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**Datasheet for the interlocutory decision
of the Enlarged Board of Appeal
of 20 March 2015**

Case Number: R 0008/13
Appeal Number: XXX
Application Number: XXX
Publication Number: XXX
IPC: XXX, XXX, XXX
Language of the proceedings: EN

Title of invention:
Controlled release oxycodone compositions

Patent Proprietors:
XXX

Opponent:
XXX

Headword:
-

Relevant legal provisions:

EPC Art. 10, 11, 23, 24
RPEBA Art. 4
ECHR Art. 6(1)

Keyword:

Lack of impartiality based on objective suspicion under
Article 24(3) and 6 ECHR ascertained facts [no] Existing
safeguard Article 23 EPC [yes]
Exclusion of the chairman objected [no]

Decisions cited:

G 0001/05, G 0003/08 of 16 October 2009 and G 0003/08 of
12 May 2010, R 0012/09, R 0019/12, R 0001/13

ECHR: Campbell and Fell v. the United Kingdom (No 7819/77, 7878/77); Cooper v. The United Kingdom (No 48843/99); Micallef v. Malta (No 17056/06); de Cubber v. Belgium (No 9186/80); Wettstein v. Switzerland (No 33958); Kleyen and others v. the Netherlands (No 39343/98, 39651/98, 43147/98, 46664/99); Pabla Ky v. Finland (No 47221/99); Levages Prestations Services v. France (No 21920/93); Steck-Risch and others v. Liechtenstein (63151/00); Savino and others v. Italie (No 17214/05, 20329/05, 42113/04); Kyprianou v. Cyprus (No 73757/01); Beaumartin v. France (No 15287/89); Sramek v. Austria (No 8790/79); Procola v. Luxembourg (No 14570/89); Rolf Gustafson v. Sweden (No 23196/94)

Catchword:

The potential conflicts intrinsic to the dual function of vice-president of the EPO Directorate-General 3 (VP3) and chairman of the Enlarged Board were perceived even prior to R 19/12 as is shown by the EPC's legislative history. They have been circumvented merely by means of specific organisational measures (points 6.2 and 6.3).

If a single individual in the form of VP3 has the dual role of safeguarding judicial independence and at the same time of exercising management authority, this can only be interpreted to mean - as shown by the EPC's legislative history and the application of the relevant provisions - that the requirement to safeguard independence must be taken into account when exercising such management authority. In other words, Article 23 EPC limits the President's power to give instructions under Article 10(2)(f) EPC to the Enlarged Board's chairman in his capacity of VP3. Article 23 EPC can only be seen as the means to counter any influence the EPO executive might seek to exert on VP3 under Article 10(2)(f) and (3) EPC (point 6.5)

In the circumstances of the present case and in view of VP3's restricted duties, there are no ascertainable facts giving objective cause to believe that Article 23 EPC can no longer fulfil its safeguard role vis-à-vis Article 10(2)(f) and (3) EPC when acting in his judicial function (point 7.2).

Whether the current organisational structure remains the most appropriate one is for EPO legislator to decide (points 3.5 and 7.3).



Case Number: R 0008/13

I N T E R L O C U T O R Y D E C I S I O N
of the Enlarged Board of Appeal
of 20 March 2015

Petitioners: N.N.
(Patent Proprietors)

Representative: N.N.

Respondent: N.N.
(Opponent 01)

Representative: N.N.

Decision under review: Decision of the Technical Board of Appeal XXX
of the European Patent Office of XXX.

Composition of the Board:

Chairman: G. Weiss
Members: M.-B. Tardo-Dino
M. Vogel
E. Dufrasne
M. Poock

Summary of Facts and Submissions

Background to the objection based on suspicion of partiality

- I. A petition for review was filed by the patent proprietors against decision XXX of Technical Board of Appeal XXX dismissing their appeal against the decision of the opposition division maintaining European patent No. XXX in amended form.
- II. At the end of oral proceedings held on 24 March 2014, the Enlarged Board, in three-member composition, decided to submit the petition to a five-member board in compliance with Rule 109(2)(b) EPC and Article 17 of Rules of Procedure of the Enlarged Board of Appeal (RPEBA).
- III. Prior to the oral proceedings before the Enlarged Board in its five-member composition, the petitioners, by letter dated 2 June 2014, filed further submissions in support of their petition and, on pages 12 and 13 of those submissions, stated with reference to R 19/12 that: "In any event as an auxiliary measure and in order to safeguard the rights of the petitioners-patentees and not to be precluded in other proceedings, we herewith object to the chairman of the current composition of the Enlarged Board of Appeal in this case for suspicion of partiality in line with the reasoning of R 19/12".
- IV. The chairman thus objected to was replaced by his alternate in accordance with Article 24(4) EPC and invited under Article 4(2) RPEBA to present his comments as to whether there were grounds for excluding

him. His comments dated 28 July 2014 were sent to the parties on 13 August 2014 and a one-month time limit was set for their comments.

V. On 10 September 2014 the petitioners filed further submissions in reaction to the comments of the chairman objected to and expressly requested that he be excluded under Article 24 EPC.

VI. Oral proceedings were held on 10 October 2014. The Enlarged Board decided that they would not be public in compliance with Article 116(4) EPC to protect the personal rights of the person concerned and because the debate revolved around documents relating to objections to the chairman of the Enlarged Board of Appeal which Rule 144(a) EPC excluded from inspection under Article 128(4) EPC.

VII. At the end of the oral proceedings the chairman closed the debate and after deliberation announced that the decision would be issued in writing after final deliberation by the Enlarged Board and that no further submissions were possible.

VIII. *The comments of the chairman objected to are summarised as follows:*

- The petitioners' partiality objection boiled down to a mere reference to R 19/12 and therefore was not properly substantiated.
- With respect to the ground which in R 19/12 had been considered to justify the suspicion of partiality, namely the participation of Vice-

President 3 (hereinafter "VP3") in administrative bodies, namely the General Advisory Committee (hereinafter "GAC") and, as from 1 July 2014, its successor body, namely the General Consultative Committee (hereinafter "GCC"), as well as the Management Committee (hereinafter "MAC"), the chairman objected to had, in the aftermath of R 19/12, been informed in writing by the President of the Office of the following decision dated 23 May 2014:

- "Not to nominate Mr. X to the General Consultative Committee established by decision of the Administrative Council CA/D2/14.
- With immediate effect, Mr. X will not be called upon to exercise any function connected with the General Advisory Committee.
- With immediate effect Mr. X will not participate in any further MAC meeting as member. Participation as observer for points of discussion with a direct bearing on the boards of appeal and its support services is not excluded".
- Therefore, the managerial activities which, in the view of the Enlarged Board in R 19/12, had led to a suspicion of partiality had been discontinued.
- The present case also differed from R 19/12 in that there was no alleged procedural violation by

the first instance giving rise to a suspicion of partiality linked to his former managerial function inside the EPO.

- He was "... not aware of any pressure...to sacrifice the right of a petitioner for review to a fair procedure and respect for his right to be heard, in order to achieve efficiency goals set by the management of the office or for any other reason".

 - As regards the reasoning of the Enlarged Board in R 19/12, (Reasons 17.2-17.4) based on the possibility of receiving "Weisungen" (instructions), he declared that he was not aware of any such "Weisungen des Amtspräsidenten" (instructions from the President of the Office) or of any resulting "Interessenkonflikt" (conflict of interests).
- IX. The chairman objected to stated that the Enlarged Board was free to quote his comments in its decision, if it so wished, and thus make them available to the public.
- X. *The petitioners' written submissions and their arguments presented at the oral proceedings are summarised as follows:*
- As to the possible inadmissibility of their objection as insufficiently substantiated:***
- (a) The conclusions drawn in R 19/12 were in fact of such a general nature that there was no necessity to further substantiate the objection of

partiality directed at VP3/ the chairman of the Enlarged Board. It was clear from R 19/12 that the reasoning based on the dual function was of a general nature and not connected to any particular case or party; it went far beyond the factual context of the case, was unrelated to any personal partiality and raised the core issue of the structure of the EPO.

- (b) The petitioners argued that "the debate is about the structure of the EPO, i.e. the implementation of the boards of appeal within the EPO as DG3, the obligations of VP3 resulting from the EPC (Article 10(2)(f) and Article 10(3) EPC) and the dual function of the member objected to as chairman of the EBA and VP3" (point 2.1 of their submissions of 10 September 2014).

In fact, R 19/12 applied to all petition proceedings involving the chairman objected to and to all his judicial activities, because it was structurally impossible for him to be independent.

As to the grounds for suspicion of partiality:

- (c) In the petitioners' view, the EPO's legal system was subject as a matter of principle to the European Convention on Human Rights (ECHR), and in particular to Article 6(1) guaranteeing access to an impartial tribunal. This, they said, implied that there could be no administrative activity or hierarchical link between the judiciary and the executive. They referred in

this respect, to decisions of the European Court for Human Rights (ECtHR), e.g, *Sramek v. Austria*, No 8790/79 of 2 October 1984; *Beaumartin v. France*, No 15287/89 of 14 November 1994; and *Kyprianou v. Cyprus*, No 73797/01 of 15 December 2005.

- (d) Decision R 19/12 had been a turning point, revealing practices within the EPO of which the public was unaware. As a result the public had lost confidence in the system, and the decision of the President was not enough to restore it. Nor would it be enough for the Enlarged Board to take a decision in this present case which limited the grounds for suspecting the chairman objected to of partiality to those highlighted in R 19/12, namely his participation in the MAC and the GAC/GCC, the bodies from which the President's decision had removed him, because R 19/12 had drawn attention to that participation "in particular" ("inbesondere").

The conclusion reached in R 19/12 was not based solely on the fact that VP3 had taken part in the MAC and the GAC/GCC. In that decision, the Enlarged Board had presented a far-reaching analysis that pointed to a potential conflict of interest arising from his dual function as VP3 and chairman of the Enlarged Board. This situation had been aggravated by the introduction of the petition for review. The case law in review proceedings, which had developed considerably during the term of office of the chairman objected to was perceived as restrictive.

In this respect in support of their complaint the petitioners referred to the comments made on decision R 01/13, and to the cases brought before national courts, particularly the German Constitutional Court, calling into question the EPO's legal system, especially the petition for review procedure. In this context they made clear that the basic problem was not VP3's bias but his dual function as VP and chairman of the Enlarged Board, which disqualified him *a priori* as a suitable judge.

- (e) The petitioners pointed out that the independence of the EPO's judiciary was also an issue in the case brought before the Court of Justice of the European Union (CJEU) by the Kingdom of Spain against the European Parliament and the EU Council challenging Regulation 1257/2012. That the EPO's judiciary was not itself subject to control by higher courts was seen as an obstacle to introducing the unitary patent.
- (f) They also referred to the Sedemund-Treiber report, which had analysed the EPO judiciary's structural organisation and recommended amending the EPC to give it greater independence. It was the basis for a proposal, submitted to the Administrative Council, to revise the EPC so as to separate the EPO judicial and executive branches.
- (g) The President's decision dated 23 May 2014 had discontinued some of VP3's managerial activities for an unspecified time but had not resolved the basic problem, namely that under Article 10(2)(f)

and (3) EPC the chairman of the Enlarged Board, in his capacity as VP3, still had to assist the President. The chairman objected to was involved in Office management at a high level, and that was reason enough to have to replace him. The petitioners did not know what the precise tasks of VP3 were, but parties should not be burdened with practices that were not transparent.

- (h) In a way, the fact that it was the President who had decided, rather than VP3 who had stepped down, offered little guarantee for the future and showed VP3's insufficient distance from the management and his lack of independence. It demonstrated in fact that VP3 followed the President's instructions. The petitioners even saw the President's decision as an expansion of his power over the judiciary. They did not know the details of the new arrangement, but feared it could further undermine the judiciary's independence.
- (i) The situation in the current case remained the same as in R 19/12 because when the current proceedings began VP3 had still been serving on the two administrative committees. If the Enlarged Board were to come to a different conclusion than in R 19/12, its composition would be open to intolerable manipulation by the President.

In this respect, in Annex I of their submissions of 10 September 2014, the petitioners analysed, by reference to the German Constitution, the necessary requirements for a lawful judge and

pointed out the deficiencies they saw in the EPO structure, where the members of the boards of appeal were employees dependent on the President's decisions for their appointment and re-appointment. The steps taken by the President in response to R 19/12 were one-off measures which could not "heal" the constructional defects for the cases filed with the Enlarged Board so far. These measures were like changing the competent judge, for no factual reason, after a case had been filed with a court.

(j) The petitioners also contended that reference to previous practice was irrelevant, because it was not true that VP3 had always also chaired the Enlarged Board and a customary practice could not become customary law.

(k) The petitioners concluded that nothing in the comments of the chairman objected to removed the need to replace him; any other decision would be in direct conflict with R 19/12. If the Enlarged Board did not take the same line in the current case, in which the context and material facts were essentially the same, this would lead to conflicting decisions at the highest level, endangering legal certainty and generating a loss of trust in the judiciary. Confidence could only be restored if the chairman of the Enlarged Board stepped down as VP3.

XI. In a letter dated 12 December 2014, the petitioners explained that they had come across a letter addressed by the members of the Enlarged Board to the

Administrative Council and to external members of the Enlarged Board, concerning the house ban imposed earlier that month by the President of the EPO on a member of the boards of appeal, and that had also triggered reactions on the part of external members of the Enlarged Board. The petitioners submitted that the fact that the chairman objected to had not been amongst those expressing their concerns about the President's disciplinary action against a member of the boards of appeal reinforced the validity of the statement in R 19/12 that the chairman's position as VP3 was in conflict with his role as an independent judge; the petitioners found it unacceptable that their case might be decided by a judge who, having maintained his position as VP3 after R 19/12 was issued, conveyed an impression to the public that he was not willing to show the necessary distance from a President who obviously did not respect the independence of the judiciary. It was incomprehensible to them how it could be argued that the impartiality of the chairman objected to was not open to at least the appearance of doubts.

XII. By a letter dated 11 February 2015 the petitioners sent to the Enlarged Board five new documents consisting of letters and articles.

XIII. By a letter dated 4 March 2015 the petitioners addressed to the Enlarged Board additional remarks in reaction to decision R 02/14 issued on 17 February 2015.

Reasons for the Decision

1. The admissibility of the objection as insufficiently substantiated

Although the petitioners first submitted the objection as a precautionary measure aimed at safeguarding their future rights, they also invited the Enlarged Board to verify that its composition was lawful under Article 4(1) RPEBA, which provides that "if the Board itself has knowledge of a possible reason for exclusion or objection which does not originate from the member himself or from any party to the proceedings, the procedure under Article 24(4) EPC shall be applied" (in line with interlocutory decision G 03/08 of 16 October 2009, point 1.2 of the Reasons).

Against the background of R 19/12, which *de facto* instilled doubts in the public's mind about the impartiality of its chairman, the Enlarged Board finds it necessary to ascertain whether in the present case there are objective reasons justifying a suspicion of partiality against VP3 in his function as chairman of the Enlarged Board, under Article 4 RPEBA (G 02/08 of 15 June 2009, point 2 of the Reasons).

2. The principles to be applied

- 2.1 In support of their objection of suspected partiality under Article 24(3) EPC, the petitioners refer to R 19/12, and therefore rely considerably on the requirements of the European Convention on Human Rights (hereinafter "ECHR"), especially its Article 6(1), which apply to the present case.

- 2.2 It is true that the European Commission of Human Rights stated in *Lenzing v. Germany*, 9 September 1998 No. 39025/97 that as the EPO was not a party to the ECHR the Commission had no competence *ratione materiae* to examine, under Article 6 ECHR, the proceedings it conducted or the decisions it took. However, it is undisputed and established case law of the Enlarged Board of Appeal, that the EPC, which was signed by contracting parties to the ECHR, must be applied in a way which supports the fundamental principles of Article 6(1) ECHR (G 01/05, OJ EPO 2007, 362, point 22 of the Reasons; G 02/08 above cited, point 3.3 of the Reasons).
- 2.3 Furthermore the Enlarged Board falls within the definition laid down by the European Court of Human Rights (hereinafter "ECtHR") in *Campbell and Fell v. the United Kingdom* (28 June 1984, No 7819/77, paragraph 76): "the word "Tribunal" in Article 6 paragraph 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country". A tribunal may also be set up to deal with specific subject-matter which can be appropriately administered outside the ordinary court system. What is important, to ensure compliance with Article 6(1) ECHR, are the guarantees, both substantive and procedural, which are in place (*ECtHR, Rolf Gustafson v. Sweden*, 1 July 1997, No. 23196/94, paragraph 45).
- 2.4 Determining impartiality within the meaning of Article 24(3) and (4) EPC in the case law developed by the Enlarged Board and the boards of appeal in line

with the case law developed by the ECtHR under Article 6(1) ECHR, means applying a subjective test with regard to the personal convictions and behaviour of a particular judge in a given case, and also an objective test to ascertain whether the judge offers sufficient guarantees to exclude any legitimate doubt about his impartiality. In this connection, the standpoint of the person concerned is important without being decisive (ECtHR *Cooper v. the United Kingdom*, 16 December 2003 No. 48843/99, paragraph 104; *Micallef v. Malta*, application, 15 October 2009 No. 17056/06 paragraphs 93 to 97; Enlarged Board of Appeal G 01/05 above cited, points 19 ff. of the Reasons; G 02/08 above cited, point 3.3 of the Reasons). This is illustrated by the oft-quoted aphorism that "justice must not only be done but must also be seen to be done" (ECtHR *De Cubber v. Belgium*, 26 October 1984, No. 9186/80, paragraph 26 (criminal case); *Micallef v. Malta* (civil case), above cited paragraph 98).

