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**Datasheet for the interlocutory decision
of 19 August 2024**

Case Number: R 0004/24

Appeal Number: T 0116/18 - 3.3.02

Application Number: 12002626.5

Publication Number: 2484209

IPC: A01N43/56, A01N51/00

Language of the proceedings: EN

Title of invention:
Insecticide compositions

Patent Proprietor:
Sumitomo Chemical Company, Limited

Opponent:
SYNGENTA LIMITED

Headword:
Exclusion and objection

Relevant legal provisions:
EPC Art. 24, 112
RPEBA Art. 2(6)

Keyword:

Partiality of chair (no); involvement of chair in G-decision leads to partiality in R case reviewing the decision applying the G-decision (no)

Decisions cited:

G 0001/21, G 0002/21



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Case Number: R 0004/24

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 19 August 2024

Petitioner:

(Opponent)

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Other party:

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Decision under review:

**Decision of the Technical Board of Appeal 3.3.02
of the European Patent Office of 28 July 2023.**

Composition of the Board:

Chairman

B. Müller

Members:

D. Rogers

K. Bengi-Akyürek

Summary of Facts and Submissions

- I. This case concerns the petition for review R 4/24 against the decision T 116/18 of board 3.3.02. During the appeal proceedings, board 3.3.02 made a referral under Article 112 EPC to the Enlarged Board of Appeal. This resulted in decision G 2/21 which was then applied by board 3.3.02 in arriving at decision T 116/18.
- II. The Chair of the Enlarged Board in G 2/21 was C. Josefsson.
- III. The composition of the Enlarged Board in R 4/24 was originally fixed as follows: Chair, C. Josefsson; Legally qualified member, D. Rogers; Technically qualified member, K. Bengi-Akyürek.
- IV. Thus, C. Josefsson was Chair in both cases G 2/21 and R 4/24.
- V. The petitioner raised an objection of suspected partiality under Article 24 EPC against C. Josefsson.
- VI. The petitioner's objection is based upon C. Josefsson's participation in decision G 2/21.
- VII. The petitioner acknowledges that C. Josefsson did not participate in decision T 116/18 and that he is not Chair of board 3.3.02. Nevertheless, the petitioner argues that decision G 2/21 and T 116/18 are:

"[...] inextricably related by virtue of Art. 112(3) EPC and well-known by the European patent community to be so.

We submit that it would be unfortunate, if not undesirable, for a member of the Enlarged Board who participated in the Enlarged Board decision now to participate in deciding whether or not that decision was implemented with fundamental procedural fairness in the decision under review."

- VIII. The petitioner further argues that the present case may fall under the "or for any other reason" clause of Article 24(2) EPC. C. Josefsson might feel that recusing himself under this provision might be appropriate.
- IX. The Enlarged Board in its original composition found the objection to be admissible. Thereupon, C. Josefsson appointed B. Müller as his alternate under Article 24(4) EPC as Chair of the panel dealing with R 4/24. The Enlarged Board in this altered composition now decides upon the objection of suspected partiality against C. Josefsson.
- X. The Enlarged Board in its composition according to Article 24(4) EPC invited the replaced Chair to make comments on the objection. C. Josefsson provided comments.

Reasons for the Decision

Legal principles concerning the application of Article 24 EPC

1. The following principles have been developed by the Enlarged Board and the Boards of Appeal for the application of Article 24 EPC (G 1/21, Reasons 1 and see also Case Law, Chapter III.J.1. "General principles"). Pursuant to Article 2(6), first sentence,

RPEBA, Article 24 EPC applies to proceedings under Article 112a EPC. These principles will also be applied by the Enlarged Board in its current composition:

- 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;
- 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;
- 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;
- the right of parties to a fair trial by an independent and impartial tribunal is a fundamental legal right, as also recognised 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 Rights Convention;

- 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;
- 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;
- 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;
- 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.

The objection against C. Josefsson

2. The objection of the petitioner under Article 24(3) EPC is set out above in the facts and submissions section

(in points V to VIII) of this decision. The Enlarged Board in its current composition under Article 24(4) EPC finds this objection unconvincing.

3. C. Josefsson did not participate in the decision that is the subject of the petition for review. Therefore, he is not excluded under Article 2(6), second sentence, RPEBA, from acting as Chair in case R 4/24. As regards C. Josefsson's participation in G 2/21, it is true that, pursuant to Article 112(3) EPC, this decision was binding for the decision under review. A decision by the Enlarged Board under Article 112 EPC and the following final decision by the referring board, however, are separate decisions. Under Article 112 EPC, the Enlarged Board of Appeal in "G"-cases answers questions of law. It has no power in respect of and must refrain from deciding the underlying case. Rather, the application of the law in question to the facts of the appeal case rests exclusively with the competent board of appeal. Against this background, the Enlarged Board is of the view that participating in decision G 2/21 does not exclude C. Josefsson from taking part in case R 4/24, reviewing the final decision in the referring case T 116/18. Moreover, the Enlarged Board sees no other reasons, whether or not mentioned in Article 24(1) EPC, for excluding C. Josefsson from case R 4/24.

4. The petitioner's argument based on the "or for any other reason" clause of Article 24(2) EPC is also not convincing. Article 24(2) EPC provides for a member themselves to put forward a reason for their exclusion. C. Josefsson has not put forward any such reason, but, rather, in his comments under Article 24(4) EPC (see above, point X), was of the view that there was no such reason.

5. In conclusion, the Enlarged Board finds that the objection against C. Josefsson is not justified and that he can continue to participate in case R 4/24 as Chair.

Order

For these reasons it is decided that:

The objection under Article 24(3) EPC against C. Josefsson is rejected.

The Registrar:

The Chairman:



C. Eickhoff

B. Müller

Decision electronically authenticated