



Case Number: D 0007/06

D E C I S I O N
of the Disciplinary Board of Appeal
of 20 December 2006

Appellant: N.N.

Representatives: N.N.

N.N.

Decision under appeal: Decision of the Examination Secretariat dated
17 July 2006.

Composition of the Board:

Chairman: P. Messerli
Members: B. Schachenmann
N. Lenz

Summary of Facts and Submissions

I. On 2 June 2006 the appellant requested enrolment for the 2007 European qualifying examination ('EQE'). In order to satisfy the Examination Secretariat that he possessed a level of scientific or technical knowledge equivalent to a university-level qualification pursuant to Article 10(1) of the Regulation on the European qualifying examination for professional representatives ('REE') and Article 3 of the Instructions concerning the qualifications required for enrolment for the EQE ('Instructions'), the appellant submitted the following diplomas:

- *Brevet de Technicien Supérieur ('BTS'), Commerce International, Académie de Nancy-Metz;*
- *Bachelor of Arts in Business Studies with Second Class Honours, Sheffield Hallam University;*
- *Postgraduate Certificate in intellectual Property Law, University of Manchester;*
- *Final Paper P6 awarded by the Joint Examination Board of the CIPA.*

II. Concerning his BTS the appellant informed the Examination Secretariat that he had noted the inclusion of this diploma in 'List B' pursuant to Article 5(1), Instructions.

III. The Examination Secretariat refused the appellant's request for enrolment by a decision dated 17 July 2006 on the ground that none of his diplomas fulfilled Article 10 REE as implemented by Articles 2 and 3, Instructions. The Secretariat also pointed to Article 6, Instructions according to which the appellant might be

considered to possess an equivalent level of scientific or technical knowledge if he proved that he had at least ten years experience as specified in Article 10(2)(a) REE. At the date of the examination, the period of the appellant's professional activity falling under Article 10(2)(a) REE would be five years and eleven months.

IV. The appellant lodged an appeal against this decision. The notice of appeal and a statement of grounds of appeal were received on 27 July 2006 and the appeal fee was paid on the same date. In the appeal proceedings the appellant pointed to additional technical knowledge acquired by him between 1987 and 1990 as a trapeze construction worker, from 1990 to 1992 as a sole trader providing laser cartridge recycling and copier/printer maintenance and repair services, from 1992 to 1996 as a sole trader/installer/repairer of ICT second user equipment and from 1994 to present as a patent translator. From 1997 to 2000 he was purchasing manager for tools and acquired technical understanding of mechanical engineering relating to cutting applications etc.

V. The Presidents of the European Patent Office and of the Institute of Professional Representatives were invited, pursuant to Article 12 of the Regulations on discipline for professional representatives, to file observations on the matter. The President of the European Patent Office filed comments on the present case as annex to a letter dated 28 September 2006. It was pointed out that the studies undertaken by the appellant were not of a scientific or technical nature. In particular, the appellant's BTS was in the field of international

commerce which could not be considered as scientific or technical subject matter within the meaning of Article 2 or 3, Instructions. It was added that the Lists A and B according to Article 5(1), Instructions dated back to the beginnings of the EQE and no longer corresponded to current circumstances. Any decisions regarding admission to the EQE were based on the conditions laid down in Article 10(1) REE and Article 2 and 3, Instructions.

- VI. In a communication dated 5 October 2006 the Board *inter alia* referred to its decision D 16/04 according to which the existing REE and the Instructions provided that "an equivalent level of scientific or technical knowledge" within the meaning of Article 10(1) REE could be established either by fulfilling the conditions of Article 3 of the Instructions or, according to Article 9, Instructions, by having at least 10 years' experience as specified in Article 10(2)(a) REE. The Instructions therefore left no room for an evaluation of such knowledge on a case-by-case basis. Furthermore, it appeared that the appellant's BTS, *Commerce International* was not a scientific or technical degree as specified in Articles 2 to 4, Instructions.
- VII. Oral proceedings were held on 20 December 2006.
- VIII. The arguments of the appellant in the grounds of appeal, in his further submissions and at the oral proceedings can be summarized as follows.
- (a) Decision D 8/04 of the Disciplinary Board of Appeal had invalidated Articles 4 and 5,

Instructions rendering the entire 'Instructions' null and void or at least unworkable in respect of a candidate not possessing a qualification under Article 2, Instructions. Consequently, Article 10(1) REE was the applicable law.

- (b) According to Article 10(1) REE candidates shall be enrolled for the EQE provided they possess a university-level scientific or technical qualification or "are able to satisfy the Secretariat that they possess an equivalent level of scientific or technical **knowledge**" (emphasis added). Nowhere in the 'Instructions' was there an objective test for assessing if a candidate for enrolment met this criterion. In its decision D 16/04 the Disciplinary Board of Appeal had misinterpreted Article 10(1) REE in that its substance was reduced to the *sine qua non* requirement of a scientific or technical **qualification** (emphasis added). A proper interpretation of Article 10(1) REE in accordance with the Vienna Convention required that equivalent technical or scientific knowledge was considered and evaluated in individual cases where evidence of the same was adduced under Article 21(2)(a) REE. The Examination Board was not permitted by Article 7(4) REE, which enabled it to create 'Instructions', to relinquish the criterion and assessment of 'knowledge' provided for in Article 21(2)(a) REE by imposing fixed rules requiring certain formal qualifications in place of such an assessment.

- (c) The Secretariat should therefore have allowed, based on Articles 10(1) and 21(2)(a) REE, demonstration on a case-by-case basis of an "equivalent level of scientific or technical knowledge" instead of providing university level scientific or technical qualification. Evidence of the appellant's "equivalent level of scientific or technical knowledge" and of his experience in the patent field had been filed by way of patent specifications he had drafted which attested not only to his technical knowledge in matters of data processing technology, but also to his aptitude for practice. Further evidence to this effect was his *Postgraduate Certificate in Intellectual Property Law* and his *Final Paper P6* awarded by CIPA.
- (d) Article 6, Instructions might appear to make the only provision for purely empirical knowledge in the absence of formal qualifications at any level. It required 10 years' experience solely in the patent field which differed inexplicably from Article 3(b), Instructions allowing a combination of formal qualification with 3 years in the patent "*or other appropriate field*". The omission of "*other appropriate field*" in Article 6, Instructions was irrational and in conflict with the respective right and duty of proof and assessment of scientific and technical knowledge pursuant to Article 21(2)(a) REE. The patent field was a derivative field, not in itself a scientific or technical activity. It contradicted both history and logic to deprive a candidate of the

opportunity of proving scientific or technical knowledge acquired empirically.

- (e) Notwithstanding the above contravention of Articles 10(1) and 21(2)(a) REE, the Secretariat had failed to take into account the appellant's BTS under Article 3(a), Instructions and to provide reasons for the rejection of the same. Concerning 'List B' such as specified by Article 5(1), Instructions the only available source of published information applicable to the appellant's circumstances was the 'European Patents Handbook' which explicitly identified the degree of *Brevet de Technicien Supérieur* as incorporated into 'List B'.
- (f) Furthermore, the Secretariat incorrectly calculated the appellant's training periods as specified in Article 10(2)(a) REE and Article 3(b) of the Instructions to be 5 years and 11 months (instead of 6 years and 14 days).
- (g) The appellant's BTS included the study of informatics and had direct applications in technical fields. It should therefore be recognized as technical within the meaning of Article 3(a) or Article 4, Instructions. In view of the inherent difficulty for the candidates in interpretation of Article 3, Instructions, these provisions should be handled liberally.
- (h) The pre-conditions of access to the EQE established a restraint in access to a professional market and must, under the EC Law, be

objectively justifiable and no greater than necessary to achieve their purpose. As had already been established by the European Commission, EC Law was applicable to the EPI Code of Conduct which was adopted on the basis of Article 134(8) EPC as the REE and the 'Instructions'. If Article 6, Instructions was to be regarded as the conclusive provision for the ascertainment of a candidate's scientific or technical knowledge, it violated EC Law as it was lacking in justification and proportionality. The monopoly conferred on the patent field by Article 6, Instructions presented an absolute barrier to all other trades, professions or disciplines which were capable of providing scientific or technical knowledge.

- (i) Article 9, Instructions expressly retained for the Examination Board a residual right of adjudication in "*cases not covered by Articles 2,3,4 or 6*". Its primary purpose was to allow the Examination Board to decide on exceptional cases not provided for in the Instructions. This was a clear expression of jurisdiction beyond the criteria of Articles 2 (and following) of the 'Instructions' of which Article 6 was the most liberal. The deficiency in Article 6 referred to above was relieved by the scope of Article 9, which saved the 'Instructions' from a fundamental conflict with the REE and from breaking EC Law in respect of the rights of establishment (Article 43 EC Treaty) and abuse of dominance (Articles 82 and 86 EC Treaty).

