

G 3/19: A need to improve the perception of independence of the EPO Boards of Appeal?

Mike Snodin (Fellow) discusses questions regarding the perceived independence of the Boards of Appeal (and the rule of law at the EPO) that have come into sharp focus in the light of G 3/19, and why these point to a need for a revision of the EPC to improve the perception of independence of the Boards.

On 14 May 2020, the EPO's Enlarged Board of Appeal (EBA) issued its opinion in case G 3/19, thereby, at least as far as the EPO is concerned, bringing to a close a long-running controversy regarding the interpretation of Article 53(b) EPC. In view of the politically charged background to G 3/19, it was perhaps always to be expected that the EBA's opinion on the questions referred would provoke yet more controversy. However, few will have predicted that, by rewriting the referral and adopting views expressed by the European Commission, Council and Parliament, representatives of some EPC Member States and the President of the EPO, the EBA would appear to rubber-stamp a rule crafted with the express intention of overturning the EBA's prior interpretation of the EPC.

The most striking outcome of the EBA's opinion in G 3/19 is an apparent circumvention of a provision of the EPC (Article 164) that establishes the supremacy of the Convention over the Implementing Regulations. This seems to open the way to the Administrative Council (AC) making wholesale changes to the EPC itself without the need to call a Diplomatic Conference, contrary to the requirements of the Convention.

Important gaps and flaws in the EBA's opinion in G 3/19 are discussed in detail in the following article, as are aspects of the EBA's opinion that give rise to problems regarding both the perception of independence of the EBA and the rule of law at the EPO. However, in this article the author discusses why structural weaknesses in the current set-up of the Boards of Appeal of the EPO mean that concerns regarding the perception of independence of the Boards can arise in cases, such as G 3/19, in which the actions of, including written statements submitted by,

representatives of Contracting States to the EPC leave the EBA in no doubt as to the outcome desired by those representatives. This article also points to changes that could (and, in the author's view, should) be made to the way in which the Boards of Appeal are set up to bolster their actual and perceived independence following on from past proposals for improvement.

Prior attempts to reform the establishment of the Boards of Appeal

In 2003, the EPO's Administrative Council (AC) considered and effectively approved¹ plans to lay the groundwork for a revision of the EPC that would have established the Boards of Appeal of the EPO as a third organ of the European Patent Organisation (to be known as the "European Court of Patent Appeals"), thereby providing the Boards with organisational autonomy. Whilst proposals for revising the EPC were duly prepared in 2004,² plans for the Diplomatic Conference required to transpose those proposals into law were postponed,³ and then dropped, apparently in view of a lack of progress with contemporaneous plans for a Community Patent⁴.

Key proposals from 2004 were capable of vastly improving the independence of the Boards of Appeal. For example, in addition to reconstituting the Boards of Appeal as a third organ of the EPO (that would have been financially and organisationally independent of the Office), one option for revising the EPC would have seen ordinary members of the Boards appointed for a non-renewable (e.g. life) term. Those key proposals were not picked up when the issue of reform of the Boards of Appeal was revisited in 2016. Thus, despite reforms implemented in 2016⁵ that, amongst other things, reorganised the Boards as an

administrative division of the Office and created the position of the President of the Boards of Appeal, it remains the case that much more could be done to improve the perception of independence of the Boards of Appeal. Indeed, as discussed below, it is arguable that at least other recent reforms (changes in 2014, 2016 and 2017 to the EPO's Service Regulations) have had the effect of *reducing* the apparent independence of the Boards.

Against this background, it was perhaps to be expected that the subject of the independence of the Boards of Appeal would eventually resurface as a topic for discussion. However, in G 3/19, it did so as the result of unprecedented developments, namely adoption by the President of the EPO and the AC of views on the interpretation of the EPC that were in conflict with a ruling of a Board of Appeal (in T 1063/18) and an opinion of the EBA (in G 2/12 and G 2/13).

