



Beschwerdekammer in Disziplinarangelegenheiten

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 0019/25

D E C I S I O N
of the Disciplinary Board of Appeal
of 4 March 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:

Chair: I. Beckedorf

Members: P. Guntz

K. Bijvank

Summary of Facts and Submissions

- I. The 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 and received marks of 45, 38, 47 and 37 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.
- III. The following marking details were communicated to the appellant in relation to paper A, which is the sole object of the present appeal:

Examination Committee: Paper A - Marking Details - Candidate No C8002308

Category	Max possible	Marks marker 1	Marks marker 2
Main claims - Device	40	14	14
Main claims - Method	10	0	0
Main claims - Kit	10	4	4
Dependent claims	25	15	15
Description	15	12	12
Total		45	45

Examination Committee agrees on 45 points and recommends the grade Compensable fail

- IV. The appellant alleged an incorrect marking of her answer to paper A as a result of mistakes which were

serious and so obvious that they could be established without re-opening the entire marking procedure. She claimed a violation of the principle of equal treatment because apparently the marking was not consistent with the criteria set out in the examiners' report. Based on these, she believed that her answer to Paper A should have been awarded a minimum of 53 marks and, thus, the higher grade of 'PASS'.

- V. The Examination Secretariat informed the appellant that the Examination Board "*after having taken due consideration of all arguments brought forward*" had not allowed her appeal. The Examination Board added the following comment:

"The arguments presented in the appeal have been carefully considered and the answer has been re-assessed. The Examination Board concluded that the answer had been marked correctly according to the details presented in the Examiners' Report."

- 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), 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). Neither of them commented on the merits of the appeal.
- VIII. The appellant's arguments can be summarised as follows.

- (a) The appellant's independent product claim fulfilled all the requirements in sections 2.1.1 to 2.1.3 of the Examiners' report, capturing the inventive concept base on the use of spherical gold nanoparticles of 20-100nm diameter, not containing any major unnecessary limitations and including all essential features.
- (b) Any minor limitations or clarity issues could not justify a deduction of 26 marks. Thus, by misapplying the marking scheme, the examination committee exceeded their discretion and committed an serious and obvious mistake that is open for review by the DBA.
- (c) Within the framework of the Examiners' report a maximum deduction of 18 marks would have been justified leading the appellant to reach a total of 53 marks and thus the grade "PASS".

IX. The appellant requested that

- the decision under appeal be set aside and
- the appellant's Paper A of the EQE 2025 be awarded the grade "PASS"
 - 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 her main nor her auxiliary request was considered allowable.

Reasons for the Decision

The admissible appeal (Article 24(2) REE) is well-founded on the basis of the auxiliary request.

1. *Decision without oral proceedings*

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

2. *Applicable law*

In this decision the REE and its implementing provisions are applied as in force since 1 January 2025. 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.

3. *Extent of the judicial review by the DBA*

In accordance with Article 24(1) REE and the consistent case law of the Disciplinary Board of Appeal, which followed decision D 1/92, 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 her 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, Reasons 3 to 5).

3.2 However, the freedom of evaluation must be exercised appropriately and without arbitrariness. 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. 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, Reasons 3.3) 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) REE.

3.3 Thus, if a candidate's answer to paper A contains all the features deemed necessary in the examiners' report, raises no objections as to clarity and contains no superfluous features, in particular unnecessarily restrictive features, it can be assumed that all the

marks provided for in the examiners' report will be awarded (see D 30/22, Reasons 1.8 and 1.9). Furthermore, the principle of equal treatment of all candidates, as expressed in Article 6(2)(c) REE, requires that the assessment principles set out in the examiners' report be applied in a consistent manner to all candidates. If, therefore, an answer shows deficiencies compared to the model solution, it can be expected that the number of marks as foreseen in the examiners' report will be deduced, but no more than that.

- 3.4 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).

4. *Serious and obvious errors in the contested decision*
On the basis of the appeal, it cannot be ruled out that the Examination Board violated these principles and committed a serious and obvious mistake by departing from the assessment framework set out in the examiners' report.

When comparing the device claim drafted by the appellant in her answer with the model solution outlined in the examiners' report, the Board has difficulties to assume that the assessment followed the guidelines set out in the examiners' report. Substantially exceeding the discretion of the

respective examination committee would constitute a serious violation of the principle of equal treatment and, thus, a serious and obvious error in the assessment procedure. In detail:

4.1 In her answer, the appellant proposed a device claim whose features differ from those of the model solution as follows (missing features are highlighted in bold by the Board in the model solution; additional features are marked in bold in the appellant's response; alternative solutions are shown in italics):

	Model solution	Appellant's answer
a.	A lateral flow test device for detecting a target molecule in a liquid sample, comprising;	Lateral flow test, <i>for testing a liquid sample (5)</i> , comprising
b.	- a sample pad (1) for receiving the liquid sample (5);	a <i>test strip</i> , the test strip comprising an absorbent sample pad (1) configured to receive the liquid sample (5);
c.	- a conjugate pad (2) downstream from the sample pad (1) comprising	a conjugate pad (2) located downstream from the sample pad (1), the conjugate pad (2) being configured to hold a <i>detection agent (11) in a dried form</i> ;
d.	a conjugate (11) of a first antibody (10) specific for the target molecule (6) and	wherein the detection agent (11) comprises conjugates (11) of a first antibody (10)
e.	a coloured particle (9); and	and a spherical coloured particle (9), wherein the coloured particle (9) is a gold nanoparticle with a diameter of 20 to 100 nm and wherein the antibody (10) is <i>configured to recognise and bind to a target molecule (6) in the liquid sample</i>
f.	- a reaction membrane (3) downstream of the conjugate pad (2) comprising a	a reaction membrane (3) located downstream from the conjugate pad (2)
g.	second antibody (12) specific for the target molecule(6)	and including a test line (7) comprising second antibodies (12),
h.	immobilized in a test line (7) across the surface of the membrane (3)	wherein the second antibodies (12) are immobilised in a line across the surface of the reaction membrane (3) and are <i>configured to recognise and bind to the target molecule (6)</i>
	characterized in that	<i>[no two part form chosen]</i>
i.	the coloured particle (9) is a spherical gold nanoparticle with a diameter of 20nm to 100nm	<i>[see feature e. above]</i>
j.		wherein the first antibody (10) of the conjugates (11) and the second antibodies (12) are of the same or different type.

4.2 Given the extensive similarities with the model solution, the DBA finds it difficult to determine what considerations may have led the examination committee

and finally the examination board to award a mere 14 marks for the device claim. Even though each individual assessment of a deviation from the expected solution is at the discretion of the examination committee, which the DBA must respect, the limits of discretion would have been exceeded if the examination board had completely departed from the assessment principles it had set itself and which are apparent from the examiners' report, as this would then constitute a violation of the principle of equal treatment expressed in Article 6 (2)(c) REE. This risk is at stake in the present case for the following reasons:

- 4.3 According to the examiners' report, the loss of 26 out of 40 marks achievable for the device claim is envisaged if candidates submit a claim that is new but not inventive (25 marks deducted) or if essential features are missing (6, 7, or 15 marks deducted depending on the severity) and/or unnecessary limitations are present (5, 10, 15, 18, 20, or 30 marks deducted) to an extent that the total deductions, taking into account unclear features (4 to 8 marks deducted for each) or minor formal errors (1 or 2 marks deducted) if applicable, add up to 26.

However, the Board finds itself unable to identify any scenario where deviations between the model solution and the appellant's solution could warrant such a high deduction on the basis of the examiners' report.

- 4.4 As provided for in the model solution, the appellant has established novelty and inventive step over D1 and D2 by including corresponding features. No essential features seem to be missing. And the few unnecessary limitations and unclarities do not seem to justify a loss of 26 marks:

In feature a), the appellant has chosen a different designation for the device. However, since the functional description in this regard is not unnecessarily limiting but only expresses what is inherent to every lateral flow test of the type described in Paper A and since there is no apparent problem of clarity, no deduction is to be expected on the basis of the examiners' report. There is also no missing feature since the suitability of the lateral flow test device to detect molecules is expressed in feature e) of the appellant's answer.

In feature b), the appellant has introduced an additional restriction to "absorbent" sample pads. This is considered a minor unnecessary limitation in the examiners' report warranting a deduction of 5 marks. Although it could be argued that this feature might be regarded necessary for the functioning of the lateral flow test, the assessment in the examiners' report apparently does not exceed the Examination Board's discretion. Thus, a deduction of **5** marks is to be expected. The use of the descriptive expression "test strip" does not seem to imply any limitations beyond what is claimed by the features as a whole.

The introduction of the term "in a dried form" in feature c) constitutes another minor limitation according to the examiners' report and leads to the deduction of **5** more marks. The term "detection agent" on the other hand, introduced to describe the conjugates, does not seem to be limiting.

Feature d) corresponds to the model solution except for the plural "conjugates" instead of "conjugate" which seems to justify no objection. The term "specific for

the target molecule" has been expressed by the appellant within feature e) by the term "configured to recognise and bind to a target molecule" which seems to be equivalent.

The rest of feature e) corresponds to the model solution incorporating also feature i). According to the examiners' report, page 4, last paragraph, the use of the one-part claim format instead of the two-part format should not lead to a deduction, since the appellant discussed the prior art in the description.

Feature f) corresponds to the model solution.

The second antibody (12) being "specific for the target molecule (6)" according to feature g) of the model solution has again been expressed by the appellant choosing the equivalent term "configured to recognise and bind to the target molecule", see feature h).

The first mention of a test line in feature g) is not objectionable in itself; however, the subsequent use of the indefinite article "wherein the second antibodies (12) are immobilized in a line across the surface of the reaction membrane (3)" in feature h) causes ambiguity, as it is not clear whether this line is meant to be the same as the test line mentioned above or whether it might constitute a separate line. According to the examiners' report, ambiguities are penalized with **4** to **8** marks. The assessment of whether the ambiguity is minor or major is left to the respective examination committee.

Feature j) has been added by the appellant. However, the fact that the first and second antibodies can either be "of the same or of different type" does not

introduce any sort of limitation or ambiguity and should, thus, be harmless.

4.5 Against this background, deductions in the range of 14 to 18 marks would have been expected on the basis of the examiners' report, depending on the exercise of the respective discretion of the examination committee.

4.6 In view of the 26 marks actually deducted in comparison, it cannot be ruled out that, in the present case, the Examination Committee departed significantly from the assessment framework set out in the examiners' report leading to a violation of the right to equal treatment with the other examination candidates as expressed in Article 6 (2) (c) REE.

4.7 This would constitute a serious and obvious mistake in the assessment, which justifies setting aside the contested decision.

5. *Remittal to the Examination Board*

5.1 The number of marks to be awarded for the appellant's answer is at the discretion of the examination board. Since the DBA has no documents at hand showing which deductions the two examiners of the examination committee made in detail and for what reasons, it cannot be said that the appellant's answer should have deserved a certain minimum number of marks in all circumstances, as it cannot be completely ruled out that further justified deductions were made on the basis of considerations not mentioned above.

5.2 In the present case, although it is entirely conceivable, the Board cannot say with certainty that a reassessment would in any case result in an additional

5 marks, which would give the desired grade of "PASS", so that a referral back would appear to be a mere formality.

5.3 For these reasons, the main request cannot be granted.

5.4 The case must, therefore, be remitted to the examination board for reassessment in accordance with Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (RPDBA), in line with the auxiliary request.

6. *Request for reimbursement of the appeal fee*

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 case is remitted to the Examination Board for reassessment of the appellant's answer to Paper A of the European qualifying examination 2025.
3. The appeal fee is reimbursed in full.

The Registrar:

The Chair:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated