



PHILIP MORRIS PRODUCTS S.A.

Registry of the Enlarged Board of Appeal

Attn. Mr Nicolas Michaleczek

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Subject: Amicus Curiae Brief on Referral G 1/21 – Oral Proceedings by Video Conference

Since 2014, Philip Morris Products SA ("PMPSA") has been listed among the Top 100 Applicants by the EPO, and is currently involved in more than 120 opposition and appeal proceedings. Further, PMPSA is currently involved in patent litigation in multiple EPC member states.

The recent expansion of oral proceedings by video conference in response to the coronavirus pandemic is of great interest to the patent community, including patent applicants, opponents, and their legal representatives, but the issue is of significant importance not only to the patent community but also to third parties.

At the core of the matter is the question whether oral proceedings can be held by video conference against the will of a party to the proceedings.

At least for certain circumstances, we believe that it is important that oral proceedings by video conference proceed, even without consent of a party of the proceedings. It is of the utmost importance that the Boards of Appeal and Opposition Divisions have a tool to reduce the opportunity for abusive behaviour that aims to delay legal certainty for parties to the proceedings and to the general public. Early oral proceedings should be the default where there is an urgent need for legal certainty. In the current circumstances, this would be achieved by the oral proceedings being held by video conference, for example where the oral proceedings relate to a patent that is the subject of active litigation.

We note the reference of the Board in T1807/15 to opinion G3/19 in the context of its dynamic interpretation of Art116 EPC relating to the right to oral proceedings, citing at 5.11.1 *“This method of interpretation could come into play when considerations have arisen since the Convention was signed which might give reason to believe that a literal interpretation of the provision's wording conflict with the legislator's aim. It might thus lead to a result which diverges from the wording of the Law.”*, where the legislator's aim is considered by the Board to include high-quality and efficient proceedings under the EPC.

We agree, and would further add that the legislator's aim more broadly would undoubtedly include a well-functioning patent system that can support the exchange of technical information and incentivise investment into research and development by providing state granted, time limited patent protection in return for technical teaching. High-quality and timely examination and opposition proceedings are a critical element of such a patent system, serving to reduce the burden on third parties and the public of the grant of invalid patents. Such “bad” patents might instead cripple investment and hinder development by granting exclusive rights for technology without merit or not invented by the patentee. Clearly, an aim of the legislator would be for a system where wrongly granted “bad” patents can be removed efficiently and quickly, to clear roadblocks from the path to private investments, employment and prosperity in Europe.

It is this vision of the “legislator's aim” that we want to evoke with reference to G3/19 and that the Enlarged Board of Appeal should consider when contemplating the referral.

Invalid patents remaining in force risk being inappropriately exploited against third parties. Even the lingering presence of invalid patents on the registers risks the stifling of product innovation and investment. We believe that such risks are not trivial concerns in an environment where consistently two thirds of European patents that are opposed are found to have been wrongly granted and are either revoked or limited from their granted form.

In conclusion – insistence on in-person oral proceedings should not be allowed to lead to needless continuation of legal uncertainty. At the least, parties should not be allowed to delay proceedings by insisting on in-person proceedings where another party requests or consents

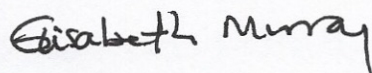
to proceedings by video conference, in particular while the timeline discrepancy between video conference and in-person oral proceedings remains significant.

The earlier the final decision, the sooner the patentee, the opponent, and the public has legal certainty on the validity of the patent.

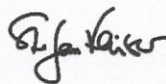
As already indicated in the decision of T1807/15, 3.6, the issue is also generally applicable to first-instance proceedings.

Yours faithfully

Philip Morris Products SA



Elisabeth Murray



Stefan Kaiser