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**Datasheet for the interlocutory decision
of 28 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(1), (2), (3), (4)

RPEBA Art. 2(2)

Business distribution scheme EBA 2021 Art. 2(2), (3)

Keyword:

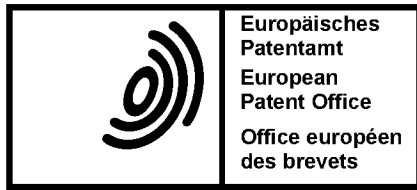
"Objections against members of the Enlarged Board of Appeal - not admissible: objections filed too late (Art. 24(3), EPC, second sentence), not substantiated by facts and arguments or not person specific; EBA panel composed to deal with a case not competent to change its own composition"

Decisions cited:

R 0012/09, T 1028/96

Catchword:

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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 28 May 2021

Appellant:
(Opponent)

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Respondent:
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Referring Decision:

Interlocutory decision of the Technical
Board 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
G. Eliasson
A. Ritzka

Summary of Facts and Submissions

1. During the oral proceedings of 8 February 2021 in case T 1807/15 the Chairman of Board of Appeal 3.5.02 (the Board) 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 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 a communication of 24 March 2021 the public was invited to file written statements on the referred question.
3. In its submission, dated 27 April 2021, the appellant-opponent (hereafter: appellant) raised an objection under Article 24(3) EPC against the Chairman and two members of the Enlarged Board for reasons of suspected partiality. The objection was based on the involvement of these members in the preparation and passage of

Article 15a of the Rules of Procedure of the Boards of Appeal (RPBA), which entered into force on 1 April 2021. A further member of the Enlarged Board informed the Enlarged Board under Article 24(2) EPC of his involvement in the preparation of said Article 15a RPBA and asked the Enlarged Board to decide on his continued participation in the referral case. The objections were found to be admissible and the panel dealing with G 1/21 was recomposed, wherein the abovementioned members were replaced by their alternates.

4. By an interlocutory decision dated 17 May 2021 the Enlarged Board decided in application of Article 24(4) EPC to replace the Chairman of the Enlarged Board and the member who had informed the Enlarged Board under Article 24(2) EPC. The composition of the Enlarged Board was subsequently changed by order of 20 May 2021.

5. By an order of 17 March 2021 the parties and the President of the EPO had already been summoned/invited to oral proceedings to be held on 28 May 2021. With a letter dated 24 May 2021 the appellant filed four objections against the internal members of the Enlarged Board for reasons of suspected partiality and of personal interest and filed 10 procedural requests, numbered as 1 to 11 (there is no request 10). These objections and requests are as follows:

Objections

In view of Article 24(3), second sentence, EPC we provide in the following objections under Art. 24(3) EPC before we come to procedural request.

- *Objection 1*

In accordance with Article 24(3) EPC regular members of panel G. Eliason [sic!], and A. Ritzka are objected to as suspected of partiality for the reasons specified below (section IV.1).

- *Objection 2*

In accordance with Article 24(3) EPC regular members of panel F. Blumer, T. Bokor, W. Van der Eijk [sic!], G. Eliason, and A. Ritzka may not take part in the present case as they have a personal interest (Art. 24(1) EPC) or alternatively suspected of partiality for the reasons specified below (section IV.2).

- *Objection 3*

In accordance with Article 24(3) EPC the regular members of the present panel according to the Order of 20 May 2021 who already belonged to the panel of the EBoA according to the Order of 17 March 2021; W. Van der Eijk, G. Eliasson, and A. Ritzka are objected to as suspected of partiality for the reasons specified below (section IV.3).

- *Objection 4*

In accordance with Article 24(3) EPC regular members of panel F. Blumer, T. Bokor, W. Van der Eijk, G. Eliason, and A. Ritzka are objected to as suspected of partiality for the reasons specified below (section IV.4).

Requests

We kindly request:

- 1. to postpone oral proceedings scheduled for May 28, 2021,*
- 2. oral proceedings to be held in the proceedings under Art. 24(4) EPC, regarding the above-mentioned objections 1 to 4 as to suspicion of partiality,*
- 3. to provide the parties with the brief submission of I. Beckedorf, mentioned in the interlocutory decision,*
- 4. to provide the parties with the brief submission of G. Eliason, mentioned in the interlocutory decision,*
- 5. to provide the parties with the brief submission of A. Ritzka, mentioned in the interlocutory decision,*
- 6. to provide information about the members of the "Working group on VICO provision in RPEA [sic!]",*
- 7. to replace the to be replaced members of the panel, Mr. Josefsson and I. Beckedorf with alternates pursuant to Art. 2(1)(b) of the Business Distribution scheme of the Enlarged Board of Appeal,*
- 8. to appoint the substitute for the chairman in accordance with Art. 2(2) of the Business Distribution scheme of the Enlarged Board of Appeal,*

- 9. to summon for oral proceedings in the proceedings under Art. 24(4) EPC, only after the submissions/information requested under items 3. to 6. have been provided to the parties of the proceedings, and*
- 11. to invite the public to file further amicus curiae concerning the composition of the panel.*
6. The first procedural request was thus that the oral proceedings scheduled for 28 May 2021 be postponed, the second request that oral proceedings be scheduled to hear the appellant on its new objections.
7. By a communication dated 27 May 2021 (but sent on 26 May 2021) the Enlarged Board informed the appellant that it had decided to reject the first procedural request and to allow the second procedural request, in that at least the admissibility of the four new objections would be discussed during the oral proceedings already scheduled for 28 May 2021.
8. During the oral proceedings held on 28 May 2021 the admissibility of the four new objections and the procedural requests 3-11 were discussed with the appellant in a non-public session. The decisions on the admissibility of the objections and on the procedural requests were announced during the public session.

Reasons

9. As a number of the procedural requests are related to the objections, the Enlarged Board will deal with the objections first. For the details of the objections as

given by the appellant, reference is made to its letter of 24 May 2021, accessible in the public part of the file.

Legal framework for the admissibility of an objection under Article 24 EPC

10. Objections under Article 24 EPC have to be decided upon by a panel in which the members objected to are replaced by their alternates (see Article 24(4), last sentence, EPC). However, according to the case law of the Boards of Appeal and the Enlarged Board, the admissibility of an objection shall be considered by the panel in the original composition, that is with participation of the members objected to. See in this regard Case Law of the Boards of Appeal, 9th edition 2019, Ch. III. J.3.1 and the decisions cited therein.
11. Article 24(3) EPC, second sentence, provides: "An objection shall not be admissible if, while being aware of a reason for objection, the party has taken a procedural step." The Enlarged Board regards the filing of an objection as the taking of a procedural step within the meaning of Article 24(3) EPC. It is clear that filing an objection is not a mere formality, as it is the very purpose of an objection to initiate a procedure under Article 24(4) EPC. This implies that any subsequently filed objection under Article 24 EPC cannot be admitted if it is based on a reason of which the party was aware before the filing date of the first objection.
12. In the case law of the Boards of Appeal it has also been held that an objection has to be reasoned and

substantiated. According to R 12/09 this requirement means that it has to be ascertained that the minimum standard for objective reasoning is met, and not whether that reasoning is also persuasive (Reasons, point 2). In this decision reference was made to decision T 1028/96 (OJ EPO 2000, 475), in particular the following passage:

"It is true that Article 24(3) EPC prescribes only two conditions for admissibility ("An objection shall not be admissible if, while being aware of a reason for objection, the party has taken a procedural step" and "No objection may be based upon the nationality of members") so that the above threshold could easily be crossed over by a party calling the composition of the board into question. However, even if it is not expressly stated in Article 24(3) EPC, the EPC requires, as a general rule, that objections be reasoned, i.e. indicates facts and arguments which are alleged to support such objection. From this requirement it follows, firstly, that an objection based on purely subjective unreasonable doubts which exist only in the mind of the objecting party should be rejected as inadmissible. It also follows that if facts and arguments filed cannot support the objection of suspected partiality raised, the objection is likewise inadmissible."

13. The Enlarged Board in its present composition will apply the above-mentioned standards in the evaluation of the admissibility of the objections.

Objection 1

In accordance with Article 24(3) EPC regular members of panel G. Eliason, and A. Ritzka are objected to as suspected of partiality (...).

14. This objection is against the two members who were already objected to in the first round of objections, Mr. G. Eliasson and Ms. A. Ritzka, because of their membership of the Presidium of the Boards of Appeal. This initial objection was considered not to be justified in the first interlocutory decision of 17 May 2021. The appellant now argues that the reasons in the first interlocutory decision concerning the issue of suspected partiality for a further member of the Enlarged Board, brought new information to light with relevance for the two members concerned. With respect to the further member, it was considered in that decision that the participation in a working group to prepare a proposal for Article 15a RPBA and the presentation of such a proposal during a meeting with representatives of users, could give rise to a concern of partiality. The appellant states that it has "reason to believe" that Mr. Eliasson and Ms. Ritzka may also have been present during that meeting and may have been involved in presenting the proposal. However, it has further stated that the information whether this was indeed the case is in the hands of the Enlarged Board, and it therefore asked to be informed about the membership of the working group and the role of the two members concerned. It was also requested to hear a further member of the Enlarged Board, who was a member in the original composition in the present case, as a witness.

15. The Enlarged Board is of the view that the objection is based on a different ground than the initial objection. It is not based on their membership of the Presidium of the Boards of Appeal and a possible positive opinion on the proposal for Article 15a RPBA, but on their possible participation in a meeting with user representatives and their possible role in drafting and presenting the proposal. As the appellant claims that the objection is based on information that only became available in the decision of 17 May 2021, the Enlarged Board accepts that it was not aware of this ground at the date of filing the first objection on 27 April 2021.
16. The Enlarged Board finds, however, that this objection does not comply with the minimum standard for an objective reasoning and substantiation. It is not based on facts ("we have reason to believe...") and the arguments are based on speculation. It presents itself to the Enlarged Board as an attempt to apply the ground for exclusion of the further member in the first interlocutory decision to the two members concerned, on the basis of possible facts on which the Enlarged Board would have to provide information. The appellant has argued that as the possibly relevant information is in the hands of the Enlarged Board, it is up to the Enlarged Board to provide that information to the appellant. The Enlarged Board does not agree. It is for the party who files an objection to substantiate it with relevant facts and arguments. With respect to information that is known to the Enlarged Board but not to the party, Article 4(1) of the RPEBA applies: "If the Board has knowledge of a possible reason for

exclusion or objection which does not originate from a member himself or from any party to the proceedings, then the procedure of Article 24, paragraph 4, EPC shall be applied." The Enlarged Board notes that in the first interlocutory decision with respect to the two members concerned the following was stated: "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." (see point 23). This means that, in knowledge of the information available to it, including the information received under Article 24(2) EPC, the Enlarged Board concluded that there was no reason to replace the members concerned. The Enlarged Board sees no basis for the appellant's request for further investigation in search of information yet unknown to the Enlarged Board that may be used by the appellant to substantiate its objection. Consequently, the Enlarged Board sees no reason to revisit this issue.

17. It is also noted that no facts were mentioned that would support that the objections are specific to the persons objected to (here members A. Ritzka and G. Eliasson). On the face of it, the objections could be seen to apply to any Board Member who takes part in internal discussions or meetings with stakeholders. It is questionable if such a general und unspecified objection can be seen as an objection of partiality within the meaning of Article 24 EPC, as explained in more detail below under objection 2. Merely limiting the objection to certain members is not sufficient to make the objection reasoned with respect to the members concerned, and cannot plausibly establish that the objection is indeed person-specific.

18. For these reasons objection 1 is not admissible.

Objection 2

In accordance with Article 24(3) EPC the regular members of the panel F. Blumer, T. Bokor, W. Van der Eijk, G. Eliason, and A. Ritzka may not take part in the present case as they have a personal interest (Art. 24(1) EPC) or alternatively suspected of partiality (...).

19. The Enlarged Board concludes from the reasons given for this objection that it solely concerns alleged personal interest (Article 24(1) EPC) with respect to the five internal members of the Enlarged Board. The reasons given on pages 17 and 18 of the appellant's letter of 24 May 2021 are not specifically stated to support a suspicion of partiality (Article 24(3) EPC). However, for the question of the admissibility, it does not appear to play a role whether these reasons are seeking to prove a personal interest under Article 24(1) EPC or a suspicion of partiality under Article 24(3) EPC.

20. The objection concerning personal interest is argued as follows. The personal interest is seen in the circumstance that the outcome of the referral will influence the way the internal members will work in the future: being able to hold oral proceedings by videoconference without consent of the parties or not. This might affect personal professional concerns of the members and their personal preferences for a certain way of working might play a role. Hence the members have "a very personal interest in the outcome of the proceedings and answering the referred question either

in the affirmative or negative". However, at least a reasonable, objective and informed person considering these circumstances would conclude he or she would have good reasons to doubt the impartiality of the members concerned.

21. The Enlarged Board sees several obstacles to admitting this objection. Firstly, this circumstance was known from the very start of these referral proceedings, but was not raised together with the first objections. It therefore does not comply with Article 24(3) EPC, second sentence, and is thus filed inadmissibly late. Secondly, what the actual preferences and concerns of the members in question would be has not been indicated by the appellant. So the bias, if any, and the direction of the bias is based on speculation and not on facts. Thirdly, this objection is so person unspecific and general that it would apply to all members of the Enlarged Board. Replacing the members objected to by other members would not be a measure that could possibly remove the concerns of the party, as the replacing members would be objectionable on the same ground (see the last paragraph on page 18 of the appellant's letter of 24 May 2021). In other words, Article 24 EPC cannot adequately alleviate such unspecific and speculative concerns of the appellant. This is a strong indication that the mechanism of Article 24 EPC is not meant for objections that are exclusively based on such general grounds. The Enlarged Board concludes that the objection is not one that can be validly made under Article 24(1) EPC as an objection on the basis of personal interest.

22. For these reasons objection 2 is not admissible.

Objection 3

In accordance with Article 24(3) EPC the regular members of the present panel according to the Order of 20 May 2021 who already belonged to the panel of the EBoA according to the Order of 17 March 2021; W. Van der Eijk, G. Eliasson, and A. Ritzka are objected to as suspected of partiality (...).

23. This objection is against the members who already participated in the original composition of the Enlarged Board before the Chairman was replaced. It is based on the argument that, because it was held in the first interlocutory decision that the Chairman and a further member could be suspected of partiality, the members that participated in the panel with them would be "infected" by their biased views on the referral and therefore the suspicion of partiality also applies to them. According to the appellant, the recomposition of the Enlarged Board took place only five working days before the scheduled oral proceedings and thus during most time of the proceedings the finally replaced Chairman and member of the panel participated in the discussions of the referral in the Enlarged Board.

24. The Enlarged Board considers that this objection is also filed inadmissibly late. By the time of the first objection on 27 April 2021 the referral proceedings were already pending for more than a month. Following the objection and the decision to declare it admissible the panel was recomposed by order of 3 May 2021. Thus, contrary to the appellant's allegation, the Chairman and the further member only participated until 3 May 2021. The risk of "infection" existed therefore mainly

before the filing of the first objection and the objection based on this circumstance could and should thus have been filed at that time. The appellant has argued that the risk of influencing had only become an issue after the Enlarged Board decided that the Chairman and the further member could be suspected of partiality. That argument is, however, not convincing because this decision was largely based on facts and arguments presented by the appellant itself in its first objection. It is not credible that the risk of influencing other members only became a concern after the Enlarged Board agreed with the appellant that its objection against the Chairman was justified.

25. Furthermore, the objection is merely based on the chronology of the procedural events, not on specifics of discussions that may have taken place between the members of Enlarged Board. Whether there has been any discussion on the merits of the case before 3 May 2021 and if any, in what way the Chairman and the other member have expressed themselves, has not been indicated by the appellant. Any discussion on the case would normally have taken place with the entire panel, including the external members, who are however not objected to by the appellant.

26. For these reasons objection 3 is not admissible.

Objection 4

In accordance with Article 24(3) EPC regular members of panel F. Blumer, T. Bokor, W. Van der Eijk, G. Eliason, and A. Ritzka are objected to as suspected of partiality (...).

27. This objection is based on the institutional provisions governing the Boards of Appeal. The appellant in particular pointed to the fact that members of the Boards of Appeal and the Enlarged Board have to be re-appointed every five years and their re-appointment is *inter alia* dependent on a positive opinion from the President of the Boards of Appeal, who is also the Chairman of the Enlarged Board. This circumstance would give rise to a concern of partiality of these members because - as the Enlarged Board understands the argument - they would tend to decide on the referral in a way that would be agreeable to the Chairman in order not to jeopardize the positive opinion they need for their re-appointment.
28. This objection refers to the institutional framework of the Boards of Appeal as in force from 1 July 2016 and is thus based on facts and arguments that were publicly known from the very start of the referral case. The objection could and should therefore have been filed already at the time of filing the first objection at the latest. Filing the objection only on 24 May 2021 is inadmissibly late.
29. Another admissibility problem is that this objection is also not person-specific and very general. Replacement of the members objected to would not address the concerns of the appellant as the alleged bias would apply to all internal members of the Enlarged Board and the Boards of Appeal for the same reason (see the last paragraph on page 23 of the appellant's letter of 24 May 2021). The mechanism of Article 24 EPC is not meant for objections that are exclusively based on such general, institutional concerns and is also not capable

of alleviating these concerns. For the same reasons as given above, such objections cannot be considered to be an objection of "suspected partiality" (or possibly a "personal interest") in the sense of Article 24 EPC. In effect, the use of Article 24 EPC for the institutional concerns expressed by the appellant, when taken to the extreme, could potentially lead to a complete paralysis of the present proceedings.

30. For these reasons objection 4 is inadmissible.

31. It results from the above that the objections 1-4 have to be rejected as inadmissible.

Procedural Requests 1-11

32. Requests 1 and 2 were addressed in the communication of 27 May 2021 (see above points 6-8).

33. With requests 3-6 the appellant requests to be provided with information concerning Mr. I. Beckedorf, Mr. G. Eliasson, Ms. Ritzka and the "Working group on VICO provision in RP[B]A". This information, so the Enlarged Board understands, would be relevant for the appellant in the context of his further (potential) objections against Mr. Eliasson and Ms. Ritzka. Since these objections have been rejected as inadmissible, procedural requests 3-6 have become moot.

34. With procedural requests 7 and 8 the appellant requests to change the composition of the Enlarged Board in this case. The appellant alleges that when recomposing the panel to deal with its first objection and again after the decision to replace the Chairman and a further

member, Article 2(2) and 2(3) Business distribution scheme have not been applied correctly and the Enlarged Board is therefore not correctly composed. As a result the right of the appellant to have its case heard by lawfully designated judges and its right to be heard have been violated. This is a substantial procedural violation.

35. The Enlarged Board notes that this request is not made under Article 24 EPC, nor is it indicated under what other provision it is made. The question arises whether under the provisions of the EPC the present panel of the Enlarged Board has a competence to replace one or more of its members, other than by the mechanism of Article 24 EPC. The Enlarged Board is unable to see such a competence in the provisions of the EPC or the ancillary regulations. According to the RPEBA the composition of the panel to deal with a particular case under Article 112 EPC is determined by the Chairman of the Enlarged Board (see Article 2(2) RPEBA). Changes to the composition of the panel are regulated in Article 2 of the Business distribution scheme of the Enlarged Board. The provisions of this article do not indicate a competence for a panel as composed by the Chairman to change its own composition. Only the Chairman is given a role in changing a given composition of a panel.

36. It would appear that an incorrect application of the provisions of the Business distribution scheme should thus be corrected by the Chairman of the Enlarged Board and not by the panel as composed by him. For the reason of lack of competence the Enlarged Board as presently composed refrains from commenting on the alleged

incorrect application of Article 2(2) and 2(3) of the Business distribution scheme of the Enlarged Board.

37. Procedural request 9 relates to postponing the oral proceedings until the information requested in procedural requests 3-6 has been provided. These requests have been found to have become moot. As a consequence, request 9 is also moot.

38. Procedural request 11 is related to procedural requests 7 and 8, in that it asks to invite the public to file further amicus curiae concerning the composition of the panel. As explained above the present panel of the Enlarged Board is not competent to decide on requests 7 and 8 and in consequence also not competent to invite the public to file amicus curiae briefs.

Order

For the reasons above it is decided:

1. The objections 1-4 filed under Article 24 EPC with the appellant's letter of 24 May 2021 are rejected as inadmissible.
2. The procedural requests 3-11 filed with the appellant's letter of 24 May 2021 are rejected.

The Registrar:

The Chairman:



N. Michaleczek

F. Blumer

Decision electronically authenticated