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Mr António Campinos
President
European Patent Office
80298 Munich
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By email to president@epo.org
Cc: patentlaw@epo.org

31 March 2020

Dear Mr Campinos,

Concerns: Oral Proceedings by Video Conference in Examination and Opposition

I trust that you are keeping well. **epi** is grateful for the careful attention you have been giving to dealing with the present difficult situation.

Thank you for your letter on the above subject and the draft Notice of the President. **epi** much appreciates you letting us know of this draft proposal.

This matter was discussed at the SACEPO-WPR meeting held today and a number of points not raised here were raised. These cautioned against such a precipitate change in established practice without extensive testing.

epi understands that, during this emergency situation, it may be necessary to adopt measures which might otherwise not have been needed. However, **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, which is one of the main points in your strategic plan.

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 or district where the internet service is not fast and/or reliable. If the connection fails, or is disconnected, the OP may need to be rescheduled. It could also lead to extra work for the Office in determining that the representative is actually in a member state when conducting the VC. The present system used by the EPO appears to be

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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 be that having OP before an Examining Division (ED) could become the norm but this could only be the case if the technology used to implement this is fully tested and effective, not only for the Office but also for the users. It appears that, at the moment, the use of a VC system only works at all where there is a single representative discussing an application with the ED. However, it does not support the users when the applicant wishes more than one representative or a technical expert to be present at the OP.

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. This takes place during the discussions with the ED and also during the breaks when the ED is considering a point. These discussions can be very useful as they can lead to a resolution of a problem, for instance to a claim amendment. It also facilitates the making of amendments as this can be done in the breaks and presented immediately to the ED.

We are not aware of systems that would permit the applicant's party to have this interaction in the VC organised by the Office. Can they have a separate VC using the same device, when that device uses the same speaker and microphone? Is it possible to mute for one VC while being unmuted for the other VC? If not, it would require each party to use a separate device to have a separate VC. This would increase the bandwidth required for each party. It could also lead to inefficient proceedings, as the representative would need to monitor both VCs. Thus, **eipi** considers that it will be necessary for the Office to implement a system that –both technically and procedurally– allows the applicant's party to have internal discussions during the breaks. There is also the problem of providing amended claims for the ED to study. At present, they are sent by email and then printed out by the ED, which makes the OP inefficient.

These problems are exacerbated in the present situation as most attorneys are working remotely from their colleagues and from their clients. When travel again becomes possible, the applicant may assemble a team in one location and have its discussions offline. However, in these times, even this is not possible and the applicant's team will have to adopt a very inefficient means for communication.

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. These may be compounded by the desire to prevent recording of oral proceedings as well as personal data protection and image rights issues. At present, if we understand the discussion paper SACEPO WPR 3/20, the technology to cope with all these possibilities is not available. It is therefore considered that OP for OD cases should only be by way of VC if all the parties agree and if all the people in each party agree to waive any image rights and any rights under the General Data Protection Regulation.

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. Although Article 113 EPC is headed "Right to be heard ...", the Article itself is not limited to "hearing". It provides that the EPO is required to give the parties an opportunity to present their comments. There is nothing in Article 113 EPC that gives the Office the power to limit the way in which a party gives its comments. It is considered that it is common to all legal systems that a party is allowed to present his or her case in any way it wishes to and by a representative of

his or her choice. Limiting presentation of comments in OP to the use of VC could be considered to be a violation of this fundamental human right.

The draft paper does concede that VC may not be the best way in certain cases, but it puts a high burden on the parties to show “serious” reasons. Having such a provision will inevitably lead to many arguments about what is or is not a serious reason, as we have already seen in appeal proceedings. Such arguments should be avoided. **epi** considers that it should be up to each party to decide for itself whether it can agree to having OP by VC so that the Office does not have to concern itself with making judgements about “serious” reasons.

It is also considered that presenting comments in a face-to-face setting is much more efficient. In such a setting, it is possible for the parties to judge the body language of the ED, OD and/or, in the case of opposition proceedings, the other party(ies). This usually leads to much more efficient OP since the parties then concentrate more closely on the points which the body language shows are important to the case. This is not possible by VC.


If parties feel pressured into VC OP and the outcome is adverse to them, the likelihood of appeals generally and appeals based on Article 113 EPC in particular will be much higher. The cost and delay of appeal proceedings is not trivial. It is no good achieving a short-term gain in processing at the first instance if the result is simply an increased backlog of appeal cases. The overall performance of the office will suffer.

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. Overall, **epi** considers that it is a sensible idea to facilitate, as far as possible, the extensive use of VC for OP, especially for ED OP. However, **epi** strongly suggests that this facilitation should be part of an evolutionary, not revolutionary, process. 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.

A better approach would be to keep the current rules but to facilitate new users exploring the capabilities of the software systems and the connections in some “demo” environment before they are expected to commit to VC as a solution. Presently, access to the practice facility seems limited to those who have already committed to using VC in a live hearing. While users have no way of trying the experience before making such a commitment, they simply cannot afford to put their clients' rights at risk.

With best wishes for your health and that of your colleagues

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Francis Leyder', with a stylized flourish at the end.

Francis Leyder

President