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**Datasheet for the decision
of the Enlarged Board of Appeal
of 6 October 2017**

Case Number: R 0003/16
Appeal Number: T 0355/13 - 3.5.02
Application Number: 00964063.2
Publication Number: 1127407
IPC: H03F 1/30
Language of the proceedings: EN

Title of invention:
An amplifier for use in a mobile phone

Patent Proprietor:
Callahan Cellular L.L.C.

Opponent:
Saur, Erich, Dr.

Relevant legal provisions:
EPC Art. 112a

Keyword:
Petition for review clearly unallowable

Decisions cited:
R 0001/08, R 0002/08, R 0012/09, R 0016/09, R 0009/10,
R 0020/10, R 0006/11, R 0002/14, T 1028/96

Catchword:
Inadmissibility of objections for suspected partiality directed against the rapporteur - decision by the Board in its original composition - fundamental violation of Article 113 EPC (No): points 19-23 of the Reasons.



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Case Number: R 0003/16

D E C I S I O N
of the Enlarged Board of Appeal
of 6 October 2017

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Decision under review:

Decision of the Technical Board of Appeal
3.5.02 of the European Patent Office of
18 November 2015.

Composition of the Board:

Chairman: W. van der Eijk
Members: M.-B. Tardo-Dino
M. Poock

Summary of Facts and Submissions

- I. The petition for review concerns decision T 355/13 of Technical Board of Appeal 3.5.02 announced on 18 November 2015 and notified on 5 January 2016. This decision dismissed the opponent's appeal against the decision of the opposition division rejecting his opposition against European Patent 1 127 407. The decision also rejected the request for reimbursement of the appeal fee.
- II. The petition was filed by the opponent (hereinafter: petitioner) on 14 March 2016. It is based on (1) fundamental violations of the right to be heard (Article 112a(2)(c) EPC) and (2) several other procedural defects, and Article 125 EPC.

The facts underlying the present petition may be summarised as follows.

- III. The decision of the opposition division

The opposition division rejected the opposition on the ground that the subject-matter of claim 1 was novel over D4, which did not disclose neither explicitly, nor implicitly, the claimed Transistors and their connections. Although there had been no objection under Article 56 EPC for lack of inventive step, the opposition division also decided that the subject-matter was inventive starting from D4 as closest prior art. In Part III of the decision, under "*Comments not forming part of the decision*", the opposition division gave extra explanations about D4. In Part IV, under "*Comments on procedure not forming part of the reasons*"

for the decision" the opposition division also gave its reasons why it did not accept the request for replacement of the members of the division based on a suspicion of partiality.

IV. Appeal proceedings

The petitioner filed an appeal together with new documents (D7 to D12). He requested that the appealed decision be reversed, that the patent be revoked and the appeal fee be refunded.

On 5 December 2013 the Board issued its provisional opinion that, *inter alia*, (1) the amplifier of claim 1 might be novel over D4, (2) the oral proceedings would provide an opportunity to further discuss novelty and inventive step and in this respect the Board indicated "The question [was] whether the output of substractor 32 of D4 includes a DC-component of the output of the amplifier 15", (3) the introduction into the proceedings of the newly filed documents would be discussed, (4) as the appeal fee can be reimbursed only if the appeal is deemed to be allowable, the possible procedural violations would be discussed and all the petitioner's requests addressed.

By way of reply on 16 January 2014 the petitioner replaced his pending requests with new ones. He requested that:

- (a) the case be immediately remitted without any oral proceedings to the opposition division before a different composition and the appeal fee be reimbursed,

- (b) the rapporteur be excluded considering his incompetence. Document D22 (a search report from the rapporteur) was filed and alleged to support this incompetence. The rapporteur should also be replaced on the basis of Article 24(3)EPC given that the communication accompanying the summons was not compliant with Article 11 of RPBA and infringed the right to be heard (Article 113 EPC),
- (c) the Board be enlarged to include a legally qualified member acquainted with the complexity of the right to be heard issue pursuant to Article 21(3)(b) EPC) and Article 9 RPBA,
- (d) the oral proceedings be postponed and new summons be issued by the new composition which would deal with the alleged substantial procedural violations committed by the first instance,
- (e) the new oral proceedings be dedicated only to the violation of the right to be heard and the remittal,
- (f) in the event that the immediate remittal was refused that the Board issue its preliminary opinion about the other requests. The petitioner also requested the possibility to provide evidence, by means of an expert and witnesses, that the subject-matter of claim 1 of the patent was disclosed in D4,
- (g) oral proceedings be held in a room where the public and press could witness the correctness of the handling of the proceedings by the Board.

