

Case Number: D 0009/14

D E C I S I O N
of the Disciplinary Board of Appeal
of 30 January 2015

Appellant: N.N.

Representative: N.N.

Decision under appeal: Decision of the Examination Secretariat dated
21 July 2014 refusing the application for
enrolment for the EQE.

Composition of the Board:

Chairman: E. Dufrasne
Members: T. Bokor
H. G. Hallybone

Summary of Facts and Submissions

- I. This is an appeal against the decision of the Examination Secretariat ('Secretariat') dated 21 July 2014 according to which the appellant's application for enrolment for the European Qualifying Examination ('EQE') 2015, pre-examination, was refused.

- II. In the application for enrolment the appellant candidate filed a copy of her "Bachelor of Engineering" degree, issued by the Sogang University in Seoul, Republic of Korea, and transcripts of her degree, including a list of the courses followed and the corresponding credits. She further submitted evidence of a training period as required pursuant to Article 10(2)(a)(i) REE, starting from 3 December 2012 and continuing at least until 1 March 2015. She also submitted a copy of the Swedish recognition of her degree by the Swedish National Agency for Higher Education (Högskoleverket), which certified that her degree corresponded to a Swedish "Bachelor of Science in Engineering" degree (högskoleingenjörsexamen).

- III. In the decision under appeal the Secretariat held that the academic qualification of the appellant did not fulfil the requirements of Rule 11(2) IPREE in combination with Rule 13 IPREE, as less than 80% of the subjects studied could be considered as scientific or technical. The required length of training (nine years) in order to establish the existence of an equivalent level of knowledge pursuant to Rule 14 IPREE was also not completed, but merely two years and three months could be recognised. As a result, she could not be considered to possess an equivalent level of scientific

or technical knowledge under Rule 14 IPREE. The conditions for enrolment were thus not met and her enrolment was refused.

IV. On 28 August 2014 the candidate appealed against the decision. The appeal fee was paid the same day. In the statement setting out the grounds of appeal she submitted that her degree should be considered as generally equivalent to a bachelor's degree in some technical or scientific subject, by a direct application of Article 11(1)(a) REE. This was also attested by the certificate issued by the Swedish National Agency for Higher Education. Even though her studies required four years, thus fulfilling the requirement of Rule 11(2) IPREE that the studies should have taken at least three years, the 80% scientific/technical course hours were inherently impossible to fulfil with a diploma from Sogang University. This was so because beside the technical major subject, at least a minor subject and general education courses had to be studied, the latter two requiring almost half of all the credits necessary for obtaining a bachelor of science degree. If her degree could not be accepted, she should still be admitted to enrol pursuant to Rule 14 IPREE in conjunction with Article 11(7) REE, because she could be considered to have equivalent knowledge as defined by Rule 14 IPREE. This is supported by her professional (technical) experience of almost 11 years, having worked as a Korean Patent Attorney, and her master degree in European IP Law. Finally, she also argued that her non-admission to the EQE was discriminatory, in that it was not based on objective and equitable criteria, given that other Korean nationals were apparently admitted

with essentially equivalent qualifications. In a different line of arguments she argued that the non-admission is also discriminatory because candidates with a relatively short education could pass the 80% hurdle, which seemed absurd against the background that she had a longer education and additionally had a significant professional experience. Generally she argued that the Secretariat should consider the spirit of the rule (REE and IPREE) and should not interpret it literally.

V. The Secretariat informed the appellant in a letter dated 2 October 2014 that it did not allow the appeal. The reasons for the decision were that the Secretariat was bound to assess candidates according to the IPREE, and the applicable provisions of the REE in general. Even if a national system inherently did not allow achieving the required 80% scientific/technical content, this did not permit the Secretariat to deviate from the rules. Also, it was not apparent that all Korean diplomas would be automatically disqualified, the experience of the Secretariat showed that other Korean candidates could successfully register, as the minor subject could apparently also be technical. The REE and IPREE did not foresee the possibility of evaluating the professional experience as argued by the appellant, even if the professional experience in itself was apparently valuable. Therefore the Secretariat transmitted the appeal to the Disciplinary Board of Appeal ('Board') with letter dated 2 October 2014.

