

For the attention of: **António Campinos**,  
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**Oral proceedings by videoconference in examination proceedings**

Dear Mr Campinos,

as professional representatives before the European Patent Office working for an Italian patent law firm, we would like to share with you some concerns regarding the content of the online publication in advance of the text of the Decision of the President of the European Patent Office dated 1 April 2020, concerning oral proceedings by videoconference before examining divisions.

It appears that, following the entry into force of the Decision, oral proceedings before examining divisions shall as a rule take place by videoconference (Article 1(1) of the Decision), whereas oral proceedings would take place on the premises of the European Patent Office only 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, it being further stipulated that a request to hold oral proceedings on the premises of the European Patent Office could be refused at the discretion of the examining division (Article 1(2) of the Decision).

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The Decision thus appears to overturn the current practice, whereby oral proceedings before examining divisions are normally conducted on the premises of the European Patent Office.

We are of course aware that oral proceedings by videoconference represent a cost-effective and environmentally-friendly procedure which is highly appreciated by the users of the European patent system.

We also appreciate that the European Patent Office has acted in an effort to facilitate the conduct of oral proceedings in view of the disruptions caused by the spread of the coronavirus; however, 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.

We would first like to observe that the Decision 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.

In those Contracting States, for example Italy or Spain, applicants and professional representatives alike might well be prevented by said restrictions to connect to the oral proceedings by videoconference by means of appropriate technical equipment and software ensuring an adequate level of security and a reliable quality of service, as they would need to connect at their homes, thus having to rely on their domestic Internet connection.

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.

Applicants and professional representatives in those Contracting States would thus be put at disadvantage by the Decision to make oral proceedings by videoconference the rule.

As it is presently not foreseeable when restrictions on the circulation of people could be lifted, the Decision might negatively affect a significant number of users of the European patent system for several months to come.

The decision to make oral proceedings by videoconference the rule in examination proceedings also appears to overlook a further practical aspect of great import.

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. The value of oral proceedings is that matters may as a result be clarified and the organs of the European Patent Office may ultimately be satisfied that a party's position is the right one, although it was not so satisfied by the written submissions alone.

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.

To make the latter the standard manner of conducting oral proceedings would significantly impair the ability of applicants and professional representatives to effectively interact with examining divisions, thereby ultimately affecting a party's right to be heard.

In view of the recognised effectiveness of a face-to-face interaction with the examining divisions, we think that the decision to stage oral proceedings on the premises of the European Patent Office should not be made discretionary: it should be left to the applicants or their representatives to decide whether they want to dispense with such an effective manner of conducting the oral proceedings.

Depriving applicants of such effective means of prosecuting their applications would, as already remarked, significantly impair their right to be heard.

We also note that the Decision only mentions the taking of evidence or an impediment preventing an applicant or representative to participate in oral proceedings by videoconference as serious reasons for not holding a hearing by videoconference.

In our opinion, if oral proceedings by videoconference become the standard manner of conducting hearings, then the complexity of a case to be discussed at oral proceedings should be added to the serious reasons for granting oral proceedings on the premises of the European Patent Office.

In fact, under the régime in place before the entry into force of the Decision, requests for oral proceedings by videoconference could be rejected by examining divisions if the complexity of the case was considered such as to require a face-to-face hearing.

We think that, logically, if oral proceedings by videoconference are to become the standard manner of conducting a hearing in examination proceedings, then the complexity of the case should be considered as a serious reason for granting a face-to-face hearing.

A further aspect of the Decision that raises a series of legal concerns is the possibility for the members of the division to connect to the oral proceedings from different locations (Article 2(2) of the Decision).

It is first unclear how, under those circumstances, it could be effectively ensured that oral proceedings be conducted in the absence of the public, as required by Article 116(3) EPC. Particularly in the case of members of the examining division working and connecting to the oral proceedings from their private dwellings, it is not apparent how the mandatory non-public character of the oral proceedings could be safeguarded.

The possibility for members of the public to effectively circumvent the provision of Article 116(3) EPC, in the case of oral proceedings conducted by videoconference with members of the division connecting from different locations, in fact raises serious concerns as to the protection of applicants from potentially serious and unjustified economical disadvantages (cf. Article 116(4) EPC) that could ensue from the presence of persons not entitled to attend the oral proceedings.

It is also unclear whether Article 2(2) of the Decision may be reconciled with the findings of the decision **T 1012/03** which, under point 38 of the grounds, stated that the term "oral proceedings before the respective department" in Article 116 EPC not only concerns the function of the deciding Division but also the location where oral proceedings are to take place.

As explained in detail under point 37 of that decision, «the various expressions used in paragraphs 1 to 4 of Article 116 EPC, namely "before the same department", "before the Receiving Section", "before the Receiving Section, the Examining Divisions and the Legal Division" and "the department before which the proceedings are taking place" can be read as a reference to the function of the department or Division as a deciding body. If the relevant department has to exercise its function in oral proceedings, it follows that the department has to be located at a specific place in order to conduct those oral proceedings. For this purpose, the Divisions have to allocate hearing rooms and they have to be present themselves at the scheduled times.

Thus the word "before" in the above expressions also implies a location "where" the proceedings have to be carried out, namely at least at the place where the relevant department is located [...] The same reasoning applies to the Examining Divisions when they have to implement an examining procedure which also entails conducting oral proceedings».

It seems questionable that members of an examining division connecting to oral proceedings by videoconference from different locations might be properly regarded as being located at a specific place.

It thus appears that the Decision impairs the right to be heard enshrined in Article 113(1) EPC, of which Article 116 EPC represents a specific instance, also in view of the findings of **T 1012/03**.

In view of the above remarks, we are of the opinion that the decision to permanently make oral proceedings by videoconference the standard manner of conducting a hearing should be carefully reviewed and discussed with the users of the European patent system, in order to properly address the various concerns outlined above.

We thank you in advance for your attention and wish you and all the staff at the European Patent Office good health and a happy Easter.

With kind regards,

Lucia Vittorangeli



Silvia Dondi



Chiara Colò



Alessandro Cossu



(professional representatives before the EPO)