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**Datasheet for the interlocutory decision
of the Enlarged Board of Appeal
of 21 October 2015**

Case Number: R 0002/15

Appeal Number: ...

Application Number: ...

Publication Number: ...

IPC: ...

Language of the proceedings: EN

Title of invention:

XXX

Patentee:

XXX

Opponents:

XXX

XXX

Headword:

Notice of withdrawal/EURO-CELTIQUE

Relevant legal provisions:

EPC Art. 24(2), (3), (4)

Keyword:

Notice of withdrawal as chairman (accepted)

Decisions cited:

G 0001/05, R 0019/12, J 0015/04, Micallef v. Malta ECtHR case
No. 17056/06

Catchword:

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Summary of Facts and Submissions

- I. The petition for review concerns interlocutory decision ..., taken by Board of Appeal ..., rejecting the petitioner's objection of suspected partiality raised under Article 24(3) EPC against its chairman. The decision was announced at the end of oral proceedings on XXX and notified in writing on XXX.
- II. The petition for review was filed on 3 March 2015; the fee was paid on the same date.

By letter of 8 May 2015, in response to a communication of 12 March 2015 indicating the composition of the Enlarged Board of Appeal in the present case, the petitioner raised an objection of suspected partiality against the appointed chairman, Mr X. It expressed the view that making him chairman of this board was perhaps due to an oversight or administrative error, and said it would welcome his voluntary withdrawal and his replacement by another legally qualified member of the Enlarged Board, in which case there would be no need to consider the matter further. If he did not withdraw, the petitioner put forward the reasons why in its view he should be excluded on the grounds of suspected partiality.

- III. By letter of 9 July 2015, Mr X wrote to the Enlarged Board as follows: *"Although (1) I have no personal interest in the outcome of the case and (2) actually played no role, at least not voluntarily, in the factual events that gave rise to the decision under review, it is a matter of fact that I was, during the proceedings before Board of Appeal ..., personally*

addressed by the petitioner on the subject-matter of the suspected partiality of the chairman of the Board of Appeal. Given that these particular circumstances could give an impression that I have been involved in the case, which could cast doubt on my ability to deal with the case in an impartial way, I inform the Enlarged Board, in accordance with Article 24(2) EPC, that I should not take part in the petition for review proceedings."

- IV. By order of 13 July 2015 an alternate to the chairman of the Enlarged Board was appointed in accordance with Article 24(4), second sentence, EPC.
- V. On 9, 13 and 23 July 2015, the petitioner was informed of Mr X letter and the Enlarged Board's composition according to Article 24(4) EPC.

Reasons for the Decision

Notice of withdrawal (Article 24(2) EPC)

- 1. There are two reasons for initiating the present proceedings under Article 24(4) EPC. Firstly, the petitioner has raised an objection of suspected partiality against the chairman of the Enlarged Board. Secondly, the chairman has himself given notice that he should not take part in the present case pursuant to Article 24(2) EPC.
- 2. Since the petitioner indicated that its objection would not need to be considered if the chairman withdrew voluntarily, the Enlarged Board - with a view to

dealing with the case as simply and quickly as possible - decided to consider the notice pursuant to Article 24(2) EPC first, because if that notice were accepted the petitioner's objection would become redundant.

3. As already stated in decision G 1/05 of 7 December 2006 (OJ EPO 2007, 362, Reasons point 2), "a notice of withdrawal does not automatically effectuate the exclusion of the Board member concerned from the proceedings; an exclusion requires a decision by the Board in its composition according to Article 24(4), second sentence, EPC, the outcome of which is not anticipated by the notice of withdrawal, as to whether the replacement of the Board member concerned is justified".

4. Without question, board members have a duty to sit on their allocated cases in the particular composition determined by the provisions applicable (here: the business distribution scheme of the Enlarged Board of Appeal, BDS/EBA); they cannot withdraw at will, for reasons which have nothing to do with the purpose of the provisions on exclusion and objection, namely to protect a party from possible partiality of the member involved (G 1/05, loc. cit., Reasons point 8). On the other hand, if a board member in a notice of withdrawal gives a ground which may by its nature constitute a possible ground for an objection of partiality, that ground should normally be respected by the decision on replacement of the member concerned, because it can be expected that the member submitting the notice knows best whether or not a possible suspicion of partiality could arise (G 1/05, loc. cit., Reasons point 7, and

interlocutory decision J 15/04 of 30 May 2006, Reasons point 13).

5. For a notice of withdrawal under Article 24(2) EPC to be accepted, it is therefore not necessary - as it is in the case of objections raised under Article 24(3), first sentence, EPC - to establish that, with respect to the member concerned, there is subjective partiality or at least an appearance of partiality (objective partiality) (see G 1/05, loc. cit., Reasons point 19; ECtHR Micallef v. Malta, 15 October 2009, case No. 17056/06, paragraph 98). It is sufficient that such an appearance of partiality is at least arguable in the circumstances of the case.

6. In the present case, it is a matter of fact that Mr X was indirectly involved in the case before Board of Appeal ... whose decision is the subject of the present petition for review. In a letter dated 17 September 2014 the petitioner asked him whether the chairman of Board ..., to whom it was objecting, had deputised for him as Vice-President DG 3 (VP3) in the period from 2008 until that date. It requested this information because it took the view that the findings of R 19/12 applied to any chairman of a board of appeal who deputised for VP3. None of the members of Board ... had reacted to its request dated 20 June 2014 to say whether they had deputised for VP3; in a letter dated 28 August 2014, it had limited the issue to the Board's chairman.

In his reply of 26 September 2014, Mr X said he expected that if the objection against the chairman of Board ... was found admissible, that board - without

the member objected to - would give the member the opportunity to comment on the objection raised. He added that under those circumstances he did not think it appropriate for him to open a parallel information channel.

On 1 October 2014, the objection was found admissible, and the Board ... chairman objected to stated that he had no comments to make.

By letter of that same day, the petitioner reiterated its request of 17 September 2014 that Mr X supply it with information about the chairman objected to's deputisation for VP3. To this request Mr X does not appear to have reacted at all.

7. The issues in the present case are, amongst others, whether the fact that the chairman objected to provided no substantive comments about his role as a deputy for VP3 came as a surprise for the petitioner, infringing its right to be heard, and whether Board ... unduly limited the petitioner's opportunity to substantiate its case with respect to the new objection for suspected partiality based on the above conduct on the part of the chairman objected to. Since, as set out in point 6 above, Mr X was addressed by the petitioner on the same issue, i.e. the role of the chairman of Board ... as a deputy for VP3, and did not provide the requested information himself, it is at least arguable that an independent observer aware of the interlocutory decision in case R 19/12 might objectively conclude that Mr X was involved, and that his choosing not to give the information requested might create the impression that he might be prejudiced. That is

sufficient to conclude that the notice of withdrawal is to be accepted (see point 5 above).

8. There is no need to fully analyse the petitioner's further objection (see point 2 above). The Enlarged Board merely notes that Mr X's own analysis is in line with the petitioner's objection, in that he accepts that, in the particular circumstances of this case, he might be perceived as having an interest in the outcome of the petition for review, or at least as not being entirely unencumbered in his approach to the petition. This also means he has not withdrawn for reasons which have nothing to do with the purpose of the provisions on exclusion and objection, namely to protect a party from possible partiality of the member involved (G 1/05, loc. cit., Reasons point 8).

9. Under these circumstances, the Enlarged Board concludes that Mr X should be replaced by Mr Moufang.

Order

For these reasons it is decided that Mr X is replaced by Mr Moufang.

The Registrar

The Chairman

P. Martorana

R. Moufang