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**Datasheet for the interlocutory decision
of the Enlarged Board of Appeal
of 17 February 2015**

Case Number: R 0002/14

Appeal Number: ...

Application Number: ...

Publication Number: ...

IPC: ...

Language of the proceedings: EN

Title of invention:

...

Patent Proprietor:

...

Opponent:

...

Headword:

Objections to the Chairman and Members of the Enlarged Board
of Appeal

Relevant legal provisions:

EPC Art. 10(2), (3), 11, 21(3), 23(1), (3), 24, 111, 112, 112a,
113, 114, 116(4) 128(4), 131

EPC R. 9(2), 12(4), 13(1), 109(2), 144(a)

RPEBA 4(1), (2), 5, 13, 14(2), (6), (7)

Business Distribution Scheme EBA 2014 Art. 1, 5, 6

Business Distribution Scheme of the Boards of Appeal 2014
Art. 2(1)

Service Regulation EPO Art. 1(5), 15, 93

ECHR Art. 6(1)

Keyword:

Suspicion of partiality against all members of the Enlarged Board of Appeal
institutional/functional conflict
normative conflict between Art. 10(2)(f), (3) and Art. 23(3)
EPC as equal-ranking rules
"normative concordance"
suspicion partly not admissible
suspicion not justified
obligation of the party to prepare its case before trial
obligation of the party to present its complete case at the outset of the proceedings
submissions and requests after the closure of the oral proceedings - re-opening of the oral proceedings and the debate (not admitted)
request to initiate new proceedings pursuant to Article 24 EPC (rejected)
request to consider late submissions and requests of a party to proceedings as *amicus curiae* brief (rejected)

Decisions cited:

G 0005/91, G 0001/05, G 0002/08, R 0012/09, R 0002/12, R 0019/12, T 1028/96
ECHR De Cubber v. Belgium (no. 9186/80), ETTL v. Austria (no. 9273/81), Hauschildt v. Denmark (no. 10486/83), Academy Trading Ltd et al. v. Greece (no. 30342/96), Pfeiffer v. Austria (no. 12556/03), Micallef v. Malta (no. 17056/06)

Catchwords:

1. The simultaneous entrustment of the Chairman of the Enlarged Board of Appeal with judicial tasks in his capacity as judge appointed in accordance with Article 11(3) EPC and with executive tasks in his capacity as Vice-President Appeals appointed pursuant to Article 11(2) EPC causes an inherent "normative conflict" between the institutional provisions of Article 10(2)(f) and (3) EPC and Article 23(3) EPC, which cannot be completely resolved without changes to the current institutional structure of the European Patent Organisation. However, in the meantime, its impact can and must be mitigated by a continuous balancing of these potentially conflicting duties ("normative concordance") (points 36 to 40).

2. The factual scope of an objection pursuant to Article 24(3) EPC is defined in the statement of grounds of objection initiating the interlocutory proceedings under Article 24(4) EPC. Apart from a subsequent elaboration of said objection by supporting facts, evidence and arguments, the subject-matter of the proceedings, in principle, cannot be extended or changed, whether by new facts or by a new objection (points 56.3 to 56.6).

Case Number: R 0002/14

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 17 February 2015

Applicant/petitioner: ...
(Patent Proprietor)

Representative: ...

Other party:
(Opponent)

Representative:

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

Composition of the Board:

Chairman: G. Weiss
Members: I. Beckedorf
 G. Assi

Summary of Facts and Submissions

I. The patent proprietor (hereinafter: the petitioner) filed a petition for review against decision ... of Technical Board of Appeal ... (hereinafter: the Technical Board of Appeal) dated ... dismissing its appeal against the decision of the opposition division dated ... revoking European patent No. The petitioner based its petition for review on a fundamental violation by the Technical Board of Appeal of its right to be heard (Articles 112a(2)(c) and 113 EPC). In essence, the petition contained the assertion that, when taking the decision under review, the Technical Board of Appeal either had disregarded essential facts or arguments submitted by the petitioner or had based its decision on facts or arguments unknown to the petitioner.

II. The present proceedings relate to the petitioner's objections to all the members of the Enlarged Board of Appeal in its original composition pursuant to Rule 109(2)(a) EPC, consisting of Mr ... as the first and Mr ... second legally qualified members (the second legally qualified member being the chairman) and Mr ... the technically qualified member (hereinafter: the Enlarged Board). The petitioner raised and reasoned these objections in its letter of 8 July 2014 (hereinafter: the statement of grounds of objection).

Rule 144(a) EPC provides for the exclusion of the documents relating to objections to members of the Enlarged Board of Appeal from inspection under Article 128(4) EPC. Furthermore, the Enlarged Board of Appeal in its current composition according to

Article 24(4) EPC (hereinafter: the Board) decided that the oral proceedings, including delivery of this interlocutory decision, were to be non-public in order to protect the personal rights of the persons concerned (Article 116(4) EPC).

III. The aforementioned objections were filed by the petitioner after the Enlarged Board had issued a communication pursuant to Articles 13 and 14(2) Rules of Procedure of the Enlarged Board of Appeal (RPEBA), dispatched together with the summons to oral proceedings. In said communication, the Enlarged Board informed the petitioner of its preliminary view on the issues raised in the petition for review and of its provisional conclusion that the petition appeared to be clearly unallowable.

III.1 As regards the Chairman, who was replaced by his alternate for the purpose of the present interlocutory decision (hereinafter: the Chairman), the petitioner referred in general to the interlocutory decision of the Enlarged Board dated 25 April 2014 in case R 19/12 (not published in the OJ EPO, hereinafter: interlocutory decision R 19/12). In that decision the Enlarged Board, in a different composition, held that the objection to the replaced chairman in that case, who was the same person as the Chairman, was substantiated. More specifically, the petitioner argued that in his function as Vice-President Appeals (hereinafter: VP3) the Chairman continued to be involved in the management and administrative hierarchy of the European Patent Office (hereinafter: the Office). In this regard, the petitioner referred to a paragraph in the Reasons of interlocutory decision R 19/12 (point

14.1 of the Reasons), according to which all the Vice-Presidents of the Office were obliged to play an active role in implementing objectives set by the President of the Office (hereinafter: the President) within the framework of the EPC, also in relation to their own Directorate-General.

III.2 Regarding the first legally qualified member and the technically qualified member (hereinafter: the Members), the petitioner objected to their assignment to the case because both were members of Technical Board of Appeal According to Article 6(2), 2nd sentence, of the Business Distribution Scheme of the Enlarged Board of Appeal for the year 2014 (OJ EPO, supplementary publication 1/2014, 3; hereinafter: BDS/EBA), the chairman, when assigning individual cases, may depart from the order in which the regular members are listed for "serious reasons". The petitioner referred to a clear separation between members of the Enlarged Board and those of the technical boards of appeal as a "serious reason". A composition of the Enlarged Board in which two of the three members came from the same technical board put the impartiality of the Enlarged Board in doubt. It meant that one technical board of appeal had a decisive impact on the decision whether a petition for review was to reach the stage of being examined by five members. Therefore, the composition of the Enlarged Board appeared to be wrong, and this led to doubts as to its impartiality (see ECHR *De Cubber v. Belgium* of 26 October 1984, no. 9186/80, point 26 of the Judgment).

IV. Originally, the petitioner had requested

- (1) that the Chairman be excluded from the Enlarged Board of Appeal in these proceedings and that he be replaced by a deputy member and
- (2) that the legally qualified member and the technically qualified member be excluded from the Enlarged Board of Appeal in these proceedings and that each of them be replaced by a deputy member.

V. By decision dated ... the Enlarged Board decided to cancel the oral proceedings and to continue with the case in a different composition according to Article 6(3) and (4) BDS/EBA.

The new composition of the Enlarged Board of Appeal for the purpose of taking a decision on the petitioner's suspicion of partiality was determined in accordance with Article 24(4) EPC.

VI. Pursuant to Article 4(2) RPEBA, the Board invited the Chairman and the other two Members to comment on the petitioner's objections.

VII. In his comments, the Chairman stated that the petitioner's objection to him lacked sufficient substantiation both as regards the fact that had led the petitioner to suspect his partiality and the legal reasoning for said suspicion. A mere general reference to interlocutory decision R 19/12 could not support such a serious objection to an appointed judge.

As far as the Enlarged Board of Appeal in interlocutory decision R 19/12 had based its conclusions on his (then)

integration in the administration of the Office at senior management level and his participation in various bodies, i.e. the Management Committee (MAC) and the General Advisory Committee (GAC), that kind of involvement had come to an end. He cited an internal decision of the President dated 23 May 2014:

"Not to nominate ... [him] to the General Consultative Committee established by decision of the Administrative Council CA/D2/14.

With immediate effect, ... [he] will not be called upon to exercise any function connected with the General Advisory Committee.

With immediate effect ... [he] 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."

As a consequence of this decision all his managerial activities in connection with the MAC and the GAC (as well as the General Consultative Committee (GCC) replacing the GAC) had been discontinued to an extent that the conclusions reached by the Enlarged Board of Appeal in interlocutory decision R 19/12 were no longer justified.

Since the petition for review in case R 2/14 challenged the way in which the technical board of appeal had acted procedurally in the appeal case in question, the petitioner could not found its objection on the reasoning of interlocutory decision R 19/12. In that case the objection was based on the suspicion that, because of his former managerial function and/or his

function as VP3, he might be inclined to pursue a restrictive approach with regard to the review carried out by the boards of appeal of decisions taken by or the procedure followed by the administrative departments of the Office, rather than with respect to the review by the Enlarged Board of Appeal of decisions taken by or the procedure followed by the boards of appeal.

