

3. Admissibility

According to Art. 24(3) EPC an objection on the ground of suspected partiality is not admissible if, while being aware of a reason for objection, the party has taken a procedural step. Nor may it be based on the nationality of members. Additionally, the boards have rejected objections as inadmissible because they were not reasoned or were a mere repetition of a previously rejected objection.

3.1. Competence of the board in its original composition

In T 1028/96 of 15 September 1999 (OJ 2000, 475) the board stated that, if an objection under Art. 24(1) or (3) EPC 1973 was made by a party, Art. 24(3), second sentence, EPC 1973 clearly required a preliminary examination of admissibility (see also R 12/09 of 3 December 2009 and T 355/13). The board stated that the purpose of the preliminary examination for admissibility was to determine whether the objection could go forward for substantive examination and decision. If the objection was not admissible, the board may not examine whether it was allowable or well founded. On the other hand, if, from the point of view of the board in its original composition, the objection was admissible, then the procedure under Art. 24(4) EPC applied. Thus, the issue of admissibility before the former board was only relevant to the opening of the procedure under Art. 24(4) EPC and had no bearing on the future decision of the board nominated in accordance with Art. 24(4) EPC. Admissibility, which is a fundamental prerequisite for a decision on the substance, must be examined by the board of its own motion (see also T 289/91).

3.2. Obligation to raise the objection immediately

In G 5/91 (OJ 1992, 617) the Enlarged Board of Appeal stated that, although Art. 24(3) EPC 1973 was only applicable to appeal proceedings, an objection on the ground of suspected partiality could also be disregarded at first instance if it had not been raised immediately after the party had become aware of the reason for the objection (or if it was based on nationality). The system might otherwise be open to abuse.

In T 568/17 the board, with reference to G 1/91, held that if the appellant in the case in hand had wished to challenge the composition of the examining division because of the examiner's earlier actions during the international phase, it should have done so in the European regional phase when it became aware of that composition.

In T 49/11 after having received the summons which had made the parties aware of the composition of the board, the respondent filed two letters with the board before raising the partiality objection. In the first letter, the respondent had expressed its intention to speak German at the oral proceedings. The board held that such a statement constituted a procedural step within the meaning of Art. 24(3), second sentence, EPC, because it was a formal notification under R. 4(1) EPC. The partiality objection was therefore rejected as inadmissible. After analysing the text of Art. 24(3), second sentence, EPC in the three official languages (Art. 177(1) EPC), the difference between Art. 24 EPC 2000 and Art. 24 EPC 1973, and the transitional provisions of the EPC 2000, the board stated that it would have come to the same result under the old and the new text of Art. 24(3) EPC.