



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
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Case Number: D 0029/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 28 February 2022

Appellant: N.N.

Decision under appeal: Decision of the Examination Board dated
21 June 2021 concerning the Paper B part of the
European Qualifying Examination 2021.

Composition of the Board:

Chairman: W. Sekretaruk
Members: T. Bokor
A. Hooiveld

Summary of Facts and Submissions

- I. The appeal is against the decision of the Examination Board posted on 21 June 2021 to award the appellant's answer paper the grade FAIL to his Paper B part of the examination of the European qualifying examination 2021 (hereinafter "Paper B 2021") in accordance with Rule 6(3)(b) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE, OJ EPO 2019, Supplementary publication 2, 18) because his answer paper had been awarded 40 marks.

- II. The decision of the Examination Board, as set out in the letter of the Examination Secretariat dated 21 June 2021 contained the usual grouping of the appellant's individual marks as foreseen in the Examiner's Report, for all four examination papers A to D. The decision also contained a statement concerning the neutralisation of a part of the paper D and the consequential awarding of 25 marks for the affected part. The group of the marks awarded for the his paper B did not appear to include any marks awarded for some special reason, nor was there any other reference in the decision to any further compensation marks, beyond those mentioned for the Paper D.

- III. By letter dated 28 July 2021, received on 29 July 2021 in the EPO, the appellant filed a notice of appeal including a statement setting out the grounds for appeal. The appeal fee was paid on 15 July 2021.

- IV. The appellant contested the marking of his paper and the conditions of the examination in general, and raised several complaints in this respect.

- V. The Examination Secretariat remitted the appeal to the Disciplinary Board of Appeal on 10 August 2021, stating that the Examination Board had decided not to rectify its decision.
- VI. The President of the Council of the EPO and the President of the European Patent Office (EPO) were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2022, Supplementary publication 1, 147), in conjunction with Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 2019, Supplementary publication 2, 2). No comments were received.
- VII. In his appeal the appellant argued in essence that the marking of his answer paper was wrong and the examination conditions were unfair for the following reasons.
- a, The examination paper was erroneous. This constituted an obvious and serious mistake, and also caused unequal treatment. There had been a mark-up error in the examination paper. This error meant that an instruction of the client was easily overlooked, namely the addition of the feature "by spraying water on said refuse". Discovering the error was difficult under the conditions of the online examination. Even if discovered, the error caused a contradiction, and it was not possible to determine whether the original or the amended claim was erroneous. This error was not present in the French version. Thus candidates taking the paper in either German or English were not treated equally.

b, The Wiseflow platform was unsuitable for the purposes of the examination and posed serious difficulties. It violated Articles 1(1) and 1(3) REE in that the fit-to-practice criterion was not respected and the examination papers were not written. Lack of usual features, such as printed papers meant that the examination was not following the usual format. Even if accepting that the online format was justified, the implementation caused undue burden to the candidates. It also violated the principle of equal treatment, in that it did not support certain formatting features for MAC platforms, while these did work on Windows platforms. These formatting features were an important editing tool for candidates. In this manner candidates were not treated equally.

c, The marking was unfair because correct solution elements by the candidate remained unrewarded. He made expected amendments, for which he received no marks, due to the fact that one single wrong amendment, such as the "drain holes" for claim 1 and "housefly eggs" for claim 5, caused 0 marks being awarded to claims 1 and 5 and the corresponding amendment arguments. For claim 5, the expected solution of amending "worms" to "earthworms" were not awarded any marks either. These deductions constituted unfair double penalty.

d, His answers were incorrectly marked in respect of a number of features. Maintaining the "water container" was a defensible solution, while there was no need to take up the "non-transparent lid". The removal of the "drain holes" and adding "housefly eggs" were admissible amendments. His arguments on the third party observations corresponded to the model solution and should have attracted more marks, this could be established without reviewing the whole paper. In sum, the marking was based on technically and legally

incorrect premises, and involved serious and obvious errors.

- VIII. The appellant requested that the decision under appeal be set aside and that his answer paper be awarded at least a COMPENSABLE FAIL grade, directly by the Board or as a subordinate request, by way of remittal to the Examination Board for re-marking. He also requested oral proceedings and the reimbursement of the appeal fee.
- IX. With letter dated 27 December 2021 the appellant submitted further arguments about the difficulties of the Wiseflow platform and provided additional details about the conduct of the examination.
- X. The Board informed the appellant in a communication dated 17 February 2022 that the Board was minded to allow the appeal and to remit for re-marking on the basis of the arguments as set out in points VII(a), (b) and (c) above, but the other arguments as set out in point VII(d) above were unlikely to succeed. These would appear to require a complete re-examination of the Paper B and as such would appear to be beyond the competence of the Disciplinary Board of Appeal.
- XI. With telefax dated 21 February 2022 the appellant stated that he consented to the withdrawal of those arguments that were identified by the Board as apparently not allowable, and requested remittal of the case, provided that the Board would decide as indicated in its preliminary opinion.
- XII. With telefax dated 22 February 2022 the appellant gave further arguments why the penalisation of the "housefly

eggs" amendment in claim 5 was decisive for the marking of his answer paper.

XIII. For the details of the examination paper in dispute, reference is made to the published examination paper and the corresponding Examiner's Report, available on the website of the European Patent Office at [https://documents.epo.org/projects/babylon/eponot.nsf/0/3003815DE4A96079C125868E00487577/\\$File/B_2021_en.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/3003815DE4A96079C125868E00487577/$File/B_2021_en.pdf) and [https://documents.epo.org/projects/babylon/eponot.nsf/0/7043D0BB750F0825C12586F8002C8336/\\$FILE/Compendium_ExRep_2021_B_EN.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/7043D0BB750F0825C12586F8002C8336/$FILE/Compendium_ExRep_2021_B_EN.pdf) at the time of writing.

Reasons for the Decision

1. The appeal is admissible.
2. The decision can be taken in written proceedings. The appellant requested oral proceedings on an auxiliary basis, i.e. in the event that his request for the awarding of a PASS or a COMPENSABLE FAIL grade was not granted. With his telefax dated 21 February 2022 he consented to the remittal of the case for re-marking also without the holding of oral proceedings, if the appeal was deemed allowable on the basis of the maintained arguments. As the request for remittal can be granted for the reasons given below, it was not necessary to hold oral proceedings.
3. The appellant requested that the contested decision be set aside. He alleged unequal treatment and obvious and serious errors in the conduct of the examination, and also in the marking of his answer paper, alleging unfair marking.

4. In accordance with Article 24(1) REE and the consistent case law of the Disciplinary Board of Appeal (hereinafter "the DBA"), which followed decision D 1/92 (OJ EPO 1993, 357), 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. It is not the function of the DBA to reconsider the entire examination procedure on the merits. This is because the Examination Committees and the Examination Board have some latitude in their evaluation which is subject to only limited judicial review by the DBA. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the DBA take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure. This is for instance the case if an examiner is found to have based his evaluation on a technically or legally incorrect premise upon which the contested decision rests (D 2/14). Another example of an obvious mistake would be a question whose wording is ambiguous or incomprehensible (D 13/02). All other claims to the effect that the papers have been marked incorrectly are not the responsibility of the DBA. Value judgments are not, in principle, subject to judicial review (see e.g. D 1/92, supra, points 3 to 5 of the Reasons).

Violation of Article 1(3) REE, requirement of written papers

5. The appellant argued that Article 1(3) REE was violated, because only certain parts of the Paper B could be printed. The Board sees no violation of this provision. Article 1(3) REE stipulates that "The examination shall comprise written papers only". In the

opinion of the Board, "written papers" is to be understood as the usual examination form where answers are submitted in writing, as opposed to oral examinations. It does not mean that the examination papers inevitably have to be printed, as argued by the appellant.

Violation of Article 1(1) REE, fit-to-practice criterion.

6. The appellant also argued that Article 1(1) REE was violated, because the examination overburdened the candidates with technical issues, and in this manner they could hardly concentrate on the examination. The Board accepts that the conditions of the examination were difficult. However, this does not lead to the conclusion that the examination was not guided by the fit-to-practice criterion. This could have been the case if the technical prowess of the candidates had been marked, and not their answer paper on the merits. The implied requirement of the examination, namely that candidates also had to be familiar with the technical details of the online examination, is in itself not completely different to the working requirements of professional representatives in their everyday practice. For example, participating in a video conference oral proceedings similarly requires certain technical competence, which was not necessary for participating in traditional in-person oral proceedings.

Erroneous paper and unequal treatment

7. It is settled case law of the DBA that equal treatment of candidates is an issue which may be the subject of appeals under Article 24(1) REE (see the recent decision D 0008/21, point 10.2 of the Reasons and the

cases cited). The principle of equal treatment requires that candidates should take part in the examination under equal conditions. Thus it follows from this principle of equal treatment that unequal conditions which may cause unjustified disadvantages for candidates should be compensated, to the extent feasible.

8. It is an undisputed fact that there had been a mark-up error in the examination paper. This is apparent when comparing the English and French versions of the Paper B 2021, page 24 (for the French version see [https://documents.epo.org/projects/babylon/eponot.nsf/0/3003815DE4A96079C125868E00487577/\\$File/B_2021_fr.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/3003815DE4A96079C125868E00487577/$File/B_2021_fr.pdf)). The amended claim 5 as suggested by client contained an amendment as compared with the originally filed claims. The client inserted the feature "by spraying water on said refuse", among other amendments made. All amendments made by the client were highlighted with bold, except this amendment. At the same time, deleted parts, such as the deletion of worms were not all marked.
9. The Board finds the appellant's arguments plausible that the added feature "by spraying water on said refuse" was difficult to discover under the circumstances of the online examination, and even if discovered, the candidates were faced with a confusing set of facts. If the lacking highlighting by bold was not discovered, they may have overlooked a wish of the client. If discovered, they had to speculate if the error was in the amended claims or rather in the original claims. Other explanations for the error may also have appeared plausible. Either way, candidates faced additional difficulties, irrespective of the discovery of the error.

10. On this basis, the Board accepts that this difference between the French and the English version may have had a significant impact on the answer paper of a candidate, and in this manner candidates writing the French and English versions had to write the Paper B 2021 under different conditions. The Board considers that these different conditions amount to an unequal treatment of the candidates. Such unequal treatment deserves some form of compensation, but such is not apparent from the Examiner's Report or the marking of the candidate. In this regard the Board refers to decision D 0008/21, points 10.1 to 10.3 and point 12.1 of the Reasons. The Board explicitly endorses these reasons of D 0008/21 and agrees with the conclusion stated in point 12.1 that the unequal treatment must be compensated.

Request that the answer paper be re-marked

11. The Board holds that the case must be remitted for new marking by the Examination Board, taking into account the difference that exists between the papers (also following D 0008/21 in this respect, point 10.4 of the Reasons). This was also the last request of the appellant. First of all, marking of papers is in principle beyond the competence of the DBA, as explained above in point 4. Remitting the case back for determining the possible compensation also permits the Examination Board to apply similar principles for similar situations, and it is known to the Board that a number of similar appeal cases address the same issue.
12. The appellant provided extensive arguments how the error influenced his answer paper and how much marks he has lost as a consequence. On this basis, he requested

that 12 marks should be additionally awarded to him for this error of the paper, by neutralising the affected parts of the paper.

13. The Board cannot comment on these arguments individually, already for the reasons given above in point 11 above. These arguments can be taken into account by the Examination Board or the Examination Committee appointed under Article 6(5), second sentence, REE, if it deems fit. However, in the opinion of the Board, the appellant cannot expect to be awarded marks on the basis of hypothetical solutions, even if his arguments explaining the amount of the potentially lost marks may appear perfectly plausible in light of his answer paper. It appears practically impossible to establish what his solutions would have been without the error of the paper. It is not realistic to expect that the re-marking should involve the speculation about possible solutions based on an analysis of his answer paper. In itself it may not be unreasonable to expect that the compensation should be tailored to the disadvantage that the candidate suffered, but there are obvious practical limits to the individualisation of the compensation in a case as the present one. Here an individualised compensation may not be realistic at all.

14. Concerning the argument that the erroneous paper represented an obvious and serious error in view of the contradictory information, and the fact that the contradiction appeared irresolvable, the Board is not convinced that this was the case. The appellant argued that candidates were instructed to highlight additions with underlining, while the client's letter did not contain any such underlining, and this have originally misled the appellant. The Board does not see why

candidates should have expected the same formatting in the client's letter that were expected from the candidates when preparing their answer papers. On the face of it, it appeared obvious from the paper that the client's additions were marked with bold. Even so, the Board accepts that it was still possible to assume that the added and unmarked feature "by spraying water on said refuse" was not an addition of the client, but was in fact erroneously missing from the original claim. However, this issue need not be decided by the Board separately. It can be accepted that the English version of the Paper B was erroneous, and that the French version was considered to be the correct one. The disadvantage caused thereby is not additional to the disadvantage that was recognised in the form of an unequal treatment, as set out in points 5 to 8 above. Compensating the unequal treatment will also compensate the disadvantage caused by the erroneous paper.

Unequal treatment of candidates due to the differences of the editing functions

15. The appellant submitted that he had serious technical issues in the examination which he had duly reported. He referred to decision D 11/19, where the DBA concluded that different technical conditions during examination may amount to an unjustified unequal treatment of candidates. These problems of the appellant were the following:
 - (a) In the paper B 2021, the candidates were not able to print the description and claims of the application, the EPO communication, the client's letter and the amended claims, and no highlighting was possible in the pdf viewer inside the Wiseflow platform. However, highlighting parts of the examination paper was an essential tool for a candidate to be able to analyse

the large volume of information. Highlighting was always available to candidates in previous years as the entire paper was printed.

(b) The editor of the Wiseflow platform did provide for copy-pasting texts. However, when the text was pasted into the editor, numerous formatting errors would be present in the pasted text that made the text practically illegible. The Wiseflow version running on Microsoft Windows offered a copy-and-paste function that avoided these formatting errors (the key combination CTRL + SHIFT + V). On the other hand, this function was not available in the Wiseflow running on a MAC platform.

(c) It was self-evident that the texts were far easier to read and errors were less likely to occur when reading the text without those formatting errors that occurred for MAC OS users, and the appellant had highlighted the issue to the Examination Secretariat. However, the issue still persisted during the Paper B. The appellant also indicated this on his answer paper and also reported in a separate e-mail to the Secretariat.

(d) The problem of formatting errors could be partly eliminated by the formatting removing (Tx) function of Wiseflow. Still, this resulted in approximately one formatting error per line of text. In this manner reading the edited text was quite distracting and far more difficult to read, as compared with an error-free text. A simple calculation showed that reformatting and correcting errors must have taken a significant time. 16 minutes would be a good estimate, even if allowing for simplifications, e.g. only assuming 3 seconds to find and correct each formatting error. Calculating with 0.5 marks per minute, the appellant would be expected to have lost at least 8 marks, as compared to users of the Windows operating system.

16. The Board finds the appellant's arguments credible that the differences between the Windows and MAC platforms caused significant differences in the perceived difficulty of the editing in Wiseflow. It is also clear that the online examination could not have been done without the editing of the texts of the paper. Furthermore, from the submissions of the appellant it appears that he was never told that sitting the Paper B would not be possible or recommended on a MAC based device. The Board considers that it cannot be expected from the Secretariat to provide tools that work on just any operation system. However, the Board considers it to be generally known that MAC OS based computers are a recognised and widespread class of computers, representing practically the only realistic option to Windows systems (at least for normal consumers). Thus it was reasonable for candidates to expect that Wiseflow will properly work also on MAC OS. By contrast, it would not have been reasonable to expect from candidates to learn how to use a Windows OS based device only for the purposes of the EQE examination. Put differently, candidates could have reasonably expected that the online examination can be absolved with the IT infrastructure they were familiar with.
17. The Board is aware that it is practically not possible to provide perfectly equal conditions for all candidates under any circumstances. Some differences always remain and have to be accepted (see e.g. D 0011/19, point 8.3.3(c) of the Reasons, referring to different examination venues and the inevitable differences resulting therefrom). The Board considers that in view of the fact that the editing functions played a key role in answering the paper, the differences of the editing functions under the two

operating systems, as explained by appellant, represent a difference that is not objectively justified. On this basis, the Board holds that the appellant was disadvantaged through the use of the MAC OS without good reason, and this disadvantage must be compensated.

18. Similarly to the compensation of the unequal treatment caused by the erroneous examination paper, the appropriate compensation must be determined by the Examination Board. As suggested by the appellant, an estimate of the effective time loss may be considered as an objective measure of the disadvantage (see also D 0011/19, point 8.3.5 (c) of the Reasons, discussing estimated time loss as a possible measure of a disadvantage, even if inevitably imprecise). However, the Examination Board may consider other factors to be a more suitable measure for the disadvantage.

Unfair marking

19. In spite of the general lack of competence of the DBA for examining details of the marking, as explained above in point 4, in exceptional cases the DBA recognised that unfair marking may constitute an obvious and serious mistake. Decisions D 0016/17 and D 0013/17 made it clear that double penalisation (Doppelbestrafung), namely where a false response may have an effect on other parts of the examination paper and thereby may lead to a further loss of marks for the same error, cannot be considered to fulfil the requirements for a fair marking as developed in the case law (point 3.7.1 of the Reasons in both decisions, concerning the marking of Paper A). These principles were further developed by decision D 0011/19, which held that separate deductions for erroneous claim

amendments and additionally for the corresponding arguments by a candidate in support of such erroneous amendments do not necessarily mean an unfair double penalty. Under the circumstances such additional deductions may well be justified, given that the expected arguments give the candidate an opportunity to review its own assessment concerning the admissibility of an amendment, for example for the purposes of Article 123(2) EPC (D 0011/19, points 7.2.1 of the Reasons, in the context of Paper B).

20. One of the main arguments of the appellant concerns the lack of marking for his allegedly correct solutions. For example, he argued for the "water spraying device" amendment and the deletion of the "lower compartment" , as expected in the Examiner's Report (point 5.2.1). However, due to the marking scheme, these arguments did not attract any marks. This was so because due to other erroneous amendments, such as the "drain holes" amendment in claim 1 and the "housefly eggs" amendment in claim 5, claims and amendment arguments attracted no marks, irrespective of other amendments. In the opinion of the appellant, this constituted "double penalty", which was deemed unfair in the case law, e.g. by decisions D 0013/17 and D 0016/17.

21. The Board refers to decision D 0022/21, decided by the present Board in the same composition. In this decision the marking scheme of the Paper B 2021 was found as potentially unfair, with special emphasis on the marking of the "housefly eggs" amendment. The appellant submitted that the marking of his Paper B was also decisively influenced by the unfair deductions/ penalties in connection with this amendment.

22. The Board accepts that this is indeed the case, but points out that the findings of decision D 0022/21 are not fully applicable for the present case. The Board stated in that decision that the marking scheme of the Paper B 2021 could be perceived as unfair for three distinct reasons: (1) The marking of the "housefly eggs" amendment appeared to contain arbitrary elements, in that the same error was penalised differently for Claim 1 and Claim 5 (point 8 of the Reasons). (2) This confirmed that it was possible to apply double penalties, in connection with the absence of a warning against double penalty (point 9 of the Reasons). (3) The feature of the loss of all marks for a single error could leave correct solution elements unrewarded, which again could be perceived unfair in itself, given that candidates performing significantly differently could still end up with the same result, 0 marks being awarded to them. Put differently, the marking scheme had the potential to apply deductions disproportionately, while the Examiner's Report stated that the award of marks corresponded to the difficulty of the expected solution (points 10 to 12 of the Reasons).

Double penalty

23. The Board points out that the applicant's answer paper does not seem to be affected by an immediately recognisable unfair double penalty. The appellant did include the "housefly eggs" amendment in his Claim 5, but not in Claim 1. The possible award of 0 marks for the amendment arguments concerning his claim 1 is most likely caused by a different amendment, namely the deletion of the "drain holes" (point 3.1 of the Examiner's Report, 3rd paragraph states that this is an Article 123(2) EPC violation, so that the amendment

arguments also lost all marks, see point 5.2). The amendment arguments concerning his claim 5 lost all points because of the "housefly eggs" amendment. Thus it is not apparent that the appellant was penalised twice for the same error. D 0022/21 also pointed out that deductions for an amendment in the claim and the corresponding argument is not necessarily an unfair double penalty (points 4 and 16 of the Reasons, referring to D 0011/19).

Arbitrary elements, unrewarded correct solution elements

24. However, the other two concerns raised by D 022/21 also apply to the marking of the appellant's answer paper. The arbitrary element remains, namely the penalisation of claim 5 with an effective 9 marks deduction for the "housefly eggs" amendment (Examiner's Report, point 3.2 states that all marks are lost), while only 4 marks deduction is applicable for claim 1. Similarly, it is not apparent why the amendment arguments for claim 1 could be affected by an effective 10 marks deduction (Examiner's Report, point 5.2.1), as opposed to 3 for the arguments for claim 5. Following the decision D 0022/21, a re-assessment of the deductions at least in respect of the "housefly eggs" amendments can be expected, but the same principle is also applicable to other amendments, such as the removal of the "drain hole". Such a new and presumably less unfair marking scheme may result in comparable deductions for claims 1 and 5, quite distinct from the question how the double penalty may be avoided where both claims contain the same error. Thus with a more fair marking, applying comparable deductions for comparable errors, the appellant's amendment arguments for claim 1 may not have lost all 10 marks as a result of the single "drain hole" amendment. This would mean that the correct

amendments, argued to be worth 9 marks, may have attracted some marks, even if not full marks.

25. The appellant argued that his amendment arguments for claim 1 may have deserved 9 marks for at least three correct amendments (Water spraying device, water container, removal of lower compartment). The Board is not convinced that this counting is correct - the water container together with the water spraying device does not appear to attract more marks than the water spraying device alone. The Examiner's Report, point 5.2.1, second bullet point states the following: " 2 marks for the arguing that the water spraying device without water container is based on paragraph [012] and Figure 2, ... **Alternatively**, (emphasis by the Board) 2 marks are awarded for a water spraying device with a container and arguments referring to Figure 2." This passage makes clear that the "water container" will not improve the expected claim. Still, even when assuming only 7 marks, this could still surpass a modified deduction for the "drain holes", if such a deduction would be oriented at the 4 marks deduction mentioned for claim 1 (Point 3.2, 2nd paragraph). In this sense the appellant rightly states that the marking of his answer paper may have been decisively influenced by the arguably unfair marking of the amendments.
26. Also the third concern identified by D 0022/21 is applicable, the possible disproportionate deduction, another consequence of the marking scheme permitting the loss of all marks for a single error.
27. The appellant submitted that his paper contained several elements of the expected amendments that were foreseen by the Examiner's Report, and which did not attract any marks because of the total loss caused by

the "drain holes" and the "housefly eggs" penalties. For example, his claim 5 included expected amendments, such as the deletion of the "optionally" feature and the "worms/earthworms" replacement, and his arguments addressed these amendments. The Board considers that such a result is almost an inevitable consequence of a marking scheme where deductions can be made for various reasons. As also stated in D 0022/21, point 10 of the Reasons, the candidates cannot expect that they will be awarded the full marks for certain partial solutions under any circumstances, even if these are doubtless correct on their own. According to Rule 24 IPREE, in the Paper B part of the EQE candidates are expected to respond to all points raised in the official communication and to provide amended claims that meet the requirements of the EPC, i.e. **all** requirements of the EPC. Thus answering Paper B cannot be reduced to the simple exercise of collecting marks for certain solution elements that are derivable from the Examiner's Report. It is also required that the totality of the claims and the corresponding arguments constitute a complete and in itself consistent solution.

28. That said, the Board accepts that also in the appellant's answer paper multiple correct and expected amendments remained without marks being awarded, as explained above in point 25. In this manner the Board accepts that the findings of D 0022/21 as set out in points 10 to 12 of the reasons are potentially applicable for the answer paper of the appellant.

Double penalty in respect of amendment arguments for Claim 5

29. The appellant argued that also Claim 5 was affected by double penalty. The correct amendment of replacing

"worms" with "earthworms" remained unrewarded. The Board does not see any unfair marking in this respect, contrary to its preliminary opinion (point X above). The amendment arguments for Claim 5 were worth a maximum of 3 marks. This stands against the possible marks of the "worms/earthworms" amendment. As stated above in point 27, there is no expectation that each and every correct solution element will receive full marks. Here, the deduction of the maximum foreseen 3 marks (due to the "housefly eggs" amendment) appears neither excessive nor disproportionate, nor is it a repeated deduction for the same error.

30. In view of the details of the marking as set out in points 24 to 28 above the Board cannot come to the conclusion that the marking of the appellant's answer paper can be considered as fair in all respects. On the other hand, the Board also cannot immediately establish that the low number of marks awarded to the appellant indeed resulted from the unfair marking, as argued by the appellant. As it is well known and also apparent from points 3 and 5 of the Examiner's Report for the Paper B 2021, deductions could be attributed to a number of factors. Thus retroactively identifying the deductions effected in the appellant's answer paper and specifically selecting those that could have been affected in an unfair manner does not appear realistic, if possible at all. Apart from the question if any reasonable result can be expected from this exercise, this would require the Board to scrutinize the totality of the Paper B (including the Examiner's Report) and the answer paper of the appellant, and effectively to perform a complete marking of his answer paper. As explained above in point 3, such an exercise is beyond the competence of the DBA.

31. The Board can establish directly from the appealed decision that the appellant obtained 5/5 marks for his independent claims by the respective markers, 2/2 marks for the dependent claims and 5/4 marks for his amendments arguments. A cursory review of his claims confirm that the argued deductions are plausible, and that the argued correct solution elements are also present in his answer paper. In view of these details the Board finds it plausible that the total marks awarded were decisively influenced by the marking of the "housefly eggs" and "drain hole" amendments, without directly accepting the argued amount of the marks possibly lost. Given that a possible unfair marking could not be excluded by Board, the Board finds, giving the appellant the benefit of the doubt, that the appeal is well founded and allowable with respect to the possible unfair marking. This means that the contested decision is to be set aside according to Article 24(4), second sentence, REE. The Board holds that a new evaluation of the appellant's answer paper is justified.

Request for re-marking and award of grade

32. As stated in points 11. and 18. above, the answer paper deserves re-marking by the Examination Board already for the compensation of the unequal treatment. Apart from that, the re-marking in view of the unfair marking would also fall on the competent Examination Committee appointed by the Examination Board. This follows from the settled case law of the DBA (see e.g. decisions D 0024/17, point 15 of the Reasons, D 0013/17 and D 0016/17, point 4 of the Reasons). An assessment of the appellant's whole answer paper for determining the marks to be awarded would effectively be equivalent to a review of the marking on the merits and thus would

require value judgments which, according to the established jurisprudence (following D 1/92, OJ EPO 1993, 357), falls outside the competence of the Board, as already stated above in points 3 and 13. This is not changed by the remaining very short time until the next Paper B examination. Therefore, the Board decides to remit the case to the Examination Board with the order to instruct the competent Examination Committee to undertake a new marking of the appellant's Paper B of the European qualifying examination 2021 under its powers pursuant to Article 6(5), last sentence, REE and to award a grade to the appellant on the basis of the re-marking. However, this does not mean that the re-marking should necessarily achieve any given number of additional marks.

33. The re-evaluation should be based on a marking scheme which is fairly proportional and avoids multiple penalties, according to the principles as set out in decision D 0022/21, point 16 of the Reasons.

Reimbursement of the appeal fee

34. The appellant requested reimbursement of the appeal fee. If the Board of Appeal allows the appeal, it orders reimbursement in full or in part of the appeal fee if this is equitable in the circumstances of the case (Article 24(4), third sentence, REE). Given that the present appeal is successful, a full reimbursement of the appeal fee is equitable. Therefore, the appeal fee is to be reimbursed in full.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the Examination Board with the following order:
 - a, the Examination Board is instructed to determine the applicable compensation for the answer paper of the appellant for the Paper B of the European qualifying examination 2021 in respect of the unequal treatment caused by (i) the erroneous examination paper and additionally the applicable compensation caused by (ii) the differences in the editing functions available to the candidates depending on the used operating system, and
 - b, to instruct the competent Examination Committee to perform a re-marking of the appellant's answer paper for the Paper B, also taking into account the determined compensation, and
 - c, to award a grade to the answer paper under Rule 6(3) IPREE accordingly.

3. The appeal fee is to be reimbursed in full.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated