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Case number: G1/21
Appeal case number: T1807/15 – 3.5.02
Patent Number: EP04758381.0 / 1609239
Title: DOHERTY AMPLIFIER WITH OUTPUT HYBRID COUPLER
Applicant: Andrew AG
Opponent: Rohde & Schwarz GmbH & Co. KG

This is in response to the Communication of the Registry of the Enlarged Board of Appeal, dated May 21, 2021, received in advance by fax on May 21, 2021:

Together with the above noted Communication the Registry provided a copy of an Order dated May 20, 2021, concerning the change of the composition of the Board.

According to said Order the composition of the Enlarged Board of Appeal for case G1/21 is now as follows:

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Dipl.-Ing. Glyndwr Charles^{1,2}
Dipl.-Ing. Oliver Hassa^{1,2}
Dipl.-Phys. Ralf Peckmann^{1,2}
M.PH. Wolfgang Sandmann^{1,2}
Dipl.-Phys. Dr. Christoph Hecht^{1,2}
Dipl.-Ing. Adrian Huissel, LL.M.^{1,2}
Dipl.-Phys. Dr. Nino M. Bratovic^{1,2}
Dipl.-Phys. Dr. Pamela Kolb^{1,2}
Dipl.-Ing. Dr. Christoph Schaupp^{1,2}
Dipl.-Phys. Dr. Carsten Müller¹
Dipl.-Chem. Dr. Stephan Tatzel^{1,2}
Dipl.-Chem. Dr. Tobias RoBteuscher^{1,2}
Dipl.-Phys. Ansgar Liebelt^{1,2}
Dipl.-Ing. (FH) Florian Wischoff²
Dipl.-Phys. Dr. Marc Lehmacher^{1,2}
Mag. (Dipl.-Phys.) Dr. Miran Mulec¹
Dipl.-Ing. Marinus Prantner^{1,2}
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PARTNERSCHAFTSREG. 1262

Chairman:	F. Blumer (CH) ¹
legally qualified member:	T. Bokor (HU) ²
legally qualified member:	W. Van der Eijk (NL) designated as Rapporteur
legally qualified member:	R. Arnold (GB) ³
legally qualified member:	E. Chatzikos (GR) ³
technically qualified member:	G. Eliasson (SE)
technically qualified member:	A. Ritzka (DE)

The interlocutory decision G 1/21 of May 17, 2021

We appreciate that the Enlarged Board of Appeal has considered our concerns regarding an appearance of partiality of several members the Enlarged Board of Appeal in the composition based on order of March 17, 2021, and we note that according to the order of the interlocutory decision of the EBoA of May 17, 2021, the Chairman is replaced by Mr. F. Blumer, as the Board finds that the objection against the participation of the Chairman in the present case for reason of suspected partiality is justified and the Chairman thus has to be replaced⁴.

We are very grateful that a further member of the panel dealing with G 1/21 (I. Beckedorf) informed the Enlarged Board that he was also involved in the preparation of Article 15a RPBA and that his involvement could be qualified as relating to circumstances underlying the objections made by the appellant and that he therefore asked the EboA in a composition under Article 24(4) EPC to decide on his continued participation in the referral case G 1/21⁵.

¹ Replacing C. Josefsson in accordance with the order of the interlocutory decision of the EBoA of May 17, 2021.

² Replacing I. Beckedorf in accordance with the order of the interlocutory decision of the EBoA of May 17, 2021.

³ External legally qualified members of the EBoA (Article 11(5) EPC) according to Article 2(5) and Article 1(2) business distribution scheme of the EBoA for the year 2021.

⁴ G1/21 of 17 May 2021; Reasons 20.

⁵ G1/21 of 17 May 2021; Facts and Submissions 7.

From the decision we further heard for the first time that a "Working group on VICO provision in RPBA" was set up by the President of the BoA⁶.

However, we do not want to conceal the fact that we are concerned that the respective members of the Board, being involved in the preparation of Article 15a RPBA, have not informed the EBoA earlier about the circumstances in agreement with Art. 24 (2) EPC.

Further we understand that our objection to the members of the EBoA G. Eliasson and A. Ritzka as suspected of partiality, is considered by the EboA as not justified and the EboA decided that both members can continue their participation in G 1/21⁷.

Fundamental right to a fair judicial procedure

We believe that the present referral relating to an important legal question, relevant for the future form of oral proceedings, with an exceptionally broad user interest⁸ is handled with the utmost care and diligence. We trust that the fundamental judicial rights to a lawful judge, to a fair hearing within a reasonable time by an independent and impartial tribunal established by law, respecting the separation of powers and independency of judges as enshrined *inter alia* in Article 6, of the European Convention on Human Rights⁹ (ECHR) and Art 47 of the Charter of Fundamental Rights of the European Union¹⁰ are respected.

In view of our believe, the change of the composition of the Enlarged Board, and the interlocutory decision of the EBoA G 1/21 of May 17, 2021 give rise to further objections.

⁶ G1/21 of 17 May 2021; Reasons 26

⁷ G 1/21 of 17 May 2021; Reasons 24.

⁸ More than 40 *amicus curiae* briefs were filed; see G 1/21 of 17 May 2021; Facts and Submissions 3.

⁹ 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.

¹⁰ Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Objections

In view of Article 24(3), second sentence, EPC we provide in the following objections under Art. 24(3) EPC before we come to procedural request.

- **Objection 1**

In accordance with Article 24(3) EPC regular members of panel G. Eliason, and A. Ritzka are objected to as suspected of partiality for the reasons specified below (section IV.1).

- **Objection 2**

In accordance with Article 24(3) EPC regular members of panel F. Blumer, T. Bokor, W. Van der Eijk, G. Eliason, and A. Ritzka may not take part in the present case as they have a personal interest (Art. 24(1) EPC) or alternatively suspected of partiality for the reasons specified below (section IV.2).

- **Objection 3**

In accordance with Article 24(3) EPC the regular members of the present panel according to the Order of 20 May 2021 who already belonged to the panel of the EBoA according to the Order of 17 March 2021; W. Van der Eijk, G. Eliasson, and A. Ritzka are objected to as suspected of partiality for the reasons specified below (section IV.3).

- **Objection 4**

In accordance with Article 24(3) EPC regular members of panel F. Blumer, T. Bokor, W. Van der Eijk, G. Eliason, and A. Ritzka are objected to as suspected of partiality for the reasons specified below (section IV.4).

Requests

We kindly request:

1. to postpone oral proceedings scheduled for May 28, 2021,

2. oral proceedings to be held in the proceedings under Art. 24(4) EPC, regarding the above-mentioned objections 1 to 4 as to suspicion of partiality,
3. to provide the parties with the brief submission of I. Beckedorf, mentioned in the interlocutory decision,
4. to provide the parties with the brief submission of G. Eliason, mentioned in the interlocutory decision,
5. to provide the parties with the brief submission of A. Ritzka, mentioned in the interlocutory decision,
6. to provide information about the members of the "Working group on VICO provision in RPEA",
7. to replace the to be replaced members of the panel, Mr. Josefsson and I. Beckedorf with alternates pursuant to Art. 2(1)(b) of the Business Distribution scheme of the Enlarged Board of Appeal,
8. to appoint the substitute for the chairman in accordance with Art. 2(2) of the Business Distribution scheme of the Enlarged Board of Appeal,
9. to summon for oral proceedings in the proceedings under Art. 24(4) EPC, only after the submissions/information requested under items 3. to 6. have been provided to the parties of the proceedings, and
11. to invite the public to file further amicus curiae concerning the composition of the panel.

I. Request for postponement of the oral proceedings

By order dated May 20, 2021 the composition of the EBoA, has been changed, thus 5 working days before the oral proceedings, scheduled for May 28, 2020, the panel deciding on Referral G 1/21 has been substantially changed. The chairman of the panel and a further legal member has been replaced, that is two out of five legally qualified members of the panel, and two out of three legally qualified regular members have been replaced, respectively.

We believe that the present referral relating to an important legal question, relevant for the future form of oral proceedings, with an exceptionally broad user interest¹¹ is handled with the utmost care and diligence.

As already noted in our previous submission filed on April 27, 2021, the EBoA has opened the present proceedings with several orders dated March 17, 2021 and issued on the same day summons to oral proceedings scheduled on May 28, 2021, just in time to fulfill the two months' notice of the summons stipulated in Rule 115(1) EPC. Even in examination and opposition proceedings, where a case is extensively discussed between the parties and the Division over a period of months or years, the summons is issued at least four months ahead of the day of the oral proceedings in examination and at least six months ahead of the day of the oral proceedings in opposition¹².

The precipitate way in which the Enlarged Board of Appeal handles this important case, which concerns fundamental rights according to Art. 116 EPC, puts the parties of the proceedings, third parties according to Article 10 of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA), and finally the members of the EBoA under unnecessary pressure in view of the complex legal issues to be discussed.

We are concerned, that a substantial reshuffle of the Panel, five working days before the scheduled oral proceedings, put the new members under exceptional pressure as they now need to familiarize themselves with the case and discuss the matter with the further Board members within an extremely short period of time.

¹¹ More than 40 *amicus curiae* briefs were filed; see G 1/21 of 17 May 2021; Facts and Submissions 3.

¹² Guidelines for Examination E-III, 6:

[...] the practice outlined below is followed in setting the date of the oral proceedings to allow the parties sufficient time for preparing and filing submissions:

- (i) Any time limit (even shorter than two months) may be set provided that prior agreement has been reached with the parties.
- (ii) Normally, the summons is issued at least four months ahead of the day of the oral proceedings in examination and at least six months ahead of the day of the oral proceedings in opposition.
- (iii) Between two and four months' notice can be given without preliminary agreement only in specific circumstances, since the parties would have very limited time for filing submissions before the date fixed in the summons. Examples are where, in examination, the summons follows an extensive exchange between the first examiner and the applicant, or where the date of the oral proceedings is changed to a later date.

Hence, we kindly request to postpone oral proceedings scheduled for May 28, 2021.

II. Brief comments provided by the previously objected members G. Eliasson, A. Ritzka and I. Beckedorf

We learned from the interlocutory decision that the Enlarged Board in its composition according to Article 24 (4) EPC invited the replaced members to make comments on the objection or on their request and that all members concerned provided brief comments¹³.

The interlocutory decision provides further details with regard to the brief comments provided by that the chairman¹⁴ and I. Beckedorf¹⁵.

However, with regard to details of the brief comments provided by G. Eliasson and A. Ritzka the decision is rather silent.

The EBoA admits that one of the roles of the Presidium is indeed to advise the President BOA on proposals for amending the RPBA. As further noted, it appears that the proposal has been discussed during a meeting of the Presidium and comments have been made on various aspects of the proposal. The decision further mentions, that there appears not to have been a vote on a negative or positive opinion and whether the objected members have contributed to this discussion and if so, what comments they made is not known.¹⁶

Further, the Enlarged Board is also not aware of any other circumstance which would prevent G. Eliasson and A. Ritzka from taking part in case G 1/21¹⁷ and hence, concluded that the objection against G. Eliasson and A. Ritzka is not justified and they can continue their participation in G 1/21¹⁸.

¹³ G 1/21 of 17 May 2021; Facts and Submissions 9.

¹⁴ G 1/21 of 17 May 2021; Reasons 13.

¹⁵ G 1/21 of 17 May 2021; Reasons 25.

¹⁶ G 1/21 of 17 May 2021; Reasons 22.

¹⁷ G 1/21 of 17 May 2021; Reasons 23.

¹⁸ G 1/21 of 17 May 2021; Reasons 24.

We understand that the objected members G. Eliasson and A. Ritzka was given the opportunity to comment on the reasons for the rejection and they filed brief comments. According to case law there is no general obligation of the member objected to provide a full response to the objection raised¹⁹. The provision primarily serves to clarify the relevant facts. However, the member concerned has a duty to cooperate, and in individual cases there may well be an obligation to comment and provide the necessary information^{20,21}. The parties involved must also be given the opportunity to comment on the reasons for exclusion or rejection¹⁵.

Further we learned from the interlocutory decision that a "Working group on VICO provision in RPBA" was set up by the President of the BoA²².

Hence, to ensure our fundamental right to be heard we kindly request to provide the parties with the brief submission of I. Beckedorf, G. Eliason, and A. Ritzka, mentioned in the interlocutory decision, and to provide information about the members of the "Working group on VICO provision in RPEA".

III. Fundamental judicial right to duly and lawfully appointed judges

III.1 Composition of the panel of EBoA according to Order of 20 May 2021

The right to the lawful judge (judge determined by law) is a fundamental judicial right that stipulates that for legal disputes and proceedings, it must already be determined in advance which court and which judge has jurisdiction.

This fundamental judicial right also applies to proceedings before the Boards of Appeal. In G 2/08 of 15 June 2009 the Enlarged Board pointed out that its members have a duty to sit

¹⁹ T 1938/09; Reasons 3.2.

²⁰ T 1938/09; Reasons 3.2:

"[...] The board acknowledges that there may be cases where a board would not be in a position to decide on the objection without having received the necessary information from the member objected to."

²¹ Europäisches Patentübereinkommen; Singer/Stauder/Luginbühl; Auflage 8 (2019); Art. 24 EPÜ, Rdn 15

²² G1/21 of 17 May 2021; Reasons 26

on the cases allocated to them (see also G 3/08 of 16 October 2009) according to their jurisdiction both "*ratione legis*" and "*ratione materiae*". That is to say, parties to judicial proceedings have a right to have their case considered and decided by the judge designated or appointed by law. This essential principle is even enshrined at a constitutional level in some EPC contracting states, e.g. Germany, Austria and Switzerland²³.

The fundamental judicial right to the lawful judge is further established in Article 6(1), 1st sentence of the European Convention on Human Rights²⁴ (ECHR) and Art 47(2), 1st sentence of the Charter of Fundamental Rights of the European Union²⁵.

As noted with reference to the Boards of Appeal in T 954/98 of 9 December 1999²⁶, the principle of the lawful judge is implemented for the Boards of Appeal by drawing up, at the beginning of each financial year, a business distribution scheme according to which all appeals filed during the year are allocated to the Boards of Appeal and the members and their alternates who may sit on each Board are designated, whereby, on the one hand, the Chairpersons may assume the task of designating the members for the examination of the individual appeals allocated to their Board, taking into account the technical and linguistic concerns of the appeal, and, on the other hand, any change once a member has been designated may only be made for good cause and in compliance with the prescribed rules on replacement established in the Rules of Procedure of the Boards of Appeal (RPBA) and the business distribution scheme.

As the German Federal Constitutional Court (BVerfGE 21, 145 f.) has also stated, there is a direct connection between the principle of the statutory judge and the principle of the impartiality and neutrality of the judge. It is presumed that a judge who has been appointed on the basis of predetermined criteria is automatically in a neutral position vis-à-vis the

²³ see also T 954/98 of 9 December 1999, J 15/04, R 15/11

²⁴ 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.

²⁵ Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

²⁶ T 954/98 of 9 December 1999, Reasons 2.3

parties in the proceedings thus assigned to him. If, exceptionally, this is not the case, the law provides for recusal as a remedy²⁷.

According to Article 2(2) RBEBA the Chairman of the Enlarged Board of Appeal shall determine the composition of the Board for each particular case in accordance with the business distribution scheme. With regard to proceedings before the Enlarged Board of Appeal under Article 112(1)(a), Article 2(4) RBEBA further stipulates that at least four of the members shall not have taken part in the proceedings before the Board of Appeal referring the point of law.

According to Article 24(4) EPC the Enlarged Board of Appeal shall decide as to the action to be taken in the cases specified in Article 24, 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 business distribution scheme of the Enlarged Board of Appeal for the year 2021 provides in Article 2(1)(a) as list of regular members and in Article 2(1)(b) a list of alternates.

Article 2(3) Business distribution scheme of the Enlarged Board of Appeal further stipulates *inter alia* that where a regular member has participated in a case referred to the Enlarged Board of Appeal or if a regular member is prevented from participating, the Chairman shall, after consulting the regular members (paragraph 1(a)), appoint as substitute a member from amongst the alternates (paragraph 1(b)).

The Business distribution scheme contains no indication that this rule can be deviated from if the chamber includes external members.

²⁷ T 954/98 of 9 December 1999, Reasons 2.4

According to G 1/21 of 17 May 2021, the chairman and the legally qualified regular member I. Beckedorf are both replaced by regular members (Article 2(1)(a)), F. Blumer and T. Bokor, respectively; and not by alternates (Article 2(1)(b)).

Hence, we are concerned that the fundamental right to the lawful judge might be infringed by decision G 1/21 of 17 May 2021 and the Order dated May 20, 2021, concerning the change of the composition of the Board.

Hence, we request to replace the to be replaced members of the panel, Mr. Josefsson and I. Beckedorf with alternates pursuant to Art. 2(1)(b) of the Business Distribution scheme of the Enlarged Board of Appeal, and consequently, to appoint the substitute for the chairman in accordance with Art. 2(2) of the Business Distribution scheme of the Enlarged Board of Appeal.

III.2 Composition of the panel of EBoA in G1/21 according to Order of 17 March 2021

The interlocutory decision G1/21 of 17 May 2021 and the above considerations with regard to the business distribution scheme and the fundamental right to the lawful judge give rise to further concerns with regard to the composition of the panel of the EBoA by Order of 17 March 2021.

One of the implications of the fundamental judicial right to the lawful judge is that it must already be determined in advance, which judge has jurisdiction.

According to the Order of the EBoA of 17 March 2021 the panel to decide about the referred points of law was charged in accordance with the business distribution scheme of the Enlarged Board of Appeal.

Article 2(2) Business distribution scheme stipulates that the Chairman of the Enlarged Board of Appeal shall determine the composition of the Board for each particular case in accordance with the business distribution scheme.

Decisions of the Enlarged Board of Appeal in proceedings under Article 112 EPC shall according to Article 2(1) Business distribution scheme be taken by an Enlarged Board of Appeal consisting of seven members, of whom no more than two may have the same nationality. Article 2(1) Business distribution scheme further specifies regular members (a) and alternates (b).

According to Article 2(5) Business distribution scheme, if a case whose scope extends beyond the internal administration of the European Patent Office is referred to the Enlarged Board, the Chairman may, after consulting the regular members, designate one or two external legally qualified members (Article 1(2) Business distribution scheme) to replace one or two legally qualified regular members.

In the present case legally qualified regular members F. Blumer and T. Bokor have been replaced by external legally qualified members R. Arnold and E. Chatzikos. Or in other words, legally qualified regular members I. Beckedorf and W. van der Eijk have been selected to stay in the panel.

According to Article 2(5) Business distribution scheme the Chairman, after consulting the regular members, designates the external legally qualified members to replace one or two legally qualified regular members.

In this regard, the Business distribution scheme does not seem to contain any provision on which of the legally qualified regular members are to be replaced by external legally qualified members.

Hence, we have concerns, that consequently one of the implications of the fundamental judicial right to the lawful judge, that it must already be determined in advance, which judge has jurisdiction, is not fulfilled.

This raises specific concerns in the present case. The chairmen who designated the external members, and the legally qualified regular members to be replaced, has later been found to be suspected of partiality, just like one of the further legally qualified regular members indirectly selected by the chairman not to be replaced by an external legally qualified member.

IV. Suspicion of partiality

IV.1 Objection 1 – Suspicion of partiality of members of the EBoA G. Eliasson (SE) and A. Ritzka (DE)

As already noted above we understand, that our objection to the members of the EBoA G. Eliasson and A. Ritzka as suspected of partiality – based on the fact that they were members of the Presidium of the Boards of Appeal (for further details see our submission dated April 27, 2021; Section II.2) – is considered by the EBoA as not justified and the EBoA decided that both members can continue their participation in G 1/21²⁸.

In the reasoning of said decision the EBoA points out, that it is not known whether the objected members have contributed to the discussion of the proposal for amending the RPBA during a meeting of the Presidium and if so, what comments they made.²⁹ The Enlarged Board further noted that it is also not aware of any other circumstance which would prevent G. Eliasson and A. Ritzka from taking part in case G 1/21³⁰.

In this regard we want to note that although there is no general obligation of the member objected to provide a full response to the objection raised³¹, the member concerned has a duty to cooperate, and in individual cases there may well be an obligation to comment and provide the necessary information^{32,33}, so that the Board is in a position to decide on the objection raised.

The knowledge of the circumstances that led to the replacement of I. Beckedorf from the EBoA, which we learned about for the first time in connection with the decision, give rise to

²⁸ G 1/21 of 17 May 2021; Reasons 24.

²⁹ G 1/21 of 17 May 2021; Reasons 22.

³⁰ G 1/21 of 17 May 2021; Reasons 23.

³¹ T 1938/09; Reasons 3.2.

³² T 1938/09; Reasons 3.2:

"[...] The board acknowledges that there may be cases where a board would not be in a position to decide on the objection without having received the necessary information from the member objected to."

³³ Europäisches Patentübereinkommen; Singer/Stauder/Luginbühl; Auflage 8 (2019); Art. 24 EPÜ, Rdn 15

further objections to suspicion of partiality of members of the EBoA G. Eliasson (SE) and A. Ritzka (DE).

The interlocutory decision notes³⁴ that I. Beckedorf was involved in presenting drafts for the proposal [for a provision that later became Article 15a RPBA] during discussions with user representatives during the consultation phase. According to the decision,³⁵ this has led to I. Beckedorf's involvement becoming visible to other actors in the process and those with an interest in the way oral proceedings are conducted before the Boards of Appeal (BoA).

We have reason to believe that also the members of the panel G. Eliasson and A. Ritzka were also involved in presenting drafts for the proposal during discussions with user representatives during the consultation phase, and that they thus represented the BoA during the meeting with user representatives together with the President of the Boards of Appeal Mr. Josefsson, and with I. Beckedorf.

However, due to the circumstances we are not in a position to further proof this information. Even, though the draft for the proposal has been presented to user representatives during the consultation phase, no public information is available about the persons involved in the drafting of the proposal and in particular presenting it to user representatives.

It seems that all the necessary information regarding the drafting process and the presentation of the draft proposal to the user representatives is in the hands of the BoA.

The above facts lead to reasonable doubts but finally the participation of G. Eliasson and A. Ritzka during drafting and presenting the draft for the proposal during consultation phase can only be investigated by the Enlarged Board of Appeal during proceeding under Article 24(4) EPC.

³⁴ G 1/21 of 17 May 2021; Reasons 26.

³⁵ G 1/21 of 17 May 2021; Reasons 27.

As evidence for further proof of the participation of G. Eliasson and A. Ritzka we request hearing of Mr. I. Beckedorf as a witness, to be summoned via the Boards of Appeal of the EPO, Richard-Reitzner-Allee 8, 85540 Haar.

As noted above, we have reason to believe that also the members of the panel G. Eliasson and A. Ritzka were involved in presenting drafts for the proposal during discussions with user representatives during the consultation phase (together with the BoA President and Mr. Beckedorf). This active involvement was visible to other actors in the process and those with an interest in the way oral proceedings are conducted before the BoA. It would consequently not inspire confidence in the impartiality of the Enlarged Board if G. Eliasson and A. Ritzka would also be part of the panel that decides on the compatibility of oral proceedings by video conference without consent of the parties with Article 116 EPC as there may exist in the public eye an objectively justified concern that both, like the replaced Chairman and Mr. Beckedorf, might be biased towards answering the referred question positively.

A reasonable, objective and informed person considering the above discussed circumstances would conclude that he or she has good reasons to doubt the impartiality of G. Eliasson and A. Ritzka in the present proceedings.

Hence, the objection to G. Eliasson and A. Ritzka as suspected of partiality is reasoned and substantiated.

IV.2 Objection 2 – The regular members of the panel of the EBoA according to the Order of 20 May 2021 may not take part in the present case as they have any personal interest (Art.24(1) EPC) / are suspected of partiality

According to Article 24(1) EPC members of the Enlarged Board of Appeal may not take part in a case in which they have any personal interest.

The referral concerns a question relating to the personal interest of the members of the Enlarged Board.

The outcome of the pending referral, namely whether the conduct of oral proceedings in the form of a videoconference is compatible with the right to oral proceedings as enshrined in Article 116(1) EPC if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference, has a direct influence on the way oral proceedings are held in the future.

This, however, has a direct influence on the regular members of the present EBoA panel, as it influences how they will work in the future. Oral proceedings might take place in person at the premises of the Boards of Appeal or oral proceedings are conducted by videoconference, and the members of the Boards might even attend oral proceedings by videoconference from different locations.³⁶ According to Article 15a(3) RPBA the Chair in the particular appeal and, with the agreement of that Chair, any other member of the Board in the particular appeal may participate in the oral proceedings by videoconference.

Hence, the answer to the referral directly affects personal professional concerns of the members of the panel. Beside the member's personal preferences for videoconferencing, which might lead to a bias with regard to the answer of the referred question, it also has an

³⁶ In the so-called distributed oral proceedings all members, representatives and/or accompanying persons attend by videoconference. In some oral proceedings, one or more of the board members also attend by videoconference (see also Annual report of the Boards of Appeal 2020; 5.4, pages 22-24; [https://documents.epo.org/projects/babylon/eponet.nsf/0/c2f6898a8034b7d5c12586b50033bfc6/\\$FILE/Annual_Report_of_the_Boards_of_Appeal_2020_en.pdf](https://documents.epo.org/projects/babylon/eponet.nsf/0/c2f6898a8034b7d5c12586b50033bfc6/$FILE/Annual_Report_of_the_Boards_of_Appeal_2020_en.pdf)).

influence on the form of future work (attending oral proceedings from the (home) office or in a court room at the premises of the BoA). Further, considering the EPO's plans for the "new normal"³⁷ in which work may even be possible by teleworking remotely from the home countries of the employees or other EPC member states, which could also apply to members of the BoA in the future, the answer to the referred question has fundamental implications on personal and professional matters of the members of the EBoA.

Hence, the members of the panel in the present case have a very personal interest in the outcome of the proceedings and answering the referred question either in the affirmative or negative.

Hence, the members of the Enlarged Board of Appeal F. Blumer, T. Bokor, W. Van der Eijk, G. Eliason, and A. Ritzka may not take part in the present case as they have a personal interest (Art. 24(1) EPC).

However, at least a reasonable, objective and informed person considering the above discussed circumstances would conclude that he or she has good reasons to doubt the impartiality of the BoA panel members F. Blumer, T. Bokor, W. Van der Eijk, G. Eliason, and A. Ritzka.

Hence, the objection to the above members of the panel as suspected of partiality is reasoned and substantiated.

This objection is due to the specific constellation of the case at hand and we are aware that even replacing the members suspected of partiality, seems not to offer a way out of this problem, since also the alternates according to Article 2(1)(b) Business distribution scheme would be suspected of partiality for the same reasons.

³⁷ Orientation paper: Towards a new normal: Flexibility, collaboration and community at the EPO, 17 March 2021; [https://documents.epo.org/projects/babylon/eponot.nsf/0/8EE5BBF5ED782B1DC125869B0051B6CF/\\$FILE/020.020.0.08_new_normal_text_version_200317_external.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/8EE5BBF5ED782B1DC125869B0051B6CF/$FILE/020.020.0.08_new_normal_text_version_200317_external.pdf)

IV.3 Objection 3 – Suspicion of partiality of the regular members of the present panel according to the Order of 20 May 2021 who already belonged to the panel of the EBoA according to the Order of 17 March 2021

The regular members of the panel W. Van der Eijk, G. Eliasson, and A. Ritzka belonged already to the panel of the EBoA according to the order of 17 March 2021. That is, these members were already part of the panel chaired by Mr Josefsson and including the legally qualified regular member I. Beckedorf, both of whom were eventually replaced due to suspicion of partiality in accordance with interlocutory decision G 1/21 of 17 May 2021

The eventually replaced members of the panel participated during discussion of the referral in the Enlarged Board. However, after it was finally decided that said members are suspicious to partiality in particular that the concern is objectively justified that both members might have a bias towards answering the referred question in the positive, this might lead a reasonable, objective and informed person to conclude that he or she has good reasons to doubt the impartiality of the other members, as they might have been influenced by the objectively justified bias of the eventually replaced members during discussion the referred question. Consequently, we have concerns, that a reasonable, objective and informed person could conclude that the members W. Van der Eijk, G. Eliasson, and A. Ritzka have been influenced by a biased argumentation during work on and discussion of the referred question, which leads to an "infection" of the other members of the Enlarged Board by a suspicion of partiality.

We are in particular concerned, as the reshuffle of the Panel just took place five working days before the scheduled oral proceedings, and thus, the most time of the proceedings the eventually replaced members of the panel participated in the discussion of the referral in the Enlarged Board.

That seems to lead to a situation, wherein there are good reasons to believe that either the regular members of the present panel according to the Order of 20 May 2021 who already

belonged to the panel of the EBoA according to the Order of 17 March 2021, are bias by the discussion during the proceedings with the eventually replaced members of the panel, or if they have not yet intensively worked on and discussed the referral, then we are concerned, that a substantial reshuffle of the Panel, five working days before the scheduled oral proceedings, put the new members under exceptional pressure as they now need to familiarize themselves with the case and discuss the matter with the further Board members within an extremely short period of time.

A reasonable, objective and informed person considering the above discussed circumstances would conclude that he or she has good reasons to doubt the impartiality of W. Van der Eijk, G. Eliasson, and A. Ritzka as members of the panel in the present proceedings.

Hence, the objection to the members of the panel W. Van der Eijk, G. Eliasson, and A. Ritzka as suspected of partiality is reasoned and substantiated.

IV.4 Objection 4 – Suspicion of partiality of the regular members of the panel of the EBoA according to the Order of 20 May 2021.

Considering the interlocutory decision G1/21 and the specific circumstances of the present case, the regulations of the EPC with regard to re-appointment of the members of the Enlarged Board of Appeal give rise to a suspicion of partiality of the regular members of the panel of the EBoA.

The independence of the members of the Boards of Appeal is laid down in Article 23(3) EPC, which states that the members of the Boards shall not be bound by any instructions in their decisions and shall comply only with the provisions of the EPC.

However, Article 23(1) EPC stipulates that the members of the Enlarged Board of Appeal and of the Boards of Appeal shall be appointed for a term of five years.

According to Rule 12d(2) EPC, upon delegation³⁸ from the President of the European Patent Office, the President of the Boards of Appeal shall exercise the right to propose *inter alia* the members of the Enlarged Board of Appeal for appointment by the Administrative Council, and the right to be consulted on their re-appointment (Article 11(3) EPC).

As established in Rule 12d(3) EPC, the President of the Boards of Appeal shall exercise the right under Rule 12d(3) EPC to be consulted on re-appointments by submitting a reasoned opinion, including an evaluation of the member's or Chairman's performance, to the Administrative Council. Subject to a positive opinion and performance evaluation and the number of posts under Article 11(3) EPC, available in the adopted budget for the Boards of Appeal Unit, the members, including the Chairmen, of the Boards of Appeal and the members of the Enlarged Board of Appeal shall be re-appointed at the end of their five-year term under Article 23(1) EPC.

³⁸ See the Delegation of functions and powers from the President of the European Patent Office to the President of the Boards of Appeal (OJ EPO 2018, A63).

That is, the members of the Enlarged Board of Appeal are appointed for a term of five years and their re-appointment is *inter alia* subject to a positive opinion by the President of the Boards of Appeal.

In the interlocutory decision G1/21 the Enlarged Board found that the objection against the participation of the Chairman in the present case for reason of suspected partiality to be justified and decided that the Chairman thus has to be replaced³⁹.

In the reasoning of the interlocutory decision⁴⁰ the Enlarged Board made clear the Chairman of the Enlarged Board has in his capacity as President BOA performed legislative and managerial acts based on the view that oral proceedings by video conference without consent of all the parties are compatible with Article 116 EPC. If the Enlarged Board gave a negative answer to the referred question, this would mean that the above-mentioned acts would lack a legal basis and would contravene the EPC. It is these acts that in the view of the Enlarged Board would lead a reasonable, objective and informed person to conclude that he or she has good reasons to doubt the impartiality of Chairman in this case. The concern that the Chairman might have a bias towards answering the referred question in the positive in order to avoid the outcome that his own acts were not in compliance with Article 116 EPC, is therefore objectively justified. and the Enlarged Board decided that the Chairman thus has to be replaced⁴¹.

Finally, the President of the Boards of Appeal was removed as Chairman of the Enlarged Board of Appeal. Hence, he is no longer member of the panel and no longer takes part in deliberation and decision of referral G1/21.

He also has no direct influence on the decision of the Enlarged Board of Appeal, as the members of the Boards of Appeal are formally independent (Article 23(3) EPC).

³⁹ G 1/21 of 17 May 2021; Reasons 20.

⁴⁰ G 1/21 of 17 May 2021; Reasons 17

⁴¹ G 1/21 of 17 May 2021; Reasons 20.

But that does not change the concern that the replaced chairman, has in his role as a President of the BoA still an interest that the referred question in G1/21 in is answered in the affirmative, since otherwise this would mean, that the BoA President's acts in the context of introducing Article 15a RPBA, would lack a legal basis and would contravene the EPC.

We are concerned that the regular members of the panel of the EBoA in referral G1/21 have a bias towards answering the referred question in the positive, following the interest of the President of the Board of Appeal, in view of the fact, that their re-appointment as a member of the Enlarged Board – and thus, their further professional career with the Enlarged Board of Appeal – is subject to a positive opinion by the President of the Boards of Appeal.

We are in particular concerned that a reasonable, objective and informed person could conclude, in view of the above facts, that he or she has good reasons to doubt the impartiality of the regular members of the panel of the EBoA F. Blumer, T. Bokor, W. Van der Eijk, G. Eliason, and A. Ritzka.

Therefore, the objection against the participation of the regular members of the panel of the EBoA for reason of suspected partiality is justified.

This is due to the specific constellation of the case at hand and we are aware that even replacing the members suspected of partiality, seems not to offer a way out of this problem, since also the alternates according to Article 2(1)(b) Business distribution scheme would be suspected of partiality for the same reasons.

Respectfully



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