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**Datasheet for the interlocutory decision
of 12 January 2023**

Case Number: T 1656/17 - 3.X.XX

Application Number: XXX

Publication Number: XXX

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Language of the proceedings: EN

Title of invention:
XXX

Patent Proprietor:
N.N.

Opponent:
N.N.

Headword:
Partiality/XXX

Relevant legal provisions:

EPC Art. 24(1), 24(2), 24(3), 24(4)

RPBA 2020 Art. 3(2)

Business distribution scheme of the Technical Boards of Appeal
for 2023 Art. 5

Keyword:

Objection of suspected partiality - formation of the board in its alternate composition

Objection of suspected partiality - notice of self-recusation

Objection of suspected partiality - admissibility (yes)

Objection of suspected partiality - allowability (no)

Decisions cited:

G 0001/05, R 0002/15, J 0015/04, T 0843/91

Catchword:



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Case Number: T 1656/17 - 3.X.XX

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.X.XX
of 12 January 2023

Appellant: N.N.
(Patent Proprietor)

Representative: N.N.

Respondent: N.N.
(Opponent)

Representative: N.N.

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted on 23 May 2017
revoking European patent No. XXX pursuant to
Article 101(3) (b) EPC.

Composition of the Board:

Chairman G. Decker
Members: F. Sanahuja
M. Paci

Summary of Facts and Submissions

- I. This decision concerns the objection of suspected partiality under Article 24(3) EPC raised by the appellant against the members of the board in its original composition ("the original board").
- II. On 5 July 2022, oral proceedings started and were then adjourned. In a letter dated 8 July 2022, the appellant withdrew its agreement to continue the oral proceedings the following week. It requested in-person oral proceedings and that the time limit under Rule 115(1), second sentence, EPC be observed.
- III. On 21 October 2022, the oral proceedings continued and were adjourned in the evening. The original board summoned the parties for 11 January 2023, 12 January 2023 and 13 January 2023 to continue the oral proceedings.
- IV. By letter dated 9 December 2022, received by the EPO on 16 December 2022, the appellant's professional representatives asked the EPO to update the address of their firm for all the matters on a list that was enclosed.
- V. By letter dated 28 December 2022, the appellant raised an objection of suspected partiality under Article 24(3) EPC concerning circumstances during the oral proceedings on 21 October 2022. The objection was directed, as a main request, against all three members of the original board and, as an auxiliary request, only against the chair. The appellant requested oral

proceedings should the requests be deemed inadmissible or not allowable.

- VI. In response to the appellant's letter dated 28 December 2022, the respondent filed a witness statement of its professional representative dated 6 January 2023 concerning events at the oral proceedings on 21 October 2022.
- VII. On 11 January 2023, the original board resumed the oral proceedings and discussed with the parties whether the objection under Article 24(3) EPC was admissible. After having announced that it saw no reason to consider the objection inadmissible, the original board interrupted the oral proceedings.
- VIII. On the same day, the board in the alternate composition under Article 5 of the Business distribution scheme of the Technical Boards of Appeal for 2023 ("BDS 2023"; Supplementary publication 1, OJ EPO 2023, 17) resumed the oral proceedings. The chair informed the parties that a technically qualified member of the alternate board had provided the alternate board with a "Notice of exclusion under Articles 24(1) and (2) EPC" which reads as follows:
- "I hereby inform you that there exists a close family relationship between me and a person who had been entrusted in first instance with the handling of the file related to case T 1656/17. I, therefore, consider that I should not take part in appeal proceedings relating to T 1656/17 (Articles 24(1) and (2) EPC)."*
- IX. Subsequently, this technically qualified member was replaced under Article 24(4) EPC by their alternate in

accordance with Article 5 BDS 2023 for the purpose of taking a decision on the action to be taken following the technically qualified member's notice of exclusion.

- X. After having heard the parties on the issue of exclusion, the board in its new alternate composition ("the alternate board") decided that the technically qualified member concerned was to be replaced by their alternate.
- XI. The alternate board interrupted the oral proceedings until the next day. Subsequently, it invited the members of the original board to present comments under Article 3(2) RPBA 2020 on whether there was a reason for the objection of suspected partiality.
- XII. Still on the same day, the members of the original board provided the alternate board with their comments under Article 3(2) RPBA 2020. The comments included an annex titled "*The Board's summary of relevant events that occurred on 21 October 2022 after 17.49 hrs*" signed by all three members objected to.
- XIII. On 12 January 2023, the alternate board resumed the oral proceedings. The comments under Article 3(2) RPBA 2020 and the objection of suspected partiality were discussed with the parties. The alternate board then decided on the objection of suspected partiality and interrupted the oral proceedings.
- XIV. The appellant's arguments may be summarised as follows.
- (a) The objection of suspected partiality should be considered admissible as the appellant had not taken any procedural steps while being aware of a reason for objection.

(b) At the oral proceedings that took place on 21 October 2022, the respondent's professional representative entered the room at 18.21 hrs where the original board was deliberating and closed the door behind them ("the room incident"). Upon resuming the oral proceedings three minutes later, the original board did not make any comments on this incident. This contravened the chair's duty to ensure the fair and orderly conduct of the oral proceedings. The appellant's professional representatives requested that the circumstances which had taken place during the board's deliberation be put into the minutes. This was not well received by the chair who *"started to hostilely question the [appellant's professional representatives] that [the chair] felt accused and wondered what [the professional representatives] accused [the chair of]"*. Instead of discussing the room incident, the chair continued to question why this was brought up by the appellant's professional representatives and what the chair and the board could have done about it. There was a very hostile and aggressive attitude of the members of the board, especially the chair, towards the appellant's professional representatives. In contrast, there was *"a much more forgiving attitude"* when addressing the respondent's professional representative.

(c) The appellant's professional representatives subsequently requested that an objection be filed under Rule 106 EPC because they considered the room incident to be a procedural violation. The chair then questioned why the appellant's professional representatives wanted to file this objection. This

was clearly an attempt to threaten or discourage them from raising such an objection.

- (d) Since the respondent's professional representative had a flight to catch, they requested an adjournment of the oral proceedings. The board discussed if the proceedings could be continued in writing to allow the appellant's professional representatives to file their objection under Rule 106 EPC. While at first contemplating this, the chair changed their mind with the explicit reasoning that the appellant's professional representatives could not be trusted due to their submissions made after the adjournment of the oral proceedings held on 5 July 2022. The chair's comment clearly showed that there was a preconceived attitude on the part of a deciding person towards a party.
- (e) To enable the respondent's professional representative to catch their flight, the appellant's professional representatives were put under pressure to formulate and submit their objection under Rule 106 EPC within 15 minutes. It was more important that the respondent's professional representative could catch their flight than to allow the appellant's professional representatives to raise a well-reasoned and well-formulated objection. This was a violation of the appellant's right to be heard under Article 113 EPC and showed that the opinion of the acting person was swayed by their attitude toward a party.
- (f) After the appellant's professional representatives had filed the objection under Rule 106 EPC, the

oral proceedings were adjourned. After the respondent's professional representative had left the room, the appellant's professional representatives were still collecting and packing their things when the chair requested that they hurry up and leave the room since otherwise the same type of violation as in the room incident could be considered to have occurred. However, the oral proceedings had been adjourned, the door was open, and the board could have left the room. The chair again mentioned that they could not understand why an objection relating to the room incident had to be filed.

XV. The respondent's arguments may be summarised as follows.

(a) The objection of suspected partiality was substantiated only regarding the chair but not the two further members of the original board.

(b) There was no preconceived attitude of the original board towards the appellant. The original board was simply reacting to the events of that day.

Reasons for the Decision

1. The appellant raised an objection of suspected partiality under Article 24(3), first sentence, EPC. It was directed, as a main request, against all three members of the original board and, as an auxiliary request, only against the chair (see point V. above).

2. *Formation of the alternate board in its initial composition*

2.1 Under established case law (see Case Law of the Boards of Appeal of the European Patent Office, 10th edn. 2022 ("Case Law"), III.J.3.1), the board in its original composition is competent to preliminarily examine whether the objection of suspected partiality under Article 24(3), first sentence, EPC is admissible. The purpose of this examination is to determine whether the objection can go forward for substantive examination and decision. If for the board in its original composition the objection is admissible, the procedure under Article 24(4) EPC applies, i.e. the members objected to are to be replaced by their alternates for the decision on the objection.

2.2 The original board concluded that the objection under Article 24(3) EPC was not inadmissible (see point VII. above). This conclusion evidently applied to the main request. Otherwise, the original board would have made a distinction between the main request and the auxiliary request. Consequently, alternate members for all three members of the original board had to be nominated under Article 24(4) EPC.

2.3 Article 5 BDS 2023 governs how the alternate board is to be composed. Applying the rules set out in Article 5(2) to (4) in conjunction with Article 2, section "Board of Appeal 3.X.XX", BDS 2023, the members of the original board were replaced by their alternates.

3. *Formation of the alternate board in its final composition*

3.1 Under Article 24(2) EPC, if for one of the reasons mentioned in Article 24(1) EPC or for any other reason a member of a board of appeal considers that they should not take part in any appeal, they must inform the board.

3.2 As soon as the alternate board in its initial composition had been formed, a technically qualified member of the alternate board informed it in a notice of exclusion that they considered that they should not take part in the appeal proceedings. As the reason, they stated that there existed a close family relationship between them and a person who had been entrusted in first-instance proceedings with the handling of the file for the case in hand (see point VIII. above).

3.3 Subsequently, to decide on the technically qualified member's self-recusation, they were replaced under Article 24(4) EPC by their alternate member under Article 5(2) in conjunction with Article 2, section "Board of Appeal 3.X.XX", BDS 2023.

3.4 The parties were given an opportunity to comment on the technically qualified member's self-recusation. They had no comments.

3.5 As per G 1/05 of 7 December 2006, OJ EPO 2007, 362, Reasons 7, if a member of a board of appeal in a notice of withdrawal under Article 24(2) EPC (also called a notice of self-recusation or exclusion) gives a ground which could by its nature constitute a possible ground for an objection of partiality, that ground should

normally be respected by the decision on replacement of the board member concerned. It can be expected that the member submitting the notice knows best whether a possible suspicion of partiality might arise (see J 15/04, Reasons 13). While a board member's notice of withdrawal does not automatically effect their final exclusion from the proceedings, it is sufficient that an appearance of partiality is at least arguable in the circumstances of the case (see J 15/04, Reasons 12; R 2/15 of 21 October 2015, Reasons 5).

3.6 Following the case law set out in point 3.5 above, the alternate board decided that in the case in hand the technically qualified member concerned should be replaced. Indeed, it is at least arguable that a board member who has family ties to a person involved in the first-instance proceedings may have an interest in confirming the findings of those proceedings and could therefore appear to be biased.

3.7 As a result, the alternate board in its final composition was competent to decide on the appellant's objection of suspected partiality under Article 24(3), first sentence, EPC.

4. *Interpretation of the main request and the auxiliary request*

With the main request, the appellant suspected all three members of the original board to be partial. Consequently, if the appellant's objection of suspected partiality under Article 24(3), first sentence, EPC is not admissible or not allowable for just one of the three members objected to, then the main request is not admissible or not allowable. This, of course, also applies if there is no reason for suspected partiality

for any of the three members objected to. In this case, the auxiliary request, which concerns only the chair as one of these three members, is not allowable either.

5. *Circumstances serving as a basis for the objection of suspected partiality*
- 5.1 In its letter of 28 December 2022, the appellant described circumstances during the oral proceedings on 21 October 2022 before the original board which, in its opinion, gave rise to an objection of suspected partiality under Article 24(3), first sentence, EPC (see point XIV. above).
- 5.2 In a witness statement dated 6 January 2023, the respondent's professional representative described the circumstances during the oral proceedings on 21 October 2022 from their point of view (see point VI. above).
- 5.3 The three members of the original board also summarised the relevant events that occurred on 21 October 2022 in their comments under Article 3(2) RPBA 2020 (see point XII. above).
- 5.4 In the case in hand, it is not necessary to establish how the events during the oral proceedings on 21 October 2022 before the original board actually took place. For the purpose of examining the appellant's objection under Article 24(3), first sentence, EPC, the board presumes that the events occurred as alleged by the appellant (see point 5.1 above).
- 5.5 Regarding the room incident (see point XIV.(b) above), however, the appellant's professional representatives were not present in the room and were thus unable to

report what was going on there. To understand the original board's conduct objected to, it is therefore important to know the recollection of the respondent's professional representative and the original board's members.

- 5.5.1 In their witness statement, the respondent's professional representative described the circumstances of the room incident as follows.

"I knocked on the door of the room where the Board of Appeal were located but because the room was very large, they may not have heard me. Therefore, I opened the door entered the room and walked to the end of the room were (sic) the Board of Appeal were located. The Chair when [they] saw me said to me 'You cannot be in here. Please leave'. I said 'I'm so sorry, but I must ask about the timing for the rest of today'. The Chair said 'We are just getting to that. Now, please leave'. I immediately left the room. I cannot remember whether the door was opened or closed when I was in the room."

- 5.5.2 In the annex to their comments under Article 3(2) RPBA 2020, the members of the original board described the circumstances of the room incident as follows.

"At 18.20 hrs, one of the respondent's representatives entered the room and closed the door behind [them]. [They] asked about the timing of the oral proceedings on that day, because the representatives had to catch a plane to London. The chair[] immediately asked [them] to leave the room as the board was deliberating, adding that the parties would be called in in a few minutes. The

representative immediately left the room at 18.21 hrs."

6. *Admissibility of the main request*

6.1 The issue of admissibility of the objection of suspected partiality before the original board (see point 2.1 above) is only relevant to the opening of the procedure under Article 24(4) EPC and has no bearing on the future decision of the board nominated in accordance with Article 24(4) EPC. Therefore, the alternate board must examine the admissibility of the appellant's objection of its own motion (see Case Law, III.J.3.1).

6.2 During the oral proceedings before the alternate board, there was only one point of discussion on admissibility. The respondent argued that the objection of suspected partiality was substantiated only for the chair but not for the two further members of the original board.

6.2.1 In addition to the two admissibility conditions explicitly prescribed in Article 24(3), second and third sentence, EPC, the EPC requires, as a rule, that objections be reasoned, i.e. provide facts and arguments alleged to support the objection. From this requirement, it follows that if the facts and arguments filed cannot support the objection of suspected partiality raised, the objection is likewise inadmissible (see Case Law, III.J.3.3, with further references cited there).

6.2.2 It is true that a large part of the appellant's allegations concern the behaviour and statements of the chair and not of the two other members of the original

board. However, it is clear that a chair, when presiding over the oral proceedings, is normally acting after consultation with or with the tacit consent of the other board members. The appellant could therefore legitimately assume that the actions of the chair, in this case, were supported by the other two members. The board understands the appellant's submissions accordingly. As a consequence, the substantiated allegations concerning the behaviour and statements of the chair apply equally to the two other members.

- 6.3 Furthermore, the appellant claimed that it had not taken any procedural steps while being aware of a reason for objection (see point XIV.(a) above).
- 6.3.1 This submission relates to the admissibility requirement under Article 24(3), second sentence, EPC. Under this provision, an objection on the ground of suspected partiality is not admissible if, while being aware of a reason for objection, the party has taken a procedural step.
- 6.3.2 The above requirement might be discussed for the appellant's objection under Rule 106 EPC filed at the end of the oral proceedings on 21 October 2022 (see points XIV.(b) to (e) above).
- 6.3.3 An objection under Rule 106 EPC is without doubt to be classed as a procedural step within the meaning of Article 24(3), second sentence, EPC. The appellant's objection of suspected partiality is, however, not limited to facts occurring before the objection under Rule 106 EPC was filed. It is based on a chain of events that also encompass facts that occurred after this objection had been filed. Moreover, the board understands the appellant's submission to mean that it

was not until all the events had occurred that it became aware of the original board's biased attitude against it. Consequently, the board considers that the filing of the objection under Rule 106 EPC did not render the subsequent objection of suspected partiality inadmissible.

6.4 Apart from the two issues discussed above, the board did not see any other circumstances to be invoked *ex officio* that could call into question the admissibility of the objection of suspected partiality.

6.5 For the sake of completeness, the board notes that non-compliance with the further admissibility requirement under Article 24(3), second sentence, EPC might also be contemplated for the request of the appellant's professional representatives dated 9 December 2022 for their firm's address to be updated (see point IV. above). However, the board does not consider the update request a procedural step within the meaning of Article 24(3), second sentence, EPC. First, it does not stem from the appellant but from its professional representatives and concerns only the latter. Second, updating this address has no bearing on the case at issue. Third, updating addresses of professional representatives is not the task of the board. Consequently, this request cannot be regarded as an agreement by the appellant that the original board continues prosecuting the case. It is therefore not an implicit waiver of the objection of suspected partiality (which is the rationale underlying the requirement under Article 24(3), second sentence, EPC).

