

In T.281/03 of 30 March 2006 the board held that the correctness of the composition had to be decided on the basis of objective criteria, i.e. on the basis of the Rules of Procedure of the Boards of Appeal and the Business Distribution Scheme. There was no subjective element which would justify an analogous application of Art. 24(4) EPC, nor did it in its substitute composition see any gap in the law which might require an analogous application of Art. 24(4) EPC. On the contrary, if the composition of a board had to be checked by a second composition, the operation of a board could be paralysed by a sequence of mere objections to its composition.

In T.355/13 the board found inadmissible the appellant's mere allegation that as a result of changes to its composition, the board had formed a special tribunal ("Spezialtribunal") to the appellant's disadvantage, and that the "real grounds" for the changes to the composition had not been communicated by the board. The board had explained in a communication to the parties that the changes to the board's composition were due to changes to the business distribution scheme, in particular it was pointed out that the former technically qualified member had been transferred to another board and the former legally qualified member was no longer a member of the boards of appeal. The appellant had nevertheless pursued its objection without producing any evidential basis supporting the allegation.

#### **1.5. "Subjective" and "objective" test, presumption of impartiality**

In T.190/03 (OJ 2006, 502; see also R.8/13 of 20 March 2015; R.19/12 of 25 April 2014; T.283/03; T.572/03 of 18 March 2005; T.1193/02; T.1021/01 of 18 March 2005; T.281/03 of 18 March 2005 and T.281/03 of 30 March 2006) the board held that partiality had to be determined on the basis of the following **two tests**: firstly, a **"subjective" test** requiring proof of actual partiality of the member concerned; and secondly, an **"objective" test** according to which the deciding board judged whether the circumstances of the case gave rise to an objectively justified fear of partiality. The board stated that actual partiality was an internal characteristic of the member himself and its presence went against the principle of a fair trial. However, suspicion and appearances were not enough to show actual partiality. It was a fundamental duty of a board member acting in a judicial capacity to take decisions objectively and not be swayed by personal interest or other peoples' comments or actions. Thus, the board held that a board member's personal impartiality was to be presumed until there was proof to the contrary (see also G.2/08 of 15 June 2009 and R.19/12 of 25 April 2014).

On the other hand, the board stated that the appearance of partiality involved external aspects and reflected, regardless of whether the member was actually biased or not, the confidence that the board inspired in the public; "Justice must not only be done; it must be seen to be done" (see also T.900/02, T.2291/08 and R.8/13 of 20 March 2015). The board held that this aspect of partiality did not need to be proved in the same way as actual partiality, but rather it had to be established whether the circumstances gave rise to an objectively justified fear of partiality (objective element). This essentially corresponded to the "objective" and "reasonable" grounds identified in the case law of the EPO. The board stated that the above was in line with generally acknowledged procedural principles in the contracting states, e.g. the jurisprudence of the European Court of Human Rights (ECtHR).