

5.3.4 Discretionary procedural decisions negatively affecting a party

In T 954/98 of 9 December 1999 the board held, with reference to T 843/91 of 17 March 1993 (OJ 1994, 818), that the mere taking of discretionary procedural steps which might disadvantage a particular party was not enough to justify exclusion, not even if the party interpreted those steps as expressing bias against it.

In T 190/03 (OJ 2006, 502; see also T 283/03, T 572/03 of 18 March 2005 and T 985/01 of 18 March 2005) the board held that not admitting amended claims, regardless of whether the board had correctly used its power or discretion to do so, would not give rise to an objectively justified fear of partiality.

5.4. Comments of the board member concerned

Under Art. 3(2) RPBA 2020 (see also Art. 3(2) RPBA 2007, and for the Enlarged Board Art. 4(2) RPEBA) the member concerned is to be invited to present his comments as to whether there is a reason for exclusion or objection (as to the scope of Art. 3(2) RPBA 2003 and Art. 4(2) RPEBA, see T 985/01 of 18 March 2005).

In T 1938/09 of 2 October 2014 the appellant referred to R 19/12 of 25 April 2014 and objected to the chairman of the board, arguing he was a potential deputy for the Vice-President of the EPO Directorate-General 3 (VP3). The chairman had not provided details, as requested by the appellant, on whether he had deputised for VP3. The board acknowledged that there might be cases where a board would not be in a position to decide on the objection without having received the necessary information from the member objected to. However, in the case at hand the board deemed it irrelevant for the question of impartiality whether the chairman had deputised for VP3 and refused the partiality objection. The provision of the requested details would only have been necessary if the board in its composition at that time had considered that these details were relevant for the decision to be taken.

6. Suspected partiality of members of the Enlarged Board of Appeal

6.1. Referral proceedings under Article 112 EPC

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

In G 1/05 (OJ 2007, 362) a member of the Enlarged Board of Appeal was objected to because he had been the chairman of a technical board which had given a prior decision related to the question of law referred to the Enlarged Board. The Enlarged Board held that to the extent that the participation in a referral of a board member who had already dealt with the matter as a member of a board of appeal was not excluded by the relevant provisions (Art. 1(2) RPEBA and Art. 2(3) BDS of the Enlarged Board of Appeal), an objection of partiality could not be based on that very fact alone (see also G 2/08 of 15 June 2009 and R 12/09 of 3 December 2009). On the contrary, unless there were specific circumstances casting doubt on the member's ability to approach the parties' submissions with an open mind on a later occasion, there could not be any objectively justified, i.e.