Finally, the Chairman stated that he was aware neither of "any pressure exerted on him to sacrifice the right of the petitioner to a fair procedure and the 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", nor of any instructions or guidance from the President to him or any resulting conflict of interest.

- VIII. Each of the other two members stated that they did not wish to make any comments.

- IX. In its reply of 22 September 2014 (hereinafter: the reply) to the aforementioned comments (points VII. and VIII.) the petitioner essentially submitted:
 - IX.1 The objection was admissible because the objection to the Chairman could only be made after it became apparent to the petitioner that the composition of the Enlarged Board had remained unchanged in spite of interlocutory decision R 19/12, which decision should have led the Enlarged Board to revise its composition *ex officio* in accordance with Article 4(1) RPEBA.

IX.2 Since interlocutory decision R 19/12 was known to all the members of the Enlarged Board of Appeal there was no need for a more detailed statement of grounds of objection; in fact, it was sufficient for the petitioner to refer to that decision.

IX.3 The objection to the Chairman was justified because his institutional influence on the other members was such that it could affect their conduct.

First, Rule 9(2) EPC indicated that VP3 could instruct the members of the boards of appeal and the Enlarged Board of Appeal (hereinafter: the board members); although Article 23(3) EPC guaranteed the board members' independence when taking decisions pursuant to Articles 111 and 112 EPC, they could be subject to instructions from VP3 in procedural matters.

Secondly, it was within the Chairman's power to influence petition for review proceedings - and their outcome - by determining the composition of the Enlarged Board of Appeal (Article 6(2) BDS/EBA); the determination of the composition could be guided by his expectations as to the members' views on specific legal or procedural issues and on efficiency and productivity targets set by the President.

Thirdly, the Chairman, who as VP3 acted as a manager for all board members, could "control" the other members.

Fourthly, whereas Articles 11(3) and 23(1) EPC provided for a limitation on the length of the term of office for the members of the Enlarged Board of Appeal, the EPC did not specify any time limit on VP3's appointment. Thus, due to his additional appointment as VP3, the

Chairman was in a far better situation than any other board member.

IX.4 In addition, the fact that as VP3 the Chairman was subject to (public or merely internal) instructions from the President pursuant to Article 10(2) and (3) EPC and Rule 9(2) EPC led to a functional conflict between his managerial responsibility for the institutional unit "boards of appeal" on the one hand and his judicial responsibilities in accordance with Article 23(3) EPC as Chairman of the Enlarged Board of Appeal on the other.

IX.5 The decision of the President of 23 May 2014 relieving the Chairman of his membership of the MAC and GAC/GCC did not rule out that the Chairman might still have other managerial responsibilities and functions as VP3, that he might be a member of other bodies under the control of the President or that his membership of the MAC and GCC and/or other managerial responsibilities and functions might be restored unilaterally by the President in the future; the petitioner pleaded lack of knowledge as to whether the President's decision was still in force, whether the Chairman had restated its full content and whether the Chairman's activities in the MAC and GAC/GCC had been given up completely. Since the President could revoke the decision at any time (Article 10(2)(a) EPC), the changes initiated by it could easily be set aside without being communicated externally. Thus, the President's decision could only have a temporary effect; to relieve a Vice-President on a permanent basis of his obligation (and individual right (*sic*)) to support the President would be *contra legem* (Article 10(3) EPC) and therefore *ultra vires*.

- IX.6 The fact that no proceedings according to Article 24(4) EPC had been initiated in respect of the Chairman *ex officio* was in itself to be considered serious breach of duty and destroyed confidence in the Chairman's judicial impartiality.
- IX.7 Finally, the petitioner clarified that the crucial matter was not the Chairman's previous function as part of the Office's management before he took up the positions of VP3 and Chairman of the Enlarged Board of Appeal, but the compatibility of his current two functions. In his (managerial) function as VP3 he was subject to instructions from the President (Article 10(2)(f) and (3) EPC), whereas Article 23(3) EPC required his complete independence when performing his second (judicial) function as Chairman of the Enlarged Board of Appeal.
- IX.8 In respect of the objections to the other two members of the Enlarged Board, the petitioner considered both of them as a "team" due to their assignment to the same technical board of appeal. Since that board of appeal was competent for appeals in the same technical field as the board that issued the decision under review, it could be assumed that the two Members were influenced by the way in which the latter board handled such cases.
- IX.9 Apart from that, the very fact that members of the Enlarged Board of Appeal at the same time acted as members of the technical boards of appeal and/or the Legal Board of Appeal was incompatible with the fundamental right to a fair trial (Article 6 of the European Convention for the Protection of Human Rights

and Fundamental Freedoms of 4 November 1950 (ECHR)). The EPC itself systematically distinguished between members of the Enlarged Board of Appeal and members of the boards of appeal (Article 11(3) and (5) EPC, Rules 12(4) and 13(1) EPC). Thus, contrary to what had been decided in case R 12/09 (points 4 and 5 of the Reasons) and in interlocutory decision R 19/12 (point 13.3 of the Reasons), the EPC did not necessarily provide for appointment simultaneously as a member of the Enlarged Board of Appeal and a member of the boards of appeal.

IX.10 The fact that no proceedings according to Article 24(4) EPC had been initiated *ex officio* was to be considered a serious breach of duty, which undermined confidence in their judicial impartiality even further.

IX.11 The role of the first legally qualified Member as rapporteur in the review case made his involvement more critical than the involvement of the technically qualified Member.

X. The petitioner essentially requested

(1) that the Chairman be excluded from the Enlarged Board in these proceedings and replaced by a deputy member and

(2) that the technically qualified Member and the legally qualified Member be excluded from the Enlarged Board in these proceedings and each replaced by a deputy member, or

(2a) on an auxiliary basis, that the legally qualified Member be excluded from the Enlarged Board in these proceedings and replaced by a deputy member,

- (2b) alternatively, that the technically qualified Member be excluded from the Enlarged Board in these proceedings and replaced by a deputy member, and
- (3) that the decision under review be set aside and
- (4) that the proceedings before the Board of Appeal be re-opened.

As an auxiliary request, the petitioner requested that oral proceedings be held.

The petitioner's requests (3) and (4) do not concern the present interlocutory proceedings in respect of its objections to the members of the Enlarged Board.

XI. In addition to these substantive requests, the petitioner requested:

- (1) that the following documents be tendered by the Office:
 - (a) the Service Regulations for permanent employees of the EPO,
 - (b) the decisions of the President pursuant to Article 10(2)(a) EPC in so far as they concerned the Vice-Presidents in general, VP3 in particular or the board members, especially the so-called "investigation guidelines",
 - (c) the decisions of the President pursuant to Article 10(2)(i) EPC in so far as they concerned the delegation of presidential functions and powers to Vice-Presidents in general or to VP3 in particular,

- (d) the President's decision of 23 May 2014 relieving the Chairman of certain managerial responsibilities and activities,
 - (e) the decision of the Administrative Council of the European Patent Organisation CA/D 2/14 and the document of the President CA/4/14,
 - (f) the rules of procedure of the GCC,
 - (g) the President's Communiqué N° 14 of 4 August 2006,
 - (h) the rules of procedure of the MAC,
 - (i) the decisions taken by the President since 4 August 2006 in respect of the MAC,
- (2) that evidence be taken in respect of the scope of VP3's powers to give instructions to board members and in respect of the board members' option to have such instructions modified,
 - (3) that evidence be taken in respect of facts which would lead to the conclusion that conflict situations were unlikely to arise from the Chairman's managerial and judicial responsibilities,
 - (4) that evidence be taken in respect of the existence and complete content of the decision of the President of 23 May 2014 relieving the Chairman of certain managerial responsibilities and activities,
 - (5) that evidence be taken in respect of all previous decisions of the President by which functions and powers were delegated to VP3 pursuant to Article 10(2)(i) EPC or concerning administrative instructions or other measures pursuant to Article 10(2)(a) EPC,
 - (6) that evidence be taken in respect of VP3's remaining ability to influence the adoption of

measures by the MAC having a bearing on the functioning of the Enlarged Board of Appeal, (7) that evidence be taken in respect of the content of the so-called investigation guidelines and their impact on the independence of board members.

The petitioner requested the aforementioned documents in order to examine whether and to what extent board members were subject to direct or indirect instructions from the President and VP3. In accordance with Article 4(1) RPEBA and Article 114 EPC, the Board was required to investigate *ex officio* and, consequently, to order that those documents be tendered. The Office could not refuse to make such an order pursuant to Article 131 EPC, applied by analogy.

XII. The Board held oral proceedings on 14 November 2014, at which the matter was discussed with the petitioner. The petitioner reiterated its line of argument from the written proceedings in further detail and confirmed its aforementioned requests (see points X. and XI. above).

In particular, the petitioner argued that its objections were admissible because the Chairman and the Members were obliged by virtue of Article 4(1) RPEBA to examine *ex officio* whether interlocutory decision R 19/12 constituted a reason for recusal. In doing so, they were required to give the petitioner an opportunity to comment on this issue in accordance with Article 6(1) ECHR and the judgment of the ECHR in the case of *Micallef v. Malta* of 15 October 2009 (no. 17056/06).

In respect of the justification of its objection to the Chairman, the petitioner added to its written submissions that the current structure was incompatible with Article 6(1) ECHR because the Chairman was subject to the disciplinary authority of the President and the board members were subject to the disciplinary authority of the Chairman/VP3. Its additional requests (see point XI. above) were aimed at allowing it to learn more about the organisational structure of the Office and the boards of appeal, including the Enlarged Board of Appeal, as well as about whether VP3 was involved in other Office bodies. The petitioner contested that the Chairman had completely and correctly reproduced the President's decision of 23 May 2014. Finally, the petitioner stated - as a new argument - that Article 6(2) BDS/EBA did not allow for the Chairman to chair (almost) all petition for review procedures.

