Videoconferences at the EPO – the desired new normal?

Till Andlauer | Follow
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More than one year ago, on 02 April 2020, the EPO started to conduct oral proceedings in the form of videoconferences (ViCos) without consent of the parties, first in **examination**, later in **opposition** and at **appeal** stage. Since then, the topic has become subject of a heated controversy in the European IP community. The debate is not about the emergency use during the pandemic, which is well understood. It is about a felt misuse of the situation for an installation with permanent character as part of a "new normal".

From the promoters of Vicos, one can sometimes get the impression that the perspective looks like: "We are moving forward in a modern way and there are just some old-fashioned patent attorneys who are not able to adapt."

I might not be the classical sample for this category of patent attorney. Digitalization in this profession is also a process claim of my side project on **www.ipappify.de**. Still, I have doubts about the implementation, but try to provide constructive critics, actually hoping that things will get better.

A **public consultation** of the EPO inviting to submit views is running until 16 April 2021.

Technical aspects

ViCos were known before the pandemic as an efficient tool for informal discussions within a team and I think the last year convincingly demonstrated this to almost everyone who did not realize before.

They are currently used also in other situations as an emergency measure, but this does not render them actually made for discussions of important or complicated matter in a possibly unfriendly atmosphere. And they will never become "equivalent" to physical meetings. Already the mere fact

that either side can end the discussion at any time and is not physically "caught" in the same room makes a big difference. This, however, has always been an important part of the right to be heard before a court.
Of course, there are also advantages of using ViCos in oral proceedings such as reduction of travels for certain parties, more efficient use of breaks, and new ways of presenting a case, e.g. with a second screen useable as a teleprompter or the option to switch to screen presentation. But this does not apply for everyone and in every case, so it does not justify an enforcement without emergency situation. Or why should it not be at the parties' discretion to do on-premise hearings in Munich if all parties are from Munich?
The limitations to communication in videoconferences are well known. It is not only the reduced information bandwidth and smaller angle of view, but in particular the stability of connection. In an oral hearing, the parties deserve to focus on presenting their case without worrying whether the submitted messages actually arrive and without being interrupted. ViCos still start with everyone reconfirming from the others "do you hear me?". Technical issues may feel embarrassing and unintentionally lead to a negative bias against the person involved, which is definitely to be excluded in a formal hearing.

Probably, there is also room for improvement in the ViCo equipment of many representatives' offices, however, they were not the ones initiating the change. On the other hand, it is still possible to see members of EPO divisions joining oral proceedings with unfavorable video quality due to insufficient room light and having their faces partly cropped by a background filter which shall hide details of their home office. That is ok for an informal team meeting but hardly appropriate for oral proceedings, in particular not one year after enforcing them in examination proceedings without consent of the applicants. If this shall become the new normal, when does it stop looking like a quick emergency solution?
It is easy to reduce costs by reducing quality. But the goal of digitalization should be to add new advantages while retaining what was good before. And, the old normal was three-dimensional and had image and sound quality limited only by human senses.
For convincing users of an initially dissatisfactory product, serious and continuous efforts in improvement may be required. So far, official announcements seem mostly focusing on the increase of the number of hearings compared to basically stopped hearings. The only announced quality improvement I can recall was the **introduction of Zoom** last November. Yes, it was an improvement, but the replaced Skype was not really up-to-date already at the introduction six months before.
I think that users of the system may to some extent expect that the EPO invests more so that all proceedings are at least conducted using highly professional setup. And in absence of real innovations which would provide advantages in complex situations, the use of ViCos should be left at the parties' choice once on-premise hearings become possible for everyone again. Otherwise, the message could be unfavorably interpreted as: "Applicants, go with your important cases somewhere else. EPO proceedings are for straightforward ones only."
As long as the technical development basically remains at the present stage, it might further be considered to use videoconferences what they are actually ready for: informal constructive discussions. For example, it could be introduced as default before oral proceedings in examination to have a videoconference between the primary examiner and the representative where both try to resolve open issues, the outcome remaining subject to approval by the whole division and the applicant, respectively. Often, this might avoid the subsequent oral proceedings and thereby increase efficiency, while still respecting them as a fundamental right.

Legal aspects

In the last months, decisions justifying forced ViCos have been rushed through at an ambitious pace, finding their current climax in the pending referral to the Enlarged Board of Appeal (EBoA) in G 1/21. There are numerous reasons against EPC compliance of oral proceedings by ViCo without consent of the parties. A very elaborated collection can be found **here**. It does not look like a straightforward case if to be decided in the positive. However, the way this question was so far treated, namely as if a confirming outcome of the referral G 1/21 was already known, has probably never been seen by the European IP community before.

Just to recall some uncommon aspects of the case:

In December 2020, a **new Art. 15a** of the Rules of Procedure of the Boards of Appeal (RBoA) was introduced, which allowed oral proceedings before the BoA to be conducted by ViCo without consent of the parties. It was adopted with unlimited duration and independent from any emergency situation such as a pandemic, despite in advance **pledges of the epi** to the contrary, which reflect the majority of professional representatives as meanwhile publicly confirmed in a **user consultation**.

It was further **announced** that the new Article merely clarified an existing possibility and was therefore started to be practiced in January 2021, before its intended entry into force in April 2021 and without approval by the Administrative Council.

In February 2021, a BoA referred the question about its legality to the EBoA as they could not find a legal basis in the EPC (**T 1807/15**).

The EBoA opened the case as G 1/21 and immediately summoned to oral proceedings 2 months later (corresponding to the theoretical minimum, normal would be more than 1 year) together with a note that "a decision on the points of law could be promptly issued" if the parties would not envisage to attend the oral proceedings.

The oral proceedings about the legality of ViCos without consent of the parties were summoned by ViCo without explicit consent of the parties.

Plural impartiality objections were raised (e.g. **here**) against all members of the EBoA in its selected composition, in particular the chair for being the same person who had proposed said Art. 15a RBoA. These concerns addressed also the other members for being either involved in the new Article as well or for pre-empting the outcome of the decision via the summons by ViCo (as this might jeopardize a valid decision that they were illegal).

The Administrative Council decided to **approve Art. 15a RBoA** in March so as to enter into force one week later, while the referral about its legality was pending (full respect of an open decision might suggest to wait for it).

The President of the EPO decided that oral proceedings by ViCo without consent of the parties **will be continued** while there were only 2 months to wait for the EBoA's ruling whether decisions taken by forced ViCos would be legally valid at all (typically, affected proceedings are stayed if a referral is pending).

At the present stage, in particular the concerns about impartiality and the way of summoning to oral proceedings seem very serious. It is worrying how the role of the Enlarged Board of Appeal could be seen if these were not overcome.

And if the basic questions about legality of forced ViCos could somehow be resolved, still many questions would remain, e.g. how to ensure privacy rights with respect to taking and distributing screen records or security in home offices for non-public proceedings.

It would be possible to enforce ViCos clearly limited to the emergency situation of the pandemic. Then the users of the system who are allegedly just too reluctant to changes might see it without being negatively biased. Afterwards, a true public survey could be made whether it is accepted to stay or just not good enough. If at the same time serious attempts were made to provide a convincing quality, there would be a good chance for its continuous introduction in widely accepted way.
Unfortunately, this is not practiced and the longer the user community is getting provoked by attempts of misusing the pandemic to enforce ViCos as part of a **strategic plan** decided before without real adaptation, the more public trust in the whole system may be lost.
It would be highly welcome if this trend could be stopped. Now that oral proceedings by ViCo are generally continued until the decision of G 1/21 will be announced, the members of the board having worked at the elaboration of Art 15a RBoA could deport themselves and the oral proceedings of G 1/21 could be postponed until on-premise hearings become possible again, all without creating any additional backlog. Procedural acts of the EBoA deserve to be excised filled with respect from its role in the legal system.

Other uses of videoconferences in a new normal

The enforced ViCos in oral proceedings are only part of the ViCo contribution in the EPO's planned **new normal**. For example, currently practiced teleworking of EPO staff from home countries seems intended to become permanent without an emergency situation of a pandemic.
Teleworking is an important flexibility element of a modern working environment and the pandemic has successfully established its recognition in society. However, in case of the EPO, it should not go as far as to change the main working place to anywhere else. Otherwise, it would effectively limit the option to summon for on-premise hearings in absence of dates with all members of a division being at the location of the EPO. And, I think the original idea was to get a cultural variety of people from all over Europe united at the place of the EPO and not separated in various different countries, connected only via ViCos.
Permanent working from home countries would also raise new legal questions how this shall be in line with the EPO being in Munich / The Hague / Berlin according to the EPC and that users can "legitimately expect that the EPO's departments will not perform acts at whatever other place they choose" (**G 2/19**). The legally foreseen solution for changing this would appear to be a diplomatic conference revising the EPC.
As another aspect, according to said plans for a new normal, conferences at the EPO seem intended to be continuously held as virtual conferences by ViCo. Currently, those until December 2021 are all **announced** like that. Indeed, also online conferences may save a lot of organization efforts for the host and travel efforts for the participants. They could effectively reach more participants who are only interested in few presentations, which does not justify to come on-premise.
However, they apparently miss the important direct interaction between the participants and their feedback to the speakers. For example, is the purpose of the annual "Meeting between Tutors and EQE Committees" not to actually meet people? A counter-wave is predictable, where the quality providers will return to physical conferences and courses as soon as possible.
Learning from the lessons of the pandemic would require to actually reflect and reconsider decisions taken before on how the new normal shall look like. For EPO conferences, the future could lie in hybrid events, physical for those who like to meet and virtual for those who don't like to travel.

Published By

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The first year is already over. Time for a review ... #EPO #EPC #videoconferences #newnormal2021

9 comments

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Jevgenijs Fortuna 2mo ···
European Patent, Trademark & Design Attorney, Lawyer, Partner

"If this shall become the new normal, when does it stop looking like a quick emergency solution?" - this is very good point. Proceedings before the OD and the BAp should not look too informal.

Like Reply | 1 Like

John Gray 2mo ···
Chartered Patent Attorney, European Patent Attorney

Thanks Till for the thoughtful comments. You mentioned the non-ideal quality of home working equipment, lighting setup, connections etc.. I have also had OP where the person in technical difficulty was the Chair, not my party. The question then becomes, is it a reasonable requirement _in the "new normal"_ for representatives to ensure have a solid connection, better equipment, lighting etc...? I am interested in what people think about that, and to separate that question from the pandemic situation (which continues, evidently for now).

Like Reply | 1 Like 1 Reply

Till Andlauer 2mo ···
Partner, Patent Attorney at WESER & Kollegen | Co-founder of IP.appify, Author of EPC.App

Hi John, yes I also did experience the technical issues to be not on our side. At short notice, I think that clear rules for room lightning and neutral backgrounds might be useful requirements, in particular to be enforced for the EPO. Representatives should have enough own interests to select a reasonable setup and test it in advance. Stability is never totally safe as demonstrated by Ms. Merkel in the video.

Like Reply

Daniel X. Thomas 2mo ···
Former Director at European Patent Office

As far as the use of ViCos is concerned it is interesting to see what is procedurally envisaged at the UPC, should it ever become reality. In order to prepare oral hearings (=OP at the EPO) before the Court of first instance (Art 7 UPCA), there is an Interim Procedure ending with an Interim Conference in order to prepare the actual hearing, cf. R 104UPCA. As a rule, the interim conference will be held by telephone conference or by video conference, R 105(1) UPCA. The actual hearing will take place in presence of the panel and of the parties. As it does not yet exist, the UPC has not been confronted with a pandemic. Should necessity arises forcing to envisage holding oral hearings in form of ViCo, procedural rules valid before the CJEU will probably be adopted. In other words a ViCo could be useful in preparing oral proceedings, but not to hold the actual OP!

Like Reply 1 Reply

Till Andlauer 2mo ···
Partner, Patent Attorney at WESER & Kollegen | Co-founder of IP.appify, Author of EPC.App

Exactly my view! That is actually the most practical aspect I read from the UPCA for a long time 😉

Like Reply

Daniel X. Thomas 2mo ···
Former Director at European Patent Office

As the EBA has invited the public to send amicus curiae in G 1/21, the EPO has also invited the public to file comments about the „New Normal". See epo.org/about-us/office/new-normal.html Seeing the way matters progress at the level of the BA, the usefulness of amicus curiae brief can be considered marginal. I fear the same may apply to comments relating to the „New Normal". But it remains very important to express views about what is presently going at the EPO. The worse would be to remain silent, as this could be considered as tacit approval!

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Till Andlauer 2mo ···
Partner, Patent Attorney at WESER & Kollegen | Co-founder of IP.appify, Author of EPC.App

Daniel X. Thomas, yes public consultations are the right way and I make use of them as well.

Like Reply

Daniel X. Thomas 2mo ···
Former Director at European Patent Office

Till Andlauer I fully agree with you, and thank you for sharing your thoughts. I find it nevertheless important to invite the public to actually file comments in an official manner. Comments just published on a platform like LinkedIn can easily be ignored!

Like Reply