

Decision on R19/12 – Machine translation from German into English

25 April 2014

Facts and Submissions

I. By letter dated 14 December 2012, the applicant applied for review of the decision T 2097/10 of the Technical Board of Appeal 3.2.04 of 12 July 2012, with a canceled this revocation of the patent by the Opposition Division and the maintenance of the patent the applicant had placed in the version of the submitted at the hearing before the Board auxiliary request 3 .

Your request for review, the applicant was based on a serious violation of their right to be heard by the Technical Board of Appeal in accordance with Article 112a (2) d) EPC. The reasons given for the applicant can be to better understand the principles of the present decision can be summarized as follows:

Already the opposition division had the applicant cut seriously the rights of defense . The opponent had , one month before the hearing, both a new ground of opposition submitted in response to a charge decision of the Opposition Division , in which the presence of inventive step has been affirmed as a large number of new citations filed . The Opposition Division had rejected the applicant's request for adjournment , but nevertheless allowed both the new ground of opposition as well as subsequently filed documents into the proceedings at the hearing . In addition, it is assumed that at the end of the hearing of a document as the closest prior art which was not addressed at all in this context, in the process up to that point. Then have the chairman taken at the hearing by an abrupt interruption of the representative of the applicant and immediate termination of the hearing, the applicant an opportunity to address these new objections by forgoing the affected claims, this is complete in the obvious desire of the opposition without further delay. The recognized by the Board of comber subsequent appeal process as patentable independent claim was included in the audited by the Opposition Division auxiliary request already .

Also, the Board of Appeal had expressed at the hearing , the chambers would have with their judicial work towards limiting the number of complaints . The complaint comber had then failed to exercise significant written and oral pleadings to the alleged serious procedural errors by the applicant in the proceedings before the Opposition Division noted and taken into account. The only way they have been able to come to their view that the proceedings before the opposition division lay no substantial procedural violation is based. As the decision shows that the Board of Appeal , instead of the process management of the Opposition Division in accordance with Article to check 113 EPC , is seen in the responsibility to justify the actions of the Opposition Division in relation to the applicant , even though they have this indicated in its decision as unfortunate.

It is clear from national constitutions and international conventions , eg the German Basic Law and the relevant case law of the Federal Constitutional Court , but also from Article 6, paragraph 1 of the European Convention on Human Rights and Article 47, paragraph 2 of the European Charter of Fundamental Rights , the need of granting legal Gehöres is a constitutive for due process absolutely fundamental right. The also have the Enlarged Board

of Appeal R 8/11 acknowledged in its decision , as well , that Article 113 EPC to the parties entitled to it granted that the respective Chamber a relevant argument takes note , it takes into account in a written decision and commends (R 17 / 11 of 19 March 2012 R 8/11 of 29 November 2011).

II In addition, the applicant rejected in its statement of 14 December 2012 from the Chairman of the Enlarged Board member suspected of partiality under Article 24 (3) EPC.

This refusal justified the applicant in the application for review and further written July 22 , 2013, of 7 November 2013, and from February 26, 2014 as follows :

The applicant has no doubt about the high legal qualifications and personal integrity of the Chairman. He had also participated in neither the contested decision nor the Board of Appeal to the previous decision of the Opposition Division .

They also follow the opinion of the Enlarged Board member in the decision R 12/ 09, that the distinction made in accordance with the EPC composition of the Enlarged Board of Appeal can not justify the suspicion of partiality of its members per se , even if they doubt that the provisions of the EPC with which the composition of the Enlarged Board of Appeal are governed satisfy the rule of law . She referred to the article by Zuck in GRUR Int. 2011.301 . The approval of the Enlarged Board of Appeal to restrictive application of Article 12 (4) RPBA by the Boards of Appeal , which already then rejected even minor changes in the applications , if this be done with the presentation of the statement of grounds , giving cause for suspicion of partiality . In view of the aforesaid Decision R 12/ 09 the Great Complaint member would a fact -based application but probably have no chance of success . In the present case, to rule on a procedural error of the Board of Appeal . These have their starting point but in a procedural error of guided objection procedure to be administrative action. The decision of the Enlarged Board of member must necessarily address the procedural errors of the Opposition Division in examining the relevance of the method error of the complaint member in this case. Thus, the Chairman of the Enlarged Board of Appeal must also located on administrative action for which he was responsible in his former position . Prior to his move to the top of the Enlarged Board of Appeal he was a leading member of the EPA and have worn such as responsibility for the organization of the process and thus also of the process underlying the opposition proceedings . Because of its past and present involvement in the organization of the EPA he would put the responsibility for the present method in a conflict situation to decide on a matter in which the organization of the EPO had obviously failed.

As now to vice president of General 3 (Appeals) - " GD3 " - is still involved in the management of the European Patent Office of the Chairman of the Enlarged replaced member . He was also a member of the Management Committee of the President (MAC) responsible for the governance of the Office he also wear over his chairmanship of the General Consultative Committee of the Office (ABA) , which have certainly existed in 2012. It follows from the principle of separation of powers, which is also binding on the EPO (G 3/08 of 12 May 2010 , No. 7.2.1) that the administration of their work could not legally control itself .

III . By order of May 3, 2013, the Board was the Enlarged Board of Appeal of the decision on the Bias application under Article 24 (4) sentence 2 EPC replaced by his representative as chairman.

IV The Board was replaced in accordance with Article 4 (2) of the Rules of Procedure of the Enlarged Board of Appeal (VOGBK) requested by letter of 22 May 2013 to the Express exclusion. In a further Letter of 16 November 2013 were given over to him , to comment on the additional arguments of the applicant on 7 November 2013.

V. The replaced chairman expressed as follows :

His alleged co-responsibility for all procedures at the EPO is irrelevant as not subject to review the decision of the Opposition Division , but the procedural elements of the handling of the complaint against this decision by a complaint comber are and their legal practice to be reviewed . The applicant does not explain how his former function to a shared responsibility for all procedures of the EPA , in particular of the independent and not bound by instructions of Appeal , should have done , nor how should result in a participation in any of these methods from his alleged responsibility. He was a member of the Examining or Opposition Division at any time and have had no influence on the way how the departments would have judged their cases in detail. He was also aware of no other reason why he should not be involved in this particular case .

With regard to the opinion of the applicant on 7 November, 2013, in which these had pointed in part to the involvement of the replaced chairman in the bodies MAC and ABA of the Office, presented the president replaced the admissibility of this completely new arguments almost eleven months after the original application in question. The evidence supplied does not meet because the review process, as he had already stated in its first opinion, the Board of Appeal decision treat and not administrative action, the first instance decision.

Reasons for the Decision

The reasons for the applicant's apprehension of bias:

1. In summary understands the Enlarged Board of Appeal, the embodiments of the applicant to the effect that the replaced chairman due to his previous activities as a major director and, at times, Acting Vice President of the Executive 5 (right) - "VP5" - and its as now to vice president of GD3 - "VP3" - continue existing membership in the executive level of the Office in its judicial capacity as chairman would escalate into a conflict situation in the review procedure under Article 112a EPC. He could be biased, administrative action, such as a restrictive practice procedures for which he was co-responsibility and what the occasion decisive decision of the Opposition Division heard - indirectly - to sanction. He would endeavor to work out that the Enlarged Board of Appeal cheap a perceived by the applicant restrictive review of first instance (discretionary) decisions by the Boards of Appeal.

2. This concern provides the applicant reinforced by the fact that the replaced chairman have continued to support in his nunmehrigen function as VP3 in accordance with Article 10 (3), sentence 1, EPC the President. The fact that the replaced chairman as vice president of GD3 associated with its integration into the structure of the administrative authority tasks actively perceives as before, the result for the applicant also from his participation in the

Management Committee of the President (MAC) and the General Advisory Committee of the Office (ABA).

Timeliness of rejection

3. In accordance with Article 24 (3), sentence 1, the EPC members of the Enlarged Chamber by any party may be rejected if suspected of partiality. Rejection is not allowed if the party has taken a procedural step, while being aware of a reason, Article 24 (3), 2nd sentence, EPC. The latter is not the case here. The applicant has also explained by the rejection in time with lodging and grounds for the request for examination and.

Factors to be considered

4. For the question whether concern is given of bias generally occurs primarily on the grounds relied on by the party, because she has to decide first if they in the circumstances at issue, a basic the concern looks, the judge will decide their case may not mind. This applies, however, only limited in the proceedings before the Enlarged Board and the Boards of Appeal.

5. According to Article 4 (1) VOGBK (as Article 3 (1) RPBA) is the procedure referred to in Article 24, paragraph 4, EPC also apply if the Enlarged Board of Appeal of a possible reason for exclusion in ways other than (affected) by the member or a involved becomes aware . The Grand Chamber is therefore in such a case, obliged to act ex officio. The meaning of the term " reason for exclusion " in Article 4 (1) VOGBK not limited to the cases of Article 24 (1) EPC , in which a member of the chamber is by law excluded from participation . For paragraph 4 of Article 24 EPC refers back to paragraphs 2 (self-rejection) and 3 (rejection by stakeholders , inter alia, the grounds of bias) and only in this context to the disqualification referred to in paragraph 1 , the wording of Article 4 (1) VOGBK " in other ways ... becomes aware " is completely open and includes the case that the chamber itself is aware of circumstances that may give rise to a suspicion of partiality . It follows that the Grand Chamber must take into account all known at the time of decision -relevant circumstances when deciding on a motion for bias .

6. Therefore, it is irrelevant at what stage of the process bias the applicant has its reference to the continuing involvement of VP3 in the administration of the office given by its participation in MAC and ABA , which contradicts the principle of separation of powers . All that matters is whether this is to circumstances that may play a role in the alleged apprehension of bias . In addition, the involvement of the replaced Chairman in his capacity as VP3 to the bodies referred to in the office is generally known.

Definition of fear of bias

7. As is apparent from the wording of the provision, a refusal pursuant to Article 24 (3) sentence 1 of the EPC not only justified if the device is truly an embarrassment of that

chamber member. It is sufficient that a concern, i.e., prima facie, the bias exists. Courts must ensure the exclusion of any risks that will not only be decided just, but that this will be visible to the public. Here the trust is at stake, which enjoys the Boards of Appeal in public (G 1/05, OJ. EPO 2007, 362, No. 19 of the reasons, with evidence from the international and national case law and the case law of the boards of appeal concerning the bias).

8. The interpretation of the rejection if suspected of partiality is relevant provisions in the field of tension that one hand can escape no one's statutory judge, he on the other hand, a fundamental right to a fair trial before an independent and impartial court (Art. 6 § 1 of the ECHR, Article 47 paragraph 2 of the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights), see also G 1/05, Nos. 8 and 9, 19 et seq of the reasons, G 2/08 dated 15 June 2009, paragraph 3.3 of the reasons). Therefore, the Enlarged Board of Appeal on the other hand, has also recognized that the "concern" of the players must be justified on an objective view. Pure subjective impressions or vague suspicions are not sufficient. The position of the person concerned is important but not decisive. The question is whether a reasonable, objective and informed person would fear in the face of the facts, with good reason, that the judge did not deal with the case impartially or treat. A reasonable observer would have to get under consideration the circumstances of the case to the conclusion that the firm could draw the impartiality of the challenged member with good reason in doubt (G 1/05, paragraph 20 of the reasons, with references).

9. The provisions of the EPC on the exclusion and rejection by members of the Boards of Appeal are modeled national procedural laws. In some States these schemes rest on the basis of their constitutions, which normalize the right to legal protection granted by a lawful judge, by an independent and impartial tribunal is a fundamental right of the individual (eg, article 30, paragraph 1 of the Federal Constitution of the Swiss Confederation (CH), Article 87, Section 1 of the Federal Constitution Act (AT), Article 19, paragraph 4, 97, 101, Section 1, Sentence 2, 103 § 1 of the Basic Law (GB)). In other states, such as in the UK, is Article 6 of the ECHR, the parent basis. The Enlarged Board of Appeal has recognized that the light of Article 6 of the Convention is binding on the proceedings before the Boards of Appeal (G 1/05, No. 22 of the reasons, G 2/08, paragraph 3.3 of the reasons) because it is based on principles of law that are common to the Member States of the European Patent Organisation and for all of their organs are (G 2/08, cited above). Therefore, it is justified both on national case law and the European Court of Human Rights - "ECHR" - in addition be used to interpret the EPC.

Burden of proof

10. The burden of proving that apprehension of bias is given, is after the decision G 2/08 (paragraph 1.2 of the reasons) is on the party alleging the objection, since the members of the Enlarged Board of Appeal a priori are presumed that they were impartial. The validity of this assumption is recognized in the case law of the ECtHR, as far as the personal impartiality of the judge is concerned (so-called subjective test in the case law of the ECtHR, see eg Micallef v. Malta, judgment of 15 October 2009, application no 17056/06, No. 94 of the decision). The applicant has stressed that she had no doubt about the personal integrity of the replaced chairman. Also to be considered facts are undisputed. Why does not

arise in the present case the question of burden of proof. It is rather solely to the evaluation of these facts with regard to the alleged apprehension of bias .

Criteria of bias

11. apprehension of bias can not only in the person of the challenged judge or lying out in his personal relationship with a party give reasons , but also from the exercise of activities that can bring the judge in conflicts of interest between this activity and the Obligations arising from the exercise of his judicial office . The disparate nature of the activities carried out side by side can justify the suspicion of partiality . This is in the case law of the Contracting States , as well as recognized the need for testing in each individual case whether the circumstances are such that they give from the perspective of an objective observer of concern, the judge was in a conflict of interest , so that it may be the case, not 'll decide impartially .

According to national case law, such as membership in associations or interest groups for economic or political reasons, justify depending on the circumstances of the individual case apprehension of bias or not (see , for example, the House of Lords , In re Pinochet [2000] 1 AC 119, as well as in Baumbach / Lauterbach, commentary on the Code of Civil Procedure , 72 edition, Munich 2014 , paragraph 14 et seq § 42 examples cited , the specifications about: " employer association " , " party affiliation " , " Political expression or activity " , " religion " , " association " , see also Fasching / Konecny , commentary on the Code of Civil laws , 3rd ed Vienna 2013 , paragraph 9 to § 19, here : participation in society or club , membership in the council of the plaintiff or defendant municipality) .

12. Institutional linkages can justify the suspicion of partiality of a judge . This is the so-called objective test in the case law of the ECtHR . In this test, it comes to determine whether the Chamber itself , including its composition , provides sufficient guarantees to exclude any legitimate doubt as to his impartiality . In most treated by the ECtHR cases involved this objective test . While it is difficult in some cases , the ECHR to provide evidence , rebut the presumption of subjective impartiality, the requirement of objective impartiality grant a further important safeguard . The objective test mostly concerns hierarchical or other connections between the judge and other participants in the proceedings . Also , an outer appearance might be in this context. Because it related to the trust that must indispensable in the courts may have the public in a democratic society . Therefore , questions should the internal organization of the Court considered (Micallef , as No. 10, No. 93-99 of the decision) .

12.1. Also in view of a prior involvement of the judge handling the case, which was not a participation in the contested decision itself, so that the judge was not already excluded by law from participation, concern the efangenheit has been affirmed under certain circumstances (see Baumbach / Lauterbach, paragraph 24 to § 42 in fine (administration of Justice) and the date set out there examples).

12.2. As to institutional links between management activities and judicial activity, the

(German) Federal Constitutional Court (Bundesverfassungsgericht NJW 1956, 137, II.2.c)) has emphasized the importance that the principle of separation of powers plays in this context, according to which judicial particular by ""of the branches of the legislature and the executive power various organs of the State is to be exercised.

Literally, leads to the Constitutional Court from :

" However, the Basic Law does not require complete separation of administration and Rspr [" However, the Basic Law does not require complete separation of administration and Rspr [jurisprudence] , but can be some overlap to . Way to stand against a part-time entrustment of the judge with shops of the administration of justice, as it is brought in the ordinary courts , even under the rule of the GG but [basic Law DE] no concerns Comes with the statutory principal occupation of a " court " with personally -dependent officials added that edit them as instruction-bound officials the same matter over which they are to decide as independent judges , so is a such a body is no longer as required by the Constitution "special" organ of state power , the instruction-bound officials of the administration involved appears to the nature of the thing itself as a party. he can not by the sentence , he was not bound by instructions as a judge , a representative of the executive be changed for individual shops in a representatives of the judiciary. With such a degree of mixing of administration and established case law , the principle of separation of powers within the meaning of Article 20, paragraph 2 of the Basic Law is violated in the core . "

12.3. Article 28 paragraph 2 c) of the Rules of Procedure of the ECHR as amended from 1 January 2014 certainly still going on and, more generally, that a judge in the trial of a case may not participate if he as an ad hoc judge or a former elected judge, in accordance with Article 26, paragraph 3 is more active, a political or administrative activities (English authentic text: "any political or administrative activity") or incompatible with its independence and impartiality activity picks up. This includes an administrative activity (outside of court administration itself) during action at the EMRG as an elected judge fortiori from.

13. The principles described above concerning exclusion and rejection treat a variety of different situations, which can scarcely be compared directly with each other and with the present case to be decided. A common approach is to make however:

13.1. The rules on exclusion and rejection serve to maintain the required distance of the judge - as a disinterested and therefore uninterested in the outcome of the proceedings "third parties" - to be worthy of border situation and the people involved (Baumbach / Lauterbach, supra Overview § 41, marginal note 2; BGH, NJW 2001, 1502, No. 3), and - if necessary - even the instance whose decision should be reviewed. This distance gives the principle of ensuring legal protection by one of the (administrative) and independent lower court this Court does not verquickte expression.

13.2. A distance commandment is consequently particularly true when it comes to the distance of the court and its judges to the administrative authority, whose decisions shall review the court. This indemnity rule goes far beyond the exclusion of a judge from

participating in cases where the decision under appeal, he has been involved.

13.3. This approach is based on the decision-R 12/09 of 3 December 2009. In this decision, the Enlarged Board of Appeal, the fact that the members of the Enlarged Board of Appeal are responsible for the review process and at the same time in a Technical or Legal Board of Appeal act only reason as a possible exclusion or refusal (Article 24 EPC) for the recognized verification procedure because the legislature had this structure deliberately provided. Otherwise, the Grand Chamber has clarified in No. 4 of the reasons, they would have to recognize this fact as a reason for exclusion or objection.

13.4. The change in time sequence between the professional activities of various kinds , in the field of law enforcement nationally and internationally is often the case . The legal systems are quite different in this area in detail. Common to them is that change , such as of a lawyer's activity or an administrative activity in a judicial activities are considered permissible and practiced. It also corresponds to national legal traditions , and applies in principle to judicial positions that are not entry-level positions , but are at the upper end of the judicial career ladder. From a judge is expected that it will come from his former profession and carrying out his new responsibilities in accordance with the judicial duty image and professional ethics.

Therefore, according to the Enlarged Board of Appeal considers the fact that a senior judge - such as the Chairman of the Enlarged Board of Appeal - has previously occupied a high position in an administrative hierarchy , not a sufficient reason , which alone justifies a suspicion of partiality for themselves.

Continuing involvement of VP3 in the administration of the Office

14. The present case is , however, different from those cases known from the national and international environment.

14.1. The GD3 and thus the Enlarged Board of Appeal are administratively part of the Office (see below). With the change of the former chief director , or for a time , acting VP5 to VP3 and at the same time as Chairman of the Enlarged Board of Appeal it is not the transfer of a high administrative level to a separate from the earlier administrative authority in court , in which the appointee entirely from its previous involvement would have dissolved in the administration. Rather, the Chairman of the Enlarged Board of Appeal and at the same time to VP3 appointee remains in his role as vice president of the management hierarchy of the Office. He remains subject to the instructions of the incumbent President as his immediate superior pursuant to Article 10 (2) f) EPC. According to Article 10 (3) EPC , the President of the Office shall be assisted by the Vice-President. This provision requires the Vice President , to participate actively in the framework of the permitted under the EPC President action to achieve its defined objectives by the President , also with respect to the DG that they lead as Vice President. They are primarily the direct managers who have to assist the President in all his duties and the decisions taken by him (Braendli in Munich commentary on Article 10 EPC, Nos. 45).

14.2. The degree of independence of the Vice President arises from the intensity with

which the President of his command and control powers them makes over use (Braendli , cited above , paragraph 46) or he otherwise zoom pulls to assist in the management of the Office . The latter is institutionalized in the form of MAC , one appointed by the incumbent President in the interest of collegial leadership Official governing body , among other things, the all vice presidents belong . The MAC is used for preparation of important decisions of the president, but limited due to him under Article 10 EPC decision-making powers not legally a (see Braendli , cited above , paragraph 47). According to the appendix " management structures of the EPO - Mandate of the Board of the EPO (MAC) " for Communique No. 14 of the President dated 4.8.2006 , the MAC has described as " an auxiliary organ of the President " , etc. could " support the President in the exercise of his enshrined in the EPC and in particular Article 10, its tasks , support the President in the definition of strategic, political and practical measures which significantly affect activity, performance or reputation of the EPA : the following tasks " .

14.3. The ABA , on a parity composed of appointed by the President and by the personnel committee of representatives committee has an extent comparable function , as it essentially has the task of the President reasoned opinions to (changes in) the staff relevant regulations and measures , but also to leave plan, submitted by the President issues (Article 38 (3) Staff Regulations of officials of the EPA in force prior to 4.1.2014 version) . According to the amended since the members of the Committee must - now " General Consultative Committee " chaired by the President - after consultation vote for or against each proposed measure or abstain. Since early 2012, the Vice- President to take on the ABA as a representative of the official line, ie the President's part . This is expressly confirmed in the recently by the President to the Board submitted document CA/4/14 from 10/03/2014 . It is stated in paragraph 16 that the trunk line (ie the President) in the ABA by Vice- President (and chief directors) will represent . It follows that the Vice President as the other official representatives of senior management in the ABA pursuant to Article 10 (2) f) EPC subject to the instructions of the President to their opinion and voting behavior .

15. This also applies to the VP3. He is there as all Vice Presidents as designated by the President for the office side representative acts and is also subject to the instructions of the President. Therefore, the VP3 can get in the ABA in the situation that he instructed, must agree to rules that are generally and so indiscriminately applicable to Board members on the staff, but which could be incompatible with the institutional and personal legal guarantee of judicial independence of the Board members. From this point about the "Guidelines for investigations in EPA" have recently advised (Circular 342 of the President dated 30.11.2012) in the discussion.

16. Although the VP3 (Art. 23 (3) EPC) is removed as Chairman of the Enlarged Board of Appeal for the decisions of the referral power of the president. Also , Article 1 (4) of the Staff Regulations states that the Staff Regulations for membership of the Board shall be valid only " insofar as their independence is not impaired " ; see also Article 15 (2) of the Staff Regulations on the special duties of the members of chambers: they " have to behave within and outside their [Richter] Office so that the trust is not compromised in their independence." A sharp boundary is not drawn - and can not even draw . Although the duties of the VP3 limited in its judicial capacity as Chairman of the Enlarged Board of Appeal in any case not sure reject incompatible instructions with Article 23 (3) EPC , but result from

this , limitations on his support obligation , on which he could rely concrete . However, these are not normative clearly determined.

Potential conflict of interest of VP3 with his management responsibility for the Boards of Appeal and as Chairman of the Enlarged Board of Appeal

17.1. The VP3 may be faced with conflicting demands. On the one hand he has to realize as the President of imputed vice president whose line circuit and performance objectives and, where appropriate, instructions for the field in the compilation of the GD3 Boards; on the other hand he has generally to provide in his leadership responsibility for the Boards to ensure that they remain free of influence measures or try the President and his administration hierarchy, which could affect the guaranteed in the EPC judicial independence of the Board members. A fortiori, he has to keep himself in the exercise of its judicial activities of such influences free.

17.2. In this situation can not be excluded a priori, that the Chairman of the Enlarged Board of Appeal, if he is given instructions of the incumbent President, for example, concerning achievable efficiency targets, facing, could be in a conflict of interest as regards its commitment to participate as Chairman of the Enlarged Board of Appeal to develop a jurisprudence that in the framework laid down by the EPC makes the review process to an effective legal instrument for the parties, as formulated by the applicant for the review process. This is the by the applicant as a "conflict situation" designated position, in which the Chairman is replaced due to its dual function.

17.3 A connection between the case law of the Boards of comber for the review procedure under Article 112a EPC and the pursuit of efficiency goals of the appeals process is also given quite concretely . The more restrictive the Enlarged Board of Appeal defined their criteria for the review of complaints procedures , eg in terms of the requirements for the protection of the rights Gehöres by the Boards of Appeal , for example in connection with the admission of further argument , the tighter the complaint combers can customize their procedures , without incurring a cancellation of their decisions in any , subsequent review process .

Approves the Enlarged Board of Appeal a restrictive from the point of due process review of first instance (discretionary) decisions by the Technical Boards of Appeal , it is the Audit and especially the opposition divisions a broader scope , the proceedings before them at predetermined or desired " efficiency " - align or " productivity " locations, including concerning by exclusion of later submissions or requests , or generally through a restrictive practice, the hearing of the parties . This is the context which the applicant makes perfect with respect to the its review process underlying complaint proceedings claim in which she criticized just such practices of the Opposition Division and the Board subsequently comber as violations of their right to be heard .

17.4. The extent of potential conflicts of interest between the eisungsgebundenheit and the support obligation of the VP3 against the incumbent President , on the one hand , and

on the other hand his judicial function as Chairman of the Enlarged Board of Appeal , in which he , though in college , yet creatively as primus inter pares on the process management by the can act Boards of Appeal , has increased significantly with the introduction of the verification procedure under the EPC 2000. Previously, the Enlarged Board of Appeal was "only" for handling the legal issues of fundamental importance in charge , whose answer , although quite patent policy and also have a more general political significance in individual cases could. Now they reviewed at the request of a party individual complaint procedure to certain procedural errors and thus designed the procedures practice of those boards (mainly as regards the grant of a fair hearing) with . In addition, potential conflicts of interest also objectives of legal policy or political importance can arise that can follow an office President legitimate manner which does not , however, shall be relevant to the decisions of the Enlarged Board of Appeal .Now they reviewed at the request of a party individual complaint procedure to certain procedural errors and thus designed the procedures practice of those boards (mainly as regards the grant of a fair hearing) with . In addition, potential conflicts of interest also objectives of legal policy or political importance can arise that can follow an office President legitimate manner which does not , however, shall be relevant to the decisions of the Enlarged Board of Appeal . A decisive effect ("casting vote") has the opinion of the Chairman of the Enlarged Board of Appeal for the assessment of the case under consideration , therefore, not as such.

17.5. Although the Enlarged Board of Appeal decides on all procedures , whether . In the cast with 3 , 5 or 7 members , by majority vote A decisive effect ("casting vote") has the opinion of the Chairman of the Enlarged Board of Appeal for the assessment of the case under consideration , therefore, not as such. In fact, the Chairman of the Enlarged Board of Appeal currently in review process has a prominent role and increased influence due to the fact that he regularly holds the Presidency , while the members from time to time change , because they alternately in the order of an erected to the schedule list to the individual be used cases. The task of securing in various formations the uniformity of decisions of the Enlarged Board comber by applying uniform inspection criteria , comes in such a system primarily to the Chairman . But that matters is whether, on the will of the member affected by a motion for bias of a panel could be affected by bias.

The decision R 12/ 09

17.6. The EPC does not require that the task of the Presidency is to be perceived in the Enlarged Board of Appeal by the Vice President of GD3 . It is simply a long-standing, only once interrupted exercise. However, exercise alone these offices connection can not be gain strength to a common law, especially not when developments have taken place over time , which can connect these offices appear in a different light (see point 17.3 f and below No. 20 ff) .

17.7. This is also true for the participation of the replaced as chairman of VP3 in the MAC and the ABA. Reason for his participation in these bodies is not a normalized obligation , the concerns of organizationally summarized in the GD3 Appeal objectively and personally respect to true (in the sense of " administration of justice ") in this way. This is especially

true for the ABA , a committee of the Office of the Vice-Presidents and thus also of the VP3 were not previously involved . Reports on MAC meetings with the participation of the previous VP3 regularly contained the words " With due consideration for the independence of VP3 " - see for example " Communique from the MAC , 135th meeting , Munich, 12 December 2005 " . Such a reservation no longer exists for the involvement of the current VP3 .

17.8. As neither the personal union VP3/Vorsitzender the Enlarged comber nor the participation of the VP3 are specified normatively in the committees MAC and ABA of the office, is a decision R 12/ 09 comparable legal situation in the present case not given (see point 13.3) . It should be pointed out that Article 6 ECHR , whose debt has recognized the Enlarged Board of Appeal of the EPO (see point 9) , at least a higher position than national law. Thus, the ECtHR has an apprehension of bias of a judge acknowledged in his judgment in matters Micallef as justified , although the national law have the reason put forward just not normalized as a reason for exclusion. Since this law has exhibited deficits and have provided no adequate guarantees of subjective and objective impartiality, the composition of the Court had not met the standard of the Convention (ibid., so No. 10, No. 100 et seq of the reasons) .

Issue of involvement of the Chairman of the Enlarged Board in the administration of the Office

18. must That the Chairman of the Enlarged Board of Appeal may are at least indirectly via " routing decisions " of the President, where he had worked as vice president , has once more as one of the elements in the organizational structure of the Boards of Appeal have been reprimanded , the radical doubt gave rise to whether the appeal chambers have a real court quality (see, for example - cited by the applicant - Zuck , discussed the constitutional judicial review of decisions of the Enlarged Board comber the European Patent Office for breach of the legal Gehöres , IIC Int 2011 , 302, the other organization legal shortcomings .) . Such an objection has been put forward in the charges brought against Decision R 2/12 of the Enlarged Board of Appeal of 17 October 2012 constitutional complaint (letter of February 25, 2013 , pp. 44 f , D.III 4.d. . - copy in the file of the completed procedure R 2 /12). Also in parallel with the review request R 8/13 filed a constitutional complaint dated 5 April 2013, and one of those beige discontinued opinion of the judge at the Federal Constitutional Court aD Bross , this view is represented (p. 13f - . BI4 .) .

19. Now the Enlarged Board of comber , in its opinion G is 3/08 of the European Patent Organisation as one of a modern state system modeled , based on the separation of powers principle organization in which the EPC office executive power , the Board , limited to subordinate standards the legislative powers and despite their structural integration assigned the role of an independent judiciary, the Boards of Appeal in the Office (OJ EPO 2011 , 10, No. 7.2.1 of the reasons) . The one will , as far as the intention of the legislature in creating the EPC , also can agree readily . Nevertheless, it can not be dismissed out of hand that the organizational and spatial , with the dual function of VP3 also personal link the boards of appeal with the Office quite some rule of law in deficit compared with requirements , provide the legal systems democratically constituted states the status , must be granted to the courts and their judges to ensure the fundamental right of citizens to effective legal protection against acts of the executive independent of such courts.

20. As early as 1997 the Board was the report of an inserted from his time incumbent president , consisting of high-level national judges, the then VP3 and Board members of working group " General 3 of the European Patent Office" under the direction of the then President of the Federal Patent Court , submitted (so-called " Sedemund driver report "). In this report - before there was the review process - it was described as important to emphasize the judicial function of VP3 as Chairman of the Enlarged Board of Appeal and to bring to the outside world more clearly . The report states in this : "After the Working Group therefore considers that the Vice President of General 3 should be possible , exempt from general administrative tasks that do not relate to the General 3 ... The VP3 should not be obliged [Moreover] , at management meetings of the Office participate , except where specific issues of DG will be discussed 3 . was considered desirable that the President of the Office gradually under the EPC his organizational and managerial powers delegated against the General 3 under Article 10 EPC to the Vice President of General Management 3 "(CA/84/97 , No. 55 and 56) . That has not happened . However, the then- VP3 in the sequence at the MAC has been involved with reservation (No. 17.7 , above); an involvement of VP3 in the ABA did not exist back then.

21. In 2004, the Board of a fully developed design of a basic proposal for a revision of the EPC to implement the organizational autonomy of the Boards of Appeal of the European Patent Office submitted under the European Patent Organisation (CA/46/04) . It would grant the Boards of Appeal , headed by a Chief Justice , the position of a third institution of the European Patent Organisation , alongside the European Patent Office and the Board of Directors and therefore the court president who should be Chairman of the Enlarged Board of Appeal , grant independent of the office and its president position. The Board of Directors had at its meeting in June 2004 of the opinion that the project was ripe for a Diplomatic Conference and should be placed on the agenda of such meeting (CA/85/04 , No. 68) . Even this did not happen until today.

22. Although both the national courts and the ECHR have recognized in the past, that the legal system of the EPC as such the provisions of the ECHR as well as to the suitability of the Court of quality of the boards of appeal requirements is sufficient (evidence at Teschemacher in Singer / Stauder , European Patent Convention , 6th edition Cologne , 2013, Article 21 Before 24 , paragraph 1 and 5). However, as show examples of the above (No. 18) mentioned constitutional complaints and its cited reference, these earlier judicial findings are of quite considerable support not (more) accepted (Teschemacher supra, with further references in FN 10).

They contend that the earlier decisions of the (German) Federal Constitutional Court had relied only on the principle of the right Gehöres in Article 113 EPC and Article 23 (3) EPC, independence of the members of the Boards combers in their decisions . The institutional issues that arise from the inclusion of the boards of appeal in the office , had not been previously considered to lack of presentation . The Advocate General of the ECJ Juliane Kokott stated in its Opinion 1/ 09 to the proceedings before the ECJ on the draft agreement on the creation of a European Patent Court critically , present the decisions of the EPO could only by the " internal chambers of the Office " checked be . A court dispute / complaint before an external court is excluded (paragraph 71 of the opinion).

Implications for determining whether bias is to be feared

23. For this question to be answered whether the participation of the Chairman of the Enlarged Board of Appeal may allow to the said governing bodies of the Office from the perspective of an objective observer at a party the concern of bias arise , can the reform proposals described above, and opinions on the offered organizational structure a judicial body can not be ignored. They reflect increased awareness and stricter views about what requests have to be made to account for the fundamental right of the parties to have access to an independent and impartial tribunal bill.

As a result of changing perceptions may be required which conform to the values of the time interpretation of legal terms . This dynamic interpretation is recognized as a method of interpretation in the case law of the Boards of comber (see, eg, G 3/98 , OJ . EPO 2001, 62, No. 2.5 of the reasons) . The right is not something static , but is continually developing with the change of living conditions and the changing views. This is especially true when it comes to determining the content of indeterminate legal concepts , as the term " apprehension of bias " , whose meaning can only be determined by the applicable values about the role of the judge in the rule of law .

To this end, the House of Lords has held in its judgment *Lawal v. Northern Spirit Ltd* with reference to various other judgments with respect to possible bias (House of Lords , [2003] ICR 856 , para 22 .)

In view of the requirements for the guarantee of the impartiality of the judge in a court system can not be disregarded one which occurs in the course of time, increased sensitivity of the public. This can lead to even what is considered legal tradition or culture of a jurisdiction , is considered critical today. The indispensable requirement of public confidence in the justice today requires a higher standard than this or more decades has been the case previously . Which was still acceptable for many years , it is not necessarily even today.

We concur .

24. It follows, according to the Enlarged Board considers :

24.1 If even the non-modifiable according to the current configuration of the EPC structural weaknesses of the organization of the Boards must be accepted with their integration into the office , despite the concerns expressed , it appears all the more necessary , the pipe embedded in the official judicial institution as far as humanly possible to dispense with the active participation in the governing bodies of the Office , in particular the President, to give the impression to the amalgamation of the judicial body with the Office action or involvement in the realization of interests and Office - aim to avoid as far as possible . In this regard, however, to observe with the involvement of VP3 in the ABA and its unconditional participation in the MAC rather an opposite trend .

24.2. Given this involvement of the Chairman of the Enlarged Board in the administration of the Office at the management level , the concern of the applicant , who replaced chairman could not completely dissolve in its judicial role of diseases caused by its participation in management decisions of the Office constraints and influences, maybe not as a purely subjective impression or mere general suspicion be considered . Rather, a reasonable , objective and informed person can certainly feared , with good reason , the Chairman could his judicial function may not be unaffected by exercise targets that are brought to him as VP3 , particularly in the context of its participation in those bodies . This also helps to ensure that the current VP3 has assumed the duty position before his appointment to the GD3 at the highest point in the administration to the President, he continues to be subject in its capacity as nunmehrigen VP3 .

24.3. It is not relevant for the present purposes of deciding whether the replaced chairman is actually biased , and whether its further integration into existing administrative action can be attributed to him subjectively . It is also not relevant whether the Grand Chamber holds in the present occupation of the replaced chairman for biased. What is relevant is whether a reasonable , objective and informed observer would reach after considering the circumstances of the case to the conclusion that the firm could draw the impartiality of the challenged member with good reason in doubt (see point 8).

24.4. This can not be denied on the reasons discussed .

Reasons for the Decision

For these reasons it is decided :

The rejection of the replaced Chairman, NN, because Apprehension of bias is well founded.

N.N. is replaced by Mrs. Guenzel .