

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ X ] To Chairmen
- (D) [ - ] No distribution

**Datasheet for the decision  
of 18 November 2015**

**Case Number:** T 0355/13 - 3.5.02

**Application Number:** 00964063.2

**Publication Number:** 1127407

**IPC:** H03F1/30

**Language of the proceedings:** EN

**Title of invention:**

An amplifier for use in a mobile phone

**Patent Proprietor:**

Callahan Cellular L.L.C.

**Opponent:**

Saur, Erich, Dr.

**Headword:**

**Relevant legal provisions:**

EPC Art. 24, 113(1), 83, 84, 54, 56

RPBA Art. 11

EPC R. 116(1), 103

**Keyword:**

Admissibility of partiality objections (no)  
Remittal to the department of first instance - (no)  
Right to be heard -  
    oral proceedings before opposition division  
Right to be heard - oral proceedings before board of appeal  
Right to be heard - violation (no)  
Grounds for opposition - lack of clarity no ground for  
opposition - late-filed ground for opposition (not admitted)  
Novelty - (yes)  
Inventive step - (yes)  
Reimbursement of appeal fee - (no)

**Decisions cited:**

G 0005/91, G 0006/95, G 0003/14, G 0010/91, R 0012/09,  
R 0019/12, T 1028/96



**Beschwerdekammern  
Boards of Appeal  
Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 0355/13 - 3.5.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.02**  
**of 18 November 2015**

**Appellant:** Saur, Erich, Dr.  
(Opponent) Marienstr. 23  
D-82327 Tutzing (DE)

**Respondent:** Callahan Cellular L.L.C.  
(Patent Proprietor) 2711 Centerville Road, Suite 400  
Wilmington, DE 19808 (US)

**Representative:** Small, Gary James  
Carpmaels & Ransford LLP  
One Southampton Row  
London WC1B 5HA (GB)

**Decision under appeal:** **Decision of the Opposition Division of the European Patent Office posted on 19 December 2012 rejecting the opposition filed against European patent No. 1127407 pursuant to Article 101(2) EPC.**

**Composition of the Board:**

**Chairman** M. Ruggiu  
**Members:** M. Léouffre  
W. Ungler

## **Summary of Facts and Submissions**

- I. The opponent appealed against the decision of the opposition division to reject the opposition and to maintain European patent No. 1 127 497 unamended. The statement setting out the grounds of appeal was received on 20 March 2013.
- II. The opposition was filed against the patent as a whole and based solely on Article 100(a) together with Articles 54(1) and 56 EPC. The opposition division held, *inter alia*, that the grounds for opposition mentioned in Article 100(a) EPC did not prejudice the maintenance of the patent as granted, having regard to EP 0 654 900 B1 (document D4).
- III. In his notice of appeal dated 7 February 2013 the appellant requested that:
- the decision under appeal be set aside;
  - the patent be revoked in its entirety;
  - the appeal fee be reimbursed because of substantial procedural violations; and
  - in the event of remittal to the opposition division, replacement of the whole opposition division be ordered.
- With the statement of grounds of appeal of 20 March 2013 the appellant alleged substantial procedural violations by the opposition division concerning the right to be heard, which he had objected to for the reason of suspected partiality. The appellant cited also new documents D7 to D12 and raised objections concerning novelty and inventive step (Articles 54 and 56 EPC) on the basis of D4 and other documents, as well as clarity (Article 84 EPC).

The newly-filed documents were the following:

- D7: communication of 3 December 2012 concerning the maintenance of the date of oral proceedings before the opposition division, received on 4 December 2012;
- D8: the envelope of the D7 letter, bearing the postmark date of 3 December 2012;
- D9: US 3 029 366;
- D10: Jirmann, "Integrierte einstufige Breitband-Verstärker für 0 bis 2 GHz", UKW-Berichte, pages 28 and 29, No. 1/1987;
- D11: Lawsuit (excerpt) against Philips Technologie GmbH, dated 21 December 2012; and
- D12: <http://www.bizapedia.com/de/CALLAHAN-CELLULAR-LLC.html>, retrieved on 27 September 2012.

- IV. The respondent proprietor replied with letter dated 1 August 2013 stating that they agreed with the decision of the opposition division. They noted also that Article 84 EPC was not a ground for opposition and that the board of appeal not a place to air arguments of lack of clarity for the first time.
- V. On 14 October 2013 the appellant requested accelerated prosecution.
- VI. On 5 December 2013, the board issued summons to attend oral proceedings to be held on 17 February 2014. In an annex to the summons the board expressed the preliminary opinion that the subject-matter of claim 1 of the patent in suit might be novel having regard to D4, that the admissibility of the newly-cited documents could be discussed. Furthermore, it was noted that the alleged procedural violations in the first instance proceedings, in particular relating to the right to be

heard, would be discussed and the other requests from the appellant addressed.

VII. In a letter dated 16 January 2014, the appellant informed the board that he regarded the summons as void ("unwirksam") because it contravened his right to be heard (Article 113(1) EPC) and because the board disregarded Article 11 RPBA, and that he therefore suspected the rapporteur of partiality in the sense of Article 24(3) EPC.

He complained that

- no position was taken in the summons about the alleged procedural violation by the department of first instance,
- no reason was given as to why the case was not to be remitted to the department of first instance,
- the admissibility of documents D9 and D10 was questioned, and
- the rapporteur was lacking in fundamental technical knowledge.

He introduced also new objections based on Articles 83 and 84 EPC and complained that

- the clarity of the last two features of claim 1 (features labelled 3.1 and 3.2 in the grounds of appeal) had not been assessed.

In the same letter the appellant summarised his former requests, which according to him read as follows:

- a) the contested decision should be set aside and the patent be revoked in its entirety;
- b) in the alternative, if the board intended to remit the case to the opposition division, replacement of all the members of the opposition division should be ordered;
- c) the appeal fee should be reimbursed;
- d) oral proceedings should be arranged;

- e) the procedure should be accelerated.

The appellant stated that requests a) to e) above were to be replaced by new requests which read as follows:

- f) the board should decide without oral proceedings to remit the case to the department of first instance, order the replacement of all members of the opposition division, and order the reimbursement of the appeal fee;
- g) the rapporteur should be excluded from the further procedure and be replaced by a competent member according to Article 24(4) EPC;
- h) the board should be complemented with at least a further lawyer with knowledge about the right to be heard (Article 21(3)(b) EPC and Article 9 RPBA);
- i) the oral proceedings should be postponed to allow the new members to get acquainted with the matter (Article 12(5) RPBA);
- j) the new and extended board should issue new summons in which the violation of the right to be heard by the department of first instance should be treated and assessed;
- k) the oral proceedings should address only the questions of the right to be heard, remittal of the case to the first instance and reimbursement of the appeal fee;
- l) in case request f) is not granted, the board should inform the appellant immediately about its decision concerning the other requests.

In case none of the previous requests f) to l) were to be granted, the appellant formulated the following alternative requests:

- m) evidence should be obtained by means of expert opinion that the subject-matter of claim 1 of the

contested patent is identical to the disclosure of D4;

- n) evidence should be obtained by hearing witnesses to prove that the filing of the contested patent was made to circumvent the D4 patent;
- o) the appellant should be given at least 2 months time to provide the evidence mentioned under items m) and n);
- p) a beamer and a whiteboard should be available for the discussion of the state of the art during the oral proceedings;
- q) the room for the oral proceedings should be large enough to allow the public and the press to witness the application of justice by the board (Article 116(4) EPC).

In the same letter the appellant cited also the following further documents:

- D13: ETSI, GSM Technical Specification, GSM 05.05, Vers. 5.10. May 1996;
- D14: Bzooijen, Prikhodko, Roemond, "Biasing Circuits for Voltage Controlled GSM Power Amplifiers", 11th GAAS Symposium, München, 2003;
- D15: Philips, Data Sheet CGY 2010G; CGY2011G, July 1996;
- D16: Philips, Data Sheet CGY 2013G, July 1996;
- D17: Philips, Data Sheet PCF5075, "Power amplifier controller for GSM and PCN systems", February 1996;
- D18: Wheatstonesche Messbrücke, Wikipedia;
- D19: "Diode/Halbleiterdidode", Internet publication [H://www.elektronikkompodium.de/sites/bau/0201113.htm](http://www.elektronikkompodium.de/sites/bau/0201113.htm), copied 15 January 2014;
- D20: Informazioni Tecniche Philips, Circuiti Integrati Lineari, page 57, 1996;



D21: Dr. Matthias Brandi-Dohrn, "Der zu weite Patentanspruch"; and

D22: EP 0 637 120 A1 with a search report from the rapporteur.

VIII. With a communication dated 28 January 2014 the parties were informed that the oral proceedings scheduled for 17 February 2014 had been cancelled.

IX. In a communication dated 11 November 2014, the legal member of the board, who acted as additional rapporteur, informed the appellant of the following about the objection of suspected partiality:

"1. Article 24(1) EPC stipulates that members of the boards of appeal may not take part in a case in which they have any personal interest. That is because it is essential, when judicial functions are being exercised, that persons judging a case have no common interests with any of the parties to the proceedings; they must be strictly neutral. If a party has legitimate cause for concern that a board member involved in its case might not be neutral, then under Article 24(3) EPC it can object to that member on the grounds of suspected partiality.

2. If this happens, the board first decides, in its original composition, whether the party's objection is admissible, i.e. whether to open the procedure under Article 24(4) EPC (R 12/09, point 2). An objection is not admissible if insufficiently substantiated, i.e. not based on facts and arguments showing at least that the reason given is recognised as such by the law (R 12/09, point 2, citing T 1028/96).

3. Applying these principles to the present case establishes that the appellant's partiality objection to the rapporteur is inadmissible. The appellant has given no reason that would justify concerns that the rapporteur is not neutral in this case. Rather, it has made it very clear that the rapporteur's provisional conclusions are not to its liking. But the objection provisions are not there to enable parties to bring about whatever changes in a board's composition they might desire.

4. The board therefore intends to dismiss the appellant's partiality objection as inadmissible."

X. In a reply dated 12 January 2015, the appellant requested anew the arrangement of oral proceedings. The appellant cited also a further document D23: vacancy advert for a technically qualified member of the boards of appeal (electricity), and considered the case law cited by the legal member as irrelevant, erroneous and wrongly applied. In a further letter dated 13 January 2015 he discussed the composition of the board, and with another letter dated 14 January 2015 he filed a copy of interlocutory decision R 19/12.

XI. On 9 July 2015 the board summoned anew to oral proceedings scheduled for 12 November 2015 and informed the parties about the possible course foreseen for the oral proceedings, namely that the following matters could be discussed at the oral proceedings:

- admissibility of the objection of partiality raised against the rapporteur (with the board in its present composition),
- if the objection was found to be admissible, amendment of the composition of the board

(replacement of the rapporteur by his alternate)  
and discussion about whether the rapporteur may  
take part in the present case,

- once the objection against the rapporteur was  
decided, indication of the composition in which  
the board would hear the substance of the case,
- discussion of the substance of the case followed  
by the statement of the final requests and closure  
of the debate,
- possibly deliberation and oral announcement of the  
final decision of the board.

XII. On 13 July 2015, the appellant called the chairman of  
the board by telephone, and indicated that:

- he had another proceedings on 12 November 2015,  
i.e. at the date foreseen for the oral proceedings  
in the present case,
- he objected to the rapporteur,
- he considered that the board was committing errors  
in law ("Rechtsfehler"),
- he suggested that the board consults a former  
member of the boards of appeal, and
- he expressed the view that the best solution would  
be to remit the case to the first instance.

He also indicated that he would file submissions in  
writing. An attendance note about this telephone call  
was sent to the parties on 16 July 2015.

XIII. With a letter dated 22 July 2015 the appellant opponent  
requested postponement of the oral proceedings  
scheduled for 12 November 2015 because he was required  
to appear at the Landgericht München II on that date.  
He qualified the summons as unlawful ("rechtswidrig")  
and the board as a "Spezial-Tribunal".

The appellant reiterated his comments about the summons and his wish to see the case remitted to the department of first instance as foreseen in Article 11 RPBA. He also objected to the different replacements of board members that had happened since the filing of the appeal and warned the board that he would raise an objection of suspected partiality against every member of the board if no plausible reason was given for the replacements.

XIV. The oral proceedings were rescheduled to 18 November 2015 and the parties were informed of this with a communication dated 3 August 2015. In another communication also dated 3 August 2015, the board, referring to the business distribution schemes of years 2013 and 2015 informed the parties about the reasons for the changes to the board composition since the filing of the appeal. With a further letter dated 17 August 2015 the appellant was informed that the patent had lapsed in all designated contracting states and he was invited to inform the board whether he requested that the appeal proceedings be continued.

XV. With a letter dated 24 August 2015, which referred to the amended summons of 3 August 2015, the communication by the chairman also of 3 August 2015 and the communication of 17 August 2015, the appellant requested that the appeal proceedings be continued according to Rule 84(1) EPC in conjunction with Rule 100(1) EPC.

In the same letter, the appellant considered the attitude of the board as scandalous, warned that he would consider publicly denouncing the perversion of justice ("Rechtsbeugung") exercised by the board and warned again that he would raise an objection of suspicion of partiality against all members if the

- board did not cancel the summons to oral proceedings, remit the case to the department of first instance, and reimburse the appeal fee before 30 September 2015.
- XVI. The patent proprietor informed the board by letter dated 11 September 2015 that they would not attend the oral proceedings.
- XVII. The parties were informed by letter dated 16 September 2015 that the oral proceedings were maintained as scheduled for 18 November 2015.
- XVIII. The letter from the patent proprietor dated 11 September 2015 and the official communication dated 16 September 2015 were sent as registered letters. The appellant did not collect these letters which were returned as "non réclamé" on 6 October 2015.
- XIX. In the meantime the appellant sent a further letter dated 9 October 2015 in which he reiterated his arguments about the violation of the right to be heard (Article 113(1) EPC) by the opposition division. He alleged a contravention of Article 110 EPC in combination with Rule 100(1) EPC and of Article 111(1) in combination with Article 11 or 12 RPBA as well as breach of law ("Rechtsbruch") and perversion of justice ("Rechtsbeugung") by the board of appeal. He objected against all members of the board, supporting this objection with a decision of the German federal constitutional court ("Bundesverfassungsgericht"), filed as D24: 2 BvR 1750/12 of 12 December 2012.
- XX. The letter from the patent proprietor dated 11 September 2015 and the official communication dated 16 September 2015 were resent on 13 October 2015 and apparently collected.

XXI. With a fax dated 17 November 2015 the appellant qualified the upcoming oral proceedings as being a farce and informed the board that he would not attend the oral proceedings scheduled for 18 November 2015. The appellant complained about an alleged sequence of errors from the EPO starting from the classification by the search department through the opposition division up to the board of appeal and stated that the conditions set out in Article 112a(2) (c) and (d) EPC for a petition for review by the enlarged board of appeal were present.

XXII. Oral proceedings took place as scheduled on 18 November 2015 in the absence of the parties.

XXIII. The appellant did not attend the oral proceedings and did not name the witnesses and experts announced in his letter of 16 January 2014. Hence the board considered the requests of the appellant (opponent) to be as follows:

- replacement of all members of the board due to suspicion of partiality;
- remittal of the case to the department of first instance due to substantial procedural violation and reimbursement of the appeal fee;
- in the alternative revocation of the patent.

XXIV. The respondent (patent proprietor) had requested in writing that the appeal be dismissed.

XXV. Claim 1 of the contested patent reads as follows:  
"An amplifier for supplying a signal (Io) to a load (ZL), comprising:

- a first transistor (T1) having a first main terminal connected to a reference terminal (GND),

- a control terminal, and a second main terminal for supplying the signal (Io) to the load (ZL),
- sensing means for determining the value of the signal (Io), wherein the sensing means comprises a second transistor (T2) having a first main terminal connected to the first main terminal of the first transistor (T1), a control terminal coupled to the control terminal of the first transistor (T1), and a second main terminal for supplying a further signal (IF), which is a representation of the signal (Io), and
  - detection means (DMNS) for supplying a DC-component of the further signal (IF), wherein the further signal is a representation of the signal (Io) and the DC-component of the further signal (IF) is provided as a measure for the power supplied by the signal (Io) to the load (ZL)."

Claims 2 to 7 are dependent on claim 1.

XXVI. The written arguments of the appellant that are relevant for the present decision can be summarised as follows:

- a) The EPO committed a sequence of errors starting with the classification of the contested patent in the international patent classification H03F1/30 instead of H04B2001/0416. The search department was not able to retrieve document D4 and cited documents which did not even deserve the category A. The examining division did not notice that the requirements of Articles 83 and 84 EPC were not met.
- b) In the communication accompanying the summons to oral proceedings the opposition division did not mention the points to be discussed. The requirement of Rule 116(1)

EPC was not met, as admitted in paragraph 23 of the contested decision of the opposition division. The communication expressed the preliminary opinion of the opposition division that the patent would likely be maintained unamended, but did not contain any explanation. Thus, the opponent was prevented from drawing up facts, evidence and counter-arguments which would have enabled his participation in oral proceedings on an equitable and fair basis. In view of this violation of Article 113(1) EPC, the opponent was forced to refrain from participating in the oral proceedings. The division did not submit its objections before taking the decision. Most of the facts mentioned by the division in its decision had been mentioned for the first time at the oral proceedings and were thus not previously notified to the opponent. It was also alleged that the opponent had objected lack of novelty of claim 7. In fact it was lack of inventive step. Furthermore, the division did not use the proper problem-solution approach.

- c) The brief communication confirming the maintenance of the date of the oral proceedings before the opposition division was received only on 4 December 2012 (see D7), i.e. after the oral proceedings.
  
- d) The opponent was one of the inventors of the device disclosed in D4 and had been in negotiations with Philips, the former owner of the contested patent, concerning the payment of a remuneration to the inventors. The negotiations failed and there was a noticeable coincidence between the deceptive behaviour of Philips and the extremely unusual and improper treatment of the case by the opposition division, which entirely neglected the right of the appellant to be heard.



e) The director's letter sent with the communication of 5 September 2012 did not contain a reasoned decision about the recusation of the opposition division requested by letter dated 14 August 2012. The director's letter contained only a preliminary opinion. The opinion of the director was erroneous since suspicion of partiality ("Besorgnis der Befangenheit") did not need to be proven. The mere existence of circumstances causing - in the view of a party - mistrust against the impartiality of the examiners sufficed to justify the request of excluding them from the further procedure. It was a fact that the opposition division extensively violated the right of the opponent to be heard. The self-justifying statements of the division were so arbitrary ("willkürlich") and so far from the accepted legal principles of the EPC - as outlined in the Guidelines and numerous decisions of the Enlarged Board of Appeal - that they were entirely unacceptable ("unhaltbar"). The opposition division disregarded all letters from the appellant in which he pointed out a procedural violation, so that it could be excluded that these errors simply happened by mistake. Rather, it had to be concluded that they were the result of wilful action. The errors in the minutes and about the facts showed that the opposition division was aware of its legally incorrect behaviour.

f) Consequently there existed no valid reasons for the board of appeal not to remit the case to the department of first instance, in accordance with Article 11 RPBA. The summons of the rapporteur was arbitrary and comprised fundamental legal and technical errors. The rapporteur did not give any reason for not remitting the case to the department of first instance and did

not consider this request. This lack of remittal contravened Article 11 RPBA. The opponent had the right that the proposed witnesses and experts be first heard by the department of first instance. Only thereafter would there be a basis for a re-examination by a board.

- g) The summons was unlawful ("unwirksam") because neither the application of Article 11 RPBA nor the procedural violation of Article 113(1) EPC by the department of first instance were considered. The rapporteur unlawfully ignored the procedural violations committed by the department of first instance. ("Der Berichterstatter der Beschwerdekammer hat es in grob rechtswidriger Weise unterlassen, sich mit den Verfahrensfehlern der ersten Instanz zu befassen", letter of 16 January 2014, point 5.1). The rapporteur was therefore suspected of partiality.
- h) In any case, the appellant should have been given the opportunity to take position before being summoned to oral proceedings. This did not happen and was a further reason to complain about the breach of the right to heard, Article 113(1) EPC.
- i) The rapporteur questioned also the relevance and admissibility into the proceedings of the documents D9 and D10, despite the fact that these documents could not have been cited earlier due to the procedural violation in the first instance. This was a monstrosity ("Ungeheuerlichkeit"), since the documents were filed with the statement of grounds of appeal and consequently were in the procedure. The rapporteur neither considered the objections of lack of inventive step nor the relevance of D9 and D10. This was another breach of the right to be heard and unlawfully arbitrary.

- j) The rapporteur should have considered the lack of clarity of the features 3.1 and 3.2 (see point q) hereafter) (Article 84 EPC) before considering the details of the circuit of D4. Claim 1 lacked any information about the where, how and why of the DC voltage component. Claim 1 was missing essential features. The rapporteur also did not consider whether the claim was clear and the disclosure sufficient (Article 83 EPC).
- k) Thus the summons comprised the following substantial legal and technical errors:
- the requests were not correctly considered;
  - the substantial procedural mistakes of the first instance were not assessed ("gewürdigt");
  - despite the procedural errors of the department of first instance, the case was not remitted;
  - although the inventive step objection together with the relevant documents had been submitted in the prescribed manner, it was announced that these documents would not be admitted (Article 12 RPBA and Article 113(1) EPC);
  - the technical comments of the rapporteur showed a lack of knowledge in basic technology, in comprehension and interpretation of claim texts, and of the prescriptions of the EPC. Not one argument could be regarded as meaningful.
- l) Therefore the rapporteur did not fulfil the requirements of Article 21(3) (a) EPC. D22 was a search report of the rapporteur about a perpetuum mobile. In that case, he should have issued a communication according to Rule 63 EPC, since a meaningful search was not possible due to the impossibility to carry out the invention (Article 83 EPC).

- m) The term "suspicion of partiality" ("Besorgnis der Befangenheit") went much beyond the term "partiality". It comprised all aspects which could hinder a member of the board from handling a case in a neutral and appropriate manner. Since the EPC contained no details of the procedure to be followed in case of objections against examiners and members of the board of appeal, Article 125 EPC should apply.
- n) Despite recurrent requests to replace the rapporteur, the chairman of the board maintained the oral proceedings with the same rapporteur and therefore the three members were objected as being suspect of partiality, Article 24(3) EPC.  
The conditions for application of Article 24(3) EPC were fulfilled, namely
- the appellant did not take any procedural step after becoming aware of the reason for the partiality objection,
  - the objection was not based on nationality,
  - the objection was supported with detailed facts and arguments (see letters dated 16 January 2014, 12 January 2015 and 9 October 2015, points 2. and 3.).

With its communication dated 11 November 2014, the board announced its intention to decide in unchanged composition about the "partiality" objection and expressed the view that the appellant had not provided facts and arguments (despite the contrary being the case, so that the admissibility of the objection was being denied without giving any reasons). However, the same board was not allowed to decide about the partiality objection: the board should decide in a new composition.

- o) The board did not explain the reason as to why two originally appointed members were replaced, thereby denying the right of the appellant to a lawful judge ("gesetzlicher Richter"). This reinforced the suspicion of partiality about the board as a whole.
  
- p) Finally the appellant could not attend the oral proceedings in front of the board because the board did not provide the information necessary for preparation for the oral proceedings. Attending an oral proceedings with a board to which he had objected could be disadvantageous for the appellant (second sentence of Article 24(3) EPC).
  
- q) Claim 1 of the patent in suit compared to D4

The proprietor, in their communication dated 20 September 2011, asserted that the way in which the opponent argued that the amplifiers 11 and 15 of D4 disclose the various transistor terminals and their connections as claimed was simply not correct. However, the proprietor failed to explain in what respect the argumentation of the opponent was incorrect.

Figure 2 of D4 was reproduced in the statement of grounds of appeal and the detailed detector circuitry within the dashed box (16) was omitted, since it was irrelevant to the scope of claim 1 of the patent in suit.

Transistors T1 and T2 of the patent in suit were nothing other than two amplifiers, connected in parallel to the same input signal. It was thus prima facie apparent that there existed no relevant difference between the circuit of D4 and the circuit disclosed in the patent in suit. The power supply of

transistor T2 was missing. Neither the examining division nor the opposition division expressed any doubt that the skilled person would be able to add all the missing and necessary elements. It was undisputed that the skilled person would have replaced the symbolic circuit representation of the patent in suit by functional circuit elements. Analogously, the skilled person would never have challenged the fact that transistors and ground terminals were unavoidable in the circuit of D4. These constituents were thus part of the implicit disclosure of D4.

Claim 1 plainly lacked any definition as to how the terminals of a real transistor were connected to the surrounding (extremely simple) circuitry.

According to the description of the patent in suit (column 3, lines 19 to 24), the proper matching of these transistor amplifiers required integration of both transistors in the same IC (which was anticipated by D4). However, this essential feature was missing from claim 1. The claim thus lacked clarity. To meet the requirements of Article 84 EPC, the essential technical feature - integration of both transistors in the same IC - needed to be part of any independent claim, Guidelines F-IV, 6.4.

The circuit of D4 comprised two RF amplifier stages (11, 15), receiving in parallel the output signal of a driver amplifier (not shown). D4 (column 5, line 28) disclosed that the integrated circuit, including amplifiers stages 11 and 15, was made of the solid state materials silicon or gallium-arsenide. Since both stages (11, 15) were integrated in the same integrated circuit (D4: section [0020], claim 1), the sensor driver amplifier 15 was subject to the same physical influences as the power final stage 11. Thus, any variations of the supply voltage or the temperature

affected both amplifier stages to the same degree. Accordingly, the variation of the output power of sensor driver amplifier 15 was always closely correlated with the variation of the output power of final stage 11. The DC component generated in power detection means 16 was thus proportional to the actual output power of the final stage 11 (D4: column 4, lines 5 to 23). Said DC component was fed via an output, here labelled "CNTRL", to a power controller (not shown), see D4: figure 2 and section [0017].

The features of claim 1 could be read into D4 as follows:

1. An amplifier (11) for supplying a signal to a load (antenna 14), comprising:
  - 1.1 a first transistor (implicitly incorporated in amplifier stage 11)
  - 1.2 having a first main terminal connected to a reference terminal (i.e. a ground terminal unavoidably being present in any transistor amplifier stage),
  - 1.3 a control terminal (input of power amplifier 11), and
  - 1.4 a second main terminal (output of power amplifier 11) for supplying the signal to the load (14),
2. sensing means (15) for determining the value of the signal,
  - 2.1 wherein the sensing means (15) comprises a second transistor (implicitly within sensing amplifier stage 15)
  - 2.2 having a first main terminal (a connection to ground) connected to the first main terminal of the first transistor (the connection of all transistor amplifier stages to the common ground potential of the IC is unavoidable),

- 2.3 a control terminal (input of sensing amplifier 15) coupled to the control terminal of the first transistor (input of power amplifier 11), and
- 2.4 a second main terminal (output of sensing amplifier 15) for supplying a further signal, which is a representation of the signal (because both amplifier stages are fed by a common input signal and are integrated in the same IC), and
- 3. detection means (16) for supplying a DC component (provided at the output of summing amplifier 32; see D4, figure 2 and column 4, lines 17 to 23) of the further signal (output signal of sensing amplifier 15),
  - 3.1 wherein the further signal is a representation of the signal (being a trivial reiteration of feature 2.4) and
  - 3.2 the DC-component of the further signal is provided as a measure for the power supplied by the signal to the load (14) (a trivial, unavoidable consequence of features 2.4. and 3.1).

It should be noted that features 1.2 to 1.4 and 2.2 to 2.4 lacked any definition of the nature or type of the transistor circuit (i.e. whether a NPN or a PNP transistor was used, whether the base or the emitter was used as the input, whether the base or the emitter was connected to ground, etc). The claim merely contained the vague and unusual terms "control terminal" and "main terminal". The wording of the claim was even so broad that it could readily be interpreted to mean - instead of bipolar - FET (Field Effect Transistor) amplifier stages. It was thus equally possible to assign the usual gate, source and drain terminals of a FET the meaning of "control" or "main" terminals. All the diverse, well-known bipolar or FET amplifier circuit variants were undistinguishable from



the wording of the claim. The claim thus merely defined the (indistinct) use of a transistor in the amplifier and the "sensing means".

In any event, the self-evident presence of a transistor within the amplifier and within the "sensing means" could not render the subject-matter of the claim novel.

Nevertheless, concerning inventive step and assuming that the subject-matter of claim 1 could be considered "to differ" from the disclosure of D4 by the features 1.1 and 2.1, namely that amplifier stages (11) and (15) each comprised a transistor, the "objective problem" would have been to find means for implementing these amplifier stages.

The "skilled person" would have readily found the important historic document D7 [*sic: this should probably read D9*], describing for the first time the use of p-n junction isolation for the implementation of several transistors in a monolithic chip (IC) of semiconductor material. According to D7 (figures 1 to 3; column 2, lines 18 to 20; column 4, lines 16 to 36) any amplifier stage (in a chain of 3 stages) consisted of a transistor (20, 30, 40) being integrated in the semiconductor IC (10). Any transistor stage comprised an input "control terminal" (base), a "first main terminal" (emitter) being connected to a common ground (E) of the IC (10) and a "second main terminal" (collector) supplying an output signal.

The "skilled person" thus would have readily replaced the "black-box amplifier units 11 and 15" (as worded by the opposition division) of D4 by a transistor stage according to the teaching of D7 and would have arrived

without any inventive skill at the subject-matter of claim 1.

Between the historic publication of D7 and the priority date of the patent in suit many thousands of patents and textbooks had been published, extensively describing the implementation of integrated amplifiers. Accordingly, the use of a transistor for the implementation of an integrated RF amplifier stage was commonplace to the skilled person. This was demonstrated in D8 [*sic: probably D10*], describing the usual consideration to derive from a "black box" block diagram (figure 1) of an IC amplifier the detailed transistor circuit of the integrated RF amplifier stage (figure 2).

In any event, the skilled person would have readily applied such a usual consideration to the circuit of D4 (figure 2) and thus would have considered the (most primitive) "transistor circuit", as shown in the sole drawing of the patent in suit, as part of the implicit disclosure of D4. The skilled person did not need the motivation of D7 or D8 (or any other document) to arrive at such a simple transistor stage. The transistors thus were part of the implicit disclosure of D4.

The detector circuit 16 (figure 2) consisted of a pair of detector diodes (161, 162), being driven by a pair of constant current sources (30, 31), providing identical biasing of the diodes within their linear range (i.e. above the forward voltage of 0.7 V). Choke coil 163 and capacitor 164 blocked any RF voltage from the reference branch, consisting of diode 162, resistor 24 and current source 31. As long as no RF signal was fed to input coupling capacitor 20, the

current through both diodes was identical. Accordingly, a voltage drop  $U_{bias}$  across resistor 22 and current source 30 (sample branch) equalled  $U_{bias}$  across resistor 24 and current source 31 (reference branch). Hence, the DC voltage output of subtractor 32 was zero in that case. In the event that a RF voltage was fed to input capacitor 20, the voltage drop across resistor 21 and current source 30 was the sum  $U_{bias} + U_{RF}$ , whereby  $U_{RF}$  was the voltage drop caused by the rectified RF input signal. Since the voltage drop in the reference branch remained at  $U_{bias}$ , the DC output of subtractor 32 was  $U_{RF}$ . The measured DC voltage was accurately proportional to the RF output power of the driver amplifier stage 15 and entirely independent of its linearity (i.e. whether the amplifier was biased to operate in class A, B or C mode) or of its efficiency. Equally, the measured voltage was independent of the collector current flowing through the transistor of amplifier stage 15. Moreover, the measured DC voltage was independent of the ambient temperature, because the difference obtained from the reference and sample branch cancelled out the temperature dependence of the detector diodes. The detector circuit had no parasitic capacitances and thus did not generate any amplitude-dependent phase shift (AM-PM conversion). Therefore, it could be utilised in a power control loop covering a very large dynamic range ( $\approx 100$  dB).

Turning to the sole figure of the patent in suit, the power detector consisted of the collector resistor R and a capacitor C. These two elements constituted a well-known RC low-pass filter (integrator). It was a well-known property of the RC low-pass filter that the voltage across R was a DC component when the frequency  $f$  of the RF input signal was much larger than the cut-

off frequency  $f_g$  of the low-pass filter (D5, pages 9 to 13).

Since conventional RF power amplifiers of mobile phones needed to be highly linear, the skilled person would have expected that both amplifier stages, T1 and T2, were biased in class A mode. It was a well-known property of class A amplifiers that their collector current was always constant, independently of the amplitude of the applied RF input signal. Accordingly, the voltage measured at the terminal CNTRL was always constant. Hence, the "power detector" of the patent in suit did not work in conjunction with usual linear class A RF amplifiers.

However, the description of the patent in suit (column 3, lines 24 to 29) revealed that the amplifier transistors were "operating in the so-called class C mode". A class C mode amplifier was characterised by a conduction angle  $< 180^\circ$ . Thus, only a part of the positive half-wave of a sinusoidal input signal drove the amplifier.

Due to the inherent AM/PM conversion in class C amplifiers (due to the voltage dependent junction capacitances) utilisation of such a non-linear amplifier would degrade the bit error rate performance of the complex modulation schemes used in current cellular systems. Moreover, all the current cellular systems were wide-band systems. The non-linearity of a class C amplifier would have caused intermodulation of the numerous spectral lines of the wide-band modulation signal. Yet, if such non-linear amplifiers had been used in the mobile phone transmitters of a wide-band CDMA system (like UMTS), the intermodulation products would have destroyed the orthogonality of the spreading codes assigned to the different cellular phones. Hence, the different user channels would have been indistinguishable at the base station receiver.

Neglecting the above obstacles (normally preventing the employment of class C power amplifiers), the use of a class C amplifier was now nevertheless assumed for the sole purpose of enabling (a kind of) functioning of the "power detector".

The current  $I_{DC2}$  through resistor R was the total current through the transistor stage T<sub>2</sub>. Accordingly, the voltage at terminal CNTRL was a measure for the total power dissipation of transistor T<sub>2</sub> (depending on biasing, efficiency and output power). That power did not correspond to the RF power fed by transistor T<sub>1</sub> to the antenna impedance  $Z_L$ . The "detector circuit" inherently introduced a considerable measurement error. In the event that no signal was present at the input, no collector current would flow through transistor T<sub>2</sub>. Accordingly, capacitor C would be charged to V<sub>DD</sub>. Thus,  $U_{CNTRL} = V_{DD}$ . Assuming that an applied RF signal was fed to transistor T<sub>2</sub>, the DC voltage at the CNTRL terminal would drop in correspondence with the increasing amplitude of the input signal. The DC voltage drop approached a maximum when T<sub>2</sub> was driven to its maximum power dissipation P<sub>max</sub>. Thus,  $U_{CNTRL} = U_{CE}$ . Hence, the DC component at the CNTRL terminal was inversely proportional to the RF output power. This was a disadvantage because the power control loop unavoidably needed an input signal which was proportional to the output power. Hence, an additional circuit for level-shifting was needed, which, however, would introduce additional offset and temperature-dependent error voltages.

Finally, the appellant made the board aware that Philips, the former owner of the patent in suit, had been obliged by the "Landgericht Hamburg" (see D11) to

pay inventor remuneration to the appellant and that Philips, in the light of the present opposition procedure and possible criminal penalty risks, dropped the argument that HF-power amplifier modules had been implemented according to the patent in suit instead of according to D4.

XXVII. The respondent argued in writing essentially as follows:

Nothing in the arguments presented in the statement of grounds of appeal was found that could rectify the omissions in the prior art, both in terms of clear disclosure and clear teaching/motivation, identified by the opposition division.

The appellant had on two occasions in his statement of grounds of appeal made observations and arguments regarding a purported lack of clarity in the claims. These arguments had not been raised during the opposition proceedings and the board of appeal was not a suitable place to air them for the first time. Article 84 EPC was not a ground for opposition and therefore these observations and arguments did not concern a ground on which a European patent could be opposed. They should therefore be disregarded.

In the reply to the notice of opposition dated 20 September 2011, the patent proprietor argued that claim 1 was limited to a current mirror function (although without using the term "current mirror") in that one transistor generated a signal which was a representation of the current supplied to the load by the main output transistor, while D4, on which the opposition was based, disclosed the use of a sensor circuit 15 which received the input voltage to the output amplifier, and clearly did not provide a current

mirror function of the output current supplied to the load. There was no feedback path from the output load current to the sensing circuit. The use of a current mirror avoided the need for a series element for monitoring the output current and gave a simpler arrangement than D4. The opponent's assessment of the relevance of D4 did not match the actual disclosure of D4 itself. In particular, the way the operational amplifiers 11 and 15 were argued to disclose the various transistor terminals and their connections as claimed was simply not correct.

### **Reasons for the Decision**

1. The appeal is admissible.
2. Admissibility of the partiality objections against the members of the board (Article 24 EPC) (appellant's arguments f) to k) and m) to p))
  - 2.1 Competence of the board in its original composition

The appellant submitted that, if an objection under Article 24(3) EPC is made by a party, then the procedure under Article 24(4) EPC automatically applies without it being necessary to consider whether this objection is admissible. Thus such objection should be examined by the board without the participation of the member objected to, who should be replaced by his alternate.

The present board cannot follow such reasoning:

Article 24(3) EPC, second and third sentences, provides that an "objection shall not be admissible if, while

being aware of a reason for objection, the party has taken a procedural step" and an "objection may not be based upon the nationality of members". These provisions clearly require a preliminary examination for admissibility.

Generally speaking, in the EPC, the purpose of the preliminary examination for admissibility is to determine whether the objection may go forward for substantive examination and decision. If the objection is not admissible, the board of appeal may not examine whether it is allowable or well founded. Insofar as the objections under Article 24 EPC are concerned, the issue of admissibility is a prerequisite for substantive examination. But this prerequisite, if satisfied, only leads to the opening of the procedure defined in Article 24(4) EPC: the member objected to is then replaced by his alternate and the board in this new composition decide on the allowability of the objections under Article 24 EPC.

This interpretation of Article 24(3) EPC was also shared by the Enlarged Board of Appeal in its interlocutory decision R 12/09 of 3 December 2009 (c.f. reasons for the decision, point 2) pointing out that the board in its original composition must first decide on the admissibility of an objection under Article 24(3) EPC in respect of a board member. The board has found nothing in interlocutory decision R 19/12 that would speak against following that procedure.

Thus, the appellant's submissions that the board committed a (substantial) procedural violation by not replacing the objected members of the board when taking any decision on the partiality objections raised, even on the issue of admissibility of those objections, are



based on an incorrect interpretation of Article 24(3) EPC.

## 2.2 Conditions for admissibility

According to Article 24(3) EPC, second and third sentences, an objection of partiality is inadmissible if, for example, the party has taken a procedural step while being aware of a reason for objection, or bases the objection on the nationality of the board member. Furthermore, the objection must be sufficiently substantiated in order to be admissible (R 12/09, reasons for the decision, point 2). From this requirement it follows, firstly, that an objection based on purely subjective unreasonable doubts which exist only in the mind of the objecting party should be rejected as inadmissible. It also follows that if facts and arguments filed cannot support the objection of suspected partiality raised, the objection is likewise inadmissible (cf. T 1028/96, OJ EPO 2000, 475, point 2 of the reasons).

## 2.3 Admissibility of the objections under Article 24(3) EPC against the first member of the board

The objections under Article 24(3) EPC against the first (technical) member of the board (rapporteur) were raised in reaction to the annex to the summons to oral proceedings dated 5 December 2013, which were signed by that member. In that regard it is to be taken into account that forming an opinion is one of the important tasks of the board. Issuing of a preliminary opinion cannot *per se* be regarded as sufficient ground for an objection of suspected partiality. According to the appellant's allegations the specific content of the aforementioned annex supported the suspicion of

partiality raised against the first member of the board. However, considering its content, it is immediately apparent that in all its parts it is clearly written as a merely preliminary, non-binding opinion of the responsible member of the board, so that none of the appellant's allegations is supported by the communication annexed to the summons. This is not only apparent from the introductory wording indicating explicitly that the "following observations are made without prejudice to the board's final decision", but also from specific expressions used throughout that communication (e.g. the "appellant's .. requests appear to be as follows..", the "appellant seems to consider that.. "..D4 does not seem to indicate ..", "seems therefore that.." .. ".. the board is not certain that ..", the "amplifier .. might therefore be novel") emphasising that the view expressed should form a basis for preparation and further discussion at the oral proceedings. Moreover, contrary to the appellant's allegations, the communication also addresses the procedural violations allegedly committed by the opposition division in the first instance proceedings. In view of the above, the board came to the conclusion that the annex to the summons obviously cannot support the allegations brought forward by the appellant in relation to the objection of suspected partiality, which therefore cannot be considered as sufficiently substantiated. Thus, the board came to the conclusion that the partiality objections against the first member of the board are not admissible.

2.4 Admissibility of the objections under Article 24(3) EPC against all members of the board

With letter dated 9 October 2015 the appellant raised partiality objections against all members of the board.

These objections were based on the allegation that the board committed several substantial procedural violations which were summarised in the aforementioned letter, and are dealt with below as follows:

#### 2.4.1 Wrong composition of the board

According to the appellant the board committed a substantial procedural violation by not replacing the objected member(s) of the board when taking a decision on the partiality objections raised, even on the issue of admissibility of those objections. This objection is based on an incorrect interpretation of Article 24(3) EPC, as already pointed out under 2.1 above. Thus, this objection cannot be regarded as an admissible partiality objection, since the fact that the procedure foreseen in the EPC had been applied by the board can in no way support that objection. Furthermore, due to the fact that the board followed the correct procedure, there is no basis for the appellant's further objection that the board took procedural steps in a wrong composition making them null and void.

Referring also to the fact that a (former) technical member and a (former) legal member had been replaced by the current board members, the appellant raised the allegation that, by those changes to its composition, the board now formed a special tribunal ("Spezialtribunal"; c.f. point 3 of the letter dated 22 July 2015) to the appellant's disadvantage. This objection appears to be directed in particular to the chairman of the board who is responsible for the board's composition (cf. Articles 3 to 5 of the business distribution scheme of the Technical Boards of Appeal, Supplementary Publication OJ EPO 1/2015, 13). However, in a communication dated 3 August 2015 the

chairman informed the parties that the changes to the board's composition were due to changes to the business distribution scheme, in particular it was pointed out that the former technically qualified member had been transferred to another board and the former legally qualified member was no longer a member of the boards of appeal. Thus, both of these former members of the board had to be replaced. Nevertheless, in his letter of 10 October 2015 the appellant, stating that the real grounds for the changes to the composition had not been communicated by the board, pursued further his objection without producing any evidential basis supporting his allegation. Thus, since it remained a mere allegation, the board found that objection inadmissible.

2.4.2 Violation of the right to be heard and of the principle of a fair trial

In various letters the appellant raised the objection that the board did not inform the appellant about its provisional opinion on decisive aspects of the case, in particular on the alleged procedural violations of the opposition division, on the issue of inventive step and the objection under Article 100(b) EPC. In that regard the board would like to emphasise that this objection appears to derive from a fundamental misunderstanding of the board's procedural obligations and the purpose of the appeal proceedings. In G 6/95 (OJ 1996, 649) the enlarged board held that the boards continued to have a discretion as to whether or not to send a communication when issuing a summons to oral proceedings, as provided for in Article 11(2) RPBA 1980, since the then newly introduced Rule 71a(1) EPC 1973 (now Rule 116(1) EPC) did not apply to the boards of appeal. Thus, contrary to the appellant's view, there is no procedural

obligation at all for the board to issue any provisional opinion or to inform the parties about the intended reasons underlying its future decision. Nevertheless, the parties have been informed about the preliminary opinion of the board by addressing decisive aspects of the present case in the annex to the summons dated 5 December 2013 and in the communications dated 11 November 2014, 9 July and 3 August 2015. Decision D24 cited by the appellant relates to a different situation: in that case the judge suspected of partiality had stated that the truth did not interest him, while, in the present case, the board, in its quest for truth, has summoned the parties to oral proceedings to give them the opportunity to be heard in all relevant matters. Consequently, the partiality objection based on that obviously wrong interpretation of the board's procedural obligations, the right to be heard and the principle of a fair trial is considered inadmissible.

According to the appellant the board also ignored his request to remit the case to the opposition division because of substantial procedural violations which allegedly occurred during the first instance proceedings and to reimburse the appeal fee. In that regard, it should first be noted that the annex to the summons to oral proceedings dated 5 December 2013 was drafted at a time when remittal of the case to the opposition division seemed to be only an auxiliary request (see the notice of appeal dated 7 February 2013). The board would then like to emphasise that in *inter partes* proceedings it is in general not possible just to automatically follow a party's request without giving the other parties the possibility to be heard on that request, and if requested, to be heard in oral proceedings on that

request, because such procedural treatment of requests would violate the other parties' right to be heard. According to Article 11 of the Rules of Procedure of the Boards of Appeal (RPBA) a case shall be remitted to the department of first instance if fundamental deficiencies are apparent in the first instance proceedings, unless special reasons present themselves for doing otherwise. However, the question whether the requirements of that provision are fulfilled in a specific case is open to discussion and has to be dealt with by the board by taking into account also the other parties' right to be heard. As to the question whether the first instance proceedings in the present case involved fundamental deficiencies, reference is made to points 4. and 5. below.

The above arguments apply *mutatis mutandis* to the request for reimbursement of the appeal fee as provided for in Rule 103(1)(a) EPC. There is no automatism in the sense that the appeal fee has to be reimbursed on a party's request solely based on the allegations and arguments submitted by that party without hearing the other parties and without any further discussion as to whether the legal requirements for the reimbursement were fulfilled in the case at hand. For the sake of completeness it is noted that the aforementioned request has been addressed explicitly in point 8 of the annex to the summons to oral proceedings dated 5 December 2013. Consequently, there is no basis in the file for the allegation that the appellant's above requests have been ignored.

In view of the fact that the appellant's partiality objection is based on a legally untenable interpretation of the purpose and functioning of the appeal proceedings, the right to be heard and the

principle of a fair trial, it is rejected as inadmissible.

2.4.3 For the sake of completeness only it is noted that the appellant's various objections concerning the "competence" of the first member of the board are obviously founded on the appellant's untenable interpretation of the purpose and functioning of the appeal proceedings and the right to be heard as shown above. Furthermore, there are no substantiated submissions on file explaining why the issue of "competence" of a member of the board is linked to the issue of "partiality", since lacking competence does not *per se* mean that the allegedly incompetent person is biased. Consequently, the objection cannot be considered as an admissible partiality objection.

2.4.4 In view of the above the board has come to the conclusion that the partiality objections of the appellant against every member of the board are to be rejected as inadmissible. The board in its present composition can therefore deal with the substance of the case.

3. Alleged errors from the search and examining divisions and Articles 83 and 84 EPC (appellant's argument a))

The search division could not have classified the patent in suit in a class of the international patent classification, namely H04B2001/0416, which did not exist at the date the search report was drafted. The examining division might have overlooked some objections relating to Articles 84 and 83 EPC. If and when such mistakes happen, a lack of clarity has the consequence that the patent as granted needs to be interpreted (see decision G 3/14). Insufficient

disclosure (Article 83 EPC) may be addressed by an opponent by raising an objection under Article 100(b) EPC when filing the opposition. This was not done here. The grounds of opposition were based in this case solely on Article 100(a) EPC.

4. Alleged procedural violation of the right to be heard by the opposition division (Article 113(1) EPC) and Rule 116(1) EPC (appellant's arguments b) and c)).
  - 4.1 Rule 116(1) EPC stipulates that "When issuing the summons, the European Patent Office shall draw attention to the points which in its opinion need to be discussed for the purpose of the decision to be taken." Nothing in the expression "the points to be discussed" can lead to the conclusion that reasons for a preliminary opinion of an opposition division on the matter related to the points to be discussed should be given. The annex to the summons can legitimately only mention the points that, in the view of the division, need to be discussed. The annex to the summons in an adversarial inter-partes procedure such as opposition should not give rise to the impression that the case is decided without having heard the parties, and thus it should not comprise any definite opinion on the final conclusion of the case. However, an opposition division may express a preliminary opinion on the case.
    - 4.1.1 In the annex to the summons to oral proceedings dated 19 June 2012 the opposition division referred to the "grounds of lack of novelty of claims 1 and 7 over prior art document D4 and lack of inventive step in the remainder (claims 2 - 6)" (see point 2 of the summons). Actually, the opponent had raised an objection of lack of novelty of claim 7. In the notice of opposition (letter dated 18 April 2011) the opponent wrote that



the "additional features of independent claim 7 are known from D4 (Fig.2)", which has to be understood as meaning that the features of claim 7 are not novel having regard to D4.

Furthermore, the annex to the summons of the opposition division were adapted to the opposition filed by the opponent which was based solely on the grounds mentioned under Article 100(a) EPC (see page 2, item VI of the form "Einspruch gegen ein europäisches Patent" and its annex filed by the opponent on 18 April 2004).

4.1.2 Thus, the opposition division did draw attention to the points to be discussed (appellant's argument b)).

Hence there was no contravention of Rule 116 EPC by the opposition division. The allegation of the opponent that the opposition division admitted contravening Rule 116 EPC in paragraph 23 of its decision is purely fantasy or wrong interpretation of this paragraph.

4.2 The opposition division did not cancel the oral proceedings scheduled for 3 December 2012 and the opponent had no right to receive a confirmation of the maintenance of the oral proceedings (appellant's argument c)).

4.3 Out of courtesy only, the office tried to confirm the scheduled oral proceedings with the communication of 3 December 2012 (D7). The alleged late reception of this communication does not change the fact that the opponent had no valid reason to doubt that the oral proceedings would take place as scheduled.

That the opponent did not attend the oral proceedings before the opposition division was his own deliberate choice. In having oral proceedings as scheduled on 3 December 2012, the opposition division did not

infringe the right to be heard of the opponent, but rather offered him an opportunity to be heard (Article 113(1) EPC).

No procedural violation can therefore be seen in the treatment of the case by the opposition division.

5. Alleged partiality of the members of the opposition division (appellant's arguments d) and e))

In her letter sent by communication dated 5 September 2012, the director concluded that "the suspicion of partiality expressed by the opponent does not appear to be justified". Even the expression "preliminary opinion" used by the director in the last sentence of her letter gave no reason to the opponent to believe that the oral proceedings would be cancelled. Actually the "preliminary opinion" should have rather been seen by the opponent as a reason to consider the scheduled oral proceedings seriously in order to defend his case. The mere sending of a further letter by the opponent (letter dated 28 September 2012) could not have the effect of stopping the procedure or forcing the opposition division to cancel the oral proceedings.

In that context it is noted that according to the appellant's submissions it appears that the opponent decided not to attend the oral proceedings due to the absence of a formal "decision" on the partiality objections in the director's letter of 5 September 2012. Obviously the opponent was awaiting a formal decision instead of a "preliminary opinion" and considered it procedurally necessary to be given a formal decision on that issue before oral proceedings could take place. In that regard the board would like

to emphasise that the opponent's behaviour was obviously based on a wrong interpretation of the procedure. In G 5/91 (OJ 1992, 617) the Enlarged Board of Appeal stated that there was no legal basis under the EPC for any separate appeal against an order of a director of a department of the first instance such as an opposition division rejecting an objection to a member of the division on the ground of suspected partiality. However, the composition of the opposition division could be challenged on such a ground on appeal against the final decision of the division or against an interlocutory decision under Art. 106(3) EPC 1973 allowing separate appeal. In the present case the director gave a clear order that - on the basis of the arguments presented so far - no member of the opposition division was going to be replaced. The opponent should have been aware that he could challenge this order only by appealing the final decision of the opposition division. By attending the oral proceedings scheduled he could have exercised his right to be heard by presenting his complete case. Thereafter he could have further pursued his objection of suspected partiality by appealing the final decision of the opposition division.

The oral proceedings before the opposition division were maintained as scheduled despite the fact that the opponent had indicated that he was in negotiations with his former employer, former owner of the patent in suit, about the payment of a remuneration to the inventors of D4. The opponent saw a coincidence between the failing of the negotiations between the former proprietor of the contested patent and the opponent and the fact that the annex to the summons to oral proceedings did not elaborate on the reasons for the preliminary view of the division. For the opponent this

gave rise to the suspicion that the members of the opposition division were pursuing other interests (see appellant's argument d) above and page 23 of the statement of grounds of appeal).

However a procedure (see D11 and D12) or even the result of a procedure between the opponent and his former employer has no direct bearing on the question of patentability of the subject-matter of the contested patent having regard to D4, which was the sole question the opposition division had to answer in the present case. Hence there was no reason to believe that the procedure between the opponent and his former employer could have influenced the decision of the opposition division about the validity of the contested patent having regard to D4. The opponent's suspicion is a pure allegation or belief which cannot serve as a basis for an objective argument of partiality (see 1st paragraph of page 634 of Case Law of the Boards of Appeal of the European Patent Office, 7th edition 2013).

The opponent had simply no valid argument which could have led to a suspicion of partiality of the members of the opposition division.

Thus the board came to the conclusion that no substantial procedural violation or fundamental deficiency occurred in the first instance procedure. Therefore, the board decided not to remit the case to the department of first instance for further prosecution.

6. Article 84 EPC and Article 100(b) EPC in combination with Article 83 EPC (appellant's argument j)).

Lack of clarity (Article 84 EPC) is not a ground for opposition and can only exceptionally be treated in

appeal. The opposition division decided to maintain the patent unamended, so that no objection of lack of clarity could be considered by the board (cf. decision G 3/14).

Furthermore, the grounds of opposition were based solely on Article 100(a) EPC. Thus no objection relating to Article 83 EPC could be admitted into the appeal proceedings without the consent of the patent proprietor, which was not given in the present case (cf. decision G 10/91).

7. Admissibility of the documents (see second paragraph of item III above) cited with or after the statement of grounds of appeal (appellant's argument i)).

7.1 The appellant cited documents D9, D10 and D13 to D21 with the statement of grounds of appeal and subsequent letters.

The appellant argued that the documents could not have been cited earlier, i.e. during the opposition procedure, because the division was objected to as being partial and because he awaited a real first communication in which reasons for the preliminary opinion of the opposition division about the substance would have been given (see penultimate paragraph of page 12 of the letter dated 16 January 2014 and page 7, 4th paragraph of the letter dated 9 October 2015).

7.2 The reasons given by the appellant are clearly reasons which should not have hindered the appellant from citing the documents relevant for the substance of the present case earlier, i.e. at least documents D9 and D10. The opponent who was awaiting a "very first communication" was apparently lacking knowledge of the procedure. A partiality objection against an opposition division does not stop the procedure until the

admissibility of this objection is discussed with the parties. The opponent presumed the decision of the opposition division without having received any hint from the opposition decision that his request would be allowable, and withheld the documents.

In an adversarial inter partes proceedings the board cannot be partial and privilege one party. A lack of knowledge of the procedure or a wrong assumption as to the outcome of an objection is not an excuse for a party to deserve special treatment.

Thus, using its discretionary power according to Article 12(4) RPBA the board decides not to admit into the proceedings the documents D9 and D10 which could have been cited earlier.

7.3 The other documents D13 to D21 (mentioned under item VII above) were introduced after the filing of the statement of grounds of appeal. These documents concern the technological background of the invention, and do not help clarifying the question raised by the board in the summons and mentioned under item 8.4 below. Thus the board, exercising its discretionary power according to Article 13(1) RPBA, does not admit these documents, which were filed later than the grounds of appeal.

7.4 Documents D22 and D23 are not relevant for the present case. D22 was cited to discredit the rapporteur who happened to be active in the field of electrical rotating machines in which files concerning perpetuum mobile are occasionally filed and classified. The general policy of the EPO, at the date at which the search report about the subject-matter disclosed in D22 was drafted, was that a search should be done when a search fee is paid. Insufficient disclosure is not synonymous with "meaningful search not possible" (see

appellant's argument 1)). The comment from the appellant does not show a lack of competence of the rapporteur in relation to the requirements listed in D23, but rather a lack of knowledge of the procedure on the side of the appellant.

8. Articles 54 and 56 EPC

8.1 The board agrees with the appellant that the following features of claim 1 of the patent in suit can be regarded as being disclosed in D4:

1. An amplifier (11) for supplying a signal to a load (antenna 14), comprising:
  - 1.1 a first transistor (implicitly incorporated in amplifier stage 11)
  - 1.2 having a first main terminal connected to a reference terminal (i.e. a ground terminal unavoidably being present in any transistor amplifier stage),
  - 1.3 a control terminal (input of power amplifier 11), and
  - 1.4 a second main terminal (directly or indirectly connected to the output of power amplifier 11) for supplying the signal to the load (14),
2. sensing means (15) for determining the value of the signal,
  - 2.1 wherein the sensing means (15) comprises a second transistor (implicitly present within sensing amplifier stage 15),
  - 2.2 having a first main terminal (a connection to ground) connected to the first main terminal of the first transistor (the connection of all transistor amplifier stages to the common ground potential of the IC is unavoidable),

- 2.3 a control terminal (input of sensing amplifier 15) coupled to the control terminal of the first transistor (input of power amplifier 11), and
- 2.4 a second main terminal (directly or indirectly connected to the output of sensing amplifier 15) for supplying a further signal, which is a representation of the signal (because both amplifier stages are fed by a common input signal and are integrated in the same IC).

8.2 However the board disagrees with the argument of the appellant that D4 disclosed the following features:

- 3. detection means for supplying a DC-component of the further signal, and
- 3.2 the DC-component of the further signal is provided as a measure for the power supplied by the signal to the load.

With reference to D4, figure 2 and column 4, lines 7 to 23, the appellant argues that:

- the detection means (16) of D4 provides a DC-component of the further signal at the output of summing amplifier 32, and that
- the DC-component of the further signal is provided as a measure for the power supplied by the signal to the load (14).

8.3 The board agrees with the opposition division that the detection means 16 does not detect a DC-component of the further signal, i.e. of the signal at the output of the sensing means 15, because the detection means 16 and the sensing means 15 are coupled through a capacitor 20 which would act to block any DC-component of the further signal.



The sensing means 16 may provide a DC value at the output of the summing amplifier 32. This DC value might be a measure for the power supplied to the load. It does not however imply that this DC value is a DC-component of the signal at the output of the sensing means 15.

8.4 Applying Rule 116 EPC (which the board does not necessarily have to follow as mentioned under item 2.4.2. above), the board issued summons to oral proceedings that were accompanied by an annex, in which the board mentioned possible points to be discussed comprising inter alia the operation of the detection means 16 and the characteristics (i.e. the peculiarities) of the signal output by amplifier 11 (of which the signal output by amplifier 15 is a representation) that would be present at the output of the summing amplifier 32. In the annex to the summons, the board indicated explicitly that the "question is therefore whether the output of subtractor 32 of D4 includes a DC-component of the output of amplifier 15." The board considered indeed that an answer to these points would be helpful to assess the novelty and inventive step of the claimed invention having regard to D4.

8.5 Rather than answering the questions raised by the board, the appellant, who is one of the inventors of the device disclosed in D4, raised an objection of suspicion of partiality against the rapporteur. The appellant did not show that the signal at the output of the summing amplifier 32 of the detection means 16 would supply a DC-component of the further signal, i.e. the signal at the output of the sensing means 15. The appellant simply submitted that the "DC component generated in power detection means 16 is thus

proportional to the actual output power of the final stage 11 (D4, col. 4, l. 5-23)" (see the penultimate sentence of the first paragraph on page 9 of the grounds of appeal dated 20 March 2013). This is different from a proportionality to a DC-component of the further signal.

- 8.6 In the absence of a clear answer from the appellant, the board can only conclude that the subject-matter of the claimed invention is new having regard to D4 (Article 54 EPC) and not obvious in the light of the available prior art (Article 56 EPC).

9. Case before the "Landgericht Hamburg"

In his letter faxed on 17 November 2015 the appellant indicated that he had won his case against the owner of the patent D4. This has no bearing on the question of patentability of the present contested patent in the light of D4, which the board has to decide upon.

10. Rule 103(1)(a) EPC (reimbursement of the appeal fee)

The appeal being not allowable for the reasons above, the precondition for a reimbursement of the appeal fee defined in Rule 103(1)(a) EPC is not satisfied. Furthermore, no substantial procedural violation or fundamental deficiency occurred in the proceedings before the first instance. Thus, the request for reimbursement of the appeal fee is to be refused.

11. Objections according to Rule 106 EPC

The board took into account that the appellant in different letters, in particular in his last letter dated 17 November 2015, raised objections concerning

procedural defects in the appeal proceedings. These objections are interpreted by the board as objections under Rule 106 EPC.

The two major objections can be summarised as follows:

- the board decided about the partiality objection in its original composition, and
- the board did not express in writing before summoning to oral proceedings on what basis the patent should be maintained and why the department of first instance was considered not to have committed a procedural violation, denying thereby the right to be heard of the opponent and infringing Article 113(1) EPC.

After deliberation the board decided to dismiss these objections for the reasons mentioned above.

## Order

### For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



U. Bultmann

M. Ruggiu

Decision electronically authenticated