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Bologna, 27 November 2020

Amendment to the Rules of Procedure of the Boards of Appeal (RPBA 2020) – insertion of new Article 15a (oral proceedings by videoconference)

Dear Mr Josefsson,

the following comments are being submitted in response to the launch of an online consultation on a proposal of amendment of the Rules of Procedure of the Boards of Appeal in the version currently in force (RPBA 2020), consisting in the addition of a new Article 15a that would allow the Boards of Appeal to hold oral proceedings pursuant to Article 116 EPC by videoconference.

Reference will be made in these comments to the proposed text of the new provision in English and to the accompanying explanatory remarks which have been made available on the website of the Boards of Appeal[1].

Introductory Remarks

Before discussing the proposed provision in detail, some preliminary remarks are deemed useful.

The proposal is being advanced as the coronavirus is raging across the world and, in view of the disruptions caused by the pandemic to the daily life of millions of people, one could have assumed that the new provision

[1] https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201113.html

had been conceived so as to ensure the functioning of the Boards of Appeal only for as long as the virus would prevent parties from across Europe to travel to Haar, rather as a permanent measure.

Yet, neither the text announcing the launch of the online consultation on the website of the Boards of Appeal nor the explanatory remarks mention or suggest any link between the pandemic and the proposal.

As a matter of fact, the new provision, if it were to enter into force, would **permanently** empower the Boards of Appeal to hold oral proceedings by videoconference, regardless of whether the coronavirus would still cause disruptions to the administration of justice or not.

New **article 15a(1)** would not only give the Boards a **time-wise unrestrained power** to appoint oral proceedings by videoconference: it would also empower any Board of Appeal to decide to hold remote hearings of its own motion, whenever it would consider it appropriate, **without the agreement of the parties** to the appeal proceedings.

Despite the reassuring explanations under point 8 of the explanatory remarks, it would be solely up to the Board in charge of a particular appeal case to decide whether oral proceedings for that case should be held in person or by videoconference, regardless of whether any of the parties would consider it necessary to present their submissions in person, for example on account of the economic importance of their particular case.

This unheard-of, unrestrained power of the Boards of Appeal to decide how parties should present their particular case is stretched even further in the proposal, in that new **article 15a(2)** would empower the Chair of a Board, under unspecified «exceptional circumstances», to order that a specific party, representative or accompanying person should attend by videoconference.

Furthermore, new **article 15a(3)** would allow any member of a Board to participate in a particular appeal hearing by videoconference, thereby opening up the possibility for **individual members of a Board** to hear, and

decide upon, an appeal case **from different geographical locations** rather than as one body sitting at one location. Nothing comparable seems to exist in the judiciaries of the majority of the Contracting States to the European Patent Organisation.

No legal remedy is explicitly foreseen for the parties in the new provision, should they not agree with any of the decisions that a Board or its Chair could take under any of the three prongs of new article 15a RPBA.

It would appear that the sole means of redress available to a party wishing to challenge such decisions, for example on the ground that their right to be heard was not properly safeguarded, would be to have recourse to a petition for review under Article 112a EPC, which however has a rather limited scope of application and is subject to very strict admissibility requirements.

The sweeping effects that new article 15a RPBA could have on the **procedural rights of parties** to appeal proceeding, particularly on their **right to be heard** pursuant to Article 113(1) EPC, are very worrisome and do not appear to have been duly considered.

The rather **questionable legal basis** provided in the explanatory remarks in support of the proposed amendment, along with the **dubious compatibility** of the new provision with several rights, such as the right to a **fair trial**, that parties to legal proceedings are granted by the fundamental laws and **constitutions** of several **Contracting States** as well as under Article 6(1) of the **European Convention on Human Rights** (ECHR), are equally worrying.

Finally, how the **public character** of oral proceedings before the Boards might be reconciled with the protection of **sensible information**, either of personal or economic nature, disclosed by any the parties during online hearings, and how **unauthorised recordings** by any of the parties or even by an unauthorised third party could be prevented during oral proceedings by videoconference, seems not to have been given any consideration at all and raises serious concerns.

In the following sections, each of these issues is individually analysed in detail; at the end, the overall consequences that the new provision could have on the European patent system as a whole are sketched.

Effects of the new provision on a party's procedural rights

A party's ability to present its case orally in an **effective** manner would be seriously curtailed by being restricted to a remote plea taking place through a computer screen, as the party concerned could no longer rely on the undoubtably superior effectiveness of a **personal interaction**, which would allow a party *inter alia* to rely on **nonverbal cues** such as posture, gestures, facial expressions. Such expressive means as voice pitch, gazes and facial expressions that are, in principle, conveyable through an electronic communication medium may become **distorted** or even be **suppressed** in videoconferencing: this is a common and recurring experience for users of videoconferencing, no matter how sophisticated the videoconference software used.

No one who has ever had any serious experience of legal proceedings in a courtroom could deny that pleading a case in person, as compared to online proceedings, is much more effective in terms of the ability to **convey one's arguments** and to create a properly **working communicative setting**, which is a necessary prerequisite for ensuring that a fundamental right, namely the **right to be heard**, be effectively guaranteed.

This is all the more true when, as is typically the case in oral proceedings before the Boards of Appeal, controversial and perhaps crucial issues are discussed.

As pointed out by the Enlarged Board of Appeal under point 2.11 of its decision **R 0003/10**, «*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*».

Albeit the Enlarged Board of Appeal did not frame these remarks with reference to oral proceedings in person, anyone who has ever pleaded a case orally before the Boards of Appeal is well aware that the persuasiveness of one's arguments and the ability to clarify difficult matters is dramatically enhanced by being allowed **to plea in person in front of the members of the Board**.

The value of presence in relation to **persuasiveness** in the context of **legal argumentation** has been extensively studied in the scientific literature.

It suffices here to mention the fundamental work of Chaïm Perelman, notably his «Traité de l'argumentation» and his discussion of the notion of «présence» in connection with the presentation of legal arguments to an audience and the ability to «connect» with this audience, for the purpose of persuading it.

As Perelman wrote in that famous treatise, citing the eminent Swiss psychologist Jean Piaget: «*Lors de la confrontation de deux éléments, par example un étalon fixe et deux grandeurs variables auxquelles on le compare, ce sur quoi le regard est centré,* ***ce qui est vu mieux*** *ou plus souvent* ***est****, de ce seul fait,* ***surévalué***»[2].

And, to quote a passage from the same work that is possibly even more relevant for the present discussion, a Board's decision to hold oral proceedings by videoconference rather than in person could produce the same effects as the decision taken by a proverbial Chinese ruler in a short story recounted by Perelman: «*Un roi voit passer un boeuf qui doit être sacrifié. Il en a pitié et ordonne qu'on y substitue un mouton. Il avoue que celà est arrivé parce qu'il voyait le boeuf et qu'il* ***ne voyait pas*** *le mouton*»[3].

To see something in person cannot be equated to «seeing» in a videoconference: there is therefore a considerable risk that sacrificing

[2] Chaïm Perelman et Lucie Olbrechts-Tyteca, «*Traité de l'argumentation*», Editions de l'Université de Bruxelles, 6e edition, p. 156

[3] loc. cit., p. 155; the story is attributed to Mencius.

face-to-face oral proceedings in favour of online hearings, as new article 15a(1) RPBA would in fact allow the Boards to do, could significantly harm the right to be heard of applicants and representatives by denying them the most powerful of expressive tools for pleading a case.

In summary, by empowering a Board to force parties to present their arguments in oral proceedings by videoconference, new article 15a(1) RPBA and new article 15a(2) RPBA would curtail the parties' ability to present their case by depriving them of the possibility to **freely choose** to plea in person in a face-to-face setting before the deciding Board, and would thus unduly impinge on the parties' **right to be heard** and, ultimately, on their **right to a fair trial**.

Likewise problematic, as far as the right to be heard is concerned, are the provisions of new article 15a(3) RPBA.

The possibility for members of a Board to attend oral proceedings by videoconference entails that one or more members could participate from different geographical locations.

This manner of conducting oral proceedings seems irreconcilable with the very same case law of the Boards of Appeal.

As explained in detail under point 37 of decision **T 1012/03**, «*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 [...]».

On the basis of this analysis of Article 116 EPC, the deciding Board in the decision **T 1012/03** concluded, under point 38 of the grounds, 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***».

Furthermore, the same Board stated earlier under point 25 of the decision that «*the right to be heard at oral proceedings must include, inter alia, the **right to present its arguments at the correct location***».

It seems logically impossible and legally arduous to maintain that members of a Board of Appeal participating in oral proceedings by videoconference from different locations, as it would be possible under new article 15a(3) RPBA, could be properly regarded as being located at «***the location** where oral proceedings are to take place*» referred to in decision **T 1012/03**. This would hold true even if the members connecting remotely were located at different places in Haar or Munich but not on the very premises of the Boards of Appeal (i.e., in the building in Haar and in the Isar building in Munich), which is «***the place** where the relevant department is located*».

Bearing in mind that the right to be heard includes, according to the cited decision, the right for a party to present arguments at the correct location and that the correct location is the place where the relevant department is located, new article 15a(3) RPBA appears to be at odds with the requirements of Article 113(1) EPC.

It should be underlined that, as explained below, the overwhelming majority of the Contracting States to the EPO require that the members of a judicial body hearing a case in oral proceedings must personally attend these proceedings, generally in a courtroom.

The requirement that the deciding judicial body be physically present in the courtroom serves, *inter alia*, the purpose of ensuring proper and

effective **policing of the proceedings** by the body itself; as explained in more detail below, oral proceedings by videoconference would not inherently allow the Chair of a Board to enforce proper policing and, in particular, would not allow the Chair to **prevent unauthorised recordings** from being made or **unauthorised persons** from secretly attending the oral proceedings.

Legal basis of the new provision

As already noted *supra* in the introduction, the explanatory remarks accompanying the proposal do not contain any hint that the amendment to the Rules of Procedures is linked in any way to the disruptions caused by the spread of the coronavirus.

Instead, they present the amendment as if it were simply a matter of codification of an existing practice within the legal framework of the EPC (see points 3 and 4 of the explanatory remarks).

Furthermore, the remarks suggest under point 5 that the provision of the EPC regulating oral proceedings before the European Patent Office, namely Article 116 EPC, would not stipulate that parties to the proceedings, their representatives or members of the Board must be physically present in the oral proceedings room.

These remarks, presented as matter-of-fact statements, must be firmly questioned from the very outset.

To conclude, on the sole basis of its wording, that Article 116 EPC does not require parties to the proceedings, their representatives or members of the Board to be physically present in the oral proceedings room is **incorrect on at least two grounds**.

First, if the reasoning underpinning point 4 of the explanatory remark were correct, one would have to conclude that, since Article 116 «*does not expressly stipulate the location where oral proceedings have to take place*», as recalled in the opening sentence of point 37 of **T 1012/03**, no limitation as to the location could be inferred from the provision.

Decision **T 1012/03** shows that this manner of interpreting Article 116 EPC is questionable.

The legal analysis of this provision under points 37 and 38 of that decision shows that the expression «*oral proceedings* ***before the respective department***» in Article 116 not only concerns the function of the deciding body of the European Patent Office but also the location where oral proceedings are to take place, since the word «*before*» also implies a **location "where" the proceedings have to be carried out,** namely at least at the place where the relevant department is located.

That this place is a specific location where both the deciding body and the parties and their representatives must be physically present is more than implied in **T 1012/03.**

In discussing its interpretation of the word «*before*» as designating the place where the relevant department is located, the Board stated at the end of point 37: «***This interpretation was never questioned*** *when the Receiving Section was set up exclusively in The Hague. It was self-evident that* ***the parties or their representatives would have to travel to The Hague*** *if the Receiving Section summoned them to oral proceedings pursuant to Article 116(2) EPC*».

The statement is crystal clear: **no one ever seriously doubted that parties and their representatives** summoned to oral proceedings pursuant to Article 116 EPC before a certain department **must personally attend the oral proceedings** at the place where the department that issued the summons is located.

Under the same point 37 of **T 1012/03,** the Board also wrote: «***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*».

This statement is equally crystal clear: in order for a department of the European Patent Office to exercise its function in oral proceedings, it has to allocate a **physical space** and the members of that department, **acting as one body**, have to be **physically present in that space.**

The second ground why the reasoning underpinning point 4 of the explanatory remarks is incorrect is that the **Travaux Préparatoires** to the EPC 1973 expressly confirm the conclusions drawn by the Board in the decision **T 1012/03.**

On page 83 of document IV/6514/61, summarising the result of the third session of the Working Group "Patents", held in Brussels from 25 September to 6 October 1961, the Working Group discussed Article 96a of the First Preliminary Draft of the Convention, regulating oral proceedings before the Boards of Appeal of the future European Patent Office.

In response to the question, asked by the President of the Working Group, whether oral proceedings before the Boards of Appeal should be obligatory or optional and **whether it could be left to the Boards to decide whether to appoint a hearing**, the members of the group took the following position (reference is made to the German version IV/6514/61/D): «*Die Gruppe genehmigt einstimmig die facultative Lösung.* ***Die obligatorische Lösung scheitert nämlich an den Schwierigkeiten, die sich aus den grossen Entfernungen*** *im Geltungsbereich des europäischen Patents,* ***aus den hohen Kosten*** *und aus den Sprachproblemen* ***ergeben***».

There was thus unanimous agreement, as early as 1961, that oral proceedings before the Boards of Appeal were meant to be proceedings **in person**, as may be understood from the rejection of the obligatory solution, which would have forced parties and representatives to travel, with attendant high costs.

One might object that, back in 1961, oral proceedings by videoconference would not have been possible and that, as a consequence, the aforementioned statement in IV/6514/61 could not be construed as ruling out such hearings by videoconference.

However, the fact that, in the final draft of the Convention, it was decided that oral proceedings **must** take place (cf. Article 116(1) EPC), thus making them **obligatory**, **if a party requires them**, clearly means that the interest of that party to present its case **in person** was considered to **prevail** and to have more weigh over the disadvantage of having to travel large distances with the attendant costs.

There is nothing in the Minutes of the Munich Diplomatic Conference, held in 1973, suggesting a different understanding with respect to these conclusions: oral proceedings pursuant to Article 116 EPC were always and unanimously understood as proceedings requiring the **physical presence** of the parties, their representatives and the members of the relevant Board of Appeal.

There was no need to expressly stipulate this requirement: it would have been superfluous, since it was common understanding that oral proceedings before the Boards of Appeal of the European Patent Office would require the physical presence of parties, representatives and members of the relevant department.

On account of the legislative history of Article 116 EPC and in view of decision **T 1012/03**, the conclusions presented under point 5 of the explanatory remarks must be firmly rejected: Article 116 EPC is to be understood as stipulating that parties to the proceedings, their representatives and members of the Board must be physically present in the oral proceedings room.

In view of these conclusions, it seems quite a stretch to state that the EPC does not exclude oral proceedings by videoconference, as stated under point 5 of the explanatory remarks.

Taking into account that, as explained below, in several **Contracting States** to the EPO oral proceedings by videoconference **before judicial bodies** are only possible with the agreement of the parties, oral proceedings by videoconference before the Boards of Appeal cannot be forced upon the users of the European patent system at the instigation of the Boards of Appeal or by a decision of the Administrative Council: the

proper process for expanding the scope of Article 116 EPC so as to encompass oral proceedings by videoconference should be a revision of the Convention in a **diplomatic conference** according to Article 172 EPC.

It is quite disturbing that the proposed amendment is presented in the explanatory remarks as a routine codification of an established practice.

The legal justification for the amendment cannot be provided by putting the users of the European patent system before a *fait accompli*, namely by stating in a cavalier fashion that «*some Boards have [already] conducted oral proceedings without all board members being present in the oral proceedings room*» and by then claiming that this practice, for which no legal basis at all exists, is merely being codified.

This manner of proceeding is not acceptable: it purports to represent a practice currently having **no legal basis in the primary legislation**, i.e. in the EPC, and for which, in fact, an attempt is being made to create a (questionable) legal basis through secondary legislation, i.e. in the RPBA, as a sort of routine, business-as-usual practice merely requiring codification.

Holding oral proceedings without all the members of a Board being present in the oral proceedings room does not make such a practice legitimate, if no legal provision in the EPC exists – **before the codification** of such a practice - which would legitimately allow a Board to dispense with the physical presence of its members in one room.

As explained above, the current practice seems to lack a proper legal basis in the EPC and it is felt that this deficiency cannot be cured through amendments of secondary legislation such as the RPBA or the Implementing Rules to the EPC.

In respect of the latter, a further remark is necessary here: although point 13 of the explanatory remarks proclaims that the proposed amendment will not affect the taking of evidence, in particular the hearing of witnesses, it does give a hint of what users of the European patent

system can expect: namely the future amendment of Rules 117 and 118 EPC so as to allow the **taking of evidence by videoconference**.

This shows how perilous and subversive the proposed amendment can be: once oral proceedings by videoconference before the Boards of Appeal are formally legitimised by means of new article 15a RPBA, it will only take an amendment of Rules 117 and 118 EPC by the Administrative Council to also introduce the **hearing of witnesses by videoconference**.

How dangerous it would be to allow a witness to provide testimony behind the curtain of a computer connection, without being subject to the «ordeal of testifying»[4] and cross-examination in person, can be easily imagined by anyone with a modicum of legal experience.

A further point should also be remarked.

There can be little doubt that justice has an **expressive function**: by having legal proceedings take place before a judicial body in a formal ambiance such as courtroom and having recourse to ceremonies, declarations and symbolic procedures, **justice transmits normative and value-based messages** to the parties[5].

This expressive function of justice generates an atmosphere where the parties act in an appropriate and desirable manner and witnesses can be deterred from testifying falsely; it conveys messages to the public and the parties as to the legal values that the judicial system purports to protect; it also affects the judges, insofar as they are personally invested in such a ceremonial setting, by making them committed to the messages that justice transmits[6].

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[4] see Lisa Kern Griffith, *The Content of Confrontation*, 7 DUKE J. CONST. L & PUB. POL'Y 51, 65 (2011)

[5] cf. Cepl/Voß, *Prozesskommentar zum Gewerblichen Rechtsschutz*, C.H. Beck Verlag, first edition 2015, § 219 ZPO (Terminsort), par. 2: «*Termine (→ § 214) werden grundsätzlich an der **Gerichtsstelle** abgehalten. Dadurch soll in das Bewusssein der Anwesenden gerufen werden, dass ein **an festgelegte äußere Formen gebundenen Gerichtsverfahren** stattfindet und nicht irgendeine Verhandlung sonstiger Art*» (emphasis added).

[6] *cf. Doron Menashe, «A critical analysis of the online court», pp. 947-949, retrieved online at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1967&context=jil*

Needless to say, a courtroom is not home: it is not designed to express comfort and convenience; it is meant to express power and to induce a feeling of awe.

The expressive function of justice ultimately endorses certain types of behaviour and rejects others, thereby allowing justice itself to function and to be effectively administered.

Oral proceedings by videoconference as envisaged by the new provision could hardly achieve this function: those symbols and ceremonies as well as the formal setting which normally play such an important role in making justice function effectively would become impalpable.

This «dematerialisation» of justice could seriously impair the work of the Boards of Appeal and their work effectiveness, by depriving oral proceedings of their formal and symbolic character; furthermore, by allowing members of the Board to attend oral proceedings from their homes, it could weaken their *ésprit de corps*, their commitment and their ability to **work as one body**.

The public character of oral proceedings before the Boards of Appeal and the protection of sensible information

Pursuant to Article 116(4) EPC oral proceedings before the Boards of Appeal are **public**, in so far as the specific Board before which the proceedings are taking place does not decide otherwise, where admission of the public could have serious and unjustified disadvantages, in particular for a party to the proceedings.

Article 116(4) EPC embodies the **principle of open justice** (*Öffentlichkeitsgrundsatz* in German; *principio di pubblicità del processo* in Italian).

The principle of open justice is a fundamental tenet of any democratic judicial system that is based on the rule of law, enabling public scrutiny of the way courts decide cases and thereby serving the purpose of safeguarding the right of the parties to a fair trial. As such, it is

also codified in the laws of the Contracting States[7] and under Article 6(1) of the European Convention on Human Rights (ECHR).

Although the principle of open justice is one of the most fundamental expressions of the rule of law, in so far as it protects the right to a fair trial, the laws of the Contracting States generally impose certain limits on the public character of legal proceedings, in order to safeguard other fundamental rights of the parties.

Thus, for example, § 169 of the German Courts Act (*Gerichtsverfassungsgesetz*) prohibits audio and video recordings of oral proceedings.

As explained in the decision 1 BVR 2623/95 – 1 BvR 622/99 of the German Federal Constitutional Court (*Bundesverfassungsgericht*), the prohibition of recordings of oral proceedings takes into account the need to safeguard personal privacy rights and the obligation to ascertain the truth and to ensure a fair trial[8].

In that decision, the Federal Constitutional Court for example mentions the risk that statements made during oral proceedings might be manipulated, thereby altering their meaning, or that they might be improperly used in a different context[9].

Remarks of a similar tenor can be read in a decision by the Swiss Federal Court (*Bundesgericht*), whereby a summons issued by the Zurich Commercial Court (*Handelsgericht*), ordering a party to attend oral proceedings by videoconference against its will, was considered to lack a legal basis in the Swiss Civil Procedure Rules (ZPO)[10].

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[7] s. for example, § 169(1) GVG for **Germany**, and Art. 111 of the Italian Constitution and Art. 128 of the Italian Civil Procedure Rules (Codice di procedura civile) for **Italy**.

[8] s. 1 BvR 2623/95 – BvR 622/99, Grounds, B.II.ee): «*Die Begrenzung der Gerichtsöffentlichkeit durch das Verbot der Ton- und Fernseh-Rundfunkaufnahmen in Gerichtsverhandlungen trägt Belangen des Persönlichkeitsschutzes sowie den Erfordernissen eines fairen Verfahrens und der Wahrheits- und Rechtsfindung Rechnung*».

[9] loc. cit.: «*Auch besteht ein hohes Risiko der Veränderung des Aussagegehalts, wenn die Aufnahmen geschnitten oder sonst wie bearbeitet, mit anderen zusammengestellt oder gar später in anderen inhaltlichen Zusammenhängen wieder verwendet werden*».

[10] s. Entscheid 4A_180/2020 of 4 July 2020 (BGE 146 III 194), n. 3.5 of the considerations (Erwägungen): «*Die Durchführung einer Hauptverhandlung in Form einer Videokonferenz wirft*

The vast majority of oral proceedings before the Boards of Appeal are contentious, *inter partes* proceedings involving parties with contrasting economic interests.

In many cases, a patent forming the object of oral proceedings before the Boards of Appeal is also litigated in transnational legal proceedings taking place in several Countries; a common scenario might involve litigation in Europe and in the United States, for instance.

Unless adequate measure are taken, statements made by a party during oral proceedings before the Boards of Appeal could be illicitly recorded by another party and used in other legal proceedings against the party that made the statement.

This could have very damaging consequences, particularly in common law legal systems and, notably, in the US, where under the doctrine of **judicial estoppel** a party can be prevented from asserting a legal position that is considered to contradict a position taken by the same party in earlier proceedings.

In such a situation, in view of the considerable variety of national rules governing **client-attorney privilege**, as a consequence of the divulgation of an illegal recording secretely undertaken in oral proceedings before the Boards of Appeal a party might be confronted with an order, by a national court deciding a case involving the same patent in a different jurisdiction, to disclose further evidence.

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verschiedene rechtliche und praktische Fragen auf; dies jedenfalls dann, wenn alle Verfahrensbeteiligten - wie vorliegend - "von ihrem jeweiligen Standort aus über ihre Mobiltelefone" teilnehmen sollen. So fragt sich, wie die Öffentlichkeit des Verfahrens (Art. 54 ZPO) sichergestellt wird und wie die Persönlichkeitsrechte der Beteiligten gewahrt werden können. Es sind datenschutz- und datensicherheitsrechtliche Vorgaben zu beachten. Ferner werden sich säumnisrechtliche Fragen stellen, wenn die Videokonferenz nicht zustande kommt oder die technische Verbindung abbricht (oder - was davon nicht immer unterscheidbar sein dürfte - von einem Teilnehmer absichtlich abgebrochen wird; vgl. Art. 234 ZPO). Hält sich eine Partei im Ausland auf, sind rechtshilferechtliche Bestimmungen einzuhalten. Auch ist diskutiert worden, wie sich die Durchführung einer Verhandlung mittels Videokonferenz zum Anspruch der Parteien auf gleiche und gerechte Behandlung (vgl. Art. 29 Abs. 1 BV sowie Art. 6 Abs. 1 EMRK [droit à un procès équitable]) und zum "Unmittelbarkeitsprinzip" verhält (siehe BOHNET/MARIOT, a.a.O., S. 183-185 und S. 192 f.; KETTIGER, a.a.O., Rz. 9 f.)».

A well-known case in point the *Bristol-Myers Squibb Co. versus Rhône-Poulenc*[11] case, where a US court concluded that, under the relevant US law and having regard to how legal privilege is regulated in France, there was an **obligation** on the part of a French patent agent **to disclose** certain evidence the production of which had been sought by Bristol-Myers in the US proceedings.

It should be clear that, even regardless of such complex matters as the protection of legal privilege across different jurisdictions and the obligation to disclose evidence in common law systems having **discovery** procedures, the illicit recording of a party's statements during oral proceedings before the Boards of Appeal could be extremely damaging for that party.

It is not difficult to understand that, if oral proceedings before the Boards of Appeal are held by **videoconference**, it becomes **impossible** for the Chair **to prevent** a party from **illegally making audio or video recordings** of the proceedings.

The Chair could only see minuscule images of the parties', representatives' and accompanying persons' faces; he could not see their bodies and in particular their hands, so as to detect any attempt to illegally operate a recording device. In view of the fact that the very same computer on which a party would run the videoconferencing software would also allow to record the proceedings at a click, it is easy to understand that a Chair would have no chance at all to detect any misbehaviour during a hearing by videoconference.

As a matter of fact, by allowing parties, representatives and members of the Board to be physically located in different places and by substracting the parties to the direct scrutiny that the three members of a Board would normally exercise in face-to-face oral proceedings, **no real control of unauthorised behaviours** could be enforced; furthermore, it

[11] *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer Inc.*, 52 U.S.P.Q. 2d 1897, 188 F.R.D. (U.S. District Court, Southern New York, 1999)

would also become impossible to prevent **unauthorised persons** from secretly **attending** oral proceedings.

The proposed new article 15a RPBA would objectively facilitate such misbehaviour.

It would be very naïve to believe that the prohibition to use sound recording devices, stipulated in the Notice of the Vice-President of the former Directorate-General 3 of the European Patent Office dated 16 July 2007, could effectively prevent parties from the temptation to make recordings.

Chairs of the Boards of Appeal would as a matter of fact not be able to ensure proper **policing** of oral proceedings (*Sitzungspolizei* in German) by videoconference.

This worrisome aspect of oral proceedings by videoconference is not addressed at all either in the new provision or in the accompanying explanatory remarks.

It is a source of great concern and it does not objectively seem possible to cure this deficiency, since it is an **inherent problem of proceedings by videoconference**.

Compatibility with constitutional rights of the parties

The proposed provision would give the Boards of Appeal of the European Patent Office **unprecedented powers** that are unheard of in the vast majority of the Contracting States.

New article 15a(1) RPBA, for example, would **permanently** empower a Board to **order** parties to attend oral proceedings by **videoconference**, even if they are not willing to.

As recalled above, in **Switzerland** the Federal Court (*Bundesgericht*) ruled that no legal provision under Swiss law allows courts to hold oral proceedings by videoconference **without the agreement of the parties**[12].

[12] s. Entscheid 4A_180/2020 of 4 July 2020 (BGE 146 III 194), cited *supra* at note 10, head note: «*Die Parteien haben Anspruch auf **rechtskonforme Abhaltung** der Hauptverhandlung,*

In **Germany**, § 128a ZPO (the German Civil Procedure Rules) allows a court to summons oral proceedings by videoconference; however, as clearly apparent from the wording of the provision, a court may only allow («gestatten») a party to participate by videoconference; **it may not force it to attend the hearing by videoconference**: a party willing to present its case in the courtroom is entitled to do it, even if other parties choose to participate by videoconference.

In **Italy**, oral proceedings by videoconference are **temporarily** possible only until 31 December 2020[13], on account of the pandemic, **provided all the parties agree**; the safeguards catered for under Article 281-*quinquies* c.p.c. (the Italian Civil Procedure Rules) and Article 281-*sexies* c.p.c., whereby a party is always entitled to request an oral debate before the judge in courtroom, are maintained.

New article 15a(3) RPBA would allow members of the Boards of Appeal to hear and decide a case from geographically distant locations, something unknown to most jurisdictions of the Contracting States.

In **Germany**, for example, § 219 ZPO expressly provides that oral proceedings take place in court: «*Die Termine werden* ***an der Gerichtsstelle*** *abgehalten*». From the conclusions drawn by the Federal Constitutional Court (*Bundesverfassungsgericht*) in the cited decision 1 BVR 2623/95 – 1 BvR 622/99 that court proceedings are public only in so far as they take place in a **public courtroom** (*Saalöffentlichkeit*), it clearly follows that the **deciding judicial body must be physically present in a public courtroom where the proceedings take place**[14].

Such provisions, by ensuring that oral proceedings take place before the court in a public courtroom, aim at protecting the right of the parties to a **fair trial** by making sure that the members of the court personally

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soweit sie nicht gemeinsam auf eine solche verzichten. Es fehlt im Anwendungsbereich der ZPO an einer rechtlichen Grundlage, die Hauptverhandlung ohne Einverständnis aller Parteien im Rahmen einer Videokonferenz durchzuführen» (emphasis added).

[13] s. art. 221 of the legislative decree n. 34 dated 19 May 2020, converted into law n. 77 dated 17 July 2020.

[14] s. 1 BvR 2623/95 – BvR 622/99, Grounds, B.II.2: «*Die Gerichtsöffentlichkeit ist gesetzlich aber nur als* ***Saalöffentlichkeit*** *vorgesehen*» (emphasis added).

ascertain the relevant facts of the case in a hearing that is subject to the scrutiny of the public.

Said provisions flow from basic principles of the rule of law (*Rechststaat*, *stato di diritto*) that are enshrined in the fundamental laws and constitutions of the Contracting States.

They embody the fundamental principle expressed in Article 6(1) EHCR that «*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*».

The Contracting States to the European Patent Organisation have entrusted the Boards of Appeal of the European Patent Office with the judicial task of hearing, and deciding upon, appeals by parties to administrative proceedings before the European Patent Office.

While the Contracting States have thereby waived some of their sovereign prerogatives as far as the grant of patent monopolies is concerned, they have certainly not forfeited any of the fundamental rights, such as the right to a fair process, that their citizens enjoy under the laws of the Contracting States.

As new article 15a RPBA impinges on such fundamental rights for the reasons presented above, it appears that the provision being proposed would not be compatible with certain constitutional obligations, such as the right to a fair trial, that the Contracting States have towards their citizens.

This incompatibility is exacerbated by the further circumstance that, unlike the jurisdictions of all the Contracting States, proceedings before the European Patent Office do not foresee three instances.

The Boards of Appeal are the **sole judicial instance available** to parties to proceedings before the European Patent Office: tarnishing the parties' right to a fair trial before the sole judicial instance they can have recourse to could have dramatic consequences.

In view of this circumstance and in the light of the considerations presented above about the need for a clear legal basis, it is maintained that the introduction of oral proceedings by videoconference before the Boards of Appeal cannot occur at the sole instigation of the Boards of Appeal and through ratification by the Administrative Council.

Whether oral proceedings by videoconference before the Boards of Appeal should receive legal codification is a matter for the Contracting States to decide; such codification should be a matter of revision of the Convention under Article 172 EPC.

At any rate, if oral proceeedings by videoconference before the Boards of Appeal are to be codified, it should be left to the parties to decide whether they want to avail themselves of such a manner of conducting the proceedings.

Conclusions

The proposed article 15a RPBA raises a number of serious concerns as regards the right of parties to appeal proceedings before the Boards of Appeal to a fair trial; it also appears that, insofar as this fundamental right is impinged upon, the proposed amendment would be in contrast with constitutional provisions of the Contracting States and with the case law of the Boards.

New article 15a RPBA also raises very serious concerns as regards the protection of personal and economic interests of the parties, particularly having regard to the fact that parties to appeal proceedings at the European Patent Office might also be involved in cross-border litigation in jurisdictions where discovery procedures are in place.

Having regard to the fact that the Boards of Appeal are the sole judicial instance available to parties to proceedings to the European Patent Office, also taking into account the systemic consequences that the introduction of hearings by videoconference could have in combination with a revision of Rules 117 and 118 EPC on the taking of evidence, it is

feared that the proposed amendment could have dramatic consequences for users of the European patent system.

In light of these considerations, it is held that the permanent introduction of oral proceedings by videoconference before the Boards of Appeal should be carefully reconsidered and discussed among the Contracting States, in order to address all the concerns discussed above.

With kind regards,

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