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User consultation on an amendment to the Rules of Procedure of the Boards of Appeal Insertion of new Art. 15a

Dear Mr De Groot
Dear Mr Josefsson

We appreciate the opportunity to comment on the proposed insertion of new Art. 15a to the Rules of Procedure of the Boards of Appeal (RPBA).

Clearly, the current Covid-19 pandemic has been a very efficient driver of the digital transformation. Videoconferencing had to replace face-to-face meetings in any kind of businesses in recent times – which worked surprisingly well in many instances. But no videoconference comes close to the power of direct personal interaction in a face-to-face meeting. Any broadcasting technology as an intermediary between human beings impairs the *principle of direct interaction* ('Unmittelbarkeitsprinzip' in German) in oral proceedings.¹ There is more to oral proceedings than just the spoken word and a tiny, delayed and sluggish image of the person who is speaking. Remarkably, the mock oral proceedings with *Skype for Business* in opposition that is showcased on the EPO's e-learning website is a not-so-good example.² It actually underlines that oral proceedings by videoconference are currently no more than a second-best alternative to face-to-face oral proceedings. The obvious deficiencies of videoconferencing may occasionally be (more than) outweighed for *some* users in view of e.g. time and cost savings. But this definitely does not hold true for *all* users, in particular not in post-pandemic times.³

¹ This issue was raised *inter alia* in decision [4A 180/2020](#) of the Swiss Supreme Court in ¶13.5, but was left undecided for the time being.

² See <https://e-courses.epo.org/course/view.php?id=196>, video embedded at the bottom of the page. There is a time shift of voice and video signals of e.g. the Chair and the proprietor's representative, and quick head moves result in a blurry video signal.

³ In any event, the system being used for videoconferencing needs to ensure that all members of the Board and all representatives are very clearly visible at all times, to mitigate the aforementioned deficiencies to the extent possible.

The *Explanatory Remarks* hold that the EPC does not exclude oral proceedings by videoconference. But, likewise, it can also not be derived from the *Travaux Préparatoires* of the EPC that the legislator had ever thought about anything else than face-to-face oral proceedings. In Switzerland, videoconferencing *had* actually been considered in the making of the Civil Procedure Code that has been enacted in 2008 – and it has not been included in the law, for good reason.⁴

Further, it must not be overlooked that sufficient bandwidth and stability of the internet connection is not a given in all areas of the EPC contracting states. Participants from locations where the internet infrastructure is less developed are disadvantaged in oral proceedings by videoconference right from the outset.

All the above holds true for oral proceedings in general. But oral proceedings before the Boards of Appeal are special in that they are the last chance for parties to argue their cases. We feel that this last chance should not be more confined than absolutely necessary in the face of the pandemic. Oral proceedings in examination are already held by videoconference only (unless there are «*serious reasons*» for not doing so).⁵ This is *not* a pilot project, but rather a regime that is apparently here to stay. In our perception, an unsuccessful applicant should at least once be given the chance to argue his case in a face-to-face hearing, i.e. before a Board of Appeal. Not only must justice be done; it should also be perceived by the parties to be done. In post-pandemic times, the parties' perception of justice being done might unnecessarily be impaired if unsuccessful parties have been deprived of the possibility to argue their case in a face-to-face hearing.

Against this background, we have the following comments on the proposed text of Article 15a RPBA:

i) Art. 15a RPBA should not be applicable in «normal» times

The proposed text of Art. 15a RPBA is drafted to be applicable permanently, i.e. not only during the current pandemic but also in «*normal*» times. Likewise, the *Explanatory Remarks* do not mention any limitations of applicability of Art. 15a RPBA.

We find this inappropriate. Users will appreciate the need for videoconferencing as a second-best but inevitable alternative to face-to-face oral proceedings in pandemic times when otherwise access to justice might be impaired. But the current pandemic must not trigger a once-and-for-all-and-forever move to a second-best alternative which can be chosen merely at the respective Board's discretion.

We thus suggest that applicability of Art. 15a RPBA be triggered and ended by a specific notice to be published by the EPO and the Boards of Appeal if need be, e.g. in case of a pandemic. A pandemic is declared by the WHO; in case of Covid-19, this happened on 11 March 2020.⁶ Likewise, the end of a pandemic / entry into post-pandemic times is also declared by the WHO.⁷ These declarations could be used as guidance. Even though local outbreaks may still occur in post-pandemic times, this could

⁴ Decision [4A 180/2020](#) of the Swiss Supreme Court, ¶3.3.1.

⁵ Decision of the President of the EPO dated 1 April 2020; <https://www.epo.org/law-practice/legal-texts/official-journal/2020/04/a39.html>.

⁶ WHO Director-General's opening remarks at the media briefing on COVID-19 of 11 March 2020; <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁷ By way of example, see the WHO's declaration regarding H1N1 of 10 August 2010: https://www.who.int/mediacentre/news/statements/2010/h1n1_vpc_20100810/en/.

well be dealt with under the normal regime for requests for postponement of face-to-face oral proceedings.⁸

ii) The guiding principle(s) of when a videoconference is «appropriate» should be spelled out in Art. 15a paragraph (1) RPBA

The proposed text of Art. 15a paragraph (1) RPBA merely holds that a «Board may decide to hold oral proceedings [...] by videoconference if the Board considers it appropriate to do so, [...]». However, the guiding principles of how a Board shall exercise its discretionary power in this respect remain unclear in the Article itself; they are outlined only in the *Explanatory Remarks*, item 8. We suggest that these guiding principles be spelled out in Art. 15a paragraph (1) RPBA itself, as it is done elsewhere in the RPBA, e.g. Art. 13 paragraph (1) RPBA. We trust that this will further not only the uniform application of Art. 15a paragraph (1) by the Boards of Appeal but also the acceptance of the newly introduced discretionary power of the Boards of Appeal by the users.

iii) A party or its (only) representative shall not be forced to attend remotely based on Art. 15a paragraph (2) RPBA if others are attending in person

a) Art. 15a paragraph (2), first sentence

The proposed text of the first sentence of Art. 15a paragraph (2) RPBA is much appreciated. Someone being *allowed* to attend oral proceedings by videoconference even though the oral proceedings are scheduled as face-to-face oral proceedings provides welcomed flexibility.

We note that this aspect of Art. 15a should be applicable without limitations, i.e. also in non-pandemic times. This is in line with a resolution that has recently been adopted at the epi Council meeting of 14 November 2020:

«Council considers that, after the Covid-19 pandemic is over, oral proceedings should as a rule be held face-to-face but any party should be free to attend oral proceedings by videoconference, even if the other parties are attending in person.»

b) Art. 15a paragraph (2), second sentence

According to the second sentence of Art. 15a paragraph (2) RPBA, the Chair may decide that a party, representative or accompanying person *shall* attend by videoconference.

Even though this is limited to «*exceptional cases*», we consider this as highly problematic. Forcing a party or representative to attend by videoconference while others are free to participate in person puts the affected party in a worse position than the other parties. As a matter of fact, a remotely attending party experiences the oral proceedings through a technical filter, with all the inherent disadvantages outlined above, while the personal attendees can directly and personally interact with the members of the Board of Appeal. If such hybrid oral proceedings are held against the will of the person that is prevented from attending in person, the respective party will not appreciate this as a fair treatment.

⁸ Art. 15 paragraph (2) RPBA 2020.

In item 10 of the *Explanatory Remarks*, some examples of «*exceptional cases*» are discussed. These relate to two fundamentally different situations:

- If «*one of several opponents*» is prevented from attending in person for serious reasons, we do not consider this as sufficient reason that would justify ordering only him to attend remotely. A party should not be punished for being prevented from attending, and it is beyond a party's control that proceedings involve more than one opponent. Equal treatment of the parties as well as timely conclusion of the proceedings before the Boards of Appeal could well be assured differently, i.e. by ordering *all parties / representatives* to attend remotely.
- The fact that «*one of several representatives of a party*» or «*an accompanying person*» is prevented from attending in person does not justify a postponement already under Art. 15 of the current RPBA, and undue delays can accordingly be prevented already nowadays. Under envisaged Art. 15a paragraph 2, first sentence, the affected person would be free to request participation by videoconference. There is therefore no need to *force* this person to attend remotely.

The examples in the *Explanatory Remarks* therefore cannot alleviate our concerns. The procedural right of equal treatment is deeply enshrined in the laws of most if not all member states, and it must not be weakened by way of the RPBA. The second sentence should accordingly be deleted from Art. 15a paragraph (2).

iv) Attendance of (members of) the Board of Appeal by videoconference has shaky legal basis

Attending oral proceedings by videoconference means that one is free to attend from whatever place one wishes to attend, provided there is sufficient connectivity to the internet. We consider that remote attendance of (members of) a Board of Appeal to oral proceedings from some arbitrary locations might be seen to contravene the EPC. The following has been held in G 2/09 ([OJ 2020, A87](#), p. 29, last paragraph):

«Users of the European Patent Organisation's services can legitimately expect that the European Patent Office's departments will not perform acts at whatever other place they choose.»

Clearly, the Boards of Appeal «*perform acts*» during oral proceedings by videoconference. Yet, it is unclear where the members of the Board that attend remotely are actually located when performing those acts. It can hardly be deemed sufficient that the *Skype for Business* or *Zoom* account that is used for videoconferencing is attributable to the EPO while the acting personnel is located at whatever other place they choose. We thus suggest that at least the Chair shall be present in person at the premises of the EPO during oral proceedings by videoconference during oral proceedings and in particular when the decision is announced. In «*normal*» times, the whole Board should convene at the premises of the EPO in any event.

v) Videoconferencing should not just be imposed on users as the «*new normal*», but rather be appropriately incentivized

It is not only that videoconferencing is appreciated by some (not all) users, in view of time and cost savings. Likewise, the EPO has cost savings when oral proceedings are not held at its premises. We

thus suggest to consider that more voluntary use of videoconferencing be incentivized by way of e.g. structuring the appeal fee. For instance, a reduced appeal fee could be foreseen if the appellant agrees to oral proceedings by videoconference. One might also consider a regime with only a basic appeal fee falling due within the four months time limit of Art. 108 EPC, and a staggered surcharge being due based on the parties' explicit requests for oral proceedings in person or by videoconference.

We hope the above is useful in your further discussions of the proposed text of Art. 15a RPBA.

Kind regards,

A handwritten signature in black ink, appearing to read 'Fraefel', written in a cursive style.

Christoph Fraefel