3. **The scope of the request based on suspected partiality:
legal framework**

3.1 In the first place, the Enlarged Board does not accept the petitioners' view that R 19/12 is a general ruling binding on the Enlarged Board in the current case as well as in all petition proceedings that include the chairman objected to on the ground that he is structurally insufficiently independent. Nor does the Enlarged Board agree with the petitioners that its sole choice here is either "following or contradicting R 19/12". That particular ruling, like any judicial decision, was necessarily based on an evaluation of the particular circumstances underlying the case in point.

There is no legal basis for taking the findings of one decision and applying them to a different case without also considering the facts and circumstances of the case at issue.

- 3.2 Furthermore, according to ECtHR case law, when assessing compliance with Article 6(1)ECHR the task is to decide in each individual case whether the relationship, i.e. in the present case, VP3's hierarchical link with the EPO executive and the possible conflict of interests arising from his duality of functions as VP3 and chairman of the Enlarged Board of Appeal, is of such a nature and degree as to indicate a lack of impartiality on the part of the person objected to (*Micallef v. Malta* above cited, paragraph 97 and 102).

Consequently, the Enlarged Board does not accept the petitioners' submissions, that R 19/12 has definitively established that the public, on an objective basis, can no longer have any confidence in an Enlarged Board chaired by VP3.

- 3.3 Rather the Enlarged Board will consider the petitioners' arguments based on their interpretation of R 19/12 and the conclusions they draw from that decision - which as shown below boils down to a reliance on its contents - in the light of the established facts underlying the present case.

- 3.4 That is also the standard approach of the ECtHR, which in *Kleyn and Others v. the Netherlands* (6 May 2003 No. 39343/98, 39651/98, 43147/98, 46664/99, paragraphs 197 and 198), for instance, in reviewing a tribunal's

impartiality expressly took into account the changes made by the state to rectify deficiencies highlighted in a previous similar case (*ECtHR Procola v. Luxembourg* 28 September 1995, No. 14570/89).

- 3.5 Furthermore, the Enlarged Board has to make a clear distinction between factual circumstances entailing a risk of objective partiality on the part of the chairman objected to and the petitioners' general arguments based on alleged structural flaws of the boards of appeal, combined with the development of the case law on petitions for review and the potential for VP3's dual function to give rise to pressure exerted by the EPO's administration on the case law.

Indeed, this very broad approach (see X (b) above) defining the subject-matter of the debate as encompassing the structure of the EPO judiciary, is aimed, as the petitioners explain, at triggering the convening of a diplomatic conference to enact structural reforms of the EPO's judicial system, which are necessary in the petitioners' view to implement the principle of the separation of powers as already set out in the Sedemund-Treiber report, submitted to the Administrative Council in CA/46/04.

However, this aim goes not only beyond the scope of the pending request but also beyond the function of the Enlarged Board, which - as will be explained in more detail below - is to apply the EPC to the existing facts at hand in line with other binding law such as the ECHR.

3.6 According to the ECtHR, neither Article 6(1) ECHR nor any other provision of the ECHR requires contracting states to comply with any theoretical constitutional concepts regarding the permissible limits of the interaction between separate powers (*Kleyn and Others v. the Netherlands*, above cited, paragraphs 193 and 198). That means analysing a situation case by case, not ruling in the abstract. The ECtHR's task is to determine whether the contracting states have achieved the result called for by the ECHR, not to indicate the particular means to be utilised; that is *mutatis mutandis* the Enlarged Board's task in the present case, in the exercise of its judicial function, with respect to the application of the EPC.

3.7 In addition general arguments based on an alleged structural weakness of the EPO's judicial system were not considered in R 19/12 to be a direct reason for suspicion; rather, they were regarded as aggravating the risk linked to VP3's involvement in specific management bodies. Accordingly, the Enlarged Board will follow ECtHR case law to the effect that when assessing compliance with Article 6(1) ECHR the task is not to rule in the abstract on the compatibility with the ECHR of the legal system concerned (i.e. in this case, that of the EPO) (*Kleyn and Others v. the Netherlands* already above cited, paragraph 198); rather, the examination should be confined to the case at hand (*Steck-Risch and Others v. Liechtenstein*, 19 May 2005, No. 63151/00 paragraphs 39 and 46) and to a careful scrutiny of its specific circumstances (*Wettstein v. Switzerland*, 21 March 2001, No. 33958/96, paragraph 41).

3.8 The petitioners also referred to the case (C-146/13) brought by the Kingdom of Spain against the European Parliament and the Council of the European Union. Spain requests that EU Regulation No. 1257/012 implementing enhanced cooperation on the unitary patent be declared void or set aside in its entirety. One of the grounds put forward (paragraph 27 of the conclusions of the Advocate General of 18 November 2014) is that the regulation is in breach of the values of the rule of law because it establishes a set of rules based on a right granted by the EPO, whose actions are not subject to judicial review. The Enlarged Board is also aware of other complaints brought before national courts contending that the current EPO judicial system and in particular the petition for review procedure, infringes human rights.

3.9 The Enlarged Board understands the petitioners to be citing these cases to convince it that there is a serious breach of Article 6(1) ECHR which would justify a decision going beyond the facts of the present case alone, but, which is not, as already explained above in point 3.5, within the jurisdiction of the Enlarged Board. Rather, it is a matter for the legislator. In any event, all the cases referred to are pending, and so far, the Enlarged Board is not aware of any national or European court decision denying the EPO's existing judicial system its capacity of fulfilling independently its judicial activity.

4. **The circumstances of the present case: the factual framework**

4.1 Turning now to the circumstances of the present case, the petitioners have made it clear that they had no subjective suspicion of the chairman objected to, merely an objective suspicion linked to the fact that the chairman of the Enlarged Board was also VP3 and that this duality of functions was incompatible with his independence and impartiality as chairman of the Enlarged Board. They emphasise that all conflicts of interest mentioned in R 19/12 were potential and have not materialised. They argue that, according to R 19/12, the mere possibility that such a conflict might arise is sufficient to consider the objection of suspicion of partiality to be justified.

4.2 However, it is not true that the Enlarged Board took decision R 19/12 irrespective of the facts of the case. Its decision, on the contrary, is based on a particular factual situation. The decisive objective circumstances which, in the view of the Enlarged Board in R 19/12, created an impression of lack of independence and impartiality for an objective observer were that the chairman of the Enlarged Board was involved, in his simultaneous function as VP3, in two administrative bodies (MAC and GAC/GCC), whereas the specific structural organisation of the boards of appeal as embedded within the EPO, requires, on the contrary, as little involvement in management as possible (R 19/12 above cited point 17.7, 23 and 24.2 of the Reasons).

4.3 The fact is that, following the decision of the President of the EPO dated 23 May 2014 (see point VIII

above, the situation of VP3 has now reverted to one similar to that prevailing prior to his appointment to the above-mentioned bodies.

- 4.4 The petitioners argued that they learnt of this new situation only from the statement of the chairman objected to. However, the mere fact that the decision discharging VP3 from his tasks in the two administrative bodies found in R 19/12 to be incompatible with his duties as chairman of the Enlarged Board was not made public does not suffice *per se* to cast doubt on the reality of the situation as reported by the chairman objected to.

A statement made by the highest representative of the EPO judiciary in the exercise of his function can be expected to enjoy great credit which cannot convincingly be called into question by a mere assertion from the petitioners.

- 4.5 Contrary to the petitioners' suppositions, the Enlarged Board is not aware of any involvement on the part of VP3 in EPO management bodies - which is limited to attending MAC meetings as an observer for matters with a direct bearing on the boards of appeal - which would justify an examination under Article 4(1) RPEBA.

- 4.6 That is in line with restricting VP3's role to the management of the boards of appeal, just like the presiding judge of a court who is also involved in its administration.

- 4.7 As already stated in points 3.1 to 3.5 above, the Enlarged Board cannot accept the petitioners' position

that their case is to be seen in the broader context of a general challenge to the structure of the EPO, i.e. the absolute assumption that VP3's obligations under the EPC (Article 10(2) (f) and (3)) EPC in the specific context of the EPO structure put him in a hierarchical position which necessarily creates the potential impression that his independence as chairman of the Enlarged Board is impaired and he is rendered unable to maintain the required distance from the administration whose decisions he has to review, regardless of the specific circumstances of a case.

4.8 To paraphrase the wording usually used by the ECtHR in the cases mentioned in point 3.4 above, the issue is therefore, whether or not, in respect of the present petition for review, the Enlarged Board chaired by a VP3 now discharged from his duties in the MAC and GAC/GCC is compatible with Article 6(1) ECHR, and not whether this situation complies with some theoretical judicial model.

4.9 In performing this analysis, one of the relevant criteria applied by the ECtHR is the existence of safeguards against outside pressures (*ECtHR Pabla KY v. Finland*, 22 September 2004, No. 47221/99 paragraph 26). This is the Enlarged Board's approach in the following analysis.

5. **The Enlarged Board's analysis**

5.1 First of all the petitioners are right to say that the EPC makes no provision for a duality of functions. Article 22(2), last sentence, EPC says that in all proceedings of the Enlarged Board a legally qualified

member must be the chairman. It does not specify any particular one. But no conclusion can be drawn from this wording: if the duality of functions has no root in the EPC, at least it is not precluded.

5.2 It is also true that for a while the two functions of VP3 and chairman of the Enlarged Board were separate. But again the only question is whether this dual function, in the present circumstances, is detrimental to the EPC provisions (Article 23 EPC) and incompatible with the requirement of the objective impartiality of a tribunal under Article 6(1) ECHR (see above points 3.4 and 3.6 and *ECtHR Kleyn and others v. The Netherlands above cited paragraph 198*).

5.3 Turning to the possible safeguards mentioned above (see point 4.9), considerable information can be derived from the legislative history of the Enlarged Board and the boards of appeal.

5.3.1 The EPC as designed in 1969 was to be open to multiple European states, irrespective of whether they were members of the European Economic Community (now European Union). That meant that the EPO's second-instance decisions could not be reviewed by a court within the EEC institutions. The Luxembourg Intergovernmental Conference drafting the EPC therefore decided in 1972 not to create an independent European patent court - partly for cost reasons, but also to avoid fragmentation of international courts and to make it easier to set up a European IP court later on. It was however intended to put in place, within the EPO, a quasi-judicial second instance. On the basis of the relevant provisions from the 1962 preliminary draft,

the conference sought to frame this instance's organisation and procedures in such a way that the boards of appeal and the Enlarged Board would correspond to the German constitution's concept of a judicial body (Singer, *Das neue europäische Patentsystem, Baden-Baden 1979*, page 81. Also Teschemacher, "*Die Entstehungsgeschichte des Bundespatentgerichts - ein Lehrstück für die Beschwerdekammern des Europäischen Patentamts ?*" in *Festschrift zum 50-jährigen Bestehen des Bundespatentgerichts*, page 911).

5.3.2 To ensure clear separation of powers, under Article 11(3), first sentence, EPC the members and chairman of the Enlarged Board of Appeal are appointed by the Administrative Council on a proposal from the President of the EPO. So are the members of the boards of appeal. Article 23 EPC ("Independence of the members of the Boards") lays down provisions for their appointment, stipulating that they cannot normally be removed from office and that they are not bound by any instructions. That is a *sine qua non* for performing a judicial function and clearly sets the Enlarged Board's members and chairman apart from other EPO staff, including the vice-presidents, who are subject to the President's supervisory authority under Article 10(2)(f) EPC.

