

6.2.2 Article 24(3) EPC objection under Article 112a(2)(a) EPC

In R 17/09 the petitioner raised an objection under Art. 112a(2)(a) and 24(3) EPC on the basis of a suspicion that the board's actions and decisions could be linked to the interests of multinational companies opposed to the petitioner's patent application. The only evidence relied on for any such link was the board's use of the term "man in the street" of the petitioner. The Enlarged Board found that in English this term had no pejorative associations but was commonly used to describe an average citizen. It could see no support for the allegation that members of the board were influenced in their decision by any bias against the petitioner.

In T 49/15 respondent 4 argued that the reasons for an objection referred to in Art. 24(3) EPC, and so the suspected partiality too, were relevant for the purposes of Art. 112a(2)(a) EPC, asserting in support of its position that the Enlarged Board had cited them in R 17/09. The board found that the respondent had overlooked that the Enlarged Board had rejected the petition for review under Art. 112a(2)(a) EPC in that case as clearly unallowable. That, in doing so, it had chosen to look at the merits of the objection under Art. 24(3) EPC did not mean that the reference in Art. 112a(2)(a) EPC to Art. 24(1) EPC could be interpreted as including Art. 24(3) EPC too.

In the decision under review in R 3/16, the petitioner argued that once an objection based on Art. 24(3) EPC had been raised, the member(s) objected to could not take part in the decision, whatsoever, be it on the admissibility or on the merits of the objection. The Enlarged Board noted that Art. 112a(2)(a) EPC foresaw the situation where a member of the board had taken part in the decision despite being excluded pursuant to a decision under Art. 24(4) EPC or in breach of Art. 24(1) EPC. The case in hand was not concerned with those two grounds since the members had not been excluded and no personal interest had been alleged. Therefore, by a mere application of the principles developed by the established case law of the Enlarged Board under Art. 112a EPC, the Enlarged Board held that if the alleged unlawfulness of the composition was not the consequence of a violation of the right to be heard or an omission of a request, this ground (an objection based on Art. 24(3) EPC) appeared to fall outside the scope of a review, since inter alia it was not on the list of grounds under Art. 112a EPC.

6.2.3 Expressions of preliminary opinions

In R 2/12 of 26 September 2012 the objection of suspected partiality was derived exclusively from the communication by which the petitioner was informed of the Enlarged Board's provisional opinion on the petition. The Enlarged Board found it would be incompatible with an objective assessment of a case and with the principle of a fair trial in inter partes proceedings, if a board member could be 'deposed' on the ground that they did not opine in favour of a particular party right from the beginning of the proceedings. See also in this chapter III.J.5.3.1.