

reasonable, suspicion of partiality against a member of the Enlarged Board of Appeal. Moreover, if all members of the Enlarged Board of Appeal having once taken part in a decision expressing a view on a point of law which was then referred to the Enlarged Board were to be excluded from taking part in that referral, it could become impossible to allocate the number of Enlarged Board members needed to conduct the case. The Enlarged Board of Appeal noted that the situation could be viewed differently if there were deficiencies in the view expressed to such an extent that there was reason to believe that they were the result of a preconceived attitude. It would also have been different if a board member had pronounced on a matter to be decided with his or her participation in such outspoken, extreme or unbalanced terms, be it in the course of or outside the proceedings, that his or her ability to consider the arguments put forward by the parties with an open mind and without a preconceived attitude and to bring an objective judgment to bear on the issues before him or her, could be doubted.

#### 6.1.2 Previous involvement in the preparation of legislation

In G. 1/21 of 17 May 2021 the Chairman of the Enlarged Board and members X and Y of the composition determined by the Chairman to decide on the referral G. 1/21 were objected to on the basis of suspected partiality (Art. 24(3) EPC), based on the Chairman's involvement, in his function of President of the BoA, in the preparation and enactment of Art. 15a RPBA 2020, which dealt with the same topic as the referral. A further member of the panel determined by the Chairman to deal with G. 1/21 (Z) asked the Enlarged Board in a composition under Art. 24(4) EPC to decide on his continued participation in the referral G. 1/21 on the basis that he was also involved in the preparation of Art. 15a RPBA 2020.

Evaluating the objections, the Enlarged Board explained that the fact that a judge had expressed an opinion on a legal issue that was to be decided upon in a case was not in itself and not always a ground for suspicion of partiality (see G 3/08 and G 2/08). The argument that the President BoA had no reservation on the compatibility of oral proceedings in the form of videoconference without consent of the parties with Art. 116 EPC (the basis for the referral question) was therefore in itself not sufficient as a basis for suspicion of partiality. The Enlarged Board noted, however, that in the current case the issue was not so much about the expression of an opinion on a legal issue but was that the Chairman of the Enlarged Board had in his capacity as President BoA performed legislative and managerial acts based on the view that oral proceedings by videoconference without consent of all the parties were compatible with Art. 116 EPC. The Enlarged Board concluded that the concern that the Chairman might have a bias towards answering the referred question in the positive in order to avoid the outcome that his own acts were not in compliance with Art. 116 EPC was therefore objectively justified. He was involved in all stages of the preparation of the legislation, which was at least indirectly under review in G. 1/21, his involvement was direct and decisive; he initiated the proposal, presented it for adoption and approval by the competent organs; he steered the practice of the boards of appeal in this direction and communicated this practice to the public. The reasoning of the ECHR in *McGonnell v. the United Kingdom* (8 February 2000 - 28488/95), that a direct involvement in the passage of legislation was likely to be sufficient to cast doubt on partiality, therefore seemed to apply a fortiori to the present case.