



Case number: D 0006/07

D E C I S I O N
of the Disciplinary Board of Appeal
of 28 August 2008

Appellant: n.n.

Decision under appeal: Decision of the Examination Board for the European qualifying examination dated 13 August 2007 that the appellant failed the examination

Composition of the board:

Chairman: J.-P. Seitz
Members: R. T. Menapace
C. Onn

Summary of facts and submissions

I. If, in paper C of the European qualifying examination 2007 ("EQE 2007"), candidates took as the closest prior art

- Annex 3 for an attack on one of claims 1-6 of the patent,

- Annex 4 for an attack on claim 4 of the patent,

- Annex 5 for an attack on one of claims 3, 5 or 6 of the patent,

the examination committees awarded no marks under Rule 4 of the Implementing provisions to the Regulation on the European qualifying examination (IPREE, OJ EPO 1998, 364 ff).

II. The Examination Board recognised that an unexpectedly high number of candidates had "erroneously" used Annex 3 as the closest prior art and was (or came to be) of the opinion that some credit could be seen in properly drafted problem and solution approaches even when the wrong starting document for assessing inventive step had been used.

III. In this context, the Examination Board "exceptionally decided to award 10 additional points to the grade of paper C of each candidate" (irrespective of which document he/she had taken as a basis), the reasoning being the following:

- The Board was empowered to do so under Article 7(3) of the Regulation on the European qualifying examination for professional representatives before the EPO ("REE", OJ EPO 1994, 7) - "The Board shall determine the grades for each paper and decide whether a candidate has passed or failed".
- " ... some credit could be seen in properly drafted problem and solution approaches even where the wrong starting point for assessment of inventive step had been used. Indeed it had been well-known and longstanding practice to award marks for an incorrect attack if the argumentation could be regarded as set out logically according to recognised substantive practice".
- An extra 10 marks was the maximum that could have been awarded in any circumstance, including reassessment of each individual paper.
- Given the lateness of the proceedings and the impossibility of remarking all papers the fairest option would be to award everyone this maximum amount of marks.
- Thereby everyone would benefit but no-one would suffer any negative consequences.

It went on to state: "The Examination board took this exceptional decision in the light of the circumstances without this constituting a precedence for the future".

IV. The above is taken from the "Remarks from the Examination Board for the EQE 2007", the "Examiners'

Report - Paper C 2007, Specific Comments" and the Examination Board's "Briefing Note" of 10 January 2008 to the President, which the President attached to the opinion issued by her under Article 27(4) REE in conjunction with Article 12(2) of the Regulation on discipline for professional representatives on 15 January 2008.

- V. Candidates were informed of the extra marks in Form EB/A-D/2007, which indicated that ten more marks had been awarded under "Grade determined by the Examination Board" than under "Grade proposed by competent committee (if different)", and the comment "Remarks, if any" read: *"For the European qualifying examination 2007, the Examination Board has exceptionally decided to award 10 additional points to the grade of Paper C of each candidate"*.
- VI. In his paper C, the appellant had taken Annex 3 as being the closest prior art and the basis for his attack on at least one of the patent claims 1-6. He was awarded 41 marks for that paper.
- VII. On 13 September 2007, the appellant gave notice of appeal and the appeal fee was paid. He requested as main request that the decision under appeal be set aside and that he be awarded a pass or compensable fail in paper C. In the accompanying extensive statement setting out the grounds of appeal he cited serious legal errors against the Examination Board's decision under appeal and the marking of his paper C.

By letter received on 11 February 2008 the Appellant submitted a brief response to the comments of the

president of the EPO (see point VII, below) and to the briefing note from the Examination Board attached therewith.

VIII. In her opinion under Article 27(4) REE of 15 January 2008, the President remarked on the significant commitment with which the Examination Board and examination committees had always performed their important task ever since the first EQE. She was convinced that the Examination Board had taken its decision to award 10 additional marks to the grade of paper C of each candidate "*after careful consideration of all circumstances*". The main point from the Examination Board's briefing note was that no candidate was adversely affected by the 10 additional marks. Thus, it was understood that in comparison with the 10 additional marks, any re-assessment of paper C would have resulted in awarding the same or a lower grade of paper C for each individual candidate. Attached to her opinion was a "Briefing Note" from the Examination Board, the content of which is largely reproduced in point III above, second to fourth sub-points.

IX. The President of the Institute of Professional Representatives before the European Patent Office (EPI) also used his right to comment on this case as on the similar appeals, and his position can be summarised as follows. Not awarding marks if the "wrong" document had been chosen contradicted the fit-to-practise criterion and was unfair; one reason it was unfair was that it contradicted the general instructions given to candidates. It must be questioned whether the blanket addition of ten points was contrary to the implied provision in Articles 8 and 16 REE that each candidate's

paper be marked individually. The appeals should therefore be allowed on this ground and the various appellants, where that was justified, should be awarded points for their argumentation and legal aspects even if they had proceeded on the "wrong" basis. The appellants should also receive the extra 10 marks as it would be unfair to deprive them of the award given to all the other candidates.

- X. In its communication of 11 July 2007, the Disciplinary Board of Appeal informed the appellant, and the appellants in all the similar appeals, of the following:

After careful consideration of the facts and the legal situation it has reached the conclusion that the general award of 10 additional points to each candidate's mark for paper C did not remedy the adverse effect suffered by the candidates concerned as a consequence of a violation of the principles governing the marking of European qualifying examinations. Therefore, paper C has to be re-marked. For factual and legal reasons such re-assessment could only be performed by the responsible examination committee which, when awarding marks pursuant to Rule 4 of the implementing provisions on the REE, will have to take into account and assess the Appellant's attack on the ground of lack of inventive step under the criteria set out in paragraph 2 and 3 of the implementing provisions on the REE.

Furthermore, the Appellant may not be deprived of the 10 additional points awarded by the Examination Board, as these have been granted to all candidates of the EQE 2007, and it would be equitable to reimburse the appeal fee in full (Article 27(4) REE).

The case was therefore ready for decision. It was proposed that, as sole or main request, a decision should be requested whose wording was set out in the communication and is identical to the operative part of the present decision.

XI. The appellant adopted this proposal in his letter dated 15 August 2008 (sole request).

Reasons for the decision:

1. The appeal is admissible.
2. The appeal against the contested marking of paper C concerns the fact that no marks were awarded for the attack on a claim in the patent whose validity was to be challenged when the candidate proceeded on the basis of a starting document which the Examination Board did not consider to represent the closest prior art.
3. However, the question of which document is correctly to be viewed as representing the closest state of the art - discussed in numerous appeals and even in publications ("Comments on Paper C of the European Qualifying Examination" by S. Roberts CIPA-Journal 2007, pages 644-646 and in *epi* Information 4/2007) - is not relevant in the legal assessment of this case in the context of appeal proceedings. According to established case law on Article 27(1) REE (most recently summarised in D 7/05, point 20 of the Reasons), the board of appeal is prevented from reviewing the marking of an examination paper as to whether the marks (especially in the form of

the award of points within the meaning of Rule 4 IPREE) are objectively justified or not. Consequently, requests for higher marks than those awarded and/or a statement or decision that the appellant has passed the EQE 2007 or for the accordance of the grade "compensable fail" within the meaning of Rule 4(4) IPREE cannot be granted within the context of the appeal procedure.

4. The board of appeal is charged with examining whether the contested course of action infringed the REE or higher ranking law, the said course of action consisting of the following two consecutive but distinct measures:
 - on the part of the relevant examination committee: no points awarded if what it deemed to be the wrong document was chosen at the outset (see Point I. above)
 - on the part of the Examination Board: the blanket addition of 10 points to the grade of all C papers in the EQE 2007 irrespective of the individual assessment of each candidate's work.

5. The Examination Board itself recognised that the examination committees were wrong to award no points across the board in respect of a particular part of the paper (see Points II and III above). However, awarding points for an (in the examination committees' and/or Examination Board's view) incorrect yet logical and, in keeping with the recognised practice, justified attack, is not just due practice but is also legally prescribed: under Rule 4(2) and (3) IPREE the number of points to be awarded for every paper (on a scale of 0 - 100) is based on how and to what extent "on the merits of that paper alone, a candidate can be considered fit to practise as

a professional representative". This is not reconcilable with marking an examination paper as if it were a list of unrelated individual questions (as in a multiple-choice system) to which there is only one correct answer. On the contrary, the fit-to-practise criterion obliges the examiners in marking the individual parts of the answers not to disregard their merit in the context of the examination paper as a whole (D 3/00, OJ EPO 2003, 365, point 3 of the Reasons for the decision) and the need to allow for fair marking of answers which deviate from the scheme but are reasonable and competently substantiated (D 7/05 OJ EPO 2007,378, headnote II). This is something to which every candidate has a legal entitlement.

6. The blanket addition of ten points by the Examination Board is also a violation of the law, in particular for the following reasons:
 - 6.1 Under the REE system, the marks awarded in respect of candidates' papers are expressed as one of the three grades ("Noten"/"notes") "pass", "fail" and "compensable fail", according to a fixed conversion scale set out in Rule 4(2) to (4) IPREE. Only the grading in this sense and the formal (and therefore appealable) decision that the whole examination has been passed (or not) falls to the Examination Board under Article 7(3) REE "Powers of the Board". Its powers do not extend to the preceding marking of candidates' individual papers on a scale of zero to 100 ("ist vom betreffenden Prüfungsausschuß unter Zugrundelegung einer Punkteskala von 0 bis 100 zu bewerten" / "est notée par la commission d'examen compétente selon un barème allant de zéro à 100"), which under Article 8(b) REE and Rule 4(1) IPREE has to be

carried out by the relevant examination committee. There is legally no room for the Examination Board to change the marks awarded by the examination committee, in this case by the blanket addition of marks for all C papers, so the Board acted *ultra vires* in this regard.

6.2 In addition, the abstract awarding of marks with no regard to the fit-to-practise criterion of Rule 4 IPREE or to the individual candidates' examination papers infringes the principle of objectivity in general and Article 8(b) REE in particular (which stipulates that each answer has to be marked separately by two committee members) and Rule 4 IPREE, which are provisions designed to ensure the most objective marking possible of examination papers. This is also why the Examination Board cannot change the marks for a particular paper under Rule 4 IPREE of its own motion, but must, if it doubts that the marks awarded by the examination committee are correct, ask that committee to review its marking and propose new grades accordingly. The Examination Board can (and must, where applicable) influence examination results on its own initiative only by way of general instructions issued in advance under Article 16 REE (see Point 6.4 below).

6.3 In an assessment of the legality of awarding extra points, it is irrelevant whether the Examination Board deliberately disregarded legal principles and/or what its motives were (such as to achieve a statistically and/or politically acceptable pass rate). The reference in the President's opinion to the "*significant commitment*" of each Board member and to her belief that the Examination Board had decided to take this measure "*after careful consideration of all circumstances*" is

also legally irrelevant: even if the Examination Board could be excused in subjective terms - and that is certainly not the finding here - its objective legal infringement could not be made good.

6.4 No supra-statutory predicament made it impossible to act in keeping with the law. There was nothing to stop the Examination Board from fulfilling its obligation under Article 16 REE to ensure, if necessary by issuing a (justified) instruction to the examination committees, that the papers - also with respect to the document chosen to attack a claim - were marked uniformly and correctly. That did not happen; indeed, the fact that all the examination committees awarded no points when candidates failed to select the "right" starting document would suggest that the Examination Board is actually accountable for this incorrect approach. It may be that, in view of the lateness with which the Examination Board - for whatever reason - decided to react to the flawed assessment on the part of the examination committees, identifying and re-marking the papers concerned would have involved extra effort and held up the entire examination procedure. But the Examination Board cannot cite this as a reason to justify its actions because those actions were its own mistake. Moreover the re-marking exercise is now limited to the papers of the relatively small number of candidates who successfully appealed against this flawed approach to the marking of their papers.

6.5 The fact that no EQE 2007 candidate was disadvantaged by the blanket addition of 10 marks - a point made by the Examination Board and underlined by the President - does not offset this measure's illegality as described above.

That the REE and relevant legal principles were infringed systematically does not make the infringement irrelevant; furthermore, the EQE is not about treating candidates favourably but rather about assessing their objective aptitude for the demanding job of a professional representative before the EPO. Any marks awarded for reasons unrelated to the individual candidate's ability to answer the examination questions is absolutely irreconcilable with the aforementioned sole purpose of the EQE (see Point 6.2 above), whatever "overriding" aspects might have been the reason for that measure.

7. Nor is raising, by an equal amount, the marks awarded to every EQE 2007 candidate irrespective of their personal performance in paper C an appropriate way of offsetting the legal disadvantage incurred by individual candidates owing to a specific infringement of marking principles when the examination committees were awarding marks (point 5 above): if only on the basis of the principle of equality the appellant must be allowed to retain the benefit of the 10 extra marks; the appeal request is not about setting aside this measure, nor, citing the principle of equality, is it about extending a form of illegal better treatment of third parties to the appellant - a situation that does not arise here and in which the principle of equality would not apply. That means that, contrary to the Examination Board's view shared by the President, the marks awarded by the Board cannot be taken as compensation for the disadvantage suffered by the appellant through being denied a legally correct marking of his paper C. In other words, the extra ten marks do not make up for marks which would

have been awarded in a fair marking of an attack on a claim based on a "wrong" document.

8. This implies that the appellant, irrespective of the extra 10 marks also awarded to him, still has an outstanding claim to a proper - i.e. a fair (within the meaning of the headnote in D 7/05) - marking of his paper C also with regard to the attack on the individual claims. This re-marking is to be carried out by the examination committee in question, whereby there is no legal limitation to 10 additional points at the maximum as the outcome of that re-examination; thereupon the Examination Board will base its decision under Article 7(3) REE on the committee's marking plus an extra 10 marks.

9. Since the appeal is therefore to be allowed and the breach of marking principles which the Examination Board itself has admitted was a gross violation, with serious consequences, of very significant rights of the appellants, the appeal fee should be refunded as this is equitable in these circumstances (Article 27(4) REE).

Order

For these reasons it is decided that:

1. The decision of the Examination Board under appeal is set aside.
2. The Examination Board is ordered
 - a) to commission the responsible examination committee to undertake a new marking of paper C of the European qualifying examination 2007, with the award of marks in accordance with Rule 4(2) and (3) of the implementing provisions to the REE taking into consideration the merits of any solution to the problems in the paper.
 - b) to determine the appellant's grade for paper C upon the basis of the marking obtained under a) plus 10 additional marks, and in accordance with Article 7(3) REE to take a decision on whether the appellant has passed or failed the European qualifying examination 2007.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:

P. Martorana

J.-P. Seitz