The petitioner further expanded on the alleged procedural violations and raised two new objections under Articles 84 and 100(b) EPC.

The Board cancelled the oral proceedings and issued a communication on 11 November 2014 through the legal member appointed as co-rapporteur whereby it expressed its view that prior to applying the procedure of Article 24(4) EPC, the Board first had to check whether the objection for suspicion of partiality was admissible, and in its view it was not; reasons were given and reference was made to R 12/09 and T 1028/96.

In reply the petitioner sent three letters on 12, 13 and 14 January 2015 wherein he insisted that, should the Board accept his first request to remit the case to the opposition division he would not pursue the procedural violations committed by the Board. He contended that the refusal to remit the case immediately to the first instance amounted to a substantial procedural violation and would give rise to a petition for review.

More specifically in the letter dated 12 January 2015, the petitioner contended that the Board "pieced together" (translation of "zusammenbasteln" used in the petition) its reasons to dismiss the rejection of the objection for suspicion of partiality. The objection was based on Article 24(3) EPC whereas the Board referred to Article 24(1) EPC. The petitioner denied any relevance of the case law quoted by the Board (R 12/09 and T 1028/96). He made clear that the request was based on suspected partiality because the rapporteur committed many procedural violations in his communication. In particular the rapporteur reported the petitioner's requests incorrectly and ignored the alleged substantial procedural violations at first instance. In addition he did not have the necessary basic and appropriate technical knowledge. The

petitioner filed a document D23 corresponding to an advertisement for the post of a technically qualified member of the Boards of Appeal and a description of the skills required to be appointed to this function. The petitioner contended that the rapporteur objected to did not fulfil these standard requirements. The petitioner claimed that the grounds supporting the objection for suspected partiality should be assessed only under the German legal provisions and case law, according to Article 125 EPC. The EPO judicial system was in breach of the fundamental principle of the "separation of instances" in democratic judicial systems. Indeed in the petition for review procedure the members of the Enlarged Board are also members of the Boards of Appeal thereby ignoring the fundamental principles according to Article 125 EPC. Decision R 19/12 underlined the deficiency of the EPO system due to the absence of the separation of powers. By way of letter dated 13 January 2015, the petitioner commented on the appointment of the legal member as co-rapporteur and argued that he could not be considered as replacing the rapporteur objected to. Decision R 19/12 was submitted with the letter of 14 January 2015.

New oral proceedings were scheduled to take place on 12 November 2015; after a later request of the petitioner, these were postponed to 18 November 2015. In the communication of 9 July 2015 annexed to the summons the Board listed the issues to be discussed, in particular the admissibility of the objection for suspected partiality of the Board in its original composition.

The petitioner called the Chair of the Board of Appeal on 13 July 2015 and *inter alia* asked him to consult one of the members of the Enlarged Board in R 19/12. Following this call, the petitioner wrote to the Board (22 July 2015) to object to the unlawfulness of the communication accompanying the summons, since the rapporteur objected to was still a member of the composition. The procedure of Article 24(4) EPC applied equally to the admissibility and merits of the objection. If the Board persisted in maintaining the member objected to, the petitioner would object to the entire composition of the Board. On the other hand, if, after replacing the member objected to, the Board changed its mind about the other issues, it should then set out its preliminary opinion. Otherwise it would be a breach of the petitioner's right to be heard; it was the petitioner's assumption that in fact the Board wanted to surprise the petitioner. The petitioner also criticised the rapporteur because he did not give any opinion on the documents D9 and D10 filed with the statement of grounds, which concerned inventive step and the new ground of insufficiency of disclosure. The petitioner contended that the arbitrary replacement of the first rapporteur by the rapporteur objected to and the arbitrary replacement of the legal member without giving the parties any information induced the impression that a "special court" was being composed.

In a further communication of 3 August 2015 the Chairman of the Board made it clear that the changes in the composition had been induced by changes in the business distribution scheme of the Boards of Appeal: the first rapporteur had been appointed into another board and the first legal member had retired. He also

made it clear that the composition as well as the alleged procedural violations would be discussed during the oral proceedings.

