



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 0002/20

D E C I S I O N
of the Disciplinary Board of Appeal
of 8 December 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 05/2019
dated 7 July 2020

Composition of the Board:

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

Summary of Facts and Submissions

I. The appeal is against the decision of the Disciplinary Committee of the Institute of Professional Representatives before the European Patent Office (epi), hereinafter "Disciplinary Committee", concerning case CD 5/2019, issued in writing by the appointed Chamber on 7 July 2020 and deciding on the basis of a complaint raised against two professional representatives, who are respondents in the present appeal (in more detail below). The appellant is the President of the Institute of Professional Representatives before the European Patent Office ("epi President").

II. The present decision refers to various legal provisions, using the following abbreviations:

- RDR: Regulation on discipline for professional representatives
- RPDBA: Additional Rules of Procedure of the Disciplinary Board of Appeal
- RPBA: Rules of procedure of the Boards of Appeal (2020)
- BDS DBA: Business distribution scheme of the Disciplinary Board of Appeal for 2021

all published in the Supplementary publication 1, OJ EPO 2021, pages 140, 67, 41 and 28 respectively.

III. In the following, the Disciplinary Board of Appeal under Article 5(c) RDR in its five-member composition dealing with the present appeal, as composed under Article 10(1) RDR and Article 2(1) BDS DBA, will be referred to as "the Board". The Chamber of the

Disciplinary Committee under Article 5(a) RDR will be referred to as "the Chamber". When referring to the Disciplinary Board of the EPO under Article 5(b) RDR, the term "Disciplinary Board" is used.

The proceedings leading to the present appeal

- IV. The Chamber dismissed the complaint against the respondents. Among other ancillary decisions, the Chamber also decided that the respondents should bear their own costs. This latter decision was made on the request of one of the respondents that her costs should be reimbursed by either the complainant or the Institute (epi), "if allowed by the applicable rules". The decision contains no details on whether that respondent provided any further reasons why either the complainant or the Institute should bear her costs. That respondent's request, set out in the reply to the complaint does not contain any arguments, beyond specifying the amount that is requested to be reimbursed.
- V. The decision briefly summarises the procedure and mentions that the complaints were forwarded to the respondents. However, it is silent about any further correspondence during the proceedings between the Chamber and other parties to the procedure, such as the President of the European Patent Office ("EPO President") and the epi President. The decision only states that the EPO President and epi President will receive a copy of the decision.
- VI. The epi President filed the appeal on 7 August 2020, and requested that the decision be set aside, based on two grounds.

- VII. The first ground is that the decision is insufficiently reasoned with respect to the costs. The epi President submits that Article 27(2) RDR foresees that costs incurred by the professional representative are to be borne by the Institute either unconditionally or possibly only in special circumstances. At any rate, the Chamber should have given some reasons why the request of the respondent was refused.
- VIII. The second ground is based on the violation of the President's right to be heard under Articles 12 and 25(1) RDR in conjunction with Article 113(1) EPC, given that he had no access to the whole file, in particular he has not received the defences submitted by respondents. In spite of the fact that he has explicitly informed the Chamber that he will decline to provide comments on the complaint without having access to the written defences pursuant to Articles 12 RDR and Article 113(1) EPC, these were not sent to him. The epi President submits that even after receipt of the decision he has been refused access to the file, such refusal being beyond the powers of the Disciplinary Committee.
- IX. In connection with the second ground, the President states that the decision is not appealed to the extent that the matter, i.e. the breach alleged by the complaint was dismissed.
- X. The Board informed the epi President in a communication under Article 14 RPDBA dated 6 May 2021 of its preliminary opinion that the appeal appeared inadmissible or at least unallowable, because the appeal grounds raised either did not specify the relief sought as required by Article 6(1) RPDBA or did not concern a substantive outcome of the appeal and

therefore no adverse effect to the appellant could be identified which had to be remedied by the appeal.

- XI. The epi President responded on 5 July 2021 to the communication of the Board. He argued that the appeal is admissible, and that there was an interest for the Institute and its members to know the Board's interpretation of the term "special circumstances" within the meaning of Article 27(2) RDR, and therefore an improved reasoning also fell under the relief sought. An adverse effect was also present, given that the epi President could not properly exercise his rights, as a result of the refusal of the access to the file.
- XII. By letters dated 15 October 2020, 6 May 2021 and 7 July 2021, the respondents and the EPO President were given the opportunity to comment on the appeal, the Board's communication and the epi President's response, pursuant to Article 12 RDR. No submissions were received from the respondents or the EPO President.
- XIII. In addition to the request to set aside the decision, in connection with the first ground the epi President requested in the appeal that the Board should not remit the case, but should "decide itself", as further delays and the uncertainty would be unreasonable for the professional representatives concerned. From the appeal and the response to the Board's communication it can be derived that the Board is expected to decide on the reimbursement and to give its own reasons for it, unless the case is remitted under Article 12 RPDBA. In connection with the second ground the epi President did not formulate an explicit request in the appeal, but the Board took from the totality of his appeal submissions that he expected the Board to provide him

access to the file and to state that refusing him access to the file constituted a fundamental deficiency in the sense of Article 12 RPDBA. In his response to the Board's communication the epi President confirmed this and requested on an auxiliary basis a remission of the case for a decision on both appeal grounds, if the Board were of the opinion that a request for a decision on the fundamental deficiency by the Board would result in the inadmissibility of the appeal. This remission should be made to the Disciplinary Board, instead of the Disciplinary Committee, in view of the findings of decision D 1/18.

Reasons for the Decision

Admissibility, formal requirements

1. The appeal, containing both the notice of appeal and the grounds of appeal under Article 22(1) RDR, was filed within one month of the date of the appealed decision. It is thus admissible as regards time limit and form as prescribed by Article 22(1) RDR. The appellant is entitled to appeal under Article 8(2) RDR.

Admissibility, substantive requirements

2. Article 22(1) RDR or Article 6(1) RPDBA contain no particular details on what may constitute admissible appeal grounds or requests. The appeal identifies two distinct grounds why a decision of the Board is requested and submits corresponding requests. Firstly, the epi President requests that the Board set aside the decision to refuse the reimbursement of the costs of the professional representative and instead that the Board decide on the reimbursement of the costs (first

ground). Secondly, the epi President requests that the Board order that he be provided with copies of the file, and more importantly, to confirm in its decision that the epi President was entitled to receive copies of the file in the proceedings before the Disciplinary Committee, and that not giving him access to the file was a fundamental procedural error (second ground). A remission to the Disciplinary Board is requested for both grounds as an auxiliary request. The epi President argues that these requests are admissible appeal requests.

3. Article 6(1) RPDBA stipulates that "*A notice of appeal ... shall state **which parts of the decision are appealed against** or whether the whole decision is appealed against and **the relief which the appellant seeks***" (emphasis by the Board). The Board finds that the submitted appeal grounds and requests do not satisfy these requirements for an admissible appeal, neither separately nor in combination.

4. In its preliminary opinion the Board pointed out that Article 107 EPC was not formally applicable for the purposes of the RDR. Still, the Board was of the opinion that the principle that an adverse effect for an appellant was a necessary precondition for an admissible appeal could be presumed to be a generally recognised principle of procedural law in the Contracting States, and as such could be invoked based on Article 125 EPC in conjunction with Article 25(1) RDR. This was not disputed by the epi President. He only argued that his special entitlement under Article 8(2) RDR to appeal decisions of the Disciplinary Committee and the Disciplinary Board did not require him to be personally adversely affected by such decisions.

First ground, admissibility: statement of the relief sought

5. The appeal makes the following argument on the costs reimbursement decision: *"The decision does not deal with the request that costs be reimbursed by the Complainant, nor does it provide a reasoning why the request that costs be reimbursed by the Institute is refused. If the matter is dismissed, the final decision may stipulate that costs shall be borne in whole or in part by the Institute. This can be argued not to be subject to any condition, although it is also arguable that the passage "having regard to special circumstances" would apply. In any case, the decision to refuse the request for reimbursement of costs under Article 27(2) RDR must be motivated. The reasoning provided by the Disciplinary Committee to deny the requested reimbursement is insufficient."*

6. The Board finds that there is no identifiable request which is directed at the desired substantive outcome of the costs reimbursement issue. There is no statement from the epi President, from which the Board could infer if he wishes the costs to be borne by the Institute, or if he is in fact satisfied with the decision with respect to the result, i.e. that no costs were awarded against the Institute. The epi President merely requested to set aside the decision but did not argue that its outcome was *per se* wrong and a different legal effect should be the outcome of the appeal.

7. The epi President submitted that the term "relief which the appellant seeks" in Article 6(1) RPDBA was not limited to requesting some specific outcome of the decision but could also include an improved reasoning or a rectification of a procedural error. The role of the epi President as potential appellant in the

proceedings was invoked in support of this broad interpretation. Appeals filed by him could be to the benefit or detriment of the professional representative against whom the complaint was filed. Furthermore, accepting the Board's interpretation of Article 27(2) RDR as expressed in the preliminary opinion, he argued that the Institute and its members had a particular interest in knowing what special circumstances might justify the reimbursement of the appeal fee. For this reason, the relief sought, namely a new and reasoned decision by the Board on the cost issue was an admissible and allowable appeal request.

8. The Board disagrees. The Board holds that the "relief" specified in Article 6(1) RPDBA must be interpreted in view of the overall purpose of the appeal proceedings, which is to establish if the legal effects of the impugned decision, in the present case the dismissal of the complaint and the refusal of the reimbursement of the costs, are correct or not. It is understood that an expected legal effect which remains undecided can also lead to an appeal, and the decision can also be incorrect in this manner and as such appealable. It is the substantive outcome, namely the legal effect of the order pronounced by the impugned decision (or its absence) which generally causes an adverse effect to a potential appellant, and therefore the Board holds that the relief sought in the sense of Article 6(1) RPDBA must also be directed at the elimination of an adverse effect in this sense, i.e. directed at a different legal effect. Even where it is argued that fundamental deficiencies occurred in the proceedings, it cannot be the sole purpose of the appeal to establish whether this was the case. The relief sought by the appellant, i.e. the appeal request ("Antrag", "demandes" in the German and French versions), must also be directed at

changing a legal effect of the impugned decision. Only such a request can demonstrate that the appellant is adversely affected. It is not sufficient to request that the decision be set aside, without requesting (and reasoning why) a different (or further) legal effect should result from the appeal proceedings instead of the appealed legal effects.

9. The Board finds that the epi President merely submitted that the unconditional costs reimbursement was one possible interpretation of Article 27(2) RDR. However, he did not state or argue that this interpretation was the only correct one. In fact, he explicitly accepted that the Board's different interpretation (see below in point 15) could also be correct, and mentioned this position also in his appeal, i.e. before learning the Board's opinion. The reasoning of the Board was expected only to clarify which interpretation was the correct one and to identify possible special conditions under Article 27(2) RDR. In light of this, the decision of the Board would appear to be directed at a theoretical question, possibly useful for future cases, but it is not demonstrated to the Board that there is a real need for setting aside the decision because its result is wrong.

10. The Board accepts that the Institute and its members have a vested interest in knowing the conditions for a possible costs reimbursement under Article 27(2) RDR. However, this interest alone is not sufficient for the Board to start the appeal proceedings. Reference is made to the case law of the Enlarged Board of Appeal: a judicial body which was established for the very purpose of the development of the law, by ensuring a uniform application of the law through its decisions or opinions. However, even the Enlarged Board generally

refrains from deciding on theoretical questions which have no bearing on the case underlying a referral to it (see CLBA 9th Edition 2019, Chapter V.B.2.3.3, page 1335 of the English version). More importantly, the Disciplinary Board of Appeal has no powers which would be comparable to those of the Enlarged Board of Appeal under Article 112 EPC and would permit it to decide on abstract legal questions.

11. Thus, the Board holds that the appeal is inadmissible to the extent it appeals the refusal of the reimbursement of the cost of the professional representative, for lack of statement of the relief which the appellant seeks, contrary to the requirements of Article 6(1) RDR.
12. Against this background, it is not necessary for the Board to examine in detail the arguments on the insufficiency of the Chamber's reasoning. For the sake of completeness, the Board observes that a manifestly insufficient reasoning is not apparent, as also indicated in its preliminary opinion.
13. The Chamber gave the following reasons for refusing the request for reimbursement: *"According to Article 27(2) [RDR], each party shall bear their own costs. In case where the matter is dismissed, the final decision may stipulate that the costs necessarily incurred by the professional representative shall be borne in whole or part by the Institute. The chamber appreciates that a great deal of work by the Respondents has been involved in responding to this complaint, but does not see a reason to make any award against the Institute."*
14. The epi President submitted in the appeal that a reimbursement by the Institute under Article 27(2) RDR

could be argued not to be subject to any condition, but conceded that it was also arguable that the passage "having regard to special circumstances" would apply (see point 5. above).

15. The Board is of the opinion that the first possible interpretation of Article 27(2) RDR as submitted by the epi President, i.e. that costs can be awarded against the Institute more or less unconditionally, does not appear to be supported by the wording of this Article. On its plain reading, the first sentence states the generally applicable rule, namely that the parties bear their own costs. The second and third sentences provide for the exception, where the choice between the second and third sentence depends on the final decision taken. It is true that the third sentence does not repeat the condition of "special circumstances" as stipulated by the second sentence, but the third sentence too states that the decision "may" stipulate a recovery of costs differently from the general rule of the first sentence. However, the term "may" makes it clear that the application of the third sentence is not unconditional, and the only identifiable condition in Article 27(2) RDR is the presence of "special circumstances" as stated in the second sentence. Thus, the second interpretation of Article 27(2), third sentence, RDR proposed by the epi President appears reasonable, namely that special circumstances are required where costs of the professional representative can be awarded against the Institute.

16. Based on the file available to it, the Board finds that the requesting respondent has not argued that special circumstances were present and should be taken into account, and none are apparent from the file. The epi President too did not argue that this was the case but

only stated that the Chamber ought to have examined *ex officio* whether special circumstances were present. The Chamber has identified the request but did not explicitly state that the respondent had not pointed to special circumstances. Thus, the reasoning of the Chamber may not have been perfect but its result appears to be correct. There seems to be no apparent reason for the Board to set the decision aside and to decide differently. Thus, there is also no reason to expect a different decision from the Chamber (or the Disciplinary Board), so that a remission would also appear not to serve any purpose, irrespective of the allegedly insufficient reasoning by the Chamber.

Second ground, admissibility and allowability: adverse effect

17. Concerning the request to be provided with copies of the file, it is the understanding of the Board that the epi President was entitled to consult the complete file through the Registrar of the Board, from the very beginning of the appeal proceedings. To the Board's knowledge, the epi President was also aware of this possibility from earlier cases. The Board considers that this request was effectively granted to the epi President in the appeal proceedings and does not require a separate decision of the Board.

18. Concerning the request for a decision on the fundamental deficiency in the proceedings conducted by the Chamber, the epi President submitted in his appeal that denying him access to the file was wrong and argued why this was the case. However, he did not submit any formal request on how the Board was expected to remedy this error. The Board initially inferred from the appeal submissions that the epi President requested a decision from the Board stating that he should be

given (or should have been given) access to the file. In his response to the Board's preliminary opinion the epi President explicitly requested that the Board issue a decision ruling that the Disciplinary Committee made a fundamental procedural error. He also requested that this error should be rectified, possibly by way of a remission.

19. Concerning the presence of a procedural error, the Board concurs with the epi President that both Presidents should be provided with copies of all documents, as a matter of course and without any particular request on their part. The question if the President of the epi (or both Presidents) is necessarily a party to the proceedings under any circumstances need not be answered. Even if formally not being a party - if only because no substantive decision under Article 4 RDR can be made against them - both Presidents have rights that make them effectively comparable to parties. Given that costs can be awarded against the Institute, or the bearing of the costs of the Institute or of the Office can be refused, the Presidents, in their capacity of representing the Institute or the Office, can be directly affected by a decision. A President is certainly a party as soon as he or she appeals. The Presidents are entitled to appeal also without being directly affected by a legal effect of the decision, i.e. they may appeal all decided issues, not only costs. Most importantly, the Board has no doubts that both Presidents must have full access to the file, in order to be able to comment (Article 12 RDR), to participate in the oral proceedings (Article 14 RDR) or to exercise their right to appeal (Article 8(2) RDR) in a meaningful manner, as pointed out by the epi President.

20. The Board recognises that there may be circumstances where the Presidents need not be heard, at least in a first stage of the proceedings, e.g. where the Chamber intends to refer the matter to the Disciplinary Board pursuant to Article 6(2) RDR. According to Article 12 RDR, the representative concerned must be given an opportunity to comment before a decision is taken **which might prejudice his or her interests**. By contrast, the Presidents shall be given an opportunity to comment before any **final decision** is taken. But this also illustrates that in certain constellations the Presidents' right to comment is even wider than that of the representative concerned. This may be the case in situations where the representative need not be heard, e.g. where the Chamber intends to dismiss a manifestly unfounded complaint. Still, in the opinion of the Board, in most cases it would hardly make sense to let only the representative comment but not the Presidents, and *vice versa*. For example, the Presidents' right to participate in the oral proceedings pursuant to Article 14 RDR is apparently independent from the expected outcome of the Chamber's decision.
21. The Board also concurs with the epi President that Article 20 RDR is not intended to represent a bar for the Presidents for accessing the files and they are inherently obliged to keep all matters confidential. This is supported by the available preparatory materials of the RDR. Articles 12, 14 and 20 RDR are unchanged since the original version of the RDR, which was adopted on 21 October 1977 by the Administrative Council of the European Patent Organisation. The Board has access to the relevant non-public preparatory materials, such as the explanatory notes prepared for the Administrative Council. These explanatory notes ("Commentary on the draft regulation on discipline",

Annex IIIb) provide some insight and support the epi President's position. With respect to Article 14 RDR, the Commentary states the following: *"This Article defines the persons who are entitled to be present throughout oral proceedings. A right to be present on the part of the complainant and of other professional representatives would scarcely be compatible with the obligation to secrecy (Article 20). This provision does not preclude the presence of other persons who may be required to attend for procedural reasons (e.g. interpreters or experts)."*

22. Given that Article 14 RDR explicitly foresees the presence of the Presidents during oral proceedings, it is clear from this explanation that the Presidents are in a special and privileged position with respect to other third parties. This is the case even with respect to the complainant or the representative concerned, as explained in point 20 above. There is a clearly recognisable legislative intent that the Presidents' knowledge of the details of the proceedings should not be regarded as being incompatible with the general confidentiality of the proceedings under Article 20 RDR.
23. On this basis, the fact that the epi President had not had access to the file would normally constitute a fundamental deficiency within the meaning of Article 12 RPDBA and would dictate a remission. In the present case, the Chamber's decision was final and as such also appealable, so that circumstances as explained in point 20 above were also not given.
24. However, the considerations as set out in points 19 to 22 above cannot cure the problem that the issue of file access is presented by the appeal as merely a

procedural problem, which appears to be unrelated to those parts of the decision which were appealed within the meaning of Article 6(1) RPDBA. The Board noted the argument that without access to the file the epi President was not in the position to assess the case and therefore was also unable to decide whether to file an appeal on the merits of the case. The epi President did not argue that the legal effects decided by the appealed decision should be set aside as a consequence of the lacking file access and a different legal effect should be decided, or that the procedure should be remitted for a new decision on the merits of the complaint. Instead, he explicitly stated that he does not wish to appeal the decision to the extent that the complaint was dismissed. Thus, the Board finds that the procedural error may have had an influence on the dismissal of the complaint but that this part of the decision is not covered by the appeal.

25. Concerning the decision on reimbursement, the appeal does not establish any link between this and the epi President's lack of file access. The arguments submitted on this ground solely address issues which were apparently known to the epi President from the impugned decision or possibly from other sources. In his response to the Board, he mentioned that he could not have known that one of the respondents requested the costs to be reimbursed by the Institute, but otherwise did not argue that his appeal on costs could have been different in view of this information. The Board also does not see the relevance of this circumstance, given that the impugned decision did contain this information and therefore this was known to the epi President. Thus, the Board holds that the appeal treats the two appeal grounds as being independent from each other. Accordingly, the

procedural error may have had an influence on the decision on the reimbursement, but this aspect of the cost decision too is not covered by the appeal.

26. In this light, given that the epi President does not seek review of the substantive decision, i.e. the dismissal of the matter, and given that the costs decision has no causal relationship with the epi President's lacking file access, the examination of the second ground cannot lead to the setting aside of the decision and as such serves no purpose. Put differently, from the point of view of the epi President, there was in fact nothing lost (despite the violation of his rights) and therefore there is nothing to be gained from the appeal. The epi President may have been adversely affected during the procedure leading to the decision but not by the decision itself nor by its reasons, given that the substantive outcomes did not appear to cause any adverse effect to the epi President, in the sense that he did not argue that these substantive outcomes were wrong. Absent such an adverse effect of the decision on the epi President, the deficiency cannot be considered as fundamental in the present case (analogously to the assessment of substantial procedural violations by the Boards of Appeal for the purposes of Article 11 RPBA).
27. This becomes even clearer when looking at the procedure. Even if the Chamber had made a separate and explicit positive decision and had permitted the epi President to access the file, such a decision would have had to be made before the final decision and could not have been a part of the final order. This demonstrates that not only was the epi President's access to the file not treated by the Chamber as part of its final decision (i.e. its order), but the

Chamber's final decision could also not be expected to include such an order. Thus, even if the procedure had been conducted in the way the epi President argues it should have been, it would seem that the Chamber's final decision would have remained the same. In other words, even if the epi President had been provided with all documents (possibly without any special request to this end), the Chamber's decision would have contained no order as to the Presidents' file access. At most, this would have been mentioned in the summary of facts and submissions as part of the procedure. It remains that the second ground does not seek to change the substantive and ancillary final decisions of the Chamber, nor does it seek any other decision which would normally be expected from the Disciplinary Committee or the Disciplinary Board. Having examined the second ground, the Board finds that it is in fact inadmissible for lack of an adverse effect.

28. The Board accepts, *arguendo*, that the appeal could still be considered admissible. Formally, even if not expected to do so, nothing would appear to prevent either the Chamber or the Board to issue an explicit order for providing the epi President with access to the file. In this manner, the Board accepts that the epi President seeks to achieve a further possible legal effect, even if this legal effect only concerns the procedural rights of the epi President. However, stating these procedural rights in an order at this stage of the proceedings would not serve any purpose. The proceedings are not going to be re-opened either for the merits of the complaint or the costs issue. Neither the Chamber or the Disciplinary Board, nor the Board would have the powers to grant the epi President access to the file in other pending or future cases. However, the Board need not decide whether the second

ground is indeed inadmissible or only unallowable. It remains that there is no reason to set aside the decision, which means that the second ground is at least unallowable.

Request for remission to the Disciplinary Board of the EPO

29. These considerations are not changed by the auxiliary request, submitted with the epi President's reply, that the Board should remit the case for a decision on the appeal grounds. Firstly, as a question of principle, admissibility of the appeal must be decided on the basis of the appeal as filed, in other words, on the basis of the submissions filed within the time limit for filing the appeal. Secondly, the Board does not see why the Board's objections against the admissibility or allowability of the appeal grounds would be overcome as a result of the request for a remission. An appeal ground must be found admissible before the Board can proceed to order the remission. Neither the Chamber nor the Disciplinary Board would have more powers or generally be in any better position than the Board to issue the requested decisions. Thus, the objections would still apply even if the request for remission had been submitted at the outset of the appeal.

30. In sum, the appeal is inadmissible at least with respect to the first ground and at least unallowable for the second ground, so that the appeal as a whole must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated