Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-3014

Case Number: D 0055/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 21 March 2023

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 02/2020 dated 6 October 2021.**

Composition of the Board:

Chairman: W. Sekretaruk
Members: T. Bokor
I. Beckedorf
S. Colombo
J. P. Frederiksen

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), "Disciplinary Committee", on case CD 02/2020, issued in writing by the appointed Chamber on 6 October 2021 and deciding on the basis of a complaint raised against two professional representatives who were respondents to the complaint and are also respondents in this appeal (in the following "the respondents", irrespective of their procedural position in the given context). 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
- Code of Conduct, also as CC: Code of Conduct of the Institute of Professional Representatives before the European Patent Office
- RPDBA: Additional Rules of Procedure of the Disciplinary Board of Appeal
- RPDC: Additional Rules of Procedure of the Disciplinary Committee of the epi
- BDS DBA: Business distribution scheme of the Disciplinary Board of Appeal for 2022

all published in the Supplementary publication 1, OJ EPO 2023, pages 146, 140, 72, 157, 33, respectively.

III. In the following, the Disciplinary Board of Appeal in its five-member composition dealing with the current appeal, as composed under Article 10(1) RDR and

Article 2(1) BDS DBA, is referred to as "the Board". The Chamber of the Disciplinary Committee as composed under Article 2 RPDC is referred to as "the Chamber". Where reference is made to the Disciplinary Board of the EPO under Article 5(b) RDR, the term "Disciplinary Board" is used.

The proceedings leading to this appeal

IV. The disciplinary proceedings CD 02/2020 leading to the appealed decision were initiated by the response of the complainant in the earlier proceedings CD 05/2019 (there in her capacity as the respondent, in the following "the complainant", irrespective of her procedural position in the given context). Like the current proceedings, the earlier proceedings CD 05/2019 concerned a dispute between members of an association (partnership) of patent attorneys in a member state of the EPC, the attorneys acting both as national patent attorneys and European patent attorneys. The complainants in case CD 05/2019 are the respondents in the current case. The complainant is one of the two respondents in case CD 05/2019.

V. The complainant, in her written defence to the complaint in case CD 05/2019 dated 27 February 2020, raised the following points, which, in her view, constituted a violation of the Code of Conduct. The respondents sought to cut off the complainant from her clients; sought to harm the complainant's reputation; relied on documents with a falsified signature of the complainant; effectively forced the complainant out of the association; generally relied on unfair practices by using purposefully modified power of attorney forms; barred the complainant from handling the matters of the association and from accessing its finances, caused

direct financial harm to the complainant; sought to prevent the participation of the complainant in an international conference; hired a private investigator to spy on the complainant at an international conference; and filed multiple unfounded national court proceedings against the complainant, these civil, penal and disciplinary court proceedings relying on false accusations. The complainant explicitly mentioned the hiring of a private investigator as a serious disciplinary offence and a violation of Article 1 RDR. She has argued that her own actions were made in good faith, were understandable in view of the acts of the respondents, did not cause harm to the respondents or to their business partners and did not violate disciplinary regulations under the RDR. Finally, she stated that the overall actions of the respondents violated the Code of Conduct, in addition to the bringing of the complaint itself, "… the acts performed by [respondents], have been the true and real violation of the Code of Conduct. Moreover, filing such unsubstantiated complaint constitutes as itself a violation of the disciplinary regulations of epi". The arguments concluded with the following statement: "Should the Committee agree with my conclusions, this letter shall be treated as a disciplinary complaint against [respondents]".

VI. The decision in case CD 05/2019 was handed down in writing on 7 July 2020. The Chamber dismissed the complaint against both respondents of the case, i.e. also against the complainant of the current case. Among other ancillary decisions, the Chamber also decided that the submissions of the complainant should be treated as a complaint against the current respondents.

VII. The decision under appeal held that the starting date of the current proceedings is the date of the decision in case CD 05/2019, i.e. 7 July 2020. One year later, on 7 July 2021, the complaint was sent to the respondents. Their written defence was received on 6 and 8 September 2021. According to their defence, it was the complainant who had made untrue statements, distorted facts, behaved unlawfully and generally harmed the interests of the partnership. The respondents had only resorted to legal remedies available under the applicable national laws for protecting their interests and the interests of the partnership in a legitimate manner. In the dispute, several court cases were still pending, but several cases had been decided in favour of the respondents.

