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**Datasheet for the decision
of 5 February 2018**

Case Number: T 0447/13 - 3.4.03

Application Number: 08153680.7

Publication Number: 2023332

IPC: G09G5/00

Language of the proceedings: EN

Title of invention:

Display apparatus and control method thereof

Applicant:

Samsung Electronics Co., Ltd.

Headword:

Relevant legal provisions:

EPC Art. 52(1), 56, 111(1), 113(1), 116(1), 123(2)

EPC R. 103(1)(a), 111(1)

RPBA Art. 11

Keyword:

Oral proceedings - non-attendance at oral proceedings in first instance proceedings - opportunity to present comments (no)
Remittal to the department of first instance - fundamental deficiency in first instance proceedings (yes)
Reimbursement of appeal fee - (yes)

Decisions cited:

G 0007/93, T 2526/11

Catchword:

For the purposes of deciding whether to grant a request for postponement of oral proceedings on grounds of illness, the reference to "serious illness" in the Guidelines means an illness which is sufficiently serious to prevent the representative travelling to oral proceedings and presenting the case on the appointed day (Reasons, point 5.3).

Where a request for postponement of oral proceedings is refused on the ground that the request was not sufficiently substantiated, it is incumbent upon the Examining Division to explain why it considers the substantiation insufficient. In other words, it should state in clear terms what, in its opinion, should have been submitted or explained, but was not (Reasons, point 6.4).



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Case Number: T 0447/13 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 5 February 2018

Appellant: Samsung Electronics Co., Ltd.
(Applicant) 129, Samsung-ro
Yeongtong-gu
Suwon-si, Gyeonggi-do, 443-742 (KR)

Representative: Appleyard Lees IP LLP
15 Clare Road
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 15 March 2013
refusing European patent application No.
08153680.7 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman G. Eliasson
Members: S. Ward
C. Heath

Summary of Facts and Submissions

I. The appeal is against the decision of the Examining Division refusing European patent application No. 08 153 680 on the grounds that the claimed subject-matter did not meet the requirements of Article 123(2) EPC and did not involve an inventive step within the meaning of Articles 52(1) and 56 EPC.

II. In the statement of grounds of appeal the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request filed with the letter of 4 January 2013 or the first auxiliary request filed with the statement of grounds of appeal.

Furthermore, a refund of the appeal fee was requested under Rule 103 EPC as the Examining Division was believed to have "committed a substantial procedural violation contrary to Article 113(1) EPC".

III. The procedural history of the case before the department of first instance, insofar as it is relevant for the present decision, is as follows:

(1) The applicant (now the appellant) was summoned to oral proceedings before the Examining Division to be held on 6 February 2013. An accompanying communication set out the main issues to be discussed: inadmissible extension of subject-matter (Article 123(2) EPC), lack of clarity (Article 84 EPC) and lack of inventive step (Articles 52(1) and 56 EPC). The inventive step argument was essentially that starting from document D2 (US 2006/082569 A1) as closest prior art, it would be obvious to the skilled person to add features from D1

(US 2004/027515 A1), thereby arriving at the claimed invention.

(2) With a letter dated 4 January 2013 the applicant filed a new main request, and provided arguments that the new request met the requirements of Articles 123(2) and 84 EPC. Furthermore, the applicant indicated its agreement with the Examining Division that D2 was the closest prior art, but argued that the combination of D2 and D1 would not lead to the claimed invention.

(3) On 30 January 2013 a telephone conversation took place between the representative and the primary examiner. The minutes of this call were set out in a communication dated 8 February 2013, and an advance copy of the minutes was sent by the Examining Division and received by the applicant prior to the date of the oral proceedings (as acknowledged in the applicant's letter of 5 February 2013).

The text of the minutes started as follows:

"The representative has been informed during the telephone conversation that the application as presently on file does not meet the requirements of the EPC and therefore the date / time already fixed for oral proceedings is maintained. The following objections are present and will be discussed during said scheduled oral proceedings during which the representative will have the opportunity to present comments and arguments in accordance with Article 113(1) EPC."

The minutes recorded that an objection had been raised by the Examining Division that the amendments filed with the letter dated 4 January 2013 did not meet the

requirements of Article 123(2) EPC. Furthermore the subject-matter of new claim 1 was considered not to involve an inventive step, as it would be obvious to a skilled person starting from document D1 as closest prior art. Similar objections applied to method claim 7.

(4) On 5 February 2013 (the day before the scheduled oral proceedings) the appellant filed electronically a letter headed "URGENT - REGARDING ORAL PROCEEDINGS" and stating the following:

"As discussed by telephone today with the Chairman of the Examining Division, the representative on this case has been take [sic] ill and is not able to attend the EPO for the Oral Proceedings scheduled for 6 February 2013 (tomorrow).

"Regrettably, we ask for the Oral Proceedings to be postponed. Please let us know the new date for the Oral Proceedings."

(5) On the same day the Examining Division sent by fax a reply indicating that the date fixed for oral proceedings was maintained, and referring to an annexed communication (Form 2906), the text of which is as follows (emphasis in the original):

"The request made by the applicant in his communication of 05-02-2013 to postpone the oral Proceedings scheduled for the 06-02-2013 cannot be granted for the following reasons.

Indeed, none of the provisions mentioned in the Guidelines (cf. Part E-II.7 Requests for the postponement of oral proceedings) for postponing oral proceedings would appear to be fulfilled in the present

instance. The representative refers in his letter only to illness ("the representative... has been take ill") and not to serious illness as mentioned in said passage of the Guidelines. Nor was the demand accompanied by a substantially substantiated written statement indicating the reasons. Therefore, the data/time [sic] fixed for Oral Proceedings is maintained."

(6) Oral proceedings took place the following day as appointed. Nobody appeared for the applicant, and after deliberation the chairman announced the decision that the European patent application was refused under Article 97(2) EPC for failure to meet the requirements of Articles 123(2) and 56 EPC.

(7) In the written decision pursuant to Rule 111(1) EPC the Examining Division essentially followed the reasoning of the telephone minutes dated 8 February 2013 in relation to the requirements of Articles 123(2) and 56 EPC (see point V(3), above).

The reasons already given for refusing the request for postponement of oral proceedings were reiterated under points 8 and 9 of the "Facts and submissions".

IV. The arguments of the appellant, insofar as they are relevant to the present decision, may be summarised as follows:

The oral proceedings being conducted by the Examining Division without the applicant being present was a substantial procedural violation contrary to Article 113(1) EPC.

The professional representative was not able to attend the oral proceedings due to illness. The Chairman of the Examining Division had been informed by telephone on 5 February 2013 explaining the nature of the illness and that it meant that the representative was unfit to travel. This illness was also confirmed in writing on 5 February 2013. The oral proceedings should have been postponed and a new date appointed.

Section 12 of the Decision raised a new objection concerning Article 123(2) EPC (omission of the wording "*by an arbiter*" in claim 1). Section 13 of the Decision rejected claim 1 of the Main Request for lack of inventive step starting from document D1, rather than from D2 as used previously by the Examining Division. In both cases, the applicant had not had an opportunity to comment on these matters contrary to the requirements of Article 113(1) EPC.

The Examining Division had committed a substantial procedural violation contrary to Article 113(1) EPC and consequently a refund of the Appeal fee under Rule 103 EPC was requested.

- V. In a Communication pursuant to Rule 100(2) EPC, the Board gave its provisional view that the appellant's complaints concerning procedural matters appeared to be well founded, and that, as a result, there were two possible ways of proceeding. The Board could remit the case to the department of first instance on the grounds of a fundamental deficiency in the proceedings (Article 11 RPBA) or it could deal with all matters and issue a final decision.

The appellant was asked to indicate a preference between these two possibilities.

- VI. In a letter of 9 November 2017 the appellant asked the Board to exercise its discretion to remit the case to the department of first instance.

Reasons for the Decision

1. The appeal is admissible.
2. *Postponement of Oral Proceedings in General*
 - 2.1 According to Article 116(1) EPC, oral proceedings shall take place either at the instance of the European Patent Office if it considers this to be expedient or at the request of any party to the proceedings.

While the EPC contains no express provision for postponing duly appointed oral proceedings, requests for postponement are nevertheless received from time to time by the EPO, and it is the long-standing practice that the relevant department of the EPO has a discretion to grant or refuse such requests on their merits. In exercising this discretion, the principles to be applied - in the case of examining and opposition divisions - are set out in section E-III, 7.1 of the current Guidelines for Examination in the European Patent Office (November 2017). This corresponds to section section E-II, 7 of the Guidelines of June 2012, which would have been in force at the relevant date.

Essentially similar provisions are set out in a Notice from the European Patent Office concerning oral

proceedings before the departments of first instance of the EPO (OJ 2009, 68).

The Boards of Appeal have also confirmed that the EPO has a discretion in this matter, and have further elaborated on how this discretion shall be exercised (*Case law of the Boards of Appeal of the European Patent Office*, 8th edition 2016, III.C.4.1).

2.2 According to the Guidelines, an Examining Division should allow a request for the postponement of oral proceedings only if the party can advance "serious reasons" which justify the fixing of a new date. Any such request must be accompanied by a sufficiently substantiated written statement indicating these reasons. One such reason indicated in the Guidelines is "serious illness".

3. *Review by the Boards of Discretionary Decisions*

3.1 In the present case the Examining Division exercised its discretion by refusing the request to postpone the oral proceedings. The appellant argues that the request should have been allowed, and that the refusal amounted to a substantial procedural violation.

3.2 Where a Board of Appeal is requested to review a decision of a department of first instance based on the exercise of a discretion conferred by the EPC, the principles to be applied are set out in the following passage from G 7/93:

"if an Examining Division has exercised its discretion under Rule 86(3) EPC against an applicant in a particular case ... it is not the function of a Board of Appeal to review all the facts and circumstances of

the case as if it were in the place of the first instance department, in order to decide whether or not it would have exercised such discretion in the same way as the first instance department ... a Board of Appeal should only overrule the way in which a first instance department has exercised its discretion if it comes to the conclusion either that the first instance department in its decision has not exercised its discretion in accordance with the right principles ... or that it has exercised its discretion in an unreasonable way, and has thus exceeded the proper limits of its discretion." (G 7/93, Reasons, point 2.6.)

- 3.3 Even if the discretion to grant or refuse a request for postponement of oral proceedings is not directly derivable from the EPC (unlike the discretion referred to in G 7/93), the Board believes that the same principles apply. It is therefore not the task of the Board to decide whether the Examining Division reached the correct decision in refusing postponement, but simply to judge whether it used its discretion in accordance with the right principles and in a reasonable manner (see e.g. T 2526/11, Reasons, point 2.2).

4. *The Reasoning of the Examining Division*

- 4.1 Although the applicant had filed a request for a postponement of oral proceedings, and this request was not subsequently withdrawn, the section of the contested decision entitled "Reasons for the decision" does not include any indication why this request was refused. The only reference to this matter is under points 8 and 9 of the "Facts and submissions" in which the contents of the brief communication faxed to the

representative in response to the request are essentially repeated (see point V(5), above).

The Board can only conclude that point 9 of the "Facts and submissions" (and the communication referred to therein) represents the complete reasoning of the Examining Division in response to this request.

4.2 According to the Examining Division the request was refused as the the provisions mentioned in the Guidelines were not met. In particular:

(a) the representative referred in his letter only to illness and not to serious illness; and

(b) the request was not accompanied by a substantiated written statement indicating the reasons.

5. *The Ground of "Serious Illness"*

5.1 The Examining Division drew a distinction between illness and serious illness, and took the position that the failure of the representative to state explicitly that his illness was "serious" was a reason to refuse postponement.

5.2 Although the Guidelines cite "serious illness" (*schwere Erkrankung, maladie grave*) as a ground for postponement for oral proceedings, no definition of the meaning of "serious" is given.

Whatever meanings the term "serious illness" may have in other contexts, the Board's view is that within the framework of deciding whether to postpone an oral proceedings, "serious illness" can only be reasonably understood in relation to the sole relevant

consideration, namely whether the representative would be well enough to travel and to present the case satisfactorily.

5.3 Hence, for the purposes of deciding whether to grant a request for postponement of oral proceedings on grounds of illness, the reference to "serious illness" in the Guidelines means an illness which is sufficiently serious to prevent the representative travelling to oral proceedings and presenting the case on the appointed day.

5.4 In the letter dated 5 February 2013, the applicant informed the Examining Division that "the representative on this case has been take[n] ill and is not able to attend the EPO for the Oral Proceedings scheduled for 6 February 2013 (tomorrow)". It was therefore for the Examining Division to decide whether this form of words was sufficient to establish that the illness was "serious" in the sense set out in the previous paragraph.

5.5 Instead, the Examining Division judged this matter according to a different criterion, namely that the representative "refers in his letter only to illness ... and not to serious illness as mentioned in said passage of the Guidelines" (emphasis in the original). Judging that the respective requirement of the Guidelines has not been met merely because the illness has been described in a way which departs from the literal wording of the Guidelines constitutes, in the opinion of the Board, an unreasonable approach based on a wrong principle.

6. *Alleged lack of substantiation*

6.1 The Examining Division considered that the request was not "accompanied by a sufficiently substantiated written request indicating the reasons" (Facts and submissions, point 9).

There is no doubt that the applicant did substantiate the request, at least to some extent. Postponement was requested on the grounds that the representative had been taken ill, and the wording "take[n] ill" together with the use of "URGENT" in the heading, would appear to imply that the representative had come down with a sudden illness. Moreover, the illness was such that the representative was "not able to attend the EPO for the Oral Proceedings" scheduled for the following day.

6.2 The Examining Division decided that this degree of substantiation was insufficient. The Board is not called upon to decide whether the Examining Division was or was not correct in this matter, but merely to decide whether the Examining Division arrived at this conclusion in a reasonable way.

6.3 The Board can accept that the Examining Division faced the difficulty that the Guidelines do not define what "sufficiently substantiated" means in the case of illness. Nevertheless, the Examining Division must presumably have taken a view on what would constitute sufficient substantiation in this regard, otherwise it would not have been possible to conclude that the actual substantiation provided was insufficient.

6.4 Where a request for postponement of oral proceedings is refused on the ground that the request was not sufficiently substantiated, it is incumbent upon the Examining Division to explain why it considers the substantiation insufficient. In other words, it should

state in clear terms what, in its opinion, should have been submitted or explained, but was not.

6.5 In the present case, neither in the decision, nor in the communication sent in response to the representative's letter, is there a clear statement of what the Examining Division considered to be required to substantiate the illness, or what was considered to be lacking, which rendered the request insufficiently substantiated.

6.6 It is true that the letter from the representative was not accompanied by any proof of illness, such as a certificate from a doctor, nor did it specify the nature of the illness (although the appellant states that this was discussed over the telephone). There is, however, no explicit requirement in the Guidelines to provide a medical certificate or a written description of the illness, and it does not appear that the applicant was ever asked to provide either.

It is possible that the Examining Division nevertheless took the view that a medical certificate or a written description of the illness was required, and that it was the failure to meet this purported requirement which resulted in the written statement being deemed to be insufficiently substantiated. If this was the case, then it should have been made clear to the applicant (at least in the decision) that this was the basis of the finding of insufficient substantiation.

6.7 It is also true that the representative's letter did not explain why the case could not be allocated to another European patent attorney within the company. However, there is no indication on file that this consideration played any role in the case, and no

statement in the decision that this had any bearing on the finding of insufficient substantiation.

- 6.8 The proper exercise of discretion requires that it should be apparent, at least implicitly, that the decision has been reached based on reasonable considerations and correct principles. To the extent that the decision not to postpone oral proceedings was based on an alleged lack of substantiation, the Examining Division exercised its discretion improperly in that it is not apparent why the written statement of the representative was considered insufficiently substantiated.

7. *Consequences*

- 7.1 For the reasons given above, the Board judges that the decision not to postpone oral proceedings was based on a flawed exercise of discretion, in relation to both the question of "serious illness" and the alleged insufficient substantiation. The request for postponement was therefore unreasonably refused.

The only realistic alternative to postponement, which would nevertheless have allowed the applicant to be represented at oral proceedings, would have been to allocate the case to another European patent attorney (e.g. within the company). In the present case, however, in which the representative was apparently taken ill the day before oral proceedings, the Board's view is that it would not have been reasonable to expect this, both on practical grounds (travel arrangements etc.) and in view of the time required for a proper preparation of the case.

7.2 The refusal of the request for postponement therefore had the direct consequence that the appellant was unrepresented at the oral proceedings, and since the Board regards this refusal as being based on an unreasonable exercise of the Examining Division's discretion, the applicant's right to be heard was violated. This conclusion applies *a fortiori* since it was the stated position of the Examining Division that the scheduled oral proceedings represented "the opportunity to present comments and arguments in accordance with Article 113(1) EPC" in relation to the issues first raised in the telephone call which took place a matter of days before the scheduled date of oral proceedings (see points V(1)-V(3), above).

7.3 The Board regards this as a fundamental deficiency in the first instance proceedings, and since no "special reasons" within the meaning of Article 11 RPBA are apparent, the case is remitted to the department of first instance for further prosecution (Article 111(1) EPC and Article 11 RPBA).

In the remitted procedure, the applicant should be afforded the opportunity to present its case at oral proceedings.

8. *Requested Refund of the Appeal fee*

8.1 According to Rule 103(1)(a), "the appeal fee shall be reimbursed in full ... where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation".

8.2 In the present case the appeal has been found to be allowable, thus satisfying the first prerequisite for reimbursement.

8.3 Moreover, as set out above, the refusal to postpone the oral proceedings was based on a flawed exercise of discretion, having the consequence that the appellant's right to be heard was infringed, which the Board regards as a substantial procedural violation. Reimbursement of the appeal fee is therefore equitable, as the appellant was forced to file an appeal and pay the appeal fee in order to assert its rights under Article 113(1) EPC.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the department of first instance for further prosecution.

The appeal fee shall be reimbursed.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated