



**Case Number:** D 0023/08

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 3 June 2009**

**Appellant:** N.N.

**Decision under appeal:** Decision of the Examination Board for the  
European Qualifying Examination dated  
11 August 2008.

**Composition of the Board:**

**Chairman:** J.-P. Seitz  
**Members:** I. Beckedorf  
H. G. Hallybone

## Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examination Board, posted by registered letter of 11 August 2008, that he had been unsuccessful in paper D of the European Qualifying Examination (EQE) in 2008.
- II. The appellant sat examinations in 2006 and 2007 in two modules. Having already achieved pass grades in EQE papers A to C in 2006 (paper A - 78, paper B - 79) and in 2007 (paper C - 62, paper D - 36), he resat only paper D of the 2008 EQE and was awarded the marks "49 fail". The Examination Board decided that he having failed the paper has failed the EQE under Article 17(1), first alternative of the Regulation on the European qualifying examination for profession representatives (REE, OJ EPO 1994, 7 et seq., OJ EPO 2002, 565 et seq.)

Copies of the appellant's answer papers had been forwarded to him. The relevant marking sheets of the two members of the Examination Committee III as well as the record of the candidate's results in the 2008 EQE were enclosed with the contested decision of the Examining Board.

- III. By letter both dated and received on 10 September 2008 the appellant filed a notice of appeal in Dutch and English asking to deduct the appeal fee from his employer's account that consented to that deduction. The appeal fee was credited on 30 September 2008. A written statement of the grounds of appeal was both dated and received on 20 October 2008.

IV. The Examination Board did not allow the appeal, and by letter of 07 November 2008 remitted it to the Disciplinary Board of Appeal (DBA).

V. The appellant's written submissions in the statement of grounds of appeal can be summarised as follows:

First, he submitted that the marking he achieved for his answer to question 3 of paper D I (0 marks) was wrong. The solution he proposed, i.e. the drafting of a disclaimer in order to react to an opposition filed against a patent that is based on a novelty destroying European patent application (Article 54(3) EPC), differed from the solution by the Examiner. However, since his solution was in line with the case law (G 1/03 and G 2/03) and Article 123(2) EPC and because it offered a broader protection than the solution by the Examiner, he should have been awarded at least one mark.

Such a marking would be in line with the papers B in the 2005 and 2006 EQE examinations for chemistry, where not giving an answer including a disclaimer as to G 1/03 and G 2/03 had been regarded a serious mistake. In view of a "uniform marking", over the years, his answer to question 3 of the D I paper both relating to disclaimers, the solution he proposed could very well be marked with at least one mark for the sake of obtaining the broadest protection possible.

The appellant's second argument was that a marking system, especially in view of marks close to 50, is questionably appropriate to decide in a "uniform manner" within the meaning of Article 16 REE on PASS

and FAIL. In view of the fact that the examination is aimed at establishing "Fitness to Practice" and of the (special) marking system for first sitters, a more uniform marking system should take into account, on a case-to-case basis, other, i.e. secondary, parameters than just the marks for a particular EQE paper. One such parameter could be the scores achieved for the other EQE examinations. For instance, if other EQE examinations have been passed with relatively high marks, and/or in total much more than 200 marks for the examinations A to D have been obtained, such as more than 240 marks, such a total score could clearly indicate that the candidate in question is fit to practice. The fact that he himself were awarded in total 268 marks for papers A to D would seem to reflect "Fitness to Practice", contrary to the score of 49 marks for the paper D. For this reason, the appellant requests to adjust the present marks given for the D examination to at least 50 marks.

VI. The appellant originally requested,

as a main request that

1 as a first part of the main request, he be given an opportunity to review the marks given in detail,

2 as a second part of the main request, he be given an opportunity to review the marking table in detail,

3 as a third part of the main request, he be given an opportunity to review the original marks given in the first instance,

4 once having reviewed the marks and marking table,  
he be given an opportunity to comment on the marks  
given,

5 specifically amongst others, the marks given by  
the Examination Committee III in re question 3 of  
D I and questions 2 and 3 of D II be reconsidered,  
6 (his answer to) question 3 of D I be marked with  
at least one mark and in consequence of said  
marking the EQE D be qualified as PASS,

as a (first) auxiliary request, that

7 in view of the scores obtained in Exams A-C the D-  
paper be scored as PASS by transferring the  
present marks given to at least 50 marks, and the  
EQE be scored as PASS.

The appellant requested oral proceedings, "if  
applicable".

