

**Internal distribution code:**

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

**I N T E R M E D I A T E  
D E C I S I O N  
of 30 March 2006**

**Case Number:** T 0281/03 - 3.x.x

**Application Number:** 92xxx

**Publication Number:** xxx

**IPC:** H04N 7/087

**Language of the proceedings:** EN

**Title of invention:**  
xxx

**Patentee:**  
N.N.

**Opponents:**  
N.N.

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 24, 112(1)(a), 114(1)  
RPBA Art. 2(3), 3(2)(3), 7(3), 11(4), 12(2)

**Keyword:**  
"Correctness of the composition of the board"  
"Partiality (no)"  
"Referral to the Enlarged Board of Appeal (no)"

**Decisions cited:**  
T 0271/85, T 0261/88, T 0390/90, T 0766/91, T 0843/91,  
T 0223/95, T 1028/96, T 0241/98, T 0954/98

**Catchword:**  
-



Case Number: T 0281/03 - 3.x.x

**I N T E R M E D I A T E  
D E C I S I O N**  
of the Technical Board of Appeal 3.x.x  
of 30 March 2006

**Appellant:** N.N.  
(Opponent 02)

**Representative:** N.N.

**Respondent:** N.N.  
(Proprietor of the patent)

**Representative:** N.N.

**Decision under appeal:** Decision of the Opposition Division of the European Patent Office posted 16 January 2003 rejecting the oppositions filed against European patent No. xxx pursuant to Article 102(2) EPC.

**Composition of the Board:**

**Chairman:** S. Wibergh  
**Members:** P. Schmitz  
K. Bumès

## **Summary of Facts and Submissions**

- I. In its decision pursuant to Article 102(2) EPC, posted 16 January 2003, the opposition division rejected the oppositions filed against European patent No. xxx. Opponent 02 filed an appeal against that decision.

In a letter received 29 September 2004, the respondent (patent proprietor) raised an objection of suspected partiality to the chairman of the Board based on a number of reasons. Similar objections were raised in six other cases pending before the same Board. The Board in the composition then responsible for the appeal considered the objection admissible. For the purposes of taking the decision on suspected partiality, the chairman was replaced by his deputy mentioned in Article 2 of the Business Distribution Scheme for the Technical Boards of Appeal (referred to as Business Distribution Scheme or BDS hereinafter). The Board in its modified composition refused the objection by a decision dated 18 March 2005.

- II. On 30 March 2006, oral proceedings were held before the Board with its original chairman reinstated (hereinafter referred to as the original Board). Shortly after the opening of the oral proceedings, the respondent objected to all three members of the Board, based on suspected partiality for reasons detailed below. The Board considered the objection admissible and the chairman designated and announced three substitute Board members who would decide on the objection.

III. The Board in its substitute composition continued the oral proceedings. The respondent's appointed professional representative, Mr G., objected to the new chairman and the new technical member because in his submission the Board was not composed correctly. The substitute chairman was not the deputy of the original chairman as provided for by the Business Distribution Scheme. The member designated as chairman might become the new technical member but not the substitute chairman.

Since the substitute Board was not correctly composed, the oral proceedings should be postponed until the correct alternate to the original chairman, i.e. the deputy according to the Business Distribution Scheme, was available. There was no reason for the case to be decided on the same day. Furthermore, the Board was not entitled to decide itself whether it was correctly composed. If the Board decided itself, it would infringe Article 24 EPC. Accordingly, this question should be referred to the Enlarged Board of Appeal (see point VII below).

IV. With respect to the suspected partiality of the original members of the Board, the respondent's appointed professional representative, Mr G., submitted the following arguments.

(a) At an earlier stage of the present appeal proceedings, an objection to the original chairman of the Board due to suspected partiality had been raised, based on, *inter alia*, a law suit instituted by the respondent against the European Patent Organisation before the Bavarian Administrative Court ("Bayerisches

Verwaltungsgericht"). The subject of this law suit was the revocation of another patent of the respondent by the same Technical Board in a different composition but with the same chairman. This partiality objection had been rejected by the decision dated 18 March 2005. However, in his introduction to the oral proceedings on 30 March 2006, the reinstated original chairman had not mentioned that part of the file history. The law suit before the Bavarian Administrative Court was unpleasant for the chairman. The omission of this unpleasant part gave the respondent the impression that the chairman had a personal problem with the case. Therefore, the respondent continued having doubts about the original chairman's neutrality.

- (b) According to the respondent's appointed professional representative, Mr G., the Board in its original composition had committed a procedural violation by referring to common general knowledge in its communication dated 15 December 2005, annexed to the summons to oral proceedings, without submitting a document supporting this allegation. The communication had introduced additional prior art by the following statement: "The Board notes that the idea of returning to the previous group index appears to be analogous to the return function in a standard menu system, as found in a mobile telephone, or a set-up arrangement in a television". The patent in suit had a priority date of 1991; at that time mobile phones did not exist. In the absence of written evidence, the respondent was not in a position to deal with alleged prior art. In his reply of 28 February 2006, the respondent had challenged the Board's statement. According to the jurisprudence of the Boards of Appeal, as illustrated by decision

T 766/91, a document had to be presented when an allegation of common general knowledge is challenged. However, the Board had failed to provide a supporting document at the beginning of the oral proceedings. According to the respondent's appointed professional representative, Mr G., this amounted to a "wilful infringement of the right to be heard". Mr G. repeatedly asserted that this conduct was part of the (original) chairman's campaign of revenge against the respondent for the seven cases where the (original) chairman had been objected to due to suspected partiality. The original Board had apparently decided in advance to destroy the patent. To achieve this aim, the (original) chairman "had invented hot air". The respondent was convinced that the original chairman was committing fraud against him. Questioned by the substitute chairman, the respondent's appointed professional representative, Mr G., confirmed that he actually meant "fraud" by the original chairman and explained that "one has to see the whole story behind it".

- V. The appellant submitted that the statement in the Board's communication of 15 December 2005 only reflected a preliminary opinion. There was still the possibility that the Board would withdraw this objection as a result of the discussion which was the purpose of the oral proceedings. Accordingly he did not see any partiality.
- VI. The substitute chairman read out brief declarations of the three original members, established with reference to Article 3(2) of the Rules of Procedure of the Boards of Appeal (RPBA), according to which none of the

original members considered that there was a reason for exclusion.

The respondent's appointed professional representative, Mr G., objected to those declarations because Article 3(2) RPBA related only to reasons for exclusion whereas his objection to the original members was based on suspected partiality (Article 24(3) EPC). Thus Article 3(2) RPBA could not form a proper basis for introducing such declarations into the proceedings.

VII. The respondent requested that the following questions of law be referred to the Enlarged Board of Appeal:

"1. Is it allowable to the EPC - in particular according to Article 24 EPC in connection with Article 4 of the business distribution plan of EPO - that a member of a Board is replacing the chairman of the Board if the replacing member according to the business distribution plan is not foreseen to replace the chairman?

2. Is it allowable that this replacing member is deciding on a request for refusing himself due to the fact that he is not the legal replacement member of the chairman?"

The respondent further requested that the oral proceedings be postponed.

The respondent further requested to refuse the members of the original Board due to suspected partiality.

The appellant requested that in case the original Board

was able to continue, the oral proceedings should be continued on the same day.

VIII. Having heard the parties' submissions at the oral proceedings, the substitute Board took a decision which was pronounced by the substitute chairman.

### **Reasons for the decision**

#### 1. *Substitute composition of the Board*

The Board in its original composition considered the objection of suspected partiality to be admissible pursuant to Article 24(3) EPC. Therefore, according to Article 24(4) EPC, the Board in a substitute composition had to decide on the action to be taken (T 1028/96, OJ EPO 2000, 475).

Article 24(4), second sentence, EPC stipulates that for the purposes of taking the decision on the alleged partiality, the member objected to shall be replaced by his alternate. In the present case, the whole original Board was objected to. Article 24(3) EPC states that "members" of a Board of Appeal may be objected to by any party. This implies that objections may be raised against each or all the members of the Board (T 843/91, OJ EPO 1994, 818). Thus, the entire original Board had to be replaced.

The question of who is the alternate within the meaning of Article 24(4), second sentence, EPC is to be answered on the basis of the Business Distribution Scheme which was adopted by the extended Presidium



according to Rule 10(4) EPC for the year 2006 (Supplement to OJ EPO No. 1/2006), and the Rules of Procedure of the Boards of Appeal (OJ EPO 2003,89) as adopted by the Presidium according to Rule 10(3) EPC and approved by the Administrative Council (Article 23(4) EPC).