7. *Allowability of the main request and the auxiliary request*

7.1 Under established case law, partiality must be determined on the basis of the following two tests (see Case Law, III.J.1.5, with further references cited there):

- first, a "subjective" test requiring proof of actual partiality of the member concerned
- second, an "objective" test according to which the deciding board judges whether the circumstances of the case give rise to an objectively justified fear of partiality

7.2 The appellant did not present any proof of actual partiality of the three members of the original board. Rather, its case is based on circumstances which in its view gave rise to an objectively justified fear of partiality. This is to be examined in an objective test.

7.3 In G 1/05 of 7 December 2006, *loc. cit.*, Reasons 20, 23 and 24, the Enlarged Board of Appeal established the following principles when examining an objection of suspected partiality.

7.3.1 The party's suspicion must be justified on an objective basis. Purely subjective impressions or vague suspicions are not enough. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or would not bring an impartial mind to bear on the adjudication of the case. It is thus necessary that a reasonable onlooker considering the circumstances of

the case would conclude that the party might have good reasons to doubt the impartiality of the member objected to.

7.3.2 The right to object to a judge for reasons of suspicion of partiality is meant to prevent that a judge be influenced in their decision making - be it deliberately or inadvertently - by extraneous considerations, prejudices and predilections, i.e. by considerations other than the arguments they consider to be factually and legally relevant for the case under consideration. A suspicion of partiality might arise where there are circumstances possibly justifying a suspicion of a tendency to favour one or more of the parties or to discriminate against one of them.

7.3.3 A suspicion of partiality might also arise if a board member has pronounced themselves on a matter to be decided with their participation in such outspoken, extreme or unbalanced terms, be it in the course of or outside the proceedings, that their ability to consider the arguments put forward by the parties with an open mind and without a preconceived attitude and to bring an objective judgement to bear on the issues before them could be doubted.

7.4 Applying these principles to the case at issue, the board concludes that the circumstances invoked by the appellant do not give rise to an objectively justified fear of partiality.

7.4.1 The appellant submitted that there had been a chain of events during the oral proceedings on 21 October 2022 before it realised that the members of the original board could be suspected of partiality (see points XIV.(a) and 6.3.3 above). Consequently, the

board will examine in turn the individual links in this chain of events for judging whether they gave rise to an objectively justified fear of partiality.

- 7.4.2 The first chain link referred to by the appellant concerned the reaction of the original board, and in particular of the chair, to the appellant's request that the circumstances regarding the room incident be recorded in the minutes.
- (a) The appellant asserted that the original board had reacted in a very hostile and aggressive way, questioning the reason for this request. In contrast, the board had shown "*a much more forgiving attitude*" towards the respondent's professional representative (see point XIV.(b) above).
 - (b) The appellant did not specify why exactly it considered the board's reaction "hostile" and "aggressive", e.g. by submitting that the chair had used extreme or unbalanced terms. It appears that the assertion is merely based on the appellant's subjective impression and thus not justified on an objective basis.
 - (c) It further appears that the appellant did not understand why its request was questioned by the board and that it suspected a preconceived attitude as the reason for this conduct. However, it is a comprehensible reaction from a board's chair to ask for reasons for a request and even question any reasons given if, at least from the board's perspective, the situation did not call for any such request. From the original board's apparent perspective, which was based on what had occurred

in the room incident (see point 5.5 above), this was the case. In the original board's view, the situation gave rise to no reason to question the fair and orderly conduct of the oral proceedings and to record the circumstances of the room incident in the minutes. The board emphasises that it is not decisive whether the appellant's or the original board's point of view was justified. What matters is that the chair's conduct apparently resulted directly from the board's opinion on the issue. Therefore, from an objective perspective, the procedural context of the chair's conduct objected to shows that it was not influenced by extraneous considerations or prejudices.

- (d) The appellant also did not substantiate the assertion that the original board had shown "*a much more forgiving attitude*" towards the respondent's professional representative. Again, it appears that this was merely the appellant's subjective impression. Moreover, starting from the apparent view of the original board that the room incident did not give any cause for addressing it further, the chair had no reason to reprimand, for example, the respondent's professional representative after the oral proceedings had been resumed. Consequently, there is no objective indication that the board willingly favoured the respondent over the appellant.

- 7.4.3 The second chain link referred to by the appellant concerned the chair's reaction to the appellant's announcement that it wanted to raise an objection under Rule 106 EPC because it considered the room incident a procedural violation.

- (a) The appellant asserted that the original board's chair, by questioning the appellant's intention to raise the objection, had attempted to threaten the appellant or discourage it from doing so (see point XIV.(c) above).

- (b) The board fails to see how the chair asking for reasons for the appellant's intention could, from the perspective of a reasonable, objective and informed person, be understood as an attempt to threaten or discourage the appellant. The appellant did not allege that the chair had used any threatening or discouraging vocabulary or held out the prospect of adverse consequences for the appellant if it maintained the objection. It thus appears that the appellant's assertion is based on a subjective impression and not justified on an objective basis.

- (c) Furthermore, the starting point for examining whether there could be an objectively justified fear of partiality is the original board's apparent lack of understanding for the appellant's intention. From the original board's apparent point of view, the room incident in which no substantive issues had been addressed (see point 5.5 above) could not give rise to the objection that the appellant's right to be heard had been infringed. Consequently, from an objective perspective, the chair's conduct is not to be understood as an attempt to prevent the appellant from raising the objection but as a normal reaction and an attempt to comprehend the appellant's reasoning. The board notes that there is no rule according to which a court must always receive procedural requests from parties without comment. Rather, it must be

possible for a court to scrutinise the motivation for a request. This is all the more true if the motivation is not readily comprehensible for the court. The board is therefore not convinced that the chair's conduct could objectively be considered to be influenced by extraneous considerations or prejudices.

7.4.4 The third chain link referred to by the appellant concerned the chair's reasoning in the board's decision on whether the proceedings should be continued in writing to give the appellant the opportunity to file its objection under Rule 106 EPC after the adjournment of the oral proceedings.

(a) The appellant asserted that the chair had stated, as a justification for the original board's decision not to adjourn the oral proceedings at that point in time, that the appellant's professional representatives could not be trusted due to their submissions made after the adjournment of the oral proceedings held on 5 July 2022. This clearly showed that there had been a preconceived attitude on the part of the chair (or all three members of the original board) towards the appellant (see point XIV.(d) above).

(b) In the above circumstances, a suspicion of a tendency to willingly discriminate against the appellant might have been justified if the board had given an implausible or even arbitrary reason for its decision or had used outspoken, extreme or unbalanced terms in their reasoning. However, this is not the case. Rather, by commenting that the appellant's representatives could not be trusted, the chair apparently pointed to the fact that the

appellant had withdrawn its agreement to continue oral proceedings on the week following the first day of oral proceedings by letter dated 8 July 2022 (see point II. above). In this context, it is not relevant whether the appellant's professional representatives had good reasons for their conduct in that situation. The decisive factor is the board's apparent intention to avoid the possibility of a delay in the proceedings by a similar incident and therefore not to trust any procedural declarations of the parties that could be retracted at a later date. As a consequence, the board does not see that the original board's reasoning in reaching its decision could objectively be considered to be influenced by extraneous considerations or prejudices.

7.4.5 The fourth chain link referred to by the appellant concerned the way in which the original board had dealt with the appellant's request to file an objection under Rule 106 EPC.

(a) The appellant asserted that its professional representatives had been pressured by the original board to formulate and submit their objection under Rule 106 EPC within 15 minutes. It had been more important that the respondent's professional representative could catch their flight than to allow the appellant's professional representatives to make a well-reasoned and well-formulated objection. This constituted a violation of the appellant's right to be heard under Article 113 EPC (see point XIV.(e) above).

(b) The board understands the appellant's argument to mean that:

- the appellant's professional representatives were not able to submit a well-reasoned and well-formulated objection within 15 minutes, leading to a violation of the appellant's right to be heard

- the original board willingly favoured the respondent over the appellant

- (c) Under Article 15(4) RPBA 2020, the chair presides over the oral proceedings and ensures their fair, orderly and efficient conduct. This means that the chair must find a balance between the parties' requests and differing interests on the one hand and the need for procedural economy on the other, at the same time taking due account of the circumstances of each case.
- (d) In the case in hand, at the time the appellant requested the filing of its objection under Rule 106 EPC, it was early evening, and the oral proceedings had already lasted all day. It is furthermore undisputed that the respondent's professional representative had a flight to catch. It does not appear unreasonable that they had booked a flight departing on the evening of the day of the oral proceedings. This was the second day of the oral proceedings, so they could reasonably assume that the oral proceedings would normally be concluded by the evening. Lastly, in deciding how much time to allow a party to prepare a request, the board must also consider the complexity of the request's content. Here, the appellant's objection to be raised did not appear overly complex.

(e) Considering these circumstances, the time given to the appellant for submitting its objection under Rule 106 EPC in writing did not seem to be unreasonably short. What matters is the fact that, from an objective perspective, the board appeared not to intentionally disregard the appellant's rights but to base its decision on comprehensible aspects in an effort to find a fair balance between the interests of the appellant and the respondent. It is in the nature of things that one or even both parties do not always (fully) agree with a decision taken by a board.

(f) But even considering, for the sake of argument, that the board's decision amounted to a violation of the appellant's right to be heard in the case in hand, this could not be regarded as a basis for an objection on the ground of partiality if the violation did not result from a preconceived attitude (see T 843/91 of 17 March 1993, OJ EPO 1994, 818, Reasons 8). Since the original board appeared to have based its decision on the circumstances listed in point 7.4.5(d) above and not on extraneous considerations or prejudices, there is no objective indication of a preconceived attitude. By the same token, the board cannot find any objective indication that the original board willingly favoured the respondent over the appellant.

7.4.6 The fifth and last chain link referred to by the appellant concerned the chair's conduct towards the appellant's professional representatives after the oral proceedings had been adjourned.

- (a) The appellant asserted that although the oral proceedings had been adjourned, the door had been open, and the board could have left the room, the chair had invited the appellant's professional representatives to hurry up and leave the room since otherwise the same type of violation as in the room incident could be considered to have occurred. Furthermore, the chair had again expressed their lack of understanding of the appellant's objection under Rule 106 EPC in relation to the room incident (see point XIV.(f) above).
- (b) As to the first action of the chair mentioned above, the board first notes that it is customary for a board to wait at the end of the oral proceedings until the parties have left the room and to lock the door. Furthermore, it might be that the chair's invitation could be regarded as overly cautious and/or unnecessary, considering that the oral proceedings had been adjourned and the door had been open. However, the board fails to see why this would objectively allow conclusions to be drawn about any bias towards the appellant. First, the invitation was not plucked out of thin air but was directly related to and motivated by the preceding events during the oral proceedings. Second, the invitation could not in any way affect the past or future proceedings in this case to the detriment of the appellant.
- (c) As to the second action of the chair mentioned above, the board refers to its explanations in point 7.4.3(c) above. Furthermore, the appellant did not allege that the chair had used extreme or unbalanced terms when they expressed, for a second

time, their lack of understanding for the appellant's request. Again, the chair's conduct is to be seen in the context of what had happened before and is within the range of normal reactions when someone has difficulty comprehending something. Therefore, a reasonable, objective and informed person considering these circumstances would not conclude that the appellant might have good reasons to doubt the chair's impartiality.

- 7.4.7 Lastly, the board is not convinced that the chain of events as a whole could give rise to a suspicion of partiality. For this to be the case, a certain preconceived attitude would have to be at least partially discernible or inherent in each or some of the events. However, as examined above, none of the single chain links referred to by the appellant contains elements which could suggest that the original board was influenced in its decision making by extraneous considerations or prejudices.
- 7.4.8 As a result, the appellant's suspicion of partiality is not objectively justified regarding either the chair or the other two members of the original board.
- 7.5 Consequently, both the main request and the auxiliary request are not allowable (see point 4. above).

Order

For these reasons it is decided that:

The objection of suspected partiality against the members of the board in its original composition is refused.

The Registrar:

The Chairman:



K. Boelicke

G. Decker

Decision electronically authenticated