Case Number: R 0019/12

INTERLOCUTORY DECISION
by the Enlarged Board of Appeal
of 25 April 2014

Unofficial Translation
(provided by Wallinger, Ricker, Schlotter, Tostmann – Munich – Germany)

Petitioner:
(Patent Proprietor)

Representative: Wallinger, Michael
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Composition of the board:
Chairwoman: B. Günzel
Members: R. Menapace
A. Ritzka
Summary of Facts and Requests

I. With brief of 14 December 2012 the petitioner filed a petition for review of the decision T 2097/10 of the Technical Board of Appeal 3.2.04 of 12 July 2012, by means of which it overturned the opposition division's revocation of the patent and ordered the maintenance of the petitioner's patent according to auxiliary request 3 submitted in the oral proceedings before the Board of Appeal.

The petitioner based its petition for review on a fundamental violation of its right to be heard by the Technical Board of Appeal in the sense of Article 112a (2) d) EPC. The reasons therefor indicated by petitioner can be summarised as follows for the better understanding of the basis for the present decision:

The opposition division had already fundamentally violated the petitioner's right to be heard. In reply to a summons from the opposition division in which inventive activity had been affirmed, the opponent had both argued a new ground for opposition and submitted a large number of newly cited documents one month prior to the oral proceedings. The opposition division had rejected the applicant's request for postponement while still admitting to the proceedings during the oral proceedings both the new ground for opposition and also the documents newly filed. Moreover, at the conclusion of the oral proceedings it had assumed the closest prior art to be a document which had thus far never been discussed in the proceedings in this context. In the oral proceedings the Chairman then, by abruptly interrupting the petitioner's representative and immediately closing the proceedings, had disentitled the petitioner of the chance to overcome these new objections by abandoning the claims concerned, obviously desiring to terminate the opposition proceedings without further delay. The independent claim which the Board of Appeal acknowledged as patentable in the subsequent appeal proceedings had already been included in the auxiliary request examined by the opposition division.
In the oral proceedings also the Board of Appeal had expressed that the Boards had to aim their case law at limiting the number of appeals. The Board of Appeal had then neglected to take notice and account of both written and oral statements of substantial facts regarding the fundamental procedural errors in the proceedings before the opposition division in respect of which the petitioner had raised objections. Only in this way could it have arrived at its opinion that the proceedings before the opposition division were not based on a substantial procedural defect. As the decision showed, the Board of Appeal, instead of reviewing the procedural conduct of the opposition division under Article 113 EPC, considered it its responsibility to justify the conduct of the opposition division towards the petitioner, although in its decision this conduct was called unfortunate.

As it followed from national constitutions and international conventions, e.g. the German Constitution and the corresponding case law of the Federal Constitutional Court, but also from Article 6 (1) of the European Convention on Human Rights, and from Article 47 (2) of the European Charter of Fundamental Rights, the imperative of granting the right to be heard was a constitutional right that was per se constitutive in democratic proceedings. The Enlarged Board of Appeal had also acknowledged this in its decision R 8/11, just like the fact that Article 113 EPC grants the parties the right that the respective panel takes notice of pertinent argument, takes it into account and discusses it in a written decision (R 17/11 of 19 March 2012, R 8/11 of 29 November 2011).

II. Moreover, in its brief of 14 December 2012, the petitioner objected to the Chairman of the Enlarged Board of Appeal on grounds of suspected partiality under Article 24 (3) EPC.

The petitioner substantiated this objection in the petition for review and in further briefs of 22 July 2013, 7 November 2013, and 26 February 2014 as follows:

The petitioner had not the slightest doubts about the Chairman’s excellent legal qualification and personal integrity. Also, he had not been involved
neither in the appealed decision of the Board of Appeal nor in the preceding
decision by the opposition division.

The petitioner further followed the opinion of the Enlarged Board of Appeal in
the decision R 12/09 insofar as the composition of the Enlarged Board of
Appeal in conformity with the EPC could not per se establish a ground of
suspected partiality of its members, even though it doubted that the EPC
provisions regulating the composition of the Enlarged Board of Appeal were in
conformity with fundamental constitutional principles. It referred to the article
of Zuck in GRUR Int. 2011, 301.

Also the consent of the Enlarged Board of Appeal to a restrictive application of
Article 12 (4) RPBA by the Boards of Appeal, which rejected even minor
amendments in the requests even if this was already done with the
submission of the grounds of appeal, gave rise to suspicion of partiality. In
view of the cited decision R 12/09 of the Enlarged Board of Appeal, however,
a request supported thereon would presumably offer no prospect of success.

The present case was concerned with adjudging a decision of a Board of
Appeal involving a procedural error. The origin of this decision, however, lay in
opposition proceedings involving procedural errors, which was an
administrative action. In this case the decision of the Enlarged Board of
Appeal, when reviewing the relevance of the procedural errors of the Board of
Appeal, necessarily had to explore the opposition division's procedural errors.
The Chairman of the Enlarged Board of Appeal thus had to adjudge
administrative actions for which he had had joint responsibility in his previous
function. Prior to changing to the top of the Enlarged Board of Appeal he had
been in a leading position at the EPO and in this capacity had shared
responsibility for organising the proceedings and thus also the opposition
proceedings on which the present proceedings were based. Due to his
previous and present integration in the organisation of the EPO, responsibility
for the present proceedings brought him into a conflicting situation of deciding
in a matter in which the EPO organisation had quite obviously failed.
Being the now Vice-President of the Directorate General 3 (Appeal) - "GD3" -, the replaced Chairman of the Enlarged Board of Appeal continued to be involved in the administration of the European Patent Office. Thus he was also a member of the Management Committee of the President (MAC). The responsibility for the administrative actions of the Office was also his, by way of presiding in the General Advisory Committee of the Office (GAC), which at any rate he had done in 2012. It followed from the principle of the separation of powers, which was also binding to the EPO (G 3/08 of 12 May 2010, No. 7.2.1), that the administration could not legally supervise its own work.

III. With the order of 3 May 2013 the Chairman of the Enlarged Board of Appeal was replaced by his alternate as the Chairwoman for the decision on the objection for suspected partiality under Article 24 (4), second sentence EPC.

IV. According to Article 4 (2) of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA) the replaced Chairman was invited with letter of 22 May 2013 to comment on the ground of exclusion. In another letter of 16 November 2013 any comments on the supplementary statements of the petitioner of 7 November 2013 were left to his discretion.

V. The replaced Chairman stated as follows:

His alleged joint responsibility for all the proceedings at the EPO was irrelevant since the subject matter of the review was not the opposition division's decision, but the procedural aspects in handling the appeal to this decision by a Board of Appeal, and the legal practice thereof had to be reviewed. The petitioner did not explain how his former function should have resulted in joint responsibility for all the proceedings of the EPO, in particular of the Boards of Appeal, which were independent and not bound by instructions, nor how his alleged joint responsibility should have resulted in participation in all of these proceedings. At no time had he been a member of an examination or opposition division, and he had not had any influence on the ways and means how the divisions in particular had adjudged their cases. He was not aware either of any other reason why he should not be involved in this specific case.
In view of the opinion of the petitioner of 7 November 2013, in which among other things the petitioner had pointed out the participation of the replaced Chairman in the MAC and GAC panels at the Office, the replaced Chairman questioned the admissibility of these entirely new arguments almost eleven months after the original petition. The argued grounds were also beside the point, because, as he had already set forth in his first opinion, the review proceedings dealt with the Board of Appeal decision and not with administrative actions, namely the first instance decision.

Reasons for the decision

Petitioner's reasons for suspecting partiality

1. Summarizing, the Enlarged Board of Appeal understands the petitioner's statements to mean that the replaced Chairman might get into situations of conflict due to his previous activities as the principal director and, temporarily, the officiating Vice-President of the Directorate General 5 (Legal) - "VP5" - and now as the Vice-President of GD3 - "VP3" - due to his continuing membership at the Directorate level of the Office in his judicial function as the Chairman in review proceedings under Article 112a EPC. He might be prejudiced to indirectly - sanction administrative actions, such as restrictive procedural practices, for which he had shared responsibility and which includes the prompting decision of the opposition division. He might seek to work towards the Enlarged Board of Appeal approving a, in the petitioner's perception, restrictive review of first instance (discretionary) decisions by the Boards of Appeal.

2. The petitioner believes this suspicion strengthened by the fact that the replaced Chairman must continue to support the President in his present function as VP3 under Article 10 (3), first sentence EPC. To the petitioner, the fact that the replaced Chairman, being Vice-President of GD3, continues to actively perform the duties associated with his being integrated in the structure of the administrative instance, also follows from his participating in the
Management Committee of the President (MAC) and the General Advisory Committee of the Office (GAC).

Objection in due time

3. According to Article 24 (3), first sentence EPC, the members of the Enlarged Board of Appeal may be objected to by any party for suspicion of partiality. The objection shall not be admissible if the party has taken procedural steps while already being aware of the reason for objection, Article 24 (3), second sentence EPC. The latter does not apply in this case. The petitioner declared the objection with filing and substantiating the petition for review and thus in due time.

Circumstances to be taken into account

4. The question whether there is suspicion of partiality in general primarily depends on the reasons which the party claimed, because its very first decision must be whether the given circumstances justify a suspicion of partiality on the part of the judge who is believed to possibly decide its case with prejudice. However, this only holds conditionally in proceedings before the Enlarged Board of Appeal and the Boards of Appeal.

5. According to Article 4 (1) RPEBA (likewise Article 3 (1) RPBA), proceedings under Article 24 (4) EPC shall also be applicable if the Enlarged Board of Appeal obtains information about a possible ground of exclusion in a way other than from the member (concerned) or any of the parties. In such a case the Enlarged Board is thus obliged to act ex officio. The meaning of the term "ground of exclusion" in Article 4 (1) RPEBA is not limited to the cases of Article 24 (1) EPC where a member of the Board is by law excluded from participating. This is because paragraph 4 of Article 24 EPC refers back to paragraphs 2 (self-objection) and 3 (objection by a party, among other things for suspected partiality), and only in this context does it also refer to the grounds of exclusion according to paragraph 1. The formulation in Article 4 (1) RPEBA "has knowledge (...) which does not originate from (...)" is entirely open and covers the case that the Board itself possesses information about
circumstances which may substantiate a suspicion of partiality. It follows that for a decision on a petition regarding partiality, the Enlarged Board must take into account any and all significant circumstances it is aware of at the time of the decision.

6. It is therefore irrelevant in what stage of the partiality proceedings the petitioner gave an indication of the continuing integration of the VP3 in the Office administration by way of his participating in MAC and GAC which was in contradiction to the principle of the separation of powers. It is solely decisive whether these are circumstances which may be of consequence to the asserted suspicion of partiality. Moreover it is generally known in the Office that the replaced Chairman participates in the panels indicated in his function as VP3.

Definition of the term suspicion of partiality

7. As the wording of the provision already indicates, an objection under Article 24 (3), first sentence, EPC is not only justified if there is an actual partiality of the Board member concerned. It suffices that there is a suspicion i.e. an appearance of partiality. Courts will have to ensure under the exclusion of any risk that not only justice is done, but that this is also perceived by the public. What is at stake is the confidence that the Boards of Appeal enjoy in the public (G 1/05, OJ EPO 2007, 362, No. 19 at Reasons, with citations from international and national case law and from the case law of the Boards of Appeal on suspicion of partiality).

8. The interpretation of the provisions concerning objections for suspected partiality lies in the area of conflict that, on the one hand, nobody may be deprived of his or her lawful judge and, on the other hand, everybody has the fundamental right to a fair trial before an independent and impartial court (Art. 6 (1) ECHR, Art. 47 (2) of the Charter of Fundamental Rights of the European Union (Fundamental Rights Charter), see also G 1/05, Nos. 8 and 9, 19 sqq. at Reasons, G 2/08 of 15 June 2009, No. 3.3 at Reasons). Therefore the Enlarged Board of Appeal on the other hand also acknowledged that the "suspicion" of the party must be justified when considered on an objective
basis. Purely subjective impressions or general suspicions are not sufficient. Although the point of view of the party concerned is significant, it is not decisive. The question is whether in view of the actual facts a reasonable, objective, informed person would have valid grounds for fearing that the judge did not, or will not, hear the case impartially. Taking into account the circumstances of the case, a reasonable observer would have to arrive at the conclusion that the party might well be justified in doubting the impartiality of the member objected to (G 1/05, No. 20 at Reasons, with citations).

9. The EPC provisions on exclusion of and objection to members of the Boards of Appeal reproduce national rules of procedure. In a number of states these regulations are based on their constitutions, which define the right to legal protection by the lawful judge, by an independent and impartial court of law as a fundamental right of an individual (e.g. Art. 30 (1) of the Federal Constitution of the Swiss Confederation (CH), Art. 87 (1) Federal Constitutional Law (AT), Art. 19 (4), 97, 101 (1), second sentence, 103 (1) Constitution (DE)). In other states, e.g. in the United Kingdom, Article 6 ECHR forms the guiding principles. The Enlarged Board of Appeal has acknowledged that the standard of Article 6 ECHR is binding in proceedings before the Boards of Appeal (G 1/05, No. 22 at Reasons, G 2/08, No. 3.3 at Reasons), because it is founded on legal principles common to all the Member States of the European Patent Organisation and applicable to all its bodies (G 2/08 loc.cit.). It is therefore justified to refer to both national case law and that of the European Court of Human Rights - "ECtHR" - for supplementing the interpretation of the EPC.

Burden of proof

10. According to the decision G 2/08 (No. 1.2 at Reasons) the burden of proof for the presence of a suspicion of partiality lies with the party who raises the objection, since members of the Enlarged Board of Appeal are a priori presumed to be impartial. The validity of this assumption is acknowledged in the established ECtHR case law as far as the personal impartiality of the judge is concerned (so-called subjective test in ECtHR case law, see e.g. Micallef v. Malta, judgment of 15 October 2009, application no. 17056/06, No. 94 at Reasons). The petitioner emphasized that it had no doubts about the personal
integrity of the replaced Chairman. The facts to be considered are also undisputed. Therefore there is no question of the burden of proof in the present case. The question is rather the assessment of these facts alone in view of the asserted suspicion of partiality.

Criteria of partiality

11. Suspicion of partiality cannot only arise out of the person of the judge objected to or out of his personal relationships to any party, but may also arise from exercising functions which may cause a conflict of interests for the judge between such functions and the duties arising from his judicial office. The incompatible nature of functions performed in parallel may likewise justify a suspicion of partiality. In the case law of the contracting states this is acknowledged, as is the necessity of examining in an individual case whether the circumstances are such that from the viewpoint of a neutral observer they give rise to suspect the judge of being in a conflict of interests so that he might possibly not make an impartial decision in that case.

According to national case law, suspicion of partiality may or may not be justified for example due to membership in associations or lobbies of an economic or political nature, depending on the circumstances in the individual case (see e.g. House of Lords, In re Pinochet [2000] 1 A. C. 119, and the examples in Baumbach/Lauterbach, Annotated Code of Civil Procedure ["Kommentar zur Zivilprozessordnung"], 72nd edition, Munich 2014, margin Nos. 14 sqq., quoted with respect to Section 42, regarding the keywords: "Arbeitgebervereinigung (employers association)", "Parteizugehörigkeit (party affiliation)", "Politisiche Äußerung oder Betätigung (political statements or activities)", "Religion", "Verein (association)"); see also Fasching/Konecny, Annotated Civil Action Laws ("Kommentar zu den Zivilprozessgesetzen"), 3rd edition Vienna 2013, margin No. 9 on Section 19, hier: Beteiligung an Gesellschaft oder Verein, Mitgliedschaft im Gemeinderat der klagenden oder beklagten Gemeinde (specifically: participation in a company or association, membership in the local council of the complainant or defendant municipality).
12. Institutional interdependences can likewise justify a suspicion of partiality of the judge. This is the so-called objective test in ECtHR case law. This test is about determining whether the Board itself, including its composition, offers sufficient guarantee for excluding any and all legitimate doubts about its impartiality. Most of the cases heard by the ECtHR were about this objective test. The ECtHR stated that while in some cases it was difficult to produce evidence refuting the assumption of a subjective impartiality, the requirement of an objective impartiality provides another, significant guarantee. The objective test mostly related to hierarchical or other relationships between the judge and other participants in the proceedings. The outward appearance could also be significant in this context. It was about the inalienable trust which the public in a democratic society had to be able to place in the courts of law. Therefore, questions of the internal court organisation also had to be taken into account (Micallef, see above No. 10, Nos. 93-99 at Reasons).

12.1 Even in view of a previous involvement of the judge in a matter which had not consisted in participating in the contested decision itself, so that the judge had not already been excluded from participating by act of law, a suspicion of partiality has been affirmed in specific circumstances (see Baumbach/Lauterbach, end of margin No. 24 on Section 42 (Justizverwaltung (administration of justice)) and the examples indicated there).

12.2 Where institutional connections between administrative functions and judicial functions are concerned, the (German) Federal Constitutional Court (BVerfG NJW 1956, 137, II.2.c)) emphasized the significance which in this context is associated with the principle of the separation of powers, according to which jurisdiction must be made by "special" state bodies different from the bodies of legislative and executive power.

The Federal Constitutional Court literally sets forth:

"However, the GG [German Constitution] does not require complete separation of administration and jurisdiction, but it allows certain overlapping. Thus there are no reservations about entrusting a judge with secondary functions in the administration of justice, as it is established in ordinary
jurisdiction, even under the rules of the GG [German Constitution] ... However, given that the composition of a "court" with personally dependent officers is basically provided for by the law, these officers, who are bound by instructions, additionally handle the same matter on which they are to decide as independent judges, then this panel is not any more the "specific" body of the state authority. The nature of the matter makes the officer of the administration involved, who is bound by instructions, appear as a party. He cannot be transformed from being a representative of executive power to a representative of jurisdiction in specific cases by the statement that when being a judge he is not bound by instructions. Given this extent of intermingling of administration and jurisdiction, the principle of the separation of powers in the sense of Art. 20 (2) GG [German Constitution] is violated to the core.

12.3 Rule 28 (2) c) of the Rules of Procedure of the ECtHR in the version of January 1, 2014 specifies in more detail and quite generally that a judge cannot take part in the consideration of any case if he or she, being an ad hoc judge or a former elected judge continuing to sit according to Article 26 (3), takes up "any political or administrative activity" (binding English version) or any activity which is incompatible with his or her independence or impartiality. This excludes all the more an administrative function (outside the court administration itself) while acting at the ECtHR as an elected judge.

13. The principles described above regarding exclusion and objection deal with a plurality of different facts which can hardly be directly compared with one another nor with the case subjected to the present decision. A common approach can still be recognized:

13.1 The provisions on exclusion and objection serve to maintain the necessary distance of the judge – who is not a party and is thus a "third party" disinterested in the outcome of the proceedings – from the facts to be discussed and from the parties (Baumbach/Lauterbach, loc.cit. overview Section 41, margin No. 2; BGH, NJW 2001, 1502, No. 3) and – as the case may be – also from the instance whose decision is under review. Such distance is an expression of the principle of granting legal protection by way of
jurisdiction independent of, and not intermingled with, the preceding (administrative) instance.

13.2 An imperative of keeping distance is accordingly all the more applicable, if the distance of the court and its judges from the administrative instance is concerned whose decisions the court must review. This imperative of distance extends far beyond excluding the judge from participating in cases in the decisions of which in the previous instance he was involved.

13.3 This approach is the basis of the decision R 12/09 of December 3, 2009. In this decision the Enlarged Board of Appeal did not acknowledge the fact that the members of the Enlarged Board of Appeal are in charge of review proceedings while concurrently acting in a Technical or the Legal Board of Appeal as a possible ground of exclusion and objection (under Article 24 EPC) in review proceedings for the sole reason that the legislator had intentionally provided such structure. The Enlarged Board pointed out in No. 4 at Reasons that otherwise it would have had to acknowledge this fact as a ground of exclusion or objection.

13.4 Successive rotation between different professional occupations is often quite common internationally and nationally in the field of application of the law. Legal systems in this field differ greatly in detail. However, they all share the fact that rotation e.g. from a lawyer's practice or an administrative position to a judicial position is considered admissible and is practised. This is in accordance with national legal traditions and basically also applies to judicial positions which are no starting positions but situated at the top of a judicial career. Judges are expected to free themselves from their former role and to perform their new duties according to the judicial concept of duties and code of ethics. In the opinion of the Enlarged Board of Appeal, the fact that a high-ranking judge – such as the Chairman of the Enlarged Board of Appeal – had previously held a high position in an administrative hierarchy thus does not constitute sufficient grounds which on its own would justify a suspicion of partiality.
Persisting integration of the VP3 in the administration of the Office

14. However, the present case differs somewhat from the cases known from national and international institutions.

14.1 The GD3 and thus also the Enlarged Board of Appeal are parts of the organisation of the Office (see below). When the former principal director or, temporarily, acting VP5 rotates to VP3 and concurrently to the post of Chairman of the Enlarged Board of Appeal, this is not a rotation of a high administrative officer to a court of law separated from the previous administration, where the person appointed had entirely detached from his previous integration in the administration. Rather, in his function as a Vice-President, the person nominated to be Chairman of the Enlarged Board of Appeal and concurrently VP3 remains to be part of the administrative office hierarchy. Under Article 10 (2) f) EPC he remains subjected to the instructions of the Office President who is his immediate superior. Under Article 10 (3) EPC the President of the Office shall be assisted by the Vice-Presidents. This provision obliges the Vice-Presidents to be actively involved, in the scope of presidential actions permitted under the EPC, in implementing the objectives specified by the President, also in respect of the Directorate General which they manage as Vice-President. Primarily they are the immediate executive officers which must assist the President in all his duties and decisions he makes (Braendli in Munich Annotations ["Münchner Kommentar"] of Art. 10 EPC, margin No. 45).

14.2 The degree of independence of the Vice-Presidents follows from the intensity with which the President exercises his authority to instruct and control them (Braendli, loc.cit., margin No. 46) or consults them otherwise for assistance in managing the Office. The latter has been institutionalised in the form of the MAC, a management body whose members are among others all the Vice-Presidents and which the President of the Office employs in the interests of a collegial performance of his duties. The MAC serves to prepare significant decisions by the President while it does not legally restrict the authority to decide which is his under Article 10 EPC (see Braendli, loc.cit., margin No. 47). According to the Annex "Management structures at the EPO – Mandate of
the EPO Directorate (MAC)" on the Communiqué No. 14 from the President of 4 August 2006, the duties of the MAC as a "subsidiary organ of the President" include among others: "Assistance to the President in exercising his duties laid down in the EPC and in particular in Article 10 thereof, assistance to the President in defining strategic, political, and practical actions which can significantly influence the activities, performance, or the reputation of the EPO".

14.3 The function of the GAC, a panel composed of representatives appointed by the President and by the Staff Committee on the basis of parity, is comparable in that its substantial duty is to provide the President with substantiated opinions on (amendments to) regulations and actions relevant to the staff, and also on general issues referred by the President (Art. 38 (3) Service Regulations for permanent employees of the EPO in the version in force prior to 1 April 2014). According to the version in force since then, the members of the committee – now "General Consultative Committee" with the President as its chairman – may, following a consultation, vote for or against any intended action or abstain from voting. Since the beginning of 2012, the Vice-Presidents participate in the GAC as representatives of the Office Management, i.e. of the President. This is expressly confirmed in the document CA/4/14 of 10 March 2014, which the President recently referred to the Administrative Council. Item 16 therein sets forth that the Office Management (i.e. the President) is represented in the GAC by Vice-Presidents (and Principal Directors). It follows that the Vice-Presidents, as do the other official representatives of the higher management in the GAC, are subjected to the instructions of the President under Article 10 (2) f) EPC on their conduct regarding opinions and voting.

15. This also applies to the VP3. As do all the Vice-Presidents, he is acting therein as a representative nominated by the President for the Office side and he is likewise bound by the instructions of the President. Therefore the VP3 may find himself in the GAC in the situation that according to instructions he must agree to regulations which are applicable to the staff in general and thus without any distinction also to members of the Boards of Appeal which, however, might be incompatible with guaranteeing the judicial independence of the members of the Boards of Appeal institutionally and with respect to staff
law. Under this aspect, for example the "Guidelines for Investigations in the EPO" (circular letter 342 from the President of 30 November 2012) have recently been subject to discussions.

16. In fact, the VP3, being the Chairman of the Enlarged Board of Appeal, is beyond the power of the President to instruct for the decisions thereof (Art. 23 (3) EPC). Article 1 (4) Service Regulations for permanent employees also specifies that the Service Regulations for permanent employees only apply to members of the Boards of Appeal "to the extent that their independence is not affected thereby"; see also Article 15 (2) Service Regulations for permanent employees on the special duties of the members of the Boards: their "conduct in and out of their [judicial] office must be so as not to jeopardize trust in their independence". A clear boundary is not drawn in this way though – and cannot be drawn anyway. The duties of the VP3 in his judicial function as the Chairman of the Enlarged Board of Appeal are not limited to objecting to instructions incompatible with Article 23 (3) EPC, but there also ensue limitations to his duty to assist which he might specifically refer to. These are, however, not clearly specified by law.

Possible conflict of interests of the VP3 between his management responsibilities for the Boards of Appeal and his position as the Chairman of the Enlarged Board of Appeal

17.1 The VP3 may be confronted with conflicting demands. As a Vice-President subordinate to the President he must, for one, implement the President’s objectives of direction and performance and optionally instructions including for the area of the Boards of Appeal consolidated in GD3; for another, in his management responsibilities for the Boards of Appeal he must generally take care that the Boards remain free of influential measures or attempts by the President and his administrative hierarchy which might affect the judicial independence of the members of the Board of Appeal which the EPC guarantees. He must all the more himself remain free of these influences in performing his activities as a judge.

17.2 In this situation it cannot be excluded a priori that the Chairman of the Enlarged Board of Appeal, when confronted with specific instructions of the
President of the Office, e.g. relating to objectives of efficiency to be reached, might find himself in a conflict of interests regarding his obligation as the Chairman of the Enlarged Board of Appeal to be involved in developing a case law which renders the review procedure in the frame set by the EPC an efficient instrument of legal protection for the parties, as the petitioner has worded it for the review procedure. This is what the petitioner described as a "situation of conflict" in which the replaced Chairman finds himself due to his dual function.

17.3 Also there is an actual concrete connection between the case law of the Enlarged Board of Appeal on review procedures under Article 112a EPC and the pursuit of efficiency goals in appeal procedures. The more limitations the Enlarged Board of Appeal defines for its criteria for reviewing appeal procedures, e.g. regarding the requirements for granting the right to be heard by the Boards of Appeal, for example in the context of admitting further statements, the better can the Boards of Appeal streamline their procedures without having to fear that their decisions will be set aside in possible subsequent review procedures.

If the Enlarged Board of Appeal consents to a review of first instance (discretionary) decisions by the Technical Boards of Appeal which is restrictive in view of the right to be heard, then the examination and primarily the opposition divisions have a broader margin for the discretion to orient the proceedings before them at predetermined or sought objectives of "efficiency" or "productivity", e.g. by excluding later statements or requests or generally by a restrictive practice as regards hearing the parties.

This is the context which the petitioner asserts, indeed with reference to the appeal procedure on which its review procedure is based, in which it has specifically raised an objection against such actions of the opposition division and subsequently the Board of Appeal as violating its right to be heard.

17.4 The introduction of the review procedure in the EPC 2000 has noticeably raised the extent of possible conflicts of interests between the VP3, being bound by instructions and his duty to assist the Office President for one, and
his judicial function as the Chairman of the Enlarged Board of Appeal for another, in which within the Board though as *primus inter pares* he can actively shape the procedural conduct of the Boards of Appeal. Previously the Enlarged Board of Appeal had "only" been in charge of hearing points of law of fundamental importance, the answers to which could, however, indeed show significance regarding patent politics and in single cases even a more general political significance. Now it also reviews, upon the petition of a party, single appeal proceedings in view of specific procedural errors and thus is involved in shaping the procedural practice of the Boards of Appeal (primarily regarding the right to be heard). Moreover, possible conflicts of interests may arise from objectives with legal or even political significance which an Office President may legitimately pursue, which must not be decisive though to the deciding practice of the Enlarged Board of Appeal.

17.5 The Enlarged Board of Appeal decides in all the proceedings by majority vote, whether it is composed of 3, 5 or 7 members. Therefore the opinion of the Chairman of the Enlarged Board of Appeal is not *per se* decisive ("casting vote") for assessing the case at issue. In fact the Chairman of the Enlarged Board of Appeal plays an eminent role specifically in review proceedings and his options of influencing are increased due to the fact that he acts as the Chairman on a regular basis while the members rotate *ad hoc* because they are used alternatingly for each case in the sequence of a list drawn up in the business distribution scheme. In this system it is primarily the duty of the Chairman to ensure uniformity of case law by the Enlarged Board of Appeal by applying uniform reviewing criteria in the rotating compositions. What is ultimately solely decisive, however, is whether the formation of the will of a panel member objected to on the ground of suspected partiality is biased.

*The decision R 12/09*

17.6 The EPC does not stipulate that the duty of chairing the Enlarged Board of Appeal must be carried out by the GD3 Vice-President. This has just been the practice for many years, which was interrupted only once. Practice alone, however, cannot make this combination of positions customary law, in particular not if over the course of time some developments have occurred

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which show this combination of positions in a different light (see above Nos. 17.3 sq. and below, Nos. 20 sqq.).

17.7 This also applies to the participation of the replaced Chairman as the VP3 in the MAC and in the GAC. The reason for his participation in these panels is not a standardised obligation to safeguard in this way the interests of the Boards of Appeal, whose organisation is consolidated in GD3 with respect to factual and staff-related matters (in the sense of the "administration of justice"). This holds primarily for the GAC, a panel of the Office in which the Vice-Presidents and thus also the VP3 have not been involved thus far. Reports on MAC meetings in which the previous VP3 participated included on a regular basis the indication "With due consideration for the independence of VP3" - see for example "Communiqué from the MAC, 135th meeting, Munich, 12 December 2005". Such a proviso has ceased to exist for the participation of the current VP3.

17.8 Since neither the dual position VP3/Chairman of the Enlarged Board of Appeal nor the participation of the VP3 in the MAC and GAC committees of the Office are prescribed by the law, the present case does not show a legal situation similar to that of the decision R 12/09 (see above No. 13.3). It is pointed out, however, that Article 6 ECHR, the binding nature of which for the EPO has been acknowledged by the Enlarged Board of Appeal (see above No. 9), at any rate prevails over national law. Thus the ECHR acknowledged as justified the suspicion of partiality of a judge in its judgment in re. Micallef, although national law had specifically not standardised the asserted ground as a ground of exclusion. Since this law had shown deficits and had not provided adequate guarantees of subjective and objective impartiality, the composition of the court had not fulfilled the standard of the Convention (loc.cit., see above No. 10, Nos. 100 sqq. at Reasons).

Problem of the integration of the Chairman of the Enlarged Board of Appeal in the administration of the Office

18. The fact that the Chairman of the Enlarged Board of Appeal might possibly at least indirectly have to adjudge "guiding decisions" of the President in which
he participated as a Vice-President, has only recently been criticised again as one of the elements in the organisational structure of the Boards of Appeal which raise profound doubts about whether the Boards of Appeal show the genuine quality of a court (see e.g. – cited by the petitioner – Zuck, The review of decisions of the Enlarged Board of Appeal of the European Patent Office by the Constitutional Court in view of violations of the right to be heard, GRUR Int. 2011, 302, discussing further deficits with regard to organisation law). This type of criticism has been set forth in the constitutional complaint brought against the decision R 2/12 of the Enlarged Board of Appeal of 17 October 2012 (brief of 25 February 2013, pages 44 sq., D.III. 4. d. – copy in the file of the terminated proceedings R 2/12). This opinion is also held in the constitutional complaint of 5 April 2013 filed in parallel to the petition for review R 8/13, and in the expert opinion enclosed thereto by the retired judge at the [German] Federal Constitutional Court Broß (pages 13sq. - B.I.4.)

19. In its opinion G 3/08 the Enlarged Board of Appeal now termed the European Patent Organisation an organisation modelled on a modern state order and based on the principle of the separation of powers, in which the EPC assigns executive power to the Office, limited legislative powers restricted to lower-ranking rules to the Administrative Council, and the role of an independent judiciary to the Boards of Appeal, their structural integration in the Office notwithstanding (OJ EPO 2011, 10, No. 7.2.1 at Reasons). One can readily agree thereto as far as legislators’ intention in creating the EPC is concerned. Still it cannot be refuted that the connection in terms of organisation and premises, with the dual function of the VP3 also in terms of staff, of the Boards of Appeal with the Office indeed shows a certain democratic deficit compared to the requirements of legal systems which democratic states set for the status that must be granted to courts and their judges to ensure the fundamental right of the citizens to effective legal protection against actions of executive powers by courts independent thereof.

20. As early as 1997 a report was referred to the Administrative Council from a panel "Directorate General 3 of the European Patent Office" headed by the then Madam President of the Federal Patents Court (so-called "Sedemund-Treiber Report") appointed by the then Office President and composed of
high-ranking, national judges, the then VP3 and members of the Boards of Appeal. This report — preceding the existence of review proceedings — stated that it was important to emphasize and to also express outwardly more clearly the judicial function of the VP3 as the Chairman of the Enlarged Board of Appeal. In this respect, the report states: "In the opinion of the panel, the Vice-President of the Directorate General 3 should therefore as far as possible be exempted from general administrative duties not concerning the Directorate General 3 ... [In addition] the VP3 ought not to be obliged to participate in management meetings at the Office, unless matters specific to the Directorate General 3 are discussed. It was deemed desirable for the Office President to incrementally delegate, in the scope of the EPC, to the Vice-President of the Directorate General 3 his power of organisation and management relative to the Directorate General 3 under Article 10 EPC" (CA/84/97, Nos. 55 and 56). This has not happened. However, the then VP3 thereafter participated in MAC only with reservations (No. 17.7, above); at the time the VP3 was not yet involved in the GAC.

21. In 2004 a complete, detailed draft of a basic proposal was referred to the Administrative Council for a Revision of the EPC about the implementation of the organisational independence of the Boards of Appeal of the European Patent Office in the framework of the European Patent Organisation (CA/46/04). It would convey to the Boards of Appeal under the direction of a court president the position of a third department of the European Patent Organisation, apart from the European Patent Office and the Administrative Council, and would thus concede to the court president, who should also be the Chairman of the Enlarged Board of Appeal, a position independent of the Office and its President. In its meeting in June 2004 the Administrative Council held the opinion that the project was ready for a Diplomatic Conference and should be added to the agenda of such a conference (CA/85/04, No. 68). Again, this has never happened up to now.

22. In the past both the national courts and the ECtHR acknowledged that the EPC system of legal protection as such meets both the guidelines of the ECHR and the requirements which the judicial quality of the Boards of Appeal must meet (for citations see Teschemacher in Singer/Stauder, European
Patent Convention, 6th edition Cologne 2013, preceding Art. 21-24, margin Nos. 1 and 5). However, as can be exemplarily seen in the constitutional complaints indicated above (No. 18) and the corresponding citation, these earlier judicial findings are not (no longer) accepted by voices which are indeed significant (Teschemacher loc.cit, with further citations in FN 10). They assert that the former decisions of the (German) Federal Constitutional Court had only been supported on the principle of the right to be heard in Article 113 EPC, and on the independence anchored in Article 23 (3) EPC of the members of the Boards of Appeal in their decisions. The institutional aspects arising from the integration of the Boards of Appeal in the Office had not been taken into account thus far for lack of argument brought. Also the Attorney General at the ECJ Juliane Kokott critically set forth in her opinion 1/09 on the proceedings before the ECJ regarding the draft of an agreement on establishing a European patent court that at the time the decisions of the EPO could only be reviewed by the "internal Boards of the Office". A judicial challenge/appeal before an external court was excluded (opinion, No. 71).

Implications for determining whether partiality is to be suspected

23. For the question to be answered presently, whether from the view of an objective observer the participation of the Chairman of the Enlarged Board of Appeal in the indicated management panels of the Office may give rise to suspect partiality, the proposals on reform indicated above and opinions on the required organisational structure of a judicial instance cannot be disregarded. They are expressions of an acute recognition and stricter beliefs on the requirements necessary for taking account of the fundamental right of the parties to access to an independent, impartial court.

An interpretation of legal concepts corresponding to the values of the present time may be required as a result of changing views. This dynamic interpretation is also acknowledged as a method of interpretation in the case law of the Enlarged Boards of Appeal (see e.g. G 3/98, OJ EPO 2001, 62, No. 2.5 at Reasons). Law is not something static, but it keeps developing with changing conditions of life and changing views. This applies in particular where determining the content of indetermined legal concepts is concerned.
such as the term "suspicion of partiality", the meaning of which can only be determined by the currently applicable moral concepts on the role of the judge in a democratic order.

In this respect the House of Lords set forth in its judgment Lawal v. Northern Spirit Ltd, referring to a number of other judgments in respect of possible partiality (House of Lords, [2003] I.C.R. 856, para. 22):

In view of the requirement of guaranteeing impartiality of the judge in a judicial system, the sensitivity of the public increasing over time cannot be disregarded. This may result in the fact that what is considered legal traditions or culture of this jurisdiction is regarded critically these days. The indispensable requirement of public confidence in the jurisdiction requires higher standards today than was the case a decade or two ago. What was acceptable many years ago is not necessarily still acceptable today.

This must be agreed with.

24. In the opinion of the Enlarged Board of Appeal, this results in the following:

24.1 If one must tolerate, notwithstanding the existing reservations, the structural weaknesses of the organisation of the Boards of Appeal with their integration in the Office, which cannot be changed according to the present-day configuration of the EPC, then it appears all the more necessary to release as far as possible the direction of the judicial institution embedded in the Office from active involvement in management panels of the Office, in particular of the President, to avoid as far as possible the impression of the judicial instance intermingling with the actions of the Office or a participation in the implementation of interests and goals of the Office. In this respect, however, with the VP3 participating in the GAC and his participation without any proviso in the MAC, one can rather observe a trend in the opposite direction.

24.2 In view of this integration of the Chairman of the Enlarged Board of Appeal in the administration of the Office on the management level, the suspicion of the petitioner that the replaced Chairman might possibly not be able to entirely
detach his jurisdictional activities from the constraints and influences due to his participation in management decisions of the Office, cannot be considered to be a merely subjective impression or a merely general suspicion. A reasonable, objective, and informed person might rather have good reason to fear that the Chairman might possibly not exercise his judicial functions without being influenced by requirements which are referred to him being the VP3, in particular in the scope of his participating in the panels indicated. This is also compounded by the fact that prior to being appointed to the GD3 the current VP3 held the position of obligations on the highest level in the administration relative to the President, to which he continues to be subjected in his present function as VP3.

24.3 For the decision to be made presently it is not decisive whether the replaced Chairman is in fact biased, and whether his continuing integration in the administrative actions can be attributed to him on a subjective level. Nor is it decisive whether the Enlarged Board in the present composition considers the replaced Chairman biased. What is decisive is whether a reasonable, objective and informed observer, taking into account the circumstances of the case, would arrive at the conclusion that the party would have good reason to place in doubt the impartiality of the member objected to (see above No. 8).

24.4 This cannot be denied for the reasons discussed.
Reasons for the decision

For these reasons it is decided that:

1. The objection to the replaced Chairman, Mr van der Eijk, for suspected partiality is substantiated.

2. Mr van der Eijk shall be replaced by Ms Günzel.

The Registrar:

P. Martorana

The Chairwoman:

B. Günzel

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