With letters of 10 December 2008 and 5 January 2009,  
the appellant requested accelerated processing in view  
of substantial and time-consuming preparations to be  
made for resitting the EQE and of further costs  
involved.

VII. By letters from the Board of 21 November 2008, the  
President of the EPO and the President of the  
Institution of Professional Representatives (epi) were  
invited, pursuant to Article 27(4) REE and Article 12  
of the Regulation on discipline for professional  
representatives (RDR, OJ EPO 1978, 91 et seq., OJ  
EPO 2008, 14 et seq.), to comment on the case. Neither  
President replied.

VIII. On 18 March 2009, the appellant was summoned to oral proceedings. In the annex to the summons, the Board expressed its preliminary opinion that the appeal was admissible but that its allowability was in doubt essentially, because the examination procedure could not be re-opened and the appellant would not meet the requirements for the provisions of Rules 4(4) and 5 IPREE for first sitters. The appellant's request for accelerated processing would not be accepted because he had not submitted any reasons constituting urgency.

IX. In a written reply to this communication and at the oral proceedings before the Board on 03 June 2009, the appellant essentially reiterated the arguments he had submitted with his statement of grounds of appeal. His additional submissions can be summarized as follows:

The DBA should apply general principles established in the case law, in particular the principles of good faith, advantage of doubt, fairness, non-discrimination and the borderline case law in relation for which he referred to the decision D 1/93.

Relying on the Universal Declaration of Human Rights (UDHR), in particular Articles 2(1) and 7 UDHR, he argued that the prohibition of discrimination and the principle of equal treatment would require Article 17 REE and Rules 4 and 5 IPREE to be applied to all candidates regardless whether they undertake the EQE for the first time or resit the examination. Applying these provisions to the appellant would result in declaring him to have passed the EQE. If the DBA did not apply the UDHR, the case should be remitted to "a" competent court. During the oral proceedings, the

appellant admitted that there was no indication of an unequal treatment among resitters.

The appellant questioned whether the necessary uniform marking according to Article 16 REE had been observed in the EQE 2008. Although the appellant acknowledged that the marking of his answer paper by the two examiners was "exceptionally uniform", when considering the marking in principle the required uniformity was not achieved in practice. The lack of uniformity in the marking in principle was due to the fact that many answers were marked differently by the examiners with a variation of 10% or more, the examiners were given some room to mark, and due to the large number of candidates and the large number of examiners. The statistical chance of a wrong decision was in the order of 5% to 20%, depending on the exact distribution of marking answers in question, and depending on the specific considerations of the examiners marking the case. Thus, the chance of a wrong decision would be most likely larger than an accepted statistical relevant level. Such a deviation from uniformity in view of costs was not justified by the law. The interpretation of criteria of marking by respective examiners would be most likely not uniform and, consequently, the marking was not uniform. Non-uniform marking would be arbitrary and open to judicial review, in the appellant's view.

A further consequence of the lack of uniformity of marking would be that secondary criteria should be taken into consideration such as the appellant's overall amount of marks (268), the fact that candidates having achieved similar marks as the appellant were considered fit to practice, the appellant's

professional experience, and the fact that the marks awarded in paper D are systematically lower than those awarded in papers A to C making a mark of 48 in paper D equivalent to a mark of 60 in paper A or B in the sense of fitness to practice.

With regard to the request for file inspection the appellant argued that Rule 6(1) IPREE should be interpreted against Articles 26 and 31 of the Vienna Convention on the Law of Treaties in a way that all the details available should be incorporated in the marking sheets.

X. The appellant finally requested

- 1 that the decision under appeal be set aside and that the appellant be declared to have passed paper D of the EQE 2008 and insofar the EQE,
2. that the appeal fee be reimbursed,
3. that the fee for enrolment of the EQE 2009 and further costs such as preparation for the EQE 2009 be reimbursed, and
4. that the appeal fee be reduced by 20%.

XI. The decision was announced at the end of the oral proceedings before the Board on 03 June 2009.



## **Reasons for the Decision**

The appeal is admissible according to Article 27 REE but not allowable.

### *Request for accelerated processing*

1. The appellant has not further proceeded with his request for accelerated processing after the Board's communication of 18 March 2009. The Board maintains its opinion expressed in said communication that the appellant's request does not meet the requirements set out in the notice from the Vice-President Directorate-General 3 dated 17 March 2008 concerning accelerated processing before the boards of appeal dated 17 March 2008 (OJ EPO 2008, 220 et seq.).

### *Scope of jurisdiction*

2. In accordance with the consistent case law of the DBA, in particular D 1/92, OJ 1993, 357, and D 6/92, OJ 1993, 361, decisions of the Examination Board may in principle only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application or higher-ranking law. In these two cases, the DBA therefore concluded that its functions did not include reconsidering the examination procedure on its merits. Accordingly, the Examination Board's value judgment concerning the number of marks that an examination paper deserves is not subject to review by the board. Only if the appellant can show that the contested decision is based on serious and obvious mistakes may the board consider this. The alleged mistake must be so

obvious that it can be established without re-opening the entire marking procedure, for instance if an examiner is alleged to have based his evaluation on a technically or legally incorrect premise on which the contested decision rests. Any further claims regarding alleged defects in the assessment of candidates' work fall outside the DBA's jurisdiction, since value judgments are not subject to judicial review (cf. D 11/07 of 14 May 2009, point 3 of the reasons; Case Law of the Boards of Appeal, 5<sup>th</sup> edition 2006, p. 671, ch. VIII.2.6.2, with further references).

*Substance of the appeal*

3. The appellant's requests at the end of the oral proceedings concern the marking of the EQE itself (request 1, hereafter: main request) and ancillary claims in respect of the appeal fee and the fee for enrolment (requests 2 to 4, hereafter: first to third ancillary requests).

*Main Request*

4. The appellant based his request that the decision under appeal be set aside and that he be declared to have passed paper D of the EQE 2008 and insofar the EQE essentially on three lines of arguments:

- As a matter of general principles of good faith, advantage of doubt, fairness and non-discrimination he should have been treated in the same way as first sitters.
- The marking was not and could not be uniform.

- The Examination Board committed an obvious mistake in marking question 3 of part I of paper D by not awarding at least one point for his solution to propose a disclaimer to react to a novelty destroying European patent application.

4.1 The appellant's first line of argument is in essence based upon the contention that Rules 4(4) and 5 IPREE are to be applied to all candidates regardless whether they sit the examination for the first time or resit the examination after having failed one or more papers in a previous EQE. Not applying these rules meant a discrimination of resitters against first sitters and, thus, infringed, the Universal Declaration of Human Rights, in particular Articles 2(1) and 7 UDHR.

Apart from the question whether the Universal Declaration of Human Rights is applicable to the EQE, the appellant is mistaken by referring to the prohibition of discrimination and the principle of equal treatment when seeking to have his examination being considered as passed regardless his failure to achieve the marks required according to Article 17(1) REE.

Said prohibition of discrimination and the principle of equal treatment that are acknowledged by all EPO Member States are not infringed if there is a justification for treating first sitters differently from resitters.

Such a justification is to be seen in the different circumstances of candidates taking the EQE for the first time and in one round and those resitting the EQE and/or taking the EQE in modules according to

Article 14(1) REE. Whereas Rule 5 IPREE requires a candidate to have taken the examination in one round, the appellant sat the examination in modules. Sitting the examination in modules gives an advantage to the candidate concerning the preparation for the examination in sections. The inherent higher degree of effort in writing all four papers of the examination in sequence is then compensated for by Rules 4(4) and 5 IPREE. It had been the appellant's individual choice not to undergo that effort but to take advantage of the option of a modular sitting of the examination according to Article 14(1) REE. This difference in the factual circumstances was acknowledged in case D 4/02, where the DBA concluded that the principle of equal treatment of first sitters and resitters is observed by the applying Rules 4(4) and 5 IPREE only to first sitters (decision of 17 January 2003, point 3.2 of the reasons).

Therefore, there is no room to follow the appellant in remitting the case to "a" competent court; notwithstanding that the decisions of the DBA in EQE matters are final and not subject to any review.

- 4.2 The appellant's second line of argument comprises two approaches, the first being based on the assumption that there is some degree of variation between the marking of the examination by different examiners, and the second being directed towards taking "secondary criteria" into account rather than evaluating the respective answer given by a candidate as such.

- 4.2.1 Concerning the appellant's first approach the appellant's submission is contradictory in itself.

During the oral proceedings the appellant admitted that the marking of his paper D was uniform, as it is obvious when comparing the sub-marks awarded by the two examiners on the schedule of marks that are identical with only one exception in respect of question 1 of part II of paper D with a slight difference of just 0.5 points. Thus, this submission in itself renders fallacious his request to have his examination remarked or to consider him as having passed the EQE despite his failure to achieve the necessary 50 points as to Article 17(1) REE in combination with Rule 4(2) IPREE for lack of uniformity.

- 4.2.2 But even the appellant's contention that the marking in principle was not uniform considering the system of marking and leaving aside the "exceptional uniform" marking of his particular paper D does not support the appellant's appeal.

First, the involvement of two examiners marking the candidates' papers independently from each other as well as the schedules and their sub-marks into as little as half a mark for individual details of the answer paper serve the purpose of uniformity within the meaning of Article 16 REE because it prevents the marking by one examiner differing considerably from the marking by other examiners. Any major difference in the marking would easily become obvious.

Secondly, although the appellant is right that some degree of variation might occur if one answer paper is marked by more than one examiner, such a variation is inevitable and inherent in the process of value judgments by different examiners. This, however, does not constitute a lack of uniformity within the meaning of Article 16 REE.

In D 7/05 (OJ EPO 2007, 378, 390) the DBA stated that in producing schedules of marks there has to be a trade-off between their purpose of ensuring uniform marking (Article 16 REE) and the need also to allow for fair marking of answers which deviate from the scheme but are at least reasonable and competently substantiated. The schedules must therefore leave some room for manoeuvre and - merely - be sufficiently detailed to constitute details of the marking within the meaning of Rule 6(1) IPREE allowing candidates to verify, on the basis of documents published or made accessible, whether the marking of their answers infringed marking principles in a way which might be subject to review by the DBA (thus already in D 12/82, decision of 24 February 1983, points 3 et seq. of the reasons).

There is established case law dealing with the issue of certain variation in the marking (cf. Case Law of the Boards of Appeal, 5<sup>th</sup> edition 2006, p. 669 et seq.):

In D 4/99 the appellant's complaint concerned the fact that the two examiners had marked Paper D differently. The DBA stated that the appellant's starting point that in case of non-identical marks only one value could be the correct one was irreconcilable with the fact that

marking was an individual assessment of the candidate's work. Rather, more or less strict standards were possible and different aspects might be considered essential or less important even within the general instructions to the examiner for marking the papers contained in the Implementing provisions to the REE. Examiners must have some latitude of evaluation when awarding marks and individual examiners might arrive at different marks, both results being justifiable. Therefore, differences in marking did not violate the REE and its Implementing regulations (D 5/94, D 6/98). In order to safeguard the principle of equal treatment, harmonisation of marking is provided for in the marking sheets. If the marking is different, the two examiners may revise their marks on the basis of a discussion among themselves, or papers may be marked by further examiners before the Examination Committee as a whole recommends a grade for the paper to the Examination Board. This system ensures uniformity of marking as required by Art. 16 REE.

In D 6/99 the DBA confirmed that small differences in marking do not, as such, violate the REE and its Implementing regulations. They were an unavoidable consequence of the provision, in Art. 8(b) REE, that each answer was marked separately by two examiners.

Considering the case law, variations in the marking *per se* do not infringe the principle of uniform marking according to Article 16 REE. This might only be different if the grade of variation is high. However, the appellant merely speculates about a variation of 10% or more but neither gives evidence for his

assumption nor even states any facts that might suggest such a wide-ranging variation.

Notwithstanding that the Board cannot find any convincing evidence for a breach of the principle of uniform marking, even if there was such a theoretical violation of Article 16 REE, this would not result in the legal consequence sought by the appellant, i.e. to award at least one additional point for his answer paper so that he would pass the threshold set out in Rule 4(2) IPREE.

- 4.2.3 The appellant seeks to overcome this legal problem with his second approach. Since there was no guarantee of uniformity in marking in principle, the answer papers should not be evaluated exclusively as such, but "secondary criteria" should be taken into account in order to establish whether or not a candidate is "fit for practice". This submission is essentially directed towards the application of the principles established under the former borderline case law.

However, borderline case assessments of candidates' fitness to practise as professional representatives before the EPO are no longer possible under the current Regulation on the European qualifying examination and its implementing provisions.

Article 17(1) REE, which is exhaustive, states that a candidate must pass each examination paper in order to pass the European qualifying examination as a whole. The sole exception to this is the provision in Rules 4(4) and 5 IPREE, whereby a candidate sitting the examination for the first time is afforded the option



of having his marks offset. This option is open to the candidate only under the conditions set out in Rule 5(1) to (3) IPREE. If he fails despite this compensatory measure he is obliged to resit all the papers in which he did not obtain a pass mark (Article 18 REE).

This invalidates the principles governing borderline decisions set out in particular in D 1/93 (OJ 1995, 227). The DBA has confirmed this in several decisions (cf. D 8/96 OJ EPO 1998, 302; Case Law of the Boards of Appeal, supra, p. 670, ch. VIII.2.4.). This consistent case law since D 1/93 was reaffirmed in D 4/02 of 17 January 2003 where the DBA held that the REE does not allow any resitting in borderline cases. There could be no question of taking an overall view whereby a candidate who had not satisfied the requirements for passing the examination was nonetheless declared to have passed it.

Under the examination law currently in force, neither the Examination Board nor the DBA have the power of discretion. Article 17(1) REE and Rules 4 and 5 IPREE prescribe the marks that candidates have to achieve in order for the Examination Board to declare them to have passed.

Since the appellant, in resitting paper D in the 2008 EQE, did not achieve an overall mark of at least 50 marks according to Rule 4(2) IPREE he cannot be declared to have passed the examination under Article 17(1) REE.

- 4.3 The appellant's third line of arguments is directed essentially towards a remarking of his answer paper D as a prerequisite for the desired declaration that the appellant has passed the examination. However, this would require a re-opening of the examinations procedure that does not lie within the DBA's scope of competence (cf. D 1/92, OJ EPO 1993, 357; D 17/05 of 19 July 2005, point 2 of the reasons; D 11/07 of 14 May 2009, point 3 of the reasons).
- 4.3.1 The object of the qualifying examination is to establish whether the candidate is fit to practise as a professional representative, which essentially also involves acting as a legal adviser or lawyer. Possession of the requisite knowledge and abilities is demonstrated by the examination results alone, not by completion of the prescribed training or by paper qualifications. Paper D tests only the candidate's legal knowledge and his abilities as a legal adviser or lawyer. A candidate incapable of achieving a high enough mark to satisfy the examination standards is not fit to practise as a professional representative.
- 4.3.2 Examination Board decisions in EQE are subject only to limited judicial review. As set out in D 7/05 (OJ EPO 2007, 378, 394 et seq.), the DBA can only consider facts constituting a mistake in the examination procedure which can be established without re-opening the whole marking procedure. The DBA does not have the power to reconsider the entire examination procedure on the merits and set its evaluation of the merits above that of the Examination Board. Technical review of the marking of an answer in terms of whether it is objectively correct or appropriate, is denied to

the DBA by virtue of Article 27(1) REE. On appeal, the Board can only consider facts constituting a mistake in the examination procedure which can be established without re-opening the whole marking procedure, for example where the two examiners differ so widely in their marking that the difference in marks alone suggests an infringement of the principle of uniform marking, or where a question is inconsistently or incomprehensibly formulated (D 13/02 of 11 November 2002, point 4 of the reasons), or where the examiners based their marking on a technically or legally false premise on which the contested decision is based (D 16/02 of 16 July 2003, point 3 of the reasons, D 6/04 of 16 July 2003, point 3). The actual marking of examination performance in terms of how many marks an answer deserves is not subject to review by the Appeal Board; nor are the Examination Board's criteria for determining the weighting of the expected answers (cf. D 20/96 of 22 July 1998, point 9 of the reasons to the examination questions (D 13/02 of 11 November 2002, point 5 of the reasons)).

Although the appellant does not directly request the DBA to reconsider his examination, his request constitutes indirectly such a proposition. It would require the DBA to reconsider the examination on its merits and, thus, to re-open the examination procedure.

As the aspects of the marking of the answer paper are not subject to review by the DBA, the Board cannot concern itself with the substance of the appellant's arguments. There is no obvious basis for reviewing the exercise by the Examination Board of its discretion. The decision that the Examination Board has taken is

one to which it was entitled to come and which shows no obvious mistake. The Board cannot identify any serious and obvious mistake affecting the marking. What the appellant seeks is in fact a reconsideration of his answers and substitution by higher marks.

- 4.3.3 The appellant submits that the Examination Committee and the Examination Board were obviously wrong in marking his answer to question 3 of part I of paper D with 0 marks out of 4 possible marks because his solution by proposing a disclaimer in order to react to a novelty destroying objection filed against a patent in opposition proceedings would be consistent with the case law, i.e. G 1/03 and G 2/03, and would be in line with the 2005 and 2006 B-EQE examinations in chemistry.

The appellant's entire submission is directed essentially at the fact that the examiners awarded his paper D an incorrect and insufficient number of points. The appellant believes that an objective evaluation of his answers should have led to his being awarded higher grades and thus being successful in the examination. His arguments are confined to his view of the meaning and the degree of correctness and completeness or at least acceptability of his answers to paper D and to substantiating why they deserved more marks than the examiners had actually awarded.

What is being contested therefore are value judgments specific to the examination. What is involved are differences of opinion between the appellant and the examiners over the "correct" marking of the appellant's papers. As these aspects of the marking of the answer paper are not subject to review by the DBA, as stated

above, the DBA cannot concern itself with the substance of these arguments. That the appellant does not like the decision and holds a different opinion from the Examination Board might be considered as being understandable but such differences of opinion are reflections of value judgments which are not, in principle, subject to judicial review (cf. D 1/92, OJ EPO 1993, 357, 360).

There is no evidence that, in marking the appellant's papers, the examiners have made a serious mistake that could be regarded as an abuse of their powers. Comparing the appellant's solution for paper D of the 2008 EQE with the alleged marking of the respective paper B in the 2005 and 2006 EQEs does not support his appeal. Every examination has to be assessed on its own. This principle is even more relevant when it comes to different papers. Since the different papers serve different purposes according to Article 13(3) REE, the individual marking of the papers cannot be directly put side by side.

For these reasons, the DBA cannot award one mark (or more) to the appellant's answer to question 3 of part I in order to consider him as having passed paper D of the 2008 EQE and the EQE altogether.

- 4.4 Since the appellant in resitting paper D in the 2008 EQE did not achieve an overall mark of at least 50 marks according to Rule 4(2) IPREE he cannot be declared to have passed the examination under Article 17(1) REE.

*(Former) Request for file inspection*

5. In his final set of requests at the end of the oral proceedings the appellant has not maintained his original request for file inspection after the Board's communication of 18 March 2009. During the oral proceedings before the Board the appellant, citing decision D 7/05, merely focussed on the subject that the marking schemes according to Rule 6(1) IPREE should include "all details available".

The Board refers to its communication where it stated that the marking sheet and the record of the impugned decision that were sent to the appellant by the Examination Board together with the documents published in the compendium enabled the appellant to verify the Examination Board's decision in his case. Therefore, the appellant had no further right to inspect the examination file.

The Board maintains this conclusion. The schedule of marks of paper D 2008 included sufficient sub-division of the maximum achievable mark (100) and the candidate's overall mark into sub-marks, and an indication of the substantive and legal issues for which those sub-marks were awarded. It, thus, contained all details of the marking within the meaning of Rule 6(1) IPREE (cf. D 7/05 OJ EPO 2007, 378, 388; also: D 11/07 of 14 May 2009, points 8 et seq. of the reasons).

*Ancillary claims*

6. With his first to third ancillary claims the appellant seeks for a reimbursement of the appeal fee and the fee for enrolment of the 2009 EQE as well as for a reduction of the appeal fee.

6.1 Reimbursement of the appeal fee is possible under the requirements set out in Article 27(4), 3<sup>rd</sup> sent. REE: If the DBA allows the appeal, or the appeal is withdrawn, it shall order reimbursement in full or in part of the fee for appeal if this is equitable in the circumstances of the case.

Since the appeal is neither allowable nor is it withdrawn, there is no room for reimbursement of the appeal fee.

6.2 In respect of the request for reimbursement of the fee for enrolment of the 2009 EQE the appellant in essence requests damages based upon the assumption that he has suffered a financial loss caused by the Examination Board in issuing the decision under appeal.

Apart from the fact that the contested decision is correct and, thus, cannot serve as a starting point for a claim for damages, there is no legal basis for such a claim of a candidate who decided to enrol for resitting the failed examination without waiting for the outcome of his appeal.

6.3 The appellant demands a reduction of the appeal fee filed with the notice of appeal dated 10 September 2008

because he filed the notice of appeal in the Dutch and English languages.

According to Rule 6(3) EPC in combination with Article 14(1) of the Rules relating to Fees provides for the reduction i.a. of the appeal fee by 20% where a person referred to in Article 14, paragraph 4, files an appeal in a language admitted in that provision.

However, Rule 6(3) EPC is not applicable in the proceedings before the DBA. Neither Article 27(4) REE nor Part IV RDR, in particular Articles 22 and 25 RDR, provide for the application of Rule 6(3) EPC.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

J.-P. Seitz