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**Datasheet for the decision
of the Enlarged Board of Appeal
of 21 November 2016**

Case Number: R 0002/15

Appeal Number: T 1938/09 - 3.3.02

Application Number: 98906678.2

Publication Number: 0964677

IPC: A61F 13/00, A61K 31/485,
A61K 9/70

Language of the proceedings: EN

Title of invention:
Sustained analgesia achieved with transdermal delivery of
buprenorphine

Patentee:
EURO-CELTIQUE S.A.

Opponents:
Hexal AG
Acino AG

Headword:
Right to be heard/EURO-CELTIQUE

Relevant legal provisions:
EPC Art. 112a(2)(c), 112a(2)(d), 113(1)
EPC R. 104(b)

Keyword:
Fundamental violation of right to be heard (no)- Failure to
decide on request (no)- Petition for review clearly
unallowable.

Decisions cited:

R 0001/08, R 0005/08, R 0011/09, R 0019/09, R 0013/12,
R 0019/12

Catchword:

-



Case Number: R 0002/15

D E C I S I O N
of the Enlarged Board of Appeal
of 21 November 2016

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Decision under review:

**Decision of the Technical Board of Appeal
3.3.02 of the European Patent Office of
2 October 2014.**

Composition of the Board:

Chairman: R. Moufang
Members: M.-B. Tardo-Dino
F. van der Voort

Summary of Facts and Submissions

Overview

- I. This petition for review concerns interlocutory decision T 1938/09 dated 2 October 2014 of Technical Board of Appeal 3.3.02 (hereinafter: "the Board") rejecting an objection of suspected partiality raised by the appellant/patent proprietor against the chairman of the Board pursuant to Article 24(3) EPC. The decision was issued by the Board in its alternate composition, i.e. without the participation of the chairman objected to. It was announced at the end of oral proceedings, which took place on 1 and 2 October 2014, and was dispatched in writing to the parties on 2 March 2015.

- II. The appellant (hereinafter: "the petitioner") filed the petition for review in two steps. It submitted a first version of the petition on 3 March 2015, which did not yet take the Board's written reasons into account, and subsequently sent a letter on 11 May 2015 to confirm and further substantiate the petition in the light of those reasons.

The petition was based on the grounds that:

- several violations of the petitioner's right to be heard had occurred during the proceedings before the Board; and

- the Board had failed to decide on a request relevant to the decision.

The proceedings before the Board

III. The petitioner had filed an appeal against the decision of the opposition division of 24 July 2009 to revoke European patent No. 0 964 677.

By letter of 6 May 2014, the petitioner raised an objection of suspected partiality under Article 24(3) EPC against all the members of the Board in the light of the interlocutory decision in review case R 19/12.

By communication of 15 May 2014 accompanying a summons to oral proceedings, the Board questioned the admissibility of the objection.

By letter of 20 June 2014, the petitioner requested that each member of the Board make an individual official statement as to whether or not he was "the appointed substitute" of the Vice-President of DG3 (hereinafter: "VP3") at any stage during the appeal proceedings.

By letter of 28 August 2014, the petitioner restricted its objection under Article 24(3) EPC to the chairman of the Board. It considered that the reasoning of the interlocutory decision in case R 19/12 relating to the suspicion of partiality of VP3 also applied to the chairman objected to if he had acted as VP3's deputy. It emphasised that "the nature of the objection" was "purely structural" and had "no personal aspect whatsoever".

By letter of 19 September 2014, the petitioner stated that, in the absence of any official statement in response to its request of 20 June 2014, it had made an attempt to obtain the relevant information from VP3. It attached a copy of its enquiry letter. It furthermore requested *inter alia* that four questions of law be referred to the Enlarged Board of Appeal. One of them ("Question 1") particularly concerned the question of whether a suspicion of partiality against a board of appeal member was justified for the sole reason that, during the course of the appeal proceedings, the objected-to member holds or has held the position of deputy of VP3.

By communication of 24 September 2014, the Board expressed its preliminary view that the objection now restricted to the chairman was admissible. However, the decision on it would be taken after hearing the parties.

IV. On 1 and 2 October 2014, oral proceedings took place. They were split into proceedings before the Board in its original composition (1 October, 9:10 to 10:15 hrs; 2 October, 14:20 to 17:55 hrs) and in its alternate one (1 October, 10:40 to 18:00 hrs; 2 October, 9:20 to 14:00 hrs). The following summary is based on the minutes drawn up according to Rule 124 EPC.

In the morning of the first day of the oral proceedings, the Board, in its original composition, decided that the objection under Article 24(3) EPC was admissible.

The Board, in its alternate composition, invited the chairman objected to to provide his comments in accordance with Article 3(2) RPBA and, after resuming

the oral proceedings at 10:40 hrs on 1 October 2014, it handed out a copy of the response to the parties (see the minutes, page 2) [here and in the following, the "minutes" are those of the oral proceedings before the Board in its alternate composition]. In his response, the chairman stated that he did "not wish to make any comments".

The petitioner requested an interruption of the oral proceedings for at least one hour in order to prepare a reaction to that response. After hearing the parties on this request and after deliberation by the Board, the chairman announced that the oral proceedings would be interrupted for 30 minutes.

The petitioner then raised two objections under Rule 106 EPC which were submitted in writing and read as follows:

Objection 1

"We herewith raise an objection under Rule 106 EPC in combination with Art. 112a (2) c), Art. 113 EPC: The patentee considers its right to be heard violated by the fact that the Board gave the Patentee only 30 minutes to react to the document dated October 1st, 2014 provided by the objected-to member and handed over during oral proceedings of October 1st, 2014 despite the Patentee's indication that it would require at least 1 hour in view of the complex legal situation arising from said document."

Objection 2

"We herewith raise an objection under Rule 106 EPC in combination with Art. 112a (2) c), Art. 113 EPC:

The document dated October 1, 2014 provided by the objected-to member and handed over in the oral hearing of October 1, 2014 comprises no statement on the facts regarding the objection for suspicion of partiality. In case that the objection for suspicion of partiality is rejected, this leads to a violation of the Patentee's right to be heard."

The Board dismissed these objections (see the minutes, page 3).

The Board and the parties then discussed the question of whether the objection under Article 24(3) EPC was justified in the light of the Enlarged Board's interlocutory decision in case R 19/12. This discussion addressed the extent to which the functions of VP3 and a chairman of a technical board, and proceedings before the Enlarged Board of Appeal and a technical board of appeal, were comparable (see the minutes, page 3). The petitioner requested a referral to the Enlarged Board of one of the questions filed with its letter of 19 September 2014, i.e. "Question 1" ("Referral question 1").

Furthermore, the parties were given the opportunity to present their observations on the declaration made by the chairman objected to. The petitioner requested

suspension of the oral proceedings and a return to written proceedings so that it could research the case law on the duty of response of a judge objected to. The Board refused this request.

The petitioner then sought to submit a letter from VP3 dated 26 September 2014. After deliberation by the Board, the chairman announced that this letter was not admitted into the proceedings and was returned to the appellant (see the minutes, page 4).

Before the end of the first day of the oral proceedings, the petitioner submitted the following new objection under Article 24(3) EPC against the chairman already objected to:

"We herewith object under Art. 24(3) EPC to the already objected-to chairman of the Board of Appeal for suspicion of partiality based on the fact that the objected-to chairman refuses to provide substantive and complete comments on the facts at issue, including disclosure of relevant facts within his own knowledge in response to the invitation under Art. 3(2) RPBA. By not providing such a response, the objected-to chairman prevents a clarification of the facts. This gives rise to a new and separate objection for suspicion of partiality."

- V. On the second day of the oral proceedings, the chairman of the Board, still in its alternate composition, stated that during the interruption the petitioner had submitted to the Board a copy of a letter to VP3. The

letter was given back to the appellant and not admitted into the proceedings (see the minutes, page 4).

The admissibility of the new objection under Article 24(3) EPC was then discussed with the parties. The petitioner requested once more, this time in writing, a return to written proceedings so that it could research the case law of the boards of appeal, national courts and the European Court of Human Rights (ECtHR) regarding the consequences of a refusal by a member of the judiciary who has been objected to on suspicion of partiality to provide comments on that objection after being asked by a court to do so.

The petitioner furthermore filed a request for referral of questions concerning the above issue to the Enlarged Board ("Referral question 2"). These questions related (1) to the duty of a board member objected to "to co-operate" under Article 3(2) RPBA, in particular to the extent to which there was such an obligation, and whether a refusal to make substantive comments could substantiate an objection of suspected partiality under Article 24(3) EPC, and (2) to the responsibility of the Board under Article 3(1) RPBA and Article 24(4) EPC to inform the parties about the facts at issue and give them an opportunity to comment on those facts.

The Board admitted the new objection under Article 24(3) EPC and announced that it would deal with the substance of the submission during the proceedings under Article 24(4) EPC that were already pending (see the minutes, page 5).

The request for a return to written proceedings was then discussed with the parties and - after deliberation - refused. The petitioner filed a further objection under Rule 106 EPC (see the minutes, page 5) which read as follows:

Objection 3

"On October 2, 2014, the Patentee filed the request termed 'Request, October 2, 2014' and starting with the words 'The Patentee requests to return to ...'

The Patentee herewith raises an objection under Rule 106 EPC in combination with Art. 112a (2)c), Art. 113 EPC because the rejection of the request to return to written proceedings amounts to a violation of the Patentee's right to be heard."

After a discussion with the parties and deliberation, the Board dismissed this objection.

The chairman then asked the parties whether they had any further arguments to present. The petitioner requested the referral of a further question to the Enlarged Board ("Referral question 3"), namely whether the Board was obliged to investigate the position of a member objected to who refused to offer information, and, if so, whether the Board had to communicate the outcome of its investigation to the parties.

The decision under review

VI. The written reasons of the decision to be reviewed may be summarised as follows:

The Board rejected the petitioner's first objection under Article 24(3) EPC against the original chairman. That objection had been filed on the ground that the chairman's possible deputisation for VP3 could put him in the same position as the chairman of the Enlarged Board, which was the critical issue in the interlocutory decision in case R 19/12. The Board considered that this decision was based on the fact that the then chairman of the Enlarged Board was, as VP3, subject to the supervisory authority of the President of the EPO (Article 10(2)(f) EPC) and had a duty to assist the President (Article 10(3) EPC). These particular duties and obligations could not be imposed on a chairman or acquired by way of delegation if a chairman was deputising for VP3. The chairman remained bound only by Articles 21(1) and 23(3) EPC.

In view of the different statutory framework governing the duties and obligations of VP3 on the one hand and those of the chairman objected to on the other, the Board concluded that it was immaterial whether the chairman had deputised for VP3. He could not become subject to the supervisory authority of the President of the EPO, nor could an obligation to assist the President be imposed on him by his mere presence in managerial committees.

The Board saw a further relevant difference compared to the situation underlying the decision in R 19/12. In his function as regular chairman of the Enlarged Board, VP3 was able to influence the outcome of review cases, which had an effect on the latitude given to the boards of appeal in general. This could not be compared to

occasional participation by a chairman of a technical board of appeal in cases of the Enlarged Board.

The Board considered itself to be in a position to take a decision without receiving a full response from the chairman objected to, since the details requested by the petitioner about whether and to which extent he had deputised for VP3 whilst its appeal had been pending were not relevant for the decision. Article 3(2) RPBA required that the member objected to be given an opportunity to present his comments and thus safeguarded his right to be heard on the objection. It did not however impose any general obligation to provide a full response to the objection raised. There might be cases where a board would not be in a position to decide on the objection without receiving the necessary information from the member objected to, but this was not one of them.

In this context, the Board also rejected the petitioner's second objection under Article 24(3) EPC, which was based on the fact that the chairman objected to had failed to comment in substance on the objection. No partiality could be deduced from his decision not to provide detailed information which, moreover, would have involved disclosing personal data about the absences of VP3.

The Board furthermore considered that the petitioner had been given sufficient time to react to the chairman's response. It concluded from the copy of the letter to VP3, filed by the petitioner with its letter of 19 September 2014 (see section III above), that the

petitioner had already considered the possibility of the chairman not giving a detailed answer.

Review proceedings before the Enlarged Board

VII. On 19 October 2015, the Enlarged Board, in a different composition, issued an interlocutory decision accepting its original chairman's notice of withdrawal from the present review case.

The Enlarged Board issued a communication informing the petitioner in advance of the oral proceedings of its preliminary view on some of the issues involved.

The petitioner replied by letter of 28 October 2016.

The oral proceedings took place on 21 November 2016 before the Enlarged Board composed according to Rule 109(2)(a) EPC. At the end of the oral proceedings, the chairman announced the decision.

VIII. The petitioner confirmed that its final requests were that:

- the decision under review be set aside and the appeal proceedings re-opened;
- the board of appeal members who had participated in the decision under review be replaced; and
- the fee for the petition for review be reimbursed.

IX. The petitioner's arguments may be summarised as follows:

(1) Its right to be heard had been infringed on numerous occasions during the appeal proceedings:

(a) Although the chairman objected to had been asked for comments in accordance with Article 3(2) RPBA, he had declined to make any, resulting in a lack of transparency.

(b) The petitioner had not been given enough time to react to this refusal to comment.

(c) Without any prior discussion, the Board had not admitted the correspondence with VP3 submitted by the petitioner during the oral proceedings.

(d) The petitioner had been given no opportunity to comment on the core reasoning in the Board's decision, namely that the scope of a deputy's responsibilities was more limited than that of VP3 himself. The decision was based on several factual statements drawing a distinction between the functions of VP3 and those of a member of a board of appeal acting as his deputy; the specific limits to the scope of deputisation for VP3 were unknown to the petitioner. The only ground on which the petitioner had expected the decision to rely was whether and, if so, how often the chairman objected to had acted as deputy for VP3 in the relevant period. The Board's restrictive understanding of deputisation as limited in scope and fundamentally different from the function of VP3 himself had been inconceivable for the petitioner and should have been communicated to the parties prior to the decision.

(e) The Board had refused the petitioner's request that the proceedings be continued in writing so as to allow it to analyse the relevant case law, including decisions of the ECtHR and national courts dealing with the situation where a judge objected to refused to comment on the objection raised.

(2) The Board had not decided on the petitioner's request that its correspondence with VP3 be admitted into the proceedings which constituted a fundamental procedural defect within the meaning of Article 112a(2)(d) in conjunction with Rule 104(b) EPC.

(3) In addition, the petitioner maintained that, since the Board's lawful composition was a prerequisite for due process and compliance with the right to be heard, the situation was so exceptional that the Enlarged Board had a duty to consider also the substance of the decision, which the petitioner believed to be wrong.

X. During the oral proceedings before the Enlarged Board, the petitioner divided these grounds into two groups.

The first group concerned what the petitioner called "the factual background" underlying the decision, i.e. "the limited scope of function of the VP3 deputy". In the absence of any public information, the petitioner was completely unaware of how deputisation worked, and it was the duty of the Board to ensure that it was informed. Instead, only in the written decision had it learned about the limited scope of responsibilities on which the Board was relying.

The second group, called "lack of facts and duty to dispel doubts", concerned the course of events during the oral proceedings before the Board and, more specifically, the refusal to comment of the chairman objected to. This gave rise to additional doubts and further reasons to suspect partiality. The petitioner cited the case law of the ECtHR and national courts, according to which the mere fact that a person objected to remained silent when the objection was not obviously devoid of merit (in the present case the objection had been found admissible) sufficed to create suspicion. The petitioner contended that if it had been allowed more time it could have collected the relevant case law; this might have affected the decision. The causal link between the alleged violation and the decision was not relevant in this respect.

The petitioner did not bring forward any further arguments to support its view (see section IX(3) above) that the Enlarged Board should also - exceptionally - examine the substance of the decision.

Reasons for the Decision

Admissibility

1. Article 112a(1) EPC

The petitioner is adversely affected by the decision to be reviewed, since its objection of suspected partiality against the chairman of the Board in its original composition was refused. The requirement of Article 112a(1) EPC is therefore fulfilled.

2. Petition against an interlocutory decision

2.1 The petition concerns an interlocutory decision dealing with objections of suspected partiality raised against the Board's chairman. Although this decision was not concerned with the substantive issues that were the subject of the appeal, but with a preliminary issue regarding the lawfulness of the composition of the Board, it was final in the sense of constituting *res judicata* for this issue, decided upon by the Board in its alternate composition.

2.2 Petitions for review of interlocutory decisions are not generally inadmissible, as already implicitly recognised in R 5/08 of 5 February 2009, which dealt with a petition for review concerning two such decisions. The Enlarged Board sees no reason to assume, in the absence of an express provision, that Article 106(2) EPC, which stipulates that a decision which does not terminate proceedings as regards one of the parties can only be appealed together with the final decision, unless the decision allows a separate appeal, is also to be applied to the petition for review procedure. Neither Article 112a EPC itself nor its implementing regulations (Rules 104 to 110 EPC) contain a provision corresponding to Article 106(2) EPC.

2.3 Moreover, Article 106(2) EPC, which concerns the ordinary legal remedy of appeal, cannot be applied analogously to the extraordinary remedy of petition for review, for the following reasons. Because the admissibility of a legal remedy is such a fundamental issue, any restrictions to it must be clearly laid down

in the law. This holds all the more true for the petition for review procedure, due to the fact that it is an extraordinary means of redress and has its own specific admissibility requirements. The wording of Rule 109(1) EPC, which refers in general terms to the provisions relating to proceedings before the boards of appeal, is therefore not to be understood as encompassing a reference to the provisions governing admissibility.

2.4 It follows from the above that the Enlarged Board is unable to identify any reason to apply, to petitions for review of interlocutory decisions, the same restrictive approach to admissibility that is applied to appeals.

2.5 Accordingly, the fact that the present petition is concerned with an interlocutory decision does not render it inadmissible.

3. Article 112a(2) EPC

3.1 A petition may only be filed on the grounds stated in Article 112a(2) EPC in conjunction with Rule 104 EPC. The present petition alleges fundamental violations of the right to be heard according to Article 113(1) EPC (see section IX(1)(a) to (e) above) in connection with the ground specified in Article 112a(2)(c), and a failure on the part of the Board to deal with a request submitted by the petitioner (see section IX(1)(c) and (2) above) in connection with one of the fundamental procedural defects defined in Article 112a(2)(d) in conjunction with Rule 104 EPC.

3.2 Although it did not expand on this point at the oral proceedings, the petitioner had maintained in its written submissions that the present review proceedings were also an opportunity to look at the substance of the decision, because the Board's lawful composition was a prerequisite for any correct procedure and for compliance with the right to be heard. The Enlarged Board acknowledges that, since the interlocutory decision deals with objections of suspected partiality against a chairman, it unquestionably has consequences of the utmost importance for the proceedings as a whole. Nevertheless, as has been made abundantly clear in the established case law, review proceedings cannot serve as a means to review the merits of a decision (see e.g. R 1/08 of 15 July 2008, point 2.1 of the reasons, and R 13/12 of 14 November 2012, point 2.5 of the reasons). This principle also applies where, as in the present case, the decision to be reviewed concerns the refusal of an objection of suspected partiality. The petition for review is therefore clearly inadmissible in this respect.

4. Article 112a(4) EPC

The petition meets the formal requirements of Article 112a(4) EPC regarding the time limit, payment of the fee, and the filing of a reasoned statement.

5. Rule 106 EPC

5.1 According to Rule 106 EPC, a petition under Article 112a(2)(a) to (d) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by

the board of appeal, except where such objection could not be raised during the appeal proceedings.

- 5.2 In so far as the petition is based on the alleged violations set out in section IX(1)(a), (b) and (e) above, the petitioner duly raised objections under Rule 106 EPC (see its objections 1, 2 and 3 reproduced in sections IV and V above).
- 5.3 As to the alleged violation set out in section IX(1)(d) above, i.e. that the petitioner was unable to comment on the facts underlying the board's core reasoning relating to the deputy's limited scope of responsibility, the petitioner maintained that it only became aware of this issue from the written reasons of the decision, and that its petition was also admissible because the alleged violation fell within the exception provided for in Rule 106 EPC.
- 5.4 Regarding the alleged violations summarised in section IX(1)(c) and (2) above, namely the absence of discussion about the admissibility of the petitioner's correspondence with VP3 and the failure to decide on a respective procedural request, no relevant objections were raised at the oral proceedings before the board. Accordingly, to the extent that the petition relies on this ground, it is clearly inadmissible. To the extent that this specific objection forms part of the petitioner's general objection of lack of transparency it will be dealt with in the context of the issues regarding the alleged lack of information (see point 9.5 below).

6. The board therefore concludes that the petition for review is clearly inadmissible in part.

Allowability

7. Overview

As pleaded by the petitioner during the oral proceedings (see section X above), the grounds put forward in support of the present petition for review essentially fall into two groups. The first group concerns the argument that the decision was based on facts and reasons never previously discussed and therefore objectively surprising for the petitioner (see section IX(1)(d) above). The second group encompasses those grounds which revolve around the alleged general lack of transparency and factual information in the appeal proceedings leading to the contested decision, a deficiency purportedly compounded by the conduct of the chairman objected to (see section IX(1)(a) above). According to the petitioner, this conduct not only led to the second objection of suspected partiality under Article 24(3) EPC, which was raised during the oral proceedings, but also prevented it from presenting its case properly. In this difficult situation, the further procedural violations specified in section IX(1)(a), (b), (c) and (e) as well as (2) above allegedly occurred. The Enlarged Board will deal with these grounds in turn.

8. First group of grounds - the surprising nature of the decision deprived the petitioner of its right to be heard

8.1 The petitioner's argument that it was surprised by and had no opportunity to argue against the crucial reasons of the Board's decision took the following lines (see also section IX(1)(d) above):

- At no time before or during the oral proceedings had it ever been suggested, let alone argued, by any party or the Board that the deputy for VP3 could be regarded as not being a full deputy, but rather as someone acting within "some specifically limited scope of deputising". The petitioner had therefore assumed that the chairman objected to had deputised for VP3 in the relevant period of time and with unlimited scope. Insofar as the decision held otherwise, it was based on facts the petitioner was not aware of.

- The plain and ordinary meaning of the term "deputy" was a person performing the same duties and under the same obligations as the person he was deputising for. No other meaning could be deduced from the relevant legal provisions. A limited interpretation of the term "deputy" was not only unknown but also completely inconceivable. The petitioner made it clear at the oral proceedings before the Enlarged Board that this had resulted in a new factual background on which it had been unable to comment.

- The petitioner had exhausted all available means of obtaining further evidence establishing the facts of the case. It had thus complied with its obligations in presenting its case.

8.2 As already summarised in section III above, the petitioner had based its first partiality objection

against the chairman of the Board (in its original composition) solely on the argument that the reasons of the interlocutory decision in case R 19/12 relating to the suspicion of partiality of VP3 also applied to the chairman objected to if he had acted as VP3's deputy.

- 8.3 In deciding on the petitioner's contention that there was a parallel between VP3's situation and that of his deputy, the Board took the view that decision R 19/12 focused on the particular duties and obligations of VP3. It therefore assessed whether the chairman objected to, if he had deputised for VP3, was subject to the same obligations as VP3 by virtue of Article 10(3) EPC.

More specifically, in the passages referred to by the petitioner, in particular points 4.3.1 to 5 of the reasons (see also section VI above), the Board based its reasoning on a specific interpretation of Article 10(2) and (3) EPC. It proceeded by deduction and referred to Article 21(1) EPC, stating that the chairman of the Board, like any member of the boards of appeal, was bound only by Article 23(3) EPC, and that the mere fact that he deputised for VP3 in administrative bodies did not mean that he was under the same duty to assist the President of the EPO. This obligation to assist, laid down in Article 10(3) EPC, was incumbent upon VP3 in his capacity as permanent Vice-President. The Board concluded that, even if a chairman could deputise for VP3 in administrative bodies, it was clear from the EPC that the deputy was not a member of the administrative hierarchy of the EPO or subject to the President's authority under Article 10(2)(f) EPC; he was not under the general obligation to assist prescribed by Article 10(3) EPC.

8.4 The core of the Board's analysis summarised above is of a legal nature, i.e. it relies on legal provisions of the EPC that are accessible to all parties to EPO proceedings, not on any particular factual knowledge about the functioning of the boards of appeal. This also holds true for the Board's further observation that with respect to review cases the chairman objected to was not in the same position of influence as that enjoyed by VP3 as regular chairman of the Enlarged Board. Indeed, Article 22(2), third sentence, EPC specifically excludes a technically qualified chairman from chairing the Enlarged Board. The petitioner's argument that the Board's reasoning - paraphrased in the petition by the phrase "some specifically limited scope of deputising" (see the letter dated 11 May 2015, page 10) - was based on facts unknown to the parties therefore cannot be followed.

8.5 Nor is it apparent that the petitioner had no opportunity to put forward its point of view on the functions and duties of VP3 as compared with those of his deputy, including the question of which statutory provisions applied to one and which to the other. According to the minutes of the oral proceedings, this comparison was central to the discussion during the hearing. On page 3 of the minutes it is stated (underlining by the Enlarged Board):

"Taking into account the questions to which extent the functions of the Vice-President of DG3 and a chairman of a technical board of appeal, and the proceedings before the Enlarged Board of Appeal and a technical board of appeal, were comparable,

the question whether the objection under Article 24(3) EPC was justified in the light of the findings of the interlocutory decision of the Enlarged Board of Appeal of 25 April 2014 in the case R 19/12 was discussed with the parties. The appellant requested that Question 1 on page 13 of its letter of 19 September 2014 be referred to the Enlarged Board of Appeal ('Referral question 1')."

Question 1 on page 13 of the letter referred to in the minutes (see also section III above) reads as follows:

"Question 1: Is an objection under Art. 24(3) EPC against a member of a Board of Appeal justified for the sole reason that, during the course of the appeal proceedings, the objected-to member in addition to the judicial function holds or has held an administrative position in the European Patent Office, provided that such dual function is not required by law, in particular when the objected-to member holds or has held the position of deputy of Vice President in charge of the Boards of Appeal?"

This question had already been formulated in advance of the oral proceedings before the Board and was considered during the oral proceedings - as the minutes make clear - to be the petitioner's reaction to the comparison of the functions of VP3 and his deputy. It shows that the petitioner was aware, or at least should have been aware, of the possibility that the Board might come to the conclusion that the functions and duties of VP3, on the one hand, and those of his deputy, on the other hand, were legally distinct and that this

distinction was of relevance in the context of suspicions of partiality.

- 8.6 According to the petitioner, the Board never suggested that "a deputy could be regarded as not being a full deputy" and that Article 10(3) EPC applied only to Vice-Presidents, not to their deputies. In support of this argument, the petitioner contested the factual correctness of that part of the decision where the respondents' arguments were summarised; it also questioned the reliability of the minutes in general on the grounds that they were not sent out until five months after the oral proceedings.
- 8.7 However, the mere fact that the minutes were issued late does not suffice to call into question the credibility of the above statement made in them. Further, there is no need to look any further into precisely what was stated in the oral proceedings by the Board and the parties and in particular whether or not the petitioner was directly confronted with the argument that - as it put it - a deputy was not a full deputy and had some specifically limited scope of deputising, and that therefore Article 10(3) EPC was not applicable to the deputy of VP3. The reason that there is no such need is that the petitioner - given that it was arguing that the findings in R 19/12 were transferable to the present case - was aware, or at least should have been, that the legal comparison of the duties and obligations of VP3 with those of his deputy was crucial for deciding on the merits of the objection raised under Article 24(3) EPC. It therefore had sufficient opportunity to argue its case.

- 8.8 The Enlarged Board concludes that no fundamental violation of the right to be heard can be established in respect of the first group of grounds on which the petition is based.
9. Second group of grounds - violations of the right to be heard and fundamental procedural violations which resulted in a lack of transparency and factual information in the appeal proceedings
- 9.1 Failure to investigate and to provide the information sought by the petitioner
- 9.1.1 According to the petitioner, by admitting the first objection under Article 24(3) EPC the Board in its original composition acknowledged that it was not devoid of merit. As put forward in "Referral question 2" annexed to the minutes of the oral proceedings and on page 15 of the letter dated 11 May 2015, the Board therefore had to investigate the factual background of the objection, because Article 3(1) RPBA and Article 6 ECHR obliged it to carry out an examination in order to provide evidence known by the Board.
- 9.1.2 This argument is not convincing. At the stage when the chairman objected to was still a member of it, the Board had to take care not to impinge on the competence of the body deciding on the merits of the objection. The Board in its alternate composition, on the other hand, was fully entitled to assess its merits.
- 9.1.3 Since the chairman objected to did not participate in the decision under review, his failure to comment in substance on the objection cannot as such constitute a

procedural violation committed by the Board in its alternate composition. A procedural violation may reasonably be argued only with respect to the manner in which the Board reacted to this behaviour. The petitioner's point is that the Board's dismissal of all its attempts to get information or time to react to the objected-to chairman's failure to comment left it in the dark and thereby improperly limited its right to be heard.

