

## 4. Suspected partiality of members of the departments of first instance

### 4.1. Competence to decide

According to the Enlarged Board of Appeal in G 5/91 (OJ 1992, 617) the practice that a partiality objection made at first instance is decided by the director of the department concerned cannot be considered illegal in view of the administrative character of the first-instance departments, which were subject to internal instructions by the President under Art. 10(2)(a) EPC (see also T 2509/11 and T 71/99). The Enlarged Board explained that under the EPC there was no legal basis for any separate appeal against an order of a director rejecting a partiality objection to a member of a department of first instance such as an opposition division. However, the composition of the opposition division could be challenged on appeal against the final or interlocutory decision of the division. If not all the members of an opposition division fulfilled the requirement of impartiality, there was a procedural violation which would normally render the decision void. The Enlarged Board of Appeal made it clear that it lay within the competence of the boards of appeal to decide whether this requirement had been fulfilled. This could also be seen in practice (cf. e.g. T 251/88, T 939/91, T 382/92, T 476/95, T 838/02, T 1349/10, T 568/17). Such consideration might take place of the boards' own motion or at the request of a party to the appeal proceedings.

In T 479/04 the board found that G 5/91 did not prohibit an opposition division from deciding itself on an allegation of partiality made against it. Moreover, it could not be inferred from G 5/91 that it was forbidden to decide on that matter together with the decision on the substance. The board concluded that the opposition division had not committed any procedural error by deciding itself on the allegation of partiality raised against it in the contested decision (see also T 1647/15).

In T 2475/17 the board noted that the boards had held multiple times that the EPC did not offer any legal basis that would allow them to act as a substitute for the EPO management and order a change to the composition of the decision-making department of first instance. Since the composition of the department of first instance was the responsibility of the EPO President, or rather his or her representatives, and not the department itself, Art. 111(1) EPC could not justify such an approach. It took the view that in cases in which the board had found that the right to be heard had been violated a board had the power to order a change in the department of first instance's composition only if it had arrived at the conclusion that the composition had been the actual cause of the violation of the right to be heard and that the violation could only be remedied by changing the composition, i.e. particularly if there was reason to suspect that one or more members of the department of first instance were partial. The board noted that any such order by a board was limited to requiring that the composition be changed so that the right of the parties to fair and lawful proceedings could be ensured. The scope of the change or which member of the examining or opposition division was replaced by whom remained the responsibility of those in whose remit the matter fell.