1.1 *Replacement of the technical member and the legal member*

Pursuant to Article 2(1) BDS, the members of the Boards of Appeal are allocated to individual Technical Boards. In proceedings for which the Technical Boards of Appeal are competent (cf Article 21 EPC), the individual appeals are assigned to specific Technical Boards according to the classification attributed to the application or the patent concerned (Article 1 BDS). On receipt of an appeal by the registry, the chairman shall determine the composition of the Board responsible for deciding it from amongst the Board members (Article 3(1) BDS).

If a member is to be replaced, the Business Distribution Scheme sets out a general system of how to proceed. It does not specify an individual alternate for each member. According to Article 4(1) BDS, if a designated member cannot or can no longer participate in the case, the chairman shall designate another member of the Board to replace that member. When designating the new member the chairman shall in particular take account of the workload of each member and the technical and language requirements of the case (Article 4(1) in connection with Article 3(2) BDS). If no member of the same Board is available, a member of a

Board in a neighbouring technical field can be designated (Article 4(2)(3) BDS).

In the present case, the original technical member and the original legal member were replaced by another technical member and another legal member of the same Technical Board. When designating the replacements, the chairman has a discretion. The Board in its substitute composition does not consider that this discretion has been used improperly. With respect to the substitute legal member, who is a member of the Technical Board concerned, the respondent did not raise any objection. With respect to the substitute technical member, it has to be observed that the Technical Board concerned comprises a technically qualified chairman and four technically qualified members. One technical member was objected to and a second one, namely the deputy of the chairman according to Article 2 BDS, was absent on that day. Thus only two technical members remained available. The one having served longest in the Boards of Appeal was appointed as the substitute chairman (see point 1.2 below), while the one having a shorter time of service in the Boards of Appeal was designated as the substitute technical member. Thus, the Board in its substitute composition concludes that the discretion of the original chairman was used correctly and the replacements satisfy the provisions of the Business Distribution Scheme. Hence, the appointment of the substitute legal member and the substitute technical member was correct.

1.2 *Replacement of the chairman*

In the present case, the original chairman was not replaced by his deputy as defined in the Business Distribution Scheme but by another technical member of the Board because the deputy was absent. The question to be answered is therefore whether the chairman can only be replaced by his deputy, as alleged by the respondent, or whether he can be replaced by another member of the Technical Board when the deputy is not available.

As set out above, the Business Distribution Scheme defines in general terms how a member of a Board is to be replaced. This applies also to the chairman. According to Article 2 BDS, the chairman has a deputy who normally acts if the chairman is prevented from acting. While that provision does not set out a specific system for replacing the chairman, Article 2(3) RPBA stipulates that the chairman may designate another member of the Board to replace him in a particular appeal, taking due account of the business distribution scheme. Neither the RPBA nor the BDS foresee that *only* the deputy as defined in Article 2 BDS can replace the chairman. Also the chairman is a member of the Board, and thus Article 4(1) BDS is applicable if he is to be replaced.

As set out above, the replacement is a discretionary decision. In the present case, there were only two technical members available for replacing the original chairman and the original technical member. The one having the longest service in the Boards of Appeal was appointed as substitute chairman. Thus he was

designated according to seniority. This is a legitimate and usual criterion when taking such a discretionary decision (see e.g. Article 7(3) RPBA). Hence, the Board in its substitute composition sees no indication that the original chairman has used his discretion incorrectly, e.g. in an arbitrary manner.

1.3 *Examination of the substitute composition of the Board*

The respondent's appointed professional representative, Mr G., challenged the correctness of the composition of the substitute Board and relied, by way of analogy, on Article 24(4), second sentence, EPC to assert that the substitute Board, in particular its chairman, was not entitled to decide on the correctness of its own composition.

- 1.3.1 The Board in its substitute composition notes that the competence of a Board to act is a requirement which has to be examined by the Board *ex officio*. One of the requirements within this context is whether the Board is correctly composed. This examination is performed by the deciding Board. There is no room for applying Article 24(4) EPC. According to the clear wording of that provision, it applies only to cases of exclusion and objection. There is no basis for applying this provision *mutatis mutandis* to a situation of different category. The correctness of the composition has to be decided on the basis of objective criteria, i.e. on the basis of the Rules of Procedure of the Boards of Appeal and the Business Distribution Scheme. There is no subjective element which would justify such an analogous application. Neither does the Board in its substitute composition see any gap in the law which

might require an analogous application of Article 24(4) EPC. On the contrary, if the composition of a Board had to be checked by a second composition, the operation of a Board could be paralysed by a sequence of mere objections to its composition.

