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**Datasheet for the interlocutory decision
of 17 May 2021**

Case Number: G 0001/21
Appeal Number: T 1807/15 - 3.5.02
Application Number: 04758381.0
Publication Number: 1609239
IPC: H03F1/02
Language of the proceedings: EN

Title of invention:
DOHERTY AMPLIFIER WITH OUTPUT HYBRID COUPLER

Patent Proprietor:
Andrew AG

Opponent:
Rohde & Schwarz GmbH & Co KG

Headword:
Exclusion and objection

Relevant legal provisions:
EPC Art. 24(2), (3), (4)
ECHR Art. 6(1)
RPBA Art. 15a

Keyword:
Suspicion of partiality concerning members of the Enlarged Board of Appeal - based on involvement in preparation and enactment of Article 15a RPBA - in two cases justified on an objective basis

Decisions cited:
G 0002/08, G 0003/08
ECHR: McGonnell v. the United Kingdom (8 February 2000 - 28488/95)

ECHR: Procola v. Luxemburg (28 September 1995 - 14570/89)

Catchword:

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**Große Beschwerdekammer
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Case Number: G 0001/21

I N T E R L O C U T O R Y D E C I S I O N
of the Enlarged Board of Appeal
of 17 May 2021

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Referring Decision: Interlocutory decision of the Technical Board
of Appeal 3.5.02 of the European Patent Office
of 12 March 2021.

Composition of the Board:

Chairman: F. Blumer
Members: W. Van der Eijk
T. Bokor
R. Arnold
E. Chatzikos
P. Gryczka
G. Pricolo

A. FACTS AND SUBMISSIONS

1. At the end of the oral proceedings of 8 February 2021 in case T 1807/15 before the Board of Appeal 3.5.02 (the Board), the Board's Chairman informed the parties that the Board would refer a question under Article 112 EPC to the Enlarged Board of Appeal.

With its interlocutory written decision of 12 March 2021 the Board referred the following question:

Is the conduct of oral proceedings in the form of a videoconference compatible with the right to oral proceedings as enshrined in Article 116(1) EPC if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference?

2. By Order of 17 March 2021 the Chairman of the Enlarged Board of Appeal (Enlarged Board) determined the composition of the panel to decide on the referral. On 17 March 2021 the parties to the appeal proceedings in case T 1807/15 and the President of the European Patent Office (EPO) were invited to file submissions on the referred question by 27 April 2021. By a communication of 24 March 2021 the public was invited to file written statements on the referred question within the same timeframe.
3. More than 40 amicus curiae briefs were filed, the President of the EPO provided his comments and also the appellant-opponent (further: appellant) filed a submission. In this submission, dated 27 April 2021, the appellant raised an objection under Article 24(3) EPC against the Chairman and two members (X and Y) of the Enlarged Board for reason of suspected partiality. The objection was based on the involvement of the Chairman in the preparation and enactment of Article 15a of the Rules of Procedure of the Boards of Appeal (RPBA), which entered into force on 1 April 2021. For

the members X and Y the objection was based on their membership of the Presidium of the Boards of Appeal.

4. Article 15a RPBA reads:

- (1) The Board may decide to hold oral proceedings pursuant to Article 116 EPC by videoconference if the Board considers it appropriate to do so, either upon request by a party or of its own motion.
- (2) Where oral proceedings are scheduled to be held on the premises of the European Patent Office, a party, representative of accompanying person may, upon request, be allowed to attend by videoconference.
- (3) The Chair in the particular appeal and, with the agreement of the Chair, any other member of the Board in the particular appeal may participate in the oral proceedings by videoconference.

5. The appellant also referred to a communication from the Boards of Appeal, dated 15 December 2020, which included the following wording: "From 1 January 2021 boards may conduct oral proceedings by VICO even without the agreement of the parties concerned, as has now been made clear in the new Article 15a RPBA adopted by the Boards of Appeal Committee. Since the new provision merely clarifies an existing possibility, boards may adapt their practice as regards dispensing with the need to obtain the agreement of the parties concerned even before the date of its entry into force." The appellant assumed that such a communication was based on the instructions of the President of the Boards of Appeal or, at least, was issued with his consent.

The appellant argues that the text of the proposal of the new Article 15a RPBA, the comments in decision document BOAC 16/20 (proposing the adoption of the new Article 15a RPBA to the Board of Appeal Committee) and the above communication demonstrated the position of the Chairman of the Enlarged Board that oral proceedings can also be held by videoconference without the agreement of the parties.

6. According to the appellant this provision deals with the same issue as the referral, namely the question whether oral proceedings can be held by videoconference without the agreement/consent of all the parties. The referral sought an answer to the question whether holding videoconferences without the consent of the parties is compatible with Article 116 EPC, whereas this question already seemed to have been answered positively in Article 15a RPBA. Therefore the appellant is of the opinion that the Chairman of the Enlarged Board who was involved in the preparation and enactment of this provision and the members X and Y who were consulted on a proposal for this provision should not decide on the referred question. A reasonable, objective and informed person considering this circumstance would conclude that he has good reasons to doubt the impartiality of these members. A similar line of argument has also been developed in several amicus curiae briefs.
7. A further member of the panel dealing with G 1/21 (Z) informed the Enlarged Board that he was also involved in the preparation of Article 15a RPBA and that his involvement could be qualified as relating to circumstances underlying the objections made by the appellant. He therefore asked the Enlarged Board in a composition under Article 24(4) EPC to decide on his continued participation in the referral case G 1/21.
8. The Enlarged Board in its original composition found the objection to be admissible and decided to honour the request of the other member. Thereupon the Chairman of the Enlarged Board recomposed the panel dealing with G 1/21:
 - The Chairman was replaced by Mr. F. Blumer,
 - X and Y were replaced by Mr. P. Gryczka and Mr. G. Pricolo respectively,
 - Z was replaced by Mr. T. Bokor.

9. The Enlarged Board in its composition according to Article 24(4) EPC invited the replaced members to make comments on the objection or on their request. All members concerned provided brief comments.

B. REASONS

1. LEGAL PRINCIPLES DEVELOPED BY THE CASE LAW OF THE BOARDS OF APPEAL AND THE ENLARGED BOARD OF APPEAL CONCERNING THE APPLICATION OF ARTICLE 24 EPC

10. The following principles have been developed by the Enlarged Board and the Boards of Appeal for the application of Article 24 EPC (see also Case Law, 9th edition, 2019, Chapter III.J.1. General principles). These principles will also be applied by the Enlarged Board in its current composition:
 - a. the right to object to a judge for reasons of suspicion of partiality is meant to prevent judges from being 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 factually and legally relevant for the case under consideration;
 - b. justice must not only be done, but must also be seen to be done and the composition of a deciding panel should inspire confidence in the impartiality of the court;
 - c. the requirement of impartiality in proceedings before the Enlarged Board and the other boards of appeal must in view of their judicial functions at final instance within the European patent granting system be strictly observed;
 - d. the right of parties to a fair trial by an independent and impartial tribunal is a fundamental legal right, as also recognized by Article 6 of the European Convention for the Protection of Human Rights and Fundamental

Freedoms (Human Rights Convention). Therefore the Boards of Appeal shall also apply the case law of the European Court of Human Rights (ECHR) and national courts regarding the fundamental principles laid down in Article 6 of the Human Right Convention;

- e. suspicion of partiality of a judge has to be determined by two tests: firstly, a subjective test requiring proof of actual partiality of the judge concerned, and secondly an objective test, whether the circumstances of the case give rise to an objectively justified fear of partiality;
- f. with respect to the subjective test it is presumed that a duly and lawfully appointed judge is personally impartial, unless there is proof of the contrary;
- g. with respect to the objective test the following question has to be answered: would a reasonable, objective and informed person on the basis of the correct facts reasonably be concerned that the judge had not or would not bring an impartial mind to bear on the adjudication of the case. It thus has to be established 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 judge objected to. This criterion excludes subjective suspicions on the part of the party who makes the objection;
- h. parties are entitled to have their case decided by a duly and lawfully appointed judge or judges. Appointed judges can therefore not withdraw from a case at will, and their replacement has to be decided upon by the court in light of the provisions of Article 24 EPC.

2. THE OBJECTION AGAINST THE CHAIRMAN OF THE ENLARGED BOARD OF APPEAL

1. The facts

11. The Chairman of the Enlarged Board also holds the function of President of the Boards of Appeal (President BOA), Rule 12a(1) EPC. One of the roles of the President BOA is defined in Rule 12c(2) EPC, which reads: "On a proposal from the President of the Boards of Appeal and after the President of the European Patent Office has been given the opportunity to comment, the Committee set up under paragraph 1 shall adopt the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal."
12. It follows from the submission of the appellant in his objection and the comments from the Chairman of the Enlarged Board that the following facts seem to be uncontested.

The Chairman of the Enlarged Board proposed in his function as President BOA an amendment to the RPBA to the Boards of Appeal Committee (BOAC) for adoption, see document BOAC/16/20. Point 20 of the explanatory remarks of BOAC/16/20 contained the following wording: "It is suggested that proposed new Article 15a RPBA enters into force on 1 April 2021, subject to its approval by the Administrative Council under Article 23(4), second sentence, EPC, and applies to all oral proceedings scheduled to take place on or after that date. As outlined above, proposed new Article 15a RPBA clarifies the practice of the Boards of Appeal since May 2020 of conducting oral proceedings by videoconference. Therefore, the Boards of Appeal may adapt their practice before the date of entry into force. The existing discretionary power of the Boards of Appeal to hold oral proceedings by videoconference remains unaffected. Accordingly, Boards may summon parties to oral proceedings by videoconference for a date before 1 April 2021 and may convert oral proceedings scheduled to take place on the premises before that date to oral proceedings by

videoconference, even without requiring the parties' agreement to this format."

The thrust of Point 20 was also communicated to the users on the Boards of Appeal web section of the EPO website on 15 December 2020 (see the citation under point 5 above).

New Article 15a RPBA was adopted by the BOAC by written procedure on 11 December 2020, approved by the Administrative Council during its E-meeting of 23 March 2021 and entered into force on 1 April 2021.

13. The Chairman of the Enlarged Board in his comments to the objection also stated that he:

- organised and chaired several meetings during 2020 with user representatives on the holding of oral proceedings by videoconference
- approved the publication of several communications on oral proceedings by videoconference from May 2020 onwards, including the communication of 15 December 2020
- proposed to the Administrative Council to approve the amendment inserting a new Article 15a in the RPBA (document CA/5/21)
- refrained from presenting CA/5/21 or discussing the proposed amendment of the RPBA during the meeting of the Administrative Council on 23 March 2021 where the proposal for Article 15a was discussed. Instead the Head of Department of the Boards of Appeal Legal Research Service conducted the presentation and discussion.

Finally, the Chairman indicated that he did not make any comments, be it internally or publicly, on the referral G 1/21.

2. The objection

14. The appellant alleges that the above facts establish that "it appears to a reasonable, objective and informed person that the BoA President had no reservations, that the conduct of oral proceedings in the form of a videoconference is compatible with the right to oral proceedings as enshrined in Article 116(1) EPC, even if not all of the parties to the proceedings have given their consent...". As the referral in G 1/21 raises precisely the question of the compatibility of this practice with Article 116 EPC, a reasonable, objective and informed person would conclude that he has good reasons to doubt the impartiality of the President BOA as Chairman of the Enlarged Board in the present proceedings.

3. Evaluation of the objection

15. The Enlarged Board notes that the referred question in G 1/21 and Article 15a RPBA indeed deal with the same topic, namely the legality of holding oral proceedings by videoconference without consent of all the parties. Where the referral seeks an answer to the question whether this practice is compatible with 116 EPC, Article 15a RPBA seems to be based on the view that it is compatible with Article 116 EPC.
16. The fact that a judge has expressed an opinion on a legal issue that is to be decided upon in a case is not in itself and not always a ground for suspicion of partiality (see also G 3/08 and G 2/08). The argument that the President BOA had no reservation on the compatibility of oral proceedings in the form of videoconference without consent of the parties with Article 116 EPC is therefore in itself not sufficient as a basis for suspicion of partiality.
17. In the current case, however, the issue is not so much about the expression of an opinion on a legal issue. The issue at hand is that the Chairman of the Enlarged Board has in his capacity as President BOA been involved in the passage of legislation, which, depending upon the answer given to the

referred question, might be found to be in conflict with Article 116 EPC. Furthermore, he has informed the public that also prior to the entry into force of Article 15a RPBA, oral proceedings before Boards of Appeal could be held in the form of a videoconference without the consent of the parties, thereby directing the practice of the Boards of Appeal in a certain way. In other words, he has performed legislative and managerial acts based on the view that oral proceedings by videoconference without consent of all the parties are compatible with Article 116 EPC. If the Enlarged Board gave a negative answer to the referred question, this would mean that the above mentioned acts would lack a legal basis and would contravene the EPC. It is these acts that in the view of the Enlarged Board would lead a reasonable, objective and informed person to conclude that he or she has good reasons to doubt the impartiality of Chairman in this case. The concern that the Chairman might have a bias towards answering the referred question in the positive in order to avoid the outcome that his own acts were not in compliance with Article 116 EPC, is therefore objectively justified.

18. This conclusion is in line with decisions of the ECHR in comparable cases, see for example the cases of *McGonnell v. the United Kingdom* (8 February 2000 - 28488/95) and *Procola v. Luxemburg* (28 September 1995 - 14570/89). In *McGonnell v. the United Kingdom* the ECHR considered in Point 55:

The participation of the Bailiff in the present case shows certain similarities with the position of the members of the Conseil d'Etat in the Procola case. First, in neither case was any doubt expressed in the domestic proceedings as to the role of the impugned organ. Secondly, and more particularly, in both cases a member, or members, of the deciding tribunal had been actively and formally involved in the preparatory stages of the regulation at issue. As the Court has noted above, the Bailiff's non-judicial constitutional functions cannot be accepted as merely

ceremonial. With particular respect to his presiding, as Deputy Bailiff, over the States of Deliberation in 1990, the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue.

19. In the current case, the Chairman was involved in all stages of the preparation of the legislation, which is at least indirectly under review in G 1/21. His involvement was direct and decisive, as follows from the above mentioned facts. He initiated the proposal, presented it for adoption and approval by the competent organs, he steered the practice of the Boards of Appeal in this direction and communicated this practice to the public. The reasoning of the ECHR that a direct involvement in the passage of legislation is likely to be sufficient to cast doubt on partiality, therefore seems to apply a fortiori to the present case.
20. In conclusion, the Enlarged Board finds that the objection against the participation of the Chairman in the present case for reason of suspected partiality is justified and the Chairman thus has to be replaced.

3. THE OBJECTION AGAINST X AND Y WHO ARE ALSO MEMBERS OF THE PRESIDIUM OF THE BOA

1. The objection

21. This objection is based on the fact that the Presidium of the Boards of Appeal was consulted by the President BOA on the proposal for new Article 15a RPBA. The two members objected to were also members of the Presidium at the time of the consultation. The appellant states in its submission of 27 April 2021, page 15, last paragraph, that the fact that the proposal for Article 15a RPBA has first been

presented for consultation to the Presidium and afterwards to the BOAC and the Administrative Council for adoption and approval, is evidence that the majority of the Presidium appeared to be in favour of the proposal. According to the appellant it appears that the members concerned thus also have a bias in favour of considering oral proceedings by videoconference without consent of the parties.

2. Evaluation of the objection

22. The EBA does not find this argument convincing. It is admitted that one of the roles of the Presidium is indeed to advise the President BOA on proposals for amending the RPBA, see Rule 12b(3)(c) EPC, but the fate of such proposals is not dependent on a positive advice of the Presidium. The Enlarged Board is not aware of a formally worded written advice of the (majority of) the Presidium on the proposal. It appears that the proposal has been discussed during a meeting of the Presidium and comments have been made on various aspects of the proposal. There appears not to have been a vote on a negative or positive opinion. Whether the objected members have contributed to this discussion and if so, what comments they made, is not known. The Enlarged Board is of the view that their membership of the Presidium and their participation in a consultative meeting where the proposal for the legislation at issue was discussed, is not enough to objectively justify the concern that the members in question are biased. Their role in an advisory body cannot be qualified as a direct involvement in the passage of legislation as discussed above for the Chairman.
23. The Enlarged Board is also not aware of any other circumstance which would prevent X and Y from taking part in case G 1/21.
24. The Enlarged Board is therefore of the view that the objection against X and Y is not justified and they can continue their participation in G 1/21.

4. THE REQUEST OF Z UNDER ARTICLE 24(2) EPC TO DECIDE ON HIS CONTINUED PARTICIPATION AS A MEMBER OF THE PANEL DECIDING ON REFERRAL G 1/21

25. Z informed the Enlarged Board that, as a member of a working party, he was involved in the preparation of what later became the legislative proposal for amending the RPBA. He mentioned that this involvement was of a mere general and informal nature.

26. From internal documents from the Boards of Appeal it appears that Z was indeed a member, and task coordinator, of the "Working group on VICO provision in RPBA" set up by the President BOA. Part of the mandate of the working group reads: "The group shall: Make a proposal for a new provision in the RPBA 2020 regulating oral proceedings to be held by videoconference (VICO). The provision may regulate, for example, that oral proceedings via VICO in any format are oral proceedings within the meaning of Article 116 EPC ..."

In his capacity as member and task coordinator Z was thus involved in the drafting of a proposal for a provision that later became Article 15a RPBA. He was also involved in presenting drafts for the proposal during discussions in the Presidium and with user representatives during the consultation phase.

27. Unlike the Chairman, Z did not play a formal role in the decision making process leading to the adoption and approval of Article 15a RPBA. However, his active involvement in the preparation of the proposal was visible to other actors in the process and those with an interest in the way oral proceedings are conducted before the BOA.

The Enlarged Board finds that it would not inspire confidence in the impartiality of the Enlarged Board if Z would also be part of the panel that decides on the compatibility of oral proceedings by videoconference without consent of the parties with Article 116 EPC. There may exist

in the public eye an objectively justified concern that he, like the Chairman, might be biased towards answering the referred question positively, because answering the question negatively would imply that he has been actively involved in the preparation of a proposal that is not compatible with Article 116 EPC.

28. In conclusion, the Enlarged Board finds that Z should not take part in the present referral case G 1/21.

C. ORDER

For these reasons it is decided that:

1. The Chairman is replaced by Mr. F. Blumer.
2. The objection under Article 24(3) EPC against X and Y is rejected.
3. Z is replaced by Mr. T. Bokor.

The Registrar:

The Chairman:



N. Michaleczek

F. Blumer

Decision electronically authenticated