



**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 0027/22

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 27 February 2023**

**Appellant:** N.N.

**Decision under appeal:** **Decision of the Examination Board dated 6 July 2022 concerning the European Qualifying Examination 2022.**

**Composition of the Board:**

**Chairman:** W. Sekretaruk  
**Members:** A. Bacchin  
D. Korper Žemva

## Summary of Facts and Submissions

I. The present appeal is against the decision of the Examination Board that the requirements of Article 14(1) of the Regulation of the European qualifying examination for professional representatives (REE, current version published in OJ EPO 2019, Supplementary publication 2, 2 ff.) had not been fulfilled such that the appellant did not pass the European qualifying examination (EQE) 2022.

II. The appellant sat the main examination in 2022 for Papers A and C. On 17 March 2022 the appellant filed a **complaint** by email at 18:52 (document **E2**) concerning the conduct of exam Paper C 2022, in accordance with item 8. of the Instructions to candidates concerning the conduct of the EQE 2022 (OJ EPO 2022, A20) and Rule 19(3) Implementing provisions to the Regulation of the European qualifying examination (IPREE). It was submitted that:

- After the beginning of **Part 1** of Paper C technical problems were encountered with the FLOWlock Browser, so that the Wiseflow software could not take an entry image using the appellant's camera. The appellant was thus not able to start the exam on time. He had attempted to solve the technical problems by rebooting the computer and restarting the FLOWlock Browser. He could only actually start the exam 30 minutes later, after having contacted an invigilator who allowed him to proceed without an entry image. His request for additional time for Part 1 was not granted. Due to the time loss, he could not submit a full answer.

- The issues persisted in **Part 2**, however the invigilator permitted - right at the beginning - to continue the exam without an entry image.
  
- In addition, the **scheduled break** between the two parts (between 12:30 and 13:15) was reduced by 15 minutes, as the appellant tried to solve the issues during the break (checking the camera again, rebooting the PC and logging in again to the Wiseflow software). He thus had a reduced recovery time and was not able to properly allocate the remaining time, in addition to the increased stress present also in Part 2.
  
- He never encountered technical problems during the previous tests of the Wiseflow system (on 3 February 2022 during the mock exam, on 10 March 2022 during Paper A and on the evening before Paper C, on 16 March 2022, for which test results were submitted).
  
- The appellant submitted as evidence: **(a)** a picture showing that the camera was working when logged in the Wiseflow system (taken on 17 March 2022, after Part 2 of Paper C) and **(b)** the transcripts of the chats with the invigilator, showing that about 28 minutes were spent for this issue during Part 1 of Paper C.
  
- In the complaint the appellant requested that:
  - a) the complaint be acknowledged;
  - b) the Examination Board determine the exact circumstances involved and provide a reasoned decision (D 12/21);
  - c) the circumstances when marking the exam, including the additional stress, be duly considered and an indication of how the incident was taken into account in the marking be provided (D 37/21; D 12/21);

d) equitable compensation for the lost time and additional stress be provided (D 37/21).

III. By letter of the Examination Secretariat dated 6 July 2022 ("*Mitteilung der vergebenen Noten*", communication of grades awarded, document **E5a**), the appellant was informed that his answer papers had been awarded the following marks: Paper A 67 marks and **Paper C 37 marks**. On the basis of these marks, the Examination Board had decided that the requirements of Article 14(1) REE had not been fulfilled, so that the appellant had not passed the EQE. The letter contained the marking details, as attachment, in which the Examination Committee II agreed on **34** points for Paper C and recommended the grade FAIL.

IV. The appellant was informed with a further letter dated 6 July 2022 ("*European Qualifying Examination 2022 - your feedback concerning paper C*", document **E5b**) that the Examination Board, based on the appellant's complaint concerning the conduct of the European qualifying examination 2022, decided to award the appellant a **compensation of 3 marks** for the issues described in the complaint. The following brief explanation was provided:

*"...This compensation has been based on the time you lost, and the amounts of marks you obtained during the effective time you had for the examination."*

It must be assumed that the increase from 34 to 37 marks for the answer Paper C, as resulting in the Communication of grades awarded (E5a), was due to the awarded compensation.

- V. With fax and letter dated 15 August 2022 the appellant filed an **appeal**, including the statement of grounds of appeal, against the decision of the Examination Board dated 6 July 2022 and paid the appeal fee. The letter was received at the EPO on 17 August 2022 and the payment of the appeal fee was received on 16 August 2022 (**E6**).
- VI. With letter dated 15 September 2022 the appellant was informed that the Examination Board had decided not to rectify its decision and to forward the appeal to the Disciplinary Board of Appeal (in the following the "DBA" or "the board").
- VII. In accordance with Article 24(4) REE in conjunction with Article 12, second sentence, of the Regulation on discipline for professional representatives (in the following "RDR" in Supplementary publication 1, OJ EPO 2023, XIV.3), the DBA consulted both the President of the European Patent Office and the President of the Council of the Institute of Professional Representatives before the EPO, neither of whom presented any comment in writing on the merits of the appeal.
- VIII. With letter of 20 January 2023, in a communication in accordance with Articles 13(2) and 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (in the following "RDPDA", in Supplementary Publication 1, OJ EPO 2023, III.4), the DBA informed the appellant on its following preliminary opinion:

The decision of the Examination Board on the appellant's complaint under Rule 19(3) IPREE was not sufficiently reasoned. This constituted a violation of Rule 19(4) IPREE. As it was not for the board to

evaluate the merits of the appellant's complaint nor to award concrete marks, the board intended to set the appealed decision aside and remit the case to the Examination Board for a new decision in relation to Paper C.

- IX. By letter dated 3 February 2023, the appellant maintained the request for oral proceedings and filed additional submissions in support of his appeal and further specified his requests.
- X. The oral proceedings took place on 27 February 2023. In accordance with Article 14 RDR, the oral proceedings were attended by Ms Margaret Mackett, on behalf of the President of the Institute of Professional Representatives before the European Patent Office (epi). The President of the European Patent Office was not represented.

Upon invitation of the Chairman of the DBA, Ms Mackett made the following statement on behalf of the President of epi:

*"Any compensation measure adopted should not take the form of neutralisation of a whole part of Paper C 2022, as this would not be fair for other candidates who suffered time losses due to technical incidents, but did not file an appeal. Rather it should take the form of a pro rata amount of marks."*

- XI. The appellant declared to maintain all requests in the order as confirmed at the beginning of the oral proceedings, namely:

As a main request, the appellant requested that the decision of the Examination Board of 6 July 2022 be set

aside and a new decision be taken, which declared that the requirements of Article 14(1) REE be fulfilled, i.e. that a grade PASS, or at least a COMPENSABLE FAIL, be awarded for his answer paper to Paper C 2022.

As a first auxiliary request, the appellant requested that the decision under appeal be set aside and an order be given to the Examination Board to award compensation for the severe time loss experienced in the form of either neutralisation of the whole part 1 of Paper C 2022 and/or a compensation of 15 marks or 10 marks for part 2 of Paper C 2022 be awarded, due to the frustration of the scheduled break and the resulting lack of recovery (compensation according to scheme 1); or an award of 18 compensational marks (compensation according to scheme 2).

As a second auxiliary request, the appellant requested that an order be given to the Examination Board in respect of the exam Paper C 2021 to award the grade PASS or at least the grade COMPENSABLE FAIL.

As a third auxiliary request the appellant requested that the appealed decision of the Examination Board of 6 July 2022 be set aside and the case be remitted to the Examination Board with the order to instruct the Examination Committee to undertake a new marking of the appellant's Paper C 2022 in line with the preliminary opinion of the Disciplinary Board expressed under points 20, 25, 44 of the Board's communication issued in preparation of the oral proceedings.

The appellant further requested that the appeal fee be reimbursed.

XII. The appellant's arguments may be summarised as follows

- (a) The technical disturbances experienced during Paper C 2022 frustrated the whole exam process. The time loss of *30 minutes* for part 1 of Paper C was severe and the additional time loss during the scheduled break (*of at least 15 minutes*) caused a lack of proper recovery and increased stress for part 2. The compensation of 3 marks, reflected application of the so-called "conservative approach", referred to in decision D 37/21. However no reasoning was given as to why this approach was adopted. The appellant invoked application of a non-conservative approach in order to compensate for technical issues.
- (b) Following the approach adopted by the Examination Board for Paper D of 2021 to neutralize Paper DI-1 because the English and French versions were not available for 10 to 15 minutes (over the entire duration of 90 minutes), compensation should take the form of neutralisation of the entire part 1 of Paper C, thus awarding the full available marks: 20 marks for claim 1, 13 marks for claim 2 and 11 marks for the general part. The two situations were comparable.
- (c) Since normally 50% of the time available is spent for reading and analysis, for part 1 the appellant had no time left for developing and writing a proper attack to claim 1, but only for the general part and for claim 2. Compensation should thus be awarded with 90% of the marks received for claim 2, *mutatis mutandis* to claim 1, thus awarding 18 compensational marks for this claim.
- (d) A fair compensation should have also taken the time loss during the scheduled break into account, which was clearly not done by the Examination Board. The lack of a proper recovery time led to increased stress during part 2 of the exam. For this reason a



compensation of 15 marks, or alternatively of 10 marks for part 2 should be awarded.

- (e) Account should also be given to the split of Paper C into two parts and the fact that it would be unfair to "spread" a time loss affecting one part only over the entire available time when it comes to calculate the compensation.
- (f) The appellant further submitted that additional marks should be awarded for claims 1, 3, 4 and 5, as a consequence of the exam frustration experienced for the technical problems.
- (g) With respect to Paper C 2021 and the similar technical problems suffered by the appellant, equitable compensation should be ordered by applying the teaching of decisions D 12/21 and D 37/21 retroactively and award the grade PASS or at least COMPENSABLE FAIL.

## **Reasons for the Decision**

### *1. Admissibility of the appeal*

- 2. The notice of appeal and the statement setting out the grounds of appeal were duly filed within the one-month time limit under Article 24(2) REE (fax letter of 15 August 2022 and confirmation letter received on 17 August 2022, within the two following weeks as required by Article 6(2) RPDBA). The appeal fee was also paid within the one-month time limit. The appeal is therefore admissible.
- 3. As a preliminary consideration, the Board observes that it could be questioned whether two appealable decisions were issued on 6 July 2022:

(i) the decision issued in accordance with Article 6(5) REE, informing the appellant that his answer paper to Paper C in the EQE 2022 had been awarded 37 marks and that, on the basis of these marks, the Examination Board had decided that the requirements of Article 14(1) REE had not been fulfilled so that the appellant had not passed the EQE (document **E5a**, referred to in point III. above), and

(ii) the decision on the feedback concerning Paper C (document **E5b**, referred to in point IV. above) issued in accordance with Rule 19(3) IPREE, informing the appellant that the Examination Board had considered the appellant's complaint and had decided to award a compensation of 3 marks, carrying the same date as the decision concerning the grades awarded (E5a).

If decision under (i) and decision under (ii) were two independent decisions, the appellant should have formally filed an appeal against each of them.

The Board however finds that in the present case the two decisions are to be considered interrelated, such that the current appeal is to be regarded, implicitly, as an appeal against both these decisions. Whereas the marking details for Paper C attached to the decision (i), issued in accordance with Article 6(5) REE, indicate the awarding of 34 points, the decision itself indicates 37 points. Since the discrepancy of 3 points results from the decision (ii), concerning the appellant's complaint and issued in accordance with Rule 19(3) IPREE, decision (i) can only be reviewed by the board taking into account decision (ii).

Despite the conclusion drawn in the present case, the board would like to underline that the practice of

issuing two separate decisions, splitting the facts and reasoning of a decision concerning the marking of the same answer paper without any reference to each other, may formally lead to the existence of two independent decisions. This practice should be discontinued and it should rather be clearly indicated that the two decisions are not independent of each other, so that candidates do not feel obliged to file two separate appeals in order to avoid their appeal being considered inadmissible or not being considered as an appeal against both decisions.

*Extent of the judicial review by the DBA*

4. In accordance with Article 24(1) REE and its consolidated interpretation by the jurisprudence of the Disciplinary Board of Appeal (cf. e.g. D 1/92, reasons 3. to 5. and D 6/92 reasons 5.), 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 of evaluation that is subject to only limited judicial review by the DBA. Value judgement concerning the number of marks that an examination paper deserves is not subject to judicial review by the DBA (cf. D 11/07, reasons 3.). In particular, it is not within the power of the DBA to review the actual marking of an examination paper in terms of how many marks an answer deserves. Only if the appellant shows that the contested decision is based on serious and obvious mistakes can the appeal Board take this into account. This is, for instance, the case when an examiner is found to have based his evaluation on a

technically or legally incorrect premise upon which the contested decision rests (cf. D 2/14, reasons 3. and 13.), or in case of a question whose wording was ambiguous or incomprehensible (cf. D 13/02, reasons 4.).

The board further considers that the above criteria apply *mutatis mutandis* to decisions of the Examination Board on a candidate's complaint under Rule 19(3) IPREE, including any value judgements on the number of compensation marks. Therefore, the appellant's requests and submissions on his answer paper to Paper C have to be evaluated and judged in line with the above principles and case law.

*Main request and first auxiliary request*

*Request for awarding of additional marks or of a concrete grade*

5. With his main and first auxiliary requests, the appellant essentially seeks the award of additional marks or of a concrete grade to be ordered directly by the DBA.
  
6. It follows from the limited judicial review accorded to the DBA (see point 4. above) that the actual marking of an examination paper in terms of how many marks an answer deserves is not subject to review by the DBA. Thus, requests for awarding of additional marks or for giving an order to the effect that the Examination Board issues a new decision declaring that the requirements of Article 14(1) REE are fulfilled, cannot in principle be taken into account by the DBA.

For these reasons neither the main request nor the first auxiliary request may be allowed.

7. In particular, since the same review criteria apply to decisions of the Examination Board on a candidate's complaint under Rule 19(3) IPREE, the request for compensation by neutralisation of the entire Part 1 of Paper C, thus awarding the full available marks, i.e. 20 marks for claim 1, 13 marks for claim 2 and 11 marks for the general part, is not allowable.

For the question whether neutralisation of an entire part of an exam would be an equitable compensation in case of technical problems, reference is made to the considerations below (points 30. and 30.1).

8. The request to award additional marks for individual claims, as a matter of compensation, is also not allowable in view of the same limited review power of the board. The board nevertheless provides further considerations, to be taken into account by the Examination Board, following remittal (see point 31. below), if it deems fit.

- 8.1 With regard to claim 1 the appellant requests that the analysis of Annex A5 in the context of inventive step against claim 2 should be considered for the expected novelty attack against claim 1, for the identical features and be awarded with 12 additional marks.

In this respect the board observes that candidates cannot expect to be awarded marks for hypothetical solutions for which there is absolutely no basis in the actual answer paper, nor can a candidate expect an examiner to choose which of the arguments provided for a claim should be taken into account in the analysis for another claim. In this case it is not clear how an examiner would have to consider under the expected

novelty attack against claim 1, an answer which is entitled "lack of inventive step over Annex 5 combined with Annex 4" and merely contains a reference to the arguments on inventive step submitted for claim 2.

8.2 With regard to claim 3 the appellant requested to award the full 5 marks available, where 4 marks and 3 marks respectively were awarded by the examiners. The added subject-matter attack fully reflected the one in the Examiners' report.

While the appellant has not alleged any serious and obvious mistake, that can be established without re-opening the marking procedure for this claim, it appears to imply that marks were deducted by the examiners for his answers to claim 3 without apparent justification. The board notes that the appellant's answer for claim 3 contains several of the elements indicated in the proposed solution according to the Examiners' report - Paper C 2022. It is however possible that at least one mark was deducted for the lack of express mentioning of the legal basis of the objection against claim 3 (Article 123(2) EPC), or of the full basis of the features of claim 3 as originally filed (paragraph [0019] and Figure 2 are missing in the appellant's answer). However as explained above, value judgements of the competent Examination Board or Examination Committee as to the number of points to be awarded to the respective answer to an examination question is not subject for review by the board. If the board were to follow the appellant's request, it would have to reassess the appellant's answer paper by awarding its own marks, which is clearly beyond the powers of the board.

8.3 With regard to claim 4 the appellant submitted (i) that the novelty attack was based on the wrong technical interpretation in the Examiners' report that Annex A6 implicitly disclosed the feature "rubber bladder". He further invoked (ii) a language mismatch between the German and English versions of Paper C (A1 [0018]), which would be disadvantageous for a sub-group of candidates. He thus requested to neutralise the expected novelty attack by granting the full 11 marks available.

(i) With regard to the first line of argument, the board notes that according to the Examiners' report a novelty attack using A6 was expected based on the implicit disclosure of the rubber bladder by the ball of A6 being sewn from panels. Annex A1, the patent to be opposed, provided the basis for supporting the argument of the implicit disclosure.

The appellant has not provided any substantiation for the mere allegation that there is no implicit disclosure in Annex A6 of the feature "rubber bladder". Already for this reason the board cannot follow this line of argument.

Even if it were substantiated, the board does not agree with the appellant. Annex A6, paragraph [0011], directly and unambiguously discloses a ball which is sewn from panels. Annex A1, paragraph [0018], indicates:

*"As with all balls which are sewn from segments or panels (7), a rubber bladder (6), made from e.g. vulcanized natural caoutchouc, is provided to guarantee airtightness".*

This paragraph, with its general wording, clearly acknowledges as a matter of common general knowledge that balls sewn from segments or panels must have a rubber bladder. It is noted that candidates must accept the facts stated in the examination paper and limit themselves to those facts and must not use any special knowledge they may have of the technical field of the invention (Rule 22(3) IPREE). Thus, the board finds that the statement in Annex 1 paragraph [0018] must be accepted as common general knowledge in the context of Article 54(2) EPC and taken into account for assessing the implicit disclosure of features in Annex A6, paragraph [0011]. It follows that a rubber bladder is implicitly disclosed in Annex A6.

(ii) As to the line of argument concerning the alleged language mismatch between the German and English version of Paper C (Annex A1 [0018]), which would be disadvantageous for a sub-group of candidates, the board finds that also this argument has not been substantiated.

A language ambiguity in an exam paper could lead to a violation of the principle of equal treatment, if, as a result of such language ambiguity, some candidates would not take part in the examination under equal conditions. As a matter of higher ranking law, a revision of this principle implies that *unequal conditions which may cause unjustified disadvantages for candidates should be compensated to the extent feasible* (cf. D 29/21, Reasons 7.). This means that only those candidates who have actually been treated differently to their disadvantage may invoke this principle.



However in the present case, except for a general reference to Annex A1 [0018] the appellant has neither indicated what the language ambiguity actually was, nor whether the German version or the English version contained an ambiguity. Since it is assumed that candidates have read the examination paper in the language in which they give their answer (cf. Rule 22(2) IPREE), the appellant could in principle be negatively affected only if the alleged ambiguity was present in the English version of Paper C and such ambiguity had unjustifiably disadvantaged the appellant. As none of these facts was submitted in the appeal, the board cannot find any unequal treatment of the appellant, which could have caused unjustified disadvantages.

8.4 With regard to claim 5 the appellant submitted that he developed a novelty attack in view of the first prior use described in Annex A3, instead of the expected inventive step attack in view of the first prior use described in Annex A3 in combination with Annex 2 and Annex 3b. The appellant argued that it would be clear from his answer for claim 4 that he realised that lack of inventive step would have been the proper attack against claim 5. However due to the exam frustration he had no time to rectify this submission for claim 5. Thus he requested that his answer for claim 5 be remarked on the basis of the submissions provided for claim 4.

The board finds that the same considerations made above for claim 1 are valid also in the present case. Candidates cannot expect to be awarded marks for hypothetical solutions, nor can a candidate expect an examiner to choose which of the arguments provided for a claim should be taken into account in the analysis

for another claim. In this case it is not apparent to the board which submissions made in the context of novelty against claim 4 should be taken into account for an hypothetical inventive step attack to claim 5. The board also fails to see where and how from the appellant's answer for claim 4 it should be apparent that he realised that lack of inventive step would have been the proper attack against claim 5.

*Second auxiliary request*

9. With the second auxiliary request the appellant requested that an order be given to the Examination Board in respect of the exam Paper C **2021** to award the grade PASS or at least the grade COMPENSABLE FAIL.
10. This request is, for the reasons which follow, inadmissible. Even if it were admissible, it would not be allowable for the same reasons indicated above for the main and first auxiliary requests.
11. The appellant did not formally file an appeal against the decision of the Examination Board dated 21 June 2021 concerning the exam Paper C 2021, nor paid the relevant appeal fee, within the time limit set in Article 24(2) REE.
12. The appellant had timely filed a complaint by e-mail of 5 March 2021 (document **E1**) in accordance with item 11. and 39. of the Instructions to candidates concerning the conduct of the EQE 2021 (OJ EPO 2021, A13). It was submitted that after the start of Part C.2, at around 13:30 an invigilator informed the appellant that the camera was not working. Since the issue could not be fixed the invigilator instructed the appellant to move on with the exam. The technical incident caused a loss

of at least 25 minutes of examination time. The appellant requested that the entire submissions be taken into account as belonging to Part C.2.

- 12.1 The Examination Board did not react to the complaint.
- 12.2 The appellant filed further e-mails on 10 April 2022 (document **E3a**) and on 11 July 2022 (document **E3b**), in which he requested reassessment of Part 2 of Paper C 2021 in the light of decisions D 12/21, D 37/21 and D 8/21 and a reasoned decision by the Examination Board. In particular, equitable compensation for the time loss and additional stress caused by technical problems was requested and the change of the grade FAIL for Paper C 2021 into the grade PASS, or auxiliary into the grade COMPENSABLE FAIL.
- 12.3 With email of 14 July 2022 (document **E4**) the Examination Secretariat replied that the results of the EQE 2021 could no longer be amended since the marking process was concluded and the appeal period had already expired.
13. With the present appeal, the appellant requested to set aside the "decision of the Examination Board", e-mailed by the Examination Secretariat on 14 July 2022 (E4), not to apply a compensation to the EQE results 2021.

As a first line of argument, the appellant essentially submitted that the e-mail of the Examination Secretariat on 14 July 2022 constituted an appealable decision.

- 13.1 The board considers that since the time limit for filing an appeal had already expired neither the email of 10 April 2022 (document E3a), nor the e-mail of

11 July 2022 (document E3b) constitute an appeal against the decision of the Examination Board concerning the EQE 2021.

- 13.2 Furthermore, the e-mail of the Examination Secretariat dated 14 July 2022 is not the decision concerning the results of the EQE 2021 in accordance with Article 14(1) REE and is not an appealable decision within the meaning of Article 24(1) REE.
- 13.3 Even if that e-mail communication were considered an appealable decision within the meaning of Article 24(1) REE, the board finds that it is not possible to appeal two separate decisions, regarding different exam papers (Paper C of 2021 and Paper C of 2022), with a single appeal (filed on 15 August 2022) by way of a main request and an auxiliary request. A separate appeal should have been filed concerning the distinct procedure for the EQE 2021 within the given time limit.
14. As a further line of argument, the appellant submitted that the decision of the Examination Board of 6 July 2022 inherently took into account both results of the exam Paper C 2021 and 2022, since it concluded that the requirements of Article 14(1) REE had not been fulfilled. Thus the appeal filed on 15 August 2022 was directed against both exams.
- 14.1 The DBA fails to see a legal basis for this submission.

The provisions on re-sitting the examination under Article 16 REE and Rule 6(5) IPREE, according to which if a candidate re-sits an examination paper, state that

*"...the marks and grade previously obtained for this paper are no longer valid."*

Thus the decision of the Examination Board of 6 July 2022 only addressed the results of the exam Paper C 2022 and could not have taken into account results - as those of the Exam Paper C 2021 - which were no longer valid.

15. As an additional line of argument, the appellant submitted that the teaching of decisions D 12/21 and D 54/21 has effect *ex tunc*.
- 15.1 The DBA fails to see a legal basis also for this argument. The example mentioned by the appellant of neutralisation of single multiple-choice questions in a EQE pre-examination, because a question in itself is ill-defined or ambiguous, is the effect of a decision taken by the Examination Board under Article 6(5) REE and not of a retroactive application of a decision taken by the DBA in a given case.
16. Even considering the appellant's line of argument as implying that there was an infringement of a provision relating to the application of the REE, to the extent that the candidate's formal complaint in 2021 was not dealt with accordingly by the Examination Board, the DBA finds that in the absence of a formal appeal against the Examination Board's decision concerning the EQE 2021, the DBA has no power to decide on such an infringement.

As a side remark, the board nevertheless notes that the initial request in the appellant's complaint for the EQE 2021 was merely that the entire submissions be taken into account as belonging to part 2 of the exam Paper C. This appears to have been the case, since the appellant's answer paper for 2021 was marked in its

entirety. The request for an additional compensation for the time loss was submitted after expiry of the period for appealing the decision of the Examination Board for Paper C 2021. It was therefore not possible to take that request into account in the framework of the exam Paper C 2021.

- 16.1 This represents a fundamental difference between the present case and the circumstances underlying D 12/21, cited by the appellant, in which, following a complaint in accordance with Rule 19(3) IPREE, an appeal was filed against the decision of the Examination Board on the ground that from this decision it was not apparent whether the appellant's complaint was taken into consideration for those proceedings. The same is valid with regard to those cases, like D 54/21, in which a "neutralisation" of erroneous elements in exam papers in view of the principle of equal treatment was decided. Also in those cases an appeal was duly filed against the decision on the exam at stake.
- 16.2 Since the factual situation in the present case does not appear to be the same as in the above cited cases, the board also fails to see a breach of the principle of equal treatment, as invoked by the appellant.
17. The board thus concludes that in order to have the complaint concerning the answer to Paper C 2021 considered by the Disciplinary Board, the appellant should have filed an appeal in accordance with Article 24(1) REE against the decision of the Examination Board taken under Article 14(1) REE on the results of the exam EQE 2021, thereby obtaining a possible revision of those results.

18. In view of the above, the board finds that the second auxiliary request is not admissible.

*Third auxiliary request*

*Violation of Rule 19(4) IPREE*

19. In compliance with Rule 19(4) IPREE any decision taken by the Examination Board in accordance with this rule, provided a complaint within the meaning of Rule 19(3) IPREE had been filed, must be based upon all the available evidence, reasoned and issued in writing.
20. As indicated above (point II. of the Facts) the appellant filed a complaint concerning the conduct of the exam Paper C 2022 by email on 17 March 2022 at 18:52 (document E2). The requirements of Rule 19(3) IPREE, according to which a written statement of the facts must be submitted to the chief invigilator at the latest 30 minutes after the closing signal on the final day of the examination, and of item 8. of the Instructions to candidates concerning the conduct of the EQE 2022 (OJ EPO 2022, A20), according to which a complaint on the conduct of the examination must be filed by email at the latest by the end of the day on which the examination takes place, are considered fulfilled, to the extent that the candidate's most favourable provision was met.
21. With regard to the further submission filed by the appellant on 3 February 2023 (cf. point IX. above), the Board would like to observe that in principle the statement of grounds of appeal is to be filed within one month of notification of the decision appealed against (Article 24(2) REE) and that the Board has a discretion to disregard facts and evidence filed after

expiry of such time limit (Article 24(4) REE, Article 25(1) RDPDA and Article 114(1) EPC).

This principle does however not apply to merely deepening argumentation concerning facts and evidence timely submitted. This is the case for the appellant's submissions filed with letter of 3 February 2023, which relate to supplementary arguments on the conduct of the exam Paper C 2022.

22. The board finds that with regard to the complaint filed on 17 March 2022, in application of Rule 19(4) IPREE the Examination Board should have ascertained the exact facts and dealt with all allegations and circumstances referred to by the complainant in a reasoned decision, or at least in its decision on the result of the examination under Article 6(5) REE (see also decision D 12/21, Reasons 2).
23. However the decision of the Examination Board dated 6 July 2022, informing the appellant that he had not passed the EQE 2022, only indicated the points awarded for the Paper C. Further, the decision dated 6 July 2022, which was issued in response to the appellant's complaint under Rule 19(3) IPREE, contained only the brief statement (see point IV. above) that:

*"This compensation has been based on the time you lost, and the amounts of marks you obtained during the effective time you had for the examination."*

Neither of these decisions meet the requirements of Rule 19(4) IPREE.

24. The fact that the appellant suffered an effective and severe time loss that could not be imputed to him, but



instead was caused by the circumstances of the examination being held online, is undisputed. Therefore the Examination Board correctly decided to award compensation.

25. However, it is not apparent from any of the above mentioned decisions of the Examination Board whether the arguments submitted by the appellant in the complaint under Rule 19(3) IPREE, and which substantially correspond to the grounds submitted in the present appeal, were taken into account by the Examination Board.
- 25.1 In particular no explanation was given as to how the technical incident was actually taken into account in the calculation of the compensation. From the brief comment provided in the decision on the complaint it is possible to infer that the so-called "**conservative approach**" referred to in decision D 37/21 (cf. reasons 23.) was applied to calculate the compensation marks additionally attributed to Paper C.
- 25.2 This approach, which was suggested as one possible method of calculation in that decision, consists in taking the ratio of the total marks achieved by the candidate during the useful time (the total time minus the time loss) and the useful time of the examination, and multiplying it with the estimated time loss.

In the present case, the formula would lead to the compensation marks awarded by the Examination Board:

$$((34/(360-30))*30)\text{APPROX3 marks}.$$

26. The board agrees with the appellant that no motivation

was provided by the Examination Board as to why the conservative approach, rather than a more favourable "**generous approach**", was adopted. The latter was suggested as an alternative calculation method in the cited decision, D 37/21.

- 26.1 One possible generous calculation takes the ratio of the potentially achievable maximum amount of marks and the total examination time, multiplied with the estimated time loss.
27. First, the Board considers that application of the conservative approach to a case of a severe time loss, such as 30 minutes in the present case, might not be suitable to provide an equitable compensation for the unjustified disadvantage suffered by a candidate, as it takes into account a number, i.e. the total marks achieved by the candidate during the useful time, which is strongly affected by the unequal conditions.
- 27.1 Second, the Board finds merit also in the appellant's argument that no explanation was given as to what was meant with **effective time** for the examination, considered for calculating the compensation, especially whether in this context account was given to the split of Paper C between part 1 and part 2. The Board does not disregard that the wording "effective time" was used by the Disciplinary Board of Appeal in decision D 37/21. That decision was taken with regard to Paper B, which however is not divided in two parts. It might therefore be questionable whether the meaning of "effective time" with regard to Paper C should be understood over the entire amount of time (360 minutes), or whether it should relate only to the part of the paper affected by the time loss (thus considered for 180 minutes).

- 27.2 If the effective time for Paper C were referred to one part only, application of the more generous method of calculation would make a significant difference in the calculation of the marks for compensation for the present case, than if the overall time available for both parts of Paper C were considered, irrespective of a concrete loss of time for both  $(100/180) \times 30$  (APPROX 16 marks).
- 27.3 Finally the Board considers that no reasoning at all was provided in the Examination Board's decision for not awarding additional compensation marks due to the time loss in the **scheduled break** and the consequent increased stress and lack of recovery for the part 2 of the exam Paper C. Following the teaching of D 37/21 (cf. Reasons 21. and 26.) even less exact conditions should play a role in the calculation of an equitable compensation, despite the difficulties to quantify the effects of a subjective condition, as the stress caused by the incident. The Board observes that a significant shortening of the scheduled break may as such justify equitable compensation, in terms of further additional marks or by applying a more generous approach in the calculation.
28. In summary, the Board finds that from both decisions (E5a and E5b) it is, *inter alia*, not apparent, neither for the Board nor for the appellant, (i) why the more conservative approach was applied, (ii) why the wording "effective time" was interpreted as referred to the whole time available for Paper C, and (iii) why no additional compensation marks were awarded *vis-à-vis* the time loss during the scheduled break. The mentioning of the general method of calculation applied for the compensation, in the absence of individualised

reasons for the concrete case at stake, is not sufficient to meet the requirements of Rule 19(4) IPREE and thus to show why discretion was exercised that way.

### *Conclusions*

29. For the above reasons, the decision of the Examination Board on the appellant's complaint is not sufficiently reasoned and thus violates Rule 19(4) IPREE. Since it is not for the DBA to assess the merits of the appellant's complaint, the Examination Board will have to instruct the competent Examination Committee to undertake a new marking of the appellant's Paper C of the EQE 2022 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. The re-evaluation should, *inter alia*, provide an equitable compensation for the time loss due to the technical incident, taking into account the alleged facts and arguments submitted in the appellant's complaint, statement of grounds of appeal and letter of 3 February 2023.
30. With regard to the determination of an equitable compensation in case of technical problems, the board agrees with the comment made during oral proceedings before the DBA, on behalf of the President of epi (see point X. above) that this should not take the form of neutralisation of an entire exam part.
  - 30.1 A neutralisation of the whole first part under the present circumstances would mean that it is assumed that the candidate provided not only a full answer, but also a fully correct answer for the whole part, had he started the exam at the right time, that is 30 minutes earlier. In the board's view such a remedial measure

would go far beyond what is necessary to re-balance the unequal disadvantage caused by the present software malfunction and would be unfair not only *vis-à-vis* candidates who experienced technical problems and did not appeal, but especially *vis-à-vis* candidates who experienced no technical troubles.

31. Therefore, the appealed decision must be set aside and the case be remitted to the Examination Board for a new decision in relation to Paper C, which takes into account also the final consideration above.

*Reimbursement of the appeal fee*

32. According to Article 24(4), third sentence, REE

*"If the Board of Appeal allows the appeal, or the appeal is withdrawn, it shall order reimbursement in full or in part of the fee appeal if this is equitable in the circumstances of the case."*

33. Since in view of the conclusion above, the appeal is successful only with regard to the third auxiliary request, the board in the exercise of its discretion finds that a reimbursement in part of the fee for appeal at 25% is justified in the circumstances of the case.

## Order

### For these reasons it is decided that:

1. The appealed decision of the Examination Board is set aside.
2. The case is remitted to the Examination Board for a new decision in relation to Paper C of the European qualifying examination 2022.
3. The appeal fee is reimbursed at 25%.

The Registrar:

The Chairman:



A. Voyé

W. Sekretaruk

Decision electronically authenticated