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BUSINESSEUROPE Comments to the EPO Consultation on an amendment to the Rules of Procedure of the Boards of Appeal regarding oral proceedings by videoconference

BUSINESSEUROPE is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and actively campaigning on the issues that most influence their performance. We speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

BUSINESSEUROPE has taken notice of the user consultation on the proposed insertion of new Article 15a (oral proceedings by videoconference) to the Rules of Procedure of the EPO Boards of Appeal (RPBA). The proposed Article 15a provides that the Boards of Appeal may hold oral proceedings under Article 116 EPC by videoconference if it is considered appropriate, either upon request by a party or of the Board's own motion.

BUSINESSEUROPE is happy to contribute - with its comments below - to this debate that will have an impact on patent litigation over the coming years. BUSINESSEUROPE appreciates the very close cooperation with the EPO Boards of Appeal and trusts that this synergy will continue in the future.

General comments on proposed Article 15a RPBA

BUSINESSEUROPE generally welcomed the decision to hold oral proceedings via videoconferencing (VICO) as an emergency measure in the context of the current COVID-19 crisis. The decisions taken by the EPO and the Boards of Appeal were reasonable to adapt to the current situation. During the COVID-19 pandemic, there have been restrictions on representatives and applicants being in the same videoconference facilities. We welcomed the proposal that the applicant and its representatives may connect to the proceedings remotely from different locations.

Although companies have already had some positive experiences with virtual oral proceedings before the EPO Opposition Divisions or the Boards of Appeal during the COVID-19 crisis, BUSINESSEUROPE has strong concerns with respect to the proposal to extend the applicability of the proposed Article 15a RPBA beyond the COVID-19 situation. In this regard, BUSINESSEUROPE would like to put forward the following comments.



a. *Face-to-face oral proceedings must be the “default way” to conduct oral hearings*

The proposed Article 15a RPBA is intended to make permanent a measure adopted to address the emergency situation under the COVID-19 pandemic. It provides for a Board of Appeal to require attendance by VICO to oral proceedings that should, in the usual course of business, be available “in person”. Outside the context of the COVID-19 situation, face-to-face oral proceedings must be the “default way” to conduct oral hearings. Imposing oral hearings by VICO would be an unjustified restriction on the manner of conducting oral proceedings before the Boards of Appeal.

After the current pandemic, oral hearings should go back to the default on-site presence set-up. It should be the parties’ decision to ask for VICO, and not for the Boards of Appeal. In particular, in *inter partes* proceedings the patent owner and the opposition party should remain the “master” of the proceedings.

BUSINESSEUROPE has also strong concerns on the proposal that the Board of Appeal may decide to hold the oral proceedings by VICO on “its own motion”. Face-to-face oral proceedings are one of the fundamental elements of European legal proceedings and this should not be changed unilaterally by Board of Appeal in charge of a particular case.

b. *Parties should not be compelled to attend via videoconference*

BUSINESSEUROPE members consider that oral proceedings by VICO are acceptable where all parties agree.

Where at least one party desires, is willing and is able to appear in-person, that party should not be compelled to attend by VICO. Also, in the context of a pandemic, if a party wishes to attend in person, the agreement of the party attending by VICO is necessary to proceed in this way.

The appearance of one party by VICO should not compel the appearance of all parties by VICO. In order to prevent giving advantages to parties and/or representatives residing local to the venue of the Boards, all parties may be offered attendance by VICO.

c. *Explanatory notes required*

The applicability of the proposed Article 15a would depend on a proper application of “discretion” to new, untested circumstances, and a proper formulation and application of a new test for “appropriateness”, which is a completely new and unelaborated criterion. This new “discretion” and “appropriateness” test should be guided by accompanying explanatory notes to any such provision setting the stage for appropriate interpretation. In particular, the criteria for determining when videoconference is appropriate should be the consent of the parties, and face-to-face hearings remain the default.

d. *Public access*

BUSINESSEUROPE considers that public access to virtual oral proceedings must be maintained irrespective of the mode of proceedings. In any event, whatever access is permitted it should not be less than at present and it should be ensured that the parties’ rights are not affected.

***e. Recording***

BUSINESSEUROPE stresses that the prohibition of sound recordings during oral proceedings by VICO is difficult to enforce. Although professional representatives may be expected to comply with this prohibition, the disadvantages that may be incurred by recordings made by parties or the public need further consideration.

f. Different tools available

BUSINESSEUROPE recommends the Boards of Appeal to provide different options in terms of technological tools for videoconferencing. Thus, if a party is prevented from using a certain software (e.g. for security restrictions), an efficient and reliable alternative should be available.

Furthermore, there is a general feeling that the attendance to oral proceedings in person has advantages with respect to attending by VICO. In order to overcome this situation, the Boards of Appeal should improve the setting and conduction of oral proceedings by VICO, so that, for example, the faces of the persons taking the floor could be viewed by those participants by VICO.

The improvement of the VICO participation to make it as close as possible to the inperson participation is seen as the best way to progressively adopt oral proceedings by VICO. This would also help neutralise the current advantages that parties and representatives residing local to the venue of the Boards might have.

g. Training

Education and training in the use of videoconferencing technology should be offered to users. The hosting of tests before oral proceedings by VICO should be available to ensure the technology is properly configured and a satisfactory connection can be established. Ultimately, these elements have an impact on the equal treatment of the parties.

h. Comparative study

BUSINESSEUROPE recommends the Boards of Appeal to conduct a comparative analysis of the outcomes from the oral proceedings by VICO conducted since May 2020 with respect to face-to-face oral hearings, before any final decision on the proposed Article 15a RPBA is taken. For instance, this comparative study should focus on the impact of VICO on the adherence to preliminary opinions.