After the discussion of the matter during the oral proceedings, the petitioner confirmed its final requests as reproduced in points X. and XI. above, upon which the debate was closed (Article 14(6), 1st sentence, RPEBA). At the end of the oral proceedings, it was announced that the decision was to be given in writing after final deliberation, that no further submissions were possible and that the minutes and the decision in writing were to be notified as soon as possible. Then the oral proceedings were closed.

XIII. By letter of 23 December 2014, the petitioner requested

- (1) that events subsequent to the closure of the oral proceedings be taken into consideration, or,

- (2) alternatively, that new proceedings in accordance with Article 24 EPC be initiated in respect of the Chairman based upon said events, or,
- (3) in the further alternative, that its letter be taken into consideration as an *amicus curiae* brief.

It reasoned its requests essentially as follows:

The President had issued a "house ban" on a member of the boards of appeal without prior involvement of the Administrative Council and the Enlarged Board of Appeal in accordance with Articles 11(4) and 23(1) EPC. Whereas almost all internal members of the Enlarged Board of Appeal wrote a letter of protest to the Administrative Council (attachment to the petitioner's letter of 23 December 2014), the Chairman neither signed said letter nor remonstrated against the President's action, which the petitioner considered to be *ultra vires*. The Chairman's failure to act gave cause for a suspicion of partiality. Furthermore, his partiality affected the other Members as well. Since the other Members could not expect the Chairman to defend their rights *vis-à-vis* the President, a party to proceedings could only doubt their impartiality.

Reasons for the Decision

Relevant legal provisions and general aspects

1. According to Article 24(1) EPC, members of the boards of appeal or of the Enlarged Board of Appeal may not take part in a case in which they have any personal interest, or if they have previously been involved as representatives of one of the parties, or if they participated in the decision under appeal ("*judex incapax / judex inhabilis*"). Those grounds for exclusion must be applied *ex officio* and may be raised by anyone, *i.e.* the parties, the Board, or a third party.
2. In addition to this, members of a Board of Appeal or of the Enlarged Board of Appeal may be objected to by any party for suspected partiality pursuant to Article 24(3) EPC (ground for objection - "*judex suspectus*"); the members' nationality does not constitute a reason for objection.
3. Pursuant to Article 24(4) EPC the Enlarged Board of Appeal shall decide as to the action to be taken in the cases specified in paragraphs 2 and 3, without the participation of the member concerned. For the purposes of taking this decision the member objected to shall be replaced by his alternate the Enlarged Board shall decide as to the action to be taken in the event of a recusal by a member (Article 24(2) EPC) or of an objection by a party (Article 24(3) EPC) without the participation of the member concerned. For the purposes of taking this decision the member objected to shall be replaced by his alternate.

In the present case, since the petitioner objected to all three members of the Enlarged Board in its original composition, all of them have been replaced by the members delivering this interlocutory decision.

4. Article 4(1) RPEBA prescribes that the procedure of Article 24(4) EPC shall also be applied in the event that the Enlarged Board of Appeal has knowledge of a possible reason for exclusion or objection which does not originate from a member himself or from any party to the proceedings.

5. As held in case G 2/08 (interlocutory decision of 15 June 2009, point 3.1 of the Reasons, not published in the OJ EPO),

"Boards of Appeal of the European Patent Office and the Enlarged Board of Appeal respectively act as judicial bodies and apply general principles of procedural law (see G 1/86, G 9/91 and G 10/91, G 1/99, G 5/91, G 1/05, G 2/08, J 15/04, T 954/98). The Enlarged Board of Appeal is established by law, the European Patent Convention being the valid instrument which confers powers on the European Patent Office, and internal as well as external members of the Board of Appeal who are called to form the Enlarged Board of Appeal are also appointed by the Administrative Council of the European Patent Organisation duly empowered by way of delegation of the Contracting States to the European Patent Convention.

Duly established by law, members of the Enlarged Board of Appeal have therefore the duty to sit in the cases

allocated to them according to their jurisdiction both 'ratione legis' and 'ratione materiae'.

That is, parties to judicial proceedings have a right to have their case considered and decided by the judge designated or appointed by law (Droit d'être jugé par son juge naturel; Recht auf den gesetzlichen Richter)."

6. Finally, according to the consistent case law of the boards of appeal and the Enlarged Board of Appeal, the principle of equal treatment and the right of parties to a fair trial enshrined in Article 6(1) ECHR are guaranteed under the EPC and are to be observed in all proceedings before the EPO (see Case Law of the Boards of Appeal, 7th edition 2013, chap. III.J.1, p. 629 et. seq.). Article 6(1), 1st sentence, ECHR provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Admissibility of the petitioner's objections

Objection to the Chairman

7. It is clear from the petitioner's submissions (and is within the knowledge of the Board) that in respect of the Chairman there is no question of an issue arising under Article 24(1) EPC. In particular, the existence of a personal interest has not been alleged, nor is the communication annexed to the summons to oral proceedings, which according to the appellant triggered

its objection, a "decision under appeal" within the meaning of said provision.

8. The Enlarged Board understands the petitioner's objection to the Chairman as being based on the ground of suspected partiality within the meaning of Article 24(3) EPC only. For this purpose, the petitioner relies essentially on the reasoning of interlocutory decision R 19/12.

9. As held by the Enlarged Board of Appeal in its decisions G 5/91 (OJ EPO 1992, 617, point 3 of the Reasons) and G 1/05 (OJ EPO 2007, 362, point 5 of the Reasons), it is a "general principle of law that nobody should decide a case in respect of which a party may have good reasons to assume partiality".

However, until proven otherwise, members of a Board of Appeal, including the Enlarged Board of Appeal, are presumed to be unbiased (see G 2/08, *supra*, points 1.2 and 3.2 of the Reasons, with reference to the following judgments of the ECHR: *De Cubber v. Belgium* of 26 October 1984, no. 9186/80; *ETTL v. Austria* of 23 April 1987, no. 9273/81; *Hauschildt v. Denmark* of 24 May 1989, no. 10486/83; *Academy Trading Ltd et al. v. Greece* of 4 April 2000, no. 30342/96).

10. In its original statement of grounds of objection, the petitioner did not substantiate its objection apart from a mere reference to interlocutory decision R 19/12 and one citation from point 14.1 of the Reasons. Although the petitioner submitted additional arguments in its subsequent reply to the Chairman's and the Members' comments, it is the original objection and the

reasons for it as contained in the statement of grounds of objection that are most relevant to the issue of substantiation and admissibility.

- 10.1 A lack of substantiation normally leads to an objection being rejected as inadmissible.

Generally, it is for the board of appeal or the Enlarged Board of Appeal in its original composition, *i.e.* including the member(s) objected to, to examine the admissibility of an objection under Article 24(1) or (3) EPC for the purpose of opening the procedure under Article 24(4) EPC (see T 1028/96, OJ EPO 2000, 475, Headnote II. and point 1 of the Reasons; *Pignatelli/Thums* in Benkard, *Europäisches Patentübereinkommen EPÜ*, 2nd edition 2012, Art. 24, para. 26; *Schmitz* in Singer/Stauder, *Europäisches Patentübereinkommen*, 6th edition 2012, Art. 24, para. 13).

- 10.2 The Board notes that in the present case the Enlarged Board in its original composition did not reject the petitioner's objection immediately but decided to continue with the case pursuant to Article 24(4) EPC in a different composition according to Article 6(3) and (4) BDS/EBA. Thus, the Enlarged Board thereby implicitly acknowledged that the objection was admissible.

- 10.3 The Board notes further that the petitioner's objection does not relate to a suspicion of subjective partiality, for instance on the basis of the actual conduct of or an expression of opinion by the member objected to (*i.e.* here the Chairman).

In support of such an objection, a party must submit (and if necessary prove) facts establishing the existence of objective indications on the basis of which 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" (G 1/05, *supra*, point 20 of the Reasons; R 12/09, interlocutory decision of 3 December 2009, point 3 of the Reasons, not published in the OJ EPO; R 2/12, interlocutory decision of 26 September 2012, point 2.1 of the Reasons, not published in the OJ EPO).

10.4 As clarified in its reply and during the oral proceedings, what the petitioner wishes to rely on with its reference to interlocutory decision R 19/12 is rather an (allegedly continuing) objective or structural/institutional partiality on the part of the Chairman, stemming from his duty as VP3 to assist the President in the management of the Office. In the aforementioned decision, the Enlarged Board of Appeal found the objection to the replaced chairman - who was the same person as the Chairman objected to in the present case - for suspected partiality pursuant to Article 24(3) EPC to be substantiated.

10.5 In points 14 to 16 of the Reasons of interlocutory decision R 19/12, the Enlarged Board discussed in detail the "VP3's continuing involvement in the administration of the Office", holding it to give rise to "a possible conflict of interest for VP3 between his management responsibilities in respect of the boards of appeal and his position as the Chairman of the Enlarged

Board of Appeal", which would lead a "reasonable, objective and informed observer" to doubt his impartiality (see interlocutory decision R 19/12, points 17.1 to 24.4 of the Reasons).

- 10.6 It is true that the statement of grounds of objection does not contain detailed submissions of fact to support the petitioner's doubts concerning the Chairman's impartiality. Nevertheless, taking account of Article 4(1) RPEBA, the Board considers the broad reference to interlocutory decision R 19/12 to be sufficient for this purpose.

