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Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: D 0015/25

D E C I S I O N
of the Disciplinary Board of Appeal
of 29 January 2026

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board dated 8 July 2025 concerning the European Qualifying Examination 2025.**

Composition of the Board:

Chairman: I. Beckedorf
Members: P. Guntz
J. P. Frederiksen

Summary of Facts and Submissions

I. The duly filed appeal is directed against the decision of the Examination Board dated 8 July 2025 that the requirements of Article 14(1) of the Regulation on the European qualifying examination for professional representatives (REE) had not been fulfilled such that the appellant did not pass the European qualifying examination (EQE) 2025.

II. The appellant sat the main examination of the European qualifying examination (hereinafter "EQE") 2025 for all papers A to D.

III. By letter from the Examination Secretariat dated 8 July 2025, the Chairman of the Examination Board informed the appellant that his answer papers had been awarded the marks 60, 69, 54 and 40, respectively. On the basis of these marks, the Examination Board decided that the requirements of Article 14(1) REE have not been fulfilled and that the appellant has not passed the EQE.

For paper D, the letter contained the following marking details:

Examination Committee: Paper D - Marking Details - Candidate No C8002610

Category	Max possible	Marks marker 1	Marks marker 2
D1 - Q1	8	0	0
D1 - Q2	7	3.5	3.5
D1 - Q3	9	4.5	4.5
D1 - Q4	10	2.5	2.5
D1 - Q5	11	4.5	4.5
D2 - Q1	27	13.5	13.5
D2 - Q2	6	4.5	4.5
D2 - Q3	17	4	4
D2 - Q4	5	1	1
Total		**38.0**	**38.0**

Examination Committee agrees on 40 points and recommends the grade Fail

IV. The appellant based the appeal on an alleged incorrect marking of his answer to paper D. This had been a result of mistakes which were serious and so obvious that they could be established without re-opening the entire marking procedure. He claimed a violation of the principle of equal treatment because not all participants had been equally compensated for a time loss due to technical issues during their work on paper D2. Further, with regard to his answers to question1 of D1 he argued ambiguous and incomprehensible wording of the question, an incorrect model answer, and several aspects of unfair marking. The latter allegedly also occurred with regard to his answers to questions 2 and 4 of D1 and, violating the prohibition of double penalisation, with regard to his answers to the last two questions of paper D2. He believed that an objective evaluation of his answers should have led to his answer paper being awarded the higher grade of at least a 'COMPENSABLE FAIL' for Paper D and thereby the grade PASS for the EQE 2025.

V. The Examination Secretariat informed the appellant that the Examination Board *"after having taken due*

consideration of all arguments brought forward" had not allowed his appeal. The Examination Board added the following comment:

"*The arguments on the answers and alleged incorrect marking have been carefully considered. After re-assessing the relevant answers, no additional marks were found. The marking was consistent with the Examiners' Report.*
As regards the comparison with other candidates who received more compensation, this argument overlooks that those candidates scored above 70 marks, where relative compensation had more effect, whereas the appellant achieved only 37 marks.
The time loss has been verified in the logs which confirm that the technical disturbance did not exceed the 15 minutes already compensated for. At best, and to the benefit of the appellant, one additional mark might be considered. This would however fall short of the six marks required for a Compensable Fail."

VI. Consequently, the Examination Board forwarded the appeal to the Disciplinary Board of Appeal of the EPO (DBA) without rectifying its decision.

VII. In accordance with Article 24(4), first sentence, REE in conjunction with Article 12, second sentence, of the Regulation on discipline for professional representatives (RDR, Supplementary publication 1, OJ EPO 2022, 142 ff), the DBA consulted both the President of the EPO and the President of the Council of the Institute of Professional Representatives before the EPO (epi), whereby only the latter, with a letter dated 20 November 2025 presented comments in writing on the merits of the appeal.

VIII. The appellant's arguments can be summarised as follows.

(a) Awarding only 2 marks for a time loss suffered due to a technical problem (unavailability of the annotation/highlighting functionality in WISEflow for the first 15 minutes of paper D2) was not proportionate in comparison with the compensation of 3.5 to 4 marks granted to other candidates. The compensation should have been calculated according to the scheme set out in D 2/23 (as apparently done in the case of candidate M.T. who received 4 marks in addition to 41 marks in paper D, of which 29.5 marks in section D2 alone) according to the formula:

(max. marks possible in D2/total time) x lost time

which would have yielded a compensation of

(55 marks/200 minutes) x 15 minutes = 4,125 marks.

