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**Datasheet for the decision
of 13 July 2012**

Case Number: T 2346/10 - 3.4.01

Application Number: 05722205.1

Publication Number: 1725979

IPC: G06Q 10/00

Language of the proceedings: EN

Title of invention:

Detection and prediction in an electronic system

Applicant:

Olsson, Kjell

Headword:

-

Relevant legal provisions:

EPC Art. 116(1), 108

EPC R. 99(2), 101(1)

RPBA Art. 11

Keyword:

"Form of appeal - admissible (no) - no indication of reasons"

Decisions cited:

T 0220/83, T 0250/89, T 0145/88

Catchword:

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Case Number: T 2346/10 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 13 July 2012

Appellant: Olsson, Kjell
(Applicant) Villagatan 11
S-761 40 Norrtelje (SE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 9 July 2010
refusing European patent application
No. 05722205.1 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: G. Assi
Members: F. Neumann
J. Geschwind

Summary of Facts and Submissions

- I. The appeal, filed on 06 September 2010, lies from the decision of the examining division, dispatched on 09 July 2010, to refuse European patent application number 05 722 205.1. The appeal fee was paid on 08 September 2010. The statement setting out the grounds of appeal was filed on 06 November 2010.
- II. In the decision the examining division refused the application for failure to comply with the provisions of Article 123(2) EPC. Moreover, despite the objections under Article 123(2) EPC, the examining division held that an inventive step could not be acknowledged (Articles 52(1) and 56 EPC). When assessing inventive step, it was held that all the features of claim 1 then on file which were performed automatically were known from a document D2. The remaining features of claim 1 were considered to be mental acts without technical significance.

The examining division additionally noted that the application was correctly classified in G06Q and that the composition of the examining division satisfied the requirements of Article 18(2) EPC.

- III. In the notice of appeal the appellant stated that "*The request for appeal regards*" the following:
- (a) "*The selection of the right Board of appeal shall be: 3.4.01 handling the classification area of G01S*";
 - (b) "*The refusal shall be withdrawn*";
 - (c) "*The classification of the invention shall be G01S*";

- (d) *"The patent application shall be examined by competent examiners in the technical field of the invention, i.e. by examiners from the field of G01S";*
- (e) *"In the examination process the inventor shall have the usual rights to a fair examination";*
- (f) *"The present EPO-process concerning "when the preclassification is wrong", must be changed"; and*
- (g) *"The Board shall analyse the topic handling of the patent application from start to end".*

IV. In the statement setting out the grounds of appeal submissions were made arguing that the application had been wrongly classified and that, as a result, the examining division was not competent to examine the application.

The lack of competence of the examining division was also apparent from the fact that, for compliance with Article 123(2) EPC, they required *"a word-by-word basis"* for all amendments to claim 1. This requirement was contested by the appellant.

Submissions were also made concerning the uncooperative attitude adopted by the examining division during the examination proceedings.

As a further request, the appellant requested *"Oral meetings with the Board of appeal, where the inventor gets a fair chance to discuss any remaining objections during the process of a competent examination"* and *"where the classification is discussed in a fair and competent way"*.

- V. By an order dated 19 January 2011, the appeal was transferred from Board 3.5.01 to Board 3.4.01.
- VI. With letter dated 21 February 2012, the appellant offered to demonstrate the invention to the Board and to present some figures in order to aid understanding.
- VII. On 16 April 2012 the Board issued a summons to oral proceedings to take place on 13 July 2012.

In an annex to the summons to oral proceedings, the Board explained that the only issue to be discussed would be the question of admissibility of the appeal and in particular, whether the statement setting out the grounds of appeal may be considered to indicate the reasons for setting aside the decision impugned. The Board held that irrespective of whether the application had been correctly classified and allocated, a reasoned decision had been issued making reference to a number of concrete objections. The statement setting out the grounds of appeal did not address these concrete objections but, instead, concentrated on the alleged incompetence of the examining division. In the preliminary opinion of the Board, the reasons for setting aside the contested decision had not been presented and so the requirements of Rule 99(2) EPC had not been satisfied.

- VIII. In response to the summons to oral proceedings, with letter of 06 June 2012, the appellant submitted that the Rapporteur "*has seriously misunderstood the Appeal, its grounds and reasons*". In view of this, the appellant repeated his request "*for presentation of*

some figures and a demonstration [of the invention] to simplify the process of understanding".

Moreover, in the appellant's view *"The admissibility of the Appeal can be accepted directly from the present information"*. Indeed, the appeal did not concern the substantive issues on which the contested decision was based, but instead only concerned the fact that the application was wrongly classified and thus allocated to an examining division which was not competent to examine the application. The wrong classification represented a fundamental deficiency in the first instance proceedings which, in accordance with Article 11 RPBA, would require the Board to remit the case to the department of first instance. This issue was clearly derivable from the statement setting out the grounds for appeal.