In the present case, the substitute Board has carefully considered the objections to its composition but, as set out above, is convinced that it is composed in accordance with the Rules of Procedure of the Boards of Appeal and the Business Distribution Scheme as adopted pursuant to Rules 10(3) and (4) EPC.

#### 1.3.2 *Referral to the Enlarged Board of Appeal*

The respondent requested that the questions of whether the chairman can be replaced by a member not defined as his deputy in the Business Distribution Scheme, and whether this member can decide himself on the correctness of his substitution, be referred to the Enlarged Board of Appeal.

According to Article 112(1)(a) EPC, a Board of Appeal shall refer any question of law to the Enlarged Board of Appeal in order to ensure uniform application of the law, or if an important point of law arises if it considers that a decision is required for the above purposes. The requirement "to ensure uniform application of the law" is fulfilled if the Board considers it necessary to deviate from the interpretation of the EPC contained in another decision of a Board of Appeal, or if there are diverging decisions of two Boards (Moser, Münchner Gemeinschaftskommentar zum EPÜ, Artikel 112, point 19;

further references to be found in Case Law of the Boards of Appeal, 4th edition 2001, VII.D.13). The Board is not aware of any decision dealing with the above point in a way different from the position taken by this Board so that this requirement is not met.

"An important point of law" arises if that point is of fundamental importance in that it is relevant to a substantial number of similar cases and is therefore of great interest not only to the parties in the present appeal but also to the public at large (T 271/85, OJ EPO 1988, 341).

Even if a point of law was to be considered as fundamental, the Board has a discretion as to whether or not it refers a question to the Enlarged Board of Appeal (T 390/90, OJ EPO 1994, 808). In this context, one of the criteria to be applied is whether the question can be resolved by the Board itself without any doubt (see Case Law of the Boards of Appeal, 4th edition 2001, VII.D.13 with further references). As set out above, the provisions on how to replace a member of a Board, including the chairman, are clear. The Board also does not have any doubts that Article 24(4) EPC is not applicable when deciding on the correctness of the Board's composition. Thus, the substitute Board does not see a necessity to refer the respondent's questions to the Enlarged Board of Appeal.

#### 1.4 *Postponement of oral proceedings*

The respondent requested that the oral proceedings be postponed to enable the deputy chairman to replace the original chairman. As set out above, the deputy is not

the only member who can replace the chairman. The provisions in the RPBA and the BDS concerning the replacement serve the purpose of procedural economy and are intended to ensure a proper conduct of the procedure. The aim is to avoid a delay of the procedure and to bring it to a proper end if an originally designated member is prevented from acting. Since the original chairman was replaced correctly, there was no need to postpone the oral proceedings on that ground.

In addition, the respondent's appointed professional representative, Mr G., submitted that the substitute Board was not familiar with the file and thus was not in a position to take a decision on the same day. In this respect, the Board notes that it does not decide on substantive matters of the appeal but on the alleged partiality of the original Board. The objections raised by the respondent were based on the behaviour of the original Board at the beginning of the oral proceedings. These objections have been discussed intensively during the oral proceedings before the substitute Board. Thus, the respondent was given an opportunity to present his case and the substitute Board was in a position to understand and evaluate the arguments presented. No points were raised which could not be dealt with during the oral proceedings.

2. *Suspected partiality*

Article 24(3) EPC stipulates that members of a Board of Appeal may be objected to by any party for one of the reasons mentioned in paragraph 1 of Article 24 EPC, or if suspected of partiality. The respondent has raised partiality objections to the original chairman, the

original technical member and the original legal member. The Board in the substitute composition thus has to decide whether these objections are justified.

In various decisions, the Boards of Appeal have dealt with how suspected partiality is to be assessed. In decision T 261/88 of 16 February 1993 (Headnote published in OJ EPO 1-2/1994), it was set out that disqualifying partiality presumed a preconceived attitude. However, in addition, there had to be reason to believe that procedural deficiencies were the result of a preconceived attitude. In T 954/98 of 9 December 1999 (not published in OJ EPO) the Board made clear that purely subjective impressions or vague suspicions were not enough. Moreover, there had to be a behaviour of the judge which objectively justified the fear of a party that the judge might be biased.

In the earlier decision on suspected partiality in relation to the present case (T 281/03 of 18 March 2005), the modified Board followed and developed this jurisprudence and explained that, when assessing partiality, there were two elements which needed to be examined. One was the subjective element as an internal characteristic of the member himself, for example due to a personal interest or dislike of a party. Personal impartiality was to be presumed until there was proof to the contrary. On the other hand, the appearance of partiality involved external aspects and reflected, regardless of whether the member was actually biased or not, the confidence which the Board inspired in the public. Since this aspect of partiality related to appearance it did not need to be proven in the same way as actual partiality, but the circumstances had to be



judged to see whether they gave rise to an objectively justified fear of partiality (objective element).

Applying these considerations to the present case results in the following findings.

## 2.1 *Objective test*

2.1.1 The first argument on which the respondent's appointed professional representative, Mr G., based his objection was that the original chairman had not mentioned the procedure concerning the earlier partiality objection. The proceedings instituted before the Bavarian Administrative Court which had formed, *inter alia*, the basis for the first partiality objection must have been unpleasant for the original chairman. The original chairman's silence on this part gave the respondent the impression that the chairman still had a personal problem with the case (see point IV.a above).

2.1.2 The argument that the procedure before the Bavarian Administrative Court was unpleasant to the chairman has been dealt with in the earlier decision T 281/03 dated 18 March 2005 (point 15 and 16 of the reasons) and accordingly the matter is *res iudicata* so that the present substitute Board cannot decide on it again. The only new argument in this respect is that the original chairman's summary presented on 30 March 2006 did not mention the partiality history of the procedure.

2.1.3 An introduction to oral proceedings usually summarises the facts relevant to the questions to be discussed at the oral proceedings. It lies within the discretion of the chairman, who is responsible for the conduct of the

oral proceedings (Article 11(4) RPBA), to mention the facts which he considers as important. The earlier partiality request had been decided upon and did not play any role for the outcome of the oral proceedings on the merits of the appeal. Therefore, not mentioning the partiality history of the procedure reduced the case to its factual basis. From an objective observer's point of view, the omission did not give rise to any fear of partiality.

2.1.4 The argument raised with respect to the introduction to the oral proceedings has only been used in relation to the (original) chairman. Thus it is not quite clear whether this argument is also intended to support the objections to the (original) legal and technical members. As already mentioned, it lies within the discretion of the chairman to formulate the introduction. The other members are not involved and therefore cannot be affected. Even assuming *arguendo* that the introductory statement reflected a common opinion of all original members, the assessment elaborated above with respect to the chairman would also apply to the other members.

2.1.5 The second line of argumentation used by the respondent's appointed professional representative, Mr G., was that the Board in its original composition had committed a procedural violation by referring to common general knowledge without presenting evidence in the form of a document. That conduct was qualified as a wilful infringement of the right to be heard since the respondent did not have a possibility to defend his position (point IV.b above). The original chairman was said to commit fraud against the patent proprietor.

The Board notes that these allegations are tantamount to accusing the chairman of perverting the course of justice, which is a criminal act. They must therefore, be taken seriously. However, the substitute Board does not see anything in the behaviour of the original Board members which, from an objective point of view, would justify such a suspicion. In its communication dated 15 December 2005, the original Board gave a preliminary opinion which was to form the basis for discussion at the oral proceedings. This is clear from point 1 of the communication which states that the (original) Board has made a preliminary study and that the subsequent observations are made without prejudice to the final decision (cf. Article 12(2) RPBA). The communication frequently uses mitigating terms such as "it appears to be" (points 5, 6), the Board "tends to agree" (point 8), the Board "tends to think" (point 9) in order to express that this is not a final view but only outlines the issues which need to be addressed and a preliminary opinion of the (original) Board subject to revision in response to arguments at the oral proceedings. This is fair enough in order to make the parties aware of the points and potential implications which the Board considers relevant so that the parties can prepare in a proper manner.

The appellant pointed out that the original Board was free to revise its opinion since no final decision had yet been taken. In decision T 241/98 of 22 March 1999 (not published in OJ EPO), the Board of Appeal observed that forming an opinion is one of the most important tasks of a Board. Issuing a preliminary opinion is to be seen within this context and can therefore not be

regarded as partial. The party not sharing the Board's opinion can then try to refute it.

2.1.6 The Board in its substitute composition does not consider that the respondent was deprived of an opportunity to present his case. It is true that at the time of the respondent's objection under Article 24(3) EPC the original Board had not cited a document proving the common general knowledge contested by the respondent. However, at this stage numerous possibilities existed as to how the procedure could develop based on the discussions to be held at the oral proceedings. In point 4 of its communication, the original Board stated that a first discussion would be necessary on whether claim 1 was novel over D1. The common general knowledge was mentioned in relation to the issue of inventive step (point 11 of the original Board's communication). In this context, the original Board had cited D1 together with common general knowledge. The communication also stated that before discussing this point clarification would be necessary as to what D1 discloses. However, novelty had not been discussed yet.

