

**Supplementary argumentation relating to the petition for review in case R 19/12**

Note: Our written submissions dated July 22, 2013, November 7, 2013, and February 26, 2014 are concerned with the argumentation of the Chairman with respect to the objection. As we do not deem ourselves authorized to give an account of these arguments in detail, we publish our comments thereon only insofar (but in each case unamended), as they contain clarifications relating to the petition of December 14, 2012 and supplementary arguments:

1. The objection is not based on the grounds mentioned in Article 24, paragraph 1 EPC, but on the suspicion of partiality, which is addressed in Article 24, paragraph 3.
2. As already stated when submitting the petition, the petitioner still has no doubts whatsoever about the personal integrity and the legal competence of the Chairman. It believes, however, that the Chairman is put into a conflict situation, as, given his former and current involvement in the organization of the EPO, he has to decide on a matter in which the organization of the EPO has quite obviously failed.
3. The present proceedings substantially differ from the majority of the review procedures under Article 112a EPC decided so far, which are usually focussed on the fact that the petitioner brings forward that the decision adversely affecting it about the validity of the underlying patent or patent application is based on a procedural error. The present case is based on the fact that the Board of Appeal has not dealt – which amounts to a procedural error – with the arguments by which the petitioner substantiated its request for establishing fundamental procedural errors in the first instance proceedings and for ordering the reimbursement of the appeal fee resulting therefrom. In this context, also the evaluation of the first instance proceedings with respect to procedural law is concerned.
4. The question is, to what extent the violation of rights (note: in the first instance) is caused by mistakes of the organization of the EPO.

The notice of opposition was received at the EPO on January 7, 2005, the response of the proprietor on August 19, 2005. Further written submissions were

– for the time being – not exchanged. On March 19, 2010, i. e. 4 ½ years after the last written submission, the summons to oral proceedings on June 22, 2010 were issued.

This long duration of the proceedings already *per se* is a violation of the right of the parties to a fair trial and also could have been the reason why the request for postponement of the proceedings after the fundamental amendment of the facts brought forward in the opposition and of the requests of the opponent was rejected.

5. The management of the EPO bears the responsibility that the employees of the Office know and apply the rules of fair procedural conduct. In particular, this requires corresponding training of the employees. In the present case, quite obviously this did not work.

It is *per se* a serious unequal treatment of the two parties that the opponent is allowed to amend its requests and its arguments to a large extent, but that the proprietor, on the other hand, is refused to react to these new attacks by reformulating the patent claims.

Of course, each Opposition Division of the EPO must know that the proprietor who faces an attack on the novelty of the patent in dispute and an attack on the admissibility of the formulation of the granted version in view of Article 123 (2) EPC in the oral proceedings for the first time, must be given the opportunity to defend the patent against these attacks by means of auxiliary requests. If this is not done – as in the present case –, then the patent is wrongly revoked.

6. An Opposition Division sufficiently trained in procedural law also knows how to proceed when the opponent extends the opposition to claims which were previously not attacked after expiry of the opposition period. It is a blatant contradiction to the standards set by the enlarged Board of Appeal in decision G 9/91 that the Opposition Division revokes these claims without deciding beforehand if these claims are to be introduced into the proceedings and without giving the proprietor the chance to comment on the introduction of the claims itself and on the question of patentability.

7. The responsibility for such training rests, as mentioned, on the management of the EPO. The management of the Office must take care that the Opposition Divisions are sufficiently made acquainted with the fundamentals of procedural law, that the decisions of the Opposition Divisions are also audited in this respect, and in particular that the members of the Opposition Division are made familiar with the fact that granting the parties' right to be heard is a fundamental principle of all proceedings before the EPO.

The course of this opposition proceedings shows that at least this Opposition Division was not sufficiently trained.

The responsibility for this rests upon the management of the Office, to which the Chairman belonged from 2005 until November 30, 2011. The oral proceedings in question took place on June 22, 2010 and were thus within this tenure of office.

8. One of the reasons why the decision of the Technical Board of Appeal contested here is based on a violation of the petitioner's right to be heard is that the Board of Appeal did not even deal with most arguments of the petitioner, and it neither referred to Article 113 (1), nor did it use the notion "right to be heard" just once in its decision. The petitioner is sure that the Board of Appeal, when thoroughly taking the petitioner's arguments into account, must establish fundamental procedural errors of the opposition proceedings.

This, however, directly leads to the finding that the training of the Opposition Division in procedural law in the period in which the Chairman had partial responsibility therefor, was insufficient.

The petitioner therefore fears that the Chairman will not be able to approach the matter with the necessary impartiality.

9. According to the principle of the separation of powers, which is valid in all member states of the European Patent Convention, the public administration cannot legally control its own work. The principle of the separation of powers is also mandatory for the EPO (EBoA, G 3/08 dated May 12, 2010, paragraph 7.2.1)

The Chairman of the Enlarged Board of Appeal is involved in the administration of the European Patent Office as a Vice President and is a member of the Management Committee. He also has responsibility for the actions of the

administration by chairing the General Advisory Committee (GAC), which was at least the case in the year 2012.

In the present case, a procedurally erroneous decision of the Board of Appeal has to be adjudged. The starting point of this decision, however, are procedurally erroneously conducted opposition proceedings, which are an action of the administration. In this case, the decision of the Enlarged Board of Appeal, when reviewing the relevance of the procedural errors of the Board of Appeal, must necessarily deal with the procedural errors of the Opposition Division.

Thus, the Chairman of the Enlarged Board of Appeal would also have to adjudge an action of the administration.

10. The Chairman states (comments, first paragraph) that the argumentation brought forward by the petitioner was no longer based on the participation of the Chairman in the contested decision, but on the general ground of "suspicion of partiality". This was a completely new argument whose admissibility 11 months after the original petition was questionable.
11. In fact, however, the petition of December 14, 2012 reads on page 16, item 9:

"The petitioner, however, objects to the participation of the Chairman of the Enlarged Board of Appeal in the present review procedure on the ground of suspicion of partiality."
12. Page 17, item 10 further reads:

"In the present case, the current Chairman of the Enlarged Board of Appeal did of course not participate, for example, in the decision of the Board of Appeal or in the decision of the Opposition Division. He was, however, in particular as far the decision of the Opposition Division is concerned, partially in charge of the organization of the proceedings and thus also of these opposition proceedings in the EPO during that period."

Correspondingly, the written submission of the petitioner dated July 22, 2013 states on page 2, item 1, that the objection is based on the suspicion of partiality according to Article 24, paragraph 3 EPC.

Furthermore, the "former and current involvement in the organization of the European Patent Office" is explicitly mentioned there.

13. Thus, the petitioner has not changed its argumentation in the course of the proceedings. The petitioner has only deepened its arguments relating to the suspicion of partiality. However, this is indispensable for protecting the petitioner's right to be heard, because otherwise it would not be possible to deal with the arguments of the Chairman in his comments with regard to contents.

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