The remittal to the department of first instance under Article 11 RPBA was *"the first point in the inventor's request for Appeal"*. In this respect, the appellant noted that *"There is a request for an examination by a competent EPO-organisation within the field of the invention"*. *"We believe that the Board of Appeal will not perform such an examination, but remit the examination to a competent examining division with the area of the Board"*. Thus, *"the requested task for the Board of Appeal is to put no more effort into the case than is necessary for finding enough reasons to make the said remittance"*.

Furthermore, the summons to oral proceedings sent by the Board was not justified, because the appellant *"has asked for oral discussion/interviews, not oral*

proceedings". The appellant "can see no reason why Oral proceedings at this stage would be expedient for anyone. And the Board of Appeal has given no reason". Anyhow, "The inventor will absolutely not be forced to such oral proceedings". "Thus the oral proceedings shall be cancelled".

IX. The Board issued a further communication, dated 19 June 2012, in order to clarify some issues.

With regard to the admissibility of the appeal, the Board explained that the requirements for an adequate statement of the grounds of appeal have been developed through the jurisprudence of the boards of appeal. In particular, it is not sufficient for the statement of grounds to confine itself merely to an assertion that the impugned decision is incorrect. Rather, the statement must set out which legal or factual grounds should form the basis for setting aside the decision (T 220/83 (OJ EPO 1986, 249); T 250/89 (OJ EPO 1992, 355); T 145/88 (OJ EPO 1991, 251)).

With regard to the summons, the Board noted that oral proceedings "*shall*" take place either at the instance of the EPO if it considers this to be expedient or at the request of any party to the proceedings (Article 116(1) EPC).

In the present case, the Board considered the oral proceedings to be expedient in order to come to a conclusion on the issue of the admissibility of the appeal in an efficient manner. Thus, the Board confirmed that the oral proceedings would go ahead as planned.

The Board also explained that the appellant is free to choose whether he attends oral proceedings or not; he is therefore not "*forced to such Oral proceedings once again*", as he feared in his letter of 06 June 2012. However, the Board shall not be 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 (Article 15(3) RPBA).

- X. In his reply of 23 June 2012 the appellant protested that the Board's summons was based on "*false premises*" because "*You [the Board] are not allowing me my right to discuss my appeal and my reasons for my appeal*". "*Therefore my presence at the Oral Proceedings is absolutely meaningless*". "*Thus such an Oral Proceeding is against the rules and is not allowed, - and shall be cancelled*".
- XI. In a further letter of 29 June 2012, the appellant repeated his demand to cancel the oral proceedings.
- XII. The oral proceedings were held on 13 July 2012 as scheduled. The appellant did not appear. The oral proceedings were thus conducted in his absence. At the end, the Chairman announced the decision that the appeal is rejected as inadmissible.

Reasons for the Decision

1. Competence of the Board 3.4.01

- 1.1 By an order dated 19 January 2011, the chairmen of Board 3.5.01, to which the present case was first allocated, and of Board 3.4.01 agreed, under Article 1(3) of the Business distribution scheme of the Technical Boards of Appeal for the year 2011 (Supplement to OJ EPO 1/2011, 12), to transfer the appeal from Board 3.5.01 to Board 3.4.01.

For this reason, the Board 3.4.01 is competent for dealing with the present case.

- 1.2 The transfer of the appeal was agreed upon because the technical content of the appeal made it appropriate for allocation to Board 3.4.01. This finding does not, however, equate to an acknowledgement that the application has been incorrectly classified, for which issue the Board lacks competence.

2. Oral proceedings

- 2.1 Article 116(1) EPC states that "*Oral proceedings shall take place either at the instance of the EPO if it considers this to be expedient or at the request of any party to the proceedings*".

- 2.2 In the present case, the Board considered the oral proceedings to be expedient in order to come to a conclusion on the issue of the admissibility of the appeal in an effective manner. Indeed, oral proceedings are intended to provide the opportunity to carry out a

focussed exchange of views enabling the Board to reach a decision on the issues discussed. The volume of correspondence which was triggered by the annex to the summons to oral proceedings indeed illustrates how cumbersome the written procedure was likely to become in the present case. For this reason, the Board saw no cause for cancelling the oral proceedings which were thus held as scheduled.

- 2.3 The appellant did not appear at the oral proceedings. The oral proceedings were conducted in his absence and a decision was taken at the end of the proceedings. This procedure is fully in line with Article 15(3) RPBA, which states *"The Board shall not be 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"*.

3. Admissibility of the appeal

- 3.1 The third sentence of Article 108 EPC states: *"Within four months of notification of the decision, a statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations"*.

Rule 99(2) EPC specifies the content of this statement of grounds: *"In the statement of grounds of appeal the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based"*.

Moreover, Rule 101(1) EPC states that "*If the appeal does not comply with Articles 106 to 108, ... , the Board of Appeal shall reject it as inadmissible, unless any deficiency has been remedied before the relevant period under Article 108 has expired*".

3.2 In the following, the Board will, in particular, consider whether the requirements of Rule 99(2) EPC are satisfied.

The following two specific aspects are essential for this assessment in the present case:

- (a) Firstly, whether an allegedly incorrect classification of the application and the consequential allocation of the application to an allegedly incompetent examining division may constitute a reason for setting aside the contested decision;
- (b) Secondly, whether the concrete objections under Articles 123(2) and 56 EPC set out in the contested decision have been addressed.

3.3 Classification of the application

3.3.1 In the letter dated 03 November 2010, which will be referred to in the following as "*the statement of grounds*", the appellant submitted that the application had been wrongly classified and had thus been allocated to the wrong examining division. In his letter of 23 June 2012 the appellant emphasised that this was the **sole reason** for his appeal. It was maintained that this reason was clearly derivable from the statement of grounds of appeal. In his letter of 06 June 2012 the appellant held that the wrong classification represented a fundamental deficiency in the first

instance proceedings which, in accordance with Article 11 RPBA, would require the Board to remit the case to an examining division which was qualified to assess the application correctly.

- 3.3.2 The Board does not consider that an allegedly incorrect classification would necessarily represent a fundamental deficiency justifying the remittal of the case to the examining division. This cannot constitute an indication of "*reasons for setting aside the decision impugned*" as is required by Rule 99(2) EPC.

In the Board's view, a "*fundamental deficiency*" in the sense of Article 11 RPBA would arise when the actual act of issuing the decision is flawed. In this respect, a "*fundamental deficiency*" does not appear to be any different to a "*substantial procedural violation*" which has been defined as "*an objective deficiency in the procedure in the sense that the rules of procedure have not been applied in the manner prescribed by the Convention*" in the Case Law of the Boards of Appeal of the European Patent Office, 6th Edition, 2010 (see page 912). Indeed, it results from the jurisprudence that a fundamental deficiency in the sense of Article 11 RPBA is held to be present whenever a substantial procedural violation has been committed. Examples of fundamental deficiencies which would justify setting aside the contested decision and remitting the case to the examining division include:

- The violation of the right to be heard (Article 113(1) EPC);
- The disregard of a request for oral proceedings (Article 116(1) EPC);

- The failure to provide reasons in the decision (Rule 111(2) EPC);
- An incorrect composition of the opposition division (Article 19(2) EPC);
- The issuance of a decision on the basis of a text not agreed upon by the applicant (Article 113(2) EPC).

These deficiencies all arise from a disregard of those fundamental legal provisions of the EPC which are intended to protect the parties to the proceedings.

In contrast, the classification which is assigned to an application is not related to such fundamental legal provisions of the EPC. Instead, any potential mistake in the classification of the application would appear to derive from an error of judgement by the search division rather than a misapplication of fundamental rules of procedure.

3.3.3 Should an examining division not be technically qualified to examine a clearly wrongly classified application, then it is likely that the resulting lack of technical expertise will be reflected in the arguments provided in the decision refusing the application. In such a case, the decision would be set aside if the applicant as appellant were to convince the Board that the substance of the decision was indeed wrong. Whilst an incorrect classification can therefore contribute to the incorrectness of a decision, it is not an issue which per se could justify setting aside the contested decision.

In view of this, the comparison made by the appellant in the present case with regard to the terms appearing in the present application and in the allegedly incorrect classification G06Q is not sufficient for invalidating the technical arguments produced by the examining division in the contested decision. Rather, convincing technical counter-arguments remain indispensable.

In conclusion, the simple allegation that the present application was wrongly classified does not constitute a reason in the sense of Rule 99(2) EPC.

3.4 Objections under Articles 123(2) and 56 EPC set out in the contested decision

3.4.1 Irrespective of whether the application was correctly classified and irrespective of whether the application was allocated to the competent examining division, a reasoned decision has been issued in the present case. In particular, the contested decision relies upon two main objections, i.e. added subject-matter (Article 123(2) EPC) and lack of inventive step (Article 56 EPC). Within the framework of the latter objection, comments are also made concerning the technical character of the subject-matter of claim 1 then on file.

Whilst the statement of grounds extensively elaborates a number of grievances concerning the competence of the examining division to examine the case and to conduct the procedure in the correct manner, no reasons have been advanced to indicate why the specific objections raised by the examining division are incorrect. Rather,

in his letter of 06 June 2012 the appellant argued that all of the arguments which he presented to the examining division were available in the EPO file and that, in his opinion, he was under no obligation to repeat what had already been said.

- 3.4.2 With regard to the objection under Article 123(2) EPC, the appellant presented his own understanding of this legal norm. In particular, the provision of a "*word-by-word basis*" of disclosure, as requested by the examining division, was not necessary. Article 123(2) EPC concerned the content of the entire application rather than requiring a literal basis for the amendments.

The appellant also explained that the amendments to claim 1 had been performed in order to improve the clarity of the claim. It was held that the claims could be amended as long as they were still supported by the description. An objection of lack of support by the description should however only be raised with well-founded reasons (Guidelines for Examination, April 2010, section C-III,6.3).

Moreover, the appellant alleged that the minutes of the oral proceedings before the examining division were deficient in that not all of the passages cited by him to provide a basis for the amendments had been recorded.

In the Board's view, these submissions are of merely a general nature. The appellant failed to produce specific reasons for rebutting each of the concrete findings of the examining division in the contested decision: not a single passage of the original

application documents has been cited in the statement of grounds which would provide a basis for the amendments objected to in the contested decision. No explanation has been provided as to why the specific findings of the examining division in the contested decision would be incorrect. Even though the appellant expressed concern that the examining division may not have referred to the same "*original disclosure*" as he was citing from during the oral proceedings, the appellant made no attempt to explain to the Board which passages from which document would provide a basis for each of the amendments.

- 3.4.3 With regard to the issues of technical character and inventive step, the appellant held that they had not been sufficiently discussed in the oral proceedings before the examining division. Indeed, the majority of time had been spent discussing Article 123(2) EPC.

The Board, however, notes in this respect that the appellant left the oral proceedings before they were closed in order to catch his plane. This fact is not contested by the appellant who moreover acknowledged that, before leaving prematurely, he had been given the chance to make submissions on the remaining issues of technical character and inventive step.

In response to the specific arguments in section 3 of the reasons of the contested decision concerning non-technical steps of the claimed method, the appellant simply argued that "*Those questions become non-questions if one considers the facts about the invention as a new detection process*".

However, this somewhat vague statement cannot be regarded as a specific reason sufficient for rebutting the concrete findings of the examining division.

Moreover, in response to the specific arguments in section 4 of the reasons of the contested decision concerning inventive step of the claimed method, the appellant made no submissions in the statement of grounds.

- 3.5 In accordance with Article 12(2) RPBA, the statement of grounds of appeal shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed and should specify expressly "*all the facts, arguments and evidence*" relied on.

It is established jurisprudence that the appeal procedure is not a continuation of the examining procedure but is a distinct procedure which relies upon the appellant's analysis of the contested decision in order that the Board may ascertain why the appellant considers the contested decision to be incorrect. Only in this manner is the Board in a position to reach a decision. Consequently, if the appellant refers to the correspondence which is already on file, then he has to point the Board to those arguments which he considers to be relevant for the specific objections of the contested decision and to construct his case accordingly. The role of the Board is not to build the appellant's case for him, but rather to judge whether the case presented by him is convincing.

In view of the foregoing, with respect to the objections under Article 123(2) EPC, no attempt was

made in the statement of grounds to indicate the reasons for setting aside the decision impugned. The same applies with respect to the objection under Article 56 EPC, the question of technical character being discussed in this context.

These issues not being sufficiently addressed in the statement of grounds of appeal, no attempt was made to indicate the reasons for setting aside the decision impugned.

For the sake of completeness, it is noted that the only arguments contained in the notice of appeal concerned the classification and the EPO procedure for correction of a classification. No other correspondence was received in the four-month period of Article 108 EPC.

- 3.6 In summary, the Board is of the opinion that the statement of grounds of appeal does not meet the requirements of Rule 99(2) EPC since it does not contain an indication of reasons for setting aside the decision impugned. As a result, the requirements of Article 108 EPC are not fulfilled and the appeal is therefore not admissible under Rule 101(1) EPC.

The Board adds that remedy of any identified deficiency under Rule 101(1) EPC was excluded at the date of the decision because the four-month period under Article 108 EPC had expired.

4. Further requests

In view of the inadmissibility of the appeal, any further requests of the appellant do not need to be

considered. In particular, the case cannot be remitted to "*competent examiners in the technical field of the invention*" because the appeal is not admissible.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

R. Schumacher

G. Assi