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**Datasheet for the decision
of 21 October 2014**

Case Number: T 0685/14 - 3.5.06

Application Number: 08857642.6

Publication Number: 2235627

IPC: G06F9/45

Language of the proceedings: EN

Title of invention:

USING FUNCTION CALLS AS COMPILER DIRECTIVES

Applicant:

PACT XPP Technologies AG

Headword:

Compiler directives/PACT

Relevant legal provisions:

RPBA Art. 11, 15(3)
EPC 1973 Art. 84, 109, 112(1)(a)
EPC Art. 108, 123(2)
EPC 1973 R. 67, 68(2), 76(1), 76(4)

Keyword:

Claims - clarity (no)
Amendments - added subject-matter (yes)
Failure to transmit the minutes - substantial procedural violation (no)
Reimbursement of the appeal fee (no)
Referral of questions to the Enlarged Board of Appeal (no)

Decisions cited:

Catchword:

See points 2.-7.



**Beschwerdekammern
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Case Number: T 0685/14 - 3.5.06

D E C I S I O N
of Technical Board of Appeal 3.5.06
of 21 October 2014

Appellant: PACT XPP Technologies AG
(Applicant) Walter-Gropius-Strasse 15
80807 Munich (DE)

Representative: Pietruk, Claus Peter
Vossius & Partner
Siebertstrasse 4
81675 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 20 September
2013 refusing European patent application No.
08857642.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman W. Sekretaruk
Members: M. Müller
G. Zucka

Summary of Facts and Submissions

- I. The appeal lies against the decision of the examining division, with reasons dispatched on 20 September 2013, to refuse European patent application No. 08857642.6 (claiming priority of 7 December 2007) because the invention according to the main request was insufficiently disclosed, Article 83 EPC. An auxiliary request filed during oral proceedings was not admitted under Rule 137(3) EPC because it did not overcome the insufficiency objection, but introduced new problems under Article 84 EPC 1973 and Article 123(2) EPC. While a copy of the main request was attached to the decision, a copy of the auxiliary request was not.
- II. The decision did not cite any document. However, in the examination proceedings reference was made to a standard textbook in compiler technology.
- III. An appeal against this decision was lodged on 19 November 2013, the appeal fee being paid on the same day. A statement of grounds of appeal was received on 28 January 2014.

The appellant pointed out that it had not received a copy of the minutes of the oral proceedings before the examining division, nor had such minutes been made available for download, contrary to the requirements of Rule 124 EPC (equivalent to Rule 76 EPC 1973). The grounds of appeal referred to "certain statements allegedly made by the applicant during the oral proceedings" and to an "undefined auxiliary request allegedly submitted during the oral proceedings". Lacking the minutes, the appellant had no way of knowing which auxiliary request the decision referred to. It thus argued that failure to provide the minutes in time viola-

ted the standards for a fair procedure (see grounds of appeal, p. 2, 5th para.), which made reimbursement of the appeal fee equitable.

It also argued that this deficiency could not be healed except by remittal to the first instance. Specifically, the deficiency was not healed by the fact that the examining division transmitted the minutes and the annexed auxiliary request after the appeal was filed (see the appellant's letter dated 11 April 2014). Moreover, since it was possible that the minutes were withheld intentionally, remittal should preferably be to an examining division in a different composition (see grounds of appeal, p. 2, last para.).

In substance, the appellant argued that the claimed invention had to be considered sufficiently disclosed, *inter alia* in view of the high average level of skill which had to be assumed in the field of compiler technology. The examining division was criticized for not having defined the skilled person properly (see grounds of appeal, p. 3, para. 4 ff.). The appellant further cited a document which the search by the USPTO had revealed, pointed to a difference over present claim 1 and argued that it established novelty and inventive step.

- IV. By letter dated 11 April 2014, the appellant reacted to the fact that it had meanwhile received a copy of the missing minutes and argued that the transmission of the minutes in response to the appeal was tantamount to a "comment" on the merits of the appeal, which was prohibited under Article 109 EPC 1973 (letter dated 11 April 2014, p. 2, paras. 4-7).

V. The appellant's requests at this point were that the decision be set aside and that (see grounds of appeal, p. 1, and p. 2, last para.; and letter of 11 April 2014, p. 2, penult. para. - p. 3, 1st para.):

1. the case be referred back to the examining division, preferably in a different composition;
2. failing this, oral proceedings be appointed;
3. the appeal fee be reimbursed;
4. an amended claim 1 filed with the grounds of appeal was to form the basis of the further proceedings before the board of appeal or the examining division, in combination with, in the board's understanding, the original description as published; and that
5. should the board be minded not remit the case to the examining division, the following questions be referred to the Enlarged Board of Appeal:

i. Is it in agreement with Rule 124 EPC and the fundamentals of a fair procedure to provide the minutes of oral proceedings in an ex-parte procedure only after the term for filing the statement of the grounds of appeal has lapsed?

ii. If not,

a) By when do the minutes have to be provided to the party at latest in order to ensure that the standards of a fair procedure are maintained?

b) Are there any consequences that shall result from not providing the minutes within the time limit defined? If so, what consequences shall result?

iii. If Q1 is found to be in agreement with Art. 124 EPC: Does sending out minutes only after the term for filing the statement of grounds of appeal has lapsed constitute a breach of Art. 109(2) EPC if the appeal is not rectified in all aspects?

VI. With a summons to oral proceedings, the board informed the appellant of its preliminary opinion. It doubted that the failure to provide the minutes in time amounted to a substantial procedural violation and it was minded neither to remit the case to the examining division immediately under Article 11 RPBA nor to refer questions to the Enlarged Board of Appeal. It further tended to disagree with the decision under appeal as regards Article 83 EPC 1973 but raised objections under Article 84 EPC 1973, and argued that claim 1 appeared to lack an inventive step over the prior art on file and common knowledge in the art of compilers, Article 56 EPC 1973.

VII. In response, in a letter dated 18 September 2014, the appellant provided further arguments and enclosed an amended claim 1 according to auxiliary requests 1-3 but stressed that these claims were deliberately *not* filed at this point but might be filed "at a later stage".

VIII. Claim 1 according to the sole request reads as follows:

"Method for compiling to assembly or object code source code of a standard high level language, the source code being written such that a class of functions distinguishable from other functions is specified in a manner allowing for easy distinction by both a programmer and the compiler,

at least one function of said specified class of functions is properly declared in a manner having an empty definition and at least one compiler directive is provided as a call of said at least one function of said specified class of functions, wherein a method of compiling is effected automatically in several stages, the frontend stage being language specific but not having hardware specific parts, the backend being hardware specific, comprising the steps of automatically distinguishing said functions of said class of functions distinguishable from other functions, passing said call of said function declared as an empty function to a later stage after distinguishing said function from other functions properly declared as empty while preserving the semantics of the internal representation over all compiler stages, and evaluating at said later stage the directive given by said call, the directive being one of a source code partitioning for reconfigurable processors and optimization for loop unrolling."

IX. Claim 1 of "unfiled auxiliary request 1" is identical to claim 1 of the main request up to "wherein", from where it continues as follows. (The added wording is underlined by the board; omissions are not marked.)

"... wherein the method of compiling is effected automatically in several stages,

each stage working on the results computed by the previous stages so that compiling is effected in a sequence of stages,
the frontend stage being language specific but not having hardware specific parts,
an optimization stage during which the structure of dataflow and control graphs is changed,
the backend being hardware specific,
the method comprising the steps of automatically distinguishing said at least one function of said class of functions distinguishable from other functions,
passing said call of said function declared as an empty function and distinguished from other functions,
from stage to stage to the backend stage in a manner preserving the semantics of the internal representation overall [sic] compiler stages despite the structure of dataflow and control graphs being changed in the optimization stage
and evaluating at said backend stage the directive given by said call,
the directive being one of a source code partitioning for reconfigurable processors and optimization for loop unrolling."

- X. Claim 1 of the "unfiled auxiliary request 2" contains a number of additions over claim 1 of "auxiliary request 1":

After the first comma in claim 1 the following phrase is inserted to make it clear that the claimed compiling is "... in a manner facilitating compiling for several hardware platforms ...".

After the feature that "the method of compiling is effected automatically in several stages", the words

"... of a modular compiler" are inserted.

And the final part of claim 1 beginning with "passing said call ..." now reads as follows (again, added wording is underlined):

"passing said call of said function declared as an empty function and distinguished from other functions, from stage to stage to the backend stage in a manner preserving the semantics of the internal representation overall [sic] compiler stages despite the structure of dataflow and control graphs being changed in the optimization stage so that the part of the compiler internal representation is uniquely identifiable, the location of the functions [sic] calls allowing to uniquely identify the parts of the source code they apply to and

at said backend stage

either if the backend implements the directive,

evaluation [sic] the directive given by said call, the directive being one of a source code partitioning for reconfigurable processors and optimization for loop unrolling,

or if the hardware specific back end is not

implementing said directive, optimizing the empty function call away in the back end."

- XI. Claim 1 of "unfiled auxiliary request 3" contains one addition over claim 1 of "auxiliary request 2", namely that after "in a manner allowing for easy distinction by both a programmer and a compiler" the following phrase is inserted:

"the manner being such that all functions used as directives start with a specific prefix"

- XII. By letter dated 14 October 2014 and telephone confirmation on 20 October 2014, the appellant informed the board that it would not attend the oral proceedings.
- XIII. The oral proceedings took place on 21 October 2014 as planned and, as indicated, in absence of the appellant. At the end of the oral proceedings, the chairman announced the decision of the board.

Reasons for the Decision

Decision in the appellant's absence

1. According to Article 15(3) RPBA 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. Therefore, and further in accordance with Article 15(3) RPBA, the board treats the appellant as relying only on its written case.

Alleged violation of a fair procedure and of Article 109 EPC 1973; Remittal to the examining division; Reimbursement of the appeal fee

2. Rule 76(4) EPC 1973 lays down that the parties shall be provided with a copy of the minutes of oral proceedings. The EPC does not specify when this is to happen. However, as the minutes serve to document in particular the essentials of the oral proceedings and the relevant statements made by the parties, Rule 76(1) EPC 1973, and might have to be corrected, the board deems it evident that the minutes should be transmitted as soon as possible after the oral proceedings while the deciding body and the parties involved still have a fresh memory

of what happened during the oral proceedings. The corresponding instruction in the Guidelines for Examination (E-II, 10.1; version as currently in force) is, to the best of the board's knowledge, generally observed, minutes being transmitted often well before the written decision, or along with it.

- 2.1 The appellant reports not having received a copy of the minutes of the oral proceedings by the end of the time period for filing the statement of grounds of appeal, nor a copy of the auxiliary request which was attached to the minutes but not to the decision under appeal.

- 2.2 The appellant argues that the fact that he was not provided with a copy of the minutes violated its right to a fair procedure because the minutes are necessary for a review of the decision (grounds of appeal, p. 2, 5th para.). The appellant was "forced to present arguments in the grounds of appeal without having access to the minutes" (letter of 18 September 2014, p.1, 3rd para.) and, in particular, without knowing the auxiliary request which formed a basis of the decision (grounds of appeal, p. 2, 1st para.). The appellant's representative explained that, in order to make sure that he refers to the exact claims subject to the refusal, he "usually refers to the Official file ... rather than to his own file wrapper ... while drafting submissions"but that this was not possible in the present case "for reasons entirely caused by the EPO" (letter of 18 September 2014, p. 2, last para.).

- 2.3 The appellant also raises the suspicion that the examining division may deliberately not have drawn up the minutes so as to hamper a review of the decision.

3. Article 11 RPBA provides that the board shall remit a case to the department of first instance if fundamental deficiencies are apparent in the first instance proceedings, unless special reasons present themselves for doing otherwise.
- 3.1 The board takes the view that the failure to transmit the minutes within the appeal period contrary to the provisions of Rule 76(4) EPC 1973 is a procedural deficiency. However, the board does not consider that this is, *per se*, a fundamental one.
- 3.2 In the board's view, it can be expected from a party to oral proceedings, and certainly from professional representatives, that they take their own notes and do not rely exclusively on the minutes provided by the EPO. Such personal notes will typically reflect the party's perspective on what were the essentials of the oral proceedings and what were the final requests or the relevant statements made during the oral proceedings. Thus they are, *inter alia*, useful for the representative to assess the accuracy of the official minutes. Under normal circumstances, therefore, a party should be in a position to file an appeal, even without the official minutes, based on its own notes.
- 3.3 The board concedes that a decision may suffer from a substantial procedural deficiency if it does not - or leaves room to suspect that it does not - address the parties' requests; in such a case, the decision would at least be considered to be insufficiently reasoned, Rule 68(2) EPC 1973.
- 3.4 The fact that the auxiliary request not admitted by the examining division was not transmitted to the appellant is relevant in this respect.

- 3.5 The decision under appeal states that the auxiliary request was not admitted because it did not overcome the objection raised to the main request under Article 83 EPC, that one added feature was unclear, and that another feature offended against Article 123(2) EPC. Although the complete wording of claim 1 of the auxiliary request was not contained in or attached to the decision, the two latter features were reproduced *verbatim*. In the board's view this should have allowed the appellant to assess whether these reasons applied to its personal copy of the auxiliary request filed during oral proceedings.
- 3.6 The appellant does not argue that these reasons were inconsistent with the auxiliary request according to its own notes.
- 3.7 Moreover, on receipt of the written decision the appellant should have noticed that the auxiliary request to which the decision referred was not on file. More specifically, if, as the appellant's representative states, he generally does not refer to his own file wrapper but to the official file in order to assess the decision and to decide whether to file an appeal, he should have noticed this deficiency well before the end of the appeal period, in particular that for filing the statement of grounds of appeal, see Article 108 EPC. Moreover, any doubt as to whether the decision referred to the auxiliary request actually submitted during the oral proceedings should have arisen by then.
- 3.8 At this point, the appellant could easily have informed the EPO of the deficiency and requested that it be corrected. In fact, however, the appellant's complaint about the lack of minutes was only received with the

- statement of grounds of appeal, a mere two days before the end of the pertinent time limit.
4. Beyond that, the board considers the following.
 - 4.1 The appellant did not state that the auxiliary request addressed was different from the one actually submitted during oral proceedings, nor did it express a reasoned suspicion that it might be.
 - 4.2 The appellant was able to respond, in the grounds of appeal, to the objection under Article 83 EPC on the basis of which the main request was refused and which was maintained for the auxiliary request, if according to a *prima facie* assessment (see decision, reasons 2). Nor did it maintain the dismissed auxiliary request on appeal.
 - 4.3 Not even when the appellant, after filing the appeal, received the minutes did it challenge their accuracy or their consistency with the decision under appeal, nor did it extend its case by any considerations which it had not been able to submit before because it lacked the minutes and their annex.
 - 4.4 The appellant did not substantiate its suspicion that the examining division may have deliberately not written or may have withheld the minutes. Without any indication to this effect the board rather considers it entirely plausible - and certainly much more likely - that an unintentional mistake occurred.
 5. In view of the foregoing, the board concludes that the appellant failed to establish that the failure to transmit the minutes and the annex constituted a fundamental procedural deficiency within the meaning of

Article 11 RPBA - or, indeed, a substantial procedural violation which, according to Rule 67 EPC 1973, is a precondition for the reimbursement of the appeal fee.

6. By letter dated 20 March 2014, a copy of the minutes was sent on behalf of the examining division.
- 6.1 By letter dated 11 April 2014, the appellant argued that this late transmission of the minutes did not heal the initial procedural violation caused by the failure to transmit the minutes in time. Rather, it contended, the transmission of the minutes amounted to a "comment" as to the merits of the appeal, which was prohibited under Article 109(2) EPC 1973 and thus constituted a separate violation of the EPC (letter of 11 April 2014, p. 2, 4th-7th para.).
- 6.2 The board notes that the appellant gave no other reasons as to why the examining division might have provided comments on the merits of the appeal. In particular, the appellant did not cite a passage in the minutes which could be construed as such a comment, nor has the board for its part noticed any such passage.
- 6.3 The appellant appears to argue that the examining division, by sending the minutes after receipt of the statement of grounds of appeal, conceded that the minutes had not been sent before. The appellant's further argument seems to be that this concession allows the conclusion to be drawn that the examining division considered the appeal to be without merit not because the alleged fact was untrue but only because it disagreed with the appellant's legal assessment.
- 6.4 The board however considers that the transmission of the minutes cannot be construed as a concession by the

examining division that the minutes were not sent earlier. The letter of 20 March 2014 does not contain any reference to the alleged fact, *i.e.* neither concedes nor contradicts it. It is also conceivable that the minutes were sent as a matter of courtesy in response to the appellant's request, without ruling out that another copy had in fact been sent before.

- 6.5 For this reason alone, the board concludes that the transmission of the minutes cannot, as such, be construed as a comment as to the merits of the appeal as mentioned in Article 109(2) EPC 1973.
7. The board cannot exclude the possibility that an action by the examining division other than a written statement may have to be construed as a "comment" in the sense of Article 109(2) EPC 1973.
- 7.1 Even if, however, in the present case the examining division's action were construed as such a comment and to the extent that Article 109(2) EPC prohibits such comments, this would neither be a deficiency in the preceding examination procedure nor have had an impact on the drafting of the appeal.
- 7.2 Hence, even if a deficiency were to be established it would not, in the board's view, justify an immediate remittal of the case to the department of first instance under Article 11 RPBA.

No referral to Enlarged Board of Appeal

8. The appellant has not argued that a decision by the Enlarged Board is required in order to ensure a uniform application of the law due to, in particular, a divergence in the jurisprudence of the boards of appeal.

Furthermore, the board is in no doubt that it is in a position to come to its own conclusion in the present case and that, hence, a decision by the Enlarged Board of appeal is not required. Question (i) was answered in the affirmative for the present case (see point 5 above), question (ii) therefore need not be answered, and question (iii) was answered in the negative (see point 6.4 above). Since, therefore, a referral to the Enlarged Board of Appeal is not required under Article 112(1)(a) EPC, the corresponding request is rejected.

Added matter, Article 123(2) EPC

9. Claim 1 specifies the empty function call to be passed to a later stage "while preserving the semantics of the internal representation over all compiler stages". For brevity, this will be referred to below as the "semantics preservation" feature.
- 9.1 This phrase was added to the claims during the oral proceedings before the examining division. Amongst the passages given as a basis for the original disclosure (see minutes, p. 5, 1st para.) only that on page 9, under 3rd bullet point, applies. This states that "[f]unction calls are linked to the semantics of the programming language [which] must be preserved in the internal representation over all compilation stages." According to the description it is thus the semantics of the programming language which must be preserved in the internal representation rather than the semantics of the internal representation itself. The semantics of the internal representation or its preservation are not defined anywhere in the application. In fact, the term "semantics" is mentioned in the application only in the cited passage on page 9.

- 9.2 The board therefore concludes that the semantics preservation feature constitutes subject-matter which goes beyond the content of the application as filed and that, therefore, claim 1 of the main request does not comply with Article 123(2) EPC.

Clarity, Article 84 EPC 1973

10. Notwithstanding the finding regarding Article 123(2) EPC, the board also considers the semantics preservation feature to be unclear, Article 84 EPC 1973.
- 10.1 The board notes in passing that this feature is central to the invention. The description repeatedly discloses as an advantage of the invention that the association of a "hint or directive ... with a certain part of the program" must remain "intact in all stages of the compilation process" (see p. 7, 2nd para., but also p. 4, last four lines; p. 9, 3rd para.) and that the semantics preservation is instrumental in achieving this goal (p. 9, 3rd para.).
- 10.2 The appellant argues (see letter of 18 September 2014, p. 6, 1st para.) that the term "semantics" as claimed must not be limited to "the semantics of the program" but must be construed as "semantics of the [compiler] internal representation of the program" including additionally "the structure as expressed by dataflow and control graphs" (see letter of 18 September 2014, p. 6, 1st para.). The appellant points out that "[t]hese dataflow and control graphs are subject to considerable changes during optimizations" during a "standard compiling process" (*loc. cit.*) and the board agrees.
- 10.3 However, as was already noted, the semantics of the internal representation is not defined anywhere in the

application, nor, in the board's view, is the "semantics of the internal representation" clear on its own - in particular since it had to be defined in such a way that it is not affected by the "considerable changes" which the internal representation undergoes during optimization. Literally, therefore, the semantics preservation feature is unclear.

