



Petition

The elected Members **Hubert Aiwanger, Florian Streibl, Prof. (Univ. Lima) Dr. Peter Bauer, Dr. Hans Jürgen Fahn, Thorsten Glauber, Eva Gottstein, Joachim Hanisch, Johann Häusler, Dr. Leopold Herz, Nikolaus Kraus, Peter Meyer, Prof. Dr. Michael Piazzolo, Bernhard Pohl, Gabi Schmidt, Dr. Karl Vetter, Jutta Widmann, Benno Zierer and Fraction (FREE VOTERS)**

To ensure the independence of the Boards of Appeal within the European Patent Office

May the Landtag resolve:

The State Government is called upon to make best efforts at the Federal and European level for measures to be taken within the European Patent Office in order to guarantee the independence of the Board of Appeal and thereby guarantee an effective protection of rights in law.

Grounds:

A series of attested events, which are set forth hereinafter, give grounds for serious doubt with regard to the independence of the Boards of Appeal of the European Patent Office (EPO). The apparent loss of security in law requires the most rapid possible action.

1. On 06.12.2017, the Administrative Tribunal of the International Labour Organization (ILOAT) ruled that a judge of the Boards of Appeal who had been wrongly suspended should be reinstated in office, the prohibition on admission imposed on him be lifted, and that compensatory damages paid (File Refs. 3958 and 3960). In this context the ILOAT confirmed the amalgamated role being played by the EPO President, detracting from the independence of the Boards of Appeal, since he had appeared in the internal Office disciplinary proceedings both as a party as well as a consultant in the disciplinary hearings for the EPO judges. The reproach therefore arises that in this situation no adequate division of power was respected. Moreover, a suspension by the Administrative Council can only formally be put into effect if the Enlarged Board of Appeal issues a corresponding recommendation in this respect.

However, after the Executive management of the Office had intervened at that time in writing in the ongoing proceedings, the panel of judges declined to continue due to this exertion of influence, and terminated the proceedings without a recommendation. Even after the Geneva judgment of December 2017, the Office Executive management initially refused to allow the wrongfully suspended judge admission to the buildings of the EPO. In the first instance, the President of the Board of Appeal was obliged, with some delay, to issue right of admission, but he was only able to do so in his position of responsibility for the building in Haar. The wrongfully suspended judge was, in the final analysis, prevented from exercising his actual independent role as a judge before the expiry of his term of office.

2. For a long time leading jurists, such as the former judge at the Federal Constitutional Court, Professor Dr. Siegfried Broß, have been calling into question the independence of the Boards of Appeal. By way of example, in an interview with the specialist journal JUVE on 29.10.2015, he pointed out that the Boards of Appeal could not be accorded the quality of a court, since there is a manifest personal amalgamation of the role of President of the Office and the supervision of the Boards of Appeal. It is true that in the interim a reform of the Boards of Appeal was set in motion by the summer of 2016, which at about the end of 2017 resulted in the spatial separation of the Boards of Appeal, by their moving to Haar. Nevertheless, nothing fundamentally changed with regard to the administrative structure: The President continues to stand at the apex of the administration, as well as remaining supreme over the Boards of Appeal. He accordingly continues to exert both a personal and material influence.
3. Not least against this background, a number of constitutional complaints are currently pending before the Federal Constitutional Court (BVerfG) against decisions by the EPO (see the Annual Schedule for 2017 of the BVerfG: File Ref. 2 BvR 2480/10, File Ref. 2 BvR 421/13, File Ref. 2 BvR 756/16, File Ref. 2 BvR 786/16), in which the legal formulation of proceedings of the Boards of Appeal is being challenged as unconstitutional. Without pre-empting at this juncture a final court decision, it must at least be pointed out that a number of complainants for different reasons have substantial reservations under constitutional law with regard to

the formulation of the proceedings as being commensurate with a state governed by law, and accordingly see themselves compelled to bring their concerns before the Constitutional Court. Accordingly, this development adds weight to the contentions set forth under 1. and 2. One particularly emphatic point in this connection is the most recent request by the Federal Constitutional Court to the Federal President that the implementation laws relating to the Unitary European Patent should not be ratified. This took place against the background of a successful application for the granting of a temporary injunction (File Ref. 2 BvR 739/17), which was directed at the reservations relating to proceedings before the EPO being commensurate with a state governed by law. Essentially, the issue of the independence of the Boards of Appeal will also have extensive consequences for the planned Unitary Patent, if, for example, despite the deficits in respect of legal protection, the EPO still intends to issue patents with unitary effect.

The shortcomings in this context which have been set forth are manifestly of considerable concern and uncertainty, since they give rise to the fear that both patents which in the final analysis are definitively rejected, as well as patents which are definitively revoked, cannot be further examined by independent bodies of judges. They therefore evoke substantial questions of principle with regard to the compatibility of the appeals structure in the EPO with the constitutional nature of a state governed by law. Accordingly, the State Government must take action accordingly on both the national and European level, such that the existing deficits in legal protection of rights are eliminated, and the high regard of this international organization does not suffer any further damage.