VIII. In the appealed decision, the Chamber summarised the submissions of the parties and the applicable legal provisions of the RDR and the Code of Conduct, and concluded as follows: "The dispute between the complainant and the respondents … is still unsolved, several court cases are pending. Initiating of legal procedures by the parties seems not to be in contradiction to the Code of Conduct. Filing a (even multiple) lawsuit cannot be regarded as a violation of the Code of Conduct. As long as there are no legally binding court decisions, it cannot be decided whether or not there is a breach of the Code of Conduct". As the effective substantive outcome of the decision, the Chamber dismissed the complaint, taking into account the fact that the court cases are still pending. The decision contains no further assessment of the various acts of the respondents, whether these are seen as factually true or whether the acts can be qualified as breaches of the rules of professional conduct within

the meaning of Article 4 RDR. The decision is dated 6 October 2021.

IX. The decision of the Chamber was sent to the epi President by electronic means on 8 October 2021, and the epi President confirmed receipt on the same day.

X. The epi President filed the notice of appeal on 12 November 2021 and the grounds of appeal on 20 December 2021 by telefax, and the confirmation copies were received later.

XI. The epi President requests that the decision be set aside based on the following three grounds.

(i) The reasons given by the Chamber for dismissing the complaint are wrong. Pending proceedings before national courts do not prevent disciplinary proceedings under the RDR. Whether the rules of professional conduct under the RDR have been violated should only be judged based on the facts of the case and should not be dependent on the opinion of a national court, which decides on the basis of national law. A disciplinary body established under the RDR need not wait for a decision of a national court in a civil or criminal case to decide whether someone infringed the applicable rules of professional conduct. If a disciplinary body was of the opinion that its decision hinged on a decision in a civil or criminal case, that body should stay the proceedings. However, given that the Disciplinary Committee cannot wait longer than nine (plus a maximum of six) months, it would still be procedurally possible to refer the complaint to the Disciplinary Board.

(ii) The Chamber's other reasons are also wrong. Filing a lawsuit could under certain circumstances be regarded as a violation of the RDR. Article 1(1) RDR stipulates that "A professional representative … shall not knowingly make any false or misleading statement". A professional representative who initiates legal proceedings against someone while knowing that they are unjustified or based on false or misleading statements effectively violates Article 1(1) RDR. Indeed, false suspicion is a criminal offence under national laws.

(iii) Two procedural errors were made with the formalities of the complaint and the composition of the Chamber. The first error was made when the letter of 27 February 2020 of the complainant (written in her position as the respondent in case CD 05/2019) was not immediately treated as a complaint. Instead of waiting for its own final decision, the Chamber should have forwarded the complaint to the Registrar immediately, and the Registrar should have followed the procedure under Article 7(4) RPDC, in turn leading to the nomination of a Chamber under Article 7(5) RPDC without delay. The start of the nine-month period for the purposes of Article 6(3) RDR should have been the date of receipt of the letter dated 27 February 2020, not the date of decision in case CD 05/2019, as the Chamber has held. The second error was made when the Chamber treating the complaint was appointed. The members deciding case CD 05/2019 should have been replaced as their participation in that case may make the members objectionable under Article 24 EPC in conjunction with Article 16 RDR. If the Chamber deciding case CD 05/2019 agreed with the current complainant that the complainants in that case, i.e. the current respondents violated the RDR, it is difficult to understand why the current Chamber dismissed the current complaint.

However, given that the epi President had no access to the file, he was unable to check whether the procedure to appoint the Chamber was properly followed.

XII. The respondents made submissions with letters dated 25 November 2022 and 16 February 2023, submitting various evidence and addressing the appeal grounds. They requested the rejection of the appeal as inadmissible or at least the dismissal of the appeal as unfounded, arguing as follows.

(i) Both the notice of appeal and the grounds of appeal were filed late. The decision was delivered to the epi President on 8 October 2021. Under Article 22(1) RDR, the notice of appeal must be filed within one month after the date of the notification of the appealed decision, and the grounds of appeal within two months. Their filing on 12 November 2021 and 20 December 2021, respectively, was late, and the appeal had to be rejected as inadmissible.

