



Mr António Campinos,  
President  
European Patent Office  
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15 April 2020

Dear Mr President,

We refer to your letter of 27 March 2020 on “Oral Proceedings by videoconference in examination and opposition”, for which we thank you. Reference is also made to document SACEPO WPR 3/20, the Decision of the President of the European Patent Office dated 1 April 2020 concerning oral proceedings by videoconference before examining divisions and its related EPO Notice of 1 April 2020.

We understand the Office has now decided to facilitate existing oral proceedings before the EPO by videoconference to address the disruptions caused by the current spread of the coronavirus disease (“COVID-19”). We also understand that the Office intends to go further and establish videoconferencing as the default way of conducting oral proceedings in examination and to allow this in opposition proceedings provided that certain conditions are met even after the COVID-19 crisis has been overcome.

BUSINESSEUROPE has taken note of these decisions and proposals and our representatives already shared some comments and concerns at the SACEPO Working Party Rules meeting on 31 March 2020. We would like to explain, once again, BUSINESSEUROPE position and provide some further comments for the Office to consider.

Our observations on (A) oral proceedings during the COVID-19 crisis, and (B) *ex parte* proceedings, (C) *inter partes* proceedings and (D) public access to *inter partes* proceedings under Article 116(4) EPC in the post COVID-19 crisis scenario, will be presented in turn.

## **A. Virtual oral proceedings during the COVID-19 crisis**

Our organisation generally welcomes the decision to hold oral proceedings via videoconferencing as an emergency measure in the context of the current COVID-19 crisis. This decision is reasonable to adapt to the current situation.



During the COVID-19 crisis, there may be however restrictions on representatives and applicants being in the same videoconference facilities. In this regard, we welcome the proposal that the applicant and its representatives may connect to the proceedings remotely from different locations.<sup>1</sup> In addition, when there are several participants for one party, they have the need to interact and align in the course of the hearing, which may be very difficult if they cannot connect from the same location. Examination and Opposition Divisions should therefore allow short breaks on request of a party.

Examination Divisions and Opposition Divisions should have flexibility to address technical problems that may arise during an oral proceeding.

Experience gained during the current crisis can be used to shape the more routine subsequent use of videoconferencing in the post COVID-19 scenario.

It would be helpful to review how well videoconferencing has worked at the next SACEPO Working Party meeting so that helpful adjustments can be made, if needed.<sup>2</sup>

### **B. *Ex parte* proceedings**

We acknowledge the decision by the Office to establish oral proceedings via videoconference in all *ex parte* proceedings by default. The transition to an arrangement in which parties are unable to be heard face-to-face in oral proceedings is a procedurally significant change for all users. In this regard, we would always urge the Office to consult widely over a reasonable period of time when such a decision is taken. As it stands, there has been less than one week and only one SACEPO Working Party on Rules meeting to consider and provide feedback on the change,<sup>3</sup> this period coinciding with the significant challenges already presented by the current COVID-19 crisis.

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<sup>1</sup> See Point 7 of Notice EPO Notice of 1 April 2020 concerning oral proceedings and interviews to be held by videoconference. We understand that some Member States have already provided for this option.

<sup>2</sup> In this regard, we would like to draw attention to the technical difficulties participants faced during the SACEPO WPR meeting of 31 March 2020: the sound from one participant was really bad, another participant had to switch to a desktop computer without camera, and yet another participant faced a breakdown of his cable internet connection, necessitating connecting again using the internet facilities offered by his mobile phone. Further, the EPO itself had some difficulty sharing its PowerPoint presentations and the chairperson was unable to see both the presentation and text-chat simultaneously, leading to inefficiencies in the conduct of the meeting. This shows that even if *bona fide* participants are eager to participate, videoconferences can fail to work properly for a variety of reasons.

<sup>3</sup> The proposal was shared with SACEPO Working Party Rules on Friday 27 March 2020, the SACEPO Working Party Rules meeting was held on Tuesday 31 March 2020, and the EPO Notice was adopted on Wednesday 1 April 2020.



We believe that, as a rule, parties should always be given the opportunity to have face-to-face oral proceedings and not only in certain circumstances, such as in the event of technical problems, disabilities and when the complexity of the case requires so.

To ensure the fundamental principle of legal certainty and respect of the party's right to be heard, clear criteria and exceptions should be defined in this regard. The need to take evidence directly or the impediment of an applicant or representative to participate in oral proceedings are just some possible examples.<sup>4</sup> Therefore, the serious reasons against holding the oral proceedings by videoconference<sup>5</sup> should at least be elaborated in a further communication and these serious reasons should also include the complexity of the case.

According to T 1142/12, the question of the venue of oral proceedings is a matter of organisational nature which belongs to the management of the Office pursuant to Article 10(2) EPC. It is doubted that oral proceedings via videoconference instead of the premises of the EPO is just "another venue", as the characteristics and the quality of the oral proceedings are influenced directly. This might even limit the right to be heard according to Article 113 EPC and the right to request an oral hearing according to Article 116 EPC.

In view of these uncertainties, it is proposed that oral proceedings before the Examining Divisions are to be held by videoconference, but that the applicant can refuse and ask for face-to-face oral proceedings. There should be no underlying conditions for this request, i.e. the party should not be required to provide any particular justification.

The alternatives "videoconference" and "face-to-face" hearings should entail equal rights. No fees should be imposed in case the party asks for face-to-face oral proceedings. This mechanism would meet the interests of both the parties and the Office in terms of flexibility, procedural efficiency and cost awareness.

Since this change in respect of *ex parte* proceedings is already effective, we encourage a review to take place at a future date to coincide with, for example, a meeting of the SACEPO Working Party Rules, and inviting inputs from the user community to undertake an evidence-based assessment of progress of the new procedure.

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<sup>4</sup> See paragraph 7 of SACEPO WPR 3/20.

<sup>5</sup> See Article 1(2) of the Decision of the President of the European Patent Office dated 1 April 2020 concerning oral proceedings by videoconference before examining divisions.



### **C. *Inter partes* proceedings**

In *inter partes* proceedings, the establishment of oral hearings via videoconference as standard way should be subject to a “pilot” period, ideally during the current COVID-19 crisis. After the crisis, and based on the results of the pilot, we encourage a wide-ranging consultation concluding in an evidence-based assessment of the relative merits of videoconferencing and face-to-face hearings. Only then can a reasoned determination be made of how videoconferencing can be applied in *inter partes* procedures. At this stage, it is recommended that face-to-face *inter partes* hearings remain the default, and the pilot serves to inform the definition of standards for any exceptions to face-to-face hearings according to which videoconferencing may be applicable.

We welcome the idea to provide education and training in the use of videoconferencing technology for users and the hosting of tests before oral proceedings to ensure the technology is properly configured and a satisfactory connection can be established. If this test fails, then parties should be allowed to have face-to-face proceedings and the date should be postponed.

In our view, face-to-face oral proceedings should always be available to parties. At least circumstances such as in the event of disabilities, complex cases, high number of parties involved, high public interest, technical difficulties should qualify for face-to-face oral proceedings. On this specific point, it should not be too burdensome for parties to have adequate technical means allowing to properly handle their oral proceedings as this could undermine their right to be heard.

Furthermore, face-to-face proceedings should always be permitted upon request of the majority of the parties involved.

Finally, BUSINESSEUROPE encourages the Office to prepare best practices, training tools and guidance for participants in oral proceedings by videoconferencing and stands ready to cooperate with the Office in this regard.

### **D. Public access**

BUSINESSEUROPE is open on the proposal to allow third parties access to virtual oral proceedings. At this stage, we do not have a clear preference on any particular option and would like to hear from the Office which technical solutions are being explored before commenting further. In any event, whatever access is permitted should not be less than at present and it should be ensured that the parties’ rights are not affected.



Our members are however concerned that the EPO and the Opposition Divisions could not effectively prevent recording of oral proceedings held via videoconference and prevent further use later on. As the outcome of *inter partes* proceedings often has a significant impact on licensing negotiations and litigation proceedings, parties might attempt to take recordings and make further use of them, e.g. in litigation trials, even if they have not been allowed to do so.

To conclude, BUSINESSEUROPE acknowledges the proposal of conducting oral proceedings by videoconference before the Office. This development could contribute to the digital transformation of the Office in line with the Strategic Plan SP2023. We suggest however a wide-ranging consultation concluding in an evidence-based assessment of the relative merits of videoconferencing so that helpful adjustments can be made, if needed.

We stand ready to further cooperate with the Examination Divisions and Opposition Divisions in view of defining the precise rules and exceptions under which face-to-face hearings should be available to parties.

Yours sincerely,

Thierry Sueur  
Chairman of BUSINESSEUROPE Patents Working Group