



**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 0039/22

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 18 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:** T. Karamanli  
A. Hooiveld

## **Summary of Facts and Submissions**

- I. This 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) EQE for Paper C in 2022 at his home. During the examination on 17 March 2022, he had two technical problems with the FLOWlock browser. On the same day at 18.58 hrs, he sent a complaint under Rule 19(3) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE, current version published in Supplementary publication 2, OJ EPO 2019, 18 ff.) and in accordance with point I.8. of the Instructions to candidates concerning the conduct of the European qualifying examination (OJ EPO 2022, A20) by email to the Examination Secretariat and outlined the technical problems as follows:

### "First problem

*At around the middle of FLOWlock Browser suddenly crashed and he threw me out of the exam.*

*I tried to re-enter in the FLOWlock Browser but an invigilator password was needed. I tried to opened [sic] the chat but after about 15 minutes everything was still blocked and completely frozen.*

*I had to forcibly shut down the computer with a complete reboot and a new access to the FLOWlock Browser. This operation took additional about 10 minutes. After that, the invigilator password was still needed. I opened the chat and an invigilator said [sic] me the digit 'water' as password after about 3 minutes.*

*Finally, I was able to re-enter to the flow for finishing the part 1 of the exam.*

*Second problem*

*At 13.30 I entered in the second part of the FLOWlock Browser but an invigilator password was still needed. I tried to digit "water" a lot of times without success. So after some minutes I opened the chat and wrote to the chat the problem to an invigilator. He wrote to me a new password 'bike' so finally, I was able to enter to the flow for starting the part 2 of the exam. The above problem took about 5-7 minutes before FLOWlock Browser could load the exam.*

*Altogether, I estimate that my time to do the exam block was reduced by about 35-40 minutes."*

The appellant also stated in his complaint:

*"I had tested my system by making several mock exams before the day of the exam in WISEflow and I had always followed the instructions*

***The above technical issues encountered during the Exam resulted in an improper conduct of the examination, caused by events beyond my control."***

In his complaint, the appellant requested:

*"- the complaint be acknowledged.  
- the Examination Board determine the exact circumstances involved and provide a reasoned decision (D 12/21);  
- do duly consider the circumstances when marking the exam, including the additional stress, and provide an indication of how the incident was taken into account in the marking (D 37/21; D 12/21);  
- to provide equitable compensation for the lost time and additional stress (D 37/21)."*

III. By letter from the Examination Secretariat dated 6 July 2022, the Chairman of the Examination Board informed the appellant that the appellant's answer paper to Paper C in the EQE 2022 had been awarded **43** 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 such that the appellant had not passed the EQE 2022.

The letter also contained, as an attachment, the details of the marking of Paper C, according to which Examination Committee II agreed on **38** points for the appellant's answer on Paper C and recommended the grade FAIL.

IV. By a further letter dated 6 July 2022 with the subject *"European Qualifying examination 2022 - your feedback concerning paper C"*, the Chairman of the Examination Board referred to the appellant's email(s) on the conduct of the EQE 2022 and informed the appellant that the Examination Board had considered the appellant's complaint and had awarded him compensation of **5** marks.

V. With his letter dated 2 August 2022 and received by fax at the EPO on 3 August 2022, the appellant filed notice of appeal including his statement of grounds for appeal to challenge the decision of the Examination Board dated 6 July 2022. He paid the prescribed appeal fee on 3 August 2022.

In his notice of appeal, the appellant stated the following:

*"In the appeal, the following request are made:*

***a) reversal of the Decision that I have not passed the European Qualifying examination.***

*In the event that the above request should not be granted, the scheduling of oral proceedings before the Board of Appeal is requested."*

In his grounds of appeal, the appellant stated the following:

*"My main request is that:*

*- my answer paper to the European qualifying examination 2022 - Paper C be awarded with a compensation of 10-11 marks so a COMPENSABLE FAIL grade for my paper be awarded.*

*My auxiliary request is that:*

*- my answer paper to the European qualifying examination 2022 - Paper C be awarded with a compensation of 7-8 marks so a COMPENSABLE FAIL grade for my paper be awarded.*

*In addition, reimbursement of the appeal fee is requested for both in case one of the above requests is found allowable."*

- VI. The Examination Board remitted the appeal to the Disciplinary Board of Appeal (DBA) without rectifying its decision.
- VII. By letter dated 16 September 2022, the Examination Secretariat informed the appellant that his appeal had not been allowed by the Examination Board and that, consequently, his appeal had been forwarded to the DBA.
- The appellant was also informed that according to the log files, the effective time he had lost was **25** minutes (21 minutes in part C1 and 4 minutes in part C2), for which the appellant had already received a compensation of **5** marks.
- VIII. In accordance with Article 24(4) REE in conjunction with Article 12, second sentence, of the Regulation on discipline for professional representatives (see Supplementary publication 1, OJ EPO 2022, 142 ff.), 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 on the merits of the appeal.
- IX. A summons to oral proceedings before the DBA in the current case (the board) was issued. In a communication in accordance with Articles 13(2) and 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (Supplementary Publication 1, OJ EPO 2022, 67 ff.), the board informed the appellant on its following preliminary opinion:

The decision on the appellant's complaint under Rule 19(3) IPREE was not sufficiently reasoned. This constituted a violation of Rule 19(4) IPREE. In the absence of a reasoned decision pursuant to Rule 19(4) IPREE, it was not for the board to evaluate the merits of the appellant's complaint. Therefore, the board intended to set aside the decision under appeal and remit the case to the Examination Board to decide - again - on the appellant's answer paper to Paper C considering the appellant's complaint and taking into account the alleged facts and arguments. Reimbursement of the appeal fee appeared equitable in the circumstances of the case at hand (Article 24(4), third sentence, REE).

- X. By letter dated 9 February 2023, the appellant withdrew his request for oral proceedings and submitted further arguments in support of his complaint under Rule 19(3) IPREE.
- XI. The oral proceedings scheduled for 20 February 2023 were cancelled.
- XII. Appellant's requests

The appellant requested as his main request that the decision under appeal be set aside, that his answer paper to Paper C in the EQE 2022 be awarded a compensation of 10-11 marks and that a COMPENSABLE FAIL grade be awarded for his answer paper to Paper C. As an auxiliary request, the appellant requested that the decision under appeal be set aside, that his answer paper to Paper C in the EQE 2022 be awarded a compensation of 7-8 marks and that a COMPENSABLE FAIL grade be awarded for his answer paper to Paper C.

The appellant further requested that the appeal fee be reimbursed.

XIII. The appellant's arguments are essentially directed against the number of marks awarded by the Examination Board as compensation after considering the appellant's complaint and can be summarised as follows.

- (a) The technical problems encountered by the appellant during the EQE 2022 - Paper C resulted in an improper conduct of the examination, caused by events beyond his control. This led to problems such as inadequate time to answer both parts of Paper C, increased stress for the appellant during the whole examination, and an impact on the overall examination and the second part of paper C.

Under the principle of equal treatment, unequal conditions which could cause unjustified disadvantages for candidates should be compensated to the extent feasible. With this in mind, the appellant had contacted the Examination Secretariat via email at the earliest opportunity, i.e. on the same day of the examination, after finishing paper C.

- (b) The Examination Board had reasoned its decision on the appellant's complaint based on the loss of time and the number of marks obtained during the effective time for the examination. The Examination Board had failed to correctly apply the equitable compensation for the lost time and equitable compensation for the real stress suffered.



In line with decision D 37/21, there were two options for determining how the estimated time loss was calculated.

A first, strict approach provided that the compensation marks could be calculated, for example, by taking the ratio of the total marks achieved by the candidate during the useful time (i.e. the total time minus the time loss) and the useful time of the examination and multiplying it by the estimated time loss. The formula was thus:

**Strict compensation = (total marks achieved / (total time - lost time)) x lost time**

A second, more generous approach provided that the compensation marks could be calculated, for example, by taking the ratio of the potentially achievable maximum number of marks and the total examination time and multiplying it by the estimated time loss. The formula was thus:

**Generous compensation = (total marks possible / total time) x lost time**

The Examination Board also considered that it was necessary to apply the average of these two approaches. Based on the 5 marks awarded to the appellant as compensation, it seemed that the Examination Board only applied the strict approach and did not consider the average. The reasoning for this approach, however, was not understandable, also in view of the example of Paper D 2021, which appeared to suggest that the generous approach to compensation marks was not alien to the Examination Board. "Effective time" should comprise not only

the time lost, e.g. the time extracted from log files (which normally shows the exact moment a user enters or exits a session), but it also should consider other aspects about the time a candidate needs to, for example, regain concentration, recover all the windows of the browser, check again all the parts already done to make sure that nothing has been lost, etc. These activities normally take a lot of time, without considering the additional stress suffered.

Moreover, the strict and the generous approaches are only two possible methods of calculating compensation marks. However, none of these methods take into account when the time loss occurred. Normally, if a problem happens at the beginning of an examination, it could affect the result much more than a disconnection at the end of an exam since the stress suffered at the beginning compromises almost the whole examination. The decision on the appellant's complaint under Rule 19(3) IPREE did not consider all these aspects.

(c) The main request

In view of the facts and evidence in the current case, the generous approach compensation calculation should have been applied based on the following data:

Paper C total time: 360 min  
Lost time: 35–40 min

Applying the data to the above formula of the generous approach would result in the following compensation marks:

**Generous compensation (35 min):  $(100/360) \times 35 = 9.72$   
marks**

**Generous compensation (40 min):  $(100/360) \times 40 = 11.11$   
marks**

Thus, if the compensation was correctly based on the generous approach only, an equitable compensation based on decision D 37/21 for his paper would result in between 9.72 and 11.11 compensation marks (approx. 9 and 11 compensation marks), and this would appear to be sufficient for awarding a COMPENSABLE FAIL grade for his answer paper C.

(d) The auxiliary request

In view of the facts and evidence in the case at hand, the average compensation of the generous approach and the strict approach should be based on the following data:

Paper C total time: 360 min  
Total marks achieved: 38  
Lost time: 35–40 min

Applying the data to the above formulas for, respectively, the generous approach and the strict approach would result in the following compensation marks:

**Generous compensation (35 min):  $(100/360) \times 35 = 9.72$   
marks**

**Strict compensation (35 min):  $(38/(360 - 35)) \times 35 = 4.09$  marks**

**Generous compensation (40 min):  $(100/360) \times 40 = 11.11$  marks**

**Strict compensation (40 min):  $(38/(360 - 40)) \times 40 = 4.75$  marks**

Calculating the average of the two approaches (generous and strict), the result would be:

**Compensation average (35 min):  $(9.72 \div 4.09) / 2 = 6.91$  marks**

**Compensation average (40 min):  $(11.11 + 4.75) / 2 = 7.93$  marks**

Thus, equitable compensation based on the average should be between 6.91 and 7.93 marks (approx. 7 and 8 marks), and this would appear to be sufficient for awarding a COMPENSABLE FAIL grade for his answer paper C.

## **Reasons for the Decision**

### *Admissibility of the appeal*

1. The notice of appeal and the statement setting out the grounds of appeal were duly filed within the one-month period under Article 24(2) REE. The appeal fee was also paid on time. The appeal is therefore admissible.

2. The board observes that it could be questioned whether two appealable decisions were issued on 6 July 2022:

(a) The decision dated 6 July 2022, informing the appellant that the appellant's answer paper to Paper C in the EQE 2022 had been awarded 43 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 such that the appellant had not passed the EQE 2022 (decision (a), see also point III above).

(b) The decision dated 6 July 2022, informing the appellant that the Examination Board had considered the appellant's complaint under Rule 19(3) IPREE and had awarded him a compensation of 5 marks (decision (b), see also point IV above).

If it is assumed that decision (a) under Article 6(5) REE and decision (b) on the appellant's complaint under Rule 19(3) IPREE were two independent decisions of the same date, the appellant should have filed an appeal against each of these decisions.

However, even though neither decision refers to the other, the board considers that the two decisions are not independent of each other but that they both concern the award of points for the appellant's answer paper to Paper C in the EQE 2022 and are therefore to be considered interrelated. This can be seen, among other things, from the fact that the details of the marking of the appellant's answer paper attached to decision (a) under Article 6(5) REE indicate the awarding of **38** points, while the decision itself indicates **43** points. This discrepancy of **5** points results from decision (b) on the complaint under Rule

19(3) IPREE. Therefore, decision (a) can only be reviewed by the board taking into account decision (b), even though the appellant formally appealed only against decision (a). Accordingly, the board considers the current appeal as an appeal against both decisions (a) and (b).

3. The board notes, however, that the practice of issuing two separate decisions splitting the facts and the reasoning of an overall decision on the marking of the same answer paper of a candidate without referring to the other decision should be changed. It should be made clear in future that the two decisions are not independent of each other so that candidates do not feel obliged to file two separate appeals to avoid their appeal being considered inadmissible or not being considered as an appeal against both decisions.

*Extent of power of investigation and decision of the DBA*

4. In accordance with Article 24(4) REE and the consistent case law of the DBA, which followed decision D 1/92 (OJ EPO 1993, 357) and D 6/92 (OJ EPO 1993, 361), decisions of the Examination Board may, as a rule, 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 Committee and the Examination Board have some latitude of evaluation that is subject to only limited judicial review by the DBA. Accordingly, the Examination Board's value judgement concerning the number of marks that an examination paper deserves is not subject to review by the DBA. The actual marking of an examination paper in terms of how many marks an

answer deserves is not subject to review by the DBA; nor are the Examination Board's criteria for determining the weighting of the expected answers (see decision D 20/96, point 9 of the Reasons) to the examination questions (D 13/02, point 5 of the Reasons). 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 re-opening the entire marking procedure (see e.g. decision D 7/05, OJ EPO 2007, 378). This is, for instance, the case if an examiner is found to have based their 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, inconsistent or incomprehensible (D 13/02). All other claims to the effect that a paper was marked incorrectly are not the responsibility of the DBA. Value judgements are not, as a rule, subject to judicial review (see e.g. decision D 1/92, *supra*, points 3 to 5 of the Reasons and D 11/07, point 3 of the Reasons).

5. The board 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.

*Violation of Rule 19(4) IPREE*

6. Rule 19(4) IPREE requires that any decision taken by the Examination Board in accordance with this rule is based upon all the available evidence, reasoned and issued in writing.

Regarding the complaint under Rule 19(3) IPREE filed by email dated 17 March 2022, the Examination Board should therefore have ascertained the exact facts and dealt with the allegations of the complainant (now appellant) in a reasoned decision or at least in its decision on the result of the examination under Article 6(5) REE (see also decisions D 3/04, point 3 of the Reasons and D 12/21, point 2 of the Reasons).

7. The decision dated 6 July 2022, informing the appellant that he had not passed the EQE 2022, indicates that his answer paper to Paper C was awarded **43** points, and the attached details of the marking of the appellant's answer paper indicate that **38** points were awarded. However, there is no explanation for the discrepancy of **5** points.
8. The discrepancy of 5 points results from the decision dated 6 July 2022, which was issued in response to the appellant's complaint under Rule 19(3) IPREE.

The only reasoning contained in this decision reads as follows:

*"The Examination Board has considered your complaint and has awarded you a compensation of 5 marks for the issues you described therein. 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."*



9. However, this brief statement of reasons does not meet the requirements of Rule 19(4) IPREE for the following reasons.
10. The fact that the appellant suffered an effective and severe time loss caused during the examination Paper C through no fault of his own but instead by the circumstances of the examination being held online seems undisputed. Therefore, the Examination Board correctly decided to award compensation.
11. However, in the complaint under Rule 19(3) IPREE, the appellant stated that the time loss caused by the technical problems during the examination was about 30 minutes for part 1 of Paper C and about 5 to 10 minutes for part 2 of Paper C, and he claimed a **total time loss of about 35-40 minutes**. The decision on the complaint under Rule 19(3) IPREE (the decision on the complaint) simply indicates that the compensation was calculated on the basis of the appellant's loss of time, without specifying the exact loss of time recognised by the Examination Board. Only in the letter of 16 September 2022, which concerns the forwarding of the appeal to the DBA and therefore cannot be part of the reasons for the decision on the complaint, did the Examination Secretariat state, without any further explanation, that the effective time loss according to the log files was **25** minutes (21 minutes in part C1 and 4 minutes in part C2). However, this recognised extent of effective time loss should have been indicated in the decision on the complaint.
12. Furthermore, taking into account the relevant arguments put forward in the complaint, it should have been explained why a lesser loss of time than that stated in the complaint was recognised. This was not done in the

decision on the complaint (nor, by the way, in the letter of 16 September 2022).

13. Since all this is missing from the decision on the complaint, the appellant and the board cannot understand on what grounds 5 marks were awarded as compensation. Thus, for this reason alone, the decision on the complaint is not sufficiently reasoned as required in Rule 19(4) IPREE.

14. From the wording ("*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.*") in the decision on the complaint, it could be inferred that the **conservative approach** (see decision D 37/21, point 23 of the Reasons) was used to calculate the compensation marks awarded for the appellant's answer paper to Paper C.

This conservative approach is one possible method of calculating compensation marks that entails taking the ratio of the total marks achieved by the candidate during the useful time (i.e. the total time minus the time loss) and the useful time of the examination and multiplying it by the estimated time loss.

As pointed out by the appellant, alternatively, under the **generous approach**, the ratio of the potentially achievable maximum amount of marks and the total examination time is multiplied by the estimated time loss (see also decision D 37/21, point 23 of the Reasons).

15. However, the decision on the complaint does not provide any reasoning on whether, and if so why, the conservative approach was chosen instead of the

generous approach, or whether another method was chosen for determining the appropriate compensation (e.g. the average of the results from both methods). Nor does it address the appellant's arguments and the circumstances of this case, for example, the division of the examination Paper C into part 1 and part 2 and/or the claimed difference in time lost in the two parts of the examination.

If the Examination Board has indeed acknowledged as the effective time loss only 25 minutes, the result would be 2.83 compensation marks if the conservative approach was applied, and the result would be 6.94 compensation marks if the generous approach was applied. The Examination Board awarded 5 compensation marks which seems to be a value followed from an extrapolation between 4.09 and 6.94 marks. However, the decision on the complaint does not explain how this value was calculated.

16. The board further notes that the decision on the complaint also does not explain what was meant by "effective time" for examination used to calculate the compensation marks and whether the division of the examination Paper C into part 1 and part 2 was taken into account. Although the term "effective time" was used in decision D 37/21, this decision was on examination paper B, which is not divided into two parts. It might therefore be questionable whether the meaning of effective time for paper C is to be understood over the whole period (360 minutes) or whether it refers only to the part of examination Paper C affected by the loss of time (i.e. 180 minutes taken into account for each part). If the effective time for the examination paper C referred to each of parts 1 and 2, the choice of method of calculation

would possibly make a significant difference in the calculation of the marks for compensation in the current case compared to if the total time available for both parts of paper C were taken into account.

### *Conclusion*

17. For the above reasons, the decision on the appellant's complaint under Rule 19(3) IPREE is not sufficiently reasoned. This constitutes a violation of Rule 19(4) IPREE. In the absence of a reasoned decision pursuant to Rule 19(4) IPREE, it is not for the board to evaluate the merits of the appellant's complaint. It will be for Examination Board to decide - again - on the appellant's answer paper to Paper C considering the appellant's complaint and taking into account the alleged facts and the arguments submitted in his complaint, statement of grounds of appeal and letter dated 9 February 2023.

Therefore, the decision under appeal has to be set aside and the case remitted to the Examination Board for a new decision.

18. The appellant has demonstrated in the calculations presented in his statement of grounds of appeal (see point XIII above) that, depending on the effective time loss of 35 or 40 minutes that he alleged, the respective calculation method leads to different calculation results. He also demonstrated that if the conservative approach was applied on the basis of 35 minutes, the result would be 4.09 compensation marks and if the conservative approach was applied on the basis of 40 minutes, the result would be 4.75 compensation marks. He further demonstrated that if the generous approach was applied on the basis of

35 minutes, the result would be 9.72 compensation marks and if the generous approach was applied on the basis of 40 minutes, the result would be 11.11 compensation marks. Accordingly, the average of both results on the basis of 35 or 40 minutes as the effective time loss would be at least 7 compensation marks, which would be sufficient for the award of a COMPENSABLE FAIL grade for the appellant's answer paper to Paper C.

Thus, it would appear that the appellant has a reasonable chance of success, depending on the effective time loss which the Examination Board recognises when it again decides on the appellant's answer paper to Paper C considering the appellant's complaint and taking into account the alleged facts and arguments.

*Reimbursement of the appeal fee*

19. The board considers reimbursement of the appeal fee in full equitable in the circumstances of the case at hand (Article 24(4), third sentence, REE).

## 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 for further prosecution.
3. The appeal fee is to be reimbursed in full.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated