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# Who owns the pepper?

## An assessment of the conflicts resulting from the amendment of Rule 28 (2) of the European Patent Convention Implementing Regulations

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### ABSTRACT

*The present article focuses on the recent decision of the Enlarged Board of Appeal in the Pepper case. It examines the impact of the amendment of Rule 28 (2) of the EPC Implementing Regulations on the scope of the exclusion for essentially biological processes for the production of plants in Art. 53 (b) of the European Patent Convention EPC. It further contains an analysis of the internal hierarchy of the institutions within the European Patent Office and focuses in particular on the question, whether the Rules of the EPC Implementing Regulations take precedence over the decisions of the Enlarged Board of Appeal. Furthermore, an assessment of the provisions of the European Patent Convention and the general principles of law should shed light on the question, whether the Administrative Council was empowered to amend Rule 28 (2) of the EPC Implementing Regulations.*


### 1. INTRODUCTION

Tomatoes, broccoli, pepper, melons – we encounter vegetables and fruits almost every day in the supermarkets, in restaurants and on our plates at home. But who owns the vegetables and fruits that we buy and consume?

This question has garnered more and more attention as modern genome editing techniques altering the genetics of plants have developed in recent years. The goal behind such manipulation of plant genetics is to discover new, beneficial properties increasing the effectiveness of lage-scale farming.[1] Biotechnology and seed companies have then looked for the most effective legal protection for their research investments and have therefore filed patent applications for new, genetically modified plants.[2] However, many non-governmental organizations and smaller plant breeders fear that patents on plants could endanger biodiversity and that only large seed companies would profit from them.[3] The central question in the field of patents on genetically modified plants is therefore which plants, parts of plants or products deriving from them should be permitted to protect through patents. This question has been discussed several times by the Technical Board of Appeal (TBA) and the Enlarged Board of Appeal (EBA) of the European Patent Office (EPO) in the last couple of years, in relation to the exclusion for essentially biological processes for the production of plants set out in Art. 53 (b) of the European Patent Convention (EPC).[4], [5] This issue is now said to have been finally resolved.

On 14 May 2020, the EBA of the EPO published its long-awaited decision in case G 3/19,[6] known as the *Pepper* case. With this decision, the EBA resolved an almost ten-year conflict concerning the patentability of plants and plant material, to the effect that these will not be patentable in the future if they are obtained exclusively from essentially biological processes. The question of the interpretation of Art. 53 (b) of the EPC has thus been clarified, at least for the time being. However, this case with all its history has raised far more questions than solely those related to the issue of the patentability of products obtained from essentially biological processes. Indeed, it raised the question of the importance of a decision by the EBA and the power structure between the organs of the European Patent Organisation (EPOrg) and their relationships to the European Union (EU).

### 2. LEGAL DEVELOPMENT BEFORE THE PEPPER CASE

In order to analyze the decision of the EBA and the resolution of the aforementioned conflicts more closely, the initial situation before the referral must be examined.

Within the EU, the legal framework for the patentability of plants obtained through an essentially biological process is governed by a hybrid system. This means that the patentability is determined by two separate and unrelated legal systems, namely the Biotech Directive (BD),[7] an EU law, and the EPC, an intergovernmental treaty.[8] Not only the provisions of these legal sources, but also the interpretation of the Articles of the BD by the Court of Justice of the European Union (CJEU), determine the patentability of essentially biological processes and the plants obtained from them. Furthermore, the patentability of those processes and plants is also determined by the interpretation of the provisions of the EPC and the Rules of the EPC Implementing Regulations[9] by the Boards of Appeals (BoA) and the EBA of the EPO.[10] Until now, there has been no judgment from the CJEU concerning the exclusion of

and decided almost unanimously on 29 June 2017 that the Implementing Regulations to the EPC should be amended in the sense that plants resulting from essentially biological processes should not be patentable.[17] They introduced the new Rule 28 (2) EPC Implementing Regulations, which entered into force on 1 July 2017 and states:

> *"Under Article 53 (b), European patents shall not be granted in respect of plants or animals exclusively obtained by means of an essentially biological process.[18]"*

Although this new Rule was intended to serve the purpose of clarifying the meaning of Art. 53 (b) of the EPC, its adoption initially caused further ambiguity.

## 3. THE PEPPER CASE AND THE REFERRAL TO THE EBA

Soon after the adoption of Rule 28 (2) EPC Implementing Regulations, the TBA was confronted with a new case concerning this new Rule and Art. 53 (b) EPC – the *Pepper*[19] case. In this case, the TBA had to deal with a European patent application relating to new pepper plants and fruits, resulting from an essentially biological process. After the application was rejected by the Examining Division of the EPO on the basis of the new Rule 28 (2) EPC Implementing Regulations, the appellant filed a notice of appeal, maintaining the same claims as before and arguing that the new Rule 28 (2) EPC Implementing Regulations was in contradiction to Art. 53 (b) EPC as interpreted by the EBA in the decision of *Tomatoes II/ Broccoli II*.[20]

The TBA clarified that the meaning of Art. 53 (b) EPC and the meaning of the new Rule 28 (2) EPC Implementing Regulations were in conflict with each other.[21] The EPC should be interpreted in conformity with the interpretation given by the EBA.[22] In this case, this would mean that Art. 53 (b) EPC should be interpreted in accordance with the EBA's decision in *Tomatoes II/ Broccoli II* and that plants obtained from essentially biological processes should therefore be patentable.[23] In contrast, Rule 28 (2) of the EPC Implementing Regulations excludes plants exclusively obtained by means of an essentially biological process from patentability. Since Rule 28 (2) of the EPC Implementing Regulations reverses the meaning of Art. 53 (b) EPC and it is not possible to interpret this Rule in such a way that there is no conflict between these two provisions, the TBA declared Rule 28 (2) of the EPC Implementing Regulations to be void. It further clarified that in case of a conflict between the provisions of the EPC and those of the EPC Implementing Regulations, the provisions of the EPC should prevail, according to Art. 164 (2) EPC.[24]

After the decision of the TBA in the *Pepper* case, at the 159th Meeting of the Administrative Council, the EPOrg Member States and the EPO discussed the need for a solution regarding the patentability of plants obtained from essentially biological processes, as the decision caused legal uncertainty.[25]

Lastly, on 8 April 2019, Mr. Campinos, then-current President of the EPO, handed in a referral to the EBA in accordance with Art. 112 (1) (b) EPC regarding the interpretation of Art. 164 (2) EPC and the assessment of Rule 28 (2) EPC Implementing Regulations.[26] In particular, the EBA was asked to answer the following points of law:

> *"1. Having regard to Art. 164 (2) EPC, can the meaning and scope of Art. 53 EPC be clarified in the Implementing Regulations to the EPC without this clarification being a priori limited by the interpretation of said Article given in an earlier decision of the Boards of Appeal of the Enlarged Board of Appeal?*
>
> *2. If the answer to question 1 is yes, is the exclusion from patentability of plants and animals exclusively obtained by means of an essentially biological process pursuant to Rule 28 (2) EPC Implementing Regulations in conformity with Art. 53 (b) EPC which neither explicitly excludes nor explicitly allows the said subject-matter?"*[27]

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17 The decision was supported by a 36/38 majority of the EPC member states. Only Slovenia abstained and Austria voted against the proposal.

18 Decision of the Administrative Council of 29 June 2017 amending Rules 27 and 28 of the Implementing Regulations to the European Patent Convention (CA/D 6/17) [2017] OJ EPO 2017, A56, Art. 3.

19 Decision of the TBA of 05 December 2018, Extreme dark green, blocky peppers/ SYNGENTA, T 1063/18, ECLI:EP:-BA:2018:T106318.20181205.

20 Ibid, para III.

21 Ibid, Reasons para 23.

22 Ibid, Reasons para 21.

23 Ibid.

24 Ibid, Reasons paras 24f., 46.

25 EPO Press Release, "EPO Contracting States discuss next steps regarding the patentability of plants obtained by essentially biological processes" (EPO, 29 March 2019) https://www.epo.org/news-events/news/2019/20190329.html accessed 11 April 2021.

26 EPO, Procedural Documents to Case G 3/19 http://documents.epo.org/projects/babylon/eponet.nsf/0/F3CCF99E734851C1C-1258474002CA7E0/$FILE/G_3_19_procedural_documents.pdf accessed 11 April 2021.

27 EPO, Case G 3/19 Referral of a point of law to the Enlarged Board of Appeal by the President of the European Patent Office (Article 112(1)(b) EPC) http://documents.epo.org/projects/babylon/eponet.nsf/0/09D15FA-10C1A3A55C125856C0057B988/$File/Referral%20under%20Art.%20112(1)(b)%20EPC_G%2003-19.pdf accessed 11 April 2021.

