



DELTA PATENTS

Training for Patent Professionals

PRE-EXAM BOOK CASES/EXAMS

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Introduction and acknowledgement

This document comprises an update to the “Pre-Exam Book - Legal Cases, Claims Analysis Cases, Pre-Exams 2014 – 2019” (“P-book”, edition June 2020, EQE 2021):

- Publications in OJ EPO after the Book was printed (OJ June 2020 – 31 Oct 2020);
- Publications in PCT Newsletter after the Book was printed (PCT NL June 2020 – 31 Oct 2020);
- Corrections to the questions and answers;
- Answers to referrals G 1/19, G 2/19 and G 3/19;
- Decision D 3/19.

We thank all who provided any comments and all candidates who participated in our Pre-Exam courses, as well as those that gave feedback on our material via email, for useful feedback. Any further comments are highly appreciated.

The latest version of this document is available on our website.

Also refer to our compilations of key parts of the EQE syllabus as in force on 31 October 2020 for EQE 2021, on <https://www.deltapatents.com/course-links.html>:

- EQE 2021 references - EQE
- EQE 2021 references - EPC
- EQE 2021 references - EPO and PCT
- EQE 2021 references - PCT

Roel van Woudenberg,
9 November 2020

EQE 2021 preparation courses

DeltaPatents organizes further training sessions for candidates preparing for Pre-Exam 2021 and for the Main Exam 2021 in the period from April 2020 until February 2021. Also, our Correction Papers programme for the EQE Main Exam papers will start after the summer and be active until late January.

Please check our website for course details, further announcements and enrolment:

<http://www.deltapatents.com/eqe.html>

<http://www.deltapatents.com/eqe-pre-exam.html>

<http://www.deltapatents.com/eqe-main-exam-paper-d.html>

<http://www.deltapatents.com/registration--cancellation.html>

or contact us via email at:

training@deltapatents.com

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Section 6 – answers and model solutions to the pre-exam papers

Pre-Exam 2019 - Question 4.1

An appeal D 3/19 was filed w.r.t. statement 1 of Question 4:

“If Didier files the application in Dutch, he **must** file a translation into one of the EPO's official languages **within two months** of filing the application”

In the appeal, it was substantially argued that the translation “must” not necessarily be filed within the 2 month period of R.6(1) EPC as R.58 EPC allows for an additional two month from the notification of an invitation. It was also noted that the statement does not include the effect of missing the original 2m time limit.

Note that (some of) these and similar arguments were also raised on our Pre-Exam Blogs by various readers (<http://pre-exam.blogspot.com/>) w.r.t. similar statements in earlier Pre-Exams:

- Pre-Exam 2014, statement 8.2: “Regarding EP-Z: the prescribed translation **shall** be filed within two months of filing EP-Z”;
- Pre-Exam 2017, statement 4.3: “According to the provisions of the EPC, Adrienn **must** file the translation of the description within two months of filing of EP-A”.

Also note that Rule 6(1) EPC uses the term “shall”, rather than must:

- R.6(1) EPC: “A translation under Article 14, paragraph 2, **shall** be filed within two months of filing the European patent application.”
- Art. 14(2) EPC: “A European patent application **shall** be filed in one of the official languages or, if filed in any other language, translated into one of the official languages in accordance with the Implementing Regulations.”

The appeal was successful. As a result, the answer to 4.1 may not be just be considered True (original exam answer) but also False (answer from candidate).

4.1 True or False

D 3/19 provides the following (emphasis added):

Summary of Facts and Submissions

I. The appeal, which complies with the relevant formal requirements, lies from the Examination Board's decision of 18 March 2019 awarding the appellant the grade “fail” in the pre-examination of the European qualifying examination 2019, her answer paper having been given a score of 68.

II. The Examination Board remitted the appeal to the Disciplinary Board of Appeal (hereinafter “Appeal Board”) without rectifying its decision and informed the appellant accordingly.

III. The Appeal Board invited the Presidents of the EPO and of the Institute of Professional Representatives before the EPO (epi) to comment on the case under Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 2019, Supplementary publication 2, 2) and Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2019, Supplementary publication 1, 119). Neither of them commented on the appeal.

IV. The appellant requests that

- the decision under appeal be set aside,
- her pre-examination of the European qualifying examination 2019 be awarded the grade “pass”, and
- the appeal fee be reimbursed.

V. The appellant's arguments are essentially those on which the following reasons for this decision are based.

Reasons for the Decision

1. The appeal is admissible.

2. The appellant argued that statement 4.1 was not formulated clearly and comprehensibly and could therefore not be unambiguously answered with "yes" or "no".

2.1 The Appeal Board agrees with the appellant that the term "must" in the first statement leads to ambiguity. It is not clear whether or not this term implies that the direct consequence of failure to observe the time limit is a loss of rights that can be remedied under Article 121 or 122 EPC only.

2.2 Although the requirement under Rule 6(1) EPC to file a translation of a European patent application into one of the official languages within two months of filing said application is undoubtedly a legal obligation ("shall be filed"), non-observance of this time limit does not lead to a loss of rights (nor to a deferral of the filing date); the Receiving Section sets a second two-month time limit (see Article 90(3) and Rules 57(a) and 58 EPC). As a consequence, the question of whether or not statement 4.1 is correct cannot be answered with either "true" or "false" as required by a "multiple-choice" question in the pre-examination.

2.3 An unclear and confusing examination question constitutes a serious and obvious mistake (D 13/02, point 4). The appeal is consequently well founded and allowable. The further objection concerning statement 2.3 need not be dealt with in this decision. According to Article 24(3) REE, the contested decision has to be set aside and the appeal fee reimbursed.

3. The appellant further requests that she be awarded a "pass" grade for the pre-examination of the European qualifying examination 2019.

3.1 In accordance with decisions D 2/14 (points 5 et seq.), D 3/14 (points 12 et seq.), D 4/14 (points 11 et seq.), D 5/14 (points 6 et seq.) and D 6/14 (points 9 et seq.) and the reasoning in each of these decisions, the Appeal Board in the present appeal case considers that special reasons within the meaning of Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (OJ EPO 2019, Supplementary publication 1, 50) present themselves for not remitting the case to the Examination Board for a new decision. These reasons allow the Appeal Board - rather than the Examination Board or the competent Examination Committee - to scrutinise the marks given for statement 4.1 of the appellant's examination paper and decide whether she is to be awarded a "pass" or a "fail" grade on the basis of the revised marking.

3.2 The appellant's answers to statements 4.2, 4.3 and 4.4 were correct. In accordance with the marking scheme for the pre-examination she was thus awarded 3 marks. Taking into account the correction with respect to statement 4.1 the appellant is given a total of 5 marks for question 4. The total marks awarded for the pre-examination thus rise from 68 to 70. Therefore, the appellant's paper is to be awarded the grade "pass" pursuant to Rule 6(2)(a) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE, OJ EPO 2019, Supplementary publication 2, 18).

4. Furthermore, the appellant requested that her registration for the pre-examination of the European qualifying examination 2020 be cancelled and the examination fees be reimbursed. There is no legal basis for granting these requests, in particular the appellant's request for reimbursement of the examination fees in the event of her appeal being allowed in part or in full (D 24/17, point 14).

5. The appellant also requested accelerated proceedings and that she be given time to register for the main examination 2020. These requests are no longer relevant.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The appellant's answer paper for the pre-examination of the European qualifying examination 2019 is awarded 70 marks and therefore, pursuant to Rule 6(2)(a) IPREE, the grade "pass".
3. The appeal fee is reimbursed.