2.1.7 In addition, the original Board's communication (points 7 and 8) raised the question of whether a procedural violation had occurred in the first instance proceedings, due to the fact that the appellant might not have been given sufficient opportunity to comment on the issue of inventive step. Thus, it was possible that the case would be remitted to the opposition division.

If the original Board were to come to the conclusion

not to remit the case, the contested common general knowledge might become a crucial question. After discussion of the technical problem to be solved, even a document already present in the proceedings might turn out to exhibit pertinent general knowledge. It could also have been considered whether or not the general knowledge in the present case might be regarded as notorious (in the meaning of T 223/95, not published OJ EPO) so that no documentary evidence was necessary. Without having discussed the relevant questions a party cannot submit that a Board is not willing to hear its arguments properly.

2.1.8 Finally, even if an application of procedural or substantive law was to be found incorrect, this would be far from proving that the deciding body is willingly violating a party's right. Even less can a party's own attacks on a previous, allegedly flawed, decision of a Board be a basis for alleging partiality of the members of the Board in future cases. If this were so, this would give parties an unrestricted possibility of excluding Board members from their cases for reasons unrelated to partiality. In decision T 954/98 of 9 December 1999 (not published in OJ EPO), the Board of Appeal set out that the provisions governing objections of suspected partiality serve dual purposes. On the one hand, a member should not act on a case implying a suspicion of partiality, on the other hand it should not be possible for a party to change the composition of the Board at will without any objective reason. If the suspicion of partiality was only based on the fact that procedural measures have been taken affecting a party, such a suspicion was not sufficient to justify an objection of partiality. This applied even where the

party interpreted those measures as an expression of a prejudice against it (Headnotes I and III).

2.1.9 Thus the circumstances of the case and the behaviour of the original Board members do not give rise to an objectively justified fear of partiality.

## 2.2 *Subjective test*

As set out in the earlier decision on partiality in relation to the present case (T 281/03 of 18 March 2005), it has to be examined whether there are subjective reasons for partiality, i.e. a personal interest or an actual dislike of a party. However, the modified Board taking the earlier decision on alleged partiality made also clear that it was a fundamental duty of a member of a Board of Appeal acting in a judicial capacity to take decisions objectively and not to be swayed by personal interest or other people's comments or actions. This principle was explicitly contained in the solemn declaration delivered by members of the Boards of Appeal at the time of their inauguration. Thus, personal impartiality of a member of a Board of Appeal was to be presumed until there is any proof to the contrary.

2.2.1 In the present case, no proof of personal partiality has been submitted. The respondent's appointed professional representative, Mr G., alleged that the acts of the chairman were driven by a desire for revenge but this is not supported by any means of evidence. It is a pure speculation based on the law suit before the Bavarian Administrative Court which the respondent himself had initiated. Accusing the chairman

of committing fraud before a final decision has been taken and even without having discussed the alleged critical aspect of the case (common general knowledge) seems to base the respondent's allegations of partiality on his own actions but not on the conduct of the proceedings by the original Board or its chairman.

2.2.2 The accusations of committing fraud and seeking revenge have been raised with respect to the original chairman. It is not clear whether these accusations are meant to apply to the original technical and legal members as well. Even if they are, no facts or evidence have been adduced to support such allegations with respect to those members either.

2.2.3 These findings are in line with the original members' declarations that they consider that there is no reason for exclusion. The Board in its substitute composition takes these declarations into account, at least pursuant to Article 114(1) EPC. Even though Article 3(2) RPBA refers only to exclusions, it may also be regarded as a legal basis since a member to which a party raises a convincing partiality objection would end up being excluded. If one followed the strict interpretation of Article 3(2) RPBA given to it by the respondent's appointed professional representative, Mr G., Article 3(3) RPBA would have to be interpreted in the same way. This would lead to the result that only in case of exclusion the further proceedings shall not continue until the decision on the exclusion is taken, but not in case of objection. However, this is not the intended meaning of this provision.

**Order**

**For these reasons it is decided that:**

1. The request for referral to the Enlarged Board of Appeal of the questions presented at the oral proceedings is refused.
2. The request for postponement of the oral proceedings is refused.
3. The objections of partiality against the original Board are refused.

The Registrar:

The Chairman:

P. Guidi

S. Wibergh