(ii) Existing unsolved disputes pending before the national courts did not prevent the dismissal of the complaint. The Chamber ruled on the merits of the case. It determined all the relevant facts, evaluated these and did not find any disciplinary misconduct. It did not wait for a decision of a national court and ruled on the case independently, not feeling to be bound either by a decision of a national court or any pending court proceedings.

(iii) The dismissal of the complaint was also correct in the result. No factual and legal grounds proved that the respondents had breached the Code of Conduct. The ongoing disputes before national courts were acknowledged, but their subject did not fall under the

jurisdiction of the disciplinary bodies under the RDR. There was no reason to stay the proceedings.

(iv) Pursuing rights and seeking legal protection from a national court cannot be regarded as disciplinary misconduct. The President alleged that filing a lawsuit could, under certain circumstances, be regarded as a violation of the RDR, e.g. where a professional representative initiates legal proceedings against someone knowing that they are unjustified or based on false or misleading statements. Nothing points to such behaviour of the respondents in this case, and several proceedings before national courts have been mainly resolved in favour of the respondents. In any case, pursuing rights and seeking legal protection from a national court cannot be regarded as disciplinary misconduct, even if such actions appear ultimately unfounded or ineffective. Even if a court does not share someone's arguments and view of the case, this is not sufficient to determine that the case was brought in bad faith. All parties are entitled to defend their case before a court, this being enshrined universally under Article 47 of the Charter of Fundamental Rights of the European Union and under Article 6 of the European Convention on Human Rights. Such fundamental rights cannot be limited by professional codes of conduct.

(v) The procedure in handling the complaint complied with the applicable rules of procedure. Even if there may have been a procedural error, this cannot lead to the invalidity of the decision in the absence of specific provisions to this effect. The alleged procedural violation had no effect on the outcome of the case. The proceedings were largely conducted during the global COVID-19 pandemic, and it was common in many

states to suspend by law the running of legal time limits. In view of these circumstances, attaching negative substantive consequences to the possible argued violation would be excessive formalism.

(vi) The composition of the Chamber was consistent with the RDR. There was no reason to exclude a member under Article 24(1) EPC, and neither the complainant nor the respondents raised an objection against the composition of the Chamber. Besides, the Chamber did not rule on an appeal against its own decision, merely the same members of the Chamber rendered a decision in another case in separate proceedings. It is also apparent from the submissions of the epi President that he has no evidence proving the alleged procedural error.

XIII. By letter dated 2 May 2022, the EPO President was given the opportunity to comment on the appeal, but he made no comments.

XIV. The epi President requested in the appeal that the Board set aside the decision of the Disciplinary Committee and refer the matter to the Disciplinary Board of the European Patent Office. Neither the epi President nor the respondents requested oral proceedings.

Reasons for the Decision

Admissibility, formal requirements
Time limit for filing the notice and grounds of appeal

1. As the respondents correctly observe, pursuant to Article 22(1) RDR, a notice of appeal must be filed within one month after the date of notification of the appealed decision, and the statement setting out the

grounds of appeal must be filed within two months after the date of notification. The RDR does not contain detailed rules on the notification of decisions of the disciplinary bodies. Pursuant to Article 21(1), second sentence, RDR, such decisions must be notified to the professional representative, the epi President and the EPO President. Some guidance is provided by Article 21(2) RDR, stipulating that Rules 125 (4) and 126 EPC apply mutatis mutandis. The current wording of this article was established by the decision of the Administrative Council of the European Patent Organisation dated 14 December 2007 (OJ EPO 2008, 14), made necessary by the EPC 2000 and the new Implementing Regulations and the corresponding change in the numbering of the applicable provisions of the EPC 1973, but there was no change in substance. Reference is made to CA/187/07, pages 4 and 5.

2. The possible means of notification under the RDR do not appear to be limited to one or more of the four options mentioned in Rule 125(1) EPC, namely postal services, means of electronic communication, delivery on the premises of the EPO and public notice, as regulated in more detail in Rules 126 to 129 EPC. This can be inferred from the apparently intentional absence of any reference to Rules 125(1) and (2) EPC (corresponding to Rule 77(1) and (2) EPC 1973), as opposed to the explicit reference to Rule 125(4) EPC (corresponding to Rule 82 EPC 1973) in Article 21(2) RDR. This also appears reasonable as the conditions for the electronic means of communication for the purposes of the EPO are determined by the EPO President (Rule 27 EPC), and the handling of official correspondence between the epi and its members obviously cannot be based on the IT systems of the EPO, as a matter of practicality. The other two options, delivery on the premises of the EPO (or, by

analogy, on the premises of the epi) or public notice also do not appear to be feasible options for the purposes of the disciplinary bodies under the RDR. In sum, notification of decisions by means of electronic communication are not excluded under the RDR. At most, some form of advice of delivery may be expected where decisions incurring a time limit for appeal are notified as this was also a requirement under Rule 126 EPC at the time of the adoption of the current wording of the RDR.

3. On the other hand, from the reference to Rule 126 EPC, it can be gleaned that the rules of postal notification under the EPC should also be applicable in the proceedings before the disciplinary bodies under the RDR. In the current case, the appealed decision was not sent to the epi President by postal services but through the internal electronic file handling system of the registry of the Disciplinary Committee. The copies of the electronic communication between the registry and the epi President is in the file available to the Board. According to these documents, the decision was electronically transmitted to the epi President on 8 October 2021, who confirmed receipt on the same day. Thus, the question arises as to the date of the notification of the appealed decision for the purposes of Article 22(1) RDR.

4. Rule 126 EPC stipulates that in case of notification by postal services, the letter is deemed to be delivered to the addressee on the tenth day following its handover to the postal service provider. Under the EPC, the same ten-day notification fiction is also applicable where notification is effected by means of electronic communication, with the difference that the electronic document is deemed to be delivered to the

addressee on the tenth day following its **transmission** (emphasis by the Board, see Rule 27(2) EPC). As explained in the preparatory document for the Administrative Council when adopting the current wording of Rule 27 EPC, "*[parties] … agreeing to electronic notification should not be treated less preferential than those receiving paper notifications. … not applying the ten-day rule would result in increased complexity, since applicants and professional representatives would have to handle two different time schedules for their system for monitoring time limits.*" (CA/47/14, point 33).

5. So, on the one hand, the Board recognises that there is a legislative intent to apply the same notification rules for decisions of the disciplinary bodies as those applicable for the appealable decisions of the departments of the EPO. On the other hand, the Board also recognises the legislative intent that traditional postal notification and notification by means of electronic communications should be treated on equal footing to the extent feasible in proceedings before the EPO. For these reasons, the Board considers that the equal treatment of paper and electronic notifications is also applicable in the proceedings within the legal framework established around the EPC, such as the proceedings under the RDR, and no reason is apparent to the Board why the well-known ten-day notification fiction of Rules 126 and 127 EPC should not be applicable in the current case. The analogous application of Rule 125(4) EPC, as a subsidiary rule for irregular notifications, does not appear justified or necessary as there is nothing in the file that would point to an irregular notification of the appealed decision.

6. Pursuant to Article 24(1) RDR, Rules 131 and 134 EPC apply to all time limits specified in the RDR. Thus, the decision must be deemed to have been delivered to the epi President on 18 October 2021 (Rule 131(1) EPC), and the time limits under Article 22(1) RDR expired on 18 November 2021 and 18 December 2021, respectively (Rule 131(4) EPC). The latter fell on a Saturday and was extended to 20 December 2021 (Rule 134(1) EPC). On this basis, the notice of appeal and the statement of the grounds of appeal was timely filed.

7. The appeal is thus admissible as regards the time limit and form prescribed by Article 22(1) RDR. The appellant is entitled to appeal under Article 8(2) RDR.

Admissibility, substantive requirements
Adverse effect to the appellant and relief sought

8. The epi President submits that he is adversely affected by the decision of the Disciplinary Committee because it harms the reputation of the profession, the Institute of Professional Representatives and the EPO when disciplinary proceedings under the RDR violate legal principles and the prescribed procedures. As the relief sought (Article 6(1) RPDBA), he requests remittal to the Disciplinary Board but did not specify further the desired substantive outcome of the complaint.

9. It is sufficient for an admissible appeal of the epi President to indicate why the appealed decision is wrong in substance. Depending on the circumstances, it may not be necessary that he specifically request what the expected substantive outcome should be; a request for remittal on the merits may suffice (see also D 0002/20, Reasons 24). Pursuant to Article 8(2) RDR, the

professional representative concerned and the epi and EPO Presidents are entitled to appeal. The Board considers that the Presidents can admissibly appeal also without being directly affected by a legal effect of the decision (e.g. a direct legal effect may arise when a decision on costs is made against the epi or the EPO, see D 0002/20, Reasons 19). Indeed, as the epi President submits, a wrong substantive decision of a disciplinary body harms the reputation and thus the interests of the whole profession and the epi. As the representative of the epi (Article 10(1) of the Regulation on the establishment of an Institute of Professional Representatives before the European Patent Office), the epi President has an inherent duty to protect epi's interests.

10. To that extent, the current case is different from the situation underlying decision D 0002/20 where the appeal of the epi President was found inadmissible because he stated that he did not wish to appeal the substantive outcome of the proceedings, i.e. the dismissal of the complaint (Reasons 24 to 28), and did not state whether the Chamber's finding on costs was wrong in the result (Reasons 5 to 11). In the current case, the epi President explicitly stated why the decision was wrong and that it had to be set aside. In the circumstances of the current case, he cannot be expected to request some specific and different substantive outcome, as explained below.

11. In sum, the Board is satisfied that the appeal complies with Article 22 RDR and Article 6 RPDBA. It is admissible.

Allowability
First ground: effect of pending national court proceedings

12. As explained above, the letter of the complainant which triggered these proceedings was written primarily not as an independent complaint but as a response seeking to defend the complainant in an earlier disciplinary proceedings initiated against her. The grounds and arguments of the current complaint had to be understood and treated accordingly. If it were not clear to the Chamber what grounds and arguments constituted the complaint and what arguments should have been seen as the defence against the earlier complaint, the Chamber would have been free to invite the complainant to clarify her position.

13. The appealed decision appears to have identified two substantive objections of the complainant, i.e. two specifically mentioned breaches of the rules of professional conduct (Articles 1 to 3 RDR): initiating court proceedings (in bad faith) and filing an unsubstantiated complaint under the RDR. The reasons of the decision appear to address these two objections. On closer scrutiny, the reasons in fact only address the court proceedings but make no recognisable statement whether the filing of a complaint may be regarded as a breach. The reasons given for the court proceedings are also not transferable to the disciplinary complaint as this was no longer pending. Conversely, it may be that the reasons were meant to address the filing of the complaint only, and the statements of the Chamber on the pending court proceedings were merely meant to explain why the filing of the complaint could not yet be assessed by the Chamber as a potential breach under Article 4 RDR. The reasons are unclear in this respect.

14. However, from the totality of the complaint, it is clear that these two objections constitute only a part of the complaint, and many more acts of the respondents are considered by the complainant to be breaches of the rules of professional conduct (see point V above). It is true that the complainant did not identify which specific article of the RDR or the CC was violated when explaining the various acts of the respondents, but the fact that these acts together and possibly also individually were submitted by the complainant as the real subject of the complaint is beyond doubt for the Board. At least the hiring of the private investigator is explicitly stated to be a disciplinary offence against Article 1 RDR in itself, as also mentioned in the appealed decision (page 4, penultimate paragraph).

15. The alleged acts of the respondents (cutting off the complainant from her clients, harming her reputation, forging her signature, forcing her out of the association, barring her from handling matters of the association, etc.) are obviously very serious, and at least prima facie may qualify as potential breaches (i.e. non-compliance with the rules of professional conduct within the meaning of Article 4 RDR). Given that the larger part of these individually identified and objected to acts of the respondents are not treated in the decision, the decision must be considered as manifestly lacking reasons.

16. The respondents submitted that the Chamber determined all the relevant facts, evaluated these, and made its decision on that basis. The Board cannot accept this. There is no identifiable reasoning in the decision showing that the Chamber examined the objected to acts of the respondents and made any attempt to establish if

these were factually correct and whether these acts, if proven, constituted a breach. The Chamber only addressed the act of initiating court cases and the filing of the earlier complaint against the current complainant. Even these two acts were addressed only very superficially, as set out further below.

17. In this light, the Board must establish that the Chamber in fact did not examine the majority of the breaches argued in the complaint but rather gave a reason why it refrained from examining these.

18. It may well be that the Chamber misinterpreted the scope of the complaint, in particular the last condition given, namely that the complainant's defence letter is to be treated as a disciplinary complaint if the deciding chamber in case CD 05/2019 agrees with the "conclusions" of the complainant (see point V. above). However, the complainant clearly stated that the filing of the complaint of case CD 05/2019 was only one of the several perceived breaches of the rules of professional conduct under the RDR. This is quite clear from the preceding sentence "*… the acts performed by [respondents], have been the true and real violation of the Code of Conduct*", obviously summing up the previously detailed acts of the respondents. The filing of the unsubstantiated complaint is mentioned as an additional breach, as implied by the term "*Moreover, …*".

19. The Board takes note of the epi President's remark that he had no access to the file. Though the epi President did not further elaborate on this circumstance and did not formulate any request in this respect, the Board points to decision D 0002/20, Reasons 19 to 23, where the deciding board set out that denying the epi

President access to the file constitutes a fundamental deficiency within the meaning of Article 12 RPDBA and may in itself warrant a remission. In the case at issue, this circumstance also becomes significant for other reasons. Given that the epi President had apparently no access to the complaint, he was also not in a position to establish the manifest lack of reasoning for the larger part of the submitted breaches as explained above (with the possible exception of the hiring of the private investigator, which was explicitly mentioned as a possible breach also in the appealed decision). Furthermore, in the absence of any recognisable assessment of the facts and the various alleged acts of the respondents in the decision, the epi President could also not be expected to form a well-founded opinion on the correct substantive outcome of the complaint, i.e. whether the dismissal was justified or instead a disciplinary measure under Article 4(a) or (b) RDR should have been ordered by the Chamber, or an even more severe disciplinary measure pursuant to Articles 4(c) to (e) RDR would have been justified.

20. Concerning the two grounds of the complaint addressed by the Chamber and the corresponding reasons of the Chamber, the Board concurs with the epi President that the Chamber's reasons are not convincing or, more precisely, they are incomplete in the form given by the Chamber.

21. The respondent argued that the Chamber was not prevented from dismissing the complaint in view of the pending disputes before a national court. This may be true, but the core of the epi President's argument is different. He disputes the Chamber's conclusion that "*as long as there are no legally binding court*

decisions, it cannot be decided whether or not there is a breach of the Code of Conduct". In the view of the Board, this statement of the Chamber can be read in (at least) two ways when interpreted against the circumstances of the case. It can be read to mean that the Chamber is formally prevented from making any legal assessment pursuant to Article 6(2) RDR of the acts in question until a national court has established whether the acts in question were legal or not. It appears that the epi President understood the Chamber's reasons in this way. The Board is also inclined to read the decision similarly, in particular because the Chamber seems to have put the emphasis on the existence of a "legally binding court decision" (presumably meaning a final, i.e. no longer appealable, decision). On the other hand, it may also be read to mean that without a final decision of the court, the Chamber is unable to establish the facts, i.e. the veracity of the alleged acts, and therefore the Chamber also cannot decide if there had been a breach of the RDR, in particular whether the respondents indeed made knowingly false or misleading statements (Article 1(1) RDR). Either way, this ambiguity further underlines the deficient reasoning of the decision.

22. The Board considers that on either reading, the Chamber's reasons are wrong or at least insufficient. Assuming the first interpretation to be the Chamber's intention, the Board concurs with the epi President that such reasons are wrong. The disciplinary bodies under the RDR act independently and are not obliged to wait for a decision of a national court or similar authority. That said, this does not mean that they cannot take pending court proceedings or already issued national decisions into account when assessing an alleged breach of the RDR. E.g. a negative decision of

a national court against an epi member will normally also serve as an argument for a breach of the rules of professional conduct. On the other hand, even if a national court finds that certain acts of a professional representative are not illegal under the national laws of a member state, such acts may still be found by a disciplinary body under the RDR to constitute a breach of the rules of professional conduct.

23. However, if the Chamber merely intended to state that it considered the outcome of a national court proceeding to be decisive for its own decision, in the sense that the court decision was seen as necessary for establishing the facts, it should have given more detailed reasons, explaining at least which facts of the case required the final court decision and why it was not an option to wait for the outcome of the court proceedings. The Board notes that the complainant and the respondents alike pointed to court decisions that had already been issued, some even being final.

Second appeal ground: disciplinary consequences of filing a lawsuit

24. The Board concurs with the epi President that the filing of a lawsuit may under certain circumstances constitute a breach of the rules of professional conduct. This does not seem to be contradicted by the respondents, who merely argued that the RDR cannot prevent epi members from exercising their right to defend their interests by all legitimate means, including court proceedings, and that the respondents did not act in bad faith. However, the epi President seems to interpret the statements of the Chamber (the second and third sentences in its reasoning, see point

VIII above) somewhat out of context by separating them from the other reasons (i.e. the first and fourth sentences).

25. The Board also agrees with the respondents that the provisions of the RDR cannot be understood to constitute some general prohibition to sue other members of the epi. To that extent, the Board can even subscribe to the statement that the mere fact of filing a lawsuit by an epi member against another epi member is not a violation of the CC or the RDR. The problem is that the Chamber formulated its reasons quite differently, stating that the filing of a lawsuit (or even multiple lawsuits) cannot be seen as a breach as long as these are pending. The wording used by the Chamber appears to present the pendency of the lawsuits as the single and absolute condition preventing the Chamber from assessing the alleged breach (whether the breach is the filing of the lawsuit or some other act being the subject of the lawsuit). The Chamber's position may hold true for many situations, but it clearly is not the general rule as suggested by the short reasons given by the Chamber. To decide if the initiation of lawsuits by the respondents were compatible with the rules of professional conduct, the Chamber ought to have assessed the totality of the circumstances instead of summarily dismissing this objection of the complainant. Furthermore, as pointed out in point 23 above, the stated condition of the pending lawsuits was obviously not fulfilled for at least some of the alleged breaches where final court decisions had already been given.

26. For these reasons, in particular due to the lacking reasons, the Board holds that the decision under appeal must be set aside. In view of the absence of any

examination of the factual background of the case, the Board should refrain from deciding on the merits of the case as this would effectively require the Board to be the first to examine the case on the merits instead of a first-instance body. For these reasons, the Board also need not assess the various factual arguments of the respondents submitted in the appeal proceedings (see point XII. iii above).

Remaining appeal grounds, procedural irregularities

27. Given that the first and second appeal grounds suffice for setting the decision aside and remitting the case to the Disciplinary Board for a new decision, the argued procedural irregularities need no decision of the Board. These are only briefly addressed.

Observation of time limits under Article 6(3) RDR and handling of the complaint by the Chamber

28. The Board does not see that the complaint was handled incorrectly. First of all, pursuant to Article 7(3) RPDC, a complaint must not be considered to have been brought to the notice of the Disciplinary Committee **until it has been received by the Registrar** in one of the official languages of the European Patent Office. This provision appears to address the start of the nine-month time limit for the purposes of Article 6(3) RDR, so both the Chamber and the epi President appear to be in error on the correct starting date of the proceedings. It may be that the defence letter of the complainant went through the hands of the Registrar, but on the face of it, it was a response letter submitted in case CD 05/2019, addressed to the Chair of the Chamber. The Board is not convinced that it would have been the duty of the Registrar to check the

totality of its contents and to discover that it contained the conditional complaint.

29. On the other hand, the Board also cannot agree that the Chamber handling case CD 05/2019 should have initiated the proceedings *ex officio* practically unconditionally and immediately after receiving the defence letter and the embedded conditional complaint. The Board recognises that the disciplinary bodies established under the RDR may initiate a complaint *ex officio* if they observe a violation of the rules of professional conduct. Still, initiating disciplinary proceedings under the RDR is a serious matter, for the complainant and the respondent alike, directly affecting their personal rights and making them potentially liable for infringing the personal rights of others, such as personal reputation and dignity. If it had been clear from the complainant's submissions that the formal filing of the complaint (whether in her name or through a reference to her case) was tied to certain conditions, respecting the complainant's wish cannot be objected to, especially where the complainant was also an epi member. Certainly, the procedure suggested by the epi President could also have been followed, but it is unlikely that the starting date of the proceedings would have been much different. Also, the Registrar would have been obliged to clarify the intentions of the complainant, and the proceedings could not have started if the complainant had not wished them to start.

30. As to the observation of the maximum possible duration of the proceedings before the Chamber, the proceedings finished on the penultimate day of the possible nine plus six months allowed by Articles 6(3) and (5) RDR. The decision(s) of the Chairman of the Disciplinary

Board allowing the total six-month extension under Article 6(5) RDR is not in the file available to the Board, but the Board has no reason to assume that this formality has not been complied with. But even if a procedural error had been made, this is now cured through the remission to the Disciplinary Board.

Composition of the Chamber

31. The Board does not see any formal procedural error or any reason for exclusion or objection under Article 24 EPC in conjunction with Article 16 RDR. As argued by the respondents, the handling of the two related complaints by two Chambers with the same members cannot be compared to a member of an appellate body having taken part in an appealed decision. In the current case, the finding of the Chamber in case CD 05/2019 that the complainant did not breach the rules of professional conduct did not inevitably prejudice the Chamber's decision on the current complaint, which concerned the acts of the respondents, possibly related to but still a different question from the subject of the earlier complaint.

32. The Chamber in case CD 05/2019 made no error in that they treated the letter as a complaint because the outcome of that case was positive for the current complainant. This appears to have been the intention of the complainant. However, this did not mean that the Chamber had to form a negative opinion on the argued acts of the respondents. The "conclusions" referred to by the complainant in her defence letter (see point V. above) were mainly directed at the substantive outcome of case CD 05/2019 and were not focused on her argument that the initiation of the complaint against her violated the disciplinary regulations of the epi. Her

defence letter was primarily directed at rebutting the accusations of the complaint in that case, and the larger part of her "conclusions" encompassed factual statements and conclusions concerning her own actions, serving as arguments for the dismissal of the complaint against her. Thus, the expected "agreement to [her] conclusions" was not to be primarily understood as the Chamber's agreement with her assessment of the respondents' acts but rather as an agreement with the assessment of her own conduct vis-à-vis the respondents, and as such leading to the dismissal of the complaint against her. For this reason, contrary to the epi President's submissions, the Board does not see any contradiction in the fact that both complaints were dismissed, and the Board has no reason to assume that the Chamber may have been partial.

Request for remittal to the Disciplinary Board of the EPO

33. The Board concurs with the epi President that remission to the Disciplinary Board of the EPO is the most suitable course of action in this case. A remission to the Disciplinary Committee would be theoretically possible in view of Article 12 RPDBA, but the expiration of the nine plus six months available for the proceedings of the Disciplinary Committee under Article 6(3) and (5) RDR would oblige the Chairman of the Disciplinary Board to transfer the case immediately to the Disciplinary Board. Restarting the time limits under Article 6(3) and (5) RDR following the remission appears procedurally problematic for similar reasons as set out in D 1/18, Reasons 19 (on whether consolidation of cases would trigger time limits anew). That said, the Board recognises that the RDR, the RPDBA or the RPDC are silent in this regard.

34. As found in D 1/18, Article 6(3) RDR sets a definite time limit of nine months. This article or any other provision of the RDR does not seem to permit deviation from this rule (except for Articles 4(a) and (5) RDR, which are again, quite definite and specific). Like the RPDC, the RPDBA is also on a lower hierarchical level than the RDR because it is based on the powers conferred by Article 25(2) RDR. On this basis, the procedural possibility of a remission, based on Article 12 RPDBA, seems a formally insufficient legal basis for overriding the provisions of Article 6(3) RDR, absent a specific permission in the RDR itself (or possibly in some other higher ranking rule, although the Board is unaware of any). As explained in D 1/18, Reasons 16, Article 12 RDBA permits a board to remit a case directly to the Disciplinary Board instead of the original deciding body, the Disciplinary Committee, in case of special reasons. In the current case, the same special reasons are applicable as in D 1/18, namely the expiry of the time limits under Article 6(3),(4) and (5) RDR.

35. The Board observes that the apparent complexity of the case also appears to justify that the Disciplinary Board should treat the case following the remission.

Order

For these reasons it is decided that:

The decision under appeal is set aside.
The case is remitted to the Disciplinary Board of the European Patent Office for decision.

The Registrar: The Chairman:

N. Michaleczek W. Sekretaruk

Decision electronically authenticated