In the Board's view, the petitioner's objection is not *prima facie* an abuse of procedure apt to delay the proceedings or to damage the reputation of the member concerned, but rather a "possible reason for objection" within the meaning of Article 4(1) RPEBA.

11. On the other hand, the Board is not persuaded by the petitioner's argument that the Chairman - and/or the other Members - were obliged by Article 4(1) RPEBA to examine *ex officio* whether interlocutory decision R 19/12 constituted a reason for recusal and to give the petitioner an opportunity to comment on this issue in accordance with Article 6(1) ECHR and the judgment of the European Court of Human Rights in the case of *Micallef v. Malta* (no. 17056/06).

First, the petitioner's conclusion cannot be derived either from the wording of Article 6(1) ECHR itself or from any passage in the judgment referred to.

Secondly, there is no legal obligation or even option for any member of the Enlarged Board of Appeal (or a board of appeal) to invite a party to the proceedings before it to propose at a particular stage in the proceedings that a member might consider whether or not he should not take part in the case. Clearly, Article 24(2) EPC is directed solely to the individual. It is only after a member has come to the conclusion that there is a reason why he should not take part in the case that he is required to inform the board accordingly. Thus, Article 24(2) EPC provides for the involvement *only* of the other members of the board to which the case is assigned and *only* once the member concerned has assessed his position.

This argument is accordingly not relevant to the question whether the Chairman - or any of the Members - should be excluded.

12. The petitioner has not taken a procedural step while aware of the suspected partiality of the Chairman, and its objection is not based upon the Chairman's nationality (Article 24(3), 2nd and 3rd sentences, EPC).
13. Thus, in so far as the petitioner objects to the Chairman of the Enlarged Board on the ground of suspected impartiality pursuant to Article 24(3) EPC, Article 4(1) RPEBA, this objection is admissible.

Objection to the other two Members

14. The petitioner based this objection, in both its statement of grounds of objection and its subsequent

reply, solely on the assignment of both Members to Technical Board of Appeal ... (see Article 2(1) Business Distribution Scheme of the Technical Boards of Appeal for the year 2014 (OJ EPO, supplementary publication 1/2014, 15; hereinafter: BDS/TBA)).

The petitioner puts forward two main lines of argument:

First, given the proximity of Technical Boards of Appeal ... and ... in terms of their fields of competence and the expertise of their members, the two Members might not be inclined to give serious consideration to the alleged procedural error by Technical Board of Appeal

Secondly, the members of the boards of appeal were assigned concurrently to both the Enlarged Board of Appeal and technical boards of appeal, which implied a fundamental and systematic deficiency in the judicial system of the EPO.

15. This is a complaint of a general nature which concerns the Chairman's original order determining the composition of the Enlarged Board to decide upon the petitioner's petition for review.

16. However, Article 24 EPC does not specify a (potential) mistake in assigning members of the Enlarged Board of Appeal (or of the boards of appeal) to a particular case as being a ground for exclusion or objection.

16.1 The petitioner's complaint clearly does not constitute a ground of exclusion within the meaning of Article 24(1) EPC. Neither its statement of grounds of

objection nor its reply contains even an indication that either or both of the Members concerned had any personal interest, had previously been involved as a representative of one of the parties or had participated in the decision under review.

16.2 Nor has the petitioner alleged or submitted any facts which could give rise to an impression of subjective partiality on the part of either or both of the Members.

16.3 Thus, in the absence of any reference to a ground of exclusion and/or objection, the Board does not share the petitioner's view that it is sufficient to give rise to the appearance of partiality that two (or more) members of the Enlarged Board of Appeal who are assigned to a particular case are at the same time legally or technically qualified members of a particular technical board of appeal (or of the Legal Board of Appeal).

17. As held by the Enlarged Board of Appeal in its decision G 1/05 (*supra*, point 20 of the Reasons; see also Case Law of the Boards of Appeal, *supra*, chap. III.J.6.1, p. 633 *et. seq.*), it is

"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)."

18. Such a conclusion cannot be arrived at based solely on the fact that the two Members of the Enlarged Board other than the Chairman, who were individually assigned to decide upon the present petition, are in their "other" function respectively a chairman of a technical board of appeal and a legally qualified member of the boards of appeal, who, according to the BDS/TBA, may be assigned to a technical board of appeal in a specific composition for a given appeal. There is no relation whatsoever between these two distinct functions.

19. The petitioner has argued that, due to the assignment of the two Members, Technical Board of Appeal ... effectively constitutes the majority on the Enlarged Board in its composition according to Rule 109(2)(a)

EPC. However, the Board cannot accept the petitioner conclusion that this composition jeopardises the Enlarged Board's independence and impartiality.

- 19.1 First, the petitioner's starting point is factually incorrect.

According to Article 2(1) BDS/TBA, Technical Board of Appeal ... consists of eight members. It examines and decides upon appeals in a composition of either three or five members (Article 21(3) EPC).

Therefore, the petitioner's argument that the examination of the present petition by the Enlarged Board in its original composition would be dominated by the technical board of appeal is erroneous because the two Members concerned could in no way form or represent Technical Board of Appeal ..., which consists of eight members altogether.

- 19.2 Secondly, the petitioner's complaint is also legally inaccurate.

The two Members concerned were assigned to the Enlarged Board in case R 2/14 not as members of the boards of appeal in general or as members of Technical Board of Appeal ... (cf. list in Article 2(1) BDS/TBA) in particular, but as members of the Enlarged Board of Appeal (cf. lists in Articles 1 and 5 BDS/EBA).

Thus, for the purpose of "composing" the Enlarged Board of Appeal competent to decide on petition for review R 2/14, the Members' other responsibility for appeal

cases is, subject to a reason for exclusion pursuant to Article 24(1) EPC, irrelevant.

- 19.3 Thirdly, the petitioner's complaint deals only with the number of members of the Enlarged Board. It is, however, completely silent as to why the fact that two members of the Enlarged Board in its original composition are also allocated to the same technical board of appeal could so undermine their presumed impartiality that they would be prejudiced against the petitioner when deciding on its petition for review.

The Enlarged Board of Appeal in case R 12/09 (*supra*, points 4 to 7 of the Reasons) dealt in detail with the question whether membership of a technical board of appeal or the Legal Board of Appeal as such justifies an exclusion of or an objection to a member of the Enlarged Board of Appeal competent in petition for review proceedings under Article 112a EPC. The Enlarged Board of Appeal came to the unreserved conclusion that the dual capacity of some members of the Enlarged Board of Appeal as members or chairmen of technical boards of appeal or the Legal Board of Appeal complied with the legislator's intention when enacting Article 112a EPC. The legislator had consciously decided to allocate the task of hearing such petitions to the Enlarged Board of Appeal as a pre-existing body with appointed members and, when doing so, had been fully aware that those members were for the most part also experienced members of technical boards of appeal or the Legal Board of Appeal. Since at the time of the relevant legislative procedure, many of the legally qualified and all of the technically qualified members of the Enlarged Board of Appeal were also chairmen of a technical board of

appeal or members of the Legal Board of Appeal, the legislator could only have intended that those members also be deployed in procedures under Article 112a EPC. Even if one were, like the petitioner, to consider the procedures for processing petitions for review under Article 112a EPC inadequate, they were at any rate in line with the legislator's intention.

For the Enlarged Board of Appeal in case R 12/09 it was clear - just as it is for the Board in its current composition - that, in allocating the task of hearing petitions for review to members of the technical boards of appeal and of the Legal Board of Appeal in their capacity as members of the Enlarged Board of Appeal, the legislator had demonstrated its intention that these members' dual function should not, in itself, constitute a reason for objecting to or excluding them when it came to performing this task. Consequently, the Enlarged Board of Appeal rejected the objection to a member of the Enlarged Board of Appeal based on aforementioned argument as inadmissible.

Applying this reasoning to the present case, the Board considers that the petitioner cannot found its objection under Article 24(3) EPC solely on the fact that the two Members concerned are both members of Technical Board of Appeal

- 19.4 Fourthly, the petitioner alleges an infringement of the rules for determining the composition of the Enlarged Board competent to examine its petition pursuant to Rule 109(2)(a) EPC.

According to Article 6(2), 1st and 2nd sentences, BDS/EBA, "individual cases shall be assigned to the regular

members of the Enlarged Board one after another in the order of their listing in Article 5 BDS/EBA. The Chairman may depart from this order for serious reasons, such as illness, workload, language requirements of the case or, in designating the technically qualified member, the possession of relevant technical expertise".

However, there is nothing in Article 6(2) BDS/EBA to support the petitioner's notion that the composition of the Enlarged Board of Appeal according to Rule 109(2)(a) EPC must never include two members who, in their other function as members of the boards of appeal, are allocated to the same technical board of appeal.

The "serious reason" under Article 6(2) BDS/Enlarged Board of Appeal, which the petitioner invokes, is that a clear distinction needs to be drawn between the composition of the Enlarged Board of Appeal and the technical boards of appeal. However, as observed in point 19.3 above, the legislator has accepted that there is an overlap between the function of the members of the Enlarged Board of Appeal and that of the members of the boards of appeal. Apart from this, no other "serious reason" is apparent in the present case.

- 19.5 The final aspect to be examined is the petitioner's allegation that, due to the proximity of Technical Boards of Appeal ... and ... in terms of their fields of competence and the expertise of their members, the two Members might be inclined to exercise a degree of reticence when reviewing the impugned decision.

However, both the petitioner's statement of grounds of objection and its reply lack any facts or even

indication of facts to support that assertion. Hence, its allegation amounts to nothing more than "purely subjective impressions or vague suspicions", which cannot justify an objection of partiality (see G 1/05, *supra*, point 20 of the Reasons). To be more precise, since the petitioner's submissions are completely silent as to any specific circumstances that could reasonably lead a party to doubt the impartiality of either of the two Members, this objection is deemed not substantiated.

20. The Board has noted the petitioner's view that there should be a clear distinction between the assignment of members to the Enlarged Board of Appeal in review cases and to a board of appeal in appeal cases. However, the Board does not consider itself to be the proper addressee for such a plea. It is rather for the legislator, *i.e.* the Contracting States to the EPC and the Administrative Council of the European Patent Organisation, to contemplate whether there is a need for clarification and/or amendment of the legal framework.

21. Therefore, the petitioner's objection to the first legally qualified member and the technically qualified member by reason of their assignment to the same technical board of appeal is not covered by any of the grounds for exclusion or objection within the meaning of Article 24(1) and (3) EPC. Consequently, the petitioner's objection, which forms the basis for its requests (2), (2a) and (2b) (see point X. above), is inadmissible in this respect.

*Justification of the petitioner's objection to the Chairman -
Standard for assessing suspected partiality according to
interlocutory decision R 19/12*

22. If follows from the above that the Board must assess whether the petitioner's objection to the Chairman is justified.

This assessment will start with a general definition of the standard for assessing the alleged partiality of a member of the Enlarged Board of Appeal (points 23 to 25).

This will be followed by

- (1) an examination of the facts on which the objection is based (see points 26 to 30),
- (2) an analysis of whether the factual situation as it is now correlates to those facts (see points 31 to 46),
- (3) a consideration of the potentially temporary nature of the measures adopted as a result of interlocutory decision R 19/12 (see points 47 to 50),
- (4) an assessment of the admissibility and/or relevance of the petitioner's further requests and offers of evidence (see points 51 and 55), and
- (5) admissibility and admission into the proceedings of the petitioner's submissions and requests filed after the closure of the oral proceedings (see points 56 to 59).

Standard for assessing alleged partiality

23. The petitioner made its objection to the Chairman, by reference to the Reasons of interlocutory decision R 19/12. Therefore the Board must now apply the standard for assessing suspected partiality according to said decision in order to examine whether the present situation is comparable to that which in that case led the Enlarged Board of Appeal to hold that it could not be denied that "a reasonable, objective and informed observer considering the circumstances of the case would conclude that the party might have good cause to doubt the impartiality of the member objected to" (see interlocutory decision R 19/12, *supra*, point 24.3 *et seq.* of the Reasons).

24. An objection under Article 24(3) EPC is not only justified if there is actual partiality on the part of the member objected to. It suffices that there is a suspicion in this respect, *i.e.* that there is an appearance of partiality. The courts - and the boards of appeal including the Enlarged Board of Appeal - have to ensure not just that justice is done but that it is also perceived by the public to be done (see G 1/05, *supra*, point 19 of the Reasons).

Furthermore, a suspicion of partiality may arise for reasons not only to do with the person of the judge objected to or with his personal connections with a party (which could be called "personal partiality"). It may also arise from the exercise of functions which might cause a judge to be faced with a conflict of interest between those functions and the duties inherent to his position as a judge. The incompatible

nature of these parallel functions may also justify a suspicion of partiality (which could be called "functional or institutional partiality", see interlocutory decision R 19/12, *supra*, point 11 *et seq.* of the Reasons).

25. As established in case G 2/08 (*supra*, point 4 of the Reasons), "in order to assess the alleged partiality of a member of the Enlarged Board of Appeal the deciding Board should apply a twofold test, namely:

Firstly a "subjective" test "*in concreto*" requiring evidence of actual partiality of the member concerned

Secondly an "objective" test "*in abstracto*" to determine if the circumstances of a case would allow a reasonably objective and informed person to conclude that he might have good reason to suspect the partiality of the member concerned."

Facts on which the objection was based

26. In the context of the first part of the test, the Board needs to establish "*in concreto*" the *factual circumstances* that led the Enlarged Board of Appeal in its interlocutory decision R 19/12 to find the objection of suspected partiality substantiated. This is followed by an examination whether those factual circumstances (or any further facts brought to the Board's attention other than by the petitioner) were still predominant at the closure of the oral proceedings on 14 November 2014.

27. In interlocutory decision R 19/12, the factual circumstances giving rise to the alleged suspicion of partiality, as established and examined by the Enlarged Board of Appeal, concerned the following overlaps at the time in question between the Chairman's judicial function in the Enlarged Board of Appeal and his previous or ongoing involvement in the management of the Office:

- (1) the Chairman's previous involvement in the administration of the Office at senior management level, as Principal Director and, temporarily, as Vice-President Legal and International Affairs (see point 28. below),
- (2) the Chairman's continued involvement in the administration of the Office as a member of the MAC and of the GAC (see points 30. *et seq.* below).

During the oral proceedings, the petitioner submitted the following new argument in support of its objection to the Chairman:

- (3) that the Chairman is not permitted by Article 6(2) BDS/EBA to assign himself as a member of the Enlarged Board of Appeal in (almost) all petition for review cases (see point 29. below).

28. The Board takes note of the petitioner's statement in its reply that its objection was in essence not aimed at the Chairman's previous function in the Office's senior management prior to taking up his appointments

as VP3 and as Chairman of the Enlarged Board of Appeal. The objection was aimed rather at the question of the compatibility of his current two functions.

Consequently, the Board will not examine the first point above in detail. Rather, the Board refers in this matter to the relevant findings in interlocutory decision R 19/12, with which it concurs. According to the Enlarged Board of Appeal in that decision, the fact that the Chairman had previously held a very senior position within an administrative hierarchy was not in itself sufficient ground to justify a suspicion of partiality (see interlocutory decision R 19/12, *supra*, point 13.4 of the Reasons).

29. Moving now to the third point above before (the second point being dealt with in detail in points 30 *et seq.* below), the Board is not persuaded by the petitioner's argument.

First, it is quite self-evident that the Chairman of the Enlarged Board of Appeal is usually one of the regular members assigned to an individual case. Article 6(4) BDS/EBA provides for his substitution only in the event that, for whatever reason, he cannot sit on a particular case.

Secondly, the Board cannot see a causal connection between the fact that the Chairman has assigned himself to a particular case and the petitioner's conclusion that his impartiality is thereby put in doubt from the perspective of a reasonable, objective and informed observer. In its submission on this point, the petitioner does no more than allege that the Chairman

could influence the outcome of petition for review cases if he is part of the Enlarged Board of Appeal in the composition deciding on those cases. However, such an unsubstantiated assertion cannot open the way for any substantive assessment.

Consequently, the Board will not elaborate on this point either.

30. In respect of the second of the above points, the Enlarged Board of Appeal held in interlocutory decision R 19/12 that the Chairman's appointment as VP3 was not "a case of a senior civil servant moving to a court of law separate from the previous administrative authority ..., having completely detached himself from his previous involvement in administration". The Enlarged Board of Appeal considered that as Vice-President he remained subject to the instructions of the President of the Office, who is the direct superior of all the Vice-Presidents, and is assisted by them (Article 10(2)(f) and (3) EPC). Consequently, the "degree of independence enjoyed by the Vice-Presidents depends on the level of intensity at which the President exercises his authority to instruct and supervise them or otherwise calls upon them to assist him in managing the Office" (see interlocutory decision R 19/12, *supra*, points 14.1 and 14.2 of the Reasons).

Whereas the Chairman of the Enlarged Board of Appeal, as far as the decisions of the Enlarged Board are concerned, is not subject to instructions from the President, his unrestricted membership of the MAC and the GAC was regarded as capable of giving rise to a conflict of interest between his managerial duties as

VP3 and his judicial position as Chairman of the Enlarged Board of Appeal (see interlocutory decision R 19/12, *supra*, points 14.2 et seq. of the Reasons).

The Enlarged Board of Appeal continued (interlocutory decision R 19/12, *supra*, point 24.1 of the Reasons):

"Given that, despite the existing misgivings, the structural weaknesses in the boards' organisation resulting from their integration within the Office have to be accepted, because the situation cannot be altered under the EPC as it currently stands, it seems all the more necessary for the head of the judicial institution that is embedded within the Office to be released, to the greatest extent possible, from any active involvement in the management bodies of the Office, and in particular of the President, in order to avoid, as far as possible, the impression that the judicial organ is bound up with the Office's administrative action or is furthering Office interests and aims. Instead, however, a contrary trend is observable: VP3's GAC membership and unreserved MAC participation."

Correlation between the aforementioned facts and the current factual situation

31. The Board in its present composition does not see any need to re-examine the factual findings and legal conclusions of the Enlarged Board of Appeal in interlocutory decision R 19/12 or to add anything to them.

Since the petitioner linked its objection to the Chairman directly and exclusively to the factual findings of the Enlarged Board of Appeal in interlocutory decision R 19/12, it is the Board's task to determine whether, in terms of the Chairman's integration in the senior management of the Office, the present circumstances are similar to or different from those prevailing at the time when decision R 19/12 was taken.

32. In this respect, the Board understands the petitioner to have alleged in both its statement of grounds of objection and its later reply that the current circumstances are exactly or essentially the same as those established by the Enlarged Board of Appeal in interlocutory decision R 19/12. At the same time, however, the Board takes note of the Chairman's statement concerning the administrative measures that were adopted as a result of decision R 19/12.

