

The Enlarged Board was not convinced by the arguments against X and Y, both members of the Presidium of the Boards of Appeal. It noted that the proposals for amending the RPBA 2020 had been discussed during a meeting of the Presidium, but that there did not appear to have been a vote on a negative or positive opinion. Their role in an advisory body could not be qualified as a direct involvement in the passage of legislation as was the case for the Chair. In his capacity as member and task coordinator, Z was involved in the drafting of a proposal for Art. 15a RPBA 2020. Unlike the Chairman, Z did not play a formal role in the decision making process leading to the adoption and approval of Art. 15a RPBA 2020. However, the Enlarged Board found that 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 had been actively involved in the preparation of a proposal that was not compatible with Art. 116 EPC. The Enlarged Board thus decided that the Chairman and Z should be replaced. It rejected the objection under Art. 24(3) EPC against X and Y.

6.1.3 Previous expressions of opinion on the legal issues to be decided

In G 3/08 of 16 October 2009 the Enlarged Board noted that, according to established case law of the boards of appeal, of the Enlarged Board of Appeal and also of national courts of member states, the mere fact that a board member had expressed a view on the legal issue to be decided on a previous occasion, be it in a prior decision or in literature, be it in a prior position in the EPO or as an expert for external political institutions, could not lead to doubts as to impartiality.

6.2. Petition for review proceedings under Article 112a EPC

This chapter concerns partiality objections raised in petition for review proceedings against members of the Enlarged Board themselves. For decisions of the Enlarged Board on the alleged breach of Art. 24 EPC in appeal proceedings, see chapter V.B.4.1. "Article 112a(2)(a) EPC – alleged breach of Article 24 EPC". As to the replacement of board members after a petition for review has been held allowable, see chapter V.B.3.13.2 "Replacement of board members".

6.2.1 Previous participation in cases as members of the boards of appeal

In R 12/09 of 3 December 2009 (see also R 2/14 of 17 February 2015) the petitioner had objected to the Enlarged Board members, alleging that they inevitably had a personal interest owing to their capacity as members of a technical board or the Legal Board of Appeal. The board observed that the legislator had consciously decided to allocate the task of hearing petitions for review to the Enlarged Board as a pre-existing body with appointed members and, when doing so, had been fully aware that those members were for the most part also experienced members of technical boards or the Legal Board of Appeal. The legislator could thus only have intended that those members also be deployed in procedures under Art. 112a EPC. The legislator had demonstrated its intention that these members' dual function should not, by itself, constitute a reason for objecting to or excluding them when it came to performing this task. The objection was thus dismissed as inadmissible.