28 G 3/19, Pepper (follow-up to Tomatoes II and Broccoli II), Reasons para II.4.

29 Ibid, Reasons paras II.5, II.6, III.

30 Ibid, Reasons para XXVI.8.

31 Ibid, Reasons para XIX.

32 Ibid, Reasons para XX.

33 Ibid.

34 Ibid.

35 Rules of Procedure of the Boards of Appeal, in force from 1 January 2020, Decision of the Administrative Council of 26 June 2019 approving the revised version of the Rules of Procedure of the Boards of Appeal (CA/D 5/19 Corr. 1) [2019] OJ EPO 2019 A/63.

36 G 3/19, Pepper (follow-up to Tomatoes II and Broccoli II), Reasons para XX.

37 Ibid, Reasons para XXI.

38 Ibid, Reasons para XXII.

39 Ibid, Reasons paras XXIII, XXIV.

40 Ibid, Reasons para XXVI.

41 In the vote, 35 Contracting States voted for the adoption of Rule 28 (2) EPC Implementing Regulations, 1 Contracting State voted against it, 1 Contracting State abstained and 1 Contracting State was not present. See Minutes of the 152nd Meeting of the Administrative Council of 28 and 29 June 2017, CA/PV 152.

42 G 3/19, Pepper (follow-up to Tomatoes II and Broccoli II), Reasons para XXVI.5.

The intention of the Contracting States to exclude from patentability products obtained from essentially biological processes should also not be incompatible with the wording of Art. 53 (b) of the EPC, since it is broad and allows such an interpretation.[43] The EBA therefore ultimately concluded that a dynamic interpretation of Art. 53 (b) of the EPC was permitted and even necessary, given the clear legislative intention of the Contracting States represented in the Administrative Council.[44]

In conclusion, Art. 53 (b) of the EPC is now interpreted as excluding from patentability products obtained from essentially biological processes, as well as essentially biological process features defining an essentially biological process.[45]

### 4.3 Lack of clarification concerning the institutional conflict

Concerning the original first referred question of the President of the EPO, which aimed at clarifying the question of the internal hierarchy of the individual organs within the EPOrg, the EBA was reluctant to give a clear answer. This might be due to the rephrasing of the questions submitted, with the rephrased question focusing solely on the interpretation of Art. 53 (b) of the EPC.

In respect of the institutional dispute, the EBA therefore merely stated that, due to the special structural organization and constitution of the EPOrg, it could not find any reason to believe that the adoption of Rule 28 (2) of the EPC Implementing Regulations by the Administrative Council violated the doctrine of separation of powers or infringed upon the essentiality theory ("Wesentlichkeitsprinzip"), originating from German constitutional law.[46] The latter states that decisions of fundamental or essential importance are reserved for the Parliament as the legislative branch and may not be made by administrative organs through administrative regulations.[47]

The EBA describes the EPOrg as an intergovernmental organization, founded under international law by the Contracting States, and governed by the rule of law.[48] The principles underlying the rule of law have generally been adopted by the Contracting States at the national level.[49] However, these principles – and in particular their scope and their implementation – must reflect the organizational structure of the EPOrg and its specific nature.[50] Art. 4 (2) of the EPC provides that the EPOrg has two organs, namely the EPO and the Administrative Council. According to Art. 4 (3) of the EPC, the EPO's task is to grant European patents under the supervision of the Administrative Council. Both institutions therefore have an executive function in this respect.[51]

According to the EBA, the BoA have the role of an independent judiciary in the European patent system.[52] Although they form a separate organizational unit with organizational autonomy, they are not an organ of the EPOrg, but rather only structurally integrated into the EPOrg in accordance with Art. 15 of the EPC. In particular, the EBA emphasized that the EPOrg does not have its own parliament, which corresponds to a legislature that is part of the constitutional arrangements of the Contracting States.[53]

Further, on the one hand, it cannot be deduced from the principle of separation of powers that there is a general prohibition on adopting secondary legislation – in this case, Rule 28 (2) of the EPC Implementing Regulations – which concerns the interpretation of primary legislation given by the EBA – here, Art. 53 (b) of the EPC.[54]

On the other hand, due to the fact that the EPOrg does not have its own parliament, the essentiality theory cannot be applied directly.[55] However, even if the essentiality theory would suggest that Art. 53 (b) of the EPC could be amended only by a Diplomatic Conference in accordance with Art. 172 of the EPC, such an assumption would be too restrictive. It would disregard the fact that the Administrative Council can amend Art. 53 (b) of the EPC within the scope of its powers under Art. 33 (1) (b) of the EPC and Art. 35 (3) of the EPC.[56]

However, the EBA noted that both of the aforementioned considerations were no longer related to the point of law that formed the basis of the proposal after the rephrasing of the referred question, as it was exclusively directed at a potential new interpretation of Art. 53 (b) of the EPC by the EBA, in its function as an independent judicial organ in accordance with Art. 112 (1) of the EPC.[57]

In view of the particular structural organization and constitution of the EPOrg, the EBA therefore could not find any foundation to believe that the adoption of Rule 28 (2) of the EPC Implementing Regulations by the Administrative Council violated the principle of separation of powers or infringed upon the essentiality theory.[58]

## 5. LEGAL EVALUATION OF THE DECISION

It remains debatable how the decision of the EBA should be evaluated from a legal perspective. In this respect, a distinction must be made between the conflict regarding the subject-matter, i.e., the interpretation of Art. 53 (b) of the EPC, and the institutional conflict.

### 5.1 Evaluation of the dynamic interpretation of Art. 53 (b) EPC

The patent situation for plants obtained from essentially biological processes, prior to the issuance of the EBA's

be identified beyond doubt and that there is no official requirement for patent marking.[74] As a consequence, breeders must be extremely careful, since the mere integration of a single patented trait, even when inadvertently used in a complex breeding process, can constitute a patent infringement. As most of the patents belong to a small number of large international seed companies, not only small farmers are affected by this, but also other stakeholders in the food supply chain.[75] Moreover, this uncertainty for breeders is enhanced by the length of patent examination processes, which often extend over several years. Further, the differences in national patent laws can lead to increased uncertainty among breeders regarding the status of biological material they want to use, since those differences may result in there being a multitude of patent claims for the same trait.[76] Thus, the situation at hand before the decision in the referral posed a fundamental threat and was seen to cause a stagnation of innovation in the field of breeding.[77]

Moreover, as already stated, the market power of large seed companies places a heavy burden on small farmers. In case of a patent granted to a large seed company, small farmers might have to pay for a seed license or to use certain traits of a new plant. They would thus be dependent on the large companies, which would be able to dictate prices on the concentrated market. Ultimately, this could lead to bankruptcy for small breeders.[78]

#### 5.1.3. Balance of interests and harmonization of law

When reviewing the arguments of the different parties involved, it is difficult to give a clear answer to the question whether products obtained from essentially biological processes should be patentable, as two major interest groups are facing each other. Nevertheless, the decision of the EBA should be evaluated positively in this regard.

The decision clearly represents a setback for those applying for plant patents, which are mostly large seed companies. However, first, it should be kept in mind that the new dynamic interpretation of Art. 53 (b) of the EPC has no retroactive effect on European patents, containing product claims or product-by-process claims, which were granted before 1 July 2017, the date when Rule 28 (2) of the EPC Implementing Regulations entered into force.[79] The same applies for pending European patent applications which were filed before that date, as the relevant date for applications is the date of filing or, if priority has been claimed, the priority date.[80] Second, the decision of the EBA does not rule out the patentability of genome-edited plants in general. Rather, only plants or plant products obtained solely by essentially biological processes remain excluded from patentability. As long as the breeding process contains a significant step of a technical nature, performed within the steps of sexual crossing and selecting, the process might still be patentable.[81] Third, the pressure that can be placed on the shoulders of smaller farmers, and probably also on the entire food chain, if a large number of patents on vegetables or other plant products are granted, will grow steadily. It is of particular concern, also from an antitrust perspective, that a few larger companies may control entire food chains.

Moreover, it should also be remarked that products obtained from essentially biological processes should be included in the exemption of Art. 53 (b) of the EPC, as any other interpretation would undermine the entire mea-

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74 Michael A Kock and Herbert Zech, "Pflanzenbezogene Erfindungen in der EU – aktueller Stand" [2017] 119 (10) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 1004, 1012; Kock, "Patents for Life" (n 2) 234.

75 Timo Minssen and Ana Nordberg, "The Impact of 'Broccoli II' and 'Tomatoes II' on European Patents in Conventional Breeding, GMOs, and Synthetic Biology: The Grand Finale of a Juicy Patents Tale?" [2015] 34 (3) Biotechnology Law Report 81, 96; Jiang (n 73) 191.

76 Kock and ten Have, 'The "International Licensing Platform-Vegetables"' (n 62) 504.

77 Ibid.

78 Karampaxoglou (n 60) 20ff.; Jiang (n 73) 191.

79 G 3/19, Pepper (follow-up to Tomatoes II and Broccoli II), Reasons para XXIX.

80 Ibid.

81 See G 2/07, Broccoli/PLANT BIOSCIENCE; G 1/08, Tomatoes/STATE OF ISRAEL, Reasons para 6.4.2.3.

82 No patents on seeds!, amicus curiae brief G 3/19 (30 September 2019) 4f. http://documents.epo.org/projects/babylon/eponet.nsf/0/0DFBAF29B5CB8798C125848700305C-F7/$File/Npos_Amicus%20Curiae%20letter%20on%20G3_19.pdf accessed 11 April 2021; The Danish Government, amicus curiae brief G 3/19 (30 September 2019) para 29 http://documents.epo.org/projects/babylon/eponet.nsf/0/5ADBCD9142BC86CE-C12584870030AA06/$File/The%20Danish%20Governments%20amicus%20curiae%20submission%20in%20case%20G%203.19.pdf accessed 11 April 2021.

83 No patents on seeds!, amicus curiae brief G 3/19 (n 82) 4; The Danish Government, amicus curiae brief G 3/19 (n 82) para 29.

84 Art. 64 (2) EPC.

85 No patents on seeds!, amicus curiae brief G 3/19 (n 82) 4.

86 Ibid.

87 The Danish Government, amicus curiae brief G 3/19 (n 82) para 29.

88 Josepha Koch, "G 3/19 - The Struggle for Power Within the EPC" [2020] 69 (10) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 1027, 1031.

89 Aloys Hüttermann, "Die Entscheidung G 3/19 oder die Kunst der autoritätswahrenden Konfliktlösung (?)" [2020] 111 (6) Mitteilung der Deutschen Patentanwälte 255, 257.

90 EPO, About the Boards of Appeal https://www.epo.org/law-practice/case-law-appeals/about-the-boards-of-appeal.html accessed 11 April 2021.

91 Maximilian Haedicke, "Das Verhältnis zwischen der Rechtsprechung der Beschwerdekammern und nachträglich erlassenen Regeln der Ausführungsordnung zum EPÜ" [2019] 68 (10) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 885, 890.

92 Ibid.

93 Ibid; CA/16/15 Proposal for a structural reform of the EPO Boards of Appeal of the 06 March 2015, para 5.

94 Opinion of the EBA of 12 Mai 2010, Programs for computers, G 3/08, ECLI:EP:-BA:2010:G000308.20100512, para 7.2.1.

95 CA/16/15 (n 93); CA/D 6/16 Decision of the Administrative Council of 30 June 2016 amending the Implementing Regulations to the European Patent Convention [2016] OJ EPO 2016, A100; CA/D 7/16 Decision of the Administrative Council of 30 June 2016 setting up a Boards of Appeal Committee and adopting its Regulations [2016] OJ EPO 2016, A101.

96 Tobias H Irmscher and Alfons Schäfers, "Comment on certain Articles of the EPC," in: Georg Benkard, Europäisches Patentübereinkommen (3rd edn, C H Beck, 2019) Art. 33 para 3.

97 Ibid, Art. 26 para 4; Koch (n 88) 1029.

98 Haedicke (n 91) 890.

99 G 3/08, Programs for computers, para 7.2.1; Irmscher and Schäfers (n 96) Art. 33 para 3.

100 Koch (n 88) 1029.

101 Haedicke (n 91) 890.

### 5.2.2. Separation of powers and mechanism of "checks and balances"

As has been shown, the system of institutions within the EPOrg is relatively clear: the Administrative Council only formally forms the legislative branch, but it does not make substantive patent law, as a Diplomatic Conference of the Contracting States is needed for that in accordance with Art. 172 EPC.[102] It also acts in an executive function when amending the EPC Implementing Regulations. The BoA, in contrast, act as a quasi-judicial branch, while the process of patent examination represents the executive branch.[103] This separation is plausible, as the BoA are better placed to find an optimal interpretation of the provisions of the EPC, since the Administrative Council is subject to political influence.[104] Hence, there could be a risk that political interests would prevail if the Administrative Council were empowered to interpret the provisions. Therefore, the system of the separation of powers would be undermined if the Administrative Council had the competence to overrule decisions of the BoA, in particular of the EBA.

Further, the patent system and its effective formal interactions are the result of the mechanism of "checks and balances" between the different institutions involved.[105] The term "checks and balances" takes into account the totality of the formal power structures in a governmental system, created by the formal mutual dependence of the individual organizations on each other.[106] The separation of powers into legislative, executive and judicial branches is the most effective regime in the system of "checks and balances," as it guarantees the independence of the judiciary.[107] The system of separation of powers does not mean that the different branches are strictly separated from each other. All institutions are interdependent and respect each other and their respective competences.[108] However, in so far as possible, the different tasks should be performed in the most appropriate manner, which means by the institutions which are best placed in terms of their function, composition and procedures.[109] Moreover, the system of separation of powers is not tailored to national government, but can be applied to any international organization.[110]

Hence, the system of "checks and balances" suggests that the BoA, not the Administrative Council, should interpret the provisions of the EPC. Since this system provides for respecting the decisions of the other institutions, this should also apply within the EPOrg, even if this implies a duty of compromise and self-restraint.[111] This is further supported by the reform package regarding a more independent position of the BoA, which entered into force in 2016, as it showed that the independence of the judiciary should be promoted within the EPOrg.[112] Consequently, it would be desirable to have an informal binding effect, leading the Administrative Council to recognize the decisions of the EBA and be *de facto* bound by them. The mere assessment of the Administrative Council that a decision of the EBA is politically inopportune is therefore not sufficient to allow it to interfere with the tasks that the EBA carries out under its own responsibility.[113]

However, such a situation emerged in the *Pepper* case and the events that led to the amendment of Rule 28 (2) of the EPC Implementing Regulations. It appeared as a daring legal construction, since the amendment was based on a Notice of the European Commission, with no legally binding effect, and which – at least at the time of the amendment – was contrary to the EBA's case law in *Tomatoes II/Broccoli II*. Further, by reformulating the referred questions, the EBA skillfully avoided the institutional issues of the case. However, not only were important institutional issues avoided; former legal acts that might not have been legitimate were not discussed and thus may even, indirectly, have been accepted. On the one hand, it remains unclear whether the introduction of Rule 28 (2) of the EPC Implementing Regulations by the Administrative Council was possible, as it was in conflict with the case law of the EBA at the time. On the other hand, it also remains open whether the TBA was entitled to declare Rule 28 (2) of the EPC Implementing Regulations invalid or whether this is a privilege of the EBA.[114]

Further, even if the EBA managed – which it also explicitly stated – not to directly violate the aforementioned doctrine of separation of powers and the mechanism of "checks and balances" in the current decision, it seemed that it was not able to withstand the political pressure from the EU. The EBA has clearly stated that the Administrative Council has no *"carte blanche"* to change the case law of the EPO at its discretion.[115] However, this may be the first time that an EBA has directly reversed its own previous case law. This suggests that the EBA ultimately bowed to political pressure from the EU and its amendment of Rule 28 (2) EPC Implementing Regulations, and pressure from the EPO President. The EU was thus the

[102] Ingrid Schneider, "Governing the patent system in Europe: The EPO's supranational autonomy and its need for a regulatory perspective" [2009] 36 (8) Science & Public Policy 619, 622.
[103] Ibid, 622f.
[104] Haedicke (n 91) 894.
[105] Susana Borrás, "The governance of the European patent system: effective and legitimate?" [2006] 35 (4) Economy and Society 594, 600.
[106] Ibid.
[107] Kathrin Klett, "Neuorganisation der Beschwerdekammern in der Europäischen Patentorganisation" [2017] (3) sic! 119 https://www.sic-online.ch/fileadmin/user_upload/Sic-Online/2017/documents/119.pdf accessed 11 April 2021.
[108] Ibid.
[109] Haedicke (n 91) 893.
[110] Klett (n 107) 120.
[111] Haedicke (n 91) 894.
[112] The question of whether this reform package is democratically viable under the rule of law and whether it actually creates complete independence for the BoA is viewed critically, see Klett (n 107) 316; Siegfried Broß, "Die Patenterteilungspraxis nach dem EPÜ – Erosion des Rechtsstaates?" [2017] 66 (8-9) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 670-674.
[113] Haedicke (n 91) 894.
[114] For more information on this issue, see: Aloys Hüttermann, "Who decides if there is a conflict between Implementing Regulations and Articles of the European Patent Convention?" [2019] 14 (12) Journal of Intellectual Property Law & Practice 958–963.
[115] G 3/19, Pepper (follow-up to Tomatoes II and Broccoli II), Reasons para II.5.
[116] Hüttermann, "Die Entscheidung G 3/19" (n 89) 257; Koch (n 88) 1030f.