(b) The model solution for Question 1 in paper D1 was factually incorrect neglecting a professional representative's obligation to follow the safest path in the best interest of his clients, especially where withdrawing the priority application was to the sole disadvantage of client B, and because it was neither clear whether any prior art had become public or had been filed between the filing dates of EP-B and PCT-AB nor to which extent the content of the two applications overlapped. Moreover, leaving reasonable and substantiated answers completely unrewarded constituted a clear case of unfair marking, especially since the model solution itself, not taking advantage of the possibility of further

processing, did not provide the longest possible delay. Finally, the wording of the question using the words "wish to delay" and "what steps should be taken" was ambiguous and incomprehensible. According to the appellant, Question 1 of D1 should be neutralised and the appellant be awarded the 8 marks available or, at least, a minimum of 5 marks for providing a reasonable alternative solution.

(c) Regarding Questions 2 and 4 of D1 the appellant challenges the fairness of the marking. Although he provided 8 of the expected 11 items according to the model solution in Question 2 and more than half of the expected items in Question 4 he was only awarded 3.5 out of 7 and 2.5 out of 10 possible marks, respectively. Additional 1.5 and 2 marks, respectively, should be awarded to the appellant's answers to these two questions.

(d) With regard to Question 4 of D2 the appellant suspects the occurrence of double penalisation. Having missed the invalidity of the priority claim in EP-ABC to EP-B, he failed to raise a novelty objection which had been penalised already in Question 3 of D2 where he gained only 4 out of 17 available marks. Based on the same wrong assumption that EP-B could not be effectively attacked, he had suggested a cross licencing arrangement in Question 4 and lost 4 of the available 5 marks. At least 2 more marks should be awarded to his answer to this question.

Thus, according to the appellant, the respective parts of paper D should have been awarded at least 12.5 more marks.

Together with the 40 marks already obtained it could be stated that he would have reached more than 45 marks without re-opening of the whole marking process.

IX. The appellant requested that

- the decision under appeal be set aside and
- the appellant's Paper D of the EQE 2025 be awarded at least the grade COMPENSABLE FAIL
  - by a direct decision by the Disciplinary Board of Appeal or, in the alternative,
  - by a new decision of the Examination Board after remittal by the Disciplinary Board of Appeal and
- the appeal fee be reimbursed.

The appellant requested oral proceedings in case neither his main nor his auxiliary request was considered allowable.

Reasons for the Decision

The admissible appeal (Article 24(2) REE) is well-founded.

Decision without oral proceedings

1. Since the appellant's auxiliary request appeared to be allowable, the condition under which he had requested oral proceedings is not fulfilled. The Board, therefore, took a decision in writing.

Applicable law

2. In this decision the REE and its implementing provisions are applied as in force since 1 January 2025 (published in OJ EPO 2024, A4 and A25, respectively). However, subject to Article 27(2)(a) REE all provisions regarding papers A to D and the respective decisions are still applied in the version as in force since 1 January 2009 (see OJ EPO 2019, supplementary publication 2, page 4 et seq. and page 20 et seq., respectively).

Extent of the judicial review by the DBA

3. In accordance with Article 24(1) REE and the consistent case law of the Disciplinary Board of Appeal, 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.

3.1 It is not the function of the Board 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 Board.

Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the Board 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). 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).

3.2 However, the freedom of evaluation must be exercised appropriately and without arbitrariness. In order to make the decision of the Examination Board in individual cases comprehensible for the applicant, Rule 4 (1) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE) provides as an essential element of the examination procedure (see D 13/17, point 3.3 of the Reasons) that the participants are sent marking sheets which must contain details of the marks awarded. The basis for awarding the individual marks broken down by category can in turn be found in the published Examiners' report, which contains information on both the solutions expected from the candidates and any errors that may have had a negative impact on the assessment. This mechanism aims at standardising the assessment of candidates' answers in accordance with Article 6(2)(b) and (c) of the REE.

3.3 Thus, where a candidate's answer contains all the features considered necessary in the examiners' report, does not raise any objections to clarity and does not

contain any superfluous, in particular unnecessarily restrictive, features, it may be expected that all marks foreseen in the Examiners' report be granted (see D 30/22, Reasons 1.8 and 1.9). It has also been held that justifiable and competently reasoned alternative solutions must be appropriately assessed and rewarded (see D 7/05 of 17.07.2006, Reasons 13, D 14/23, Reasons 2.2). However, the assessment of an examination paper can only be based on considerations that can be attributed to the candidate's statements in the paper at the time of its assessment. Subsequent explanations that can only be taken from the grounds for appeal cannot be taken into account (see D 16/02, reasons 3.2).

3.4 With regard to the possibility that marks might be lost twice for a single mistake because a wrong answer to one part of a paper could have implications for the answer to another part, it has been held that such a "double penalisation" was not in keeping with the standards for fair marking (see D 13/17, Reasons 3.7.1).

3.5 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 e.g. D 10/97, Reasons 4.1, D 19/04, Reasons 5.1, D 11/19, Reasons 8, D 8/21, Reasons 10.2, D 37/21, Reasons 6 and D 2/23, Reasons 4.3.2). 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.

Serious and obvious errors in the contested decision

4. On the basis of the appeal it must be stated that the Examination Board violated these principles and committed a serious and obvious mistake by denying appropriate marks to justifiable and competently reasoned alternative solutions to Question D1.

The decision expressed on page 2 of the examiners' report regarding Question D1 not to award any points for alternative solutions designed to cause a delay at the procedural level (failure to fulfil the acts necessary for entry into the regional phase and subsequent request for further processing) does not sufficiently take into account the requirements of the case law described above.

4.1 Taking into account the objective of the examination to establish whether an applicant is qualified to practice as a professional representative before the European Patent Office (Article 1(1) REE, "fit for practice" requirement), not awarding any marks may be justified if a solution cannot be seen as a reasonable alternative to the model solution, for example because it entails significant disadvantages or does not produce the desired effect. However, this cannot be assumed in the present case, as the President of the epi also stated in his opinion of 20 November 2025:

" The proposed alternative approach – delaying entry into the EP phase combined *with further processing – appears to me a legally possible solution to the presented problem, but could, under certain circumstances, also better protect the client's interests than the approach proposed in the model solution, even if the duration of the delay in entering*

the regional EP phase would be shorter than in the model solution. "

4.2 It is true that the desired effect of only a few months delay in the variant chosen by the complainant is considerably less than in the model solution, which achieves a delay of one year for the entry of the international application (PCT-AB) into the regional phase by waiving the priority of the earlier application (EP-B). However, the effect achieved comes at such a high risk (see below) that the appellant was right to raise the question of whether this solution is compatible with the duty of care incumbent on professional representatives, especially when – given the situation in the examination – it does not appear possible to consult with the client.

In fact, the wording of the question 'what steps should be taken and why' suggests that a solution is expected which the professional representative can implement directly in response to the client's expressed wish for a strategic delay, rather than simply proposing various options to the client while advising on the associated advantages, disadvantages and risks. This question must be viewed against the background of the legal framework of the REE, according to which, unlike in Part 2 of this paper, Part 1 of Paper D does not require a legal assessment of specific facts for the purpose of advising a client, but should rather show, in accordance with Article 1 (4) REE and Rule 26 (1) IPREE, 1st case, the ability to 'answer legal questions' whereby the answers should be, in accordance with Rule 26 (2) IPREE, 'brief and to the point'.

4.3 As stated by the appellant, the withdrawal of the priority claim would not only result in all documents published between the filing dates of EP-B and PCT-AB becoming prior art under Article 54 (2) EPC, even if they would otherwise (if European) only have been relevant under Article 54(3) with regard to novelty or (if non-European) would not have been relevant at all.

4.4 Moreover, a potential withdrawal would also be extremely risky because the statement in the paper that 'the European search report for EP-B cites only A documents' does not support the conclusion obviously underlying the model solution that 'there is no prior art preventing the grant of PCT-AB'. This is because the paper did not state that the search report for EP-B was only prepared after the filing of PCT-AB and since the search report for EP-B typically does not include any prior art after the filing date of EP-B.

As the Office endeavours to prepare European search reports within six months of the filing date (see Guidelines for Examination, Part E, Chapter VIII, 4.1) , candidates had to assume that many months could have elapsed between the preparation of the search report and the filing of PCT-AB, during which time further documents potentially classifiable as X or Y could have been published which the report could not yet cover and assess in terms of their threat to the patentability of the application.

4.5 On the basis of the information provided in the paper, it was therefore not possible to assume with certainty that PCT-AB would be patentable.

4.6 Since the model solution also logically required the withdrawal of EP-B prior to its imminent publication in

order not to become prior art prejudicial to the novelty of PCT-AB after the priority had been abandoned, there was a significant risk, due to the above-described effects on the scope of the relevant prior art, that whereas abandoned EP-B might have been patentable, maintained PCT-AB could lack novelty or be rendered obvious by the published prior art. The final abandonment of a property right is an action that requires the highest degree of care on the part of the representative. It is not a "step that should be taken" by the representative alone to implement a mere strategic "wish" of their client without further consultation and detailed information of the client regarding the exact risk involved.

4.7 In the present case, as the appellant has rightly pointed out, an non-agreed action is precluded simply because of the irresolvable conflict of interest in which the common representative finds himself. Although he has power to represent both A and B, by withdrawing EP-B he would be taking an action that is primarily advantageous to A to the detriment of B, who would lose all rights from his earlier application.

A candidate who is required to demonstrate in the examination that he is fit to act as a professional representative before the European Patent Office (fit for practice requirement under Article 1(1) REE) was therefore justified in refraining from such an action.

4.8 Against this background, the solution proposed by the appellant cannot be regarded as an unacceptable alternative for which the award of points can be completely refused. On the contrary, the question arises as to whether the model solution is not rather an interesting mental exercise than a set of

instructions that can be directly implemented by a representative. In any case, it would only be feasible for a diligent representative after intensive consultation with his clients about all the risks involved, especially for client B, which cannot be directly reconciled with the form of the question cited ('what steps should be taken').

4.9 As a result, the refusal to award an appropriate number of points in the present case therefore constitutes a serious and obvious error which justifies setting aside the contested decision.

4.10 When assessing the exact number of marks to be awarded to the alternative solution it has to be kept in mind that the evaluation of an examination paper can only be based on considerations that can be attributed to the candidate's statements in the paper at the time of its assessment. Subsequent explanations that can only be taken from the grounds for appeal cannot be taken into account (see D 16/02, reasons 3.2). In the case of candidates basing their answers on a justifiable minority opinion from case law, it will therefore generally be required, in order to award full marks, that the candidate's answer shows knowledge of the prevailing opinion and provides reasons why the candidate considers the minority opinion to be preferable.

Since, as explained above, the model solution in the present case also raises considerable concerns and therefore cannot necessarily be regarded as the sole obvious solution, and since, as explained above, according to Rule 26 (1) and (2) IPREE, legal questions in the first part of task D must be answered 'briefly and to the point' and no advisory legal information is

expected, it might be possible to deviate from this requirement in the present case. However, a decision on whether or not to award full marks to the alternative solution would be taken by the Examination Board at its discretion as part of its reassessment of the appellant's alternative solution. The Examination Board could also decide to follow the statement by the epi President, "However, the candidate did not provide the client with a full picture of options, making the client aware of all connected risks and possible advantages. This would also need to be reflected in the marking." From the last part of Question 1 "what steps should be taken *and why*" the candidates could deduce that at least a short reasoning as to the feasibility of the steps suggested was expected.

Time loss in Paper D2 caused by WISEflow problems

5. It is undisputed that in the present case the appellant suffered a loss of time, due to a general technical problem outside his control (unavailability of the annotation/highlighting functionality in WISEflow for the first 15 minutes of paper D2). In such a case adequate compensation must be awarded to avoid unequal examination conditions. The principle of equal treatment of EQE candidates has been adhered to as higher ranking law in the jurisprudence of the DBA (see the case law cited above). This principle means that the individual disadvantage suffered by the appellant without an objective reason should be compensated in an adequate manner. At the same time it means that all candidates suffering from the time loss should be equally treated and, thus, their compensation be calculated according to the same fair method.

Against this background it is not understandable why other candidates were compensated with 3.5 to 4 marks whereas the appellant only received a compensation of 2 marks. Where the calculation has been based on the method set out in D 02/23 which is not in the knowledge of the Disciplinary Board but seems to be probable when comparing the very similar situations of the appellant and candidate M.T. the appellant should have been awarded additional 2 marks. Therefore, a violation of the principle of equal treatment has to be stated which constitutes a serious mistake which is so obvious that it can be established without re-opening the entire marking procedure.

Marking of Questions 2 and 4 of D1; potential double penalisation in Questions 3 and 4 of D2

6. It is not within the knowledge of the Disciplinary Board how the examiners weighed the individual items expected according to the model answer. At first sight, it seems rather extraordinary that 8 out of 11 expected items score only 3.5 of 7 available marks and that more than 50% of the expected answers yield only 2.5 of 10 possible marks. But justifiable reasons for this evaluation might exist and for the Board it is not possible to deduce with certainty that a serious and obvious mistake must have occurred that, seen in isolation, would justify setting aside the impugned decision. The same is true with regard to a potential prohibited double penalisation in Questions 3 and 4 of D2.

However, in case of a remittal to the Examination Board the re-evaluation of the appellant’s answer paper would not need to be limited to the re-examination of Question 1 of D1 and securing a fair compensation for

the time loss suffered. The Examination Board would be free to re-examine the appellant's answers to Questions 2 and 4 of D1 and 3 and 4 of D2.

Remittal to the Examination Board

7. It is up to the Examination Board to apply a fair system for compensating the time loss suffered. The Examination Board itself acknowledged that an additional mark might be considered (see letter dated 10 September 2025 which however contains incorrect facts and does not explain why the appellant has not been treated alike his fellow candidate M.T.; therefore, for equal treatment, it might be necessary to award 2 additional marks).

The exact number of marks to be awarded for the appellant's answer to Question 1 of D1 and potentially additional marks regarding the other questions mentioned above would also be at the discretion of the Examination Board.

However, even if the Examination Board were to apply the legal concept of D 16/02 and would only award half of the available marks to the appellant's alternative solution regarding Question 1 of D1 and if the Examination Board would compensate the appellant's time loss with only one additional mark as already indicated in the letter dated 10 September 2025, the appellant would have reached a minimum of 45 marks which is sufficient for the grade 'COMPENSABLE FAIL', no matter whether the Examination Board were to award any additional marks to any of questions 2 and 4 of D1 and question 4 of D2.

With regard to the fact that the reassessment would in any event result in the awarding of sufficient marks to at least reach the requested grade of 'COMPENSABLE FAIL', a referral back to the Examination Board would appear to be a mere formality, constituting an unwarranted hardship for the appellant, especially since it is not sure whether a decision of the Examination Board could be reached before the next EQE. Thus, special reasons not to remit the case according to Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (RPDBA) apply and it is established case law of the Disciplinary Board of Appeal in such a situation to grant the requested grade in a direct decision of the Board, see e.g. D 14/17, Reasons 3.3, D 30/22, Reasons 3, D 14/23, Reasons 6.

Overall consequence

8. Since the appellant has been awarded a 'PASS' grade in all remaining papers and his total aggregate mark in the four papers is at least 228, he fulfilled the prerequisites of Article 14(1) and (2) REE in conjunction with Rule 6(4) IPREE and passed the European qualifying examination 2025.

Request for reimbursement of the appeal fee

9. With respect to the appellant's request for reimbursement of the appeal fee, reference is made to Article 24 (4), third sentence, REE.

The appeal is successful and the board considers it equitable to order the reimbursement of the appeal fee in full.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The grade "COMPENSABLE FAIL" is awarded for the appellant's answer to paper D of the European qualifying examination 2025.

3. The appellant is declared to have passed the European qualifying examination 2025.

4. The appeal fee is reimbursed in full.

The Registrar: The Chairman:

N. Michaleczek I. Beckedorf

Decision electronically authenticated