VI. In a Communication dated 1 December 2014 the Board informed the appellant of its provisional view that the

finding of the Secretariat and its assessment of the applicable provisions appeared to be correct, for reasons essentially corresponding to reasons discussed below in this decision.

VII. With letter dated 16 December 2014 the appellant submitted, through a professional representative acting as representative of the appellant under Article 17 of the Regulation on discipline for professional representatives, further arguments supported by copies of various documents. She argued that her degree indeed fulfilled the requirements of the REE and IPREE in that the 80% of technical/scientific subjects was actually achieved, if various factors were properly taken into account. These factors were the four-year education, and the significance of psychology for computer sciences. Furthermore, the equivalent knowledge pursuant to Rule 14 IPREE was also given, if the professional experience of the appellant as a Korean Patent attorney was also taken into account.

VIII. Oral proceedings were held on 30 January 2015. Both the President of the European Patent Office (EPO) and the President of the Council of the Institute of Professional Representatives (epi) were informed about the appeal proceedings and given the opportunity to file submissions. The President of epi was not represented at the oral proceedings, nor did he file observations. The representative of the President of the EPO attended the oral proceedings.

IX. In the oral proceedings the appellant was accompanied and represented by a professional representative, who argued in detail (see point 8 below) why under the

individual circumstances and facts of the case the degree of the appellant should be deemed to correspond to a degree requiring 80% technical subjects and as such to fulfil Rule 11(2) IPREE, so that the application for enrolment had to be granted on that basis. If the Board would not follow this argument, it was further submitted that the activities of the appellant while working as a Korean patent attorney were comparable to the activities of an assistant under Article 11(2)(a)(i) REE working under the supervision of a professional representative. In this manner the professional experience of the appellant during her years in Korea could be taken into account, so that at least she should be enrolled under Rule 14 IPREE.

X. The representative of the President of the EPO submitted that knowledge of psychology might be useful in certain technical fields, such as computer sciences, but this fact does not make psychology courses technical or scientific for the purposes of Rule 11(2) IPREE. As to Rule 14 IPREE, in the requirement of "at least ten years' experience in the activities defined in Article 11(2)(a) REE" the term "experience" was not intended to have any special significance. The rule merely intended to mean that a candidate shall establish a correspondingly longer training or employment essentially in the same manner as defined in Article 11(2)(a) REE for the shorter three (two) years' period and under similar conditions, i.e. either as an assistant to a professional representative or as an employee representing his employer before the EPO.

XI. The appellant requested that the decision under appeal be set aside, and her application for enrolment for the

pre-examination of the EQE 2015 be granted. The decision of the Board was announced at the end of the oral proceedings.

Reasons for the decision

Unless indicated otherwise, REE refers to the version in force from 1 January 2009 (Supplementary Publication to OJ EPO 2/2014, 2), and IPREE refers to the version in force from 1 April 2010 (Supplementary Publication to OJ EPO 2/2014, 18).

1. The appeal is admissible.
2. Article 24(1) REE provides that an appeal shall lie from decisions of the Examination Board and the Secretariat only on grounds of infringement of the REE or any provision relating to its application. Such decisions may therefore in principle only be reviewed by the Disciplinary Board of Appeal for the purposes of establishing whether they infringed the REE, provisions relating to its application or higher ranking law (D 1/92, OJ 1993, 357; D 6/92, OJ 1993, 361). The issue to be examined in the present case is therefore whether the decision of the Secretariat to refuse the appellant's application for enrolment for the EQE 2015 pre-examination infringed the REE, any provision relating to its application or higher ranking law.
3. Article 9(2)(b) and (c) REE stipulates that the Secretariat shall prepare and organise the examinations and decide on the registration and enrolment of candidates in accordance with the REE and IPREE. It is noted that following the introduction of the pre-examination (Article 1(7) REE, Rule 10 IPREE), the term

"registration" is reserved for the examination proper, while "enrolment" is used for the pre-examination. Both concern in essence the formal admission to the respective examinations, which clearly falls in the competence of the Secretariat. Article 10(2)(b) REE stipulates that in performing its duties relating to registration and enrolment, the Secretariat shall not be bound by any instructions and shall only comply with the provisions of the REE and the IPREE.

4. The appellant applied for enrolment for the pre-examination. The conditions of enrolment for the pre-examination are specified in Article 11(7) REE. Article 11(7) REE, first sentence requires that candidates provide evidence of at least two years' training pursuant to Article 11(2)(a)(i) or (ii) REE. Such evidence has been provided by the appellant. Furthermore, Article 11(7) REE, second sentence dictates that all other conditions applicable to the examination shall apply equally to the pre-examination, unless the contrary is specifically stated.

5. Article 11(1)(a) REE stipulates that candidates shall be registered for examination (and implicitly, shall be enrolled for the pre-examination) provided that 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, as defined in the IPREE. The relevant implementing provisions to this article are Rules 11-15 IPREE. Rule 11(1) IPREE requires that the degree must have at least the level of a technical bachelor (or equivalent), and further it must be in a subject as defined by Rule 13. The fulfilment of these

requirements is not disputed in the present case (also considering Rule 12 IPREE). One contentious issue is the requirement of the 80% technical/scientific course hours, as defined by Rule 11(2) IPREE. The other contentious issue is the proof of the required duration and/or substance of the experience in professional activities as defined by Rule 14 IPREE, in order to establish the possession of equivalent knowledge for the purposes of Article 11(1)(a) REE in conjunction with Rule 11(3) IPREE.

80% technical/scientific course hours, Rule 11(2) IPREE

6. As a preliminary and general observation, the Board holds that the Secretariat has little room to take factors into consideration which were not explicitly addressed by the REE and IPREE, when examining a degree of a candidate. Article 11(1)(a) REE explicitly refers to the IPREE. Rule 11, in particular paragraphs (1) and (2) IPREE provide the applicable rules for determining whether the necessary qualification for the purposes of Article 11(1)(a) REE is given for any candidate. Rule 11(3) IPREE clearly identifies Rule 14 IPREE as the (only) applicable provision when the formal educational requirements foreseen in Rule 11(1) and 11(2) IPREE are not fulfilled. It follows from the structure of the REE and IPREE that any possible exceptions from the otherwise cogent provisions must be clearly and explicitly identified. As examples of such foreseen exceptions the Board points to Rules 14, 16 and 17 IPREE, which are again based on an explicit permission of a higher ranking law, see Article 11(1)(a) REE, last phrase (for Rule 14 IPREE), Article 11(5) REE (for Rule 16 IPREE) or Article 3(6)(b) REE (for Rule 17

IPREE). The Board sees no possibility to ignore the requirements of Rules 11 to 13 IPREE, other than the exception foreseen by Rule 14 IPREE (see also D 9/13 of 21 May 2014, point 9 of the Reasons). On this basis, the Secretariat (and the Board) is bound to interpret these provisions of the REE and IPREE relatively strictly and limiting.

7. In the grounds of appeal the appellant did not dispute the facts upon which the finding of the Examining Secretariat were based, namely that her formal education did not fulfil Rule 11(2) IPREE concerning the required 80% technical content. It was only later, in her letter of 16 December 2014 and during the oral proceedings before the Board, that the appellant also contested this and provided arguments for the recognition of her degree pursuant to Rule 11(2) IPREE.

8. The appellant submits that her degree must be considered to achieve the required 80% technical/scientific content taking into consideration the combined effect of four distinct points, as follows:
 - (a) The basis of the calculations should be the required number of credits, and not the actually achieved higher number, i.e. 140 credits instead of 145 credits. The additional 5 credits were earned in non-obligatory courses, for which she should not be punished.
 - (b) The calculation must take into consideration that the degree took four years of study, instead of the required three years. Accordingly, the number of credits serving as the basis of the calculation of the 80% should be proportionally lowered, i.e. instead of 140 credits, only $\frac{3}{4} \times 140$ credits =

105 credits should be taken into consideration. Thus she merely needs to show that at least 80% of 105 credits = 84 credits have been obtained through courses which are devoted to technical/scientific subjects.

- (c) The degree of the appellant is in the field of information technology (commonly referred to as IT). This field is specifically listed in Rule 13 IPREE. Within this broad field, her major subject is Computer Sciences, while her minor subject is Psychology.
- (d) Psychology is very important for and plays a particular role in the field of IT. This is attested by the various scientific articles and textbook sources submitted with the letter of 16 December 2014. This fact is well known, and follows also from the fact that one of the main goals of IT is to support, complement and/or imitate mental processes of humans. Also, there are various interdisciplinary fields falling within IT, among others such as artificial intelligence (AI) and human-computer interaction (HCI), which rely on the results of psychology. In this manner, it is clear that certain fields (or subjects) within psychology are particularly important for IT, and advantageously complement the computer science education of the appellant. Such fields are, among others, the following: Psychology of adjustment, Human growth and development, Psychology of cognition, Social psychology, Educational psychology. These fields within the psychology studies deal with the topics relevant for the technical subjects of AI and HCI. The appellant obtained 12 credits in these

subjects. In this manner, these 12 credits are relevant for the technical content of the studies and therefore must flow into the calculation of the 80%. On this basis, the appellant can demonstrate 88 credits, i.e. 84% technical/scientific content $(=(76+12 \text{ credits}) / 105 \text{ credits})$.

9. The Board understands that the calculation as presented above only yields the required minimum percentage if all four above points (a) to (d) are accepted by the Board. This understanding was also explicitly confirmed by the representative of the appellant during the oral proceedings, on a question by the Board. However, the Board holds that at least point (b) of these arguments cannot be accepted, as explained below.
10. Rule 11(2) IPREE requires that an academic degree for the purposes of Article 11(1)(a) REE shall have been awarded after at least three year's full-time course, but the basis of the calculation of the 80% technical/scientific course hours is the "course hours taken to obtain **this** degree" (emphasis by the Board).
11. The Board notes that the rules do not foresee that the calculation should also be possible on the basis of the credits, here the credits awarded by the Korean university. Rule 11(2) IPREE clearly state "course hours". However, this point has not been raised by the Secretariat, and the Board takes it that the Secretariat was satisfied that the credits awarded were essentially proportional to the number of course hours. In this regard, the Board does not wish to employ stricter criteria than the Secretariat. The Board is

aware that many educational establishments issue certificates indicating only the awarded credits, but not necessarily the course hours. For this reason the Board accepts, for the benefit of the appellant, that a calculation on the basis of credits may be suitable for the purposes of Rule 11(2) IPREE. In order to avoid any misunderstanding, the Board confirms that in case of any discrepancy between the calculations based on course hours vs. calculations based on credits, the former is authoritative, see also decisions D 1/12-D 4/12 of 5 December 2012, e.g. points 16-19 of the Reasons in D 1/12.

12. Concerning the argument under point (b), the Board holds that there is no room for "scaling down" the basis of the calculation to three years. This proposition of the appellant implicitly presumes that the legislator sought to define some abstract "minimum reference course", with a given number of technical or scientific course hours over three-years, so that any applicant needs only to demonstrate that his course hours achieve this number. However, there is no such "reference course" derivable from the applicable rules. The legislator recognises that different technical or scientific degrees may require different number of course hours, not to mention the differences due to differing academic levels, and therefore the 80% is always to be calculated from the required course hours for the given academic degree under scrutiny. In the present case this means that the degree of the appellant required four years of study, and therefore it is still 80% of the total of the course hours "taken to obtain this degree" that must be scientific or technical. On this basis, it appears that the

calculated technical content (accepting for the benefit of the appellant the 140 credits as basis under point a) and still ignoring points c) and d) on the issue of the technical nature of the psychology subjects) is merely $(76+12)/140 = 88/140 = 62\%$, i.e. rather far from the required 80%. Therefore, the Board is unable to accept that the degree of the appellant fulfils the requirements of Rule 11(2) IPREE.

13. Given that the argument under point b) is not accepted by the Board and the appellant admits that its arguments can only succeed if accepted in all four points, the arguments under points c) and d) need not be examined in detail for the decision of the Board, nor needs the Board to review the content of the documents submitted in support of these arguments.
14. In the grounds of appeal the appellant submitted further arguments why her degree should be considered to fulfil the requirements of Rule 11(2) IPREE. These arguments were dealt with in detail by the Board in its preliminary communication. The appellant did not dispute these arguments, or raised them in the oral proceedings as independent arguments, but merely to supplement and to underline its arguments as explained in points IV and 8 above. The Board gives its assessment of these subsidiary arguments below.
15. The appellant submitted that her degree formally corresponded to a Swedish technical bachelor degree, and this was attested by the competent Swedish authority; see point II above (point 1.1 of the Grounds of Appeal). The Board points out that the REE and IPREE do not permit the Secretariat to accept the mere fact

that the Swedish authority recognised the diploma of the candidate as a Swedish "Bachelor of Science". Apart from the fact that the Swedish authority most probably employs different criteria for the recognition, it must be kept in mind that it is not the conferred title, but the actual technical content of the studies which is decisive pursuant to Rule 11(2) IPREE. In fact, it is not impossible that a Swedish candidate with a Swedish "Bachelor of Science" diploma will also not be admitted to the EQE, depending on the relevant technical content of the studies. Decisively, the EQE system is independent and autonomous, based on its proper requirements adapted to the special requirements of the regulated patent profession. In this case, the submitted facts concerning the recognition of the degree by the Swedish authority cannot influence the disputed calculation.

16. The appellant submitted that a candidate graduating from any Korean university, or at least a graduate of the Sogang University, inherently cannot have a technical proportion above 80%, see point IV above (point 1.2 of the Grounds of Appeal). The Board observes that on the basis of the evidence available in the file, this argument appears to hold only for students of the Sogang University, or possibly to a number of other Korean universities, but not necessarily to all of them. The admission criteria of the REE and IPREE do not guarantee that at least some degrees from any country or technical university must be recognised for the purposes of the EQE. It is indeed possible, though probably unintended, that **none** of the degrees offered by some technical universities of some countries would satisfy the requirements of the REE and

IPREE for admission to the EQE, no matter how prestigious such universities may be. The Board also notes that the appellant did not make it very clear why this argument should lead to a recognition of her degree, but the Board takes it from the totality of the submissions that the appellant relies on equitable principles, and this argument on the general unsuitability of Korean degrees also supports her argument below in point 17.

17. The appellant submitted that she is aware of at least four other Korean nationals, who did not or could not possess the required technical qualifications, yet they were admitted to the EQE, see point IV above (point 1.3 of the Grounds of Appeal). The Board is unable to rely on or to verify these facts in the absence of any tangible evidence. Moreover, without knowing further details, the mere fact that this could have happened, does not establish the legal grounds for the appellant to be admitted as well. The Board refers to cases D 0001-0004/12, which treated a similar issue. There the competent Board held that no legitimate expectation of a non-admitted candidate can be recognised from the mere fact that an authority applied the law beyond the limits of its foreseen powers without any apparent and justifiable reason (the principle of "kein Gleichbehandlung im Unrecht", essentially saying that there is no claim to equal treatment that is wrong in law). If this were not so, an authority charged with the application of a cogent legal provision would be given the effective power to overturn or hollow out such cogent legal provisions completely, simply by substituting the law with essentially erroneous decisions, where later decisions could then be taken

with a simple reference to the principle of equal treatment (see e.g. D 0004/12 of 5 December 2012, points 23-25 of the Reasons).

18. For the reasons above, the Board is unable to accept that the degree of the appellant fulfils the requirements of Rule 11(2) IPREE, so that her degree cannot be recognised as a university-level scientific or technical qualification for the purposes of Article 11(1)(a), first phrase, REE.

Equivalent knowledge through experience, Rule 14 IPREE

19. Rule 14 IPREE stipulates that "equivalent [level of scientific and/or technical] knowledge" of a candidate can be recognised instead of a degree pursuant to Rules 11 to 13 IPREE, if the candidate "can establish that he has at least ten years' experience in the activities defined in Article 11(2)(a) REE".
20. In the grounds of appeal the appellant invoked a number of arguments why her professional experience should be recognised under Rule 14 IPREE as "equivalent knowledge" for the purposes of Article 11(1)(a), second phrase, REE. The argument of other Korean nationals being admitted (point 2.2 of the Grounds of Appeal) has been treated and dismissed by the Board, see point 17 above, and the Board does not see why this argument would succeed for the recognition of the equivalent knowledge. The substance of this argument, i.e. the existence of discrimination, is apparently not related to the circumvented or ignored legal provision, here the (allegedly) missing qualifications of the admitted Korean nationals. The other arguments (points 2.3-2.4

of the Grounds of Appeal) concerned the proven and demonstrated factual professional experience of the appellant. This was attested by a supporting statement from a European professional representative, who attested his personal opinion that the appellant demonstrated more than adequate level of technical qualifications. Further, the appellant elaborated in detail her professional career, thus demonstrating that she had many years of experience in patent work.

21. These arguments were treated by the Board in its preliminary communication, where the Board gave reasons why these arguments could not be accepted. These reasons of the Board are reiterated here, also referring to its general observation in point 6 above.
22. The Board observes that the appellant seeks to rely on her professional activities in a non-contracting state, contrary to Rule 15 IPREE, and therefore it appears problematic to take into consideration the professional experience of the candidate from her years in Korea. As discussed below in points 34-36, this problem indeed affects the recognition of her professional experience.
23. Maintaining its preliminary opinion, the Board holds that a recognition of some other, general professional experience, which does not clearly fall under any of the two provisions of Article 11(2)(a)(i) and (ii) REE, also taking into account work on national patents pursuant to Article 11(4), is not foreseen in the REE or IPREE, and the Board does not have the power to introduce this by way of jurisprudence (D 0009/13 of 21 May 2014, points 14 and 16 of the Reasons). To that extent, neither the supporting letter of the

supervising professional representative, nor the legal degree of the candidate can be taken into consideration by the Board. The Board adds that it is an inherent problem of the recognition of professional experience that any comparison with some legally defined minimum threshold (which comparison would then inevitably be a duty of the Secretariat) is necessarily subjective and difficult in practical application.

24. The above is also applicable to the argument of "risk of unintentional discrimination relative to candidates having a shorter education" (point 2.6 of the Grounds of Appeal), see also point V above. The Board repeats that the experience of the candidate as a Korean patent attorney is by no means considered useless. The Board is also not aware of any legislative intention to discriminate foreign (i.e. non-European) nationals. However, as also demonstrated by Rule 15 IPREE, the system is essentially designed for the European practice and practitioners. There cannot be any expectation, let alone a legitimate expectation, that the legislator ought to have considered (or indeed did consider) the possible implications of the admission rules of the REE and IPREE for candidates having degrees from non-European educational establishments. The legislative history and previous case law clearly demonstrates that setting up the admission criteria while keeping in mind the large spread of degrees offered by European educational establishments was a difficult task for the legislator in itself.

25. The Board observes that the above arguments of the appellant concerning admission under Rule 14 IPREE were not relied on in the oral proceedings, and in its

letter of 16 December 2014 the appellant admitted that some of her arguments in the grounds of appeal were less relevant. Instead, in this letter and in the oral proceedings she emphasised the fact that her professional experience involved close cooperation with European professional representatives, the latter effectively supervising the appellant. The Board will examine this argument in detail below.

26. Turning to the substance of Rule 14 IPREE (see point 19 above), the first question that arises here how the term "at least ten years' **experience in the activities**" (emphasis by the Board) is to be understood. The representative of the President of the EPO submitted during the oral proceedings that in the practice of the Secretariat, this requirement simply means that the full-time training or employment should have lasted ten years (nine years for an admission to the pre-examination), instead of the three (two) years applicable for candidates with a recognised degree. Otherwise, all other conditions should be the same, including the formal full-time assistant or employee status stipulated by Article 11(2)(a)(i) or (ii) REE. The Board adds that if this were indeed so, apparently Rule 15 IPREE also would have to apply, so that in the present case the work experience in Korea would have to be disregarded on this ground alone.

27. The appellant essentially argued that her activities while working in Korea were highly similar to the activities of an assistant being trained under the supervision of a professional representative in the sense of Article 11(2)(a)(i) REE. However, she did not argue that she was actually an assistant of a European

professional representative while working for her clients in Korea in her capacity as a Korean Patent Attorney. Indeed, she has only established a relatively short period where she was also formally an assistant, see points II and III above.

28. The Board considers that this assessment of her status is also correct. As a Korean attorney, she was obviously in charge of the files of her clients (or her Korean employer), and as such she was entitled to give instructions to the European professional representative partners with whom she cooperated. In this manner she must have been directly responsible for her work towards her clients (or her employer), while her relationship with the European professional representative was necessarily a client-representative relationship. Such a client-representative relationship is not compatible with the status of an assistant, who is under the supervision of and instructed by the professional representative, the latter being finally responsible for the work done by the assistant. See decision D 2/13 of 5 May 2014, points 19 and 20 of the Reasons, also citing decisions D 12/06 and D 13/06 of 13 February 2007.

29. In this manner it is clear that the appellant cannot fulfil the requirements of Rule 14 IPREE, if this rule indeed requires a candidate to work full time as an assistant or employee for ten years, as submitted by the representative of the President of the EPO, see points X and 26 above. The Board notes that the Secretariat requires merely nine years for candidates applying for admission to the pre-examinations, apparently applying the foreseen reduction of the

applicable periods by Article 11(7) REE analogously to Rule 14 IPREE.

30. The Board notes that the wording of Rule 14 IPREE is ambiguous, in that it appears to leave open whether the "experience" in the referred activities must be obtained in one of the formally prescribed forms of employment, namely as an assistant (Article 11(2)(a)(i) REE) or employee (Article 11(2)(a)(ii) REE), or whether the emphasis in Rule 14 IPREE is only on the actual "activities", i.e. the actual work done by the candidate. However, it need not be decided in the present case whether the lacking assistant or employee status of the appellant *per se* precludes her from complying with the requirements of Rule 14 IPREE.

31. Even if assuming, for the benefit of the appellant, that the "at least ten years' experience in the activities" required by Rule 14 IPREE only refers to the "wide range of activities pertaining to European patent applications or European patents", the Board holds that the (proportional) amount (i.e. volume) and character of this activity must be comparable to that expected from an assistant pursuant to Article 11(2)(a)(i) REE. Accordingly, the Board must examine if this is the case here.

32. In this regard, it was submitted that the work of the appellant with European patents and patent applications was highly similar to that of an assistant, even when she was working in Korea as a Korean patent attorney. Among others, she had to prepare drafts which were reviewed by the European professional representative. Her work on the European applications required her to

have a deep understanding of the European legal framework and European patent practices. Further, Article 11(4) REE foresaw that work on national patents should be "taken into account" when determining the applicable periods of professional activity under paragraph 2(a) of that article.

33. The Board, having carefully examined the submissions of the appellant and the totality of the facts, is not convinced by this argument, for the following reasons.

34. The activities referred to in Rule 14 IPREE are not exhausted by the core activities of a representative, i.e. the analysis and preparation of written materials for patent applications and generally correspondence with the EPO, with the cooperating representatives and with the clients, i.e. "the paperwork". Article 11(2)(i) REE requires the assistant to take part in a **wide range of activities** pertaining to European patent applications and patents. These wide ranging activities also include his exposure to numerous other tasks of a professional representative, such as consulting personally with the clients, organising the work within the office of the professional representative, working with a system for monitoring time limits, paying fees, etc. It is partly for this reason that Article 11(2)(a)(i) REE requires full-time training, which essentially requires that the assistant is working in close relation with the supervising professional representative, at least on a regular basis and for a larger part of the training. (D 4/86 of 9 June 1987, point 5 of the Reasons (under previously applicable, but similar rules) and D 2/13 *supra*, point 17 of the Reasons). This condition obviously

could not have been met by a Korean patent attorney working in Korea (unless the supervising professional representative himself had his regular office in Korea and was also working there on a regular basis, but this was not submitted here), quite apart from the possible problem of Rule 15 IPREE mentioned under point 26 above.

35. The Board has no reason to doubt that a Korean attorney can or even needs to work in a similarly orderly and organised fashion as a European professional representative, and is faced with highly similar tasks when organising the everyday work of a patent attorney. However, the Board can only recognise these activities as "experience" under Rule 14 IPREE if they were indeed performed under the direct and personal supervision of a European professional representative, working in close relation with the candidate. The representative is expected to attest towards the Secretariat the amount and the character of the work and that the work was performed under his supervision. However, the supervising professional representative can only issue a reliable attest if the candidate worked with him on a regular basis.

36. The Board also holds that under the circumstances of the above mentioned client-attorney (legal) relationship (see point 28 above) some training aspects of the professional relationship inevitably has to be different from that existing between an assistant and the supervising professional representative. While in the latter case the supervisor is normally entitled to assign a certain amount of work to the assistant and is able to assess the amount (and quality) of work actually done, including the proportion of the European

patent work, this is hardly possible with a foreign patent attorney client. The Board can accept that the appellant regularly sent drafts prepared by her and received the corrected drafts, but does not find it plausible that the consulting European professional representative would have been in a position to dispose over and control the work of his client. Put simply, the element of supervision by the professional representative is also missing in this respect.

37. The lack of supervision cannot be compensated by **also** (emphasis by the Board) taking into account some of the work of the appellant under Article 11(4) REE. The Board considers that this provision is merely of supplementary nature, so that the work with national patents, even when taken into account, can only constitute a part of the activities of the assistant (or employee). Therefore, it needs not be addressed here whether Rule 15 IPREE also applies, or whether a candidate's experience (or "activity" in general) in national patent matters must necessarily relate to proceedings in the Contracting States to the EPC, in order to be "taken into account" under Article 11(4) REE.

38. The Board notes that for employees pursuant to Article 11(2)(a)(ii) REE the supervision by the professional representative is substituted by the requirement for a factual representation of their employer before the EPO. In this manner, instead of a supervisor, the Secretariat is able to assess the amount and character of the candidate's activities.

39. Thus considering the totality of the facts and submissions of the appellant, the Board finds that the appellant did not establish that her experience with European patent applications and patents would correspond to that of an assistant working essentially full-time for at least nine years. She has not submitted, and the Board needs not consider it whether her experience would have been comparable to that of an employee in the sense of Article 11(2)(a)(ii) REE. This is anyway not plausible, as according to her submitted personal profile (curriculum vitae, Document 7 attached to the grounds of appeal) in the period in question she was not employed by any European company whom she possibly could have represented directly before the EPO under Article 133(3) EPC. In this manner her professional experience cannot be recognised under Rule 14 IPREE. From this it follows that she cannot be considered to possess an equivalent level of scientific or technical knowledge pursuant to Article 11(1)(a) REE.
40. On the basis of the above, the Board finds that the decision of the Secretariat did not infringe the applicable provisions of REE or IPREE, nor of any higher ranking law. Therefore, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

E. Dufrasne