Decision of the Enlarged Board of Appeal dated 7 December 2006
G 1/05

(Language of the proceedings)

Composition of the board:

Chairman: P. Messerli
Members: B. Günzel
P. Alting van Geusau
C. Holtz
W. Moser
A. Nuss
N. Pumfrey

Applicant: N.N.

Headword: Exclusion and objection/XXX

Article: 24(1), (2), (3), (4), 76(1), 105(1), 112(1)(a), 123(2) EPC
Rule: 66(2)g) EPC
Article: 1(2) RPEBA
Article: 13, third sentence, 15 RPBA
Article: 2(3) Business distribution scheme EBA 2006
Article: 6(1) ECHR
Rule: 28(2)(a), (d), (3) Rules of Court ECHR
Article: 87(3) Federal Constitution (AT)
Article: 30(1) Federal Constitution (CH)
Article: 101(I) 2 Federal Constitution (DE)
Jurisdiktionsnorm (AT) §20
Patentgesetz (AT) §76
Zivilprozessordnung (DE) §41
Codice di procedura civile (IT) Article 51

Keyword: "Notice of withdrawal under Article 24(2) EPC - requirements for replacement of a member of the Enlarged Board of Appeal - Suspicion of partiality against a member of the Enlarged Board of Appeal - merely based on participation of that member in a prior decision of a Board of Appeal having taken a position on the matter - suspicion not justified on an objective basis"

Headnote:

I. If a member of a Board of Appeal in a notice of withdrawal gives a ground which may by its nature constitute a possible ground for an objection of partiality that ground should normally be respected by the decision on replacement of the Board member concerned (Reasons, point 7).

II. As regards proceedings before the Enlarged Board of Appeal and unless there are specific circumstances throwing doubt on the Board member's ability to approach the parties' submissions with an open mind on a later occasion there cannot be any objectively justified, i.e. reasonable suspicion of partiality against a member of the Enlarged Board of Appeal within the meaning of Article 24(3), first sentence, EPC for the reason that a position on the matter was adopted in a prior decision of a Board of Appeal in which the Board member concerned had participated (Reasons, point 27).

Summary of facts and submissions

I. In decisions T XXXX/XX of ..., T XXXX/XX of ... and T XXXX/XX of ... Boards of Appeal 3.X.X, 3.X.X and 3.X.X respectively submitted questions to the Enlarged Board of Appeal .... These became pending before the Enlarged Board of Appeal under case numbers ....

II. On 9 May 2006 the Enlarged Board of Appeal decided to consider the points of law referred to it in the above cases in consolidated proceedings.

III. Subsequently, Ms X, a member of the Enlarged Board of Appeal in the consolidated proceedings informed the Board that she ought not to be taking part in referral G XXXX/XX, since one of the opponents in the case underlying the referral was represented by the law firm in which her husband and her son were partners.

IV. By order of the Chairman of the Enlarged Board of Appeal of 14 June 2006, Mr Alting van Geusau was appointed as alternate of Ms X for the purpose of the proceedings under Article 24(4) EPC.

V. In a letter dated 14 June 2006, the appellant's representative in case T XXXX/XX questioned the position of Mr Y as a member of the Enlarged Board of Appeal because it would appear that Mr Y, by membership of the Board of Appeal in case T XXXX/XX, had already taken a position in relation to matters now to be decided. The said decision had stated that the invention(s) defined in the claims of a divisional application determined the content of the divisional application per se (Reasons, point 2). T XXXX/XX thereby affirmed and applied decision T 797/02. The appellant's representative submitted that that decision, in which he had also acted as representative, had been characterised by a lack of clear thinking and of a proper legal basis. He did not believe that someone who had affirmed decision T 797/02 brought an unbiased position to the review now to be undertaken by the Enlarged Board of Appeal.

VI. By order of 23 June 2006 the Chairman of the Enlarged Board of Appeal appointed Ms Günzel as alternate of Mr Y in the proceedings under Article 24(4) EPC. Mr Y was invited to comment on the allegation made by the appellant in T XXXX/XX.

VII. In his comments of 30 June 2006 Mr Y answered that in his view no ground of exclusion arose against him on the basis of his participation in decision T XXXX/XX. He saw nothing, whether in his being a Board member in case T XXXX/XX or anything else, that supported a suspicion of a tendency to favour one or more of the parties in the present three cases, or to discriminate against them.

T XXXX/XX - in its point 2 - did adopt the view expressed in T 797/02 and referred to in point V. above. However, a significant difference between the two decisions was that on the facts in T XXXX/XX it was found that the amended claim met the requirements of Article 123(2) EPC even if the strict view expressed in T 797/02 was taken.

Even if the Board in T XXXX/XX had considered appropriate a more generous view on Article 123(2) EPC as applied to the content of divisionals this would have made no difference to the outcome of the appeal, which in either case would have been favourable to the appellant. This meant that the option of referring a question to the Enlarged Board of Appeal on what was the appropriate view of the law in relation to Article 123(2) EPC as applied to first generation divisional applications was not open in T XXXX/XX, since the requirement of Article 112(1)(a) EPC was not met. In case T XXXX/XX the Board had thus only two options: to decide as it did, or to decide differently to decision T 797/02 while giving the grounds therefore, in compliance with Article 15 RPBA.

Mr Y's comments further pointed to decisions T XXXX/XX and T XXXX/XX, in which Mr Y had taken part as a Board member.

VIII. By communication of 14 July 2006 the rapporteur appointed for the purpose of the decision on exclusion of and objection against members of the Enlarged Board of Appeal informed the parties about the notice of withdrawal of Ms X, the allegation of apparent partiality of Mr Y, Mr Y's comments and the replacements made for the purpose of the decision to be taken by the Enlarged Board of Appeal under Article 24(4) EPC. The parties were invited to comment.

IX. The only comment received was that of appellant ... in case T XXXX/XX who stated that while he had no reason to believe that either Mr Y or Ms X were unable to bring an unbiased position to the review being

undertaken by the Enlarged Board of Appeal they were appreciative of the professional integrity displayed by Ms X and the decision of the Enlarged Board of Appeal to replace Mr Y by Ms Günzel.

X. On 6 October 2006 a third party filed an intervention under Article 105(1) EPC into the opposition proceedings pending before Board of Appeal 3.X.X under case No. T XXXX/XX. The documents on file concerning the issues of exclusion of and objection to Ms X and Mr Y were communicated to the intervener. By letter of 31 October 2006 the intervener declared that he did not wish to take a position on the matter.

Reasons for the decision

The notice of withdrawal

1. According to Article 24(1) EPC members of the Enlarged Board of Appeal may not take part in any appeal if they have any personal interest therein, if they have previously been involved as representatives of one of the parties, or if they participated in the decision under appeal.

According to Article 24(2) EPC, if, for one of the reasons mentioned in paragraph 1, or for any other reason, a member of the Enlarged Board of Appeal considers that he should not take part in any appeal, he shall inform the Board accordingly.

2. According to Article 24(4), first sentence, EPC the Enlarged Board of Appeal shall decide as to the action to be taken. Thus, a notice of withdrawal does not automatically effectuate the exclusion of the Board member concerned from the proceedings; an exclusion requires a decision by the Board in its composition according to Article 24(4), second sentence, EPC, the outcome of which is not anticipated by the notice of withdrawal, as to whether the replacement of the Board member concerned is justified (see also J 15/04 of 30 May 2006 – Possible reasons for exclusion/MITSUBISHI HEAVY INDUSTRIES, LTD., Reasons, point 12). Therein the EPC is in line with some national laws (see below, Reasons, point 9) while differing from other laws. Thus, Rule 28(3) of the Rules of Court of the European Court of Human Rights (ECHR) provides that if a judge withdraws for one of the reasons aforementioned in that rule he or she shall notify the President of the Chamber, who shall exempt the judge from sitting. Similarly, in the UK it is at first for the judge who sits in a case to decide whether or not to withdraw (*Locabail (UK) v. Bayfield Properties Ltd*, [2000] QB 451 at 478, CA (hereinafter referred to as "*Locabail*").

3. In her notice of withdrawal Ms X sets out her close family relationship with two of the partners in the law firm representing appellant ... in case T XXXX/XX, underlying the referral G XXXX/XX.

Ms X's notice contains nothing to the effect she had any personal interest in the outcome of the referrals within the meaning of Article 24(1) EPC but Article 24(2) EPC also covers the case where a member of the Enlarged Board of Appeal considers for other reasons that he or she should not take part in the referral.

4. A close family relationship with a party is one of the classic grounds for excluding a judge by virtue of law from taking part in the case concerned (See e.g. Rule 28, 2.(a) of the Rules of Court of the ECHR; AT: § 20 "Jurisdiktionsnorm (JN) ", § 76 "Patentgesetz"; DE: § 41 "Zivilprozessordnung" (ZPO); IT: Article 51 "Codice di procedura civile (c.p.c.)").

That is not generally so where a family or other close relationship is not with the party but with a representative of the party (see, however, IT: Article 51 c.p.c.).

In these cases an objection of suspected partiality may arise and may have to be regarded as justified depending on the legal tradition of the Contracting State concerned (i.e. the relationship between the judiciary and the legal profession in general, consider e.g. the role of solicitors and barristers in the performance of judicial functions in the UK, see e.g.: *Locabail* at 478) and on the circumstances of the case (AT: Fasching, Kommentar zu den Zivilprozessgesetzen, 2nd edition, Wien 2000, § 19 note 9; CH: Leuch/Marbach, Die Zivilprozessordnung für den Kanton Bern, 5th edition, Bern 2000, Article 11, point 5.d.; UK: *Locabail at* 480, *Jones v. DAS Legal Expenses Insurance Co Ltd* [2004] I.R.L.R. 218, CA).

5. In its decision G 5/91 (OJ EPO 1992, 617 – Appealable decision/DISCOVISION, Reasons, point 3) the Enlarged Board of Appeal underlined the importance of a very strict observance of the requirement of impartiality in proceedings before the Boards of Appeal and the Enlarged Board of Appeal in view of their judicial functions at

supreme level within the European system of patent law. It must be considered as a general principle of law that nobody should decide a case in respect of which a party may have good reasons to assume partiality.

6. Article 24(2) EPC serves to preserve this principle by obliging a Board member to inform the Board accordingly if he or she considers that he or she should not take part in a case for any such reason. This avoids that the circumstances underlying a notice of withdrawal come up later in the proceedings and cast a shadow on the decision making process or even the decision taken.

Accordingly, it is very important that there should not remain a real possibility of the public or a party to suspect bias after a Board of Appeal has taken a decision under Article 24(4) EPC on a notice of withdrawal of a Board member (see also J 15/04, Reasons, point 13). Judges or courts are not only to take care that in their decisions they are not influenced by personal interest but they are to avoid the appearance of labouring under such an influence (see *Locabail* at 472 with reference to further case law).

7. Therefore, if a member of a Board of Appeal in a notice of withdrawal gives a ground which may by its nature constitute a possible ground for an objection of partiality that ground should normally be respected by the decision on replacement of the Board member concerned because it can be expected that the member submitting the notice knows best whether or not a possible suspicion of partiality could arise (J 15/04, Reasons, point 13; AT: Fasching, loc.cit., § 19 note 8).

8. Admittedly, it is very important that Board members discharge their duty to sit in the cases allocated to them (*Locabail* at 479). That duty, viz. the right of the parties to a hearing before a judge or court in the particular composition as determined by the provisions applicable thereto ranks at constitutional level in some of the Contracting States (AT: Article 87(3) of the Federal Constitution; CH: Article 30(1) of the Federal Constitution; DE: Article 101(I)2 of the Federal Constitution "Recht auf den gesetzlichen Richter") and is also recognised in the jurisprudence of the Boards of Appeal (see in particular, T 954/98 of 9 December 1999 – Ablehnung wegen Besorgnis der Befangenheit, Reasons, point 2.2, J 15/04, Reasons, point 12). Therefore, it is important that Board members cannot withdraw from the proceedings at will, i.e. for reasons which have nothing to do with the purpose of the provisions on exclusion and objection to protect a party from possible partiality of the Board member involved.

9. On the other hand it should also be avoided that a Board member has to sit in a case where he or she is convinced or fears that he or she might not be able to be impartial (DE: Baumbach-Lauterbach, Zivilprozessordnung, 64th edition, Munich 2006, § 48 note 10; UK: *Locabail*, at 489). This is also recognised in such laws of the Contracting States which attach utmost importance to the duty of judges to sit in the cases that have been allocated to them in accordance with the provisions applicable to the matter and which neither recognise a right of the judge concerned to withdraw from the proceedings solely by his own decision nor withdrawal as an automatic consequence of the judge having submitted a notice of withdrawal (AT: Fasching, loc.cit., § 19 note 8; CH: Walder-Bohner, "Zivilprozessrecht nach den Gesetzen des Bundes und des Kantons Zürich unter Berücksichtigung anderer Zivilprozessordnungen", 3rd edition, Zürich 1983, § 6 note 14; DE: Baumbach/Lauterbach, loc.cit., § 48, notes 2 and 10).

10. In the present case none of the parties has raised any objection to the replacement of Ms X by an alternate.

11. The Enlarged Board of Appeal therefore concludes that Ms X shall be replaced by Mr Alting van Geusau.

The objection to the participation of Mr Y

Exclusion

12. It is undisputed that in the case of Mr Y there is no question of an issue arising under Article 24(1) EPC. In particular, neither has the existence of a personal interest been alleged nor is the decision referred to by the appellant a decision under appeal within the meaning of the said provision.

13. Mr Y not having taken part in any of the proceedings before the Boards of Appeal where points of law have been referred to the Enlarged Board of Appeal he is also not excluded from taking part in the present proceedings under Article 1(2) of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA) or Article 2(3) of the business distribution scheme of the Enlarged Board of Appeal for the year 2006.

Objection

14. The objection of apparent bias was raised by the appellant in case T XXXX/XX in response to the communication by the Enlarged Board of Appeal concerning the questions referred to it as well as the composition of the Board and was thus filed in time under Article 24(3), second sentence, EPC.

15. According to Article 24(3), first sentence, EPC members of the Enlarged Board of Appeal may be objected to by any party, if suspected of partiality.

16. The reason given by the appellant for its objection against Mr Y is that it would appear that by virtue of his membership of the Board in decision T XXXX/XX of ... Mr Y had already taken a position in relation to matters now to be decided and that the decision to which T XXXX/XX referred was characterised by a lack of clear thinking and a lack of legal basis. The appellant did not believe that someone who had affirmed decision T 797/02 brought an unbiased position to the review now to be undertaken by the Enlarged Board of Appeal.

17. Decision T XXXX/XX was taken by a three-member Board of Appeal in which Mr Y acted as the legally qualified member. Decisions of Boards of Appeal are taken by the Board as a whole and not by members individually. Thus, the reasons for the decision reflect the view of the Board as a whole and as such do not reflect the opinion of an individual member of the Board concerned. If the members of a Board are not all of the same opinion after deliberation, a vote is required in accordance with Article 14 of the Rules of Procedure of the Boards of Appeal (RPBA) and the decision is taken by majority. Moreover, because of the secrecy of the deliberations (Article 13, third sentence, RPBA) it normally appears not even factually possible to attribute opinions expressed in a decision to one specific member of the Board.

18. However, even assuming that any opinion expressed in T XXXX/XX could be attributed to Mr Y as being his opinion by virtue of him having taken part in that decision the Enlarged Board of Appeal is unable to find therein a ground which could justify a suspicion of partiality within the meaning of Article 24(3), first sentence, EPC.

19. As the wording of the provision indicates for an objection under Article 24(3), first sentence, EPC to be justified it is not necessary that there is an actual partiality of the Board member concerned. It suffices that there is a suspicion i.e. an appearance of partiality (in the jurisprudence of the European Court of Human Rights (ECHR) called the "objective test" since Piersack v. Belgium (1982) of 1 October 1982, Series A, 5 E.H.C.R.169, Series A, No. 53, paragraph 30). There should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done (*Locabail* at 477). What is at stake is the confidence that the Boards of Appeal inspire in the public (T 190/03, OJ EPO 2006, 502 – Partiality/XXX, Reasons, point 9 at the end; ECHR, Puolitaival and Pirttiaho v. Finland of 23 November 2004, No. 54857/00, paragraph 42).

20. It is, however, also commonly recognised in the jurisprudence of the Boards of Appeal and elsewhere that the "suspicion" by the party must be justified on an objective basis. Purely subjective impressions or vague suspicions are not enough (for the jurisprudence of the Boards of Appeal, see T 190/03, Reasons, point 7 and the reference to further decisions contained therein; for the ECHR: Piersack and Puolitaival loc.cit.; AT: Fasching, § 19 JN, note 5: "Befangenheit mit Grund befürchtet"; DE: Baumbach-Lauterbach, § 42 ZPO, note 10: "Parteiobjektiver Massstab"; UK: *Locabail* at 479: "tenuous or frivolous objection"). The standpoint of the person concerned is important but not decisive (ECHR: Puolitaival, paragraph 42; see also T 241/98 of 22 March 1999 – Ablehnung wegen Besorgnis der Befangenheit des Berichterstatters, Reasons, point 4). The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case (*Locabail*, loc. cit.). It is thus necessary that a reasonable onlooker considering the circumstances of the case would conclude that the party might have good reasons to doubt the impartiality of the member objected to (T 954/98, Reasons, point 2.4; DE: Baumbach-Lauterbach, loc.cit., Schulte, Patentgesetz mit EPÜ, 7th edition, Köln 2005, § 27 note 43).

That conclusion cannot be arrived at based on the fact alone that the Board member concerned has expressed a view on the legal issue to be decided on a prior occasion be it in a prior decision or in literature. It is in principle also not relevant whether or not the view expressed is correct.

21. It is the very function and obligation of the decision making Boards of Appeal as of any other judge or court to decide the cases pending before them on the basis of the legal principles applicable to the case and by explaining them in the reasons for the decision (Rule 66(2)g) EPC). It is, thus, the essence of the function of the Boards of Appeal to take position in relation to the matters to be decided in the case under consideration.

22. The principle of equal treatment and the right of parties to a fair trial as e.g. enshrined in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) oblige the Boards of Appeal to decide the individual cases pending before them according to uniformly applied criteria and not in an arbitrary manner. The establishment of a uniform jurisprudence which is consistently applied to the individual cases under consideration appears, thus, as a means to safeguard that justice is done to the parties, on condition that the principles developed in the jurisprudence are applied to the individual cases under consideration in a manner which takes due account of their particulars, if any.

23. The right to object against a judge for reasons of suspicion of partiality is meant to prevent that a judge is influenced in his or her decision making - be it deliberately or inadvertently - by extraneous considerations, prejudices and predilections (*Locabail* at 480), i.e. by considerations other than the arguments he or she considers as being factually and legally relevant for the case under consideration. A suspicion of partiality might arise where there are circumstances possibly justifying a suspicion of a tendency to favour one or more of the parties or to discriminate against one of them (In similar terms: T 843/91, OJ EPO 1994, 818 – Befangenheit/EASTMAN KODAK COMPANY; Reasons, point 8). However, any such suspicion must be based on the specific facts of the case. For the reasons mentioned above it cannot be justified merely by the submission that a legal question was already decided in a certain way in a prior decision.

These principles appear to be quite commonly accepted in the laws of the Contracting States (CH: Leuch/Marbach, Article 11, point 5.c.; DE: see the examples from jurisprudence cited in Schulte, § 27 note 44, Baumbach-Lauterbach, § 42, note 10 Beispiele: "Allgemeine Auffassungen - nein", "Festhalten an einer Ansicht - nein", "Irrtum - nein", "Rechtsansicht - nein"; UK: *Locabail at* 480) as is in the jurisprudence of the Boards of Appeal (T 261/88 of 16 February 1993, Reasons, points 3.2 and 3.3, T 843/91, Reasons, point 8, T 241/98, Reasons, point 3).

24. The situation could be viewed differently if there were deficiencies in the view expressed to such an extent that there was reason to believe that they were the result of a preconceived attitude (T 261/88, Headnote II, T 843/91, loc.cit.; AT: Fasching, § 19, note 9; DE: Schulte, § 27 note 45, Baumbach-Lauterbach, § 42, D. Beispiele: "Irrtum ja").

It would also have been different if a Board member had pronounced himself or herself on a matter to be decided with his or her participation in such outspoken, extreme or unbalanced terms, be it in the course of or outside the proceedings, that his or her ability to consider the arguments put forward by the parties with an open mind and without preconceived attitude and to bring an objective judgment to bear on the issues before him or her, could be doubted (AT: Fasching, loc. cit., note 10; DE: Schulte, § 27, note 45, DE: Baumbach-Lauterbach, § 42, D. Beispiele: "Festhalten an einer Ansicht - ja"; *Locabail* at 480). Thus, Rule 28(2)(d) of the Rules of Court of the ECHR provides that a judge may not take part in the consideration of any case if he or she has expressed opinions publicly, through the communications media, in writing, through his or her public actions or otherwise, that are objectively capable of adversely affecting his or her impartiality.

25. The considerations set out above must apply to the proceedings before the Enlarged Board of Appeal in the same manner as they apply to the proceedings before the Boards of Appeal. No different interpretation can be given to Article 24(3) EPC in that context.

26. In the RPEBA and the business distribution scheme of the Enlarged Board of Appeal provisions have been set up defining the extent to which Board members having already dealt with an issue to be decided by the Enlarged Board of Appeal should be excluded from participation in a referral.

Article 1(2) RPEBA provides that at least four of the members of the Enlarged Board of Appeal shall not have taken part in the proceedings before the Board of Appeal referring the point of law. Article 2(3) of the business distribution scheme of the Enlarged Board of Appeal for the year 2006 is even stricter in this respect. It further provides that where a permanent member has participated in a case referred to the Enlarged Board of Appeal, the Chairman shall, after consulting the permanent members (paragraph 1(a)), appoint as substitute a non-permanent member (paragraph 1(b)).

27. It follows that to the extent that participation in a referral pending before the Enlarged Board of Appeal of a Board member having already dealt with the matter as a member of a Board of Appeal is not excluded by these provisions, an objection of partiality cannot be based on that very same fact alone.

On the contrary, also as regards proceedings before the Enlarged Board of Appeal and unless there are specific circumstances throwing doubt on the Board member's ability to approach the parties' submissions with an open mind on a later occasion there cannot be any objectively justified, i.e. reasonable suspicion of partiality against a

member of the Enlarged Board of Appeal within the meaning of Article 24(3), first sentence, EPC for the reason that a position on the matter was adopted in a prior decision of a Board of Appeal in which the Board member concerned had participated.

Moreover, on a practical level, if all members of the Enlarged Board of Appeal having once taken part in a decision of a Board of Appeal expressing a view on a point of law which is then referred to the Enlarged Board of Appeal were to be excluded from taking part in that referral, the Enlarged Board of Appeal's functioning would be severely affected. It could become impossible to allocate the required number of members of the Enlarged Board of Appeal to be able to conduct the case. This holds particularly true for referrals like the present ones concerning frequently occurring issues with which all Technical Boards of Appeal have to deal in a considerable number of cases.

Preconceived mind

28. In point 3.2 of his statement of 30 June 2006 Mr Y points out that by referring to decision T 797/02 decision T XXXX/XX did adopt the view that the invention or group of inventions defined in the claims of a divisional application determined the content of the divisional application per se for the purpose of Article 123(2) EPC. Mr Y does then, however, also further explain why the Board took this way of action.

As can be inferred from Mr Y's statement, and when reading the cited passage of decision T XXXX/XX in the overall context of the decision it may indeed be doubted whether the Board really can be seen to have adopted that position. It is clear from point 4. of the reasons that a decision on this issue was not at all necessary for the decision to be taken as the requested limitation fell within the scope of the claims of the divisional application as filed (and that there was basis for the limitation in the description). The amendment was, thus, allowable even on the basis of the defined stricter approach to amendments in divisional applications and it could be argued that that was the only matter the Board actually decided.

29. In his comment of 30 June 2006 on the objection raised against him Mr Y also refers to decision T XXXX/XX of ... in which he had taken part and in which the Board accepted a limitation of the claims as filed of a divisional application as a basis for remittal without the question as to whether or not this would appear to be allowable under Article 76(1) EPC having been addressed at all.

30. Decision T XXXX/XX to which the attention of the Enlarged Board of Appeal was also drawn by Mr Y is concerned with procedural problems arising from late filed amendments in appeal proceedings in situations in which multiple divisional applications are co-pending and does not deal with the issues put before the Enlarged Board of Appeal in the present referrals.

31. It is thus abundantly clear that – on an objective basis - there is nothing which could justify any suspicion that Mr Y could have any kind of preconceived attitude on the questions put to the Enlarged Board of Appeal by the present referrals and even less that he would have preconceived attitudes to such an extent that there could reasonably be any suspicion that he would not give full weight to all arguments raised in the matter.

32. Accordingly the objection against Mr Y must be rejected.

Order

For these reasons it is decided that:

1. Ms X is replaced by Mr Alting van Geusau.

2. The objection under Article 24(3) EPC against Mr Y is rejected.