The petitioner sent new submissions, (24 August 2015, 9 October and 17 November 2015) which can be summarised as follows. He maintained that the communication of 3 August 2015 was unlawful because of the presence of the rapporteur objected to in the composition. He assigned a deadline to the Board of 30 September 2015 to cancel the oral proceedings and remit the case to the department of first instance. Otherwise it would be the entire Board which would be objected to, the petitioner putting this conditional objection into effect in his written submissions of 9 October 2015. His main issue was that the Board was not entitled to decide on the objection for suspected partiality, be it under admissibility or under the merits, without replacing the member objected to by an alternate. The objection was anyway admissible.

He alleged that the conduct of the Board was a disgrace ("skandalös"). The way in which it handled the case without giving any information about inventive step, questioning the admissibility of new documents, was arbitrary and preposterous. Furthermore the Board was favouring the other party.

Finally, on the day prior to the oral proceedings the petitioner announced he would not be attending because he had not been given the information necessary to prepare his case. He claimed that maintaining the oral proceedings to be held before a Board objected to for suspicion of partiality was unlawful and the proceedings would only be a mockery ("Farce").

The Board held the oral proceedings in the absence of the parties.

V. The decision under review

The Board decided in its original composition that the objections for suspicion of partiality raised against the rapporteur and the whole Board were inadmissible. The objection against the rapporteur was unsubstantiated. This objection, based on Article 24(3) EPC, was filed in reaction to the communication signed by the rapporteur. It was only a preliminary opinion and the objection was factually erroneous (the communication actually dealt with the alleged procedural violations). The board in its whole composition was objected to because of different procedural violations which were: the rapporteur had not been replaced, no provisional opinion had been provided on decisive aspects of the case, two members of the composition had been changed and the reasons given were not correct, so that it was a "special court" (Spezialtribunal"), and the Board had ignored the request for immediate remittal to the first instance. The Board rejected this objection as inadmissible because it was based on a legally untenable interpretation of the purpose and functioning of the appeal proceedings, the right to be heard and the principle of a fair trial.

The Board further decided that there were no substantial procedural violations committed by the opposition division; that the clarity objection could not succeed since it concerned the claims as granted; that the new ground under Article 100(b) EPC could not be introduced into the appeal proceedings without the consent of the patent proprietor. It upheld the

decision with respect to the novelty and inventive step issues.

It dismissed the two objections of the petitioner which could be interpreted as objections under Rule 106 EPC (decision by the Board in its original composition; no preliminary opinion sent prior to oral proceedings).

VI. The petition for review

The arguments in support of the petition may be summarised as follows:

The Board violated the petitioner's right to be heard in several ways.

(a) The opposition division had committed violations of Rule 116 and Article 113 EPC and the Board failed to deal properly with these procedural violations:

(i) In spite of repeated requests from the petitioner, the Board never informed the petitioner of its preliminary view about the procedural violations allegedly committed by the opposition division with respect to Rule 116(1) EPC and Article 113(1) EPC and issued its final decision directly. The petitioner referred to G 4/92 which stated that a decision against a party who fails to appear at oral proceedings may not be based on facts put forward for the first time during those oral proceedings.

(ii) The Board did not deal with each of the alleged violations in its decision.

(iii) The Board upheld the decision of the opposition division to reject the objection for suspicion of partiality, even though this decision was in breach of the general procedural principles.

(b) The decision by the Board

(i) The Board, on the basis of Article 12(4) RPBA and without any evaluation of the merits of the documents did not admit into the proceedings documents D9 and D10 filed precisely to evidence that the decision under appeal was incorrect in that it held that document D4 disclosed parallel amplifiers (11, 15). It should have immediately remitted the case according to Article 11 RPBA.

(ii) The Board overlooked that the petitioner had only been made aware of the reasons for the rejection of the opposition in the written decision of the opposition division, so that he had had no opportunity to file the documents earlier. It was malicious of the Board to state that the petitioner had withheld the documents, wrongly considering that he could have cited them earlier.

(iii) The Board distorted the petitioner's arguments put forward to justify the late filing of documents D9 and D10; this was why the petitioner raised an objection for suspicion of partiality against the Board.

- (iv) The Board introduced new objections and arguments which were neither in the reasons of the decision under appeal nor brought by the patent proprietor, thereby infringing the principle of prohibition of *reformatio in peius*. The Board took into consideration the obiter dictum of part III: Comments on substance did not form part of the reasons for the decision, whereas the Board ignored the petitioner's argument that the unofficial arguments given in the *obiter dictum* about document D4 had not been submitted to the parties.
- (v) In the annex to the summons to oral proceedings sent on 5 December 2013, the Board had indicated *inter alia* that the question was "whether the output of subtractor 32 of D4 includes a D-C component of the output of amplifier 15". The petitioner contends that he had not understood it as a question and had given all the necessary arguments for the Board not to decide erroneously, which it however did.
- (c) The Board acted in a way that assisted the patent proprietor and justified the objection for suspicion of partiality. It also deprived the petitioner of his right to two instances.
- (d) In breach of Article 24(3) and (4) EPC, the Board decided itself that the request based on suspicion

of partiality was inadmissible, although none of the grounds for inadmissibility pursuant to Article 24 (3) EPC, namely objection based on nationality, or filed by a party aware of the reason for objection after taking a procedural step, were applicable.

- (e) This also amounted to a breach of the established case law of the German Constitutional Court, which should be recognized according to Article 125 EPC. There is a legal loophole in the EPC in the sense that Article 112a EPC allows a petition for review only in cases where a member of the Board of Appeal took part in the decision in breach of Article 24(1) or despite being excluded pursuant to a decision under Article 24(4) EPC. Therefore in a case such as the present one where there has been a clear violation of Article 24 EPC, Article 125 EPC is to be used and the principles established in most of member states should be applied: there must be a possibility to submit the case to the Enlarged Board.

- VII. The Enlarged Board of Appeal, hereinafter Enlarged Board, issued a communication in view of the oral proceedings, in which it expressed its provisional view that the petition for review was clearly unallowable.

The petitioner replied by way of a letter dated 6 September 2017. He confirmed his requests and disputed the view of the Enlarged Board. He contended, *inter alia*, that there was no provision in the EPC which allowed the conclusion that the silence of a party might affect its right to be heard or that a causal link is needed between the procedural

deficiencies and the decision. The petitioner insisted that, unlike the Enlarged Board's view, the decision by the Board on the alleged substantial procedural violations committed by the first instance came as a surprise and amounted to a substantial procedural violation. Likewise, whereas the aim of appeal proceedings is to review whether the appealed decision was correct, the refusal to remit the case and the non-admission of pieces of evidence deprived the petitioner of his right to two instances.

Eventually the Board played down the pertinent objection for suspected partiality and improperly dealt with the objection itself, instead of handing the objection over to an alternate composition - which is a breach of Article 24(4) EPC and Article 6(1) ECHR. In such a case, attending oral proceedings would have been pointless since any request regarding the objection for suspected partiality would have been rejected. There is no basis in the EPC to draw any consequence for the right to be heard from the non-attendance of a party at oral proceedings and the case law referred to by the Enlarged Board did not concern cases where the Board's impartiality was being challenged.

Two days prior to oral proceedings, observations ("Amicus curiae Eingabe") were sent by a third party followed by a letter from the petitioner indicating that he endorsed those submissions.

VIII. Oral proceedings were held on 6 October 2017.

The petitioner's final requests were the following:

- to set aside the decision under review

- to reopen the proceedings before the board of appeal in a different composition
- to reimburse the petition fee.

Reasons for the Decision

Admissibility of the petition

1. The petition was filed and the relevant fee paid within the time limit according to the requirements under Article 112a(4) EPC. It was also substantiated according to the requirement of the same article.

1.1 Rule 106 EPC

The petitioner had submitted in writing that, should the Board not allow his requests for a detailed communication and for handing over the subject-matter of the objections under Article 24 EPC to an alternate Board, this would give rise to objections under Rule 106 EPC. The Board dismissed these potential objections, which in fact covered most of the grounds supporting the petition.

Accordingly, the Enlarged Board concludes that the petition is not clearly inadmissible.

1.2 The so-called "*Amicus Curiae Eingabe*"

As such, this submission is not admissible. The provisions ruling the petition for review procedure do not foresee such a possibility. The possibility to file

amicus curiae observations is aimed at giving any third party an opportunity to make a statement on a point of law of fundamental importance in the framework of a referral to the Enlarged Board. On the other hand Article 115 EPC aims to give a third party the possibility to present observations on issues of patentability.

- 1.3 The objective of the petition for review procedure is to remedy a fundamental procedural defect adversely affecting the subjective rights of a party in a particular case. Observations by a third party on patentability issues or *amicus curiae* on a specific legal point of law find no justification.

- 1.4 In the case at hand however, the petitioner fully endorsed this submission. Bearing in mind that this submission only expanded on the petitioner's earlier ground regarding the objection of suspected partiality, the Enlarged Board decided to consider this new submission as filed by the petitioner. Since this new submission did not introduce anything new within the meaning of Article 12 Rules of Procedure of the Enlarged Board of Appeal (RPEBA) and merely took up the petitioner's arguments, the Enlarged Board did not see any reason against admitting it.

Allowability of the petition

Violations of the right to be heard

2. Preliminary remark

The history of the case as reported above (especially III to IV of the "Facts and submissions") makes it clear that most of the petitioner's reactions during the opposition appeal proceedings appear to have been induced by his general distrust of the two deciding bodies which dealt with his case in the opposition and appeal proceedings, leading the petitioner eventually to refuse to take part at all in the oral proceedings before either of those instances. This distrust materialised in objections on the grounds of suspected partiality raised against both instances, after the first communication issued by each of them had conveyed a negative opinion on the petitioner's requests.

3. This distrust, in the Enlarged Board's view, cannot however justify the way the petitioner addressed the Board and its individual members in some of his submissions, in particular the rapporteur. On several occasions he fell short of the respect and courtesy that can be expected when addressing a judicial body.

4. Having said that, the Enlarged Board will now concentrate on the facts as they are established in the file. In the context of the right to be heard, the questions to be answered are whether, given the fact that the petitioner did not appear at the oral proceedings, the Board took his written arguments into account when deciding and whether it based its decision on grounds or evidence on which the petitioner had had no opportunity to comment.

Alleged failure to deal properly with the procedural violations committed by the opposition division

5. Regarding ground (a) (i) and (ii) of VI above, namely the way in which the Board dealt with the alleged violations committed by the opposition division and its rejection of the objection for suspected partiality, it is to be borne in mind, as repeatedly underlined in the Enlarged Board case law, that petition for review is an exceptional means of redress and not a further instance of appeal. It can by no means be understood as an opportunity to obtain a decision on the merits from the Enlarged Board or an evaluation as to whether the decision under review is right or wrong. This has already been made clear in case R 1/08 of 15 July 2008 and confirmed afterwards (see as illustrative examples: R 2/08 of 11 September 2008; R 6/11 of 4 November 2011). The review by the Enlarged Board under Article 112a(2)(c) EPC is thus restricted to checking whether the Board had taken into consideration the petitioner's arguments and based its decision only on grounds and evidence on which the petitioner had had opportunity to comment.

6. In this respect, in Reasons, paragraph 4, the Board gave its reasons why in its view the opposition division did not infringe the right to be heard. It analysed the communication annexed to the summons to oral proceedings as matching the opposition as filed in this *inter partes* case, pointing out the issues to be discussed. It also noted that the petitioner, who had chosen deliberately not to attend the oral proceedings, did not have any reason to complain about having received the communication too late that confirmed that

the oral proceedings would nevertheless take place. The Enlarged Board does not see how these reasons could be interpreted otherwise than as an answer to the petitioner's argument. That the petitioner did not agree with this answer is another issue not amenable to a review under Article 112a EPC.

7. As to the rejection of the objection for suspected partiality (ground (a) (iii) of VI above) the Board came to the conclusion that the behaviour of the petitioner originated in a misunderstanding of the procedure about objection for suspected partiality against the opposition division, in that the petitioner awaited a formal decision instead of a preliminary opinion (Reasons, point 5).
Again, the petitioner may not agree with the Board's reasons but those reasons dealt with his argument and the Enlarged Board has no jurisdiction to assess their merits.
8. For sake of completeness the Enlarged Board notes that the petition for review procedure is dedicated to fundamental procedural violations committed by the Boards of Appeal. The Enlarged Board in this legal framework has no jurisdiction to directly assess the alleged violations committed by the opposition division (R 20/10 of 25 August 2011).
9. The petitioner also complains that the Board had not given a detailed opinion in its communications prior to oral proceedings. However, the communication of 5 December 2013 gave the petitioner at least a hint that the Board was then not persuaded by his argument and that the petitioner would still have to discuss his

case at the oral proceedings. That the Board at this stage of the proceedings did not go further in the evaluation of the petitioner's argument does not amount to a violation of the right to be heard, as also made clear many times by the case law (R 16/09 of 19 May 2010, Reasons 2.2.17).