- 9.1.4 However, as already set out above, the Board was of the opinion that it could reach a decision without any further investigations into the factual circumstances of the objected-to chairman's deputisation for VP3. It was therefore not obliged to try to clarify an issue which, according to its own legal assessment (the correctness of which is not a matter to be evaluated in review proceedings, see point 3.2 above), was not relevant for the outcome of the proceedings. Furthermore, according to the established case law of the Enlarged Board, a violation of the right to be heard can only be considered as fundamental for the purposes of Article 112a(2)(c) EPC if a causal link exists between the procedural defect and the final decision (see R 1/08, point 3 of the reasons; R 11/09 of 22 November 2010, point 8 of the reasons; R 19/09 of 24 March 2010, point 9.2 of the reasons). There is no such causal link in the present case, since the decision expressly states that the circumstances which, according to the petitioner, should have been investigated had no bearing on the outcome of the appeal proceedings.

9.2 Time allocated to petitioner during oral proceedings

9.2.1 The petitioner alleges that it was not allocated enough time during the oral proceedings to react to the objected-to chairman's refusal to comment. It had requested that the oral proceedings be interrupted for at least one hour, but the Board only interrupted them for 30 minutes. The petitioner raised an objection ("Objection 1", see section IV above), which was dismissed.

9.2.2 The Enlarged Board notes that the proceedings before the Board (in its alternate composition) took place on two days, i.e. between 10:40 hrs and 18:00 hrs on the first day and between 9:20 hrs and 14:00 hrs on the second day. On both days, the petitioner was given ample opportunity to present its case, including arguments, objections and questions for referral. In particular, it raised a second objection of suspicion of partiality based on the refusal to comment. It has not been argued - and is not apparent from the minutes - that the Board dismissed any of these arguments or objections as belated for not having been submitted immediately after the above-mentioned interruption. Therefore, the Enlarged Board fails to see how the difference in the length of the interruption (30 minutes instead of 1 hour) at this early stage of the proceedings could have affected in any way the decision which was finally taken.

9.2.3 Accordingly, the alleged deficiency cannot amount to a fundamental violation of the petitioner's right to be heard.

9.3 Refusal to return to written proceedings

9.3.1 The petitioner furthermore maintained that the Board committed a fundamental violation of its right to be heard by refusing to return to written proceedings, since at the oral proceedings the petitioner could not adequately deal with the objected-to chairman's failure to comment. The petitioner's position is that a return to written proceedings would have enabled it to submit further relevant case law, in particular decisions of the ECtHR and of national courts supporting its contention that the chairman objected to had a duty to comment in substance and its further argument that its second objection of suspected partiality, based on the refusal to comment, was well-founded.

The petitioner argued during the oral proceedings before the Enlarged Board that the Board had made the wrong decision because - had it been aware of the relevant European and national case law - it would have recognised that it and the objected-to chairman were under an obligation to dispel any doubts. Its decision, according to the petitioner, ignored the ECtHR's case law on Article 6 ECHR as well as the relevant national case law. There was thus a causal link between the refusal to return to written proceedings and the outcome of the appeal proceedings.

9.3.2 The issue which the Enlarged Board must decide on is not whether the Board made a wrong decision. That would imply an assessment of the merits of the decision and would therefore fall outside the scope of the petition for review procedure (see point 3.2 above). Rather, the crucial issue is whether, prior to the Board's decision,

the petitioner had sufficient opportunity to put forward all its relevant arguments.

9.3.3 The time allocated to the petitioner by the Board to react to the objected-to chairman's refusal to comment is to be assessed in the context of the case as a whole. The oral proceedings before the Board in its alternate composition, devoted to a preliminary procedural point, namely the objection under Article 24(3) EPC, and not to the substance of the appeal case, took place on two consecutive days and lasted, with interruptions, more than a full day. As already noted above (point 9.2.2), on both days the petitioner was given ample opportunity to present its case, including arguments, objections and questions for referral.

9.3.4 According to Article 15(6) RPBA, a board of appeal shall ensure that a case is ready for decision at the conclusion of the oral proceedings, unless there are special reasons to the contrary. Thus, whilst it is not out of the question for a board to return to written proceedings, this power has to be exercised with caution and in exceptional circumstances. So the issue is whether the circumstances of the present case were so exceptional that the Board was obliged to return to written proceedings and, by not doing so, fundamentally violated the petitioner's right to be heard.

As is apparent from the written reasons of the decision (see section VI above), the Board took the view that Article 3(2) RPBA safeguarded the objected-to member's right to be heard on the objection, by giving him an opportunity to present his comments, but did not impose any general obligation to provide a full response to the

objection made. The Board accepted that there might be cases where a board would not be in a position to decide on the objection without obtaining the necessary information from the member objected to, but took the view that this was not such a case. Therefore, no partiality could be inferred from the objected-to chairman's failure to comment in substance on the objection.

9.3.5 As already stated on a number of occasions above (see points 3.2 and 9.3.2), it is not within the Enlarged Board's competence in the framework of the present review to decide whether the Board's view was correct. The only question is whether the Board, to respect the petitioner's right to be heard, should have used its exceptional power to return to written proceedings to give it an opportunity to research the case law, in particular decisions of the ECtHR and national courts, for rulings that might have contradicted the Board's view and persuaded it to change its mind.

One of the Board's considerations in deciding not to accede to the petitioner's request for a return to written proceedings was the content of a letter to VP3, a copy of which had been submitted by the petitioner with its letter of 19 September 2014. In that letter the petitioner noted that, so far, no statement had been made by the member objected to and it cited an English Court of Appeal decision according to which a judge faced with an objection that he should recuse himself on the ground of apparent bias had a duty to disclose relevant information (see annex Pet 11 to the present petition). The Board concluded from the letter that the petitioner, prior to the oral proceedings, had in fact

given consideration to the possibility that no detailed answer would be given by the member objected to. The petitioner complained that a letter addressed to VP3 was being used against it, whereas further items of correspondence with VP3 had not been admitted (see point 10 below).

However, there are no grounds for objection if a board, when assessing a request for a return to written proceedings, takes into account the party's previous behaviour as documented in a submission made prior to the oral proceedings. Nor is it inconsistent with this approach not to admit further correspondence submitted only at the oral proceedings.

9.3.6 For these reasons, it cannot be concluded that, in the procedural circumstances of the case at issue, the Board was obliged to accede to the petitioner's request for a return to written proceedings to give it an opportunity to research further case law. In this respect, no fundamental violation of the petitioner's right to be heard has occurred.

9.4 In view of the above, the Enlarged Board concludes that when the Board decided that the lack of detailed information from the chairman objected to did not give rise to the appearance of suspected partiality as alleged, it made a decision on an established fact: the chairman's silence, which it evaluated in the context of the case as a whole, including R 19/12 - which also refers to Article 6 ECHR and ECtHR case law. Having heard the petitioner's arguments, it did not find it necessary, in order to evaluate the facts it had to decide on, to delay the proceedings and wait for

possible guidance from national and European case law that might be submitted by the petitioner. Further, the Enlarged Board concludes that (i) the petitioner had time to express its doubts about whether the chairman objected to had the right to remain silent and about the consequences of this silence, (ii) there was no exceptional circumstance requiring a return to the written proceedings, and (iii) the contention that the silence of the chairman objected to might have been interpreted differently if the Board had been in possession of the national and European case law referred to by the petitioner remains speculative, given all the circumstances taken into consideration by the board in this particular case.

9.5 Non-admission of further correspondence with VP3

9.5.1 In addition to the copy of the enquiry letter already filed with the letter of 19 September 2014, the petitioner submitted two further items of correspondence with VP3 in the course of the oral proceedings, namely a copy of VP3's response to this letter and a copy of a further enquiry letter sent to VP3 on the first day of the oral proceedings (see sections IV and V above and the petition of 3 March 2015, page 8). The Board handed both documents back to the petitioner. The petitioner alleges that this amounted to a failure to decide on its requests that these documents be admitted (Article 112a(2)(d) EPC in conjunction with Rule 104(b) EPC), and that the absence of any discussion of these requests constituted a fundamental violation of its right to be heard (see section IX(1)(c) and (2) above).

9.5.2 Nothing in the minutes contradicts the petitioner's allegation that the admissibility of the documents was not discussed. The Enlarged Board therefore assumes, at least for the sake of argument, that the parties were not heard on this issue.

9.5.3 However, even leaving aside the fact that the petitioner did not raise any specific objection under Rule 106 EPC in respect of the admission of the correspondence, the Enlarged Board notes that this correspondence was filed in order to (i) demonstrate the lack of information, (ii) justify the petitioner's expectation that the chairman objected to would make a statement disclosing the missing information, and (iii) demonstrate its surprise at the chairman's refusal to comment. Therefore, the reasons set out above regarding the lack of information and the decision coming as a surprise apply here as well, and the Enlarged Board fails to see that any possible causal link has been established between the fact that the Board refused to admit the correspondence, without making any formal decision, and the outcome of the proceedings.

9.6 The Enlarged Board concludes that no fundamental violation of the right to be heard can be established in respect of the second group of grounds on which the petition is based.

10. Conclusion

For the above reasons, the petition is clearly unallowable. It also follows that the fee for the petition cannot be reimbursed.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as clearly unallowable.

The Registrar:

The Chairman:

P. Martorana

R. Moufang