

GUIDELINES2DAY

ORAL PROCEEDINGS IN OPPOSITION VIA VIDEOCONFERENCE: QUESTIONS AND ANSWERS FROM THE LIVE SESSION 04.03.2021

1. Do oral proceedings by VICO meet the requirements of Article 116 EPC?

In its decision [T 1378/16](#) the board confirms this and holds at pt. 1.3: "...oral proceedings held by videoconference are not excluded by the EPC and fulfil the requirements for holding oral proceedings within the meaning of Article 116 EPC. The EPC only requires that the public character of the proceedings be ensured (Article 116(4) EPC). The form in which the parties present orally their arguments - with or without physical presence - is not predetermined by Article 116 EPC."

2. What is the legal basis for allowing distributed divisions where the members of the division connect to the oral proceedings by VICO from different locations, even from different EPC member states?

The EPC does neither determine the form of oral proceedings nor the place of the physical presence of the participants to oral proceedings. This applies to parties as well as to members of the division. Hence, having regard to Article 10(2)(a) and Article 116 EPC, the President of the EPO allowed in Article 3(1) of his decision dated 10 November 2020 ([OJ EPO 2020, A121](#)) that the members of the opposition division may connect to the videoconference remotely from different locations.

3. Is Article 10(2)(a) EPC a sufficient legal basis for the President to allow oral proceedings by VICO considering that Article 10(2)(b) EPC restricts the President's power to the locations of the EPO in Munich and The Hague?

Article 10(2)(b) EPC does not limit the President's organisational powers, it directs him for dividing the tasks of the EPO between the sites of the Office. Article 3(3) of the decision of the President of the EPO dated 10 November 2020 ([OJ EPO 2020, A121](#)) provides that the venue of oral proceedings by videoconference is deemed to be the location where the opposition division is set up. Hence, the President made use of his organisational powers under Article 10(2)(a) EPC in the context of Article 10(2)(b) EPC.

This is the transcript of the questions received during the live session and the corresponding answers provided by the speakers.

4. What are the main reasons for holding oral proceedings by VICO without the parties' consent?

Access to justice is independent from and as a legal principle is seen to prevail the parties' individual consent to the form of oral proceedings. Likewise, the functioning of the office and the operation of the proceedings conducted before the EPO are independent from an individual party's consent.

5. Please give some examples of "serious reasons" that justify oral proceedings to be held on the premises of the EPO.

Serious reasons for holding oral proceedings on the premises of the EPO instead of by VICO include reasons relating to a participant as an individual (e.g. a proven visual impairment that would prevent a representative from following the oral proceedings on screen) and reasons relating to the nature and subject-matter of the proceedings (e.g. where they involve the demonstration or inspection of an object where the haptic features are essential, to the extent that this is possible in accordance with the applicable provisions).

6. Does demonstrable complexity of the case (complex for understanding the invention, e.g. demonstrated by multiple official communications and more than one summons earlier in the same case) qualify as "serious reason" for postponement of the oral proceedings by VICO until oral proceedings can be held on the premises of the EPO?

Complexity in understanding the invention does not, in itself, justify postponement of oral proceedings or holding oral proceedings on the premises of the EPO. Neither of the two options reduces the complexity of understanding the invention.

7. Would it amount to a "serious reason" justifying a request for postponement of oral proceedings by VICO if a representative had COVID?

The provisions of the Guidelines, [Part E-III, 7.1.1](#) apply regardless of the type of serious illness. If a new summons for oral proceedings is issued it will be by VICO if scheduled to take place during the pilot (until 15 September 2021).

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8. In the present pandemic situation, would quarantine be a “serious reason” for postponement of the oral proceedings by VICO where a reliable internet connection is missing to participate in oral proceedings by VICO from home?

Generally, parties are expected to arrange for the availability of commonly used equipment that allows participation in oral proceedings by videoconference. This includes availability of a reliable internet connection. However, should there be a proven non-availability of e.g. a stable videoconference connection at the place of the confinement of a person whose presence at the oral proceedings is essential and that non-availability cannot be overcome with reasonable investment by the time the oral proceedings are scheduled, serious reasons for postponement of the oral proceedings by VICO are given. In such case, that party would have to provide evidence for the alleged non-availability. This could, for instance, be the case if all reasonable effort and due care has been made to meet the technical requirements and a test call has demonstrated that a suitably reliable connection cannot be established. If a new summons for oral proceedings is issued it will be by VICO if scheduled to take place until 15 September 2021.

9. Is Zoom the only application that can be used for oral proceedings in opposition? What if an applicant’s/representative’s company policy does not allow to use Zoom for cyber security reasons?

By default, Zoom is used for all oral proceedings by VICO in opposition. Participation in oral proceedings by VICO before the EPO requires standard office equipment. Parties are therefore expected to arrange for the availability of such commonly used equipment including, if internal circumstances so require, a stand-alone terminal, disconnected from other IT infrastructure.

In this context, please also be referred to the technical and cyber security advice which is part of the [FAQ for oral proceedings held by VICO](#).

10. Oral proceedings by VICO before examining divisions are held using Skype for Business. I have read that Skype for Business will be discontinued by the program developer. Will Skype for Business then be replaced by Zoom for oral proceedings before examining divisions?

For the time being, Skype for Business is used for oral proceedings in examination and Zoom is used for all oral proceedings in opposition. The EPO will communicate timely any foreseen changes.

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11. Are the technical requirements for participating in oral proceedings with interpretation different from oral proceedings without interpretation?

Please note that the interpreting feature is currently not supported on the Zoom web client. It is therefore recommended to either use the desktop client installation on Windows/Mac OS or the Zoom mobile app for iOS or Android.

In addition, where interpretation is provided in oral proceedings by VICO it is of utmost importance that everyone who participates is equipped with their own high-quality audio device, namely a USB headset with integrated microphone or a USB microphone (clip-on or stand-alone) with echo-cancelling function. It is also important that every speaker has their own camera or a room camera is available that zooms in to the speaker to help the interpreter see their facial expressions.

12. Is the internal camera of the computer or notebook not sufficient for participation in the oral proceedings via VICO?

We recommend that you use a good-quality webcam (HD 720p or above), preferably a PTZ (Pan-Tilt-Zoom) model. Please note that most built-in webcams do not deliver the required quality and flexibility. Please also use a high-quality audio device, namely a USB headset with integrated microphones or a USB microphone (clip-on or stand-alone) with echo-cancelling function in order to ensure a very high audio quality especially for interpretation. For more detail, please see the [technical guidelines for oral proceedings held as videoconference at the EPO](#).

13. Does the EPO provide for break-out rooms for the parties to facilitate communication between those who connect from different locations?

If individuals belonging to a party decide to connect from different locations, they should agree beforehand on means for confidential discussions.

At present, the Zoom host (the chair) has access to any virtual deliberation rooms. Therefore, the EPO will not set up any virtual deliberation rooms for the parties. If necessary, the parties should organise their own parallel VICO. The EPO will inform users should this situation change.

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14. May an accompanying person who will not speak be present in the room with the representative, or do accompanying persons need a separate connection to the oral proceedings?

We recommend that everyone who follows the oral proceedings connects from their own device with their own headset and camera in order to ensure good audio quality, regardless of whether they take an active role in the proceedings or not.

15. In oral proceedings held on the premises of the EPO a whiteboard/flip chart is available for drawing/writing to illustrate arguments. Can a participant use a similar function in Zoom or must illustrations be submitted by email?

The whiteboard functionality in Zoom is disabled and cannot be used. For security reasons, screen sharing is not active by default in Zoom. It can, however, be activated by the chair at the request of a party and subject to the agreement of the division. Information illustrating a party's arguments may also be presented on paper via the camera. Any items displayed in this way will not be considered to constitute a submitted document.

Before the presentation of any information, the division might ask the respective party to submit the information by email so that it can be included in the minutes and/or distributed to the other parties.

16. Is there something like a "code of conduct" for participants of oral proceedings by VICO?

Oral proceedings by VICO are conducted in essentially the same way as oral proceedings on the premises of the EPO. As in oral proceedings where the participants are physically present, it is the responsibility of the chair to ensure the proper conduct of the proceedings.

For participation of the public the conditions for remote attendance of oral proceedings by videoconference (Section B. of the [information about access to oral proceedings by VICO before opposition divisions](#)) provide further guidance. The [FAQ for oral proceedings held by VICO](#) contain further useful information, e.g. that microphones of all participants other than the chair should normally be muted in order to avoid background noise. The parties should switch on their microphones when they are given the floor by the chair. Delays in activation of the microphones should be taken into account.

It is also understood that professional representatives adhere to the epi's code of conduct ([OJ EPO 2020, Supplementary publication 1, 129-134](#)).

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17. Can multiple members of the public watch proceedings from the same device in the same room?

If several persons intend to participate from a VICO room or classroom this should be indicated when requesting access to the oral proceedings as well as the names of all participants.

18. If I attend oral proceedings by VICO as a member of the public, why can the chair ask me to open my camera? Can the parties ask for the identity of the persons participating as public?

Public attendance of oral proceedings by VICO is as anonymous as attendance of oral proceedings on the premises of the EPO. The chair can ask the members of the public to switch on their cameras to allow the videoconference participants to ascertain their identity just as if they were taking part in person on the premises of the EPO. The same can happen during the oral proceedings in case some disturbances are noticed. Members of the public do not have to provide further information.

19. The identification of parties and patent attorneys who do not have their EPO ID card/badge ready requires the use of the ID check room. This is very cumbersome. Are you looking into enabling new types of identification procedures?

If you do not dispose of an EPO badge and you would like to avoid to use the ID check room, you may also submit a copy of your identification document via the EPO Online Filing options no later than two days prior to the oral proceedings. For the different means of electronic filing see <https://www.epo.org/applying/online-services/online-filing.html>.

20. Can we follow oral proceedings by VICO in two languages at the same time, as is the case when the proceedings are held on the premises of the EPO?

You can either follow the original audio or one of the translations. By default, when you listen to an audio channel providing translation, the original audio will be audible with 20% of its volume. You can turn the original volume off completely. However, this can be disadvantageous in situations where the original speaker changes the language, e.g. when quoting from a document and the translation stops. In this case you may probably miss hearing the quote, even though it is easy to switch from one channel to the other/to the original.

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21. Can the participants to oral proceedings by VICO arrange the volume of the original audio relative to the translation?

No. When listening to an audio channel that provides translation, it is not possible to turn the original audio further up than 20% or lower it without turning it off completely.

22. In the past it was not allowed to file an authorisation during oral proceedings by VICO by email. How come it is now allowed to submit an authorisation as pdf by email?

With entry into force on 14 May 2020 of the decision of the President concerning the filing of documents during telephone consultations and during interviews and oral proceedings held by videoconference ([OJ EPO 2020, A71](#)) all subsequently filed documents, including authorisations (signed by the authorising party), must be filed by email.

23. Are electronic signatures allowed when documents are submitted during oral proceedings or is a handwritten signature necessary?

When submitting documents during oral proceedings that necessitate a signature on behalf of the party making the submission, you can either sign and date the relevant pages by hand, scan them and send them as pdf document by email, or you can sign and date the relevant pages by facsimile signature (facsimile reproduction of your signature) and send them as pdf document. You may also send the relevant pages as pdf document by email and sign the email. The signature may take the form of a string of characters or a facsimile signature. A string of characters must clearly indicate your name and position.

Please also be referred to the decision of the President of the European Patent Office dated 13 May 2020 concerning the filing of documents during telephone consultations and during interviews and oral proceedings held by videoconference ([OJ EPO 2020, A71](#)).

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24. Is it possible to submit handwritten amendments?

The Guidelines for Examination, Part E-III 8.7.3 apply for oral proceedings by VICO. The proprietor can submit amended patent documents with handwritten amendments. These documents must be filed as attachments in PDF format and must comply with the WIPO Standard for Filing and Processing in Electronic Form (Annex F).

In case the interlocutory decision of the opposition division is based on documents which do not comply with Rule 49(8), i.e. which contain handwritten amendments, the opposition division will invite the proprietor in the communication under Rule 82(2) to file a formally compliant version of the amended text. The invitation will specify the formally deficient amended paragraphs and/or claims for which replacement paragraphs and/or claims need to be filed.

Rather than submitting hand-written amendments (which necessitate scanning) you may submit typed amendments using the text available from the European publication server as explained in this tutorial: <https://e-courses.epo.org/mod/page/view.php?id=5220>.

25. Are there means to check whether a witness is not linked as public to the OP by ViCo?

Witnesses are instructed not to follow the proceedings until they are called upon in order to retain the evidentiary value of their testimony. Should there be viable reason to believe that a witness misunderstood or ignored these instructions, the chair may ask the public to open their cameras to allow the videoconference participants to ascertain their identity just as if they were taking part in person on the premises of the EPO.

26. How do you ensure that a witness is not influenced by others during their testimony?

That a witness' statements are not influenced by a (third) party's interests needs to be ensured as far as possible regardless of the form of the oral proceedings. Witnesses are therefore instructed to testify truthfully before they give testimony. Should there be viable reason to believe that a witness' statements are (being) influenced, this will be made the subject of the witness' examination. If the respective questions are not answered to the division's satisfaction and doubts remain as to the truthfulness of the witness' statements, the EPO may request the competent court in the country of residence of the person concerned to re-examine the testimony under oath or in an equally binding form under Rule 119(2) EPC as is the case in oral proceedings conducted on the premises of the EPO.

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27. Given that we can now hear witnesses via VICO, is there a consideration to hear the witness prior to the oral proceedings? With the current practice, a lot of new evidence/information is presented at a very late time in the procedure. This was understandable for practical reasons of the witness hearing, but now that does not seem necessary anymore.

For practical reasons witnesses will, as a rule, still be heard in the course of oral proceedings. Sometimes it does not transpire until the evaluation of a witness' statements that further questions need to be answered and the testimony needs to be amended. This is only possible when witnesses are heard during oral proceedings.

28. Is witness hearings in view of public prior use not a good example for having mandatory in-person proceedings, particularly as it is important to recognize what the witness is not saying and how the witness is doing the statement?

Physical presence *per se* does not impact on the evaluation of evidence. Should, in the course of the evaluation of a witness' statements, doubts arise as to the truthfulness of the witness' testimony, the EPO may request the competent court in the country of residence of the person concerned to re-examine the testimony under oath or in an equally binding form under Rule 119(2) EPC as is the case in oral proceedings conducted on the premises of the EPO.

29. What happens when a request for inspection has been submitted by the opponent? How is this examined by the opposition division and also by the patentee if the Oral Proceedings and the taking of evidence are held by VICO?

If the opposition division is of the preliminary opinion that the inspection of the object is relevant for the decision of the case, it will issue a respective order to take evidence and invite the opponent to send the object to the EPO in due time before the oral proceedings. Where the object cannot be sent to the EPO (e.g. a production line) the division may set a separate date for the inspection at the place where the object is located (Rule 117 EPC) and may commission one of its members to examine the evidence adduced (Rule 119(1) EPC).

At the day of the oral proceedings, one of the members of the opposition division will inspect the object and its technical details with a handheld camera. The parties may instruct that member of the opposition division to focus the camera on specific parts of the object or measure the object. A protocol of the inspection will be recorded/drawn up in the presence of the parties and the parties will be given the opportunity to evaluate the evidence. Should it become necessary to re-examine the object and to focus on further details, the respective protocol will also be amended.

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Should the haptic feel or the handling experience of an object be of the essence, the inspection of the object will have to be conducted in the presence of the parties on the premises of the EPO in order for the parties' representatives to feel/touch the object.

30. How frequently are inspections of objects carried out?

The inspection of an object under Article 117(1)(f) EPC is carried out in approximately 10 oral proceedings per year.

31. Is the EPO thinking about the use of real time transcription software. This could help to follow the spoken word even in your own language?

Automatic transcription is currently not considered. Rule 124(1) EPC requires minutes of oral proceedings to contain the essentials of the oral proceedings, not every spoken word.

32. How will oral proceedings be conducted after 15 September 2021? Will they be held on the premises of the EPO or by VICO?

Oral proceedings by VICO before opposition divisions are still held in the framework of a pilot project. It will depend on the outcome of the evaluation of the pilot project how the EPO will proceed. In this context, the EPO is in close cooperation with user associations such as epi and Business Europe. If you would like to provide your feedback, please do so through these user associations including SACEPO.

33. Are there any specific differences for oral proceedings by VICO before the boards of appeal?

This online seminar only covers oral proceedings by VICO before opposition divisions. Oral proceedings before the boards of appeal are conducted under the sole responsibility of the boards which are independent from the EPO. For further information please consult the [information relating to oral proceedings before the boards of appeal](#).

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