33. Whereas the petitioner has not submitted any (new) facts or evidence in respect of the Chairman's current Office-related managerial activities, the Chairman, in his comments on the objection, has assured the Board that, following interlocutory decision R 19/12, all his managerial activities in the senior management committees of the Office, *i.e.* the MAC and the GAC (and also the GCC, which has replaced the GAC), have been discontinued, with the exception of his participation as an observer in the MAC for points of discussion having a direct bearing on the boards of appeal and their support services.

The Board is well aware that there has been no official publication of the aforementioned measures. However, bearing in mind that the members of the boards of appeal and of the Enlarged Board of Appeal have special obligations under Articles 11(4) and 23(3) EPC and Article 15 of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter: Staff Regulations), the Board is of the opinion that the unqualified, clear and unambiguous assurance given by the Chairman has considerable evidential weight.

Thus, in the absence of any clear and reliable facts or evidence to the contrary, either from the petitioner or otherwise brought to the attention of the Board, the Board concludes that the facts stated by the Chairman are accurate.

34. As a consequence, the present factual circumstances "*in concreto*" clearly differ from those on which interlocutory decision R 19/12 was based. What remains of the previously established facts, as relied on by the petitioner, is that the Chairman, in his function as VP3, continues to be subject to the provisions of Article 10(2)(f) and (3) EPC.

35. In respect of the "objective" test, the Board must determine "*in abstracto*" whether the Chairman's continuing involvement in the senior management of the Office pursuant to Article 10(2)(f) and (3) EPC would in itself allow a reasonable, objective and informed person to conclude that a party might have good reason to suspect him of partiality.

36. In this respect, the Board notes that the Chairman's functions are twofold and interdependent.
- 36.1 In his management function as VP3, he assists the President (Article 10(3) EPC). Performance of this duty is subject to the President's supervisory power (Article 10(2)(f) EPC), which means that the Chairman has to answer directly to the President and is bound by the President's instructions as a matter of principle.
- 36.2 However, in his judicial function both as a legally qualified member of the boards of appeal in general and as Chairman of the Enlarged Board of Appeal, the Chairman is, by law, not bound by any instructions and must comply only with the provisions of the EPC (Article 23(3) EPC). Hence, in this capacity the Chairman is in no sense hierarchically subordinated to the President and is not answerable to him.
- 36.3 In both his functions the Chairman is subject to the disciplinary authority of the Administrative Council (Articles 11(2) to (4) and 23(1) EPC) and thus not that of the President (Article 93 *et seq.* Staff Regulations).

Hence, the petitioner's argument that the Chairman is subject to the disciplinary authority of the President is supported neither by the legal provisions referred to above nor by any facts. The same applies to the petitioner's argument that board members are subject to the disciplinary authority of VP3/the Chairman of the Enlarged Board.

- 36.4 It follows from the above that the suspicion of "functional or institutional partiality" on the part of

the Chairman relates particularly to his administrative function as VP3. Clearly, the broader the scope of his duties as VP3 and the more substantial their content vis-à-vis his judicial function as Chairman of the Enlarged Board of Appeal, the more likely it is that a reasonable, objective and informed person might conclude that the Chairman's performance of his judicial duties could be materially influenced by the managerial or even political objectives of the Office, which are set in accordance with instructions given - or potentially to be given - by the President.

Vice versa, the less prominent the administrative tasks of the Chairman in his capacity as a member of the Office's senior management under the immediate direction of the President, the more his judicial role, the complete independence of which is guaranteed by the EPC, may prevail.

37. Thus, the Board notes that it is the rules governing the Chairman's dual functions, *i.e.* Article 10(2)(f) and (3) EPC in respect of his managerial function and Article 23(3) EPC with regard to his judicial function, that could in principle come into conflict with one other.

In legal terms, there is a "normative conflict" between two equal-ranking rules which is inherent in the legal framework governing the Chairman's dual functions and professional duties under the provisions of Article 10(3) EPC and Article 23(3) EPC. All other relevant provisions in the EPC (e.g. Article 10(2)(f) EPC), which regulates the President's supervisory authority, or in the Staff Regulations, which apply to

the Chairman in his capacity as VP3, and to the President and all other Vice-Presidents, if there is express provision to that effect in their contract of employment (cf. Article 1(5) Staff Regulations and Article 11(2) EPC), are subordinate to Articles 10(3) and 23(3) EPC.

Neither the EPC, which is the self-contained statutory code forming the primary law of the EPO, nor any of the secondary legislation, such as the Staff Regulations, adopted under the EPC, contains an explicit rule of precedence as to which of the two functions should override the other in the event of conflict (see *Pignatelli/Irmscher* in Benkard, EPÜ, *supra*, Art. 10, para. 44 *et seq.*, and Art. 23, para. 19; *Pignatelli/Beckedorf* in Benkard, EPÜ, *supra*, Art. 21, para. 1; *Braendli*, *supra*, Art. 10, para. 45 *et seq.*, Travaux Préparatoires EPC 1973, Article 10). The Board is aware of the academic opinion that attributes priority to the Chairman's appointment according to Article 11(3) EPC over the VP3's appointment under Article 11(2) EPC (see *Braendli*, Münchner Gemeinschaftskommentar EPÜ, March 2000, Art. 11, para. 37).

38. The very fact that the Chairman's dual functions are governed by equal-ranking provisions of the EPC indicates that he may not perform either function without having regard to the other.
39. Certainly, since time of the EPC 1973, the Presidents and Vice-Presidents of the EPO have been careful to avoid any direct clash between the above-mentioned provisions (see, with regard to representation of the

President by VP3, *Braendli, supra*, Art. 10, para. 53 in combination with para. 29 *et seq.*). Nevertheless, the problem of this "normative conflict" remains and needs to be addressed by means of the rules themselves.

39.1 The most radical - but at the same time most clear-cut - solution appears to be the organisational separation of the boards of appeal from the Office. In its interlocutory decision R 19/12 (point 21 of the Reasons with reference to CA/46/04 and CA/85/04), the Enlarged Board of Appeal referred to the already existing complete draft for revision of the EPC in this respect. The boards of appeal, together with their support services, would then no longer be integrated in the Office as DG3 but would become a separate, fully independent body within the European Patent Organisation (see *Pignatelli/Beckedorf* in Benkard, EPÜ, *supra*, Art. 21, para. 17).

This initiative, the purpose of which would be to strengthen the judicial role and independence of the boards of appeal, has received considerable support.¹

¹ See e.g.: *B. Battistelli*, President of the Office, GRUR Newsletter 2/2010, page 3: "Der gerichtliche Charakter der Beschwerdekammern des EPA und die richterliche Unabhängigkeit der Beschwerdekammermitglieder sind im EPÜ verankert, und in den Texten zur Ausführung des derzeitigen europäischen Patentsystems ist dies weiter abgesichert. Dass die Mitglieder der Beschwerdekammern Richter sind, wurde auch von nationalen Gerichten anerkannt. Diese gerichtliche Unabhängigkeit könnte jedoch besser sichtbar gemacht werden, wenn die Beschwerdekammern neben dem Europäischen Patentamt und dem Verwaltungsrat das dritte Organ der Europäischen Patentorganisation wären. Meiner Ansicht nach wäre es vorzuziehen, den in CA/46/04 enthaltenen Entwurf eines Vorschlags für eine entsprechende Revision des EPÜ aufzugreifen, der das Konzept einer Europäischen Patentorganisation mit drei Organen im Detail darlegt und der sowohl intern als auch im Verwaltungsrat und seinen Unterausschüssen intensiv diskutiert wurde. 2004 waren sich die Vertragsstaaten einig, dass der Entwurf einer Diplomatischen Konferenz zur Revision des EPÜ vorgelegt werden sollte, falls eine solche einberufen wird, um z.B. die zur Einführung des EU-Patents nötigen

Implementing the initiative would require a Diplomatic Conference of the EPC Contracting States. However, there are no plans for this as yet.

- 39.2 Irrespective of when the Contracting States may act on this or any other (similar) legislative initiative, the "normative conflict" and the need to resolve it remain issues of fundamental importance.

The Board notes that in the wake of interlocutory decision R 19/12, the institutional status of the boards of appeal has become a subject of debate in the Administrative Council of the European Patent Organisation. However, no conclusions have been reached so far.

- 39.3 Aside from said legislative initiative - and at least until a clear and convincing solution to question of the institutional status of the boards of appeal has been agreed on and fully implemented - the problem of the "normative conflict" needs to be mitigated by other means.

Court of Justice of the European Union, Statement of position by the Advocates General, Opinion 1/09, point 73: "Another option that may be contemplated is the creation of an administrative patent court ...";
H. Däubler-Gmelin, Federal Minister of Justice, speech given on occasion of the centenary of the Patent Attorneys Act on 26 May 2000 in Munich : "So halte ich es für mittlerweile dringend geboten, darüber nachzudenken, in welcher Weise den Beschwerdekammern des EPA die ihnen gebührende richterliche Unabhängigkeit garantiert werden kann. ... Richterliche Unabhängigkeit hat aber nicht allein eine Wirkung nach innen, sondern sie stellt auch sicher, dass die Öffentlichkeit erst gar keinen Anlass hat an ihr zu zweifeln. Ich glaube, dass dem Amt ... manche Verdächtigung erspart geblieben wäre, wenn die Beschwerdekammern organisatorisch vom Amt getrennt wären."

I.B. Stjerna: "Unitary patent" and court system - Compatible with Constitutional Law?, revised article of 11 October 2014, www.stjerna.de;
Teschemacher, Mitteilungen der deutschen Patentanwälte, 2014, 379.

In this context the Board is aware of the fact that the notion of a "normative conflict" is not unique to the European Patent Organisation but is known to legal systems of the Contracting States as well. Thus, the respective concepts for resolving such conflicts under national laws may serve as a model vis-à-vis the "normative conflict" of two provisions of the EPC.

39.4 German constitutional law recognises a legal concept called "praktische Konkordanz" ("practical" or, more precisely, "normative concordance"), which is applied in order to establish a balance between two conflicting fundamental rights provisions.² This concept, which is recognised in the legal systems of other Contracting States³, constitutes a standard of constitutional interpretation, according to which two conflicting constitutional rules are "equalised", such that the legislative purpose of each can be achieved. The underlying principle is that preferential treatment should not be given to one constitutionally protected right at the expense of another - equally protected - right.

Thus, by fairly weighing up the competing interests in an individual case in accordance with the principle of

² *K. Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, reprinted 20th edition, Heidelberg 1999, para. 72: „Verfassungsrechtlich geschützte Rechtsgüter müssen in der Problemlösung einander so zugeordnet werden, dass jedes von ihnen Wirklichkeit gewinnt. [...] beiden Gütern müssen Grenzen gesetzt werden, damit beide zu optimaler Wirksamkeit gelangen können.“

³ See e.g. Conseil constitutionnel, Décision n° 94-352, 18 January 1995; *F. Tulkens / S. van Drooghenbrouck*, L'évolution des droits garantis et l'interprétation jurisprudentielle de la Convention Européenne des Droits de l'Homme, Grenoble 2002, Introduction, para. 11 ; ECHR, *Pfeiffer v. Austria* of 15 February 2008, no. 12556/03, dissenting opinion of Judge

proportionality it is possible to achieve a balance between two conflicting constitutional provisions.

39.5 It is true that the concept of "normative concordance" has been developed primarily in connection with rules governing fundamental rights. However, the rationale underlying this theoretical legal concept may be transposed to conflicts between other provisions of constitutional law, including equal-ranking provisions governing, for instance, the institutional status of the central organs or bodies of a state or international organisation or their inter-institutional relations.

39.6 Consequently, the Board considers that it is appropriate to apply the legal concept of "normative concordance" so that a balance between the conflicting legal / institutional provisions of Article 10(3) EPC (in respect of management functions) and Article 23(3) EPC (in respect of judicial functions) can be achieved with regard to the Chairman's dual duties as VP3 and Chairman of the Enlarged Board of Appeal.

39.7 In applying the concept of "normative concordance" to the present case, the Board concludes that the President's power to give instructions to the Chairman in his function as VP3 pursuant to Article 10(2)(f) and (3) EPC is limited by virtue of Article 23(3) EPC.

The Chairman is accordingly relieved of any obligation

- (a) to obey any presidential instructions or
- (b) to observe other administrative/executive directions or

(c) to assist the President pursuant to Article 10(3)
EPC

if and to the extent that any such instruction, direction or assistance might affect him and/or any other member of the boards of appeal, including the Enlarged Board of Appeal, directly or indirectly, in performing their judicial duties (see also *Braendli*, Münchner Gemeinschaftskommentar EPÜ, *supra*, Art. 10, para. 53, and Art. 11, para. 37).

39.8 An indirect effect in this context could even be caused by any measure of the aforementioned kinds which, *prima facie*, is not immediately and intentionally directed to the exercise of judicial duties in the narrow or obvious sense.

Similarly, measures directed to less central aspects of the work or working conditions of the Chairman and the other members of the boards of appeal and of the Enlarged Board of Appeal could also have longer-lasting effects. These might be perceived by the members concerned and/or by a reasonable observer, for example a party to proceedings before a board of appeal or the Enlarged Board of Appeal, as influencing the independence of the members of the boards of appeal or the Enlarged Board of Appeal.

39.9 The need to balance the conflicting requirements of Article 10(2)(f) and (3) EPC and Article 23(3) EPC also applies to the way in which the Chairman carries out his duties.

Therefore, the Board considers that the EPC obliges the Chairman, when exercising his judicial duties, to observe that he is bound only by the fundamental principle of the independence of his office as a member of the Boards of Appeal and of the Enlarged Board of Appeal, by the corresponding principle of impartiality as required by Articles 23(3) and 24 EPC, and by the parties' fundamental right to a fair trial as provided for in Article 6(1) ECHR.

Consequently, the Chairman bears sole and absolute responsibility for forming a judgment in each individual case and for ensuring that his conduct, whether in his capacity as VP3 or as chairman of the Enlarged Board of Appeal, in no way brings about an imbalance between his potentially conflicting managerial and judicial duties.

Notwithstanding the potential difficulties in balancing the conflicting duties of the Chairman/VP3, the parties to proceedings before the boards of appeal and before the Enlarged Board of Appeal are entitled to expect the Chairman always to consider the public perception of his actions.

However, the Chairman/VP3 could be confronted with an unresolvable conflict, *i.e.* with a situation in which either he carries out a presidential instruction or any other Office related managerial obligation and thereby risks failing in his duties as a judge and/or offending against the principle of judicial independence (whether his or that of another board member),

or, on the other hand, he elects not to carry out what he is asked to do as VP3 and thereby risks failing in his duties to assist the President.

In that event, one may legitimately expect that his judicial duties under Articles 23(3) and 24 EPC and under Article 6(1) ECHR must prevail.

40. As a consequence, the inherent "normative conflict" caused by the dual function of the Chairman as VP3 and as a member of the boards of appeal and Chairman of the Enlarged Board of Appeal cannot be completely resolved without changes to the current institutional structure of the European Patent Organisation. However, in the meantime, its impact can and must be mitigated by a continuous balancing of the potentially conflicting duties.

Yet, once lawfully appointed, the Chairman - like any other judge - is deemed to act in good faith and is therefore presumed to be impartial until proven otherwise.

41. Accordingly, in the absence of any duly substantiated (let alone proven) information to the contrary, the Board - once again - can only rely upon the clear and unconditional statement made by the Chairman. According to this statement, the Chairman was aware neither of any pressure exerted on him to sacrifice the petitioner's right to a fair procedure or his right to be heard in order to achieve efficiency goals set by the management of the Office or for any other reason, nor of any directions and guidance from the President to him and any resulting conflict of interest. The

Board assumes that this statement continues to reflect accurately the situation at the closure of the oral proceedings in these interlocutory proceedings because the Chairman would have been expected to inform the Board and the petitioner on his own initiative of any change in the factual circumstances.

42. It therefore appears that, with the implementation of the institutional measures adopted following interlocutory decision R 19/12, the Chairman's judicial function as legally qualified member of the boards of appeal and chairman of the Enlarged Board of Appeal now prevails over his managerial function as VP3.

The petitioner has further asserted that the Chairman may still have other managerial responsibilities concerning the Office as a whole in his capacity as VP3 or may be a member of other bodies under the control of the President. However, it has submitted no facts or evidence support this assertion, nor is the Board aware that the Chairman has any such duties. The Board cannot base its decision on blanket, unsubstantiated assumptions.

43. As a result of the measures taken, it seems that the potential for undue external influence being exerted on the Chairman in the performance of his judicial duties is now comparable to, or at any rate no greater than, it was before the Chairman took on the additional managerial functions that were not assigned to his predecessors.

The Board notes however, that, in institutional terms, the boards of appeal, including the Enlarged Board of

Appeal, continue to be integrated in the Office, and the Chairman remains part of its senior management.

In its interlocutory decision R 19/12 (*supra*, point 24.1 of the Reasons), the Enlarged Board held in this regard that, despite the existing misgivings, the structural weaknesses in the boards' organisation resulting from their integration within the Office have to be accepted, because the situation cannot be altered under the EPC as it currently stands.

The Board now concludes that, if this is true, a reasonable, objective and informed person considering the circumstances of the Chairman's integration within the Office hierarchy at present would no longer have good reason to suspect the Chairman of partiality.

44. As a further point, the petitioner argues in its reply that its objection to the Chairman was justified because of his institutional influence on the other members of the Enlarged Board of Appeal, including the other two Members objected to. However, none of the petitioner's arguments (see point IX.3 above) is substantiated. The petitioner confines itself to describing the influence that the Chairman might be able to exert on board members as a result of the powers vested in him in either of his two capacities.

In particular, its reference to an alleged difference between the respective terms of office of the Chairman of the Enlarged Board of Appeal and VP3 is so vague that it is not open to proper scrutiny.

45. Thus, the Board concludes that, on the basis of the facts established at the closure of the oral proceedings of 14 November 2014, there is nothing, either *in concreto* or *in abstracto*, in the Chairman's conduct or in his institutional role as VP3 that could justify a (continuing) suspicion against him or require his exclusion from the Enlarged Board in case R 2/14.
46. The petitioner has additionally argued that the fact that no proceedings according to Article 24(4) EPC were initiated *ex officio* is in itself to be considered serious breach of duty which has destroyed confidence in the Chairman's judicial impartiality. In view of the Board's conclusion on the previous point, this argument too must fail.

Limitations of the temporary measures adopted as a result of interlocutory decision R 19/12

47. The petitioner argues that the decision of the President of 23 May 2014 relieving the Chairman of his membership of the MAC and GAC/GCC did not rule out that the President might in the future unilaterally restore other managerial responsibilities and functions. The President could revoke that decision at any time (Article 10(2)(a) EPC), and the changes initiated by it could easily set aside without being communicated externally.
48. It is true that the measures adopted as a result of interlocutory decision R 19/12 are not permanent in the sense of having been incorporated into the EPC itself.

49. Nevertheless, the petitioner's objection to the Chairman in the present case can only be assessed on the basis of the facts that were either submitted by the petitioner itself or were otherwise brought to the knowledge of the Board by the time of closure of the oral proceedings.

The Board would have expected the Chairman to have notified it of his own motion if he had become aware of any changes to the facts, whether by the President revoking the administrative measures adopted or by the adoption of new measures that might have an impact on his involvement in Office management or on his independence or the independence of any board members.

50. The Board notes that no facts other than those dealt with in the preceding sections of this decision have been brought to its attention. Accordingly, its aforementioned conclusions are based exclusively on those facts available to it at the closure of the oral proceedings on 14 November 2014. It is self-evident that these conclusions may not hold true should the factual circumstances change (see in this respect points 56 *et seq.* below).

Further requests

51. The petitioner has sought to broaden the factual basis upon which its objection to the Chairman is to be decided by submitting further requests with its reply (see point XI. above).

52. Those additional requests can be categorised according to their legal nature and object as follows:

- (1) requests that curtailed internal documents be disclosed
(see requests (1)(a) to (i) in point XI. above),
and
- (2) requests that evidence be taken
(see requests (2) to (7) in point XI. above).

53. The Board considers that none of the requests in the first category can be granted for the reasons that follow.

53.1 First, the Board itself cannot rule on any of the documents referred to by the petitioner because they have never been introduced into the present proceedings by the petitioner itself or by any other person, be it the Chairman, one of the Members or any third party.

53.2 Secondly, the Board cannot order the President or any Office employee to furnish any of the documents referred to because there is no legal basis for such an order.

53.3 Thirdly, the Board is not required, either at a party's request or *ex officio*, to explore and establish facts in support of a party's case. It is rather for the party itself to submit all the facts, arguments and evidence in support of its case, *i.e.* a party must in principle already present its complete case at the outset of the proceedings and in any reply. This applies likewise to a party who raises an objection of impartiality.

53.4 Hence, the burden of setting out, substantiating and proving its case rested entirely upon the petitioner itself. The petitioner should have expressly specified all the facts, arguments and evidence relied on. In particular, it should have arranged to have at its disposal and should have submitted all the documents referred to in its reply. This burden could not be shifted to the Board. If documents which the petitioner sought to rely on were publicly unavailable, it could have requested them from the competent bodies.

54. With regard to the second category of requests, the Board notes that a request to take evidence needs to be supported by facts and arguments as to what is to be proven by the respective piece of evidence and why it is relevant for the party's case.

However, the requests in question are so vague and general that they appear to be aimed simply at obtaining mere facts which the petitioner feels unable to adduce by its own means. In other words, the petitioner has not offered evidence in order to prove a substantiated allegation of fact but rather to discover facts in the first place.

Requesting the taking of evidence is not meant to be a fact-finding exercise ("discovery") to allow a party to proceedings to prepare its case for trial. Rather, a party is in principle required to prepare its case before trial and it may only file a motion to take evidence in order to prove facts that have been alleged already.

55. Hence, the Board dismisses these requests as not relevant to the present case.

Submissions and requests after the closure of the oral proceedings

56. By its letter of 23 December 2014, the petitioner in essence submitted new facts and arguments in respect of the Chairman, which, it said, at the same time affected the other two Members.

These new submissions cannot be admitted into the present proceedings or taken into account in this decision for the following reasons:

56.1 According to Article 14(7) RPEBA, the Board shall ensure that each case is ready for decision at the conclusion of the oral proceedings, unless there are special reasons to the contrary. Furthermore, Article 14(6), 2nd sentence, RPEBA stipulates as a general rule that no submissions may be made by the parties after the closure of the debate. The re-opening of the debate is mentioned as an (exceptional) option for the Board to decide upon.

56.2 The Board notes that the petitioner's submissions and requests were filed not only after the closure of the debate but even after the closure of the oral proceedings, which is the point in time at which the findings of fact have been concluded and the party's final requests have been established (Article 14(6), 1st sentence, RPEBA). At the same time this provides the basis for the Board to take its decision.

56.3 The Board notes further that in interlocutory proceedings pursuant to Article 24(4) EPC a party objecting to a member of a board must set out already in its statement of grounds of objection clearly and concisely why a replacement of the member is requested.

In the event of an objection to a member for suspected partiality pursuant to Article 24(3) EPC, the statement of grounds of objection must contain the party's complete case in respect of the factual and/or legal circumstances that gave rise to the party's suspicion of partiality. The party may substantiate its initial submissions further during the proceedings. However, since the primary factual (and legal) framework has to be set in the party's initial statement, any subsequent submission must remain within that framework.

Apart from a subsequent elaboration of the original objection by supporting facts, evidence and arguments, the subject-matter of the proceedings, in principle, is defined at the beginning of the interlocutory proceedings pursuant to Article 24(4) EPC and cannot be extended or changed, whether by new facts or by a new objection. Hence, submitting new facts and/or legal aspects unrelated to or otherwise distinct from those previously submitted would constitute a new case outside the scope of the objection defined at the outset.

56.4 Apart from the chronological aspect, what matters when deciding whether, as an exception rather than as a rule, subsequent submissions or requests could lead to a re-opening of the debate, which was formally closed at the

end of the oral proceedings (Article 14(6), 2nd sentence, RPEBA), is that the late submissions and requests:

- (a) relate to factual circumstances (including evidence),
- (b) of which the party relying upon them only afterwards became aware,
- (c) if and insofar as the cause of the circumstances arose prior to the closure of the oral proceedings, or
- (d) if and insofar as the new circumstances were clearly linked to those existing at the time of the closure of the debate and the oral proceedings.

Even if all the aforementioned requirements are fulfilled, it remains at the Board's discretion whether or not to re-open the oral proceedings and allow the debate to be resumed. When exercising this discretion the Board may consider further conditions as well. However, in view of the Board's conclusion in the present case there is no need to enter into a discussion of such conditions.

56.5 As to the aforementioned requirements (a) and (b), the Board notes that the petitioner referred to factual circumstances (*i.e.* the imposition of a house ban on a member of the boards of appeal by the President, and the Chairman's conduct in this respect) of which the petitioner became aware only after the closure of the oral proceedings.

56.6 However, with regard to the remaining requirements (c) and (d), all the events referred to by the petitioner occurred only after the closure of the oral proceedings. The circumstances that the petitioner submitted in its letter of 23 December 2014 are distinct from those on which its original objection was based.

The petitioner originally based its objection not on actual conduct by the Chairman ("subjective partiality") but solely on an alleged structural/institutional ("objective") partiality on his part, stemming from his duty as VP3 to assist the President in the management of the Office (see points 10.3 and 10.4 above). In contrast, its new submissions are directed to the Chairman's conduct (*i.e.* his alleged failure to act). This amounts to a new objection belonging to a separate category of objections to partiality (subjective partiality *versus* objective partiality). The cause of the circumstances on which the petitioner relied in its new submissions did not arise prior to the closure of the oral proceedings, nor were they clearly linked to the factual circumstances that existed at the closure of the oral proceedings.

For these reasons, the petitioner's late submissions constitute a fresh case, which cannot be dealt with within the framework of the present proceedings.

56.7 Consequently, the petitioner's request that its new submissions be admitted and that the debate be re-opened is rejected. The same applies to the petitioner's second auxiliary request that its submissions be taken into consideration as an *amicus curiae* brief. Therefore, that auxiliary request is

rejected. Besides, an *amicus curiae* brief can be accepted only in proceedings under Article 112 EPC (Article 10 RPEBA).

57. As far as the petitioner requested that new proceedings in accordance with Article 24 EPC be initiated in respect of the Chairman, based upon said events (first auxiliary request), this request is rejected as well.

The Board in its current composition was set up in accordance with Article 24(4) EPC to decide upon the petitioner's original objections. It may neither extend the subject-matter of the pending proceedings nor initiate new proceedings of its own motion.

Thus, for procedural reasons alone, the new objection to the Chairman could not be admitted into the present interlocutory proceedings.

58. It follows that the petitioner's additional grounds of objection to the Chairman were not considered by the Board in the present proceedings as to their merits. Accordingly, they have not been rejected for substantive reasons.

59. Since the petitioner's new objection to the Chairman was not admitted into the proceedings, the implied new objection to the other two Members that is directly linked to the Chairman could not be considered either.

Conclusion

60. For the reasons set out above, the Board concludes that the petitioner's objection to the first legally qualified member and the technically qualified member of the Enlarged Board in case R 2/14 is inadmissible.

The Board also concludes that it has failed to provide sufficient justification for a suspicion of partiality on the part of the Chairman of the Enlarged Board to rebut the presumption of the Chairman's impartiality.

Therefore, in respect of the circumstances on which the petitioner based its objections at the outset of the current interlocutory proceedings up to the closure of the oral proceedings on 14 November 2014, the Board in its present composition does not see any reason to exclude and replace any of the members of the Enlarged Board, *i.e.* the Chairman, the legally qualified Member or the technically qualified Member, in its composition in case R 2/14 pursuant to Rule 109(2)(a) EPC.

Order

For these reasons it is decided that:

1. The requests of the petitioner to replace Mr ... and Mr ... as members of the Enlarged Board of Appeal in case R 2/14 in its composition pursuant to Rule 109(2)(a) EPC are rejected as inadmissible.

2. The request of the petitioner to replace Mr ... as chairman of the Enlarged Board of Appeal in case R 2/14 in its composition pursuant to Rule 109(2)(a) EPC is rejected as unjustified.

3. Mr ..., Mr ... and Mr ... remain members of the Enlarged Board of Appeal in case R 2/14 in its composition pursuant to Rule 109(2)(a) EPC.

The Registrar:

The Chairman:

P. Martorana

G. Weiss