5.4 The same principles are reflected in the EPC's Implementing Regulations: the Presidium under Rule 12, for example, can exercise management functions only if it does not impinge on board members' independence and freedom from instructions as guaranteed in the Convention. Similarly, the Enlarged Board, presided

over by its chairman (not VP 3) adopts its own rules of procedure and annual business distribution scheme (Rule 13 EPC). Special provisions relating to the quasi-judicial status of the Enlarged Board, its chairman and boards of appeal members are also laid down in the EPO's Service Regulations (e.g. their Articles 1(4), 15, 20(2), third sentence, and 41). In other words, the EPO's derived legislation contains suitably explicit rules confirming that the members of the boards of appeal, and the members and chairman of the Enlarged Board, enjoy the "independence" necessary in their judiciary function.

- 5.5 This structure of the boards of appeal under the EPC has, however, been open to criticism on the grounds that the independence enshrined in Article 23 EPC is only functional and cannot be complete so long as the judiciary is embedded in the Office (*Sedemund-Treiber report above cited* and cases referred to by the petitioners brought before national courts to protest against the lack of independence). However, as stated in R 19/12, only the EPO legislator has the power to make the necessary amendments, in particular through a diplomatic conference revising the EPC. Therefore the reality has been that the independence of the members basically relies on the binding character of Article 23 EPC.

6. The potential for conflicts of interest caused by the dual function

- 6.1 As things stand, the serving VP 3 also acts as chairman of the Enlarged Board.

6.1.1 As VP 3, he is appointed by the Administrative Council after the EPO President has been consulted (Article 11(1) EPC). In this function, he is in charge of Directorate-General 3 (DG 3, "Appeals", Rule 9 EPC) and assists the President (Article 10(3) EPC) and is subject to instructions from the EPO President (Article 10(2)(f) and 10(3) EPC).

6.1.2 As chairman of the Enlarged Board, he is appointed by the Council on a proposal from the President (Article 11(3) EPC).

In this function, he enjoys the independence enshrined in Article 23 EPC and is subject only to the EPC provisions.

In both of his functions, his disciplinary authority is the Administrative Council.

6.2 The potential conflicts intrinsic to this dual function were perceived even prior to R 19/12 as is shown by the EPC's legislative history. They have been circumvented merely by means of specific organisational measures.

6.2.1 This is exemplified by various decisions and implementing provisions reflecting VP3's special status as head of the organisational unit DG3 ("Appeals").

6.2.2 For instance, VP3 is expressly excluded from deputising for the President of the EPO. According to the decision of the Administrative Council of 6 July 1978, (OJ EPO 1978, 326) implemented by the established rules (ServRegs-Rules on deputising for the President Codex 1a, updated November 2014), "The substitute for the President ... shall be the longest-serving Vice-President Directorate-General 2, 4, or 5 who is present in Munich

at the relevant time". VP3 is absent from that list. The explanatory document CA/3/78 of 7 February 1978 submitted to the Administrative Council at the time was clear: "... nor the Vice-President of Directorate-General 3, in view of the independence which that Directorate - General is required to observe, could deputise for the President".

- 6.3 This dual-role issue was also analysed by former EPO President Paul Braendli in the *Münchner Gemeinschaftskommentar*" 24. Lieferung, March 2000 Art.11 EPC.

Braendli pointed out that, if two functions (VP3 and Enlarged Board chairman) are exercised by one and the same person whose appointment by the Administrative Council is subject to differing conditions and procedures (see above points 6.1.1 and 6.1.2), this raises the issue of which of the two procedures takes the precedence. Braendli concluded that... "the only way to solve this conflict..., is for the Administrative Council to appoint the President's proposed candidate first of all as EBoA chairperson and then, in a second step, as VP3... Another justification for this solution is that the EBoA chairperson's function as the most senior representative of the judicial bodies at the EPO is of more fundamental legal importance. It takes precedence over VP3's function of assisting the President in managerial activities (Article 10(3) EPC) which is in any case limited in scope by the judicial independence the VP enjoys as chairperson (Article 23 EPC)" (*Münchner Gemeinschaftskommentar*" above cited, points 36 and 37, translated from German).

6.4 The Enlarged Board can only confirm that within the legal structure enshrined in the EPC. The EPO's administrative and executive authorities have consistently tried until a recent past to discharge VP3 from tasks which might not be compatible with his status of head of the judiciary i.e. reduce the scope of application of Article 10(3) EPC which should make it apparent that the function of chairman of the Enlarged Board of Appeal prevailed over the VP3 function, so that in his function as chairman of the Enlarged Board he could enjoy the functional independence guaranteed by Article 23 EPC.

6.5 From the above it can also be concluded that, if a single individual, in the form of VP3, has the dual role of safeguarding judicial independence and at the same time of exercising management authority, this can only be interpreted to mean - as is shown by the EPC's legislative history and the application of the relevant EPC provisions - that the requirement to safeguard independence must be taken into account when exercising such management authority. In other words, Article 23 EPC limits the President's power to give instructions under Article 10(2)(f) EPC to the Enlarged Board's chairman in his capacity of VP3. Article 23 EPC can only be seen as the means to counter any influence the EPO Executive might seek to exert on VP3 under Article 10(2)(f) and (3) EPC.

6.6 As shown above, the balance achieved within this structure, had been considered, several times prior to R 19/12, as being sufficient to ensure that independence and thus the users' confidence in the EPO

- judiciary (e.g., G 03/08 of 12 May 2010, point 7.2.1 of the Reasons, OJ EPO 2011, 10).
- 6.7 The only petition for review case the Enlarged Board is aware of in which an objection based on suspected partiality (other than for subjective reason) was raised is R 09/12 of 3 December 2009, which, precisely was not chaired by the chairman of the Enlarged Board and where all three members were objected to, on the grounds that they were at the same time members of a technical board or the Legal Board and therefore might have an interest in the case. The Enlarged Board is not aware of any challenge to the chairman of the Enlarged Board in review proceedings prior to R 19/12.
- 6.8 National decisions have also expressed this confidence, for example Lenzing AG's European Patent (UK) [1997] R.P.C. 45. The latter decision was referred to the ECtHR which underlined the guarantees offered by the EPO system, in particular through Article 23 EPC.
- 6.9 In R 19/12 the Enlarged Board judged that the operational balance achieved between the judicial body and the administrative interface of VP3, which maintained the necessary distance from the EPO's executive and enabled the Enlarged Board to carry out its tasks in full independence, had been disrupted by VP3's participation in the MAC and the GAC/GCC.
7. **The situation in the present case**
- 7.1 VP3's present situation has changed from the one prevailing under R 19/12 as a result of the termination of his active involvement in the MAC and the GAC/GCC.

In this situation the safeguards of judicial independence, referred to above, are no longer jeopardised. What remains is the argument that the dual function of VP3 and chairman of the Enlarged Board within the EPO judiciary body is at odds with the principle of separation of powers, which, as is implicit throughout the petition, is the real issue behind the objection of partiality.

- 7.2 The petitioners argued that the case started under the former organisational arrangement and therefore the situation of conflict of interests remains the same as in R 19/12. The Enlarged Board cannot accept this argument.

Firstly this argument is no longer related to the factual situation but to the person, who is suspected of not being able to be as independent as were his predecessors in the same situation in the past. As already mentioned above, the Enlarged Board has no reason not to believe the statements of the chairman objected to.

Secondly, while the standpoint of the petitioners is important, it is not necessarily the standpoint of an objective observer. It appears to a neutral observer that the function of VP3, freed from the administrative tasks found incompatible in R 19/12, is now basically restricted to the administration of DG3. Those are the only established facts of which the Enlarged Board is aware. Under these circumstances, the conditions are again met for Article 23 EPC to fulfil its safeguard role vis-à-vis Article 10(2)(f) and (3) EPC for VP3 when acting in his judicial function.

7.3 It follows from the above that, also bearing in mind ECtHR case law, the mere fact that a judicial organisation includes a dual function which does not happen to coincide with a specific conceptual model of the separation of powers does not mean that it necessarily infringes Article 6(1) ECHR. Thus, the dual function does not in itself give rise to suspicion of partiality and cannot justify excluding the chairman objected to. Whether this organisational arrangement, chosen by the EPO administrative and executive authorities, remains the most appropriate after R 19/12, is not for the Enlarged Board to decide (*Kleyn and others v. the Netherlands* above cited paragraph 198).

7.4 It remains to be ascertained whether, in the present case, as argued by the petitioners, there are other specific elements linked to this dual function, apart from the structural organisation of the EPO which could give an objective observer an impression of partiality or lack of independence.

8. The petition for review procedure as an aggravating cause of the risk of partiality

8.1 In this respect the petitioners argued that the hierarchical subordination of the chairman to the EPO executive has influenced the case law on petitions for review, and especially on the board's application of Article 12 RPBA, in a way which serves the EPO's interests but is detrimental to the parties (R 01/13 of 17 June 2013 was cited). They further contended that the increased procedural stringency apparent during the

present VP3's term of office reflected implementation of the management policy of the EPO executive.

- 8.2 The Enlarged Board does not consider that these contentions have established the specific elements referred to in point 7.4 above, i.e. ascertainable facts giving rise to an apparent lack of independence entailing lack of impartiality resulting from a conflict of interests. It takes this view for the following reasons.
- 8.2.1 The endorsement or rejection of any procedural trends is immaterial for the present case. Rather, the Enlarged Board refers to the proposal to amend the Rules of Procedure of the Boards of Appeal which the Presidium, an autonomous authority within the Boards of Appeal - the presidium members apart from its chairman are elected by all members and chairmen of the Boards (Rule 12 EPC) - has adopted and submitted to the Administrative Council as CA/133/02. It is clear that when drawing up these revised rules of procedure the boards of appeal themselves took steps to streamline their proceedings. The initiative for these procedural amendments has not been ascribed to VP3.
- 8.2.2 Therefore, contrary to the petitioners' contentions, there is no objective reason to believe that the alleged increased procedural stringency is necessarily rooted in managerial concerns of the EPO's executive; it would instead appear that at a certain point in time the EPO's judiciary, like any other court of justice, simply needed to take measures to streamline the appeal proceedings.

8.2.3 Similarly, the legislator's intention in introducing the petition for review procedure was also clear. (*Travaux préparatoires* for Article 112a EPC, CA/PL 17/00; CA/PL PV 13, points 65-70; CA/PL PV 14, points 112-117; CA 100/00, pages 133-142; CA/124/00 point 9; CA/125/00, points 25-32; MR/2/00, pages 137-146; MR/8/00, MR10/00; MR/21/00 pages 91-93 OJ EPO 2007, special edition No 4, especially comment 5 on page 126). This procedure should not be seen as a means to streamline the boards' case law, but as an exceptional means to remedy "intolerable deficiencies occurring in individual appeal proceedings" (comment 5).

9. Nor can the Enlarged Board accept the petitioners' arguments that the decision of 23 May 2014 is detrimental to the concept of "*lawful judge*" and fails to remove the possibility that the dual function may lead to undue influence being exerted. The Enlarged Board is also of the opinion that cases must be allocated to judges according to objective rules and criteria known in advance. That is the rule and practice followed in the Enlarged Board (the business distribution scheme and the RPEBA rules for replacing a member).

10. As to the other arguments namely that the chairman objected to should have stepped down of his own motion, and that the fact that it was the EPO's President who took the measure implied that he can change it at any time, the only established fact is that the particular situation which might have created an impression of lack of independence and impartiality no longer exists.

11. **The ECtHR case law cited by the petitioners**

The present case is not comparable to the cases cited by the petitioners.

