



## Conducting Oral Proceedings at the European Patent Office by Videoconference

The European Patent Office (EPO) uses oral proceedings as a means to bring pre-grant examination and post-grant opposition proceedings to a close. Oral proceedings are appointed when the EPO considers it expedient to discuss outstanding issues face to face and/or at the request of any party to the proceedings. Consequently, the majority of EPO oppositions conclude with oral proceedings. Oral proceedings are rarer during pre-grant examination, but are typically appointed when the EPO intends to refuse the application. The Boards of Appeal also hold oral proceedings during the appeal procedure.

The EPO's policy is to conduct all first-instance oral proceedings by videoconference by default. For appeal hearings, it is at the Board of Appeal's discretion whether to conduct the oral hearing by videoconference or in person.

From a legal standpoint, oral proceedings held by videoconference and those held in person are of equivalent status. As such, there is no legal reason to favour one format over the other. However, there are practical implications and considerations which may be of interest to and should be taken into account by users of the European patent system. This briefing seeks to explore some of those practical implications and considerations.

### Oral Proceedings Conducted by Videoconference

All first-instance (examining or opposition division) oral proceedings are held by videoconference unless there are serious reasons against doing so. The scope of the "serious reasons" that might necessitate an in person oral proceedings appears fairly limited. Examples of serious reasons include: reasons relating to a participant as an individual (e.g. a proven visual impairment that prevents a representative from following oral proceedings on screen), and reasons related 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). By contrast, a non-specific preference for oral proceedings in person or a lack of suitable equipment are not considered serious reasons.

If a party prefers examining or opposition division oral proceedings to be conducted in person, it is advisable to put a request on file early, together with "serious reasons".

### Attendance by the Parties and Their Representatives

An advantage of videoconferencing is that participants are not bound to any particular geographic location as long as there is a stable internet connection.

Consequently, the EPO envisages the members of an examining division, opposition division or Board of Appeal either connecting together from a videoconferencing studio within an office of the

EPO, or separately from home and/or different offices as required.

Similarly, on request, representatives for a given party are generally allowed to connect from different locations, provided that this does not have an impact on the stability of the videoconference connection. Likewise, any "accompanying persons", such as a client/expert/other legal adviser, may also connect from different locations on request. It is necessary to request permission from the EPO for participants to connect from different locations. Any such request should be made as early as possible, and ideally by the Rule 116 deadline for filing final written submissions where possible.

The EPO, especially for opposition hearings, may refuse the request if the number of additional participants would "impair the efficient conduct of the proceedings". Such a decision to refuse is not appealable.

### Attendance by the Public

Oral proceedings during pre-grant examination are not public. However, the EPC stipulates that oral proceedings before opposition divisions are public (unless the EPO decides otherwise). Likewise, oral proceedings before Boards of Appeal are also public. Consequently, the EPO has had to make provisions for such oral proceedings held by videoconference to be attended by the public.

In particular, members of the public are able to watch public oral proceedings held by videoconference by requesting remote access at least three working days prior to the date of the oral proceedings. The EPO then provides details for connecting to the videoconference.

To obtain the connection details, the member of public must provide information about themselves. During the oral proceedings, if requested by the chairperson, the member of public must temporarily switch on their camera to allow the participants to ascertain their identity just as if they were attending the oral proceedings in person on the premises of the EPO. Therefore, a "strawman" opponent attending the oral proceedings as a member of the public may run the risk of having their identity revealed, although disconnecting from the videoconference should always remain an option.

### Conduct of Oral Proceedings

The EPO aims for oral proceedings conducted by videoconference to mimic those conducted in person. Thus, the general structure of the oral proceedings is generally the same, irrespective of whether it is held in person or by videoconference. That is to say, at the start of the oral proceedings, the chair announces the

particulars of the patent or patent application under consideration, and identifies the parties present.

During this introductory section, the chair provides an email address to which electronic submissions should be sent during the oral proceedings. The chair also provide a telephone number to be called in case of technical difficulties arising, and asks the representative(s) to provide a telephone number that they can be reached on. During *inter partes* proceedings, each party is also asked to provide an email address to which the other parties can send electronic submissions.

The oral proceedings then typically proceed in sections focusing on one issue at a time (added subject matter, novelty, inventive step, sufficiency, etc.), generally with a decision announced at the end of each section. The parties' representatives are given an opportunity to present their cases on each issue in the usual way.

While presenting during in-person oral proceedings, it is common for the representative to receive input/instructions from a client/expert/other legal adviser who is also present at the oral proceedings. Likewise, if two or more representatives are acting for a particular party, those representatives may well need to consult each other during presentation of their case. Accordingly, to replicate such communications during videoconference oral proceedings, we typically set up a "back channel" (for example via an instant messaging service) allowing private communication in real time.

Another aspect to consider are the pauses for EPO deliberation that typically take place after the conclusion of each section. When the oral proceedings are held in person, this involves the parties' representatives leaving the room whilst the examiners discuss the case privately. When the oral proceedings are held by videoconference, the members of the tribunal "leave" the main

videoconference and deliberate in private, either in person (if they are all at the same location) or via a private videoconference connection if they are at different locations.

During the pause for deliberation, it is usual for the representative(s) to plan for the next section of the oral proceedings and discuss these matters with any clients/experts/other legal advisers present. The back channel discussed above could be used for such discussions, though in some cases it might be preferable to have a separate videoconference or telephone connection available.

Any submissions that are made during oral proceedings via videoconference, such as new claim requests or an amended description, need to be sent by email to the EPO at the address provided at the opening of the proceedings.

At the end of the oral proceedings, the chair announces a final decision in the usual way, following which the oral proceedings are closed and the videoconference connection terminated.

#### **Technical Considerations**

The EPO uses Zoom for all oral proceedings held by videoconference.

In case of technical problems preventing the oral proceedings by videoconference from being conducted properly on the day, a new summons will be issued. However, as with oral proceedings held in person, if a party fails to appear for other reasons, the oral proceedings may, and generally will, take place in the absence of that party.

Should you have any questions regarding oral proceedings by videoconference, please approach your usual contact who will be able to advise.

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