Europäisches Patentamt
European Patent Office
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**Beschwerdekammer in Disziplinarangelegenheiten**

**Disciplinary Board of Appeal**

**Chambre de recours statuant en matière disciplinaire**

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**Case Number: D 0001/18**

# D E C I S I O N
# of the Disciplinary Board of Appeal
# of 26 September 2019

**Appellant:** N.N.

**Decision under appeal:** **Decision of the Disciplinary Committee of the Institute of Professional Representatives before the European Patent Office dated 28 November 2017 issuing a warning in respect of Complaint CD 07/2015 and referring the complaint CD 15/2016, together with the relevant papers, to the Disciplinary Board of the European Patent Office**

**Composition of the Board:**

**Chairman:** C. Josefsson
**Members:** T. Bokor
T. Johnson
P. H. Gendraud
E. Dufrasne

## Summary of Facts and Submissions

I. The present appeal is against the decision 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 on 28 November 2017 and deciding on the basis of two complaints which were raised against the appellant (in more detail below).

II. The present decision makes reference to a number of legal provisions, using the following abbreviations:

- RDR: Regulation on discipline for professional representatives
- CC: Code of Conduct of the Institute of Professional Representatives before the EPO (the latter also as "epi")
- RPDC: Additional Rules of Procedure of the Disciplinary Committee of the epi,
- RPDB: Additional Rules of Procedure of the Disciplinary Board of the EPO,
- RPDBA: Additional Rules of Procedure of the Disciplinary Board of Appeal of the EPO,

all published most recently in the Supplementary publication 1, OJ EPO 2019, pages 119, 113, 131, 141 and 50, respectively.

III. The present decision also refers to other disciplinary bodies in addition to the Disciplinary Committee. In the following, the Disciplinary Board of Appeal in its five-member composition dealing with the present appeal as composed under Article 10(1) RDR 2019 will be referred to as "the Board". Where reference is made to the Disciplinary Board of the EPO under

Article 5(b) RDR, the term "Disciplinary Board" is used. The Chamber of the Disciplinary Committee will be referred to as "the Chamber".

*The proceedings leading to the present appeal:*

IV. A first complaint was filed against the appellant by the Swedish company YYY (YYY) on 23 December 2015 (File number CD 07/2015, hereinafter Complaint 1 or the "YYY Complaint"). The Disciplinary Committee of the epi appointed a Chamber pursuant to Article 2 RPDC. According to the file available to the Board the Rapporteur of the Chamber sent several letters to the appellant concerning the commencement of disciplinary proceedings under Article 6 RDR and Article 8 RPDC. Two of these letters are in the file of the Board, dated 9th and 11th March 2016. The Rapporteur invited the appellant to state any exclusion objections, and generally to comment on the complaint, within a time limit of two months. The Board's file does not contain information whether these letters of the Rapporteur were sent by e-mail or by ordinary mail in paper form. However, in light of the fact that later correspondence from the Chamber (e.g. in point VIII below) explicitly states sending both by e-mail and registered letter and uses the EPI heading, it can be inferred that these first letters of the Rapporteur were only sent by e-mail. According to the file the Chamber received no response from the appellant.

V. The Chairman of the Disciplinary Board acting under Article 6(4) RDR extended the time limit for consideration of the matter under Article 6(3) RDR with three months, so that the new time limit was to expire on 23 December 2016.

VI. A second complaint was filed against the appellant by the Finnish company XXX on 28 November 2016 (File number CD 15/2016, hereinafter Complaint 2 or the "XXX Complaint"). The Disciplinary Committee of the EPI appointed the same Chamber pursuant to Article 2 RPDC to deal with the matter which was handling the YYY Complaint.

VII. The Chairman of the Disciplinary Board informed the Registrar of the Disciplinary Committee (and implicitly the Chamber) in a letter dated 20 December 2016 that "in the case of a consolidation" the time limit for consideration of the matter in the consolidated proceedings "will be extended" to the time limit of the later complaint (i.e. the XXX Complaint), and will expire on 28 August 2017. By order of 21 December 2016 the Chairman of the Chamber informed the epi that the two proceedings were consolidated. There is no trace in the file that the Chairman of the Disciplinary Board at this point of time, i.e. in December 2016, formally extended again the time limit under Articles 6(3) and 6(4)(a) RDR (cf. point V), or that this time limit was determined in any other manner.

VIII. The Chairman of the Chamber addressed the appellant in a letter dated 18 January 2017, informing him of both complaints and according to the file, attaching these to the letter. This letter laid out the procedure before the Chamber (with the same content as the letters of 9th and 11th March 2016 mentioned in point IV). A time limit of two months was given to the appellant for commenting on the complaints. This letter of the Chairman appears to have been sent by registered mail and also by e-mail to the appellant.

IX. With a letter dated 6 April 2017 the Chairman of the Chamber granted an extension of time to the appellant for responding to the Chamber, the new time limit expiring on 6 May 2017. The letter makes reference to an e-mail of the appellant dated 3 March 2017. This e-mail is not part of the Board's file.

X. The appellant sent a detailed response to the Chamber dated 3 May 2017, apparently by e-mail. Apart from the comments on substance (as set out in detail below), he stated that the complaints were not received by him before February 2017 (specific date of receipt not being mentioned). This response of the appellant (in the form of a paper printout) makes references to annexes/enclosures, but these are not in the file of the Board.

XI. With letter dated 8 June 2017, the Chairman of the Chamber summoned the appellant to oral proceedings, scheduled to take place on 10 August 2017. The letter states that Ms. Gerasimovic replaces Ms. Smideberga as Rapporteur, and sets out the procedure to be followed before and during the oral proceedings.

XII. The Rapporteur contacted both YYY and XXX in June 2017, and requested information. YYY and XXX replied. The legal counsel of XXX supplied the Chamber with various pieces of evidence in support of their complaint (annexes A1 to A13 attached to the letter of the legal counsel dated 5 July 2017).

XIII. In the meanwhile, the time limit under Articles 6(3) and 6(4)(a) RDR expired on 28 August 2017, cf. points V and VII. There is no trace in the file that the Chairman of the Disciplinary Board extended the time limit at any time after December 2016, or that the

Chamber or the appellant made any observations in this respect. This point is not raised in the appeal either.

XIV. After a request for postponement by the appellant, the oral proceedings before the Chamber was held on 8 September 2017. The appellant provided comments in writing with letter (presumably sent by e-mail) dated 7 September 2017. He also attended the oral proceedings in person. The Chamber did not take a decision during the oral proceedings. The minutes of the oral proceedings are not in the Board's file.

XV. The Chairman informed the appellant with letter of 8 September 2017 (i.e. on the day of the oral proceedings) that the appellant is given a month to comment on the information provided by the Complainants (point XII). According to the file, no further comments were provided by the appellant.

XVI. The decision under appeal was issued in writing by the Chamber on 28 November 2017 and was stated to be notified to the appellant on 11 December 2017. As part of the reasoning it refers to a number of e-mails which are not part of the Board's file. The appellant filed the appeal on 9 January 2018 and the grounds of appeal on 12 February 2018.

XVII. By letters dated 27 June 2018 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 EPO stated with letter dated 3 August 2018 that he did not wish to comment. The President of the epi submitted by letter dated 5 September 2018 comments on certain issues (cf. points 6.13, 14 and 19).

XVIII. The Board sent out a communication under Article 14 RPDBA dated 12 March 2019 and informed the appellant of its preliminary opinion, essentially along the lines of the present decision. The Chairman of the Board granted the appellant's request for file access for his legal representative under Article 19 RDR, and a copy of the Board's file was posted to the legal representative.

XIX. The appellant responded on 17 May 2019 to the communication of the Board and agreed in essence to the assessment of the case as outlined by the Board. He also withdrew his request for oral proceedings before the Board (point XXVI.i).

*The substantive issues:*
*The YYY Complaint*

XX. YYY asserts that the appellant issued towards YYY an unreasonably large invoice, relating to the transfer of YYY's patent portfolio from the appellant's firm to another firm. The portfolio consisted of about 80 cases. YYY further asserts that the appellant did not maintain the files of YYY in good order, and therefore incurred unreasonable costs to YYY. Thirdly, the complaint asserts that YYY made attempts to settle the matter but the appellant could not be contacted. The complaint does not mention which specific provision of the Rules of professional conduct (Part I of the RDR) or of the Code of Conduct was violated.

*The XXX Complaint*

XXI. XXX asserts that the appellant breached his obligations by disclosing confidential information to XXX's competitors and by acting as professional representative in spite of an existing conflict of

interest, given that he was owner of and board member in such competitors.

*The findings of the decision under appeal*

XXII. The decision issued a warning pursuant to Article 4(1)(a) RDR with respect to the YYY Complaint, and referred the XXX Complaint to the Disciplinary Board pursuant to Article 6(2)(c) RDR.

*The arguments of the appellant*
*With respect to the procedure:*

XXIII. The appellant asserts a number of procedural violations allegedly committed by the Chamber (page numbers referring to the grounds of appeal dated 12 February 2018, unless otherwise stated):

i. violation of the right to be heard by relying on (unspecified) facts and evidence not known to the appellant (page 9, bottom),
ii. failure to specify the allegedly violated legal provisions (page 11, top),
iii. communication by e-mail instead of regular mail (page 11, second paragraph),
iv. ignoring request for copy of file (page 11, bottom),
v. ignoring appointed legal representative (page 12, top),
vi. violation of the right to be heard by ignoring request for continued oral proceedings (page 12 bottom),
vii. failure to request translation of documents (page 13 top),
viii. ignoring time limits for setting oral proceedings (page 13, second paragraph),

ix. continued sending of e-mails against appellant's requests (page 13, third paragraph),

x. changing board composition [apparently Chamber composition is meant] without involving the appellant (page 14, top),

xi. ignoring evidence (page 14, second paragraph),

xii. withholding evidence (page 14, third paragraph),

xiii. ignoring further (unspecified) requests (page 14, bottom),

xiv. relying on arguments concerning the conflict of interest not known to the appellant (page 18, top),

xv. conflict of interest between Chamber members and appellant (page 18, second paragraph),

xvi. violation of the right to be heard by relying on an argument in respect of the XXX Complaint not known to the appellant (page 21, comment on Point M),

xvii. citing evidence in the decision (e-mails) not known to the appellant (page 33, middle of page).

*With respect to the merits of YYY Complaint:*

XXIV. The decision contains factual errors, while ignoring important arguments of the appellant. The transfer involved a substantial amount of work by the appellant, and this work was also justified in the circumstances.

*With respect to the merits of the XXX Complaint:*

XXV. The decision contains factual errors, while ignoring important arguments of the appellant. There was no genuine conflict of interest between XXX and the appellant, so that his activities in the allegedly competing companies were unobjectionable.

XXVI. In the grounds of appeal the appellant made the following requests:

i. Oral proceedings for the admissibility (page 5), for the remission (page 8), for the merits (page 35)
ii. Interlocutory revision by the Disciplinary Committee under Article 109 EPC (page 7), seemingly as main request
iii. Remission under Article 12 RPDBA (page 8) (seemingly as a lower ranking request with respect to ii above),
iv. Examination of the case by a newly composed Chamber of the Disciplinary Committee (page 8)
v. Apportionment of costs under Article 27 RDR (page 19, top)
vi. Sending of copies of documents mentioned in the decision (page 36)
vii. Dismissal of the YYY complaint (page 25, bottom)
viii. Dismissal (also) of the XXX complaint (page 35) (the rank of requests vii and viii with respect to ii, or iii is not clear from the grounds of appeal),
ix. Receipt of copy of the files under Article 19 RDR (page 35, bottom)

## Reasons for the Decision

*The procedural effect of the consolidation*

1. It seems to the Board that throughout the consolidated proceedings, the Chamber essentially treated the two complaints separated concerning their merits and the legal consequences. The main tangible result of the consolidation is the fact that the two distinct

decisions as to the merits of the complaints were issued formally in a single decision in a single document. Given the assessment of the case by the Board as explained below, it appears reasonable to maintain the factual separation of the two complaints also in the present appeal proceedings, while procedurally keeping them together as a single case in consolidated proceedings before the Board.

2. The appealed decision contains two distinct decisions on the merits of the case, addressing each of the YYY and XXX complaints separately (point XXII).

3. The appeal is 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 of the appeal as regards the YYY complaint*

4. The Board is satisfied that the appeal is admissible to the extent it addresses the findings of the appealed decision on the YYY complaint, i.e. the issuance of a warning pursuant to Article 4(1)(a) RDR.

*Admissibility of the appeal as regards the XXX complaint*

5. The Chamber decided to refer the XXX Complaint to the Disciplinary Board pursuant to Article 6(2)(c) RDR. Article 8(1) RDR stipulates that "The Disciplinary Board of Appeal shall hear appeals against **final decisions**, including dismissals, of the Disciplinary Committee...". The question arises, what a "final decision" here means, in particular if a referral under Article 6(2)(c) RDR can be considered to be such a final decision. The Disciplinary Board of Appeal (in a different composition) has recently held in two related

decisions that a referral is a "final decision" for the purposes of Article 8(1) RDR. Reference is made to the decisions D 0002/18, both issued under the same appeal file number. In the following, D 0002/18 of **8** April 2019 will be denoted as D 0002/18 **A** (on the appeal of the affected professional representative), while D 0002/18 of **5** April 2019 will be denoted as D 0002/18 **P** (on the appeal by the President of the epi).

6. For the reasons given below, the present Board does not concur with the finding of decisions D 0002/18 and holds that only a decision which effectively terminates the disciplinary proceedings by a substantive decision vis-a-vis the professional representative is meant to be a "final decision" in the sense of Article 8(1) RDR. A referral cannot be considered a final decision in this sense.

*Outline of disciplinary proceedings under the RDR*

6.1 Disciplinary proceedings before the Disciplinary Committee and the Disciplinary Board may result in a penalty, Articles 4(1)(a) to (e) RDR. The wording makes it clear that only one penalty may be imposed, not several. Thus it is clear that the substantive outcome of disciplinary proceedings is either a penalty or the dismissal of the complaint.

*A referral under Article 6(2)(c) RDR produces no adverse effect in the substantive sense*

6.2 From the above it follows that a referral from the Disciplinary Committee to the Disciplinary Board cannot result in a substantive legal effect, but merely a procedural one, namely that the proceedings are closed before the Disciplinary Committee and become pending

before the Disciplinary Board. In the absence of a substantive legal effect there is no adverse effect, which is normally the precondition of an admissible appeal, cf. Article 107 EPC. Already for this reason the appealable character of a referral is at least questionable.

6.3 It may be added that a substantive legal effect cannot even arise **simultaneously** with a referral, because it does not seem possible for the Disciplinary Committee to impose a penalty AND to refer the case to the Disciplinary Board. A referral is quite obviously the result of an expectation on the part of the Committee that the Disciplinary Board will impose a more serious penalty than those within the competence of the Committee. However, the imposition of an **additional** penalty by the Disciplinary Board (in addition to the one imposed by the Committee) would contradict the principle that only one penalty can be imposed, unless it was presumed that the Disciplinary Board implicitly had the power to set aside the decision of the Disciplinary Committee. Such powers are not apparent anywhere, because the Disciplinary Board is not an appellate body with respect to the Committee. Thus it remains that a referral cannot produce an adverse substantive legal effect, because it cannot produce a substantive legal effect at all.

*Legislative history gives no conclusive answer*

6.4 Article 8(1) RDR is unchanged since the original version of the RDR, which was adopted on 21 October 1977 by the Administrative Council of the European Patent Organisation, simultaneously with the establishment of the epi and the EQE (European Qualifying Examination) legal framework. The draft

version of the RDR was prepared by an Interim Committee of the European Patent Organisation and presented to the Administrative Council as Annex III of a Memorandum dated 7 October 1977, with the reference number "CI/ Final 2/77 rev. 1" (also used in the document as "CI/ Final 2 **e**/77 rev. 1"). The draft RDR (Annex IIIa) was complemented with explanatory notes ("Commentary on the draft regulation on discipline", Annex IIIb). This document is referred to as the "AC Memorandum".

6.5 The AC Memorandum does not contain any unambiguous statement concerning a referral under Article 6(2) (c) RDR, which would provide a clear and direct guidance on the question of its appealable character. However, certain conclusions can be drawn from various statements in the AC Memorandum.

6.6 In the reading of the Board, the AC Memorandum explains that the Disciplinary Committee and the Disciplinary Board both exercise first instance jurisdiction in disciplinary matters, while there is only one appeal instance, the Disciplinary Board of Appeal. Page 3 of Annex IIIb, point 5, third paragraph explains: "*The draft makes provision for two—tier proceedings. Appeals will lie both from decisions of the Disciplinary Committee and those of the Disciplinary Board and will be heard by the Disciplinary Board of Appeal.*"

6.7 The AC Memorandum at first generally states that "*Appeals may be lodged against all decisions terminating proceedings, including decisions to acquit or dismiss the case because the matter is of a trivial nature*" (Annex IIIb, page 3). A little more detail is added where specifically Article 8 RDR is addressed: "*Appeals will lie only from decisions terminating* ***first instance*** *proceedings and not from interlocutory*

*decisions* [emphasis by the Board]. *Decisions of the Chairman of the Disciplinary Board* [to transfer a disciplinary complaint from the Disciplinary Committee to the Disciplinary Board upon expiry of the time limit of Article 6(3) RDR] *are not subject to appeal.*" (page 9 of Annex IIIb, point 13). A referral is not mentioned here. The term "interlocutory decision" does not lend itself to cover a referral under Article 6(2)(c) RDR, as after an interlocutory decision the case is expected to continue before the same body, in order to decide further not yet decided issues. At first sight, the clarification that "first instance proceedings" are to be terminated by a "final decision" offers little help. It is clear that "terminating proceedings" can only mean the termination of first-instance proceedings excluding the appeal: The very definition given by Article 8 RDR implies that an appeal against the "final" i.e. terminating decision cannot but re-open the proceedings in the appeal stage. Thus the statement "terminating proceedings" must refer to the situation where **no** appeal is filed and the first-instance proceedings come to an end by virtue of the "final decision".

6.8 One may take the view that the referral "terminates the proceedings" before the Disciplinary Committee, but it is clear that the proceedings **generally** and in particular "first instance proceedings" as a whole will not terminate, as the Disciplinary Board will have to deal with the case. The Board considers that "terminating proceedings" must mean here terminating **in respect of the representative** being the subject of the proceedings, and not (only) in respect of the body before which the proceedings are conducted. The central figure of the proceedings is the person who may face the disciplinary measure, the professional

representative. The substantive issue is whether the proceedings will terminate from his point of view. Though not a party to the proceedings with full rights, the complainant will be equally interested to know if the proceedings were to continue or not (cf. Article 21(1) RDR, last sentence). The proceedings do not terminate where the Disciplinary Committee refers the matter to the Disciplinary Board: in fact no decision is made on the merits, and also the proceedings continue, quasi automatically, in that no further step to this effect is required from the professional representative.

6.9 Put differently, the AC Memorandum appears to suggest that **substantive** (first instance) proceedings must be terminated by a final decision. After all, it seems beyond dispute that after a referral only the decision of the Disciplinary Board will terminate the proceedings (of the first instance bodies) **completely**, i.e. from the point of view of a substantive outcome. This also corresponds well with the German and perhaps even better with the French equivalents of the "final decision" in Article 8(1) RDR: "Endentscheidung" respectively "décision mettant fin aux poursuites".

*The right to appeal a referral is not guaranteed in the RDR*

6.10 Article 6(4) RDR foresees that the Chairman of the Disciplinary Board transfers the case to the Disciplinary Board if the Disciplinary Committee does not take a "final decision" within the extendable time limit of 9 months stipulated in Article 6(3) RDR. Pursuant to Article 6(3) RDR the Disciplinary Committee "shall submit a report within **that** time limit on **the state of the proceedings** to the Chairman of the Disciplinary Board..." (emphasis by the Board). Thus it

seems that the report may, but need not include a substantive assessment of the complaint by the Chamber. The RDR does not suggest that a transfer (as distinct from a referral under Article 6(2)(c) RDR) can also be made on the initiative of the Disciplinary Committee. Presuming that a transfer is only reserved for the Chairman, it seems that the purpose of the report is to allow the Chairman to decide if the case should be transferred or that it may remain with the Disciplinary Committee (as long as this is possible with an extension).

6.11 The AC Memorandum states that such a transferring decision of the Chairman is not appealable (point 6.7). On this basis, it is instructive to look at the proceedings in an assumed (and perfectly plausible and realistic) situation where the 9 month time limit of Article 6(3) RDR expired and the Committee did not take any decision yet. From this point in time, the Chairman of the Disciplinary Board may decide to transfer the case to the Disciplinary Board. By such a decision he is able to prevent any appeal on the findings of the Disciplinary Committee. The Chairman is under no obligation to grant any extension under Article 6(4)(a) RDR. The Board considers that the right to appeal is a fundamental right of the parties. Assuming the right to appeal against a referral, it must be concluded that the procedural powers of the Chairman apparently override the right to appeal, in the sense that he has the powers to pre-empt an appeal, for example in a case where it appeared likely that the Disciplinary Board might have to continue the proceedings. In fact, here the Chairman has the full powers to transfer the case quite independent from the facts on the file, i.e. also where it seems that the matter might be dismissed or only a minor penalty might

be imposed. Thus it seems more reasonable to assume that there is no right to appeal at this stage of the proceedings, and therefore the powers of the Chairman are unproblematic.

6.12 Similarly, it is apparently in the hands of the Disciplinary Committee whether or not to permit an appeal – instead of issuing a decision under Article 6(2)(c) RDR, it is open to the Disciplinary Committee to prepare a document which is provided with reasons for a referral, but with the title of a "Report under Article 6(3) RDR" and wait for the time limit to expire. Given that the Chairman of the Disciplinary Board has no other options than those given in Article 6(4)(a) and (b) RDR, at the latest on the expiry of the maximum 6 months extension under Article 6(5) RDR the Chairman inevitably has to order the transfer of the matter to the Disciplinary Board, and as explained above, such an action is clearly not appealable.

6.13 Thus it appears that the Disciplinary Committee could effectively circumvent the (presumed) right to appeal, and so could the Chairman of the Disciplinary Board, the latter quite independently from the Disciplinary Committee (and even independently from the Disciplinary Board), as soon as the proceedings lasted more than 9 months. This issue is also raised by the President of the epi, by pointing out that a case may also be transferred to the Disciplinary Board without a decision of the Disciplinary Committee.

*An appealable referral leads to inconsistent procedure*

6.14 It is also clear that following a referral it is the task of the Disciplinary Board to examine the totality

of the case before it. Nothing in the applicable procedural provisions appears to suggest otherwise. The legislative intent that following a referral the Disciplinary Board is expected to continue proceedings, instead of merely reviewing the findings of the Disciplinary Committee, is also illustrated by the procedural provisions applicable for the transfer of the case from the Disciplinary Committee to the Disciplinary Board. Article 19(2) RPDC explicitly regulates the procedure following a referral by the Committee under Article 6(2)(c) RDR. Specifically Article 19(2)(d) RPDC foresees that comments of the members of the Chamber (if any) are also to be transmitted to the Disciplinary Board. Such transmittal of the individual positions of the members of the Chamber hardly fits with the notion that the remitting decision of the Chamber, which acts as a collegiate body, at the same time effectively produced a "final" decision. The whole procedure implies that the proceedings are going to continue, and on the basis of the totality of the work done by the Committee, i.e. not only on the basis of their "final decision", while only the latter can be appealed. In other words, the Disciplinary Board would be free to consider issues not treated in the appeal (if the appeal were to be dismissed), thus questioning the meaningfulness of the latter.

6.15 Article 20 RDR stipulates that deliberations of disciplinary bodies shall be confidential. It would appear that the transmittal of the individual opinions of the members of the Chamber under Article 19(2)(d) RPDC can only be compatible with Article 20 RDR (and with Article 15 RPDC) with the simultaneous assumption that the proceedings before the Disciplinary Board are in fact a continuation of the proceedings before the

Disciplinary Committee, again contradicting the idea of a "final decision" which is supposed to terminate the first instance proceedings. Note that Article 6(b) RPDB which regulates a transfer under Article 6(4)(b) RDR, i.e. a procedural situation where the Chamber obviously cannot take an appealable decision, is substantially equivalent to Article 19(2) RPDC. None of them mentions explicitly the report under Article 6(3) RDR, implying that it is no longer necessary.

*The arguments of the D 0002/18 decisions do not prove that a referral is necessarily appealable on the basis of the RDR*

6.16 On one hand, D 0002/18 A relied on the perceived absence of any ranking or hierarchy between the possible outcomes of the proceedings mentioned in Article 6(2)(a) to (c) RDR (Reasons 1.1), on the other hand it relied on the wording of Article 6(3) RDR for the meaning of "final decision" (Reasons 1.2), and concluded that this term necessarily had to refer to the possible decisions mentioned in Article 6(2) RDR, what more, to all three of them. Decision D 0002/18 P additionally stated that also the reasons of a decision may determine the scope of an appeal (Reasons 6). In the opinion of the present Board, these arguments cannot prove that the opposite possibility, i.e. the non-appealable status of the referral was not foreseen or is not derivable from the RDR.

6.17 As explained above, a referral under paragraph (c) of Article 6(2) RDR is significantly different from those under paragraph (a) or (b), because the referral has no substantive effect, but only a procedural one. Thus it is not true that a referral must inevitably be treated in the same way as the other decisions mentioned in Article 6(2)(a) and (b) RDR when interpreting the RDR.

6.18 The present Board does not categorically exclude the possibility that the "final decision" of Article 6(3) RDR may possibly also mean a referral under Article 6(2)(c) RDR. The German and the French wording certainly does not exclude this, as such a decision is final (or "endgültig") in the sense that it terminates the proceedings of the Disciplinary Committee, and it also holds that the Committee "were unable to pronounce a finding on an alleged breach" as stated by the French version: "la Commission ... ne peut statuer sur un manquement présumé". But this does not prove that a referral is appealable, because Article 6(3) RDR may not refer to a "final decisions" in the same sense as Article 8(1) RDR. The use of the same term in the English version might be a mere coincidence, and as such not decisive.

6.19 Firstly, looking at the wording of Article 6(3) RDR, establishing the direct link to Article 8(1) RDR is already problematic because only the English wording repeats the term "final decision", the German and French versions use different wordings: "endgültige Entscheidung" vs. Endentscheidung, "ne peut statuer sur un manquement présumé" vs. "décisions mettant fin aux poursuites".

6.20 Secondly, Article 8(1) RDR is formulated with a view to the decisions of **both** the Disciplinary Committee and the Disciplinary Board, while Article 6(3) RDR is only concerned with the decisions of the Disciplinary Committee. While the latter could have intended to mean decisions closing the procedure before the Disciplinary Committee, the former may have been formulated with a view to the totality of the first instance substantive procedures, as explained above. The Board notes that

the AC Memorandum does not provide more explanation on Article 6(3) RDR than that derivable from the wording itself. Put differently, it is far from certain that the legislator had the very same concepts in mind when Articles 6(3) and 8(1) RDR were adopted. Thus Article 6(3) RDR cannot be safely relied on for providing a definition for the purposes of interpreting the "final decision" in Article 8(1) RDR.

6.21 Summing up, in view of the differing German and French versions, and in the absence of any direct statement linking Articles 6(3) and 8(1) RDR, either in the RDR or in the AC Memorandum, the present Board sees no proof that strictly the same categories of decisions are meant in Articles 6(2) and 8(1) RDR. This alone is sufficient to cast doubt on the appealable character of a referral.

6.22 Another line of counter-argument casts doubt on the presumption that all three ways of deciding as provided by Article 6(2) RDR are indeed encompassed by the reference "final decision" in Article 6(3) RDR. It is the opinion of the present Board that Article 6(3) RDR does not necessarily have to treat a referral under Article 6(2)(c) RDR, neither on a grammatical, nor on a systematic interpretation, contrary to the findings of D 0002/18 A. 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. Even Article 6(2) RDR itself does not call its alternatives in paragraphs (a) to (c) verbatim as "decisions", but merely states that these are the options that the Disciplinary Committee may "decide" ("kann...entscheiden"/ "décide"). The present Board agrees with D 0002/18 A to the extent that the

"final decision" 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, but from this no firm conclusion can be drawn for the presently discussed issue, as explained below.

6.23 The wording of Article 6(3) RDR does not dictate that **all** three variants – i.e. a dismissal or issuance of a warning or reprimand, or the referral – are inevitably to be subsumed to fall under the term "final decision". Both on a grammatical and systematic interpretation Article 6(3) RDR leaves open the possibility that "final decision" means only a subset of the possible decisions of the Committee. At most it can be established that the wording of Article 6(3) RDR does not contradict the position of D 0002/18 A, but it does not prove it either. The present Board considers that Article 6(3) RDR can be directly interpreted as not including a referral: systematically Article 6(3) RDR need not address this case. In that case the term "does not take a final decision" ("trifft nicht ... eine endgültige Entscheidung/ne peut statuer ... dans un délai" are only to be read onto the decisions under Article 6(2)(a) and (b) RDR.

6.24 This is perhaps best illustrated by a suitable re-wording:
In the reading of the two D 0002/18 decisions Article 6(3) RDR stipulates the following: "If the Disciplinary Committee does not (a) dismiss the matter or (b) issue a warning or a reprimand or (c) does not refer the matter to the Disciplinary Board within 9 months of an alleged breach of the Rules of Professional Conduct being brought to its notice, it shall ... submit a report ... to the Chairman of the Disciplinary Board ..."

The present Board holds that another reading of Article 6(3) RDR is equally plausible: "If the Disciplinary Committee does not (a) dismiss the matter or (b) issue a warning or a reprimand within 9 months of an alleged breach of the Rules of Professional Conduct being brought to its notice, it shall ... submit a report ... to the Chairman of the Disciplinary Board ...".

6.25 As explained above, the apparent purpose of the report on "the state of the proceedings" is to provide information to the Chairman of the Disciplinary Board for his decision either to order a transfer or to extend the time limit. Against this background it is apparent that the provisions of Article 6(3) RDR are no longer applicable if the Disciplinary Committee already took a decision under Article 6(2)(c) RDR. The possibility to submit a report to the Chairman of the Disciplinary Board and subsequent actions of the Chairman under Articles 6(4) and (5) RDR become moot. He has no more room to decide whether or not to extend the time limit or to transfer the matter, as the case is already before the Disciplinary Board (note that the Chairman has no powers to refuse the referral). Put differently, nothing changes in the (otherwise obvious) procedure foreseen in Articles 6(3) to (5) RDR if only the decisions under Article 6(2)(a) and (b) RDR are read as the "final decision" mentioned in Article 6(3) RDR.

6.26 The last argument mentioned that the scope of the appeal can also be determined by the reasons of the decision and not only by the order of the decision (point 6.16). This is in fact a circular argument because it presumes that a referral must be reasoned. However, a referral only needs to be reasoned if one

already starts from the presumption that a referral is appealable, Article 17(1) RPDC referring to Rule 111(2) [EPC]. Assuming that a referring decision is not appealable under Article 8(1) RDR, it needs no reasoning either pursuant to Rule 111(2) EPC), and as such does not provide any scope for an appeal in the sense argued by D 0002/18 P. It is not apparent from the RDR that the Disciplinary Committee would be given the discretion to permit an appeal against a referral, for example by deciding to provide the referral with reasons.

6.27 In summary, the present Board holds that the correct interpretation of the RDR dictates that the referral under Article 6(2)(c) RDR is not appealable, and this leads to a systematically more consistent and robust procedure which is also supported by the wording of the RDR. The Board considers that this interpretation is also supported by the legislative preparatory materials. The decision "to refer the matter" to the Disciplinary Board does not "terminate first instance proceedings", given that it does not result in a dismissal of the complaint or a penalty under Article 4(1) RDR, but the proceedings continue before the other first instance disciplinary body. Thus the referral is not a final decision within the meaning of Article 8(1) RDR.

6.28 On this basis, the appeal is inadmissible, to the extent it addresses the referral of the XXX Complaint to the Disciplinary Board.

7. In light of this finding, it is not appropriate for the Board to address any of the substantive issues which are exclusively relevant for the XXX Complaint,

as it would prejudice an independent examination of the matter by the Disciplinary Board.

*Allowability of the appeal on the YYY complaint*

8. First of all, the Board concurs with the appellant that the impugned decision does not specifically identify which Rule of Professional Conduct (Articles 1 to 3 RDR) has been violated. The appellant has repeatedly and throughout the procedure pointed out that the Chamber must identify the specific legal provisions. The Chamber also took note of this argument of the appellant in the decision (page 6, paragraph III of Respondent's submissions), thus could not have overlooked it.

9. Article 17 RPDC stipulates that "...the decision shall state which Rule of Professional Conduct has been violated and which recommendation, if any, made in accordance with Article 4(c) of the Establishment Regulation, has not been observed...". Essentially the same provisions are found in the RPDB and RPDBA: Article 15 RPDB, Article 17 RPDBA.

10. In the opinion of the Board, the requirement of Article 17 RPDC is not a mere formality. To the extent that disciplinary proceedings have similarities with criminal proceedings, as also found by D 19/99 of 18 December 2001 (Reasons 5.1, 2nd paragraph), this is an expression of the principle "nullum crimen sine lege".

11. Contrary to the finding of the decision under appeal, there is no room for issuing a penalty under Article 4(1) RDR for generally violating the "spirit, aim and purpose" of either the RDR or the CC. A

decision of a disciplinary body under Article 5 RDR must **specifically** identify the violated Article, whether in the RDR or in the CC. This requirement in itself does not bar a disciplinary body from taking into consideration "the spirit, aim and purpose" of the applicable provisions, but such considerations must serve the purpose of establishing whether the examined acts of the professional representative can be qualified as violating a specific rule of the Rules of Professional Conduct as stipulated by the RDR.

12. It is noted that mentioning a specific provision of the CC only is not sufficient to comply with Article 17 RPDC (The impugned decision refers to Articles 1(b) and 3(a) CC, but does not state explicitly that these were violated). The CC merely serves to interpret the rather generally formulated Rules of professional conduct in the RDR, and the provisions of the CC can only be invoked together with a specific provision of the Rules of professional conduct in a decision of a disciplinary body established under Article 5 RDR.

13. Furthermore, it is not clear from the decision which specific actions or behaviour of the representative were conclusively found to violate the Rules of professional conduct. In the context of the YYY complaint the decision only refers to "a number of factors that must be weighted" and to "other factors" which "...factor can in fact be the behaviour of the Professional Representative towards the Client". The decision only additionally states that both actions and non-actions of the appellant were found to be inappropriate, as well as his behaviour towards the Chamber as a disciplinary body of the epi. The most specific statement of the Chamber is the finding that "the Complainant's request for re-consideration" was

handled in a reproachable manner, but it is not even clear if this meant the YYY Complainant (probably) or the XXX Complainant or possibly both. The other reproachable act of the appellant is the "non-responsive behaviour" towards the Chamber. To the extent that a decision of the Disciplinary Committee also may serve as guidance for the profession as a whole (Article 20 RPDC), it appears questionable whether an objective reader of the decision, such as other members of the epi, would find clear guidance therein what behaviour they should definitively avoid. In summary, the decision contains a very limited material substance which could form the basis of an appellate review by the Board.

*Remission*

14. The Board considers that the above analysis (cf. points 8 to 11) demonstrates fundamental deficiencies within the meaning of Article 12 RPDBA. This latter stipulates that the Board should remit the case to the disciplinary body which issued the decision under appeal ("that Body"), unless special reasons present themselves for doing otherwise. The President of the epi also asked the Board to examine if such special reasons were present.

15. The Board does not see any special reasons for not remitting the case. Conditions for a summary dismissal of the YYY complaint by the Board under Article 18 RPDC are not given. The YYY complaint combines the issue of unreasonable invoicing with the question of maintaining the files in proper order, which latter may well be an issue under Article 1(1) RDR (as shown clearly by the provisions of point 5(d), second sentence, CC). To the extent that a client perceives the allegedly

unreasonable invoices to be caused by not properly maintained files, this may also touch on Article 1(2) RDR. However, while these issues were raised in the YYY complaint and also seem to be recognised by the appealed decision (points G and H), the position of the Chamber on these issues is far from clear. On the contrary, the Board considers that the case should be globally re-examined by a first-instance organ.

16. However, the Board considers that instead of remitting the case to the Disciplinary Committee, it appears more appropriate to remit the case directly to the Disciplinary Board. To that extent the Board recognises the presence of special reasons in the case before it and makes use of its discretion to deviate from that formal course of action which is suggested by Article 12 RPDBA. The considerations behind this are as follows:

17. Given the rejection of the appeal on the XXX Complaint (point 6.28), this latter must be treated by the Disciplinary Board. Thus if the Board were to remit the YYY Complaint to a Chamber of the Disciplinary Committee, this would immediately result in the separation of the consolidated cases. Looking apart from the apparent lack of procedural regulation for this situation, the separation of the cases would immediately raise the question if the original cause for the effective extension of the time limit under Article 6(3) RDR - namely the consolidation - is still applicable. To answer this question in the positive appears difficult. However, the question need not be answered explicitly in light of the decision of the Board.

18. On this basis, it would appear that the Chamber would anyway be obliged to refer the YYY complaint to the Disciplinary Board, unless the remittal itself would be seen as triggering the Article 6(3) RDR time limit anew, similarly as the consolidation of the YYY and XXX Complaints (obviously under Article 12(1) RPDC) were taken to trigger it anew, as could be deduced from the letter of the Chairman of the Disciplinary Board dated 20 December 2016.

19. The President of the epi also raises the question of the legality of an effective extension of the time limit under Article 6(3) RDR in consolidated cases, and appears to suggest that this is long-standing practice. The Board fails to see a proper legal basis for this practice. Article 6(3) RDR sets a definite time limit of 9 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). It is clear that the RPDC is on a lower hierarchical level than the RDR, as the RPDC is based on the powers given by Article 25(2) RDR. On this basis, the procedural possibility of consolidation, based on Article 12 RPDC, 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, but such is not known to the Board).

20. With the same logic, given that the RPDBA is also a lower level legislation with respect to the RDR, it would appear questionable to rely on Article 12 RPDBA for overriding (or extending) the time limit under Article 6(3) RDR or to trigger it anew.

21. It may be mentioned that importing procedural provisions "generally recognised in the Contracting States" on the basis of Article 125 EPC (in combination with Article 25(1) RDR) does not seem to help. Article 125 EPC is applicable "in the absence of procedural provisions". A lacuna in the law is not necessarily present here, in the sense that a manifestly unreasonable procedural situation might arise out of the (seemingly) lacking regulation of the time limit of Article 6(3) RDR in case of consolidations (and remissions). While treating consolidated cases still before a Chamber of the Disciplinary Committee may certainly be practical for both the epi, the Disciplinary Board and the representative involved, there seem to be no real hurdles before a different (and seemingly unproblematic) procedure. A referral of a complaint to the Disciplinary Board can be made anytime, even well before the expiration of the time limit of Article 6(3) RDR, and arguably without any detailed reasoning. This follows from Article 17(1) RPDC in conjunction with Rule 111(2) [EPC] in light of the analysis on the interpretation of a "final decision" (points 6.27 and 6.26). If a referring decision is not appealable under Article 8(1) RDR, it needs no reasoning either pursuant to Rule 111(2) EPC).

22. Finally, the practical considerations for the benefit of the appellant seem to dictate that he should continue to be involved in consolidated proceedings before the same body.

23. So based on the above, the Board holds that the YYY Complaint is to be remitted directly to the Disciplinary Board. That the Board has the powers to do so is also derivable from Article 22(3) RDR, explicitly referring to the totality of Article 111(1) EPC.

*Objections of the appellant not treated above*

24. A formal finding by the Board on the remaining alleged procedural violations iii-xvii (point XXIII) is not necessary for the present decision of the Board. These questions may form part of the examination of the Disciplinary Board and may become relevant again after its finding on the complaints, for example for the question of the bearing of costs pursuant to Article 27(2) RDR. To that extent they should be dealt with by the Disciplinary Board.

*Request for interlocutory revision (apparent main request)*

25. Apart from the fact that this request was directed towards the Disciplinary Committee, there is plainly no legal basis for applying Article 109 EPC. Wherever the legislator wished to rely on some provision of the EPC, this is clearly indicated in the RDR. Article 109 EPC is not mentioned anywhere, either in the RDR, RPDC or RPDBA.

26. In his response of 17 May 2019 the appellant refers to the AC Memorandum mentioning interlocutory decisions (point 6.7), and perceives a clear link to Article 109 EPC. Suffice it to say that Article 109 EPC regulates the possibility of an interlocutory **revision** (Abhilfe, révision préjudicielle) where a deciding body is given the possibility to review and cancel its own decision, while interlocutory **decisions** (Zwischenentscheidung, décision intermédiaire) are something else, as explained above in point 6.7.

*Request for apportionment of costs, point XXVI v.*

27. This request can only be decided in light of the findings on the merits of the complaints, and thus also falls on the Disciplinary Board after the remittal.

*Remaining requests*

28. The request for oral proceedings was withdrawn (point XIX). Sending of e-mails cited in the decision is part of the request for a copy of the file (point XXVI v. and ix.). The request was granted by the Chairman of the Board (cf point XVIII), to the extent that the e-mails were available in the Board's file. The fate of any further missing e-mails may be examined by the Disciplinary Board if necessary.

**Order**

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

1. The appeal is rejected as inadmissible to the extent it appeals the referral of the complaint CD 15/2016 (XXX Complaint) to the Disciplinary Board of the European Patent Office.

2. The decision under appeal is set aside to the extent of the warning imposed in respect of the complaint CD 07/2015 (YYY Complaint).

3. The case is remitted to the Disciplinary Board of the European Patent Office for decision on the complaint CD 07/2015 (YYY Complaint).

The Registrar: The Chairman:

N. Michaleczek C. Josefsson

Decision electronically authenticated