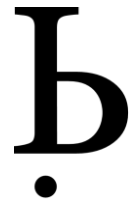


[Translation]



User survey on the amendment of the Rules of Procedure of the Boards of Appeal by adding a new Article 15a (oral hearing as a video conference)

BARDEHLE PAGENBERG thanks for the opportunity to comment on the intended amendment of the Rules of Procedure (RPBA). We will first briefly address the special situation caused by the pandemic (item 1.) before discussing oral hearings as video conferences from a number of practical (item 2.) and legal points of view (item 3.). Subsequently, we will explain that “*hybrid hearings*” could combine the benefits of hearings with physical attendance and VICOs (item 4.) and, on this basis, suggest adjustments to the current version of Article 15a RPBA (item 5.).

1. We welcome all efforts to limit the impact of the Corona pandemic on the conduct and completion of proceedings before the Boards of Appeal. The use of video conferences (VICOs) is an appropriate and necessary means of enabling the conduct of oral hearings which cannot be adequately conducted at the courthouse due to the restrictions that have been put in place. In the case of *inter partes* as well as *ex parte* appeal proceedings, the parties, potential competitors and the public have an interest that the clarification of the intellectual property rights situation is not unduly delayed. Given the unforeseeable further duration of the pandemic, it therefore appears necessary for oral hearings before the Boards of Appeal to be conducted as VICOs even without the consent of the parties in order to avoid a standstill in the administration of justice, especially in cases where the proceedings have already been in progress for a long time, but also in cases where one party has an interest in delaying the matter.

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2. However, if such danger is no longer given, there are practical aspects for considering pure VICO as a full replacement for oral hearings in the court premises:
 - a. First, there are important arguments for an extended involvement of VICO technology in oral hearings, including those before the Boards of Appeal. VICO reduce the travel activities of the parties and, in addition to saving time, thus make a significant contribution to environmental protection, especially to reducing CO₂ emissions. They also provide simplified access to oral hearings for non-European applicants as well as for European applicants who do not have an office at the respective venue, provided that the Chambers are prepared to be flexible when it comes to fixing the schedules (e.g. in the afternoon for applicants from the US and in the morning for applicants from Asia). This further increases the transparency of the board of appeal system of the EPO and contributes to a deeper knowledge of the European patent system and increased acceptance of decisions among international applicants — and thus ultimately also to improved quality of new patent applications.
 - b. However, such aspects have their limits if the oral hearing is about the case as such. Empirical evidence of this view can be found in a study prepared by the UK Civil Justice Council for the Master of the Rolls. In this wide-ranging study on “*remote hearings*”, the vast majority of participants expressed positive opinions about the course of the hearing. However, the majority of respondents considered the remote hearing to be worse and less efficient than a hearing in court.¹ In this regard, the statement of a Queen’s Counsel is striking:

It’s quite important for people’s expectations that they feel they’ve had a proper and fair and complete hearing. If you’re simply one of a number of blinking figures in a video chat, the whole idea that the

¹ Civil Justice Council, The impact of Covid-19 measures on the civil justice system, May 2020, note 1.20. <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f-1.pdf>

judge listened carefully to what everyone said, that the advocate gave their best, is diminished. ...

Empathy, in general, might also be lacking. The judge feels more responsible for their decision in a face-to-face hearing. If you have to look at someone in the eye and say 'you're going to lose your home' or 'your claim is dismissed', you take a degree of responsibility for it by being in the courtroom. ²

- c.** Although this may not be a general opinion, this statement gives an understandable impression. The reasons for this may be manifold. For example, in the case of a VICO, the possibilities of perceiving the reactions of the members of the court to the submissions of the parties are restricted, especially as regards their facial expressions, body language and the timbre of their voices. Also, following on screen is more tiring than participating in presence. Thus, it has to be feared that the court's receptiveness and also that of the parties suffers, especially in long hearings. Discussion and interaction among the participants are rather formal than spontaneous. Supporters of VICOs also acknowledge that it is incomparably much more difficult to notice, interpret and use atmospheric occurrences as a yardstick in VICOs than when they are present in the same room.³
- d.** Moreover, supporters of pure VICOs often argue that it is easier to illustrate complex issues in a video conference than in meetings with physical attendance, for example by sharing a whiteboard with drawings, a graphic animation or presentation, or a video. In practice, however, it has become apparent in courts and legal systems that allow very extensive virtual processes that the strength of the legal or technical argument may fade into the background in case of disputed questions when exploiting all digital presentation possibilities. If difficulties of comprehension become evident in a hearing with physical attendance, the technical facts of the case can easily be illustrated by using a model, a drawing on a flip chart or

² Loc. cit. FN 1, Annex F, page 25.

³ Mantz/Spoenle, Corona pandemic: "Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung", MDR 2020, 637, section III, first paragraph.

by explaining a statement with gestures in front of the bench. Simple means to help stakeholders explain a point without shifting the focus too much from the questions that are essential for the decision to digital presentation technology.

- 3.** From a legal point of view, we believe that there are considerable doubts with regard to the currently proposed version of Article 15a RPBA:
 - a.** The proposed regulation does not include any provisions on the form of participation of the members of the Chamber as a collegial body. Paragraphs 2 and 3 seem to refer to oral hearings with physical presence, to which individual participants or members of the Board are connected by video conference. In any case, the draft does not seem to preclude the possibility that the members of the Chamber do not sit together in a meeting room equipped with video technology but participate in the VICO separately in their offices or even at home. This also seems to be the common practice in the first instance.

We have considerable reservations against this practice, as it would likely be a serious infringement of the collegial system established in Art. 21 EPC. Experience with VICOs at first instance shows that the hearing is often limited to a discussion with the rapporteur, who has dealt with the matter most thoroughly.⁴ While a certain division of labor between the various members of the department may be justified in the administrative grant procedure, in the judicial appeal proceedings, it can be assumed that all members bear the same responsibility as regards the decision to be rendered. This requires that they deal intensively with the matter in dialog with each other and with the parties involved. This is naturally more effective in person.

- b.** We consider the unrestricted possibility of arranging VICOs at the discretion of the Chambers to be a development that affects the judicial

⁴See in this regard the statement of the Patentanwaltsskammer (the Chamber of Patent Attorneys) of July 15, 2020 on VICOs under item 1.c), accessible at www.patentanwaltskammer.de.

character of the Boards of Appeal. The right to a public oral hearing is guaranteed not only in Art. 116 EPC, but also in Art. 6 (1) European Convention on Human Rights⁵. Although the order of an oral hearing by way of a VICO as such does not violate Art. 6 (1) European Convention on Human Rights, the Court has to examine in individual cases whether the order pursues a legitimate objective and observes the principle of fair proceedings.⁶ Nothing else applies to the parallel regulation in Art. 47 (2), sentence 1 of the Charter of Fundamental Rights of the European Union. Thus, it is not compatible with this if a court orders an oral hearing as a video conference without any special circumstances of the individual case justifying this.

- c.** According to the traditional understanding, an oral hearing is a hearing at the place of trial. It represents the culmination and the end point of a conflict between parties or a party and the Office and is therefore emphasized for the perception of the parties and the public. Traditionally, a certain setting is chosen for this, in a “Palace of Justice”, in a hall, with judges and lawyers in robes, which emphasizes the special situation and gives it dignity and acceptance. The corresponding regulations have thus always naturally assumed that the parties and the members of the court are physically present, as the Swiss Federal Court recently stated in a judgment which overturned a first-instance judgment based on the conduct of the hearing as a VICO.⁷ This is also assumed by the German regulation regarding VICOs in Sec. 128a German Code of Civil Procedure, which allows the parties to be at a different location in paragraph 1, first sentence, while the court is assigned the court room in sentence 2.⁸ This regulation allows the parties to appear in the court room despite the order of a video

⁵ *Meyer-Ladewig/Nettesheim/von Raumer*, Europäische Menschenrechtskonvention, 4th edition 2017, Art. 6 marginal no. 99.

⁶ European Court of Human Rights of October 5, 2006, 45106/04, *Viola/Italien*, marginal no. 67.

⁷ Swiss Federal Court, judgment dated July 6, 2020, 4A_180/2020, grounds B.3.2, with further references.

⁸ See *Musielak/Voith*, ZPO, 17th ed. 2020, marginal no. 2, with further references.

conference.⁹ Thus, conducting the oral proceedings as a VICO is not enforceable. Insofar as it is permitted in the UK that the judges are not present in the court at a VICO, this is based on the regulation in the Corona Act 2020, which is tailored to COVID-19 and is limited in terms of time.

- d.** The place of jurisdiction of the Boards of Appeal has a connecting factor in the EPC. The structural reform for the Boards of Appeal has not changed the fact that they are organizationally part of the EPO. According to Art. 6 (2) EPC, their registered office is in Munich and they accordingly also carry out their business in Munich. In G 2/19¹⁰ the Enlarged Board of Appeal (EBA) did not consider the principle of the right to a fair hearing to have been infringed if oral hearings were not held in the city of Munich, but in Haar in the district of Munich. However, the Enlarged Board of Appeal acknowledged a possible connection between the grant or infringement of the right to a fair hearing and the spatial-temporal framework for a scheduled oral hearing. From this, it can be concluded that the scheduling of an oral hearing as a VICO affects the principle of the right to a fair hearing if an involved party has demonstrated in a substantiated manner that a physical presence in the office building in Haar instead of a VICO appears to be appropriate. An exception to this rule would only be justified from the point of view of the right to a fair hearing in order to enable an otherwise not feasible oral hearing within a reasonable period of time, as explained in item 1. However, this should not be the case outside of times of pandemic or natural disasters.
- e.** A deviation from the above-mentioned principles of the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the German civil procedure law or the temporary solution in the United Kingdom is not justified by particularities of the proceedings before the Boards of Appeal. It is true that, for the most part, the

⁹ *Mantz/Spoenle*, loc. cit., section II.2, 1st paragraph.

¹⁰ G 2/19, Official Journal 2020, A87 - *Rechtliches Gehör und richtiger Verhandlungsort*, section IV.1.

proceedings before the EPO are in writing.¹¹ This is derived from the objective of the grant procedure, which is to issue a written document detailing the protection granted to the applicant.¹² Of course, this idea does not apply to opposition proceedings, which, in character, have essential similarities with national nullity proceedings.¹³ In any case, the obligatory oral hearing is conceived as an essential supplement to the written proceedings, which is a specific manifestation of the principle of the right to a fair hearing and its significance has been emphasized repeatedly by the Boards of Appeal.¹⁴ It gives the parties a better opportunity than the written proceedings to present their views, to focus on the issues that prove essential and to contribute to the clarification of issues in dispute.¹⁵

- f. Consequently, the discretion granted to the Boards of Appeal under Art. 15a (1) of the draft appears to constitute an infringement of Art. 116 (1), 113 (1) EPC. A Board of Appeal may consider a VICO “appropriate” if it considers it to be efficient. Then, the exercise of discretion is also not verifiable, because the Chamber decides as the last instance. The Swiss example shows that, in national proceedings, there is judicial relief against an wrongly ordered VICO. This is not the case in proceedings before the Boards of Appeal. The examination procedure according to Art. 112a EPC is not expected to correct the discretionary decision.¹⁶ The success rate in these proceedings for objections due to an infringement of the right to a fair hearing is extremely low. In addition, widespread, though not unanimous, case law holds that a violation of the right to a fair hearing

¹¹ G 4/95, Official Journal EPO 1996, 412 - *Vertretung/BOGASKY*, grounds no. 4c

¹² *Bühler in Singer/Stauder*, 8th ed. 2019, Art. 116 EPC, marginal no. 1

¹³ G 9/91, Official Journal 1993, 408 - *Prüfungsbefugnis/ROHM AND HAAS*, grounds no. 2.

¹⁴ Case law of the Boards of Appeal, 9th ed. 2019, III.C.2.1.

¹⁵ *Waage*, Principles of Procedure in European Patent Law, EPO, 2002, marginal nos. 2-93.

¹⁶ R 10/09 of June 22, 2010, grounds no. 2.3.

does not exist if a request concerning the right to a fair hearing was discussed with the party.¹⁷

4. As a result, we consider the ordering of oral hearings in the form of a VICO to only be appropriate with the consent of the parties. In contrast, an arrangement as a VICO without the consent of the parties is only justified as *ultima ratio* for as long as participation in face-to-face negotiations is not possible due to the current (or even a future) pandemic.

For times outside of a pandemic, other means are available to take advantage of the key benefits of VICO technology in the context of the oral hearings, without giving up the core of the oral hearing – as a place for exchanging oral arguments and clarifying open questions. The current practice of the German Federal Court of Justice could be the prototype for such a regulation. The judges are together in the courtroom, and a limited circle of local participants, usually the leading representatives, is allowed, in a “*hybrid form*” so to speak, while other participants, e.g. representatives with in-depth knowledge of individual points or in-house representatives of the parties join in via VICO, also from overseas. Thus, the essential character of the oral hearing is maintained and, at the same time, the essential advantages of the VICO technology are utilized.

5. We therefore suggest the following legal amendments:
 - a. In accordance with the systematics of other regulations of the Rules of Procedure of the Boards of Appeal (RPBA), it should be welcomed that the hearing being conducted face-to-face (or in “*hybrid form*” if necessary) is considered the preferred normal case, for example

¹⁷ Cf. for example R 1/13 dated June 17, 2013, grounds no. 13.5 regarding a case in which the patent proprietor intended to react to a late objection by means of an amended request that was not admitted. Here, the Enlarged Board of Appeal denied an infringement of the right to a fair hearing on the grounds that the patent proprietor had been heard on the approval of the application. See also R 10/09, loc. cit., footnote 17.

„For oral proceedings scheduled to be held in person, the Chair may allow a party, representative or accompanying person to attend by videoconference.“

- b.** Regardless of this, the current Article 15a (1) – which, in our opinion, should form Article 15a (2) – should specify the Chamber’s discretion in deciding on a pure VICO. This is especially the case in view of the fact that the discretionary decisions of the Chamber are much more clearly defined in the procedural questions of admission, see e.g. the criteria laid down in Article 12 (4) or Article 13 (1) RPBA, or the detailed criteria for a postponement provided for in Article 15 (2) (b) RPBA. In this respect, the suitability of the case, in particular the complexity and the possibility of the parties to participate (as provided for in item 8 of the “*Explanatory remarks*”) appear to be of essential importance, but less decisive, at least in *inter partes* proceedings, is the mere subjective willingness.
- c.** In addition, the planned provision should initially define how a VICO is normally carried out before the exceptions to this normal case are then decided on. In our view, the normal case of a VICO in that sense is that the Board of Appeal, as a collegiate body, meets in a meeting room in Haar, while the parties are present wherever their VICO equipment is available. We assume that representatives and parties can be connected in different places (the latter overseas, for example).
- d.** As far as the members of the Chamber are concerned, an exception to attendance among the participants should only be justified if the member cannot be present at the VICO, for example because he or she is subject to an ordered quarantine or for other health reasons. On the other hand, it should not be a reason for a member’s absence that he or she is subject to travel restrictions, such as those resulting from working from home in their home country. This ought to be laid down in the provisions accordingly.
- e.** As regards using Zoom as a platform, data security for the servers of the external participants is an eminently important aspect of the VICO procedure. In this respect, we do not see ourselves in a position to make a statement at short notice due to the lack of closer examination. In any case,

the concerns already expressed on this issue by others must be taken seriously.¹⁸ Since all potential participants are likely to have stored sensitive data, they should be informed about security gaps and possible ways to close them, if only for liability reasons.

It should also be noted in this respect that image and sound recordings of oral hearings are generally prohibited for good reason. Although Zoom allows a host to prevent recording via the software itself, there is third-party software that allows “secret” recording without any major technical hurdles. Especially when a large group of participants attend the hearing via a VICO, a subsequent traceability of records will be difficult.

¹⁸ See also in this regard the Swiss Federal Court, *loc. cit.*, grounds no. B.6.