



**Beschwerdekammer in Disziplinarangelegenheiten**

**Disciplinary Board of Appeal**

**Chambre de recours statuant en matière disciplinaire**

Boards of Appeal of the  
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Case Number: D 0019/19

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 12 November 2021**

**Appellant:** N.N.

**Decision under appeal:** Decision of the Disciplinary Committee of the  
Institute of Professional Representatives  
before the European Patent Office in case  
CD 03/2018 dated 5 September 2019

**Composition of the Board:**

**Chairman:** W. Sekretaruk  
**Members:** C. Brandt  
T. Bokor  
C. Rebbereh  
S. Colombo

## **Summary of Facts and Submissions**

- I. The present appeal is against the decision CD 03/2018 of the Disciplinary Committee of the Institute of Professional Representatives before the European Patent Office (epi), hereinafter "Disciplinary Committee", issued in writing by the appointed Chamber in decision of 5 September 2019 holding that the appellant committed a breach of the duty to conduct himself in a manner as not to prejudice the necessary confidence in the profession according to Article 1(2) Regulation on discipline for professional Representatives (RDR, published most recently in the Supplementary publication 1 OJ EPO 2021, 140). The Disciplinary Committee decided to proceed under Article 6(2)(c) RDR and referred the matter to the Disciplinary Board of the European Patent Office, hereinafter "Disciplinary Board", recommending "a stronger sanction than the ones available for the Disciplinary Board." The decision of the Disciplinary Committee was notified to the appellant on 9 September 2019.
- II. The appellant filed an appeal on 7 October 2019 and the statement of grounds of appeal with letter of 8 November 2019. In his statement setting out the grounds of appeal the appellant requested in principle that the decision of the Disciplinary Committee to refer the matter to the Disciplinary Board is set aside and that the Disciplinary Board of Appeal of the European Patent Office, hereinafter "Disciplinary Board of Appeal", either dismisses the complaint or, if a sanction is deemed to be necessary, that a disciplinary measure pursuant to Article 6(2)(b) RDR be issued. Oral proceedings were also requested.

III. By letters dated 16 October 2020 the President of the epi and the President of the EPO were given the opportunity to comment on the appeal pursuant to Article 12, second sentence, RDR. The President of the European Patent Office did not file any comments. The President of the epi submitted with letter dated 11 January 2021 that he would not take part in a case in which a professional representative is involved whom he personally knew and with whom he had cooperated before he was elected. Accordingly, he had asked the Vice-President of the epi to deputise him. The Vice-President of the epi submitted by letter dated 11 January 2021 that the Disciplinary Board of Appeal should follow the decision D 1/18 and made further comments and suggestions on how the present Disciplinary Board of Appeal should proceed and deal with the case.

IV. With communication dated 3 March 2021 the Disciplinary Board of Appeal set out its preliminary and not binding opinion according to Articles 13(2) and 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (RPDBA, Supplementary Publication 1 OJ EPO 2021, 67). In the communication "DC" was used for Disciplinary Committee, "DB" for Disciplinary Board and "DBA" for Disciplinary Board of Appeal. The Disciplinary Board of Appeal informed the appellant i.a. as follows:

"According to Article 8(1) RDR "the Disciplinary Board of Appeal shall hear appeals against **final decisions** ... of the Disciplinary Committee of the Institute and the Disciplinary Board of the

European Patent Office.” (emphasis made by the DBA). In the present case the DBA will follow the rationale in decision **D 1/18 of 26 September 2019** (publicly available from 22.11.2019). In that decision the DBA provided comprehensive and detailed reasons why **a referral under Article 6(2)(c) RDR by the DC does not constitute a “final decision”** according to Article 8(1) RDR and consequently is not appealable. Consequently, the appeal is not admissible, since in the absence of a substantive legal effect of a referral under Article 6(2)(c) RDR there is no adverse effect, which is the precondition of an admissible appeal, cf. Article 107 EPC.

**Therefore, the appeal will have to be rejected as inadmissible.**

In consequence of a decision by the DBA rejecting the appeal as inadmissible the proceedings before the DB will continue (D 1/18, point 6.27 of the reasons). Following a referral according to Article 6(2)(c) RDR the proceedings are closed before the DC and become pending before the DB, at which the DB is expected to continue proceedings instead of merely reviewing the findings of the DC. The DC is a further first-instance disciplinary body and not an appellate body like the DBA. In case of a referral according to Article 6(2)(c) RDR the proceedings do not terminate since in fact no decision is made on the merits by the DC and the proceedings continue, quasi automatically, in that no further step to this effect is required from the professional

representative (D 1/18, points 6.2, 6.8, 6.14 of the reasons). The DB will conduct preparatory enquiries and has the same options as the DC, as provided by Article 7(2) RDR."

The Disciplinary Board of Appeal added:

"The same result and legal situation as described above ... would occur, if the appeal would be withdrawn. In such a case the proceedings could be accelerated and be continued before the Disciplinary Board without further delay.

Under these circumstances it is neither necessary nor appropriate for the DBA to address any of the substantive issues relevant for the case (D 1/18, point 7. of the reasons) as it would prejudice an independent examination of the matter by the DB.

This also applies to the potentially flawed procedure according to Article 6(3) and (4) RDR in the present case and the question whether this would constitute a procedural violation. However, also this issue concerns the allowability of the appeal which again presupposes the appeal to be admissible."

The Disciplinary Board of Appeal further invited the appellant "to inform the DBA **within two months from notification of this communication** whether under these circumstances the appeal is upheld and, if the appeal is upheld, whether the request for oral proceedings is maintained."

V. The appellant stated with letter dated 30 June 2021 that the appeal and the request for the oral proceedings were maintained, but did not file any comments on the merits in reply to the Board's communication of 3 March 2021.

VI. On 12 November 2021 an oral proceedings took place before the Disciplinary Board of Appeal. In accordance with Article 14 RDR, the oral proceedings were attended by Ms. N. van der Laan, on behalf of the President of the epi.

The President of the European Patent Office was not represented, as announced with letter of 25 October 2021.

VII. During the oral proceedings the appellant provided arguments why his appeal should be regarded as admissible and allowable. The arguments can be summarised as follows:

- 1) The Board should follow decision D 2/18 instead of decision D 1/18, since the ruling in D 2/18 according to which the referral pursuant Article 6(2)c) RDR qualified as a "final decision", was correct. During the oral proceedings the appellant in particular referred to the finding of D 2/18 that due to the absence of any ranking or hierarchy between the possible outcomes of the proceedings mentioned in Article 6(2)(a) to (c) RDR and due to the wording of Article 6(3) RDR ("If the Disciplinary Committee does not take a final decision ...") the term "final decision" necessarily had to refer to

the all three possible decisions mentioned in Article 6(2) RDR.

- 2) At the end of the contested decision of 5 September 2019 (last page: "Possibility of Appeal") the Disciplinary Committee itself indicated that Article 8(2) RDR provided that an appeal may be filed by the professional representative concerned. From this indication it could be gathered that the appeal had to be regarded as admissible.
- 3) The procedure before the Disciplinary Committee was flawed, and epi's position on the matter was biased, as apparent from the submissions of the President and the Vice-President in their letters dated 11 January 2021, pertaining to the present appeal, which submissions should be disregarded.
- 4) The entitlement to appeal also followed from Article 107 EPC, since the decision of the Disciplinary Committee to refer the case to the Disciplinary Board adversely affected the appellant, given that its request that the complaint be dismissed was not granted by the Disciplinary Committee.
- 5) A question should be referred to the Enlarged Board of Appeal according Article 112 EPC in order to ensure legal certainty in view of the conflicting decisions D 2/18 and D 1/18, also in view of Article 125 EPC.

VIII. The representative of the President of epi submitted that the present Board should follow the rationale of the decision D 1/18, according to which a referral by the Disciplinary Committee to the Disciplinary Board under Article 6(2)c) RDR was not a final decision for the purposes of Article 8(1) RDR and emphasised the need for a clarification of the legal situation in view of the conflicting decisions D 2/18 and D 1/18.

IX. **The appellant requested,**

that the decision of the Disciplinary Committee to refer the matter to the Disciplinary Board of the EPO is set aside and that the Disciplinary Board of Appeal either dismisses the complaint or, if a sanction is deemed to be necessary, that a disciplinary measure pursuant to Article 6(2) (b) RDR be issued.

During the oral proceedings the appellant further requested a referral of a question to the Enlarged Board of Appeal according Article 112 EPC in order to ensure a uniform application of the law in view of the decisions D 2/18 and D 1/18 of the Disciplinary Board of Appeal.

The appellant also requested that the letters of the President and of the Vice-President of the epi both dated 11 January 2021 be deleted from the file or be disregarded by the Board.



## Reasons for the Decision

1. The notice of appeal and the grounds of appeal were filed within the time limits as prescribed by Article 22(1) RDR. However, the appeal is not admissible, since a referral under Article 6(2)(c) RDR by the Disciplinary Committee to the Disciplinary Board does not constitute a **final decision** according to Article 8(1) RDR and consequently is not appealable (emphasis made by the Disciplinary Board of Appeal).

*Decisions D 2/18 and D 1/18 of the Disciplinary Board of Appeal on a referral pursuant to Article 6(2)c) RDR as a "final decision" for the purposes of Article 8(1) RDR (VII. 1 above)*

2. The appellant is of the opinion that the Disciplinary Board of Appeal should follow decision D 2/18 instead of decision D 1/18, since the ruling in D 2/18 according to which the referral pursuant to Article 6(2)c) RDR qualified as a "final decision", was correct. D 2/18 rightly held that the absence of any ranking or hierarchy between the possible outcomes of the proceedings mentioned in Article 6(2)(a) to (c) RDR and to the wording of Article 6(3) RDR ("If the Disciplinary Committee does not take a final decision ...") implied that the term "final decision" necessarily had to refer to all of the three possible decisions mentioned in Article 6(2) RDR. The present Board agrees with D 2/18 to the extent that according to the hierarchy, ranking and structure of Article 6(2) and (3) RDR "final decision" as mentioned in Article 6(3) RDR cannot be anything else than a decision which the Disciplinary Committee issued under

its powers pursuant to Article 6(2) RDR. The present Board, however, is also convinced that applying the further criteria relevant for an interpretation of a legal provision as regards the character, legal consequences and purpose, Article 6(3) RDR does not necessarily have to concern a referral under Article 6(2)(c) RDR, neither on a grammatical, nor on a systematic interpretation.

- 2.1. First of all, Article 6(3) RDR simply mentions "final decision", but it does not specifically point to Article 6(2)(c) RDR and does not even add "under Article 6(2) RDR" after the "final decision" term.
- 2.2. What is decisive is that the measures decided by the Disciplinary Committee according to Article 6(2)(a) and (b) RDR will terminate the first instance proceedings before the Disciplinary Committee. The Disciplinary Board will not become responsible for dealing with the case, instead only the Disciplinary Board of Appeal will have to further decide on the matter in case of an possible appeal (Articles 8, 22 RDR). The decisions under Article 6(2)(a) and (b) produce adverse effects to the persons entitled to appeal according to Article 8(2) RDR, respectively.
- 2.3. In contrast, a referral under Article 6(2)(c) RDR produces no adverse effect in the substantive sense, but merely a procedural one, namely that the proceedings are closed before the Disciplinary Committee and become pending before the Disciplinary Board. The Disciplinary Board is not an appellate body with respect to the Committee. It is clear that the legislative intent is that following a referral under

Article 6(2)(c) RDR the Disciplinary Board is expected to continue proceedings, instead of merely reviewing the findings of the Disciplinary Committee. Therefore, the decision to refer the matter to the Disciplinary Board does not terminate first instance proceedings as a whole, given that it does not result in a dismissal of the complaint or a penalty under Articles 4(1), 6(2)(a) and 6(2)(b) RDR, rather the proceedings continue before the other first instance disciplinary body (Disciplinary Board), quasi automatically, in that no further step to this effect is required from the professional representative. After all, the present Board holds that after a referral only the decision of the Disciplinary Board will terminate the proceedings of the first instance bodies completely.

- 2.4. For the complete arguments and reasons for the decision of the present Board that a referral under Article 6(2)(c) RDR does not constitute a final decision the extensive reasons in the decision D 1/18 are referred to (in particular under points 6.2 to 6.27). The present Board agrees with these reasons.

*"Possibility of Appeal"*

3. During the oral proceedings the appellant submitted that at the end of the contested decision of 5 September 2019 (last page: "Possibility of Appeal") the Disciplinary Committee itself had indicated that Article 8(2) RDR provided that an appeal may be filed by the professional representative concerned. From this indication it followed that the appeal had to be regarded as admissible.

This argumentation is legally unfounded.

- 3.1. The passage referred to by the appellant at the end of the contested decision of 5 September 2019 with the title "Possibility of Appeal" represents an instruction on the right to appeal providing information on who (Article 8(2) RDR) and in which time limits (Article 22 RDR) an appeal generally can be filed against the Disciplinary Committee's decision. First of all the Board notes that the instruction on the right to appeal does explicitly not refer to Article 8(1) RDR according to which the "Disciplinary Board of Appeal shall hear appeals against **final decisions** ..." (emphasis by the Board). Instructions on the right to appeal are in principle not part of the decision in a legal sense, but rather an administrative service and assistance providing information by whom and by which legal remedy the decision can be contested also pointing to the time limits to be observed. In line with this nature of an instruction on the right to appeal the "Possibility of Appeal" - passage only refers to and partly repeats the text of Articles 8(2) and 22 RDR without containing or being based on any factual or legal evaluations and conclusions. Accordingly, the representative of the President of epi stated during the oral proceedings that it was the general practice of the Disciplinary Committee and Disciplinary Board to add the "Possibility of Appeal" - passage, even if there were doubts whether there was a valid legal basis for an appealable decision. The Board also notes that the impugned decision was issued before D 1/18, but after D 2/18, and therefore the deciding Chamber had no reason to suspect that an appeal against its decision might not have been admissible.

3.2. Apart from these considerations no legally binding effect on the Disciplinary Board of Appeal can be imputed to an instruction on the right to appeal as the said "Possibility of Appeal" - passage. Any appellate body, as e.g. the Disciplinary Board of Appeal (Article 8(1) RDR), to which a legal remedy, as an appeal in the present case, has been directed is obliged to examine the admissibility of the legal remedy first before turning to its allowability. The very first issue to be examined regarding the admissibility is whether the appellate body concerned is at all responsible and empowered to deal with the received legal remedy. This includes the question whether the contested decision constitutes by itself an appealable decision being subject to the jurisdiction of that appellate body. It is abundantly clear and beyond any doubt that this basic legal check rests exclusively and without any restrictions on the appellate body, in the present case the Disciplinary Board of Appeal. This latter is responsible and empowered to decide on the appeal brought forward to it independently from any statement, comment or even advice from that body issuing the contested decision. Therefore, this Disciplinary Board of Appeal is in no way legally bound or can be prejudiced by said "Possibility of Appeal" - passage in the impugned decision on the question whether the Disciplinary Committee's decision according to Article 6(2)(c) RDR constitutes an appealable decision or not.

3.3. The Board also notes, that since the legal situation as described above (point 3.2.) regarding the appellant's argument related to the "Possibility of Appeal" -

passage in the contested decision is unambiguous and self-evident, no legal consequences and conclusions could be validly drawn from that passage either based on the principle of the protection of legitimate expectations. The appellant, even more in view of his special knowledge as a professional representative, could not legitimately assume that from the "Possibility of Appeal" - passage a binding effect on the Disciplinary Board of Appeal could be inferred to the extent that the decision of the Disciplinary Committee pursuant to Article 6(2)(c) RDR would mandatorily have to be assessed as appealable and admissible by the Disciplinary Board of Appeal.

*Flawed procedure, letters from the President and Vice-President of epi of 11 January 2021*

4. The appellant further submitted that the procedure before the Disciplinary Committee was flawed.
- 4.1. This in particular pertains to the appellant's contention that the procedure according to Article 6(3) and (4) RDR in the present case was incorrect and also that the Disciplinary Board did not acknowledge the request for oral proceedings, which, among other alleged failures, would constitute procedural violations justifying the reversal of the contested decision. The Board does not dispute that at least the denial of the appellant's request for oral proceedings by the Disciplinary Committee possibly may be qualified as a procedural violation and an infringement of the appellant's right to be heard.

These issues, however, are subject-matter of the allowability of the appeal, the treatment and consideration of which, as an indispensable precondition, require that the appeal is found admissible. As stated above (point 2.), this Board holds that the appeal is not admissible, since a referral under Article 6(2)(c) RDR by the Disciplinary Committee to the Disciplinary Board does not constitute a final decision according to Article 8(1) RDR and consequently is not appealable.

Under these circumstances it is neither necessary nor appropriate for the Disciplinary Board to address any of the substantive issues relevant for the case (see also D 1/18, point 7. of the reasons) as it would prejudice an independent examination of the matter by the Disciplinary Board.

- 4.2. This also applies to the objection that epi's position on the matter was biased, argued to be apparent from the submissions of its President and Vice-President in their letters dated 11 January 2021, pertaining to the present appeal, which submissions should therefore be disregarded.
  
- 4.3 The Disciplinary Board of Appeal sees no legal basis for formally excluding or disregarding the submissions of the epi, whether by the President or the Vice-President. However, the appellant can derive from the Board's communication of 3 March 2021 as well as from the fact that oral proceedings were held before the Disciplinary Board of Appeal on 12 November 2021 that the Board disagreed with some proposals made in the letter of the Vice-President of the epi dated 11

January 2021, since the suggestions made would have contravened the appellant's procedural rights. It is the Board's opinion that the proposal in that letter of 11 January 2021 to "refrain from inviting the appellant to inform the DBA for commenting on the Board's preliminary opinion whether he wishes to maintain or withdraw his appeal ... and rather issue a decision" and "that the appellant should be invited to withdraw his request for oral proceedings" would clearly have disregarded the appellants' right to be heard. An immediate decision of the Disciplinary Board of Appeal would also have disregarded the appellants' request for oral proceedings.

*Applicability of Article 107 EPC ("adversely affected")*

5. During the oral proceedings the appellant alleged that its entitlement to appeal followed from Article 107 EPC, since the decision of the Disciplinary Committee to refer the case to the Disciplinary Board adversely affected the appellant, given that its request that the complaint be dismissed was not granted by the Disciplinary Committee. The present Board disagrees with this opinion.

5.1. First of all the Board states that Article 107 EPC is not mentioned in Article 25(1) RDR containing an enumeration of provisions of the EPC which shall apply mutatis mutandis to proceedings before the disciplinary bodies. Furthermore, Article 107 EPC does not immediately help in interpreting "final decision" as used in Article 8(1) RDR. Even less can it be derived from this provision that a referral according to Article 6(2)(c) RDR qualifies as a "final decision".



- 5.2. Though the Board is of the opinion that Article 107 EPC is not formally applicable for the purposes of the RDR, the principle that an adverse effect for an appellant is a necessary precondition for an admissible appeal can be presumed to be a generally recognised principle of procedural law in the Contracting States and as such can be invoked based on Article 125 EPC in conjunction with Article 25(1) RDR.

However, as stated above (point 2.3.) a referral under Article 6(2)(c) RDR does not produce any adverse effect in the substantive sense, but merely a procedural one, namely that the proceedings are closed before the Disciplinary Committee and become pending before the Disciplinary Board, which is expected to continue proceedings. After a referral only the decision of the Disciplinary Board will terminate the proceedings of the first instance bodies completely. The appellant's allegation that it is adversely affected because its request that the complaint be dismissed was not granted by the Disciplinary Committee does not hold against this factual and legal situation. While it is true that the Disciplinary Committee did not decide to dismiss the complaint, it does not mean that this desired outcome is no longer possible without an appeal. If the proceedings are continued by the Disciplinary Board after a referral under Article 6(2)(c) RDR the Disciplinary Board can still decide that the matter be dismissed (Article 7(2)(a) RDR). Only such a decision would terminate the first instance proceedings, and as such would be the final decision according to Article 8(1) RDR.

Finally, the Board points out that being "adversely affected" by a decision is not the only requirement for an appealable decision. Crucially, an appealable decision needs to be a "final decision" in the sense of Article 8(1) RDR . In order to be regarded as a final decision that decision has also to terminate the respective instance, here the first instance proceedings before the Disciplinary Committee and the Disciplinary Board. As explained above, this does not apply to a referral under Article 6(2)(c) RDR.

*Referral under Article 112 EPC*

6. The appellant requested in the oral proceedings before the Board that a question should be referred to the Enlarged Board of Appeal pursuant to Article 112 EPC in order to ensure legal certainty in view of the conflicting decisions D 2/18 and D 1/18 also in view of Article 125 EPC.

First of all the Board notes that Article 112 EPC is not mentioned in Article 25(1) RDR as one of the provisions of the EPC which shall apply *mutatis mutandis* to proceedings before the disciplinary bodies. Therefore, the Disciplinary Board of Appeal has no powers to refer a question to the Enlarged Board of Appeal in order to ensure uniform application of the law, or if a point of law of fundamental importance arises. A competence of the Enlarged Board of Appeal to render decisions or opinions on the basis of Article 112 EPC on issues falling in the competence of the Disciplinary Board of Appeal is also not derivable from the scope of Article 112 EPC. This provision is restricted to referrals from Boards of Appeal or from

the EPO President (Article 112(1) (a) and (b) EPC), and it is clear that the term "Board of Appeal" in Article 112(1) (a) and (b) EPC must be a Board pursuant to Article 21 EPC. Even the EPO President would not have any power to make such a referral as requested.

As far as the appellant refers to Article 125 EPC no different conclusion can be drawn with regard to the applicability of Article 112 EPC in disciplinary matters according to the RDR. Article 125 EPC reads as follows: "In the absence of procedural provisions in this Convention, the European Patent Office shall take into account the principles of procedural law generally recognised in the Contracting States." The appellant has not contended, let alone brought forward evidence, nor is the Board aware that there exists a principle of procedural law generally recognised in the Contracting States according to which there must be a mandatory legal provision allowing to refer a case to a higher court in the case of conflicting decisions of a lower judicial instance.

*Conclusion and further procedure*

7. It follows from the above reasons that the appeal is inadmissible.
  
8. As a consequence of this decision and as already stated in the Board's communication dated 3 March 2021 the proceedings do not terminate in case of a referral according to Article 6(2) (c) RDR, but rather continue, quasi automatically, before the Disciplinary Board not requiring any further step to this effect from the

professional representative (D 1/18, points 6.2, 6.8. 6.14 of the reasons).

*Final comments on the submissions of the Vice-President of epi in their letter dated 11 January 2021 and of the representative of the epi during the oral proceedings*

9. In the Vice-President's letter of 11 January 2021 (last paragraph) it is suggested that the Disciplinary Board of Appeal should usefully comment in an obiter dictum that a decision of the Disciplinary Committee to refer a case to the Disciplinary Board under Article 6(2)(c) RDR did not need to be reasoned.
10. The Board refrains from providing such an obiter dictum, since the question raised by the Vice-President of epi does not form a subject-matter of the appeal underlying the present decision. The Board only notes that there appear to be no provision among the provisions governing the proceedings before the disciplinary bodies which would require that a referral according to Article 6(2)(c) RDR has to be reasoned. There seem to be no provision which would suggest the omission of reasons in this context. Reasoning of decisions is addressed with a reference to Rule 111(2) EPC in Article 17 of the Additional Rules of Procedure of the Disciplinary Committee and in Article 15 of the Additional Rules of Procedure of the Disciplinary Board (Supplementary Publication 1 OJ EPO 2021, 146 and 157, respectively), but Rule 111(2) EPC only prescribe reasoning for appealable decisions. An inverse conclusion to refrain from giving reasons cannot be drawn from these provisions.

11. As far as the representative of the President of epi submitted during the oral proceedings that the present Board should follow the rationale of the decision D 1/18 and emphasised the need for a clarification of the legal situation in view of the conflicting decisions D 2/18 and D 1/18, the Board points out that the present decision clearly endorses the line taken by D 1/18. A stronger statement cannot be made. The decision of the present Board does not have any binding effect on the decision of the Disciplinary Board of Appeal in future cases dealing with the same subject-matter.

## Order

### **For these reasons it is decided that:**

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated