

# Virtual hearings: Legality goes online

03-03-2021 Muireann Bolger



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**As the European Patent Office enforces virtual hearings—even without the consent of all affected parties—its stance has fuelled controversy and a legal challenge. Muireann Bolger reports.**

The COVID-19 pandemic has confirmed that technology can deliver effective virtual interaction in many different scenarios. Over the past year, remote technology has become an essential tool for courts to ensure the continuation of judicial proceedings.

But the widespread adoption of virtual hearings—<sup>19-05-2015</sup> and speculation about their possible expansion beyond the pandemic—has prompted concerns about whether litigants' rights and their access to justice may be adversely affected.

In April 2020, the [European Patent Office](#) (EPO) created a pilot project allowing oral proceedings in opposition cases to be carried out exclusively by videoconference to avoid a growing backlog of cases. Before the pandemic, video hearings were granted only under “exceptional circumstances”.

This development has ignited debate within the IP sector, especially when the

EPO announced in November that videoconference oral proceedings before opposition divisions would become mandatory until September 2021—even without the consent of all affected parties. In December, the EPO confirmed that the boards of appeal could also adopt the same approach.

### A question of legality

A challenge to the EPO's position arose in an EPO board of appeal patent dispute hearing on February 8. The opponent, Rohde & Schwarz, represented by German firm [Mitscherlich Partmb](#), put forward the question of “whether an oral hearing under article 116 European Patent Commission can be replaced by a videoconference if the parties do not agree to it”.

This issue is being referred to the EPO's Enlarged Board of Appeal (EBA), which decides on points of law of fundamental importance raised by a board of appeal or by the EPO president, António Campinos.

As the IP industry waits for the outcome of the review, some speculate that this legal uncertainty could result in the significant backlog that the EPO set out to avoid. Steve Howe, partner at patent law firm [Reddie & Grose](#)'s office in London—who represented the patentee at the EPO board of appeal where the referral was made—predicts a “hiatus” in board of appeal decisions.

“NON-DISCRETIONARY ORAL PROCEEDINGS BY VIDEOCONFERENCE REPRESENTS A STARK DEPARTURE FROM THE PREVIOUS PRACTICE OF THE EPO.”  
*ALESSANDRO COSSU, BUGNION*

“In the short term there is potential for people to try and put off hearings until this question is decided. That is where the real difficulty is going to come over the next six months or so,” Howe says.

However, many have welcomed this development, including Alessandro Cossu, senior patent consultant at Italian law firm [Bugnion](#)'s Bologna office.

“Non-discretionary oral proceedings by videoconference represents a stark departure from the previous practice of the EPO, under which video hearings were granted only under exceptional circumstances,” Cossu says. “Imposing oral proceedings by videoconferencing does not seem to be compatible with the right to a fair trial.”

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In April 2020, Cossu and his fellow attorneys sent an open [letter](#) to Campinos, arguing the decision to hold opposition hearings by videoconferencing “appears to overlook a series of practical and legal aspects” which could ultimately impair “the right to be heard”.

The EPO has argued that such a measure is necessary during the pandemic. According to a report released by the office on November 11, “[Opposition oral proceedings by videoconference in the context of COVID-19](#)”, the uptake rate of videoconferencing remained low for the first six months of the pilot because the consent requirement “acted as too strong a limitation”.

During this period, just 230 cases had been concluded under the pilot, representing a mere 4% of opposition cases. This is because in most cases at least one party did not agree to holding the proceedings by videoconferencing, the report confirmed.

However, while these measures were introduced in response to the pandemic, there is mounting speculation that the EPO is planning for oral proceedings by videoconferencing to become commonplace once the crisis is over. At the beginning of this year, the organisation introduced a new rule of procedure, [article 15a](#), which permits a board of appeal to hold oral proceedings by videoconferencing without the consent of all parties whenever “the board considers it appropriate to do so”.

## The right to be heard

These developments have alarmed the [European Patent Litigators Association](#) (EPLIT) which had [opposed](#) the EPO's introduction of article 15a.

“While the option of videoconferencing is welcome, 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,” says Leythem Wall, partner at [HGF](#)'s office in The Hague, and president of EPLIT.

According to a [survey](#) conducted by EPLIT, 75% of 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. Only 7% believed that the hearings should continue to be mandated, without the consent of all parties.

“The majority of our members are very concerned that the right to be heard will be affected by being compelled to participate in a videoconference, even if the party has objected to it,” says Wall.

“In-person hearings undoubtedly allow a party to more clearly and directly communicate and engage with the opposition division or board of appeal members,” he adds.

Wall believes that the judicial system is still in the very early stages of using the videoconference systems for *inter partes* proceedings and should tread carefully.

“As well as potential IT and security issues, longer and more involved hearings will tend to be more tiring for all parties before a screen than in person,” he says.

### **Limitations of video**

Videoconferencing is, by its nature, inherently limited, Cossu argues. “It will impair the expressive efficacy of parties; they will not be able to rely on nonverbal cues such as posture, gestures and gazes for pleading their cases and for ‘guessing’ the reactions of members of the EPO deciding body to their arguments,” he says.

These disadvantages will be compounded by the inevitable distortion of expressive means such as voice pitch and facial expressions that is inherent in videoconferencing, Cossu adds.

“The most serious consequence will be the impairment of the right to be heard for parties to proceedings before the EPO. This is of particular concern in appeal proceedings, since the boards are the only and last appellate instance in

proceedings before the EPO,” he says.

“If you lose your case before the boards, you lose everything; there are no further remedies.’

In its submission to the EPO during November’s consultation, Bugnion cited evidence that shows persuasiveness can be significantly enhanced in a face-to-face setting, where a speaker’s ability to “connect” with the audience plays a significant role in the success of their argument.

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According to the [Brennan Center for Justice](#) at the [New York University of Law](#): “The increasing use of remote video technology poses challenges for fair judicial proceedings and judges should adopt the technology with caution.” In a report released in September

2020, “[The Impact of Video Proceedings on Fairness and Access to Justice in Court](#)”, the centre collected and summarised existing scholarship on the effects of video technology in court proceedings.

The report drew attention to a 2017 study by advocacy organisation Transform, “[Defendants on video: conveyor belt justice or a revolution in access?](#)” In Transform’s survey of lawyers, magistrates, probation officers, intermediaries, and other officials about the use of remote proceedings in the UK, 58% of respondents thought that video hearings had a negative impact on defendants’ ability to participate in hearings, and 72% thought that video hearings had a negative impact on defendants’ ability to communicate with practitioners and judges.

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### **Weakened security**

Other arguments centre around whether the policing of hearings by the divisions

and the boards will be weakened.

“Since the parties and the public (in opposition and appeal proceedings) will not be in the same room as the deciding body of the EPO, it will be difficult to ensure that proceedings remain closed to the public,” says Cossu. He believes that parties may be less inclined to act in an appropriate manner and witnesses will be less deterred from testifying falsely.

The risk of a hearing by videoconference being illegally recorded creates a further danger. Cossu points out that recordings of statements made by a party in proceedings before the EPO might be used against that party in proceedings before common law courts.

“For example, US courts apply the doctrine of judicial *estoppel*, preventing a party’s assertion of a legal position that is considered to contradict a position taken by the very same party in earlier proceedings,” he says.

According to Tobias Kaufmann, partner at [Bardehle Pagenberg](#)’s office in Munich:

“Outside of these unusual times, important cases deserve to be heard in presence, if this is the parties’ desire.” This is because applicants may feel “less understood” if they lose their case after a remote hearing, he notes.

Kaufmann also fears that a new status quo could generate less discussion among the board members. “If public or personal health reasons during a pandemic prevent the members being in the same room, this needs to be taken into account. In other times, I think the norm should be that the board members are placed in the same room.”

The debate has raised concerns that parties will opt for “technology over argument”, Kaufmann adds. “Parties might prepare more and more presentations, videos, animations, etc. There might be a few cases where this helps to clarify open questions, but in the vast majority of cases, it distracts from the key points to be decided,” he says.

### **Benefits of virtual hearings**

Some have rallied around the EPO’s stance. In particular, the organisation has drawn strong support from the [UK Chartered Institute of Patent Attorneys](#) (CIPA).

Alicia Instone, CIPA president, says: “There is a very clear majority view among CIPA officers and in our decision-making council to support the EPO’s position on

videoconferencing.”

Instone believes that the use of remote technology to facilitate virtual hearings has clear benefits.

“For businesses, access to justice is improved, decisions are timely and costs are reduced. There are diversity and inclusion benefits, for example a single parent or someone with mobility problems can more easily attend a videoconference hearing, as well as a reduced environmental impact.”

She adds that if videoconferencing proves an effective way of transacting over the next months, this should pave the way to more permanent adoption.

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Parminder Lally, senior associate at Appleyard Lees’ office in Cambridge, told *WIPR* when the EPO launched the pilot last year that her firm had positive experiences in conducting EPO oral proceedings before the examining division by videoconference for years.

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## **Hybrid hearings**

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“This allows applicants from across the globe to more actively participate in EPO hearings, while at the same time leaving in place the system we all believe in and on which our system is based,” says Kaufmann. “In Germany, the Federal Court of Justice has a similar concept—which we think works very well—and we have argued for this approach as well.”

The EPO was initially lukewarm, stating that only in “exceptional cases” would hearings be heard in this format. However, in a proposed revision to article 15a in



December, it stated: “Where oral proceedings are scheduled to be held on the premises of the EPO, a party, representative or accompanying person may, upon request, be allowed to attend by videoconference.”

The CIPA has criticised the concept of hybrid hearings as being “inherently unbalanced”.

“The principles of fair proceedings referred to by the Boards of Appeal Committee—fair conduct, right to be heard, right of access—all support the approach of videoconference for all,” the Institute stated in a [submission](#) to the EPO.

### **Pressing questions**

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