- 11.1 In *Beaumartin v. France* (24 November 1994, No. 15287/89) the court (Conseil d'état) which was called upon to take a decision on the basis of an international agreement asked the Minister for Foreign Affairs for an interpretation of an unclear clause in the agreement, and found that this interpretation by the executive was binding on the court.
- 11.2 In *Sramek v. Austria* (22 October 1984, No. 8790/79) one of the members of the Constitutional Court was the subordinate of the transaction officer representing one of the adversarial parties of the claimant Sramek.
- 11.3 In *Kyprianou v. Cyprus* (15 December 2005, No. 73797) the lawyer was prosecuted for contempt of court before the court he had offended. The court observed that the case related to contempt in the face of the court, aimed at the judges personally, and it was a situation where the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears. It was a functional defect and the impartiality of the Assize Court was capable of appearing open to doubt (point 127 of the Reasons). What is striking about this case is that as usual the court declined to take a position on the general issue of the summary proceedings challenged before it but stated: "The Court does not regard it as necessary or desirable to review generally the law on contempt and the practice of summary proceedings ... Its

task is to determine whether the use of summary proceedings to deal with Mr Kyprianou's contempt in the face of the court gave rise to a violation of Art. 6(1) of the Convention".

As to point 121 of the decision referred to by the petitioners, the ECtHR there defined in more general terms the functional situation in which a lack of judicial impartiality arises, for instance "where the exercise of different functions within the judicial process by the same person, or hierarchical or other links with another actor in the proceedings objectively justify misgivings as to the impartiality of the tribunal".

- 11.4 It is immediately apparent from their factual background that none of these cases is comparable with the present one, because it is clear that in each of them there was a narrow link between the court or, at least one of its members, and either a party or another actor in the proceedings.
- 11.5 Far more relevant is a comparison with decisions in cases where members of the court had a dual function, whether advisory and judicial (*Kleyn and Procola cases above cited*) or as a member of parliament (*Savino and others v. Italy, above cited*). In these cases, when assessing whether a judge was independent within the meaning of Article 6(1) (ECHR) the ECtHR took the view that neither Article 6(1) nor any other provision of the ECHR imposed any particular structure on a judicial system (*Savino, above cited, paragraphs 91 and 92*). Each individual case was to be assessed on its merits

(Levages Prestations Services v. France above cited, paragraphs 43 to 48).

12. **Conclusion**

It results from the above that the real ground underlying the present request claiming suspected partiality is a perception that the EPO's whole judicial system is defective, and that its petition for review procedure is tainted by partiality even after the President's decision of 23 May 2014, the key reason why this procedure is deficient being the dual function of chairman of the Enlarged Board and VP3.

12.1 In so far as this request is based on fundamental structural issues of the EPO's judiciary and procedure for petition for review it calls for a more ambitious result than excluding the chairman of the Enlarged Board from the present proceedings, and in particular for an amendment of EPC or its implementing regulations, which exceeds the scope of the Enlarged Board's competence in a petition for review case (points 3.5; 3.6; 7.3 above). Such issues are matters for the Administrative Council and possibly the contracting states.

12.2 As to the dual function of chairman of the Enlarged Board and VP3 as such, in the circumstances of the case as now established, the Enlarged Board concludes that given the existing safeguards provided by Article 23 EPC this dual function, as shown above, does not give rise to an objective suspicion of partiality under Article 24(3) EPC, within the meaning of Article 6(1) ECHR.

12.3 This conclusion results from, and is limited to, the present situation with the existing safeguards; it remains that specific new measures, including internal EPO provisions, possibly affecting the independence and impartiality of the chairman of the Enlarged Board in his dual function as VP3 might make it necessary to reconsider it on a case-by-case basis, under the provisions of the EPC in accordance with the principles established by the ECHR.

As Mr. Justice Jacob (as he then was) wrote in *Lenzing* (see above point 6.8) and as still holds true: "*That is not to say that the judicial structures and procedures of the EPO could not be strengthened. ... But that is a matter for the Administrative Council and not a matter for national courts*". The Enlarged Board endorses that, it is not its role to take the place of the legislature.

13. **The reopening of the debate**

13.1 The letter referred to by the petitioners in their submissions of 12 December 2014 and the events it concerned (the house ban imposed by the President of the EPO on a member of the boards of appeal) took place after the oral proceedings and after the debate was closed, during the final deliberation of the Enlarged Board. The question arises for the Enlarged Board whether the new submissions have a direct impact on the present case and constitute grounds for reopening the debate.

13.2 Here again, as in points 3.5 and 12.1, the Enlarged Board has to make a distinction between (i) events seen as highlighting deficiencies in the EPO's judicial system and endangering the independence of the members of the boards of appeal which predated the letter dated 8 December 2014 and (ii) what is alleged to point to a lack of impartiality resulting from the dual function (the chairman's non signature of the confidential letter dated 8 December 2014).

13.3 First of all, as to issue (i), the Enlarged Board reiterates that to consider the general issue of the independence of its members, in particular the chairman of the Enlarged Board, goes beyond its powers in the present case.

13.4 As to the issue (ii), from the letter of members of the Enlarged Board dated 8 December 2014, without even considering its confidential character and its content, no conclusions about the objective partiality of the Enlarged Board's chairman can be drawn from the fact that he did not sign it. Furthermore, the Enlarged Board is not prepared to reopen the debate in order to extend the scope of the present case to a new line of argument based on this specific act of its chairman which would amount to a new ground of subjective partiality.

13.5 The letter dated 4 March 2015 does not raise any new point; it only concerns issues which are analysed in this decision.

13.6 Nor does the petitioners' letter dated 11 February 2015 require further consideration in substance, since it

does not rely on new elements relevant for the case but only to several opinions expressed.

Order

For these reasons it is decided that the request of the petitioners that Mr. X be replaced as chairman of the Enlarged Board in its composition pursuant to Rule 109(2)(b) EPC is rejected.

The Registrar

The Chairman

P. Martorana

G. Weiss