- 10.4 The relevance of the term "semantics of the internal representation" within claim 1 remains unclear even if it is interpreted as the "semantics of the programming language" being compiled (as is disclosed on page 9, 3rd bullet point). The board considers the requirement that the compiler preserves the program semantics to be redundant. A compiler translates a program from one language into another one - e.g., as claimed, a "high level" language into object code - and, as a translator, must maintain the program semantics at all times. In particular, optimizations must not change the program semantics. Carrying out a specific optimization may (and is meant to) have an effect on runtime efficiency or memory consumption but must not change *what* the program does. For example, a call of a function with an empty definition can be discarded precisely because it does not matter semantically whether this call is executed or not. For the same reason, an empty function call can be moved anywhere in the program code without affecting the program's semantics, irrespective of where it was located in the source code. Therefore, the board also cannot see why, as the description states, the preservation of semantics alone should "make[] it possible to uniquely identify the part of the internal representation, a hint or directive ... refers to".

10.5 In summary, the board concludes that the semantics preservation feature and its effects on the subject matter of claim 1 of the main request are unclear, Article 84 EPC 1973, and that the written arguments submitted by the appellant were insufficient to remedy this deficiency.

"Auxiliary claims likely to be filed at a later stage"

11. The claims filed with letter of 18 September 2014, which were marked, respectively, "Amended auxiliary claim", "Auxiliary request 2 claim" and "Auxiliary request 3 claim", were expressly not filed up to this point (see that letter, p. 3, 5th para.). However, in the board's understanding the appellant refrained from filing the auxiliary claims in case this might weaken its position with regard to the alleged procedural violation discussed above but, at the same time, it submitted them so as to avoid their being later rejected as late filed (see letter of 18 September 2014, p. 3, 5th - 7th para.). Under these circumstances, and although it does not share the appellant's concerns, the board deems it appropriate to deal briefly with the auxiliary claims as well.

12. The semantics preservation feature, which was found above to be deficient under Article 123(2) EPC and Article 84 EPC 1973, is contained in each of these auxiliary claims.

12.1 The first auxiliary claim elaborates further on the semantics preservation by specifying that semantics be preserved "despite the structure of dataflow and control graphs being changed in the optimization stage".

12.1.1 The objection under Article 123(2) EPC to the semantics preservation feature cannot be overcome by limiting it further as claimed.

12.1.2 The added phrase also cannot change the assessment (see point 9 above) that the semantics preservation feature renders the claim unclear, Article 84 EPC 1973. Program semantics must not be changed by the optimization stage independently of what internal representation is used, dataflow and control graphs included. And the semantics of the internal representation remains undefined even if it is specified that the internal representation comprises dataflow and control graphs. If anything, the lack of a definition of the semantics of the internal representation becomes more apparent with the specification that it is to be preserved even though part of the internal representation can be changed.

12.2 The second and third auxiliary claims specify the "preserving" further to be "so that the part of the compiler internal representation is uniquely identifiable, the location of the function[] calls allowing to uniquely identify the parts of the source code they apply to".

12.2.1 Again, the additional phrase is insufficient to address the Article 123(2) EPC objection.

12.2.2 Moreover, the board considers it unclear, for the purpose of Article 84 EPC 1973, how "preserving the semantics" is instrumental in making identifiable the parts of the source code which the empty function calls "apply to". Firstly, since the claims do not define which parts of the source code a function call "applies to" it is unclear what exactly the "location of the function[] calls" allegedly allows to identify. Se-

condly, since an empty function call can be moved around freely or even discarded without affecting the program semantics, it does not, in general, allow identification of any parts of the source code, let alone those that "they apply to". And thirdly, the added phrase does not overcome the deficiency that the "semantics of the internal representation" is undefined.

13. In summary, the board concludes that auxiliary claims 1-3 likewise do not overcome the objections to claim 1 of the main request under Article 123(2) EPC and Article 84 EPC 1973 EPC.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.
3. The request for referral of questions to the Enlarged Board of Appeal is rejected.

The Registrar:

The Chairman:



B. Atienza Vivancos

W. Sekretaruk

Decision electronically authenticated