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**Datasheet for the decision
of 23 January 2014**

Case Number: T 1931/09 - 3.5.05

Application Number: 04104465.2

Publication Number: 1637979

IPC: G06F3/033

Language of the proceedings: EN

Title of invention:

User interface having viewing area with non-transparent and semi-transparent regions

Applicant:

BlackBerry Limited

Headword:

User Interface/BLACKBERRY

Relevant legal provisions:

RPBA Art. 12(4)

Keyword:

Admissibility of main and auxiliary requests (no)

Decisions cited:

T 0528/93, T 0390/07

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 1931/09 - 3.5.05

**D E C I S I O N
of Technical Board of Appeal 3.5.05
of 23 January 2014**

Appellant: BlackBerry Limited
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 14 May 2009
refusing European patent application No.
04104465.2 pursuant to Article 97(2) EPC.

Composition of the Board:

Chair: A. Ritzka
Members: P. Corcoran
F. Blumer

Summary of Facts and Submissions

- I. The present appeal is against the decision of the examining division to refuse the European patent application no. 04 104 465.2, publication no. EP 1 637 979. The decision was announced during oral proceedings held on 19 February 2009 with the written reasons being dispatched on 14 May 2009.
- II. During proceedings before the department of first instance the then applicant and present appellant amended the application after receipt of the European Search Report by submitting a new claim set with the letter of 16 June 2005.
- III. Claim 1 of the claim set filed with the letter of 16 June 2005 reads as follows:

"A method for displaying, in a graphical user interface having overlapping viewing areas, a foreground viewing area (64) having foreground viewing area content (70) over a background viewing area (62) having background viewing area content (74), the method comprising: displaying the foreground viewing area (64) with a non-transparent region (68) that obscures any part of the background viewing area (62) overlapped thereby and a semi-transparent region (66) through which background viewing area content (74) overlapped thereby can be at least partially viewed; updating the user interface (60C) to display changes to the foreground viewing area (64) by repainting only the non-transparent region (68) and not repainting the background viewing area (62) and the semi-transparent region (66)."
- IV. In an official communication dated 7 May 2007, the examining division raised objections against the claim

set filed with the letter of 16 June 2005 and submitted *inter alia* that the subject-matter of claim 1 lacked an inventive step in the light of the following prior art documents:

D3: US 5 617 114;

D4: US 6 750 858.

According to inventive step assessment of the examining division, said claim was distinguished over D3 by the concluding feature of updating the user interface to display changes to the foreground viewing area by repainting only the non-transparent region and not repainting the background viewing area and the semi-transparent region. The problem addressed by this distinguishing feature was formulated as how to decrease the computation time for processing the display information and the claimed solution was said to be obvious in the light of D4.

- V. With a letter dated 10 September 2007 in response to the objections raised in the official communication of 7 May 2007, the applicant made no identifiable attempt to rebut the above-mentioned inventive step objection raised by the examining division but instead amended claim 1 to remove the step of updating the user interface.
- VI. The decision under appeal was based on a main request and a first auxiliary request, both of which were filed in electronic form on 29 October 2008. The main request was not admitted to the proceedings pursuant to Rule 137(3) EPC due to allegedly failing to overcome a previously raised objection concerning lack of compliance with Article 123(2) EPC. The auxiliary request was refused under Article 123(2) EPC. In an *obiter dictum* to the decision it was stated that the matter for which protection was sought in accordance

with the claims of the main request lacked an inventive step over D3 (US 5 617 114 B) and the matter for which protection was sought in accordance with the claims of the auxiliary request lacked novelty over D2 (EP 0 344 082 A2).

- VII. Claim 1 of the auxiliary request filed in electronic form on 29 October 2008 reads as follows:
- "A method for displaying, in a graphical user interface having overlapping viewing areas, a foreground viewing area (64) having foreground viewing area content (70) over a background viewing area (62) having background viewing area content (74), the method comprising the steps of:
- a) displaying the foreground viewing area (64) with an interior region (68) and a border region (66) surrounding the interior region (68), said step of displaying the foreground viewing area (64) comprising determining a type of transparency level of the foreground viewing area (64) as one of:
 - none where the interior region (68) and the border region (66) of the foreground viewing area (64) completely obscure from view content (74) in an area of the background viewing area (62) that is overlaid by the foreground viewing area (64);
 - border and interior where the interior region (68) and the border region (66) of the foreground viewing area (64) have a degree of transparency such that content (74) from the background viewing area (62) in an area of said background viewing area (62) that is overlaid by said interior and border regions (68, 66) can be partially seen through said interior and border regions (68, 66); or
 - border only where the interior region (68) of the foreground viewing area (64) completely obscures from view content (74) in an area of the background viewing

area (62) that is overlaid by said interior region (66) and the border region (66) has a degree of transparency such that content (74) from the background viewing area (62) in an area of said background viewing area (62) that is overlaid by said border region (66) can be partially seen through the said border region (66); and b) displaying the background viewing area content (74) lying beyond the foreground viewing area."

VIII. Notice of appeal was received at the EPO on 13 July 2009 with the appropriate fee being paid on the same date. A written statement setting out the grounds of appeal was received at the EPO on 11 September 2009. With the statement setting out the grounds of appeal, the appellant filed an amended set of 6 claims as a new main request.

IX. Claim 1 of the request filed with the written statement of grounds reads as follows:

"A method for displaying, in a graphical user interface having overlapping viewing areas, a foreground viewing area (64) having foreground viewing area content (70) over a background viewing area (62) having background viewing area content (74), the method comprising the steps of:

a) displaying the foreground viewing area (64) with an interior region (68) and a border region (66) surrounding the interior region (68), said step of displaying the foreground viewing area (64) comprising determining a type of transparency level of the foreground viewing area (64) as one of:
none where the interior region (68) and the border region (66) of the foreground viewing area (64) completely obscure from view content (74) in an area of the background viewing area (62) that is overlaid by the foreground viewing area (64);

border and interior where the interior region (68) and the border region (66) of the foreground viewing area (64) have a degree of transparency such that content (74) from the background viewing area (62) in an area of said background viewing area (62) that is overlaid by said interior and border regions (68, 66) can be partially seen through said interior and border regions (68, 66); or

border only where the interior region (68) of the foreground viewing area (64) completely obscures from view content (74) in an area of the background viewing area (62) that is overlaid by said interior region (66) and the border region (66) has a degree of transparency such that content (74) from the background viewing area (62) in an area of said background viewing area (62) that is overlaid by said border region (66) can be partially seen through the said border region (66); and
b) updating the user interface to display changes to the foreground viewing area (64) by copying and redisplaying the border region (66) and portions of the background viewing area (62) that are not overlapped by the foreground viewing area (64)."

X. In a communication accompanying a summons to oral proceedings to be held on 23 January 2014, the board gave its preliminary opinion concerning the appeal and, *inter alia*, made the following observations:

- (i) With respect to claim 1 of the claim set filed with the written statement setting out the grounds of appeal, it was noted that said claim appeared to be an attempt to re-introduce subject-matter which had been introduced during proceedings before the department of first instance but had been subsequently withdrawn and

consequently not pursued to a final decision in the context of said proceedings.

- (ii) Referring to the provisions of Rule 12(4) RPBA, the board expressed reservations about the admissibility of the aforementioned claim set, in particular because the claim set in its present form did not appear to have been drafted in a manner which complied with the requirements of Articles 84 and 123(2) EPC.

XI. With a letter of reply dated 16 December 2013, the appellant filed an auxiliary request comprising 6 claims and entitled "Second Auxiliary Request".

XII. Claim 1 of the auxiliary request filed with the letter of 16 December 2013 reads as follows:

"A method for displaying, in a graphical user interface having overlapping viewing areas, a foreground viewing area (64) having foreground viewing area content (70) over a background viewing area (62) having background viewing area content (74), the method comprising the steps of:

- a) displaying the foreground viewing area (64) with an interior region (68) and a border region (66) surrounding the interior region (68), said step of displaying the foreground viewing area (64) comprising determining a type of transparency level of the foreground viewing area (64) as one of:
 - none where the interior region (68) and the border region (66) of the foreground viewing area (64) completely obscure from view content (74) in an area of the background viewing area (62) that is overlaid by the foreground viewing area (64);
 - border and interior where the interior region (68) and the border region (66) of the foreground viewing area

(64) have a degree of transparency such that content (74) from the background viewing area (62) in an area of said background viewing area (62) that is overlaid by said interior and border regions (68, 66) can be partially seen through said interior and border regions (68, 66); or

border only where the interior region (68) of the foreground viewing area (64) completely obscures from view content (74) in an area of the background viewing area (62) that is overlaid by said interior region (66) and the border region (66) has a degree of transparency such that content (74) from the background viewing area (62) in an area of said background viewing area (62) that is overlaid by said border region (66) can be partially seen through the said border region (66); and
b) for a border only type of transparency level, updating the user interface to display changes to the foreground viewing area (64) by copying and redisplaying the border region (66) and portions of the background viewing area (62) that are not overlapped by the foreground viewing area (64) and displaying the updated foreground viewing area (64) with an updated interior region (68) that obscures any part of the background viewing area (62) overlapped thereby."

XIII. Oral proceedings were held as scheduled on 24 January 2014. Nobody appeared on behalf of the appellant and the appellant's representative confirmed in a telephone conversation with the board's registrar during oral proceedings that he would not be attending the oral proceedings. The board decided to continue the proceedings in the absence of the appellant.

XIV. The requests submitted by the appellant during written proceedings are as follows:

- (i) As a main request, the appellant requested that the decision under appeal be set aside and that the case be remitted to the examining division to consider novelty and inventive step on the basis of claims 1-6 as filed with the statement setting out the grounds of appeal dated 11 September 2009.
- (ii) As a first auxiliary request, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1-6 as filed with the statement setting out the grounds of appeal dated 11 September 2009.
- (iii) As a second auxiliary request, the appellant requested that the decision under appeal be set aside and that the case be remitted to the examining division to consider novelty and inventive step on the basis of claims 1-6 filed as Second Auxiliary Request with letter dated 16 December 2013.
- (iv) As a third auxiliary request, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1-6 filed as Second Auxiliary Request with letter dated 16 December 2013.

XV. Insofar as they are relevant to the present decision, the written submissions made on behalf of the appellant during the present appeal proceedings, may be summarised as follows:

- (i) With respect to the claim set filed with the statement setting out the grounds of appeal, the

appellant made submissions to the effect that said claim set was based on the previously filed auxiliary request and that claim 1 had been amended to specify updating the user interface to display changes to the foreground viewing area by copying and redisplaying the border region and portions of the background viewing area that are not overlapped by the foreground viewing area.

- (ii) According to the appellant, the effect of this difference was disclosed at length in the description as originally filed, e.g. at paragraphs 36 to 38, and it was beneficial to have to re-paint as little information as possible to reduce processing burden. It was further submitted that this distinction had not been appreciated fully in the official communication of 7 May 2007.
- (iii) Concerning the board's reservations about the admissibility of this claim set, the appellant submitted that at the time that the appeal was filed, the case law of the Boards of Appeal indicated that such a main request should be admissible and that it was the appellant's reasonable expectation that the main request should be admissible. If there had been a move towards a stricter admissibility hurdle in the meantime, the appellant requested that the application should be remitted to the examining division for consideration of inventive step.
- (iv) It was additionally submitted that the amendment to claim 1 of said claim set was an attempt to overcome the objections raised in the decision under appeal rather than a redirection of the

claims that would constitute a fresh case. The feature added to said claim 1 was not unrelated to the feature removed from claim 1 of the refused auxiliary request as both were aimed at offering presentation modes that reduced the computer resources required to update them.

- (v) With respect to the question of support for the amendments, it was submitted that original claim 4 and paragraph 38 of the originally filed description disclosed that if updating a foreground area, the blended portion of the border region and the non-overlapped portions of the background might be re-used.

- (vi) With respect to the claim set filed with the letter of 16 December 2013, the appellant submitted that claim 1 thereof had been amended to include that the final updating step was for a border only type of transparency level. It was further submitted that the features of said claim were supported by the description and figures, specifically Fig. 6 and blocks 600, 601, 630, 632 and 634 as well as paragraph 38 of the description.

XVI. At the end of the oral proceedings the chair announced the board's decision.

Reasons for the Decision

1. The appeal is admissible. However, it is not allowable for the reasons which follow.

2. *Non-attendance at oral proceedings*
 - 2.1 Article 15(3) RPBA stipulates that the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case.

 - 2.2 At the oral proceedings held as scheduled on 24 January 2014, nobody appeared on behalf of the appellant. The appellant's representative confirmed in a telephone conversation with the board's registrar during oral proceedings that he would not be attending the oral proceedings.

 - 2.3 Having regard to the provisions of Article 15(3) RPBA, the board decided to continue the proceedings in the absence of the appellant who had been duly summoned. By not attending the proceedings the appellant effectively chose not to avail itself of the opportunity to present comments orally before the board but instead to rely on its written case as contained in statement setting out the grounds of appeal dated 11 September 2009 and the letter of 16 December 2013.

 - 2.4 In the present case, the board was in a position to announce a decision at the conclusion of the oral proceedings as foreseen by Article 15(6) RPBA.

3. *Article 12(4) RPBA*

3.1 Pursuant to Article 12(4) RPBA an appeal board is empowered to hold inadmissible facts, evidence and requests which could have been presented in the first instance proceedings. The boards of appeal thus retain discretion, as a review instance, to refuse new material, including requests (claim sets) which ought to have been, but were not, submitted during first instance proceedings.

3.2 It follows from Article 12(4) RPBA that the admission of new requests in appeal proceedings, the purpose of which is mainly to review the decision of the department of first instance, is a matter for the board's discretion and not a right of any party. In particular, the board has the discretionary power not to admit new claims, even when filed together with the notice of appeal, in cases where such claims ought to have been presented in the first-instance proceedings.

3.3 The present Article 12(4) RPBA was originally enacted as Article 10a(4) of the amended Rules of Procedure of the Boards of Appeal which were adopted under Rule 10(3) EPC on 28 October 2002 and entered into force on 1 May 2003 following approval by the Administrative Council of the EPO (cf. Decision CA/D 17/02 of Administrative Council of 12 December 2002).

3.4 The discretionary power under Article 12(4) RPBA has to be exercised appropriately which requires the appeal board to consider and weigh up the relevant factors having regard to the particular circumstances of each case.

Main and first auxiliary requests

4. The appellant's main and first auxiliary requests concern the claim set filed with the written statement setting out the grounds of appeal. In both cases, it is requested that the decision under appeal be set aside. According to the main request, the board is requested to remit the application to the department of first instance for further prosecution on the basis of said claim set. According to the first auxiliary request, the board is requested to grant a patent based on said claim set. For the reasons which follow, the board cannot allow either of the aforementioned requests.

5. *Amendments to claim 1*

5.1 The concluding feature of claim 1 of the auxiliary request on which the decision under appeal is based, i.e. the auxiliary request as filed on 29 October 2008 (cf. Facts and Submissions, item VII above), reads as follows:

"b) displaying the background viewing area content (74) lying beyond the foreground viewing area."

5.2 Claim 1 of the request filed with the written statement setting out the grounds of appeal has been amended by the replacement of the aforementioned feature as follows:

"b) updating the user interface to display changes to the foreground viewing area (64) by copying and redisplaying the border region (66) and portions of the background viewing area (62) that are not overlapped by the foreground viewing area (64)."

5.3 The board concurs with the appellant's submissions to the effect that the new feature of claim 1 filed with

the statement of the grounds of appeal relates to the technical problem of reducing the processing burden by selectively re-painting particular sub-areas of the display. The board does not, however, accept the appellant's statement to the effect that the deleted feature of the earlier version of claim 1 referred to in 5.1 above, i.e. as filed on 29 October 2008, relates to the same technical problem (cf. Facts and Submissions, item XV(iv) above). The earlier version of claim 1 merely refers to "displaying the background viewing area content ... lying beyond the foreground viewing area" and contains no identifiable specification relating to the selective re-painting of particular sub-areas of the display.

- 5.4 It is apparent from the record of first instance proceedings that a version of claim 1 which did relate to substantially the same technical problem referred to in 5.3 above was filed with the letter of 16 June 2005 (cf. Facts and Submissions, item III above). That version of claim 1 was evidently based on the "border only" transparency level embodiment of Fig. 6. Despite using somewhat different terminology and being restricted to specifying a single type of transparency level (corresponding to the aforementioned "border only" transparency level), the board judges that the version of claim 1 filed with the letter of 16 June 2005 relies on substantially the same technical effect and raises substantially the same issues with respect to inventive step as those which arise in relation to claim 1 of the claim set presently under consideration.
- 5.5 The foregoing interpretation of claim 1 as filed with the letter of 16 June 2005 is confirmed by the appellant's submissions referring to the official

communication of 7 May 2007 (cf. Facts and Submissions, item XV(ii) above). The board does not, however, concur with the submissions of the appellant in this regard according to which it is alleged that the significance of the technical contribution provided by the selective re-painting of particular sub-areas of the display was "not appreciated fully" in the official communication of 7 May 2007. On the contrary, it would appear from said official communication that the examining division recognised the technical effect provided by the concluding feature of the claim, i.e. the step of updating the user interface, but took the position that this feature did not provide a non-obvious technical contribution in the light of D4 (cf. Facts and Submissions, item IV above).

5.6 The response of the then applicant and present appellant to the objections raised in this regard in the official communication of 7 May 2007 was to amend the aforementioned claim 1 by deleting the step of updating the user interface (cf. Facts and Submissions, item V above). There was no identifiable attempt on the part of the applicant to contest the inventive step objection raised against the claim and no further independent claim incorporating such a feature was pursued during the remainder of the proceedings before the department of first instance. The board interprets this behaviour as an effective abandonment of the corresponding subject-matter.

6. *Admissibility*

6.1 In the board's view, Article 12(4) RPBA (cf. 3. above) confers discretionary powers to hold inadmissible requests relating to subject-matter which was effectively abandoned during first instance

proceedings, irrespective of the stage of the appeal proceedings at which such requests are filed. Thus, the board may validly exercise this discretionary power with respect to requests which have been filed with the written statement setting out the grounds of appeal.

6.2 If the board were to admit the claim set filed with the written statement setting out the grounds of appeal it would be compelled either (in accordance with the appellant's main request) to remit the case to the department of first instance for further prosecution or (in accordance with the appellant's first auxiliary request) to decide itself on the critical issues which arise in this regard.

6.3 In the present case, in particular insofar as the question of inventive step is concerned, a remittal to the department of first instance in accordance with the appellant's main request would effectively return the proceedings to the status prevailing at the time of the official communication dated 7 May 2007 and would oblige the examining division to revisit issues which had previously been raised in relation to claims seeking protection for substantially similar subject-matter but which had not, through a deliberate choice of the appellant, been pursued to a final decision. In the board's judgment, such a course of action would be contrary to the principle of procedural economy.

6.4 If, on the other hand, the board were to admit the claim set and proceed to decide upon its merits in accordance with the first auxiliary request, it would be effectively compelled give a first ruling on issues, in particular the question of inventive step, which had not been the subject of a decision during first instance proceedings. Such a course of action would run

contrary to the primary purpose of appeal proceedings which is to review that which has been decided at first instance (cf. T 0390/07, point 2 of the Reasons).

- 6.5 In this regard, it is additionally noted that the board has reservations as to whether the version of claim 1 presently under consideration complies with the requirements of Articles 84 and 123(2) EPC.
- 6.6 Said claim is evidently based on the embodiment of the invention illustrated in Fig. 6 and disclosed in the corresponding passages of the description. It would appear from [0038] of the originally filed disclosure that the updating step specified in the concluding feature of the claim is only disclosed in connection with one of the transparency levels, i.e. the "border only" transparency level. However, the concluding feature of the claim lacks any such limitation and consequently the question of compliance with the requirements of Article 84 and Article 123(2) EPC arises in respect of this feature. As the appellant was not represented at the oral proceedings before the board, there was no possibility to discuss and resolve this question in the appellant's favour during said proceedings.
- 6.7 Thus, admission of the claim set in its present unamended form would effectively compel the board to proceed to a first ruling on the aforementioned question which has not been the subject of a decision during first instance proceedings due to the effective abandonment of the relevant subject-matter in the first instance proceedings (cf. 5.6 above). In the board's view, this is a further relevant factor to be taken into account against the admissibility of the claim set.

6.8 In view of the foregoing, the board decided to exercise its discretionary power under Article 12(4) RPBA not to admit the claim set filed with the written statement setting out the grounds of appeal. For this reason, neither the main request nor the first auxiliary request can be granted.

7. *Observations re the appellant's submissions*

7.1 The board refers to the appellant's submissions to the effect that the claim set should be considered admissible in view of the case law at the time that the appeal was filed (cf. Facts and Submissions, item XV(iii) above) and notes that it cannot concur with these submissions for the reasons which follow.

7.2 In the first place, it is noted that the appellant only refers in a general manner to "the case law of the Boards of Appeal" and does not cite any specific decisions to support its assertions in this regard.

7.3 As noted previously (cf. 3.3 above), the Rules of Procedure of the Boards of Appeal have included provisions corresponding to those of the present Rule 12(4) RPBA since 1 May 2003, i.e. more than six years prior to the filing of the present appeal. The exercise of the discretionary power accorded under these provisions requires the appeal board to have regard to the particular circumstances of each case and to arrive at a decision on the basis of its own discretionary judgement.

7.4 The appellant has not succeeded in establishing that, at the time of filing the appeal, it was the common

practice to exercise the aforementioned discretionary powers in the favour of appellants under directly comparable circumstances. Even if the existence of such a practice on the part of other boards had been established, it is doubtful as to whether this could be relied on to bind the present board with respect to exercising the aforementioned statutory powers on the basis of its own discretionary judgement and having due regard to the particular circumstances of the present case.

- 7.5 Moreover, the board notes that prior to the entry into force of the provisions of the Rules of Procedure of the Boards of Appeal corresponding to the present Article 12(4) RPBA in May 2003, decisions had been taken not to admit requests filed at the commencement of appeal proceedings on the grounds that they contained substantially similar subject-matter to requests which had been withdrawn during first instance proceedings.
- 7.6 In this regard, reference is made to T 0528/93 (cf. Headnote; Reasons, point 1). The approach taken in that decision was confirmed and followed in the later decision T 0390/07 (cf. Headnote 1; Reasons, points 1 to 3). The board is aware that the aforementioned decisions relate to *inter partes* proceedings but nevertheless considers that the considerations on which they are based are also applicable *mutatis mutandis* to *ex parte* cases.
- 7.7 In view of the foregoing, the board judges that the appellant's arguments invoking a "reasonable expectation" that the claim set should be admissible in view of the case law at the time that the appeal was filed must be rejected.

Second and third auxiliary requests

8. The appellant's second and third auxiliary requests concern the claim set filed with the letter of 16 December 2013. In both cases, it is requested that the decision under appeal be set aside. According to the second auxiliary request, the board is requested to remit the application to the department of first instance for further prosecution on the basis of said claim set. According to the third auxiliary request, the board is requested to grant a patent based on said claim set. For the reasons which follow, the board cannot allow either of the aforementioned requests.

9. *Amendments to claim 1*

9.1 Claim 1 as filed with the letter of 16 December 2013 is substantially identical to claim 1 filed with the written statement setting out the grounds of appeal and differs only in that it has been amended vis-à-vis its earlier filed counterpart to specify that the updating step applies only for a "border only" type of transparency level (cf. Facts and Submissions, item XV(vi) above).

10. *Admissibility*

10.1 In view of the fact that the later filed claim 1 raises substantially the same issues with respect to inventive step as its earlier filed counterpart, the objections detailed under 6.2 to 6.4 above apply *mutatis mutandis* with respect to the admissibility of the later filed claim set.

10.2 In this regard, it is additionally noted that the board has reservations as to whether the later-filed version of claim 1 complies with the requirements of Articles 84 and 123(2) EPC. Said claim is evidently based on the embodiment of the invention illustrated in Fig. 6 and disclosed in the corresponding passages of the description. It would appear from [0036] to [0038] of the originally filed disclosure that in addition to the updating step specified in the concluding feature of claim 1 in relation to the "border only" transparency level other types of updating procedures are executed with respect to the other types of transparency level. However, the claim omits any specification of the updating procedures to be executed in the case of the other specified types of transparency level and a question of compliance with the requirements of Article 84 and Article 123(2) EPC arises in respect of this omission. As the appellant was not represented at the oral proceedings before the board, there was no possibility to discuss and resolve this question in the appellant's favour during said oral proceedings.

10.3 Hence, admission of the claim set in its present unamended form would effectively compel the board to proceed to a first ruling on the aforementioned question which has not been the subject of a decision during first instance proceedings. In the board's view, this is a further relevant factor to be taken into account against the admissibility of the claim set.

10.4 In view of the foregoing, the board decides to exercise its discretionary power under Article 12(4) RPBA not to admit the claim set filed with the letter of 16 December 2013. For this reason, neither the second nor the third auxiliary request can be granted.

Conclusions

11. In the absence of an allowable request the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



K. Götz

A. Ritzka

Decision electronically authenticated