

Kluwer Patent Blog

Opposition against EPO plan to hold oral proceedings before examining divisions by videoconference

Kluwer Patent blogger · Wednesday, April 29th, 2020

The decision of the European Patent Office to start holding videoconferences as the standard way of conducting oral proceedings in examination and opposition proceedings is facing heavy criticism. There has been no testing, no consultation, the EPO doesn't have the facilities, it may be discriminatory and in violation of Article 113(1) EPC, according to the epi, among others. The EPO's Central Staff Committee thinks the "measures presently foreseen should be immediately halted".

The measure was announced by EPO president António Campinos on 1 April 2020 and can be found on the EPO's special COVID-19 webpage (a more detailed notice here). However, it is not presented as an emergency measure but as a permanent change, as the first article of the decision shows:



Article 1 – Oral proceedings by videoconference before examining divisions

(1) Oral proceedings before examining divisions are to be held by videoconference.

(2) Notwithstanding paragraph 1, oral proceedings may be held on the premises of the European Patent Office, either at the request of the applicant or at the instigation of the examining division if there are serious reasons against holding the oral proceedings by videoconference such as, in particular, the need to take evidence directly. If a request to hold oral proceedings on the premises of the European Patent Office is refused, the applicant will be informed of the reasons; such a refusal is not separately appealable. (...)

Currently, less than 10 percent of examination oral proceedings are held by videoconference. Campinos announced the change in a [letter to the Institute of Professional Representatives before the EPO](#) (epi) late March:

“Even when looking beyond the current situation, I firmly believe that video-conferencing can

contribute to a more efficient, modern and sustainable European patent system, in line with the goals of the EPO's Strategic Plan 2023. (...) The EPO would now like to go a step further and establish video-conferencing as the standard way of conducting oral proceedings in examination, and to allow this in opposition upon request of a party or at the instigation of the division."

epi

In a meeting, 31 March, of the Standing Advisory Council to the European Patent Office (SACEPO) and epi representatives, the draft proposals were discussed. It failed to abate the epi's concerns about videoconferencing.

"epi considers that such emergency measures should not be allowed to become permanent without much more extensive testing of any possible technical solution and also extensive consultation as to their long term effect, in particular on support given to users of the system (...). A first point here is that, despite the fact that a number of applicants request oral proceedings (OP) by video conference (VC), on many occasions the request has been denied, apparently because the Office does not have the facilities to do so.

It is pointed out that the use of VC relies on the internet. This could lead to discrimination against a party using a representative from a member state of district where the internet service is not fast and/or reliable. (...)

The present system used by the EPO appears to be deficient because only the speaker can be seen, thus denying the other party or parties the opportunity of seeing the reaction of any other persons or parties present. (...) It may not be appreciated by the Office that, where there is more than one person in the applicant's party, there is a lot of interaction between the representative making the presentation and the other members of his or her party. (...) These discussions can be very useful as they can lead to a resolution of a problem, for instance to a claim amendment. (...) We are not aware of systems that would permit the applicant's party to have this interaction in the VC organised by the Office. (...)

The situation for OP before an opposition division (OD) is even more complicated. Not only are there necessarily three parties involved, the OD, the Proprietor and the Opponent, there are often the additional problems of the presence of more than one opponent, providing translations, taking evidence and providing access to the public. (...)

It is also considered that there are very good reasons why having OP by VC without the agreement of the applicant or all the parties to opposition proceedings does not meet the requirements of Article 113 EPC. (...) There is nothing in Article 113 EPC that gives the Office the power to limit the way in which a party gives its comments. (...)

For all these reasons, it is epi's view that OP before an OD should only be by way of VC if all the parties agree. (...) A draconian change should not be implemented overnight but should follow a process of development of a complete system which not only works for the Office but also properly supports the users and which has benefitted from extensive consultation with users." (the letter of the epi can be found [here](#))

Open letter

On 11 April, four representatives before the EPO of the Italian IP firm Bugnion sent an [open letter](#)

to Campinos on the same issue, arguing the decision “appears to overlook a series of practical and legal aspects which could ultimately impair the applicants’ right to be heard enshrined in Article 113(1) EPC.” According to the authors, it could “negatively affect applicants and professional representatives residing in Contracting States that are at present most severely affected by the epidemic and where the national governments have imposed strict restrictions on the free circulation of people, in order to curb the spread of the contagion. (...) At present, due to the aforementioned restrictions and the resultant high number of people working from home, the quality and reliability of videoconferencing over the Internet in those Contracting States could not be sufficient to ensure that applicants and representatives could attend the oral proceedings in a reliable manner.”

They argue there are various other reasons why it could be in violation of Article 113(1) EPC if the choice for oral proceedings by videoconference is not left to the parties. For instance: “As rightly underlined for example under point 2.11 of the decision R 0003/10 of the Enlarged Board of Appeal, oral proceedings allow the organs of the Office and the parties to discuss issues, including controversial and perhaps crucial issues. (...) In this respect, it cannot be sufficiently underlined how effective can be, for users of the European patent system, a face-to-face discussion of technically or legally complicated issues, as they typically arise in examination proceedings, in the course of the up to now conventional oral proceedings on the premises of the European Patent Office, as compared to an oral discussion by videoconference.” (the letter is [available here](#))

The epi has asked its members to **share their experience**, “good or bad, in order to provide anonymised feedback to the EPO and its President.”

Central Staff Committee

The Central Staff Committee (CSC) of the EPO is very outspoken about the announcement, in the middle of the coronapandemia, that videoconferencing will be the new standard: we’re being rushed into a change which is full of legal and technical pitfalls. In a letter published on the EPO’s internal pages half April, the CSC points out that many high and lower courts in the member states have suspended all oral proceedings which are not absolutely urgent. It “would make sense to align the Office with the practice as well as with emergency provisions of its host countries. This would also appear mandated by the Protocol on Privileges and Immunities.”

The CSC argues: “Holding oral proceedings as distributed videoconferences with the members of the division participating at different locations in the Office or at home is part of your initiative of generalising and making teleworking mandatory, which constitutes a fundamental change in the working conditions of an major part of staff. It must therefore be subject to statutory consultation with the COHSEC and the GCC in accordance with Articles 38(2) and 38a(3) ServRegs.

Since it has been decided to extend the new procedures for oral proceedings in examination beyond the current Corona crisis, in-depth consultation is necessary. The same applies to opposition oral proceedings for which this new procedure appears likewise here to stay.”

The CSC sees various legal issues: “Opposition oral proceedings are by law public proceedings, cf. Article 116(4) EPC. It is not at all clear how this is guaranteed if the hearing is conducted as a ViCo (see e.g. T1266/07, points 1.2 and 1.3). The preliminary guidance given in VP1’s announcement (...) states that if the division “receive[s] requests of public to attend opposition proceedings performed via ViCo” it should “contact [its] line manager”, presumably that of the

first examiner. Aside from the fact that the line manager is not competent for interfering with the discretionary decisions of the Divisions, the public does not need to “request” attendance, or to announce it in advance. A possibility for the public to attend should therefore be guaranteed in all cases, regardless of any advance request. The guidance thus brings examiners into a conflict between the expectations of management and the requirements of the EPC.”

“A problem of breach of confidentiality might further arise if members of divisions were not able to adequately isolate themselves, especially during examination non-public OP’s and during deliberations.”

On the technical side there are issues as well, according to the CSC: “a yet unknown number of examiners cannot establish simultaneously both a Skypefor-Business connection and an EPO network connection via Pulse-VPN, as would be required for ViCo OPs, because the network hosts the application documents and the EPO email account. Only either connection works fine by itself.”

This leads the CSC to a very clear conclusion: let’s not do this. “At present there are no clear laws, no guidelines and no technical facilities to allow distributed oral proceedings in examination and opposition proceedings. In the latter case, even “non-distributed” ViCos with divisions on the Office premises would at present not rest on a solid legal basis.

The measures presently foreseen should be immediately halted and reviewed, also involving the Staff Representation.

In view of the additional strain on the examiner’s mental health, we can at present only advise divisions to judiciously choose, weighing all circumstances, whether to conduct oral proceedings by ViCo or rather to postpone them to a later date until circumstances for conducting them either as a classical ViCo from the Office premises or as “standard” proceedings in person are restored.”

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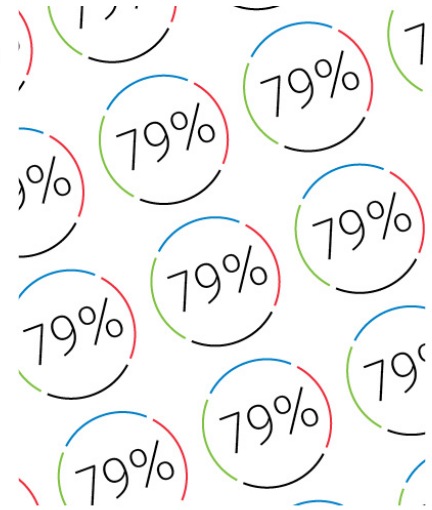
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