As will be discussed in more detail below, weaknesses in the current set-up of the Boards mean that a divergence of views between the EPO's "executive" and "judiciary" on the interpretation of the EPC can, especially in cases where the EBA is in no doubt as to the outcome desired by the "executive", give rise to an *objectively justifiable* fear of partiality.

Independence of the Boards of Appeal: background

Appointment and reappointment

The AC, whose members are representatives appointed by the national patent offices, is responsible for appointing and, more importantly, reappointing members of the Boards of Appeal. Absent reappointment, it appears that a Board Member recruited from the EPO will be assigned to a post within the Office,⁶ whereas an external appointee's employment with the EPO will cease.

In 2014, the AC amended the EPO's Service Regulations⁷ to include an explicit link between the reappointment of a member of the Boards of Appeal and the "performance" of that member.

Any performance review must be "conducted in a fair and objective manner".⁸ Together with a reasoned opinion on reappointment, it must also be submitted to the AC by the President of the Boards of Appeal.⁹ Further, members of the Boards can challenge appraisal reports with which they disagree.¹⁰ Nevertheless, the insecurity of tenure resulting from such reviews is potentially problematic.¹¹ This is not least because, whilst the criteria against which performance will be measured are set by the President of the Boards of Appeal (in consultation with the Boards of Appeal Committee), those criteria have not been made public.

Post-service employment

Under Article 20a of the EPO's Service Regulations, as amended in 2016 and 2017,¹² a member of the Boards of Appeal wishing to take up a new position within two years of leaving their service at the EPO is obliged to inform the AC of their intentions. If the AC establishes that the new position is "related" to work carried out by the member during the last three years of his service and "could

lead to a conflict with the integrity of the EPO's appeal system", they may either forbid him from taking up the new position or provide approval subject to any conditions that they see fit.

This provision is potentially problematic on the grounds that the AC appears to have a wide discretion with regard to their decision as to whether or not a member may be permitted to take up a new position and, if he is so permitted, the conditions on which he can take up that position. Again, the criteria for making such decisions have not been made public.

Disciplinary matters and allegations of misconduct

Article 23(1) EPC provides the AC with authority to discipline and, if necessary, remove from office any member of the Boards of Appeal. By virtue of Rule 12a(2) EPC, the AC has the same authority with respect to the President of the Boards of Appeal.

The 2017 amendments to the Service Regulations enhanced the disciplinary powers of the AC by giving it the power to suspend, on half pay and for a period of up to two years¹³ (or more, in "exceptional circumstances"), any member of the Boards of Appeal charged with "serious misconduct, whether through a failure to honour his professional obligations or through an infringement of the applicable law".

In addition to this, the EPO's executive branch is authorised to investigate alleged misconduct by members of the Boards of Appeal. Thus, the President of the EPO has the power to initiate and oversee investigations into misconduct, and therefore to create the conditions under which the AC could invoke its powers to immediately suspend (for up to two years or more) a member of the Boards of Appeal.¹⁴

Whilst the Service Regulations define misconduct in very wide and general terms,¹⁵ there is no clear definition of what constitutes *serious* misconduct.¹⁶ Again, this is potentially problematic on the grounds of the wide discretion afforded to the EPO's executive branch with regard to their determination of whether serious misconduct has occurred. Concerns can also arise in connection with the manner in which the EPO's executive branch conducts its investigations¹⁷, the limited and time-consuming avenues for appeal against decisions to impose disciplinary measures¹⁸ and the possibility for members of the executive branch to rely upon unproven allegations (including, at least in Germany, allegations of defamation¹⁹) in order to launch *criminal* proceedings against a member of the Boards of Appeal, which proceedings would qualify under Article 104(3) of the Service Regulations as "exceptional circumstances" that could justify a period of suspension exceeding two years.

Subjective and objective tests for partiality

In G 5/91, the EBA indicated that a very strict observance of the requirement of impartiality was required in proceedings before the Boards of Appeal and the EBA, based upon the general principle of law that "nobody should decide a case in respect of which a party may have good reasons to assume partiality".

The case law of the Boards of Appeal²⁰ of the EPO recognises two different tests for assessing allegations of partiality. The first is a “subjective” test, which involves establishing whether there is proof of actual partiality of the member concerned. The second is an “objective” test, which instead focuses upon whether the circumstances of the case give rise to an objectively justified fear of partiality.

The “objective” test is based upon the *appearance* of partiality, the requirement for public confidence in decisions of the Boards of Appeal and the old adage that “Justice must not only be done; it must be seen to be done”. Purely subjective impressions or vague suspicions are not enough to support an allegation of partiality on this ground. However, at least one Board of Appeal has upheld an objection raised by a party under Article 24(3) EPC in circumstances where a reasonable onlooker considering the circumstances of the case would conclude that the party might have good reasons to doubt the impartiality of the member objected to.²¹

Referrals to the EBA by the EPO President

Whilst a feature of the EPC since its inception, referrals to the EBA of questions from the President of the EPO are nevertheless an oddity. This is because such referrals essentially represent a request for the EPO’s “judiciary” to interpret the law in the situation where the head of the EPO’s executive branch, whilst not a party to the proceedings, has complete control over whether and how such referrals are initiated. For example, the President:

- determines both the points of law addressed in the referral and the manner in which they are framed; and
- can present arguments in favour of a particular interpretation.

Unusually, all parties whose (patent) rights might be affected by the EBA’s opinion are mere observers to the proceedings, and can present their views only through the filing of *amicus* briefs (a situation which is arguably contrary to the normal rule in judicial proceedings of *audi alterem partem*, i.e. the principle that both sides of the argument should be heard).

Because of these unique circumstances, public confidence in the outcome of referrals from the President of the EPO relies very heavily upon public confidence in the independence of the EBA. That is, not only must the EBA be independent of the EPO’s executive branch but it must also be perceived to be so.

The relevance of politics to G 3/19

The genesis of the referral in G 3/19 is an item discussed at the 159th meeting of the AC, which took place in Munich on 27 and 28 March 2019. On 29 March 2019, the EPO reported²² the outcome of the AC’s deliberations on that agenda item as follows.

“In the 159th meeting of the Administrative Council, the representatives of the 38 EPO Contracting States together

with the European Patent Office discussed the need to find a solution in the short term following the decision T 1063/18.

The Contracting States expressed their concerns with regard to the legal uncertainty caused by decision T 1063/18. **The President of the EPO expressed his view that a President’s referral of the case to the Enlarged Board of Appeal is justified and necessary.** The aim is to obtain an opinion from the Enlarged Board of Appeal on the patentability of plants exclusively obtained by essentially biological processes, hereby considering recent legal developments (interpretations and statements of the European Commission, the EU Council, European Parliament and EPO’s Administrative Council on the interpretation of the European Patent Convention and the EU Bio-Directive, all of them concluding that there should be no patentability in these cases).

The President’s proposal received broad and overwhelming support from almost all Contracting States. President António Campinos announced that the EPO will proceed swiftly to submit the referral. The EPO endeavours to restore legal certainty fully and speedily in the interest of the users of the European patent system and the general public” (emphasis added).

First of all it should be noted that, as the EPC is an independent treaty of states, three of the four bodies mentioned by the EPO in connection with “recent legal developments”, the European Commission, Council and Parliament, do not have any locus in relation to the EPC. Further, whilst the fourth body (the AC) does have certain powers to amend the EPC, those are limited by Articles 33 and 35(3) EPC²³ (the latter of which requires unanimity). In addition, while the AC has less restricted powers (3/4 majority) to amend the Implementing Regulations, the effects of doing so are expressly constrained by Article 164(2) EPC²⁴ (which provides that the terms of the Convention prevail over any terms of the Implementing Regulations).

Secondly, the EPO’s report made it clear that the overwhelming majority of the representatives to the AC²⁵ took the view that, contrary to the decision in T 1063/18:

1. the AC *was* competent to introduce Rule 28(2) EPC; and
2. that Rule changed the interpretation of Article 53(b) EPC.

Further, precisely the same views were reiterated by the President of the EPO (when referring questions to the EBA in G 3/19), and again in *amicus curiae* submitted:

- by, or on behalf of, ten Contracting States to the EPC (AT, BE, CZ, DE, DK, ES, FR, NL, PL and PT); and
- by the European Union²⁶ (which, at the time, was composed of 28 Member States, which States together represent a majority of the Contracting States to the EPC).

Does the “political” background affect the (perceived) independence of the EBA?

For the reasons outlined above, members of the Boards of Appeal are reliant upon the AC (and, to some extent, the President of the EPO) for their security of tenure. They may also require the AC’s permission to take up a new position of their choice after leaving the service of the EPO. It is arguable that these arrangements might, in certain circumstances, lead a reasonable onlooker to conclude that there are objective reasons to doubt the impartiality of the Boards of Appeal.

As also explained above, a referral to the EBA by the President of the EPO (under Article 112(1)(b) EPC) creates circumstances in which the perception of independence of the EBA from the EPO’s executive arm assumes heightened significance. In this context, and in view of their position of influence with regard to the security of tenure (and/or future employment options) of members of the EBA, the EPO President and the AC arguably bear a heavy responsibility to exercise restraint when expressing their views on the subject matter of the referral. This is because there can be no public confidence in the outcome of a referral if it is perceived that conclusions reached by the EBA are potentially the result of external pressure.

Curiously, the EPC does not appear to contain any safeguards in this respect. Article 112(1)(b) EPC could, in theory, be triggered by the President of the EPO simply stating that a ruling from the EBA is required in order to ensure uniform application of the law, or that a point of law of fundamental importance arises, in view of a perceived difference on a particular point of law between decisions given by two Boards of Appeal. However, the EPC does not explicitly forbid the President from going much further than that, by arguing for a particular interpretation of the EPC. It also does not explicitly forbid representatives to the AC from doing the same in *amicus* briefs. Indeed, the EBA has not raised any objections on the occasions when either (or both) of these things have happened.

The lack of protest from the EBA on this point could be based upon a presumption that the mere presentation of arguments, by the President of the EPO and/or representatives to the AC, in favour of particular answers cannot, on its own, give rise to an objective fear of partiality.

In any event, this point is likely academic in view of the 15 June 2009 interlocutory decision in G 2/08. In that case, the EBA drew a distinction between, on the one hand, grounds that may be raised *ex officio* according to Art. 24(1) EPC and, on the other, an objection of partiality, which is reserved to the parties. Thus, because there are no parties to the proceedings in connection with a referral under Article 112(1)(b) EPC, it is doubtful whether the EBA would entertain any objections under Article 24(3) EPC raised by third parties.

Regardless of whether objections raised by third parties are technically admissible, public confidence in the EBA’s rulings cannot be achieved if parties affected by those rulings can

point to evidence that justifies a fear of partiality with respect to members of the EBA.

The view of this author is that there are objectively justifiable grounds for concern in connection with G 3/19, namely public pronouncements that will have left the members of the EBA in no doubt as to the outcome desired by the AC and the President of the EPO (i.e. by the very body and individual empowered by the EPC to take decisions that may affect the security of tenure and/or future employment options of members of the EBA).

Because the “objective” test for partiality relies upon *appearances*, it is not necessary (for the purposes of that test) to establish whether members of the EBA actually felt pressured into reaching particular conclusions. Instead, what matters is the perception of the reasonable onlooker considering the circumstances of the case. Of course, the existence of evidence that arguably supports a fear of partiality is not the only factor capable of affecting the public’s perception of the independence of the EBA. Another very important factor will be the content of the EBA’s opinions, and in particular the robustness of the reasoning that the EBA relies upon to reach its conclusions. The EBA’s reasoning on key issues in G 3/19 (with which readers may already be familiar) is therefore discussed in the following article, as are gaps and flaws in that reasoning.

Summary and conclusions

In view of the background to G 3/19, the members of the EBA could have been left in no doubt that the President, as well as the overwhelming majority of Contracting States to the EPC and of the representatives to the AC (and also the European Commission, Council and Parliament), were most anxious for the EBA to issue an opinion confirming the validity and effectiveness of Rule 28(2) EPC. Indeed, the EBA explicitly acknowledged its awareness on this point when it commented that:

“Question 2 already contains, in thinly disguised form, the answer that it seeks, by stating that Article 53(b) EPC ‘neither explicitly excludes nor explicitly allows’ the patentability of plants and animals exclusively obtained by an essentially biological process.”

In principle, the EPO President and (the representatives of) the Contracting States to the EPC are free to express their views on any given point of law, and even to do so in a blunt and uncompromising manner. However, when the point of law in question is the subject of a referral to the EBA, the expression of such views is potentially problematic, not least because it could be perceived by objective observers as an attempt to influence the decision. Indeed, a basis for such a perception could be the fact that the members of the EBA will be aware that their security of tenure, and possibly their ability to pursue the post-service career of their choosing, is in the hands of the representatives of the Contracting States (and, to some extent, the EPO President).

The problem here is that a reasonable onlooker, considering the circumstances, might see the strongly expressed views of those having influence over the tenure and career prospects of members of the EBA, and then conclude that there are objective reasons that justify concerns about possible partiality of members of the EBA.

The EBA is the lynchpin of the “judiciary” established under the EPC. Thus, the independence of the EBA is fundamental to the proper functioning of the EPC, particularly with respect to its interactions with other legal systems, such as TRIPS, national laws, EU laws and the ECHR. This is not least because the absence of an adequately independent “judiciary” would render the EPC inconsistent with fundamental principles that underpin those other legal systems. It is therefore a serious cause for concern that the EBA’s opinion in G 3/19 has prompted a number of practitioners to openly question whether the EBA is adequately independent of the EPO’s executive branch.²⁷

Of course, mere alignment between the conclusions reached by the EBA and the views expressed by the President and the AC is not, on its own, evidence of partiality. However, a fear of partiality based upon different grounds (i.e. the “objective” test discussed above) will be hard to dismiss if the reasoning of a particular decision does not adequately support the EBA’s conclusions. Disappointingly, and as discussed in the following article, analysis of the reasoning in G 3/19 reveals significant gaps and flaws that not only raise further questions regarding the EBA’s independence but also point to potential concerns regarding the rule of law at the EPO.

With regard to the *perception* of independence of the EBA, the concerns raised by G 3/19 are in part connected to significant gaps and flaws in the EBA’s reasoning on crucial (and controversial) issues. However, concerns also stem from conclusions of the EBA that appear to increase the powers of the EPO’s executive branch to:

- force a new interpretation of the EPC (by effectively amending the EPC without following the procedures laid down in the EPC itself); and, if necessary
- gain admissibility of a referral that effectively asks the EBA to rubber-stamp such a new interpretation.

With regard to the (perception of) the rule of law at the EPO, G 3/19 gives rise to two main grounds for concern. These are discussed in the following article. In short, firstly, there are reasons to doubt whether the opinion in G 3/19, as well as the new interpretative powers handed to the AC by that opinion, respects the hierarchy of laws and separation of powers established in the EPC. Secondly, the EBA’s use of seemingly arbitrary tests (to determine admissibility of the referral, as well as the “legal limits” of the EPC) casts doubt upon the extent to which the EBA fulfilled its ECHR-related obligations to decide cases using uniformly applied criteria.

Certain decisions of the Boards of Appeal have great commercial significance. This makes it likely that any potential weakness with regard to the rule of law at the EPO will, at some point, be explored in an action before a national or European court. Weaknesses highlighted by G 3/19 with regard to the *perception* of independence are arguably supported by objective evidence. It is therefore not entirely fanciful to suggest that a court might conclude that there are indeed problems with the independence of the EPO’s Boards of Appeal, or with another aspect of the rule of law at the EPO.²⁸

There are, of course, actions that could be taken to eliminate all grounds upon which an objectively justifiable fear of partiality could possibly be based. One such action would be restructuring of the Boards of Appeal of the EPO in a manner rendering them indisputably independent of the AC and the President of the EPO (for example by revisiting key proposals from 2004)²⁹. In the light of potentially serious consequences of a court decision upholding complaints based upon the weaknesses discussed above, the view of this author is that it would be preferable for such restructuring to be undertaken in a proactive manner, and without delay. □

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The Boards of Appeal new office in Haar. Source: EPO

Notes and references

1. See the minutes of the 93rd (OJEPO 7/2003, 319) and 95th (OJEPO 2/2004, 79) meetings of the Administrative Council.
2. CA/46/04 and CA/46/04 Corr. 1.
3. See the minutes of the 97th meeting of the Administrative Council (OJEPO 7/2004, 357).
4. Proposal for a Council Regulation on the Community patent (COM(2000) 412 final; Official Journal of the European Communities 2000/C 337 E/45).
5. See: CA/D 6/16 (OJEPO 2016, A100), a key provision of which was the establishment of a “Boards of Appeal Unit” as an administrative division of the European Patent Office (as opposed to an independent organ of the European Patent Organisation); and CA/D 7/16 (OJEPO 2016, A101), which outlined rules for the composition and functioning of the Board of Appeals Committee (BoAC).
6. See Article 41(3) of the EPO’s Service Regulations.
7. See Articles 24 to 28 of the Decision of the Administrative Council, 11 December 2014 introducing a new career system (CA/D 10/14)
8. See Article 47a(1), EPO’s Service Regulations as amended by CA/D 10/14.
9. See Rule 12d(3) EPC.
10. See Article 110a(7) of the EPO’s Service Regulations. However, any challenge: (a) is considered by an Appraisals Committee appointed by the President of the Boards of Appeal, who is also responsible for taking a final decision on any objection raised; and (b) can only review whether the appraisal report was “arbitrary or discriminatory”. Also, it is unclear whether a successful challenge against a negative appraisal report will necessarily lead to revision of any associated opinion on reappointment,
11. Indeed, the Association of Members of the Boards of Appeal has criticized the link between re-appointment and performance evaluation (and the goodwill of the President of the BoA), on the grounds that it “*may be seen as licensing the exercise of pressure on individual members*”. (AMBA Statement on the Reform of the BoA dated 15 July 2016; see <http://amba-epo.org>)
12. See Article 1 of the Decision of the Administrative Council of 30 June 2016 amending Article 19 of the Service Regulations for permanent employees of the European Patent Office (CA/D 5/16). A subsequent Decision of the Administrative Council dated 29 June 2017 (CA/D 7/17) changed the numbering of the relevant provision.
13. Article 104 of the Service Regulations, as amended by Article 51 of CA/D 7/17. Arguably, the mere length of the potential period of suspension (relative to the five year term of appointment) is problematic. This is because it could be viewed as undermining the safeguard of Article 23(1) EPC, which affords the AC with the power to remove a member of a Board of Appeal from office only if and when it has received a proposal from the EBA to take a decision to that effect.
14. Indeed, it cannot be ruled out that the President could order suspension without the prior involvement of the AC. This is because, as noted by the EBA in G 2301/16, “*the Office President assumes the power to investigate and to suspend members of the Boards of Appeal and bar them from the Office*”.
15. Article 21 of the Service Regulations defines this as “failure by an employee or former employee to comply with his obligations under these Service Regulations, whether intentionally or through negligence on his part”.
16. Article 94a of the Service Regulations does not define serious misconduct but instead provides a non-exhaustive list of factors to be considered in connection with determining the seriousness of the alleged misconduct.
17. See judgments 3958 and 3960 the Administrative Tribunal of the International Labour Organization (ILOAT), where decisions to (further) suspend of a member of the Boards of Appeal were quashed on the grounds of an objectively justified fear of partiality with respect to an individual (the EPO President) who participated in the decision-making process.
18. Once all “internal” avenues for appeal at the EPO have been exhausted, an “external” appeal against a decision to impose a disciplinary measure may be pursued by filing a complaint at the ILOAT. Criticisms of the ILOAT include its refusal to hold oral hearings, order discovery or hear from witnesses, as well as its “*typically unreasoned deference to the conclusions of internal administrative procedures controlled by the person against whom the complaint has been made*” (see M. Parish “An essay on the accountability of international organizations”, *International Organizations Law Review*, Vol. 7, No. 2, 2010). It is also subject to (further) years of delays before a decision is made.
19. See Regional Court of Munich decision no. 24 Qs 18/17, in which allegations of defamation against a member of the Boards of Appeal were dismissed as being based upon “assumptions” or “suspicions” (see also http://patentblog.kluweriplaw.com/2018/06/20/landgericht-munchen-patrick-corcoran-innocent-acquitted-charges/?doing_wp_cron=1593091614.6596479415893554687500)
20. See, for example, T 190/03
21. See R 19/12 of 25 April 2014, where a fear of partiality of the chairman of the EBA was found to be objectively justified in view of his involvement in the administration of the EPO. See also the 21 October 2015 interlocutory decision in R 2/15, where an objective fear of partiality was pertinent to the EBA’s acceptance of a notice of withdrawal from the member originally appointed as chairman.
22. <https://www.epo.org/news-issues/news/2019/20190329.html>
23. Article 33(1)(b) only empowers the AC to amend Parts II to VIII and X of the EPC and only then for the purpose of bringing the EPC “*into line with an international treaty relating to patents or European Community legislation relating to patents*”. Article 35(3) indicates that exercise of the AC’s powers under Article 33(1)(b) requires unanimity of the Contracting States voting at an AC meeting at which all the Contracting States are represented.
24. Article 164(2) indicates that “*In case of conflict between the provisions of this Convention and those of the Implementing Regulations, the provisions of this Convention shall prevail*”.
25. Though clearly not all of the representatives to the AC.
26. Whilst the EU does not have any locus in relation to the EPC, its comments could be perceived to represent the majority view of the EU Member States.
27. See, for example: (i) A Sandys “Enlarged Board of Appeal issues G 3/19 decision on plant patents” *Juve Patent*, 19 May 2020; (ii) commentary by Mewburn Ellis (www.mewburn.com/news-insights/g3/19-the-enlarged-board-of-appeal-has-its-cake-and-eats-it); (iii) detailed commentary on IPKat (<http://ipkitten.blogspot.com/2020/05/lessons-in-legal-fudge-from-eba-in.html>); and (iv) Michael A Kock, “G 3/19 ‘Pepper’ – Patentability of plants obtained by breeding processes. Is this the end?”, *Bio-Science Law Review*, 2020, 7(5), 184-201.
28. Upcoming decisions of the Federal Constitutional Court (the *Bundesverfassungsgericht*) in Germany on cases relating to the EPO (joined cases 2 BvR 2480/102, BvR 421/132, BvR 786/15 and 2 BvR 756/16) might provide some insight into whether national courts have any serious concerns on either ground.
29. See CA/46/04 and CA/46/04 Corr. 1) and, in particular, proposals for the Boards of Appeal to be reconstituted as a third, independent organ of the EPO and for ordinary members of the Boards to be appointed for a non-renewable (e.g. life) term.