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26 April 2021

VIITTEENNE:  
YOUR REFERENCE:

VIITTEEMME:  
OUR REFERENCE:

## **G 1/21**

**Attn. Mr Nicolas Michaleczek**

Dear Sirs,

Re: **G 1/21** - A written statement under Article 10(1) of the Rules of Procedure of the Enlarged Board of Appeal by Laine IP Oy

We write further to the communication of 24 March 2021 by the Enlarged Board of Appeal and respectfully present comments on some aspects of oral proceedings. Several learned amicus curiae briefs have already been submitted. It is therefore our intention to concentrate on aspects not sufficiently covered in those earlier submissions.

### **1. The European Convention on Human Rights**

The Enlarged Board of Appeal has recognized that Article 6 of the European Convention on Human Rights is binding for proceedings before the Boards of Appeal since it relies on principles of law common to all of the European Patent Organisation's member states (R 19/12, G 1/05 and G 2/08).

Article 6 § 1 of the European Convention on Human Rights states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

## **2. Different requirements for different types of proceedings**

Since oral proceedings before the examining divisions are *ex parte* and behind closed doors fulfilment of the requirements of Articles 113 and 116 EPC may be considered sufficient. However, *inter partes* proceedings before the opposition division or before the Boards of Appeal demand the fulfilment of Article 6 § 1 ECHR.

Oral proceedings before the Boards of Appeal in particular must also meet the criterion of entitlement to a fair and public hearing enshrined in the European Convention on Human Rights.

Therefore, in the event that the Enlarged Board of Appeal decides to answer to the referred question in the affirmative, *i.e.* that the conduct of oral proceedings in the form of a videoconference is compatible with the right to oral proceedings as enshrined in Article 116(1) EPC even without the consent of all parties, the Enlarged Board of Appeal is respectfully requested also to clarify:

Is the conduct of oral proceedings in the form of a videoconference compatible with the entitlement to a fair and public hearing in oral proceedings before the opposition divisions and the Boards of Appeal if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference?

In addition to the serious concerns already presented in several other amicus curiae briefs, some additional aspects are discussed in the following.

## **3. Different qualities of different videoconferencing arrangements**

There are different ways to arrange videoconferences. One way is a videoconference *via* Zoom in accordance with the EPO's current practice. Another way is for videoconferences to be arranged by national authorities.

### **3.1. Zoom vs. EU Regulation on cooperation between the courts of the Member States**

One possibility would be for national patent offices or other authorities to arrange videoconferences. This could be done for example by applying *mutatis mutandis* the EU Council Regulation No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (see also Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020).

The General Secretariat of the Council has also produced a *Guide on videoconferencing in cross-border proceedings*<sup>1</sup>, which applies to cases where videoconferencing is used for any part of legal proceedings, in particular for taking of evidence from remote locations in other EU Member States. The guide discusses different aspects of the cross-border use of videoconferencing in criminal, as well as civil and commercial matters. The arrangement discussed in the guide is more secure than the Zoom platform as the videoconferencing equipment is provided by the court and authorities are present during the proceedings. Additionally, the guide proposes the use of two cameras whereby one camera provides an overview of the courtroom when necessary.

Videoconferences *via* Zoom platform according to the current configuration are inferior to in-person oral proceedings in terms of the fairness and publicity of the hearing. The current Zoom arrangement is also inferior to videoconferences arranged in accordance with the above-referred Guide on videoconferencing in cross-border proceedings. Some drawbacks of the Zoom proceedings are discussed below.

### **3.2. Zoom allows hidden presence of persons not allowed to take part in the proceedings**

In the present configuration, each party and each attendee provides their own Zoom videoconferencing facilities at a location of their own choice using equipment of their own choice, *i.e.* the parties and attendees themselves make the arrangements for the Zoom videoconference according to their own preferences and requirements. This includes the room and the camera and screen set-up.

The EPO and the other parties cannot see and have no means to monitor the presence and any possible input from accompanying persons that assist the party's representatives (professional representatives or notified accompanying persons) in the same room but outside the field of view of the camera. The invisible persons can also provide verbal instruction when the microphone is mute. Therefore, it is possible that a person with no permission to take part in the proceedings has control over and impact on the oral proceedings without the knowledge of a party, thereby denying an affected party the possibility to raise an objection.

Such situations may be for example the following:

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<sup>1</sup> Guide on videoconferencing in cross-border proceedings:  
<https://www.consilium.europa.eu/media/30606/qc3012963enc.pdf>

- A professional representative advises in a matter on which he has represented or advised the other party with opposing interests, contrary to Article 3(2) of the Disciplinary Regulation
- An employee of the European Patent Office advises a party during the oral proceedings
- The presence of a person that, if known, would create suspicion of partiality of the member of the division or the Board.

These situations, and any suspicion thereof, are ruled out in in-person oral proceedings wherein the parties can see each other and all the accompanying persons and the EPO checks the identities of the persons present in the courtroom.

The non-public nature of the parties' own "courtrooms" in Zoom videoconferences can also serve interests that are not to be promoted, for example in the context of strawman oppositions. While strawman oppositions are in themselves permissible, it is not beneficial to the purpose of the patent system that, for example, a patent infringer can have full control over the oral proceedings without revealing his identity. With the current videoconferencing system, a technical expert of a straw man opponent may be present and provide input and advice without the knowledge of a proprietor or without the knowledge of the opposition division or Board of Appeal. This is not possible in in-person oral proceedings wherein identities are checked and all the accompanying persons are visible to the EPO and the other party.

As the Zoom videoconferencing allows hidden participation of accompanying persons in the parties' teams, the EPO, other parties and the general public are deprived of full publicity of the proceedings. At the same time, the current Zoom arrangement can be detrimental to the entitlement to a fair hearing.

Additionally, although there is provision for members of the public to be present, each member should be present *via* their own link and should be visibly present if and when the chair of the opposition or chair of the board of appeal requests. This is open to abuse by members of the public who wish their presence to be completely anonymous; such persons may hide from view for the moment in time that the member of public validly present in proceedings switches on a camera at the request of the chairperson.

### **3.3. Authenticity of audio and video stream**

In the current Zoom videoconferencing arrangement, the audio and video signal feed comes from parties' own hardware and software. In the current configuration, other parties cannot know if

one of the parties preprocesses and modifies the audio and video signal in their own system before feeding it into the Zoom application. Modification of the transmitted audio and video signal would not be compliant with the spirit of a fair hearing.

In videoconferences arranged by the parties themselves, the parties can also conceal their location by using virtual private network technology. Hence, representation can also be conducted from outside of the Contracting States, which is not compatible with the EPC.

### **3.4. The requirements for a valid videoconference**

As is discussed above, not all videoconferences are the same when it comes to publicity and fair trial. Zoom videoconferences according to the present model have several drawbacks, which can be avoided in in-person oral proceedings and which can be avoided in videoconferences arranged by national authorities.

Therefore, in case the Enlarged Board of Appeal decides to answer to the referred question in the affirmative, i.e. that the conduct of oral proceedings in the form of a videoconference is compatible with the right to oral proceedings as enshrined in Article 116(1) EPC even without consent by all of the parties, the Enlarged Board of Appeal is respectfully requested also to clarify:

What are the minimum requirements that a videoconferencing technology must fulfil in order for a videoconference to be compatible with the entitlement to a fair and public hearing in oral proceedings before the opposition divisions and the Boards of Appeal if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference?

### **4. Temporal application due to pandemic**

In case the Enlarged Board of Appeal is of the opinion that it is justified to temporarily limit the right to in-person oral proceedings, we respectfully request the Enlarged Board of Appeal to define the conditions for doing so.

One recommendation is given by International Commission of Jurists (ICJ) in publication: *Videoconferencing, Courts and COVID-19, Recommendations Based on International Standards, November 2020* <sup>2</sup>. According to the ICJ, for a hearing in which under international

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<sup>2</sup> [https://www.unodc.org/res/ji/import/guide/icj\\_videoconferencing/icj\\_videoconferencing.pdf](https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf)

law a person would normally have the right to be physically present, a judge may decide that participation in the hearing should exceptionally take place *via* videoconferencing, without a party's consent, due to a public emergency including a public health emergency. According to the ICJ, such a decision should be taken only based on the judge's assessment, with reasons, that the imposition of such a measure is necessary and proportionate to the local circumstances of the emergency in question, and that the person's physical presence is not required on the basis of a judicial assessment of the appropriateness of substitute methods of participation in light of the characteristics of the case and the interests of the parties, and with any guarantees necessary to ensure the fairness and integrity of the proceedings.

Thus, even during the pandemic, there should be no default practice of videoconferencing but any decision to derogate from the right to appear in person before an opposition division or a Board of Appeal should be reasoned on a case-by-case basis.

One problem here is of course that the opposition division or the Board of Appeal does not know beforehand what arguments and how the parties will present in the coming oral proceedings. The division or the Board can only decide on the bases of their own understanding of the case and based on what they expect and want to hear from the parties. As the question is about the parties' right to be heard, it is essential that any derogation from the right is reasoned and an opportunity to comment is given to the parties before the oral proceedings.

## **5. Speed aspect**

It has been argued that videoconferencing without parties' consent is required for avoiding unjustified delays in administering justice. However, these delays occur only in a limited number of cases and most of the cases under examination remain untouched. The EPO can arrange oral proceedings in cases in which the parties consent to videoconferencing and can advance other cases by way of written proceedings. Therefore, the impact of the delays on the average time to decision is expected to remain reasonably low even though some individual cases are delayed.

In this context, we cite an EPO publication "*Principles of Procedure in European Patent Law*" by Eskil Waage, page 95: "No consideration of procedural economy, not even a suspicion of an abuse of procedure, may stand in the way of the right of a party to be heard during oral proceedings".

Singer: The European Patent Convention, Revised English Edition by Raph Lunzer, 1995, page 613 cites T 598/88 as follows: "an obligatory procedural provision, against which considerations

of expedition, procedural economy, or even equity cannot be taken into consideration. All that has to be investigated is whether there was a valid request for oral proceedings in existence before the date of the decision.” After the quotation, the following interpretation is given: “Even where the request is manifestly an attempt to delay the proceedings, the right to oral proceedings cannot be denied”.

It seems that attempts to limit the parties’ right to oral proceedings constitutes a substantial change in the understanding of the fundamental principles of EPC.

We do understand that sometimes one of the parties is desirous of a quick decision whereas the other party does not feel such an urgency. Parties may also request accelerated processing of the case. Any additional delay by one year or so by the pandemic may be frustrating, but on the other hand, if a case is still pending before the EPO after 15 to 19 years from its filing date, parties may feel it a bit odd, and may feel aggrieved if the file is suddenly treated with such urgency that their procedural rights are limited.

## **6. Conclusion**

The Enlarged Board of Appeal is an extremely highly esteemed court and we look forward to the decision and its thorough reasoning.

Yours faithfully,



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