IX. The appellant requests:

Main request:

That the decision under appeal be set aside and the applicant be enrolled for the EQE 2007 on one or more of the following grounds:

that the appellant's level of scientific and technical knowledge meets the criterion of Article 10(1) REE when applied reasonably;

that the appellant's scientific and technical knowledge satisfies Article 10(1) REE when the provisions of the Instructions are implemented in conformity with the REE;

that the appellant's scientific and technical knowledge satisfies Article 10(1) REE under the provisions of assessment provided by Article 9, Instructions.

Auxiliary request 1:

That the application for enrolment be remitted back to the Examination Secretariat for urgent consideration of the appellant's evidence of possession of the equivalent level of scientific or technical knowledge submitted under Article 21(1) (a) REE, this consideration to be completed in time for the appellant to sit the EQE 2007.

Auxiliary request 2:

That the period of 10 years' experience in Article 6, Instructions, be interpreted as recognising experience in the patent or another appropriate field, as accepted under Article 3(b), Instructions.

Auxiliary request 3

That the appellant's case be referred urgently to the Examination Board for a decision under Article 9, Instructions, followed if necessary by a decision by the Secretariat in accordance with the decision reached by the Examination Board.

Procedural request

That in any event, the appeal be determined with convenient speed sufficient to permit the appellant, if successful, to be enrolled in the EQE 2007.

Reasons for the Decision

1. The appeal complies with the provisions of Article 27(1) and (2) REE and is therefore admissible.
2. *Main request*
 - 2.1 Article 10(1) REE invoked by the appellant in support of his *main request* provides that candidates requesting enrolment for the EQE must possess a university-level scientific or technical qualification or be able to satisfy the Secretariat that they possess an equivalent level of scientific or technical knowledge. The appellant refers to the second alternative of this provision, i.e. possession of "an equivalent level of scientific or technical **knowledge**" (emphasis added). According to his submission the Examination Secretariat, instead of only considering his qualifications under Article 3, Instructions, should have separately considered the evidence supplied under Article 21(2)(a) REE of his scientific or technical knowledge on an

individual basis. Article 3, Instructions, if not totally invalidated by decision D 8/04, should not be interpreted as excluding him from satisfying the Secretariat as to his level of scientific or technical knowledge in accordance with Article 10(1) REE by other means than having one of the degrees mentioned in Article 3(a), Instructions. In any case, if the appellant's case was not covered by Articles 2, 3 or 6, Instructions the Examination Board should have considered the appellant's evidence in accordance with Article 9, Instructions (cf. points VIII.(a) to (c), (e) and (i)).

2.2 The Board does not share the appellant's interpretation of the provisions referred to above for the following reasons.

2.2.1 Pursuant to Article 134(8)(a) EPC the Administrative Council may adopt provisions governing the qualifications and training required of a person for admission to the EQE. Based on this competence the Administrative Council has adopted *inter alia* the provision of Article 10(1) REE concerning the qualification or knowledge required for enrolment and, at the same time, has delegated the power to draw up instructions concerning this issue to the Examination Board (cf. Article 7(4) REE). The Administrative Council obviously saw a need for a more specific implementation of the general provision of Article 10(1) REE in order to enable its practical application by the Examination Secretariat which, pursuant to Article 9(4) REE, has to decide on the enrolment of candidates "in accordance with instructions drawn up by the Board". The 'Instructions' are therefore to be understood as

implementing provisions to Article 10(1) REE as also follows from the preamble of the 'Instructions' adopted by the Examination Board on 19 May 1994 referring to Article 7(4) REE as their legal basis.

2.2.2 The 'Instructions' follow the structure of Article 10(1) REE in so far as they make a distinction between "a university-level scientific or technical qualification" (Article 2, Instructions) and "an equivalent level of scientific or technical knowledge" (Article 3, Instructions). The latter can be established either by having "a degree, diploma or certificate" as specified in Article 3(a), Instructions combined with an additional three years' period of practical experience or, according to Article 6, Instructions by having at least 10 years' experience as specified in Article 10(2)(a) REE. Articles 2, 3, and 6, Instructions do not offer any possibility for candidates to establish equivalent scientific or technical knowledge by other means and, in particular, leave no room for an evaluation of such knowledge on a case-by-case basis as proposed by the appellant.

2.2.3 Of course, the competence conferred to the Examination Board by delegation pursuant to Article 7(4) REE is not unlimited. In particular, the Examination Board could not draw up 'Instructions' under Article 7(4) REE in such a way that their effect would be in conflict with Article 10(1) REE or other provisions of the REE which, in case of conflict, would prevail. On the other hand, as the Disciplinary Board of Appeal found in its decision D 3/89 (OJ EPO 1991, 257, points 6 and 7), the Examination Board was empowered to draw up provisions including a more specific interpretation of the general

rule contained in Article 10(1) REE (then Article 7(1)(a) REE). It went on to state that "the purpose of that is to clarify the meaning of university-level scientific or technical qualification and how an equivalent level of scientific or technical knowledge can be corroborated". Even if the Disciplinary Board of Appeal has criticised some of these provisions later, it has never questioned their legal validity as such. This can, in particular, be seen from decision D 8/04 referred to by the appellant, in which the Board, by interpretation of the criticised Articles of the 'Instructions', developed factors relevant for their application to the case then to be decided.

2.2.4 Given the competence of the Examination Board to further specify, by drawing up 'Instructions', the meaning of Article 10(1) REE, the provision of Article 21(2)(a) REE is to be understood as referring to evidence for the requirements as specified by Articles 2 and 3, Instructions, rather than giving candidates the right to have evidence for their knowledge considered on an individual or case-by-case basis independently of what is required by the 'Instructions'. This interpretation is in conformity with the constant jurisprudence of the Board according to which the "evaluation-by-type" approach is justified for admission purposes, there being no possibility in an admission procedure of ascertaining the quality of training in individual cases (cf. D 14/93, OJ EPO 1997, 561, point 2.8; D 25/96, OJ 1998, 45, point 3.3.2).

2.2.5 The Board is satisfied that the effect of the 'Instructions' as adopted by the Examination Board

under Article 7(4) REE is not contradictory to or in conflict with Article 10 REE or any other provision of the REE. The general purpose of Article 10 REE is to ensure in the general interest that only those candidates are admitted to the EQE as may be assumed to have prospects of passing it (see decision D 16/04, point 2.5, referring to decisions D 14/93 and D 25/96). Each of the three options for meeting the conditions for enrolment as provided by Articles 2, 3 and 6, Instructions ensures a level of technical or scientific knowledge which, together with the required practical experience in the patent field, is suitable for attaining the purpose of Article 10 REE referred to above (for Article 6, Instructions see, in particular, point 4.3, below).

2.2.6 In support of his *main request* the appellant in addition invoked Article 9, Instructions according to which "cases not covered by Articles 2, 3, 4 or 6 will be decided upon by the Examination Board" (cf. point VIII.(i)). According to the appellant the purpose of this provision was to allow the Examination Board to decide on exceptional cases not provided for in the 'Instructions'. However, in order to understand the significance of this provision in the context of the 'Instructions' and the REE, it cannot be neglected that the 'Instructions' have been drawn up by the Examination Board based on the power conferred on it by Article 7(4) REE. As set out in point 2.2.3 the 'Instructions' must not therefore be in conflict with Article 10(1) REE or any other provision of the REE. This would, however, be the case for Article 9, Instructions in the appellant's interpretation since Articles 7(4) and 9(4) REE stipulate a clear separation

of powers between the Examination Board as legislator of the 'Instructions' and the Secretariat as executive organ which has to decide on the enrolment of candidates in accordance with the 'Instructions'. Article 9, Instructions cannot therefore be understood to the effect that the Examination Board itself could decide on the enrolment of individual candidates in exceptional cases. It rather indicates that the Examination Board, as legislator according to Article 7(4) REE, might decide to recognize further types of qualifications not mentioned in the 'Instructions' and instruct the Secretariat accordingly (cf. D 16/04, point 4 of the reasons). Accordingly, the Board does not share the interpretation of Article 9, Instructions as proposed by the appellant, even if it has to be admitted that this provision appears to be either *ultra vires* or unnecessary.

2.3 Considering now the circumstances of the present case in the light of the above interpretation of the relevant provisions of the REE and the 'Instructions', the Board reaches the following conclusions for the *main request*.

2.3.1 The appellant's BTS which he submitted as evidence of his possession of an equivalent level of scientific or technical knowledge cannot be considered as a scientific or technical degree under Article 3(a), Instructions since it is a BTS, *Commerce International* obtained in a two years' course which mainly concerned languages, law, economics, management and informatics (about 3 hours per week). Nothing can be derived in favour of the appellant from the fact that 'List B' referred to in the 'European Patents Handbook 2006'

mentions the BTS as a qualification admissible under Article 3(a), Instructions. This information obviously referred to BTS degrees in fields of technology rather than those which mainly concern economics, law and management. The appellant's further submission that his BTS, *Commerce International* was technical in so far as it had direct applications in technical fields (cf. point VIII.(g)) does not take account of Article 4, Instructions according to which, in the case of combined disciplines, the scientific or technical part alone must meet the requirements of Articles 2 or 3, Instructions. The appellant's BTS, *Commerce International* cannot therefore be considered as a scientific or technical qualification or degree as required by Articles 2 and 3, Instructions. The same is true for the other certificates submitted by the appellant which substantially concern business studies and training courses in intellectual property law, for the patent applications drafted by him and for his practical technical knowledge acquired between 1987 and 2000 (cf. point IV.).

2.3.2 Accordingly, none of the appellant's diplomas or activities fulfils the requirements of Article 10(1) REE as implemented by Articles 2 and 3, Instructions which are binding upon the Secretariat and leave no room for an evaluation of the appellant's scientific or technical knowledge by other means (cf. point 2.2.2 and 2.2.4). Article 9, Instructions, on the other hand, is not applicable to the present case since the Examination Board is not competent to decide on the enrolment of candidates in individual cases (cf. point 2.2.6).

2.3.3 For these reasons the appellant's qualifications and knowledge do not meet the conditions for enrolment under Article 10(1) REE and Articles 2, 3, Instructions nor can his knowledge be examined on the basis of Article 9, Instructions. Consequently, the *main request* cannot be granted.

3. *Auxiliary request 1*

3.1 According to the appellant's *first auxiliary request* the application for enrolment should be remitted to the Examination Secretariat for consideration, under Article 21(1)(a) REE, of the appellant's evidence of possession of the equivalent level of scientific or technical knowledge .

3.2 In this connection reference can be made to the observations of the Board in point 2.2.4 according to which Article 21(2)(a) REE is to be understood as referring to evidence for the requirements as specified by Articles 2 and 3, Instructions. Within this framework the evidence submitted by the appellant has already been evaluated in point 2.3.1. For the same reasons as given there the *first auxiliary request* cannot be granted.

4. *Auxiliary request 2*

4.1 In support of the *second auxiliary request* the appellant argued that the period of 10 years' experience in Article 6, Instructions, should be interpreted as recognising experience in the patent **or another appropriate field** (emphasis added), as accepted under Article 3(b), Instructions (cf. point VIII.(d)).

- 4.2 As already set out above the general purpose of Article 10 REE is to ensure that only those candidates are admitted to the EQE who may be assumed to have prospects of passing it (cf. point 2.2.5). Articles 2, 3 and 6, 'Instructions' provide three options for meeting the conditions for enrolment which all appear to be suitable for attaining the purpose referred to above. The logic underlying this regulation generally consists in a compensation of lower levels of technical degrees by longer periods of practical training.
- 4.3 In particular, Article 6, Instructions provides that if a candidate does not meet the conditions under Articles 2, 3 or 4, Instructions, the candidate may nevertheless be considered to possess an equivalent level of scientific or technical knowledge if he or she has at least 10 years experience as specified in Article 10(2)(a) REE (i.e. either in a professional representative's office or in the patent department of a firm in a Contracting State of the EPC). Article 6, Instructions is based on the assumption that a person working at least 10 years in a professional representative's office or in the patent department of a company and taking part in a wide range of activities pertaining to European patent applications or patents has acquired sufficient technical knowledge and sufficient experience in patent law to have prospects of passing the EQE. This assumption appears to be reasonable and justified. As the Board found in its decision D 3/89 (point 5 of the reasons) experience in a range of activities pertaining to patent matters is a perfectly acceptable way of making up any shortfall in scientific or technical knowledge, since such

experience requires, among other things, in-depth analysis of scientific and technical subject-matter (see also decision D 14/93, point 2.7).

4.4 According to the appellant's interpretation the required 10 years' experience should not be limited to practical training in the patent field as specified above, but should include experience in "another appropriate field" by analogy with the additional three years' experience pursuant to Article 3(b), Instructions (cf. point VIII.(d)). The Disciplinary Board of Appeal does not share this interpretation for the following reasons.

4.4.1 The ordinary meaning to be given to the terms of Article 6, Instructions in their context leaves no room for uncertainty or doubt. By referring to Article 10(2)(a) REE the legislator deliberately limited the practical experience to be recognized under Article 6, Instructions to the patent field. The justification behind this provision is that practical work with professional representatives and/or in patent departments in industry in the Contracting States focuses on European patent applications and patents and that it is therefore in such places that appropriate experience is most likely to be gained (cf. D 25/96, OJ EPO 1998, 45).

4.4.2 The Board cannot endorse the appellant's view that Article 6, Instructions conferred a "monopoly" on the patent field presenting an absolute barrier to all other trades, professions or disciplines which were capable of providing scientific or technical knowledge. By limiting the required experience to the patent field,

Article 6, Instruction does not restrict candidates' activities to a particular trade, profession or discipline since, according to Article 10(2)(a) REE, such experience can be acquired not only as an assistant to a professional representative but also in patent departments in industry, i.e. in a wide range of science and technology.

4.4.3 Moreover, the option according to Article 6, Instructions is not discriminatory for the following reasons. It can be assumed that candidates possessing a university-level scientific or technical degree may need, depending on their national educational system, about 7 to 8 years after leaving school until they meet the conditions for enrolment under Article 2, Instructions, whereas candidates without university-level degree or without technical degree at all, may need 8 to 10 years (Articles 3 and 6, Instructions, respectively). These moderate differences in time cannot be objected to as being discriminatory since the required additional practical experience is a reasonable compensation for candidates possessing a lower level or no scientific or technical degree at all, as the case may be.

4.5 The appellant further submitted that, if Article 6, Instructions was regarded as the conclusive provision for ascertaining the scientific or technical knowledge of candidates having no scientific or technical diploma, it violated **EC law** in respect of the rights of establishment (Article 43 EC Treaty) and abuse of dominant position (Articles 82 and 86 EC Treaty) (see points VIII.(h) and (i)). The Disciplinary Board of

Appeal finds that none of the provisions of the EC law referred to above is applicable to the present case.

4.5.1 The European Patent Organisation is an international organization which, in its proceedings, applies the provisions enshrined in its legal system as set out in the European Patent Convention establishing the Organisation or drawn up by the latter's competent organs. The departments of the European Patent Office charged with the procedure are therefore not bound by national law or the Community's standards or directives (cf. decisions D 9/96, point 3.2 and D 3/89, point 4). In particular, the competence of the Disciplinary Board of Appeal in EQE cases is restricted, according to Article 27(1) REE, to examining whether decisions taken in individual cases infringe the existing REE, its implementing regulations or higher ranking law (cf. e.g. D 6/92, point 5). Higher ranking law within the meaning of these decisions includes the EPC (D 1/81, point 2) and, in accordance with Article 125 EPC, the principles of procedural law generally recognized in the Contracting States, as e.g. the principle of equal treatment of parties (cf. D 7/82, point 3; D 1/86, point 4; D 9/96, point 3.1). On the other hand, for the reason set out above, provisions of the EC treaty or of national legislations cannot, as such, be considered as higher ranking law in the present context.

4.5.2 It is true that the Commission of the EC in its case No. IV/36.147 [1999] EComm 36 (7 April 1999) applied former Article 85 (now Article 81) EC Treaty to provisions of the Code of Conduct of the Institute of Professional Representative before the EPO (EPI) on the ground that they significantly restricted competition

or affected trade between EC Member States. This decision was taken on the basis that the EPI, to which all professional representatives registered with the EPO belong, was an "association of undertakings" within the meaning of Article 81(1) EC Treaty and that the Code of Conduct was the expression of the collective will of the members of this association. As to the applicability of the EC Treaty to such a situation reference was made by the Commission to a judgment of the Court of Justice according to which "Article 85 states that it applies to agreements between undertakings and decisions by associations of undertakings" and that "the legal framework within which such agreements are made and such decisions are taken (...) [is] irrelevant as far as the applicability of the Community rules on competition and in particular Article 85 of the Treaty are concerned" (cf. Case 123/83, **BNIC v. Clair**, [1985] ECR 391, at paragraph 17).

4.5.3 Obviously, the 'Instructions' cannot be considered as an agreement between undertakings (i.e. patent agents) or a decision by an association of such undertakings (i.e. the EPI). As set out above (cf. point 2.2.1) they are part of the legislation within the legal system of the EPC concerning the admission of candidates to the EQE and equally apply to all nationals of the EPC Contracting States (including therefore all EC Member States). The criteria referred to above for the applicability of EC law to the Code of Conduct of the EPI are clearly not met for the 'Instructions'.

4.5.4 Even if, for the sake of argument, it is assumed that the Articles 43, 82 and 86 of the EC Treaty were applicable to the 'Instructions', the conclusions drawn

by the appellant for his case could not be followed.

Article 43 EC Treaty concerns restrictions on the freedom of establishment of nationals of an EC Member State in the territory of another EC Member State. As the provisions of the REE and the 'Instructions' apply to all nationals of EPC Contracting States independently of their place of residence or employment in the Contracting States, it cannot be seen that the freedom of establishment of candidates could in any way be affected by these provisions. In particular, the appellant has not substantiated that his freedom of establishment was indeed restricted by the 'Instructions'. For this reason alone the decision C-55/94, **Gebhard v Consiglio dell'Ordine Degli Avvocati**, [1995] ECR I-4165 referred to by the appellant is not relevant for the present case. This decision concerned a situation in which the taking-up of a specific activity of a national of an EC Member State was subject to certain conditions in a host Member State, as e.g. the obligation to hold a diploma. Such conditions, if liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty (such as freedom of establishment in the host Member State) must fulfil four requirements: (1) they must be applied in non-discriminatory manner, (2) they must be justified by imperative requirements in the general interest, (3) they must be suitable for securing the attainment of the objective they pursue and (4) they must not go beyond what is necessary to attain it. Even if, as set out above, the 'Instructions' do not affect the candidates' freedom of establishment, the Board is satisfied that its provisions would in any case comply with the four **Gebhard** requirements as they are not discriminatory (cf.

point 4.4.3), they are in the general interest of avoiding unnecessary examinations (cf. point 2.2.5), they are suitable for obtaining the objective they pursue (cf. points 4.2 and 4.3) and they do not go beyond what is necessary in order to attain it (which can be concluded from the fact that in 2006 only about 37% of the candidates passed the EQE in the first sitting). On the other hand, **Articles 82 and 86 EC Treaty** referred to by the appellant concern abuse by one or more undertakings of a dominant position within the common market which is prohibited in so far as it may affect trade between Member States (Article 82). The same is true for undertakings to which a Member State has granted special or exclusive rights (Article 86). The appellant has not substantiated that the 'Instructions' grant exclusive rights to undertakings affecting trade between Member States. In the Board's view the provision of Article 6, Instructions according to which, in the exceptional case of candidates without technical diploma, 10 years' experience in the patent field is required for the admission to the EQE, is far from granting such exclusive rights to any undertaking. As already set out in point 4.4.2 the experience and knowledge required for admission to the EQE can be obtained in a wide variety of undertakings in the EPC Contracting States without any territorial restriction.

- 4.6 For all these reasons the Board is not able to follow the appellant's argument that, for the purposes of Article 6, Instructions, experience in other fields than those defined in Article 10(2)(a) REE must be recognized. Since the appellant's training periods as specified in Article 10(2)(a) REE amount to a total of

about 6 years instead of the required 10 years the requirements of Article 6, Instructions are not met. Accordingly, the *second auxiliary request* has to be rejected.

5. *Auxiliary request 3*

5.1 According to the appellant's *third auxiliary request* the case should be referred to the Examination Board for a decision under Article 9, Instructions. As already set out in point 2.2.6 the provision of Article 9, Instructions cannot be understood to the effect that the Examination Board has the power to decide on the enrolment of individual candidates in cases not covered by Article 2,3,4 or 6, Instructions.

5.2 For this reason the *third auxiliary request* has to be rejected as well.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The President:

P. Martorana

P. Messerli