

# EPLIT

EUROPEAN PATENT LITIGATORS ASSOCIATION



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Carl Josefsson  
President of the Boards of Appeal  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
Germany

November 27, 2020

**Re: EPLIT position paper on an amendment to the Rules of Procedure of the Boards of Appeal (RPBA 2020) – insertion of new Article 15a (oral proceedings by video conference)**

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Dear Mr. Josefsson,

## **Summary**

The members of EPLIT welcome the possibility of holding oral hearings in appeal proceedings by video conference.

However, in order to guarantee each party's right to be heard, a party should always have the right to attend the oral hearing in person. This also applies if the other party has decided to participate in the hearing by videoconference.

EPLIT is therefore against introducing Art. 15a in the proposed form.

Instead, Art. 15a should be amended in such a way that each party has the choice of attending an oral hearing in person or by videoconference.

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## Reasoning

1. First of all, we would like to thank the Boards of Appeal Committee (BOAC) and the President of the Boards of Appeal for inviting us to comment on the proposed amendments to the Rules of Procedure.
2. EPLIT was founded in 2013 as the association of European Patent Attorneys who represent and advise clients in patent disputes before the European Patent Office and national patent offices, and in patent litigation before national courts and, hopefully, in the future, before the Unified Patent Court (UPC).
3. EPLIT's main objectives are to promote user-friendly, fair, efficient and cost-effective patent litigation in Europe and to promote any measures for improving patent litigation, in particular before the UPC and national courts, as well as EPO inter partes proceedings.  
For EPLIT, it is of fundamental importance to strike a balance between, on the one hand, procedural efficiency and predictability and, on the other, the right of the parties to be heard.  
  
A further aim of EPLIT is to strengthen the relationship between patent attorney practitioners entitled to represent parties in patent disputes in Europe.
4. This position paper is in reaction to the proposal for an amendment to the Rules of Procedure of the Boards of Appeal (RPBA 2020) – insertion of new Article 15a (oral proceedings by videoconference).

## Member Survey

5. EPLIT is an association with a diverse membership. In order to be able to consider the opinion of our members and their experience with video conferences, we conducted a member survey at short notice. About half of the members took part in this. Of these, 50% attend 4 or more oral hearings per year before the EPO. 24% of all participants have already taken part in videoconferences at the EPO.

We summarise the results of the survey in the following key points:

- a. Our members expressly welcome the possibility of holding oral proceedings before the Boards of Appeal as video conferences. It is seen as an advantage that time and costs can be saved and, in particular, that the impact on the environment can also be reduced.



- b. However, a very large majority (75%) of our members oppose the possibility of Boards of Appeal being able to determine, against the will of a party, that oral proceedings should take place in the form of a videoconference. Oral proceedings should only take place as a video conference if all parties agree.
- c. Members' experience with the technical process varies. A typical positive statement is:

*Technology works fine, and it may help to save considerable time and costs, which the client may appreciate as the case may be.*

Other members have had problems with the technology. Again for a typical statement:

*The proceedings were frequently disrupted because opposing counsel had difficulties with the internet connection. Although our bandwidth was excellent, we also in a few instances had difficulties understanding some of the arguments and it seemed impolite to repeatedly ask the chairman or the other party to repeat their argument.*

*With introducing Skype for Business, the quality of the video transmission became very poor because of a very low frame rate; the Members of the Division often have a seating arrangement such that two members can only be seen from the side; the camera at the EPO is usually far away from the members of the division and their mimics can hardly be seen.*

- d. This last point is crucial in explaining why many members refuse to be forced to use videoconferencing. Indeed, while verbal communication is considered more or less satisfactory, most members who have already taken part in an oral hearing via videoconference complain about the largely or even practically complete loss of non-verbal communication.

Here again some typical statements:

*There is hardly any non-oral communication and feedback due to the small images on the screen. Especially, in borderline cases I cannot recommend OPs by VC.*



*A lot is lost in VC. Not only is it important to meet the examiners in person and get a feel for them, there is a lot of nonverbal interaction that is completely lost during the VC.*

*The proceedings were conducted efficiently and everyone seemed better prepared so far as ex parte examining division proceedings were concerned. Not so opposition proceedings which failed in providing the necessary communication modes to convey and argue the subtleties of language and technology in partes.*

*The situation is very artificial and a true focussed debate about the topics is difficult to perform. Non-verbal communication gets lost to a high extent.*

*VC is really good for sharing information. VC lacks many important 'dimensions' of proper human communication.*

- e. One aspect of proceedings before the EPO is that for applicants and patentees, the Boards of Appeal are the last resort if they lose. This is not the case for opponents as they can initiate revocation actions before national courts or, hopefully, before the UPC in the near future.

Although the technical conditions are considered to be similar, video conferencing is viewed more critically before the Boards of Appeal when compared with oral proceedings before the examining or opposition divisions: the fact that this is the final instance at the EPO, the lack of non-verbal communication and the limited possibilities to use visual aids in the presentation are even more prominent.

Here are some quotations on this issue as well:

*Apparently, BA cases are very important to the client. Therefore, the attorney should have the best options to represent his/her client.*

*It is the final instance - no further chances. ViCo. is good but sub-optimal.*

*If all parties involved agree to hold the proceedings by video conference, it is fine by me. If one party does not wish a video conference, OP should be held at the EPO.*



- f. The last quote concerns the case referred to in proposed Article 15a (2), namely that one party attends the hearing in person while the other party participates by video conference. This case will be referred to below as a “**hybrid**” conference.

The participants in the survey do not share the same opinion. While most participants welcome the possibility of hybrid conferences, there is also strict opposition to this format. Again, here are some different statements:

*In my opinion, a hybrid system would be quite suitable. The party who wants to attend the OP in person, can attend the OP at the EPO. The other party, who requested the OP to be held as a videoconference, could join by videoconference without the need of attending the OP in person.*

*I think videoproceedings can be a great thing, especially in hybrid form to allow, e.g., a US client to attend, but it should not be made mandatory or become the rule. Especially in important and complex cases, the directness of in-person oral proceedings is irreplaceable.*

*I have attended to a "hybrid" videoconference with very good experience. After the oral proceedings, there was no concern that the parties did not have an equal or fair treatment.*

*Different media transport different signals, therefore hybrid OP are unfair.*

*I am less afraid of an actual unequal or unfair treatment, than of the perception of the losing party that the winning party had an unfair advantage because it used a different mode of communication. I would therefore allow hybrid OPs only in very exceptional cases, namely if all parties and the Board agree.*

- g. The participants of the survey do not only see problems in communicating with the board, but also with communicating with their own clients when they are in a different location than the attorney attending the video conference. Again some statements:

*A video conference cannot adequately replace looking in each others' faces, reading the body language of the division/board/opposed party, conferring back with the*



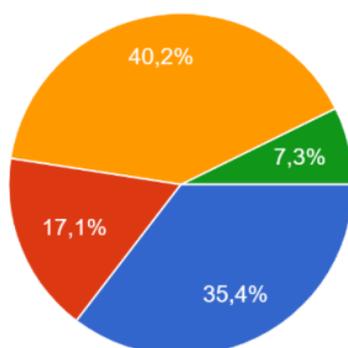
*client/colleague by simply whispering to the person sitting next to me*

*Several of my clients expressed concern about the possibility to discuss with the team.*

*We had to set up a parallel communication channel (separate video conference) with my colleague for internal communication. Handling two video conferences at the same time is not easy. In ex parte it was possible to focus on only one speaker at a time. Inter partes seems to be much more complex and difficult to handle.*

- h. We show two diagrams that reflect the opinions of the participants quite well:

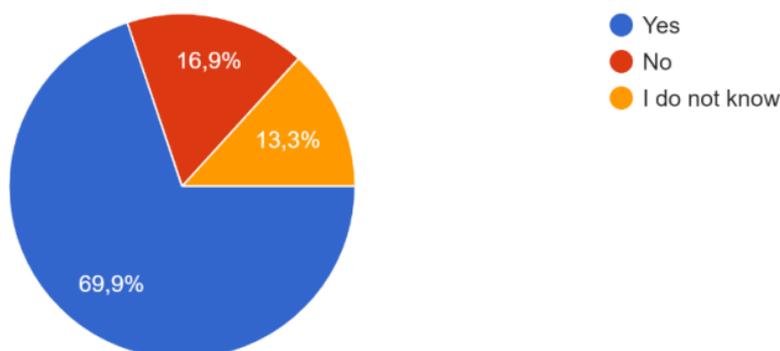
When asked whether oral proceedings before the Boards of Appeal should continue to be held as video conferences after the Corona pandemic, 82 participants replied as follows:



- No, OPs before BA should be held at the EPO premises
- Yes, but OPs by videoconference should only be at the request of at least one party
- Yes, but OPs by videoconference should only be at the request of all parties
- Yes, and OPs by videoconference may be decided by the BA on their own motion



The question whether there is a risk that the parties may not have an equal and fair treatment during a hybrid hearing was answered by 83 participants as follows



### The right to be heard

6. The majority of our members are very concerned that the right to be heard will be affected by being compelled to participate in a video conference, even if the party has objected to it.

Para. 5 of the explanatory remarks states that Article 116 EPC does not require that the parties and the Board members be physically present in the hearing room.

This is true, but this is only because on 5 October 1973, nobody thought that oral proceedings could take place via videoconference.

On the other hand, oral proceedings by videoconference could well have been considered when the EPC was revised on 22 November 2000. For example, on 1 January 2001, § 128a ZPO was introduced into the German Code of Civil Procedure, allowing parties to participate in oral proceedings remotely.

Obviously, the revision of the EPC did not lead to the conclusion that oral proceedings could take place via videoconference. At least, the travaux préparatoires, according to our research, do not indicate that this was considered at the time of the revision.



Because the appeal procedure is the last chance for applicants or patentees to obtain or maintain the patent, they must have the opportunity to present their arguments in the same way as they would in a face-to-face oral hearing.

This includes the possibility of making explanatory sketches or presenting three-dimensional designs. Both are not possible or only possible to a limited extent in a videoconference.

In addition, the question of technical quality is not addressed in proposed new Art. 15a RPBA. At what point is the quality of the oral proceedings impaired? How often and how long may an oral hearing be interrupted in the event of transmission problems? These are all problems that do not arise in a face-to-face hearing.

In its decision G 4/95, the Enlarged Board of Appeal points out in para. 4.c of the grounds:

*Article 116 EPC provides that oral proceedings shall take place either at the instance of the EPO, or at the request of any party to proceedings. Thus oral proceedings are an optional extra. Both opposition and opposition appeal procedures are primarily written procedures. Nevertheless, oral proceedings are of critical importance to the decision-making process.*

According to our members, an oral hearing by videoconference is more similar to a written procedure than a real oral hearing. Since, as the Enlarged Board of Appeal rightly observes, the oral hearing takes place at a critical stage of the decision-making process, it is a clear violation of Art. 113(1) EPC if an oral hearing takes place by videoconference against the will of the party.

7. Since the question of videoconferencing is not regulated in the EPC, Art. 125 EPC provides that the principles of procedural law generally recognised in the Contracting States must be taken into account.

In the short time available, it has not been possible to obtain a comprehensive picture of how the issue of videoconferencing is handled by national patent offices and courts across Europe.

In Italy, court hearings by video conference are being held because of the Corona pandemic. However, important hearings are being postponed.



In Germany, the possibility of holding a hearing in court by video conference is regulated in § 128a Code of Civil Procedure, which was introduced in 2001 and revised in 2013. This provision reads as follows:

*§ 128a Oral Hearing by means of sound and vision transmission*

*(1) The Court may, upon request or of its own motion, authorise the parties, their agents and advisers to be present in any other place during oral proceedings and to perform procedural acts from there. The hearing shall be transmitted simultaneously in sound and vision to that place and to the hearing room.*

*(2) The Court may, on application, permit a witness, expert or party to be present in another place during questioning. The questioning shall be transmitted simultaneously in sound and vision to that place and to the hearing room. If parties, agents and advisers have been permitted to be present in another place in accordance with paragraph 1 sentence 1, the questioning shall also be transmitted to that location.*

*(3) The transmission shall not be recorded. Decisions under paragraph 1, sentence 1 and paragraph 2, sentence 1 cannot be contested.*

In other words, the Court cannot force the parties to participate in an oral hearing in the form of a video conference. It can only allow a party to take part in the hearing by video conference.

In the relevant literature, this provision is generally regarded as being required by the Constitution since the court is located in a courtroom to which the parties and the public must have access.

The X. civil senate of the Bundesgerichtshof, the German Federal Court of Justice, which is responsible for patent nullity appeal proceedings, has made the following arrangement for oral hearings in these proceedings during the Corona pandemic: Only nine persons may be present in the courtroom, owing to its size. In addition to the five judges, two persons, usually two attorneys, may therefore be present for each party. The other participants on the parties' side are connected by video conference. In order to meet the requirement of public access, the hearing will be transmitted to a separate room. Recording is prohibited.

In our opinion, the provisions in § 128a of the German Code of Civil Procedure should be taken into account by the EPO in the sense of Art. 125 EPC.



We ask therefore whether the EPO has conducted a study of oral proceedings by videoconference in EPC contracting member states prior to proposing these changes. Also, taking into account the level of discretion of the Boards of Appeal, we take this opportunity to express the desire for rules of procedure for any oral proceedings by videoconference. In both these aspects EPLIT would be happy to contribute to any further consultation or developments.

## Change of Format

According to para. 15 of the explanatory notes, Rule 115 (1) EPC and Art. 15 RPBA only apply to the summons. However, it should be possible to change the format of the oral proceedings within those time limits.

The EPLIT members regard this as problematic. If a European Patent Attorney from the United Kingdom wishes to attend a hearing in person together with their client from the USA, the appropriate travel arrangements must be made in advance. If the format of the hearing is changed at short notice, the travel arrangements will also have to be changed, which may result in additional costs.

It is therefore desirable for the Board to give notice with the summons if it wishes to hold the hearing in the form of a video conference and to ask the parties to present their views on this proposal at short notice.

Finally, with regard to the last sentence of para. 16 of the explanatory notes, we request that a clear date be set with ample notice for any change to the practice of the Boards of Appeal.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Leythem Wall', written over a horizontal line.

Leythem Wall  
President, EPLIT