Alleged procedural violations in the decision of the Board

10. Under ground (b) the petitioner argued that the Board deprived him of his right to be heard in several ways. In not admitting the documents D9 and D10 under Article 12(4) RPBA on a factually wrong basis ((i), (ii) and (iii) (b) of VI above), without examining their technical relevance, the Board foreclosed any means to prove that the decision under appeal was wrong. The petitioner argued that contrary to what the Board stated he could not have filed these documents earlier. In refusing to remit the case it deprived the petitioner of the right to have its case dealt with at two instances.

11. The Enlarged Board notes that the Board gave reasons underlying the refusal of the documents D9 and D10 (Reasons, point 7). The contention by the petitioner that the Board distorted his argument because he actually could not have filed them earlier -contrary to the finding of the Board- has no factual basis and is merely subjective. Although the Board made an analysis of the situation that was different from the petitioner's, this can by no means be considered as distorting facts. The Board found that the petitioner did not have to wait for an opinion from the opposition division to file these documents, which should have

been filed in support of its opposition, whereas the petitioner believed that he was right to wait for the opinion of the opposition division. Accordingly, this is not about the Board having distorted a fact but about a disagreement with a conclusion of the Board. As to the ground that the Board should have remitted the case to the department of first instance, the Enlarged Board notes that there is no right to remittal but only a discretion to be exercised by the Board, as stated in R 9/10 of 10 September 2010, points 8 and 9 of Reasons.

12. Then the Board, the petitioner contends, took into account considerations which were not part of the decision but were taken from an "*obiter dictum*", considerations upon which the petitioner had had no opportunity to comment ((b) (iv) of VI above).

However in the present case the point is not whether an *obiter dictum* is part of the decision or not, but about the right to be heard. It is a matter of fact that the petitioner discussed the subject-matter dealt with in the *obiter dictum* in his statement of grounds and the Board merely dealt with these arguments. This does not amount to a violation of the right to be heard.

13. The petitioner finally complains (ground (b) (v) of VI above) that he had misunderstood the first communication and believed that what was actually a question and an issue to be discussed was a mere statement from the Board. Regarding this particular issue the Enlarged Board notes that it would have been sufficient for the petitioner to attend the oral proceedings to clarify the possible misunderstanding. The petitioner cannot ascribe to the Board the

responsibility for his own misunderstanding because (1) the Enlarged Board does not see how the wording of the communication could raise any ambiguity and (2) the petitioner is himself responsible for not having attended the oral proceedings where the alleged ambiguity could have been dispelled since it was a decisive point to be discussed. The petitioner was free not to attend the oral proceedings but this choice was at his own risk since a board is never obliged to postpone oral proceedings only because a party does not appear, provided that it bases its decision on the facts and arguments on file (Rule 115 EPC and Article 15(3) RPBA) - see below paragraphs 21 and 22 about the non-attendance at the oral proceedings.

Accordingly no procedural violation is to be ascribed to the board.

Breach of the principle of equal treatment

14. As to ground (c), the Enlarged Board of Appeal cannot see further grounds or facts distinct from the facts and grounds considered above which could be a basis to conclude that the Board committed a breach of the principle of equality of treatment of the parties or deprived the petitioner of his right have his case examined by two instances.

Breach of Article 24 EPC

15. The objection for suspected partiality was rejected as inadmissible by the Board because it was based on a "legally untenable interpretation of the purpose and functioning of the appeal proceedings, the right to be heard and the principle of a fair trial" (Reasons, last

- sentence of point 2.4.2). The history of this case should be borne in mind when reading this statement.
16. The petitioner had argued that once an objection based on Article 24(3) EPC had been raised the member(s) objected to could not take part in the decision, whatsoever, be it on the admissibility or on the merits of the objection. Article 24(4) EPC makes no distinction between admissibility and merits except in two specific situations (objection raised late or objection based on nationality).
 17. Article 112a EPC foresees in paragraph (2) (a), among the possible grounds for a petition for review, the situation where a member of the Board has taken part in the decision despite being excluded pursuant to a decision under Article 24(4) EPC or in breach of Article 24(1) EPC (when the member had a personal interest or took part in the appealed decision).
 18. The present case is obviously not concerned with those two grounds since the members had not been excluded and no personal interest had been alleged. Therefore, by a mere application of the principles developed by the established case law of the Enlarged Board under Article 112a EPC, if the alleged unlawfulness of the composition is not the consequence of a violation of the right to be heard or an omission of a request, this ground appears to fall outside the scope of a review, since (1) it is not on the list of grounds under Article 112a and those of Rule 104 EPC and (2) in the present case the Board took a decision about the admissibility of the request, the merits of which may not be reviewed.

19. However the petitioner further contends that it is an established principle that a party has no obligation to appear before an unlawful court; that, on the contrary, it could be prejudicial to do so since the right to be heard cannot be properly guaranteed before such a court. In his view, this in fact leads to the question as to whether appeal proceedings held by a board unlawfully composed may amount *per se* to a breach of the right to be heard.
20. This question however may remain open because, for the reasons given below, the Enlarged Board does not come to the conclusion that the Board actually ignored the procedure of Article 24(4) EPC and thereby might have committed such a violation of the right to be heard on this ground.
21. Firstly, the case law referred to by the Board (T 1028/96 and R 12/09) to justify its jurisdiction to assess the admissibility of the objection was confirmed in R 2/14 of 17 February 2015 (paragraph 10.1):
"Generally, it is for the board of appeal or the Enlarged Board of Appeal in its original composition, i.e. including the member(s) objected to, to examine the admissibility of an objection under Article 24(1) or (3) EPC for the purpose of opening the procedure under Article 24(4) EPC" (see the additional references given in this decision: Pignatelli/Thums in Benkard, *Europäisches Patentübereinkommen EPÜ*, 2nd edition 2012, Art. 24, para. 26; Schmitz in Singer/Stauder, *Europäisches Patentübereinkommen*, 6th edition 2012, Art. 24, para. 13). Accordingly, the Board had

- jurisdiction to ascertain the admissibility of the objections.
22. Secondly the Enlarged Board does not deny that it was the petitioner's right to (strongly) disagree with the Board's views. It was his right to stand firm on his position that the Board should not decide itself. On the other hand the Enlarged Board does not see how attending the oral proceedings might have endangered the petitioner's rights, as he contended. On the contrary, oral proceedings were the appropriate place and time for the petitioner to express his disagreement and thereby defend his case. He did not accept any discussion offered by the Board on the admissibility of the objection on the ground that he could no longer have confidence in the Board because of the conduct of the appeal proceedings so far, and contended that the Board would not change its mind.
23. However, the petitioner does not put forward any objective circumstances which the Board might have overlooked and which would point to a misuse of the procedure of Article 24(4) EPC by the Board. On the contrary, he only relies on the facts and arguments already submitted before the Board and on which the Board based its decision, merely contending that the Board should not have decided in its original composition. Under those circumstances, and without of course any judgment on the merits of the Board's decision on the issue, the Enlarged Board can only conclude that the Board, when deciding that the objection was inadmissible, did not go beyond this competence, recognised in this respect by the case law referred to above; whereas, on the other hand, it was

the petitioner's responsibility as a party to use all procedural means to defend his case (R 2/08 of 11 September 2008, Reasons 9.10 and 9.11 and R 9/14 of 24 February 2015, Reasons 2.2).

Breach of Article 125 EPC

24. The Enlarged Board took into consideration the general principle put forward by the petitioner regarding the right to be heard by a court in a lawful composition because this principle may touch upon the right to be heard. However as to the application of Article 125 EPC, the Enlarged Board notes that Article 112a EPC provided the legal means to deal with the present case and there was no lacuna in the procedural provisions of the EPC which would justify an application of Article 125 EPC.
25. It results from the above that the petition is clearly unallowable.

Order

For these reasons it is unanimously decided that:

The petition is clearly unallowable.

The Registrar:

The Chairman:

P. Cremona

W. van der Eijk