



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 0018/19

D E C I S I O N
of the Disciplinary Board of Appeal
of 22 November 2021

Appellant: N.N.

Decision under appeal: Decision of the Disciplinary Committee of the
Institute of Professional Representatives before
the European Patent Office in case CD 04/2018
dated 4 July 2019

Composition of the Board:

Chairman: W. Sekretaruk
Members: T. Karamanli
I. Beckedorf
P. H. Gendraud
D. Korper Žemva

Summary of Facts and Submissions

- I. This appeal is against the decision of the Disciplinary Committee of the Institute of Professional Representatives before the European Patent Office (epi) (the Disciplinary Committee) dated 4 July 2019 to forward complaint case CD 04/2018, together with the relevant papers, to the Disciplinary Board of the EPO (the Disciplinary Board) in accordance with Article 6(2) of the Regulation on discipline for professional representatives (RDR, published in the Supplementary publication 1, OJ EPO 2021, 140).
- II. On 9 October 2018, the epi Secretariat received a complaint against the appellant dated 9 October 2018 and addressed to the Disciplinary Committee.
- III. In accordance with Article 7(5) of the Additional Rules of Procedure of the Disciplinary Committee of the epi (RPDC, published in the Supplementary publication 1, OJ EPO 2021, 151), the Chairman of the Disciplinary Committee appointed a Chamber pursuant to Article 2 RPDC and assigned the complaint (case CD 04/2018) to that Chamber.
- IV. By a communication under Article 6 RDR and Article 8 RPDC dated 12 October 2018 and sent to the appellant by registered letter, the Rapporteur of the Chamber of the Disciplinary Committee (the Chamber) forwarded the complaint and the supporting documentation to the appellant and invited him to state any exclusion objections and to comment on the complaint within a two-month period.

- V. The appellant filed his written defence on 7 December 2018. On 1 July 2019, oral proceedings took place before the Chamber, at which the Chamber decided to forward the case to the Disciplinary Board.
- VI. By a letter dated 9 July 2019, the decision of the Disciplinary Committee dated 4 July 2019 to transfer the complaint to the Disciplinary Board in accordance with Article 6(2) RDR was notified to the appellant in compliance with Article 21(1) RDR. In that letter, reference was also made to Articles 8 and 22(1) RDR.
- VII. On 12 August 2019, the appellant filed notice of appeal against the decision of the Disciplinary Committee. His statement setting out the grounds of appeal was filed on 11 September 2019.
- VIII. By letters dated 22 November 2019, the Rapporteur of the Chamber informed the President of the EPO and the Chairman of the Disciplinary Board that the complaint against the appellant had been withdrawn by letter dated 21 November 2019.
- IX. By letters dated 16 October 2020, the President of the epi and the President of the EPO were given the opportunity to comment on the appeal pursuant to Article 12, second sentence, RDR.
- X. By a letter dated 11 January 2021, the President of the epi informed the Board that he had asked the Vice-President of the epi to deputise for him and gave reasons for that.
- XI. By a letter dated 11 January 2021, the Vice-President of the epi submitted her comments. She supported the finding in decision D 1/18, Reasons, points 5 to 6.28

that an appeal against decisions of the Disciplinary Committee to transfer a complaint to the Disciplinary Board was not admissible. She took the view that the Board should confirm that such decisions were not a "final decision" within the meaning of Article 8(1) RDR and that it did not concur with the finding of decision D 2/18. She also made suggestions on how the Disciplinary Board of Appeal should proceed and deal with the case.

XII. No comments were received from the President of the EPO.

XIII. With a communication dated 26 May 2021, the Disciplinary Board of Appeal (the Board) set out its preliminary and non-binding opinion under Article 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (RPDBA, published in the Supplementary publication 1, OJ EPO 2021, 67).

The Board was inclined to reject the appeal as inadmissible because the Board did not regard a referral under Article 6(2)(c) RDR as a final decision within the meaning of Article 8(1) RDR. The Board therefore concurred with the finding in decision D 1/18 in that regard and did not follow the finding in decision D 2/18 of 5 April 2019. Therefore, it did not appear appropriate for the Board to address any of the substantive issues as this would prejudice an independent examination of the matter by the Disciplinary Board.

The Board also informed the appellant that it understood from the wording of the appellant's auxiliary request for oral proceedings that this request did not apply if the Board intended to reject

the appeal as inadmissible and that, therefore, the Board had not appointed oral proceedings.

The Board further invited the appellant to comment on the Board's preliminary opinion and to inform the Board within the two-month period whether, in view of the likely rejection of the appeal as inadmissible, he wished to maintain or withdraw his appeal within two months from notification of the Board's communication.

XIV. By letter of 22 July 2021, the appellant filed a reply to the Board's communication. He informed the Board that he wished to maintain his appeal and that he requested oral proceedings if the Board intended to reject the appeal as inadmissible.

XV. On 22 November 2021, the Board held oral proceedings.

In accordance with Article 14 RDR, the oral proceedings were attended by Ms N. van der Laan, on behalf of the President of the EPI. The President of the EPO was not represented, as announced by letter of 26 October 2021.

The appellant requested that the decision under appeal be set aside and that "*the matter be remitted to the EPI first instance Committee with new members for it to conduct preparatory inquiries under Article 6(2) of its Additional Rules of Procedure*".

XVI. The appellant's arguments relevant to the present decision may be summarised as follows.

(a) The Board should follow decision D 2/18 instead of decision D 1/18 since the ruling in D 2/18, according to which the referral pursuant to Article 6(2)c) RDR was qualified as a "final decision", was

correct. In view of the wording of Article 6(3) RDR, a referral under Article 6(2)(c) RDR should be considered a final decision. Moreover, there was no decision by the Enlarged Board of Appeal on this conflicting case law.

- (b) In view of the composition of the Disciplinary Board of Appeal in each of the cases D 1/18 and D 2/18, the question arose whether the composition of the Board was correct in the case at hand since it had to apply conflicting case law. Moreover, none of the members of the Disciplinary Board of Appeal in case D 1/18 was a member of the Board in the case at hand.
- (c) The epi's position given in the Vice-President's letter dated 11 January 2021 on the issue of the appeal's admissibility should not be followed. Her comments in the third paragraph on page 3 of her letter in particular were neither consistent nor logical.
- (d) In the letter dated 9 July 2019, by which the appealed decision of the Disciplinary Committee dated 4 July 2019 had been notified to the appellant in compliance with Article 21(1) RDR, reference was also made to Articles 8 and 22(1) RDR, indicating that an appeal could be filed by the professional representative concerned. The appellant was adversely affected by this misleading remark in the letter of 9 July 2019 and by the decision under appeal in view of Article 6(3) RDR. In addition, legal uncertainty had now existed for many years.

(e) The proceedings before the Disciplinary Committee were flawed for several reasons and, therefore, Article 12 RPDBA should be applied.

(f) The withdrawal of the complaint after the filing of the current appeal should have been considered and dealt with by the Disciplinary Committee, and therefore the case was still pending before the Disciplinary Committee and not the Board.

XVII. The representative of the President of the epi stated that the current Board should follow the rationale of decision D 1/18, according to which a referral by the Disciplinary Committee to the Disciplinary Board under Article 6(2)c) RDR was not a final decision for the purposes of Article 8(1) RDR. She emphasised the need for a clarification of the legal situation in view of the conflicting decisions D 2/18 and D 1/18 and considered it therefore desirable that the decision on the appeal case at hand be published.

Reasons for the Decision

Composition of the Board in the case at hand

1. The appellant argued that, in view of the composition of the Disciplinary Board of Appeal in each of the cases D 1/18 and D 2/18, the question arose whether the composition of the Board was correct in the case at hand as it had to apply conflicting case law. Moreover, none of the members of the Disciplinary Board of Appeal in case D 1/18 was a member of the Board in the case at hand.

2. Firstly, the latter argument of the appellant does not hold as one of the members of the Disciplinary Board of Appeal in case D 1/18 is also a member of the Board in the case at hand.
3. Decisions D 1/18 and D 2/18, handed down by the Disciplinary Board of Appeal in different compositions, are conflicting on whether a decision under Article 6(2)(c) RDR can be considered a "final decision" within the meaning of Article 8(1) RDR. These decisions are case law of the Disciplinary Board of Appeal, which the Board takes into account in its decision in the case at hand. However, none of these decisions is legally binding on the Board. Therefore, the Board is free to follow or depart from either decision in the case at hand, provided that it applies the applicable law in an objective manner. For this reason, the Board cannot see why its composition could be called into question because of the conflicting decisions D 1/18 and D 2/18.
4. Moreover, the Board points out that the Disciplinary Board of Appeal has no power to refer questions to the Enlarged Board of Appeal under Article 112(1)(a) EPC (see decision D 5/82, OJ EPO 1983, 175).
5. On the basis of the above considerations, the Board does not see why its composition could be called into question. Nor has the appellant submitted any further arguments in this regard.

Pendency of the appeal

6. The appellant submitted that, due to the withdrawal of the complaint after the filing of the current appeal, the case would now have to be examined and dealt with

by the Disciplinary Committee and would therefore no longer be pending before the Board.

The Board cannot agree with the appellant. With the appeal against the decision of the Disciplinary Committee, the proceedings had reached another stage, namely the appellate stage. The appeal is pending before the Board until it decides on it, unless the appellant withdraws his appeal before a decision of the Board is announced at oral proceedings or issued in written proceedings. Therefore, the fact that the complaint was withdrawn after the appeal had been filed does not affect the pendency of the current appeal before the Board.

Admissibility of the appeal

7. In the case at hand, the appellant appealed against the Disciplinary Committee's decision to forward complaint case CD 04/2018, which had been filed against him, to the Disciplinary Board in accordance with Article 6(2)(c) RDR. Therefore, the question arises whether the current appeal is admissible.
8. Article 8(1) RDR reads: "*The Disciplinary Board of Appeal shall hear appeals against **final decisions**, including dismissals, of the Disciplinary Committee of the Institute and the Disciplinary Board of the European Patent Office.*" (emphasis added by the Board)
9. From this, the Board concludes that only final decisions, including dismissals, of the Disciplinary Committee are appealable. The Board is of the opinion that only a decision of the Disciplinary Committee which effectively terminates first-instance disciplinary proceedings against a professional

representative can be considered a "final decision" within the meaning of Article 8(1) RDR (see also decision D 1/18, Reasons, point 6). This position is also supported by the legislative preparatory materials as analysed in decision D 1/18, Reasons, points 6.4 to 6.7.

10. Pursuant to Article 6(2) RDR, the Disciplinary Committee decides, where appropriate after conducting an investigation, to (a) dismiss the matter, (b) issue a warning or reprimand, or (c) refer the matter, together with the relevant papers, to the Disciplinary Board. Thus, the Disciplinary Committee has various options for decision in accordance with the exhaustive list of Article 6(2) RDR.
11. The appellant is of the opinion that the Board should follow decision D 2/18 instead of decision D 1/18 since the ruling in D 2/18 under which the referral pursuant to Article 6(2)c) RDR qualified as a "final decision", was correct. In view of the wording of Article 6(3) RDR, he argued that a referral under Article 6(2)(c) RDR should be considered a final decision.
12. However, the Board takes the view that not all decisions of the Disciplinary Committee under Article 6(2)(a) to(c) RDR are final decisions within the meaning of Article 8(1) RDR and thus agrees with the finding of the Disciplinary Board of Appeal in a different composition in case D 1/18 (see decision D 1/18, Reasons, section 6) and not with the finding of the Disciplinary Board of Appeal in another different composition in case D 2/18.
13. The Disciplinary Committee's decisions to dismiss a matter under Article 6(2)(a) RDR or to impose one of

the penalties mentioned in Article 6(2)(b) RDR (a warning or reprimand) can be considered substantive decisions which effectively terminate the disciplinary proceedings against the professional representative pending before the Disciplinary Committee. This view is in line with the findings in decision D 1/18 (Reasons, points 6.23 to 6.24) and decision D 2/18 (Reasons, point 1).

14. However, the Board considers that the situation is different when the Disciplinary Committee decides to refer the matter, together with the relevant papers, to the Disciplinary Board in accordance with Article 6(2)(c) RDR. Such a decision does not result in a final decision within the meaning of Article 8(1) RDR. Rather, it is merely a procedural decision, namely that the first-instance disciplinary proceedings are closed before the Disciplinary Committee and become pending and continue before the Disciplinary Board which is another first-instance disciplinary body and not an appellate disciplinary body like the Disciplinary Board of Appeal (see also D 1/18, Reasons, points 6.3 and 6.27). After a referral, only the decision of the Disciplinary Board terminates the first-instance disciplinary proceedings completely, i.e. from the point of view of a substantive outcome (see also D 1/18, Reasons, point 6.9). Hence, a referral under Article 6(2)(c) RDR from the Disciplinary Committee to the Disciplinary Board cannot be considered a decision which effectively terminates the first-instance disciplinary proceedings.

15. For the full arguments and reasoning for the present decision that a referral under Article 6(2)(c) RDR does not constitute a final decision within the meaning of Article 8(1) RDR, the Board refers to the detailed

reasoning in decision D 1/18 (see in particular Reasons, points 6.2 to 6.27), which it endorses.

16. In view of the above, the Board does not consider a referral under Article 6(2)(c) RDR to be a final decision within the meaning of Article 8(1) RDR and consequently does not find such a referral to be appealable. This also means that Article 6(3) RDR quoted by the appellant, which explicitly refers to a "final decision", is not applicable in the case of a referral under Article 6(2)(c) RDR.

17. The appellant further submitted that in the letter dated 9 July 2019, by which the appealed decision of the Disciplinary Committee dated 4 July 2019 was notified to the appellant in compliance with Article 21(1) RDR, reference was also made to Articles 8 and 22(1) RDR, indicating that an appeal could be filed by the professional representative concerned, meaning that the appellant was adversely affected by this misleading remark in the letter of 9 July 2019.

18. The Board does not consider this to be a valid argument. The passage in the letter of 9 July 2019 referred to by the appellant as well as the passage at the end of the contested decision titled "Possibility of Appeal" constitutes an instruction on by whom (Article 8(2) RDR) and within which periods (Article 22 RDR) an appeal against the decision of the Disciplinary Committee may, in principle, be lodged. However, neither passage has any legally binding effect on the Board.

Firstly, Article 21(1) RDR, unlike Rule 111(2) EPC (which is not mentioned in Article 25(1) RDR as one of

the provisions of the EPC which applies mutatis mutandis to proceedings before the disciplinary bodies), does not require that the decision of a disciplinary body be accompanied by a communication pointing out the possibility of an appeal and drawing the parties' attention to the relevant provisions on appeals.

Secondly, the Disciplinary Board of Appeal, which is an appellate body under Article 8(1) RDR, is obliged to first examine the admissibility of an appeal before turning to the examination of the allowability of the appeal. When examining admissibility, the first question is whether the Disciplinary Board of Appeal has jurisdiction and competence at all to deal with the appeal received. This includes whether the contested decision itself constitutes an appealable decision which falls within the competence of the Disciplinary Board of Appeal. This fundamental legal examination lies exclusively and unreservedly with the Disciplinary Board of Appeal. The latter is competent and empowered to decide on the admissibility and allowability of an appeal brought before it, independently of any statement, opinion or instruction given by the disciplinary body which issued the contested decision. Therefore, in the case at hand, the Board is in no way legally bound or prejudiced by the above-mentioned passages in the letter of 9 July 2019 and the decision under appeal as to whether the decision of the Disciplinary Committee under Article 6(2)(c) RDR constitutes an appealable decision.

19. It also follows from the above that the appellant, especially in view of his special knowledge as a professional representative, could not legitimately assume that a binding effect for the Disciplinary Board

of Appeal could be derived from the passage in the letter of 9 July 2019 or the passage at the end of the contested decision titled "Possibility of Appeal" to the extent that the decision of the Disciplinary Committee pursuant to Article 6(2)(c) RDR would have to be judged as appealable by the Disciplinary Board of Appeal. Therefore, the principle of the protection of legitimate expectations does not apply here.

20. In view of the above, the Board concludes that the appeal in the case at hand is not admissible because a referral under Article 6(2)(c) RDR to the Disciplinary Board is not a final decision within the meaning of Article 8(1) RDR and consequently not appealable.

Flawed procedure

21. The appellant alleged that the proceedings before the Disciplinary Committee were flawed for several reasons and argued that, therefore, Article 12 RPDBA should be applied.

However, these issues of possible procedural violations are the subject to the allowability of the appeal, the handling and examination of which requires, as an indispensable precondition, that the appeal be found admissible. As stated above, this Board holds that the appeal is not admissible since a referral under Article 6(2)(c) RDR by the Disciplinary Committee to the Disciplinary Board does not constitute a final decision within the meaning of Article 8(1) RDR and consequently is not appealable.

Thus, it is neither necessary nor appropriate to address any of the substantive issues.

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

22. To the extent that the Vice-President of the epi in the letter of 11 January 2021 and the representative of the President of the epi at the oral proceedings argued that the Board should follow the reasoning of decision D 1/18 and stressed the need to clarify the legal situation in view of the contradictory decisions D 2/18 and D 1/18, the Board points out that its decision, follows decision D 1/18 on whether a referral under Article 6(2)(c) RDR by the Disciplinary Committee to the Disciplinary Board constitutes a final decision within the meaning of Article 8(1) RDR. It is, however, important to note that the present decision has no binding effect on future decisions of the Disciplinary Board of Appeal in appeal cases concerning the same matter.

23. As regards the proposals contained in the Vice-President's letter of 11 January 2021, it is clear from the Board's communication of 26 May 2021 and from the fact that oral proceedings were held before the Board that the Board did not agree with some of these proposals as they would have infringed the appellant's procedural rights, such as the right to be heard under Article 113(1) EPC, which applies mutatis mutandis to proceedings before the Board under Article 25(1) RDR. It is the Board's opinion that the proposals in the letter of 11 January 2021 that the Board "should refrain from inviting the appellant to inform the Board within the two-month period for commenting on the Board's preliminary opinion whether he wishes to maintain or withdraw his appeal in view of the likely rejection of the appeal as inadmissible" and instead

"should clarify the situation by issuing a decision" and "that the appellant should be invited to withdraw his request for oral proceedings" would clearly have disregarded the appellant's right to be heard. An immediate decision of the Board would also have disregarded the appellant's request for oral proceedings.

24. The Vice-President's letter of 11 January 2021 also suggests that the Board should indicate in an obiter dictum that a decision of the Disciplinary Committee to refer a case to the Disciplinary Board under Article 6(2)(c) RDR need not be reasoned.

The Board refrains from making such an obiter dictum as the issue raised by the Vice-President is not the subject of the appeal underlying this decision.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated