



26th April 2021

**SUPPLEMENT TO THE
PRELIMINARY *AMICUS CURIAE* BRIEF OF **epi** IN CASE G 1/21
PURSUANT TO ARTICLE 10(1) RPEBA IN VIEW OF ARTICLE 4(1) RPEBA**

epi has already filed a preliminary *amicus curiae* brief pursuant to Article 4(1) RPEBA on Monday, 12 April 2021. After the filing of that preliminary brief, decision T 0328/16 – 3.2.07 was published online on Wednesday, 14 April 2021.

For the reasons presented below, **epi** considers it important to draw the attention of the Enlarged Board of Appeal to this decision, which could however not be taken into account in the preliminary *amicus curiae* brief of 12 April 2021.

The present letter is thus supplementing the preliminary *amicus curiae* brief of **epi** already on file. To avoid any confusion, the main *amicus curiae* brief of **epi** will be sent separately.

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Summons to oral proceedings were issued by Board 3.2.07 on 20 December 2019 in the appeal case T 0328/16. By a notification dated 25 January 2021, the Board informed both parties (patentee and opponent) that the oral proceedings would not be held in person, but rather by way of a videoconference, on 2 February 2021.

The patentee had previously indicated, in its submission of 22 January 2021, that a videoconference could not replace oral proceedings in person, since the frame conditions of a videoconference could not be equated to those of oral proceedings in person and unduly limited the parties' right to be heard. The patentee therefore requested a postponement of the oral proceedings, in order for them to be conducted in presence.

The opponent subscribed to the view of the patentee and likewise requested, with its letter dated 22 January 2021, that oral proceedings be postponed, in order to allow for said oral proceedings to be held in presence.

Even though both parties had disagreed with videoconferencing and had requested that oral proceedings be postponed, so as to allow for in-person oral proceedings at a later point in time, the Board issued a procedural order on 27 January 2021 and confirmed the date and the format

(videoconference) of the oral proceedings. Accordingly, oral proceedings by videoconference took place on 2 February 2021.

In its decision T 0328/16 of 2 February 2021, Board 3.2.07 quoted the procedural order of 27 January 2021 *verbatim* at point 2.2.4 of the grounds, where it provided the reasons why it had decided to appoint oral proceedings as a videoconference *ex officio*, despite the disagreement of both parties (cf. page 12 of the decision, third paragraph: *“Es liegt im Ermessen der Beschwerdekammer, eine mündliche Verhandlung gemäß Artikel 116 EPÜ auf Antrag eines Beteiligten oder, wie hier, von Amts wegen als Videokonferenz, durchzuführen“*; in English: *„It is at the Board’s discretion to conduct oral proceedings pursuant to Article 116 EPC at the request of a party or, as in this case, of its own motion as a videoconference“*).

epi observes first that the procedural order of 27 January 2021 and the decision T 0328/16 of 2 February 2021 were taken by Board 3.2.07 before the entry into force of new Article 15a RPBA, which now empowers the Boards to conduct oral proceedings as a videoconference even without the agreement of the parties. New Article 15a RPBA, as is well known, entered into force on 1 April 2021.

epi further observes that it is at the Boards’ discretion to postpone oral proceedings, so as to allow their conduct in person, for example if the parties indicate in advance a need to present their case in person, rather than by videoconference, and more generally in view of the fact that the legality of oral proceedings by video conference without the consent of the parties has yet to be assessed in the pending referral G 1/21; **epi** observes that the Boards had this discretionary power to postpone oral proceedings also before the entry into force of said Article 15a RPBA.

The Enlarged Board of Appeal is referred, by way of example, to the appeal case T 0541/17, where Board 3.3.09 decided to postpone oral proceedings, initially appointed for 22 and 23 April 2021 in the form of a videoconference (see the communication of the Board dated 15 February 2021), and issued new summons on 19 April 2021, ordering that oral proceedings take place in person at a new date. The new summons was issued following *inter alia* a request for postponement filed on 19 March 2021 by one of the parties, based on the ground that, in view of the pending referral G 1/21, a postponement was appropriate until the legality of oral proceedings as a videoconference without the consent of the parties had been determined.

Board 3.2.07 in the case T 0328/16 decided not to avail itself of this discretionary power, in spite of the fact, noted above, that both parties had indicated well in advance of the oral proceedings of 2 February 2021 that they disagreed to a videoconference.

Furthermore, as already noted above, Board 3.2.07 issued the procedural order of 27 January 2021 before the entry into force of Article 15a RPBA.

Finally, in its decision of 2 February 2021 Board 3.2.07 did not consider the circumstance that the legality of oral proceedings by video conference without the consent of the parties has yet to be assessed in the pending referral G 1/21: this is readily apparent by reading point 2.2.4 of the grounds.

Board 3.2.07 thus took a stance on exactly the same question that is at stake in G 1/21, i.e., whether parties can be summoned to oral proceedings by videoconference even if they do not agree to this format.

These circumstances on their own would allow a reasonably objective and informed person to conclude that Board 3.2.07 apparently had no doubts that the answer to the question of law yet to be decided in G 1/21 should be “yes”, namely that the conduct of oral proceedings as a videoconference without the consent of the parties is in conformity with Article 116 EPC.

epi notes that the reasons given at point 2.2.4 of T 0328/16 for the Board’s decision to conduct oral proceedings as a videoconference before the entry into force of Article 15a RPBA, despite the disagreement of both parties and the pendency of referral G 1/21, can all be found in the proposal of the President of the Board of Appeals according to the document BOAC/16/20 to introduce new Article 15a RPBA.

The reasons presented on pages 12 and 13 of T 0328/16 (point 2.2.4) are, apart from being expressed in German, substantially identical to those presented by the President of the Board of Appeals at points 5, 7, 13 and 20 of that document BOAC/16/20.

epi furthermore notes that the reasons given on pages 12 and 13 of T 0328/16 (point 2.2.4) are substantially identical to those presented in the explanatory remarks that accompanied the proposal of insertion of new Article 15a RPBA, published by the Boards of Appeal on the public section of the Boards of Appeal on the occasion of the user consultation on the amendment of the

Rules of Procedure of the Boards through insertion of said Article 15a RPBA. This identity is not surprising, since at least points 7 and 13 of document BOAC/16/20 itself are presented as “explanatory remarks” (see section V.A of BOAC/16/20).

Of particular relevance, in this context, is the circumstance that both the decision T 0328/16 and the procedural order issued by Board 3.2.07 on 27 January 2020, on the one hand, and document BOAC/16/20 and the aforementioned explanatory remarks, on the other hand, state that the Boards may conduct oral proceedings as a videoconference without the consent of the parties before the entry into force of new Article 15a RPBA.

The Chairman of Board 3.2.07 in the case T 0398/16, Mr Ingo Beckedorf, is a member of the panel of the Enlarged Board of Appeal in G 1/21. Furthermore, he was designated deputy of the President of the Enlarged Board of Appeal, who is also the President of the Boards of Appeal, in September 2020; he still holds the office of deputy (s. the business distribution scheme for the Enlarged of Appeal as amended from 1 September 2020 and the scheme for 2021).

In view of the identity of language used in the decision T 0328/16 and in the document BOAC/16/20 to justify and support the practice of holding oral proceedings as a videoconference without the consent of the parties before the entry into force of Article 15a RPBA, taking into account the office held by the Chairman of Board 3.2.07, a reasonably objective and informed person would conclude that there is good reason to think that there is at least an appearance of suspicion that the Chairman of Board 3.2.07 supported the practice, advocated in T 0328/16 as well as in document BOAC/16/20 and in the aforementioned explanatory remarks, to hold oral proceedings as a videoconference without the consent of the parties already before the entry into force of new Article 15a RPBA.

A reasonably objective and informed person concludes that he might have good reason to think that there is at least an appearance of suspicion that the Chairman of Board 3.2.07 considers said practice to be in conformity with Article 116 EPC.

Since the conformity of that practice with Article 116 EPC is the very question of law to be decided in G 1/21, a reasonably objective and informed person concludes that there might be good reason to think that there is at least an appearance of suspicion of partiality with regard to the Chairman of Board 3.2.07 as a member of the Enlarged Board of Appeal that will decide case G 1/21.



As observed by the Enlarged Board of Appeal in its decision G 2/08, it is a general principle of law that a member should not decide a case in which one may have good reason to assume or even suspect partiality.

This general principle of law is equally essential for a proper working of the European patent system, since it serves the purpose of safeguarding the right of the parties to a fair trial (cf. Article 6(1) ECHR).

epi therefore believes that the information submitted should be duly considered by the Enlarged Board of Appeal for the purpose of deciding whether the procedure according to Article 24(4) EPC should be applied.

Signed on behalf of **epi**,

A handwritten signature in black ink, appearing to be 'F. Leyder', written over a faint, large oval shape.

Francis Leyder
President