

## 4.2. Remittal and rehearing of a case

In T 433/93 (OJ 1997, 509), the board noted in its headnote that following a substantial procedural violation in connection with a decision issued by a first instance department, at the request of a party, such decision has to be set aside. If a party has reasonable grounds to suspect that the same composition of opposition division would be tainted by the previous decision and therefore partial, at the request of that party the case should be reheard before a different composition of opposition division. The board considered that if the case were re-heard and re-decided by the same composition of opposition division, the members would first have to attempt to put out of their minds the result of their previous decision on the case. The board noted that the important point was not whether the file record showed any previous evidence of actual partiality by the members of the opposition division during the previous conduct of the case (see T 261/88 of 16 February 1993), or whether the present members of the opposition division would in fact be unprejudiced or impartial if they re-heard the case, but whether a party would have reasonable ground to suspect that they would not receive a fair hearing if the case was re-heard before the same composition of opposition division (see also T 628/95 of 13 May 1996, and T 611/01). In T 2362/08 the board also ordered a new composition of the opposition division after remittal, stating that after procedural irregularities in the first proceedings it was fundamental that the parties had no ground to suspect that they had not received a fair hearing in the further proceedings, as they might well do if the same opposition division were again to revoke the patent even after conducting the proceedings in an impeccable way.

In T 611/01 the board found a substantial procedural violation had occurred and remitted the case to the department of first instance for further prosecution to be conducted by a differently composed examining division (three new members). The board stated that this was typically done when there was a question of possible bias against a party. Although that was not the case here, a differently composed division could also be appropriate when a party had reasonable grounds for feeling it might not otherwise have a fair re-hearing (see T 433/93, OJ 1997, 509; see also T 628/95 of 13 May 1996). Even if the appellant had not requested a different composition the board stated there should not be any ground for dissatisfaction with the conduct of the further proceedings. This could be the case if the same examining division, even after impeccably conducted proceedings, refused the application again.

In T 1647/15 the board observed that whereas under normal circumstances a potential suspicion of bias concerning a member of an opposition division might be a strong indication for a remittal, this was not the case here where this suspicion did not affect the whole process of decision-making but only arose out of an uncontrolled outburst at the end of exceptionally long and intense oral proceedings. The contested decision was based on reasons which were extensively discussed in oral proceedings before said incident occurred. The board doubted that a remittal to the department of first instance, even in a different composition, would serve the interests of justice, as the remittal would cause an excessive delay in having the case finally decided. Accordingly, the board decided not to remit the case to the opposition division.