



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

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Case Number: D 0049/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 9 February 2022

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board dated 21 June 2021 concerning the European Qualifying Examination 2021.**

Composition of the Board:

Chairman: W. Sekretaruk
Members: T. Karamanli
D. Korper Žemva

Summary of Facts and Submissions

- I. This appeal is against the decision of the Examination Board that the requirements of Article 14(1) of the Regulation of the European qualifying examination for professional representatives (REE, current version published in OJ EPO 2019, Supplementary publication 2, 2 ff) had not been fulfilled such that the appellant did not pass the European qualifying examination (EQE) 2021.

- II. The appellant sat the main examination in the EQE 2021 for Papers A, B, C and D.

- III. By letter from the Examination Secretariat dated 21 June 2021, the Chairman of the Examination Board informed the appellant that the appellant's answer paper to Paper A in the EQE 2021 had been awarded 38 marks and that, on the basis of these marks, the Examination Board had decided that the requirements of Article 14(1) REE had not been fulfilled such that the appellant had not passed the EQE 2021.

The letter contained, *inter alia*, as an attachment, the details of the marking of Paper A, according to which Examination Committee I agreed on 38 marks for the appellant's answer on Paper A and recommended the FAIL grade.

- IV. By her fax-letter dated 28 July 2021, received by the Examination Secretariat on the same day, the appellant filed notice of appeal, including her statement of grounds for appeal to challenge the decision of the Examination Board. She paid the prescribed appeal fee

on the same day. The confirmation letter was received by the Examination Secretariat on 2 August 2021.

The appellant's submissions in her statement of grounds of appeal were directed only against the marking of her answer to Paper A. She submitted that her answer to Paper A was incorrectly marked as a result of mistakes which were serious and so obvious that they could be established without re-opening the entire marking procedure. These mistakes led to her failing Paper A and, as a result, the EQE in its entirety. This was therefore an infringement of the provisions of the REE and the Implementing provisions to the Regulation of the European qualifying examination (IPREE, current version published in OJ EPO 2019, Supplementary publication 2, 18 ff). She believed that an objective evaluation of her answers to Paper A should have led to her answer paper being awarded a higher grade (at least a COMPENSABLE FAIL).

- V. The Examination Board remitted the appeal to the Disciplinary Board of Appeal of the EPO (DBA) without rectifying its decision.
- VI. By letter of 10 August 2021, the Examination Secretariat informed the appellant that her appeal had not been allowed by the Examination Board and that, consequently, her appeal had been forwarded to the DBA.
- VII. In accordance with Article 24(4), first sentence, REE in conjunction with Article 12, second sentence, of the Regulation on discipline for professional representatives (RDR, Supplementary publication 1, OJ EPO 2022, 140 ff), the DBA consulted both the President of the EPO and the President of the Council of the Institute of Professional Representatives before the

EPO (epi), neither of whom presented any comment in writing on the merits of the appeal.

VIII. On 3 January 2022, a summons to oral proceedings before the DBA in the current case (the board) was issued. In a communication in accordance with Articles 13(2) and 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (Supplementary Publication 1, OJ EPO 2022, 67 ff), the board informed the appellant of its preliminary opinion.

IX. The non-public oral proceedings before the board were held on 9 February 2022 by video conference.

The appellant was accompanied by the professional representative Mr B.H. Heller pursuant to Article 24(4), first sentence, REE in conjunction with Article 17 RDR. The President of the epi was represented by Mr B. van Wezenbeek pursuant to Article 24(4), first sentence, REE in conjunction with Article 14, second sentence, RDR. The President of the EPO was not represented.

The appellant confirmed that her requests were as follows.

The appellant requested that the decision under appeal be set aside and that her answer paper to Paper A in the European qualifying examination (EQE) 2021 be awarded at least 45 marks, i.e. a COMPENSABLE FAIL grade. In addition, she requested that the appeal fee be reimbursed.

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

(a) *Independent product claim*

She accepted that 15 marks had been deducted from the 40 marks possible as her independent product claim to an engine component in which an adhesion layer was present excluded the embodiment in which the coating was deposited directly on the superalloy (see also point 4.1.2 of the Examiners' Report - Paper A 2021 (Examiners' Report)). She also accepted that a further 10 marks had been deducted because her product claim, which was new in view of the adhesion layer, lacked the feature of the ceramic oxide layer having a minimum thickness (see also point 4.1.6 of the Examiners' Report).

However, her product claim should have been awarded 15 out of the 40 marks available because it was unjustifiable that 7 more marks had been deducted.

On the one hand, a deduction of 7 marks for the reasons given in point 4.1.6 of the Examiners' Report was a serious and obvious mistake in line with decision D 7/05 as her product claim had not been limited to components of the combustion zone but instead merely required that the coated engine component be suitable for engines with a combustion zone at a temperature of at least 1600 °C, and this could not be considered an unnecessary limitation. Only a legally incorrect interpretation of her claim would have considered it limited to combustion zones. Hence, her claim had been misread or misinterpreted.

On the other hand, an alternative reason for the deduction of 7 marks was the justification in point

4.1.3 if the examiners had considered the feature "*the adhesion layer containing nickel and/or cobalt ... and/or yttrium*" in her product claim to present an unnecessary limitation other than the one set out explicitly in the Examiners' Report. She submitted that the presence of the composition of the adhesion layer in her claim was not an unnecessary limitation but was required in view of the examination paper. The adhesion layer was required in her claim (in combination with the columnar ceramic oxide) to achieve the technical effect of improving the lifetime of the D1 components and thus solve the technical problem of providing coated engine components with longer lifetimes. As such, to assert that the composition was an unnecessary limitation in her claim must be the result of a serious and obvious mistake based on a technically false premise (D 7/05). This mistake could be established without re-opening the entire marking procedure by looking to the relevant paragraphs in the letter from the applicant and in D1.

(b) *Independent method claims 9 and 12*

- (i) Point 4.2.1 of the Examiners' Report stated: "*In general when marking the method claims no double penalisation is applied. Thus, no marks are deducted in the method claims for features already subject to a mark deduction in the product claim. Similarly a mark deduction applied to one method claim is not applied to the other method claim. The exceptions to this rule are defined below.*" In view of this statement and decision D 13/17, in which

the board held that losing marks twice for a single mistake (due to Paper A's particular structure) was not in keeping with the standards for fair marking, the appellant assumed that no marks had been deducted for the presence of an adhesion layer in her independent method claims 9 and 12. If marks had been deducted for the presence of this feature in these claims, this was clearly a serious and obvious mistake.

- (ii) It was possible that marks were deducted for including a proviso in independent method claim 9 that "*when the ceramic oxide is zirconium oxide, the temperature is 950-1000°C*" because this proviso was not included in the expected independent claim in the Examiners' Report. Instead, this proviso was expected in a dependent claim (see point 4.3.3 of the Examiners' Report). However, paragraph [009] of the letter from the applicant stated that "*when the ceramic oxide is zirconium oxide a temperature of 950-1000°C is required*". Therefore, without this wording, claim 1 covered non-working embodiments in so far as it related to zirconium oxide and a temperature outside of 950-1000 °C during the deposition. Therefore, it was clear from the facts of the examination paper, specifically paragraph [009] of the letter from the applicant, that the proviso was required for this independent method claim to be sufficiently disclosed. It would have been a serious and obvious mistake to deduct

marks for including this proviso in the independent claim. This could be established with reference to paragraph [009] of the letter from the applicant and did not require re-opening the entire marking procedure.

- (iii) In section 4.2.5, the Examiners' Report stated that "*both methods must deposit a coating on a superalloy, if this limitation is not present then 2 marks are lost*". If 2 marks were deducted in the appellant's answer paper, this would be incorrect. Her independent method claim 9 required the step of "*evaporating the source for the adhesion layer and depositing it on the substrate to form the adhesion layer*". The substrate recited in her claim 9 had to be made of superalloy by virtue of the dependency on claim 1 and the statement in claim 1 that the "*substrate is made of a superalloy*". Similarly, her independent method claim 12 required the step of "*applying the adhesion layer (12, 22) and then the ceramic oxide layer (13, 23) to the substrate*". Claim 12 was dependent on claim 8, which was dependent on claim 1. Therefore, for the same reasons as for claim 9, no marks should have been deducted for lack of the term "*superalloy*" in independent method claim 12. Thus, both her independent method claims clearly recited depositing a coating on a superalloy through use of the term "the substrate" and the antecedent basis by virtue of the dependency on claim 1, where the substrate

was defined as being "*made of a superalloy*". The deduction of any additional marks for the above reasons would be a serious and obvious mistake.

- (iv) Her independent method claim 12 was dependent on claim 8, which referred to claims 1 to 7 and was thus a dependent product claim. Based on the Examiners' Report, it appeared that she had been deducted 3 marks for including plasma spraying in claim 12 (see section 4.2.4) and 3 marks for an unnecessary limitation based on the dependency on claim 8 (i.e. requiring that each column consist of a stack of flattened grains of ceramic oxide). Dependent product claim 8 was a mistake, and because of the features of claim 8, it had been necessary to base independent method claim 12 on claim 8 and to include plasma spraying in claim 12. Hence, she had lost marks several times for the same mistake. As held in decision D 13/17, losing marks twice for a single mistake was not in keeping with the standards for fair marking set in the case law. The board in D 13/17 noted that due to the particular structure of Paper A, it might happen that an incorrect answer by a candidate to an element in one part of the paper affected the answer to another part of the paper and that this could lead to a loss of the marks that could be achieved twice for one and the same error. Therefore, the deduction of 3 marks for including plasma spraying in claim 12 and 3

marks for an unnecessary limitation based on the dependency on claim 8 amounted to a double penalty which was the result of a serious and obvious mistake.

(c) *Dependent claims*

Based on point 4.3.3 of the Examiners' Report, the appellant understood that marks were awarded for her claim 3 ("maximum thickness"), claim 4 ("thickness of adhesion layer"), claim 5 ("zirconium oxide or list of oxides mentioned in application and D1"), claim 6 ("components mentioned in the application"), claim 7 ("turbine blade with cooling holes"), claim 13 ("laser") and claim 14 ("cooling holes by laser"). However, additional marks should have been awarded for the dependent claims part of her paper for the following reasons.

(i) Double penalty

Although the board in case D 13/17 did not explicitly consider the dependent claims of Paper A, this decision would apply equally to such claims. An incorrect answer in the independent claims could affect the answer in the dependent claims, resulting in a double penalty, which would not be in keeping with the standards for fair marking set in the case law.

It appeared that no marks had been awarded for the appellant's claim 2, which recited that the ceramic oxide layer had a thickness of at least 25 micrometres. As

set out in the Examiners' Report, this feature should have been in the independent product claim, and thus 10 marks were lost for her claim 1 as a result. Applying D 13/17, to not be awarded marks for a dependent claim reciting a feature that should have been in the independent claim (where marks had already been lost for the absence of this feature from the independent claim) equated to a double penalty. Therefore, if no marks were awarded for the minimum thickness feature in claim 2, this was a double penalty and the result of a serious and obvious mistake. While she should have included this feature in claim 1, she had identified that it was a relevant feature and hence included it in a dependent claim. As such, marks should have been awarded for her claim 2. As an aside, the Examiners' Report - Paper A 2017 explicitly stated that *"candidates who had a feature missing from the independent claim could gain 3 marks for having that feature in a dependent claim"*. A similar marking practice should have been carried out for Paper A 2021 (if it had not been) to avoid double penalties.

In addition, the appellant should have been awarded dependent claim marks for features in her independent claims that were not present in the expected independent claims in the Examiners' Report and for which she was deducted marks. It would not have been logical for her to have included such features in dependent claims (and therefore

be awarded the dependent claim marks) when those features were already present in an independent claim (where they had resulted in a deduction of marks). Thus, this situation equated to a double penalty as she had been penalised for including these features in independent claims and also not awarded dependent claim marks for these features, despite the fact that they attracted marks in the Examiners' Report. Therefore, the composition of the adhesion layer featured in her claim 1 should be awarded the 2 marks available under the dependent claims. She should also be awarded 1 mark each for the source of the adhesion layer in her independent method claim 9 and for the adhesion layer and plasma spraying in her independent method claim 12. She also noted that the "temperature of zirconium oxide" was awarded 1 dependent claim mark in the Examiners' Report. She had been incorrectly penalised for this feature being present in her independent method claim 9.

- (ii) Her dependent claims 10 and 11 should be awarded 1 mark each, despite not being mentioned in the Examiners' Report. The features of these claims were disclosed in the letter from the applicant (paragraph [009]) and were reasonable fallback positions for the electron-beam evaporation method set out in her independent claim 9. Therefore, claims 10 and 11 represented reasonable dependent claims and should be awarded marks. This was in line with

decision D 7/05, where the board referred to the need to allow for the fair marking of answers which, although deviating from the marking scheme, were nonetheless reasonable and competently substantiated. (She noted that this decision related to Paper D and that the "*competently substantiated*" criterion did not apply to the claim drafting in Paper A, where marks were awarded for the claims irrespective of any substantiation. This was clear from the Examiners' Report, where the marks awarded for the claims, under sections 2, 3 and 4.1 to 4.3, were for the claimed features themselves.)

Reasons for the Decision

Admissibility of the appeal

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

Shorter notice period

2. Under Article 24(4), first sentence, REE and, *mutatis mutandis*, Article 13(2) RDR, Rule 115(1) EPC applies *mutatis mutandis* to the oral proceedings in the case at hand. Rule 115(1), second sentence, EPC provides that at least two months' notice of the summons must be given unless the appellant agrees to a shorter period.

The summons to attend oral proceedings specified a shorter notice period and therefore did not fulfil the requirement of an at least two-month period of notice. However, the appellant agreed to a shorter notice period by letter dated 6 January 2022.

Extent of the judicial review by the DBA

3. In accordance with Article 24(4) REE and the consistent case law of the DBA, which followed decisions D 1/92 (OJ EPO 1993, 357) and D 6/92 (OJ EPO 1993, 361), decisions of the Examination Board may, as a rule, only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application or higher-ranking law. It is not the function of the DBA to reconsider the entire examination procedure on the merits. This is because the Examination Committee and the Examination Board have some latitude of evaluation subject to only limited judicial review by the DBA. Accordingly, the Examination Board's value judgement on the number of marks that an examination paper deserves is not subject to review by the DBA. As held in decision D 6/13 (points 8 and 9 of the Reasons), the Examination Board not "perfectly" fulfilling its implied obligation to draw up an impeccable examination paper and corresponding impeccable marking scheme does not automatically qualify as an infringement of a provision of the REE or IPREE. Thus, a finding in the given case would require a value judgement, which is normally beyond the powers of the DBA. The marking of an examination paper in terms of how many marks an answer deserves is not subject to review by the DBA, and nor are the Examination Board's criteria for determining the weighting of the expected answers (see D 20/96,

point 9 of the Reasons) to the examination questions (D 13/02, point 5 of the Reasons). Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the board take this into account. The alleged mistake must be so obvious that it can be established without re-opening the entire marking procedure (see e.g. decision D 7/05, OJ EPO 2007, 378). This is, for instance, the case if an examiner is found to have based their evaluation on a technically or legally incorrect premise upon which the contested decision rests (D 2/14). Another example of an obvious mistake would be a question whose wording is ambiguous, inconsistent or incomprehensible (D 13/02). All other claims to the effect that the papers have been marked incorrectly are not the responsibility of the DBA. Value judgements are not, as a rule, subject to judicial review (see e.g. D 1/92, cited above, points 3 to 5 of the Reasons and D 11/07, point 3 of the Reasons; Case Law of the Boards of Appeal, 9th edition 2019, V.C.2.6.3, with further references).

The statement of grounds of appeal is primarily concerned with whether the appellant's solution is an equivalent or even better solution than the solution expected by the Examination Board. To answer this question, however, a factual review of the examination procedure by the board would be necessary. This would have to include both an in-depth analysis of (examination) Paper A and an evaluation of the solutions of the appellant and the Examination Board. This would, however, be tantamount to re-opening the entire marking procedure and to an evaluative reconsideration of the answer paper, which, in accordance with the principles set out above, is not the task of the board.

Nor is it the task of the board to review the discretion applied by the Examination Board in assessing the appellant's answer paper as to whether Examination Committee II or the Examination Board deducted too many marks or did not award enough marks for the answers in the respective parts of the appellant's answer paper. If the board were to follow the appellant's approach, it would ultimately have to reassess the answer paper by awarding its own marks. However, under the established case law of the DBA, the value judgement of the competent Examination Board or Examination Committee on the number of marks to be awarded for an answer to an examination question in an examination paper is not subject to review by the DBA (D 13/02, point 5 of the Reasons; D 7/05, cited above, point 20 of the Reasons). This must also apply to the criteria on the basis of which the Examination Board determines the value of the expected answers to the questions of the examination paper.

As explained above, the justification for this limited judicial review is to be seen in the discretionary power which the Examination Committees and the Examination Board are entitled to in the EQE.

Independent product claim of Paper A 2021

4. The part of the appellant's answer paper on the independent product claim was awarded 8 out of 40 marks possible. The appellant accepted that 15 marks were deducted from the 40 marks possible since her product claim to an engine component in which an adhesion layer is present excludes the embodiment in which the coating is deposited directly on the superalloy (see also point 4.1.2 of the Examiners' Report - Paper A 2021

(Examiners' Report)) and that a further 10 marks were deducted because her product claim lacks the feature of the ceramic oxide layer having a minimum thickness (see also point 4.1.6 of the Examiners' Report). However, she found a further deduction of 7 marks unjustified and based her objection on two lines of argument (see point X(a) above).

5. According to the appellant's first line of argument, her product claim was not limited to components of the combustion zone but instead merely required that the coated engine component was suitable for engines with a combustion zone at a temperature of at least 1600 °C.

6. The board does not find it convincing that, based on the appellant's first line of argument, it can be established that a serious and obvious mistake was made without re-opening the entire marking procedure. According to point 4.1.2 of the Examiners' Report, limiting the component to components of the combustion zone (components of the exhaust zone can also be coated) is considered an unnecessary limitation and thus attracted a deduction of 7 marks. In the board's view, the appellant's entire argument is essentially directed at the fact that, in her opinion, the examiners did not award enough marks for her product claim because, with their legally incorrect interpretation, they considered that her claim was limited to combustion zones. As explained above, the value judgement of the competent Examination Board or Examination Committee on the number of marks to be awarded for an answer to an examination question in an examination paper is not subject to review by the board. If the board were to follow the appellant's approach, it would have to reassess the appellant's answer on the product claim by awarding its own marks.

Furthermore, the appellant's arguments raise the question of whether her drafted claim is an equivalent or even better drafted claim than the claim expected by the Examination Board. To answer this question, a substantive review of the examination procedure by the board would be necessary. This would have to include an in-depth analysis of Paper A and an assessment of the solutions of the appellant and the Examination Board. This would amount to re-opening the entire evaluation procedure and an evaluative reconsideration of the examination work, this not being the task of the board under the principles set out above. Deciding on the issues raised by the appellant would therefore result in an exercise well beyond the powers of the board.

7. In the appellant's second line of argument on the composition of the adhesion layer, the appellant submitted, giving detailed reasons, that the presence of the composition of the adhesion layer in her independent product claim was required to achieve the technical effect of an improved lifetime for components comprising the adhesion layer and the columnar ceramic oxide.

8. The board does not find it convincing that, based on the appellant's second line of argument, it can be established that a serious and obvious mistake was made without re-opening the entire marking procedure. The appellant's entire submission is directed essentially at the alleged fact that the examiners awarded her answer paper an incorrect, and insufficient, number of marks.

The board notes that, according to point 4.1.2 of the Examiners' Report, the inclusion of an adhesive layer in the independent product claim, even without

specifying its composition, already excludes the embodiment in which the coating is applied directly to the superalloy. Therefore, the mere inclusion of an adhesive layer already constitutes a limitation of the independent product claim, for which 15 marks were deducted. The Examiners' Report also indicates that if the composition of the adhesive layer is also included in the independent product claim, this claim is further limited. This is shown in point 4.3.3 of the Examiners' Report, where it is stated that a dependent product claim directed to the adhesion layer attracted 4 marks and a dependent product claim directed to the composition of adhesion layer attracted 2 marks. This is further illustrated in the "*Annex - Example set of claims*", where the adhesive layer is present in dependent claim 2 and its composition is present in a further dependent claim, namely dependent claim 3. Therefore, it cannot be excluded that this further limitation in the appellant's independent product claim was unnecessary and therefore led to a further deduction of 7 marks as indicated in point 4.1.3 of the Examiners' Report.

The examination of the appellant's submissions and arguments results in an exercise which obviously cannot be done without a value judgement. The appellant's arguments raise the question of whether her solution to include the composition of the adhesion layer in her independent product claim is an equivalent or even better solution than the solutions expected by the Examination Board. To answer this question, a substantive review of the examination procedure by the board would be necessary. This would have to include an in-depth analysis of Paper A and an assessment of the solutions of the appellant and the Examination Board. This would amount to re-opening the entire evaluation

procedure and an evaluative reconsideration of the examination work, this not being the task of the board under the principles set out above. The assessment of the facts related to the composition of the adhesion layer and the legal conclusions of this assessment as well as the comparison of the example solutions with the appellant's answer paper would entail a value judgement. However, in accordance with consistent case law of the DBA, value judgements are not, as a rule, subject to judicial review. Deciding on the issues raised by the appellant would result in an exercise well beyond the powers of the board as this would in fact be tantamount to reviewing the substantive content of the examination material.

9. In view of the above, the board fails to see any infringement of law or unreasonable exercise of discretion in the marking of the independent product claim of Paper A.

Independent method claims of Paper A 2021

10. The appellant presented in her answer paper independent method claims 9 and 12. The part of the appellant's answer paper on the independent method claims was awarded 10 out of 20 marks possible. The appellant considered that the deduction of 10 marks was not justified and based her objection on several lines of argument (see point X(b) above).
11. The board shares the appellant's view that because of the statement in point 4.2.1 of the Examiners' Report, it can be assumed that no marks had been deducted for the presence of the adhesion layer in her independent method claims and that, therefore, she had not lost

marks twice for the same mistake (see point X(b) (i) above). The board also agrees that if, however, marks were deducted for the presence of this feature in these claims, this would clearly be a serious and obvious mistake.

12. According to the appellant (see point X(b) (ii) above), it was clear from the facts of Paper A, specifically paragraph [009] of the letter from the applicant, that the proviso "*when the ceramic oxide is zirconium oxide, the temperature is 950-1000°C*" was required in independent method claim 9 for this independent method claim to be sufficiently disclosed. Therefore, it would have been a serious and obvious mistake to deduct marks for including this proviso in the independent claim. This could be established with reference to paragraph [009] of the letter from the applicant and did not require re-opening the entire marking procedure.
13. The board does not find this line of argument convincing. The appellant's entire submission is directed essentially at the alleged fact that the examiners awarded her answer paper an incorrect, and insufficient, number of marks. The examination of the appellant's submissions and arguments results in an exercise which obviously cannot be done without a value judgement. The appellant's arguments raise the question of whether her solution to include the proviso "*when the ceramic oxide is zirconium oxide, the temperature is 950-1000°C*" in independent method claim 9 is an equivalent or even better solution than the solutions expected by the Examination Board. To answer this question, a substantive review of the examination procedure by the board would be necessary. This would have to include an in-depth analysis of Paper A and an assessment of the solutions of the appellant and the

Examination Board. This would amount to re-opening the entire evaluation procedure and an evaluative reconsideration of the examination work, this not being the task of the board under the principles set out above. The assessment of the facts related to the inclusion of the above proviso in claim 9 and the legal conclusions of this assessment as well as the comparison of the example solutions with the appellant's answer paper would entail a value judgement. However, in accordance with consistent case law of the DBA, value judgements are not, as a rule, subject to judicial review. Deciding on the issues raised by the appellant would result in an exercise well beyond the powers of the board as this would in fact be tantamount to reviewing the substantive content of the examination material.

14. According to the appellant's further line of argument (see point X(b) (iii) above), both her independent method claims clearly recited depositing a coating on a superalloy through use of the term "*the substrate*" and the antecedent basis by virtue of the dependency on claim 1, where the substrate was defined as being "*made of a superalloy*", and the deduction of 2 additional marks was a serious and obvious mistake.
15. The board finds this line of argument convincing. In section 4.2.5, the Examiners' Report stated that "*both methods must deposit a coating on a superalloy, if this limitation is not present then 2 marks are lost*". However, as the appellant convincingly argued, both method claims deposit a coating on a superalloy due to their wording and their dependency on claim 1.
16. According to the appellant's further line of argument (see point X(b) (iv) above), the deduction of 3 marks

for including plasma spraying in claim 12 and 3 marks for an unnecessary limitation based on the dependency on claim 8 amounted to a double penalty which was the result of a serious and obvious mistake. She acknowledged that dependent product claim 8 was a mistake. However, because of the features of claim 8, it had been necessary to base independent method claim 12 on claim 8 and to include plasma spraying in claim 12. Hence, she had lost marks several times for the same mistake.

17. As held in decision D 13/17, due to the particular structure of Paper A, it might happen that an incorrect answer by a candidate to an element in one part of the paper affected the answer to another part of the paper and that this could lead to a loss of the marks that could be achieved twice for one and the same error. The appellant acknowledged that claim 8 was wrong and that she most probably lost marks for her dependent claim 8. The appellant convinced the board that the dependency of her claim 12 on her claim 8 was a logical result of the wording of incorrect claim 8 and that she therefore had lost marks twice for the same mistake. Consequently, the deduction of 3 marks for an unnecessary limitation of independent method claim 12 because of its dependency on claim 8 would amount to a double penalty, which would not be in keeping with the standards for fair marking set in the case law. It cannot, however, be determined by the board with sufficient certainty from the documents available whether the appellant lost marks for her dependent claim 8 and whether 3 marks were deducted for an unnecessary limitation of independent method claim 12.
18. However, the board cannot accept the argument that it should have been necessary to include the plasma

spraying feature in independent method claim 12 because of the features of claim 8. Therefore, in the board's view, there was no double penalty if 3 marks were deducted for including plasma spraying in claim 12.

Dependent claims of Paper A 2021

19. The appellant presented in her answer paper dependent product claims 2 to 8 and dependent method claims 10 to 14. The part of the appellant's answer paper on the dependent claims was awarded 12 out of 25 marks possible. The appellant essentially argued that serious and obvious mistakes had been made in the marking of her dependent claims and that these claims should have been awarded more than 12 out of 25 marks.

20. Point 4.3.1 of the Examiners' Report reads:

"Up to 25 marks were available for the dependent claims. No marks were awarded for any claims going beyond the 15th claim. When more than 15 claims were present only the first 15 claims were marked. This rule was applied irrespective of how the claims were numbered. The claims are marked as a whole and if appropriate up to 2 marks are deducted for unclear claims or for incorrect dependencies from the total number of marks awarded. The marks for dependent claims are awarded independently of the marks awarded for the independent claims (thus marks are awarded for claims dependent upon a product claim that is not novel)."

Point 4.3.2 of the Examiners' Report, inter alia, states: *"Full marks are not awarded if the dependent claim is more limited than necessary (e.g. a claim to an adhesion layer with the preferred range of*

thicknesses would be marked as a claim to an adhesion layer, but would not receive all 4 of the marks available for such a claim, as the claim is more limited than necessary)."

21. From the above passage 4.3.1 of the Examiners' Report, the board first concludes that all the appellant's dependent claims had been marked as there were less than 15 claims in total.
22. According to the appellant, marks for her dependent claims were lost as a result of a double penalty (see point X(c) (i) above).

Under decisions D 13/17 and D 16/17, an approach according to which a candidate's wrong answer to an element in one part of the examination paper affects the answer to another part of the examination task and that there is thus a double loss of the marks that could be awarded for one and the same mistake (a double penalty) was not in keeping with the standards for fair marking set in the case law. The board agrees with the appellant that such an approach should also be avoided for the marking of dependent claims in Paper A.

23. With regard to dependent claim 2 in the appellant's answer paper, it cannot be excluded that the incorrect answer for independent claim 1, i.e. the absence of the feature of the ceramic oxide layer with a thickness of "at least 25 micrometres", and the deduction of 10 marks already for this mistake, was not taken into account in the marking of this dependent claim.

According to point 4.3.1 of the Examiners' Report, the dependent claims were marked as a whole and if appropriate, up to 2 marks were deducted for unclear

claims or for incorrect dependencies from the total number of marks awarded (emphasis by the board). Since an "at least 25 micrometre" thick ceramic oxide layer was expected by the examiners in independent claim 1, it could be argued that claiming this thickness in dependent claim 2 was an incorrect dependency which could have caused a deduction of a maximum of 2 marks. However, it also says in the same passage of the Examiners' Report that "*the marks for dependent claims are awarded independently of the marks awarded for the independent claims (thus marks are awarded for claims dependent upon a product claim that is not novel)*". The board therefore assumes that marks for dependent claims were awarded independently of the marks for the independent product and process claims and that only an example was given in brackets in this statement. This means that the candidate's dependent claim 2, which defines that the ceramic oxide layer has a thickness of at least 25 micrometres, should have been evaluated independently of independent claim 1, even if this feature in claim 1 had already been required to satisfy the requirements of Article 84 EPC. In this assessment, there should also not be a deduction of up to 2 marks for a wrong dependency if the feature which according to the Examiners' Report should have been present in independent claim 1 and for the absence of which 10 marks have already been deducted is now claimed in dependent claim 2. Such an approach would amount to a double penalty, which would not be in keeping with the standards for fair marking set in the case law.

The appellant argued that it appeared that no marks had been awarded for her claim 2, which recited that the ceramic oxide layer had a thickness of at least 25 micrometres. It is very likely that no marks were awarded for claim 2 for the reasons given above. This

would amount to a double penalty, although it may be that no or fewer marks were awarded for claim 2 for other reasons. This, however, cannot be determined by the board with sufficient certainty from the documents available. It is not clear from the Examiners' Report how many marks were available for each of the dependent claims expected by the examiners. For example, the Examiners' Report does not indicate how many marks were given for a "laser" claim dependent on the second method claim.

24. In addition, the appellant argued that she should have been awarded marks for features which were not included in her dependent claims but were in her independent claims as marks had already been deducted for her independent claims because these features were not present in the independent claims expected in the Examiners' Report. Otherwise, she would lose marks twice for a single mistake, receiving a double penalty, which was not in keeping with the standards for fair marking set in the case law. She also noted that the Examiners' Report - Paper A 2017 explicitly stated that *"candidates who had a feature missing from the independent claim could gain 3 marks for having that feature in a dependent claim"* and submitted that a similar marking practice should be carried out for Paper A 2021 to avoid double penalties. According to the appellant, this logic should also apply to features for which marks had been deducted because they were present in her independent claims but which could have received marks if they had been present in a dependent claim. The appellant was of the following view.

- (a) The composition of the adhesion layer featured in her independent product claim should be awarded the 2 marks available under the dependent claims.

- (d) The source of the adhesion layer in her independent method claim 9 should be awarded 1 mark under the dependent claims.
- (b) The adhesion layer and plasma spraying in her independent method claim 12 should be awarded 1 mark each (i.e. 2 marks) under the dependent claims.
- (e) The temperature of zirconium oxide should also be awarded 1 mark.

The board does not accept this argument. Even if it would not have been logical for the appellant to have included these features in dependent claims (and therefore be awarded the dependent claim marks) when these features were already present in an independent claim (where they had resulted in a deduction of marks), marks cannot be awarded for features not comprised in the dependent claims. Candidates should not simply draft independent claims and hope that features that should not be in those claims will be awarded some marks in the dependent claims section, even if they are not mentioned in their dependent claims. Thus, there is no double loss of the marks that could have been awarded for one and the same mistake in the case at hand. The situation here is therefore different from that of Paper A 2017, where 3 marks were awarded for features present in a dependent claim although this feature was missing from the independent claim.

25. Furthermore, the appellant submitted that her dependent claims 10 and 11 should be awarded 1 mark each, despite not being mentioned in the Examiners' Report since they represented reasonable dependent claims and should be awarded marks in light of decision D 7/05 (see point X(c)(ii) above).

Decision D 7/05 recognises the need to allow for the fair marking of answers which, although deviating from the marking scheme, were nonetheless reasonable and competently substantiated. The board agrees with the appellant that the "*competently substantiated*" criterion does not apply to the claim drafting in Paper A, where marks were awarded for the claims irrespective of any substantiation. Therefore, her dependent claims 10 and 11, which were not mentioned in the Examiners' Report, should have been awarded marks if they represented reasonable dependent claims. Again, the board cannot determine with reasonable certainty from the documents available whether the examiners took this into account.

Remittal

26. If an appeal is admissible and well-founded, the DBA is, as a rule, under Article 24(4), second sentence, REE only authorised to annul the contested decision and refer the matter back to the Examining Board for a new decision. Within the framework of the appeal procedure, the DBA only has the task of reviewing the decision of the Examination Board for legal errors. If the Examination Board has made a discretionary decision, the DBA can only review whether a discretionary error has occurred. In matters of discretion, however, the DBA cannot replace the contested decision with its own decision. Therefore, requests for the award of additional marks or a certain grade cannot, as a rule, be dealt with in the appeal procedure before the DBA unless there are very special exceptional circumstances in which important reasons speak against a remittal. This would be conceivable, for example, if there is no

longer any margin of discretion for the grade or if the Examination Board's margin of discretion for reassessing a paper on remittal is so small that the binding effect of a decision of the DBA would not be observed if the Examining Board did not change the grade (see e.g. D 1/86, OJ EPO 1987, 489, point 2 of the Reasons; D 3/14; D 14/17 and D 20/17). However, such exceptional reasons do not exist in the current case. As set out above, the board is not in a position to determine, on the basis of the available documents in the case at hand and without interfering with the discretion reserved to the Examination Board, what awarding of marks appears appropriate for the appellant's independent method claims and dependent claims. Thus, although it is likely that the appellant would receive a score close to the required 45 or more marks instead of the 38 marks previously awarded if she were to be reassessed, taking into account the considerations set out in points 11, 15 to 18 and 23 to 25 above, this cannot be determined by the board with sufficient certainty and without an evaluative reassessment of the appellant's whole examination Paper A.

Request for reimbursement of the appeal fee

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

"If the Board of Appeal allows the appeal, or the appeal is withdrawn, it shall order reimbursement in full or in part of the fee appeal if this is equitable in the circumstances of the case."

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 with the order to instruct the competent Examination Committee to re-mark the appellant's answer paper to Paper A of the European qualifying examination 2021.
3. Reimbursement of the appeal fee in full is ordered.

The Registrar:

The Chairman:



A. Voyé

W. Sekretaruk

Decision electronically authenticated