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**Datasheet for the decision
of 30 July 2015**

Case Number: T 2068/14 - 3.5.06

Application Number: 10193245.7

Publication Number: 2381359

IPC: G06F9/445, G01R31/36, G01R31/40

Language of the proceedings: EN

Title of invention:
System and method for displaying battery information

Applicant:
Psion Inc.

Headword:
Displaying battery information/PSION

Relevant legal provisions:
EPC Art. 84, 116, 112(1)(a), 113(1)
EPC R. 103(1)(a), 111(2)
RPBA Art. 11

Keyword:
Referral to the Enlarged Board of Appeal - (no)
Oral proceedings - change of date (no)
Substantial procedural violation - (yes)
Remittal to the department of first instance - special reasons
for not remitting the case
Claims - clarity (no)
Reimbursement of appeal fee - (no)

Decisions cited:

T 1266/07, G 0001/04, G 0007/93, T 0411/04, J 0005/81

Catchword:

Although the board is prepared, in principle, to consider in exceptional circumstances the holding of ex parte oral proceedings by video conference, for the reasons set out in point 1.2.5 the conditions are not met in the present case. Moreover a party's right to be heard under Article 113(1) EPC does not imply a separate right of the party's representative to be heard and therefore does not imply a right to have oral proceedings before the EPO held by video conference (see point 1.3.18).



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Case Number: T 2068/14 - 3.5.06

D E C I S I O N
of Technical Board of Appeal 3.5.06
of 30 July 2015

Appellant:
(Applicant)

Psion Inc.
2100 Meadowvale Boulevard
Mississauga, ON L5N 7J9 (CA)

Representative:

Treleven, Colin
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Grove House
Lutyens Close
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Decision under appeal:

**Decision of the Examining Division of the
European Patent Office posted on 5 June 2014
refusing European patent application No.
10193245.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman W. Sekretaruk
Members: A. Teale
G. Zucka

Summary of Facts and Submissions

I. This is an appeal against the decision, dispatched with reasons on 5 June 2014, refusing European patent application No. 10 193 245.7.

II. According to the reasons for the appealed decision, the feature added to independent method claim 1, namely

"determining, by the user, whether the current energy stored in the battery is sufficient to operate the portable computer for a predetermined operating time period",

had no basis in the application as originally filed, contrary to Article 123(2) EPC. A corresponding feature added to the independent apparatus claim 8 gave rise to a corresponding objection under Article 123(2) EPC. For the purposes of assessing inventive step, it was assumed that said added feature was not set out in claims 1 and 8. The following document formed the closest prior art:

D1: US 2006/0248363 A1.

Construing claims 1 and 8 in this way, their subject-matter did not involve an inventive step, Article 56 EPC, in view of the disclosure of D1.

III. Insofar as it is relevant to the present decision, the examination procedure can be summarised as follows.

In a first communication dated 4 January 2012 the examining division raised *inter alia* novelty objections, Article 54 EPC, against the independent

claims 1 and 8 in view of D1. With a response received on 25 July 2012 the applicant filed *inter alia* amended claims.

In a second communication dated 8 January 2013 the examining division raised an objection of lack of inventive step, Article 56 EPC, against *inter alia* amended claims 1 and 8 in view of D1. With a response dated 9 May 2013 the applicant filed amended pages 2 to 8 of the description as well as amended claims 1 to 8.

In a third communication dated 17 December 2013 accompanying a summons to oral proceedings the examining division raised an objection under Article 123(2) EPC that the expression in claim 1 "determining, by the user, whether the current energy stored in the battery is sufficient to operate the portable computer (400) for a predetermined operating time period" had no basis in the application as originally filed. A corresponding objection was raised against claim 8. The subject-matter of claims 1 and 8, construed as not setting out the features regarded as added subject-matter, lacked inventive step, Article 56 EPC, in view of D1. In a response received on 2 January 2014 the applicant requested that the oral proceedings be held by video conference.

In a communication dated 14 January 2014 the examining division stated that it did not allow the request to hold the oral proceedings as a video conference because the subject-matter of the application was unsuitable to be discussed by means of a video-conference, and the objections (Articles 123(2) and 56 EPC) raised in the summons were such that there appeared to be no possibility of overcoming them by a simple exchange of arguments during a video conference. In a response

received on 24 April 2014 the applicant stated that it would not attend the oral proceedings.

A telephone interview was held on 28 April 2014 between the applicant's representative and the first examiner in which, according to the minutes of the conversation, the examiner informed the applicant that it was not possible to assess the inventive step of the objected added feature, since it had no basis at page 6, lines 21 to 28, of the application as originally filed. The added feature of "determining, by the user, whether the current energy stored in the battery is sufficient to operate the portable computer for a predetermined operating time period" was also not directly and unambiguously derivable from the following statements: "a user of a portable computer may select a battery to use in the portable computer for the duration of a shift" and "the user may see that the selected battery is suitable for use for a shift"; see page 6, lines 21 to 28, of the application as originally filed.

In a further response, received on 30 April 2014, the applicant's representative stated *inter alia* that the division was proposing to refuse the case, and thereby leave it to be forwarded to the board of appeal, without a full analysis of inventive step. This amounted to a lack of reasoning, since it was not clear whether the examining division regarded the claims as they stood as involving an inventive step, and constituted a substantial procedural violation. The expression "the current energy stored in the battery" was taken from original claim 2, and page 6, lines 21 to 29, which stated *inter alia* that a "user of a portable computer that is used in a cold storage setting may select a battery to use in the portable computer for the duration of a shift" and that "The

user may see that the selected battery is suitable for use for a shift and the user will give an indication to proceed, for example by hitting a key on the portable computer". The representative also requested that the summons be re-issued with a new date and "completed" inventive step argumentation so that the applicant could decide whether or not to attend the oral proceedings or to ask for a decision on the state of the file. In the event of a refusal, the board of appeal would then be able to reach a decision on inventive step without remittal to the examining division. The representative stated that he still considered oral proceedings by video conference to be appropriate and that, according to Guidelines E-11 11.1.1, a request to hold oral proceedings by video conference should normally be granted.

Oral proceedings took place on 20 May 2014 in the absence of the applicant, at the end of which the appealed decision was announced.

- IV. In a notice of appeal, received on 5 August 2014, the appellant requested that the decision be set aside. The appeal fee was paid on the same date.

- V. In a statement of grounds of appeal, received on 3 October 2014, the appellant requested, in order of decreasing preference, firstly, interlocutory revision with refund of the appeal fee and either "immediate grant" of the patent on the basis of the documents on file or a phone call with or a communication under Article 94(3) EPC from the examining division, once examination had been resumed. Secondly, the appellant requested that the board of appeal set aside the decision and refund the appeal fee. Thirdly, the appellant requested a communication from the board, if

it did not intend to set aside the decision immediately and grant the application. The appellant also made an auxiliary request for oral proceedings before the board "if the case is not resolved in written proceedings to the applicant's satisfaction". The appellant argued that the appeal fee should be refunded in view of four substantial procedural violations by the examining division.

- VI. In an annex to a summons to oral proceedings the board set out its provisional opinion that, of the four substantial procedural violations alleged by the appellant, the board tended to agree with the appellant regarding only two: the first (regarding claim 2) and the third (regarding the text of the independent claims). The amendments to the application were found to comply with Article 123(2) EPC. The board raised objections *inter alia* regarding the clarity of the independent claims, Article 84 EPC.
- VII. With a response received on 29 June 2015 the appellant filed amended description and drawings pages and claims according to a main and first to third auxiliary requests. The appellant maintained the request for oral proceedings and also requested that a patent be granted according to one of the new main and first to third auxiliary requests. The appellant also requested that various questions (see below) be referred to the Enlarged Board of Appeal.
- VIII. In a fax communication from its registry on 1 July 2015 the board pointed out that certain claims of the first auxiliary request mentioned in the response received on 29 June 2015 had not been received by the board. In a response received on 2 July 2015 the appellant filed a

complete set of claims 1 to 7 of the first auxiliary request.

- IX. In a letter received on 24 July 2015 the appellant enquired whether the oral proceedings would still take place as scheduled, which the board confirmed the same day in a communication from its registry.
- X. In a letter received on 28 July 2015 the appellant stated that it would neither attend, nor be represented at, the oral proceedings. The appellant requested that the oral proceedings be re-scheduled and held by video conference. The appellant also reiterated the request to refer questions to the Enlarged Board of Appeal.
- XI. Oral proceedings were held on 30 July 2015 in the absence of the appellant, at the end of which the board announced its decision.
- XII. The application is being considered in the following form:

Claims:

Main request: 1 to 7, received on 29 June 2015.

First auxiliary request: 1 to 6, received on 2 July 2015.

Second auxiliary request: 1 to 6 of the main request, received on 29 June 2015.

Third auxiliary request: 1, received on 29 June 2015.

Description:

All requests:

page 1, as originally filed,
pages 3 to 10, received 29 June 2015.

Main request:

page 2, received 29 June 2015.

First auxiliary request:
page 2, received 29 June 2015.

Second auxiliary request:
page 2, received 29 June 2015.

Third auxiliary request:
page 2, received 29 June 2015.

Drawings:
sheets 1 and 2, as originally filed
sheets 3 and 4, received on 29 June 2015.

XIII. The independent claims according to the main request read as follows, claims 2 to 6 being dependent on claim 1:

"1. A method (200) of displaying battery condition information on a display (402) of a portable computer (400) to a user, the method comprising the steps of: powering on (102) the portable computer (400); a processor (406) retrieving (202) battery condition information (202) of a battery (408) of the portable computer, the battery condition information (202) comprising a current energy stored in the battery (408); displaying (204) the retrieved battery condition information (204) on the display (402) of the portable computer (400); determining, by the user, whether the current energy stored in the battery is sufficient to operate the portable computer (400) for a predetermined operating time period; and executing (208), by the processor (406), an operating system (420) loaded into a memory (410, 412) of the portable computer (400) when the user indicates that the current energy stored in

the battery is sufficient to operate the portable computer (400) for at least the predetermined operating time period."

"7. A portable computer (400) for displaying battery condition information to a user, the portable computer (400) comprising: a battery (408); a processor (406) retrieving battery condition information (202) of the battery (408), the battery condition information (202) comprising a current energy stored in the battery (408); a display (402) for displaying the battery condition information (204); and a memory (410, 412) for storing an operating system (420); wherein the user determines whether the current energy stored in the battery is sufficient to operate the portable computer (400) for a predetermined operating time period and wherein the processor (406) executes the operating system (420) stored in the memory (410, 412) when the user indicates that the current energy stored in the battery is sufficient to operate the portable computer (400) for at least the predetermined operating time period."

XIV. The independent claims of the first auxiliary request read as follows, claims 2 to 5 being dependent on claim 1, ~~deletions~~ and **additions** being indicated with respect to the corresponding independent claims of the main request.

"1. A method (200, **300**) of displaying battery condition information on a display (402) of a portable computer (400) to a user, the method comprising the steps of: powering on (102) the portable computer (400); a processor (406) retrieving ~~(202)~~ battery condition information (202) of a battery (408) of the portable computer, the battery condition information (202)

comprising a current energy stored in the battery (408); displaying ~~(204)~~ the retrieved battery condition information (204) on the display (402) of the portable computer (400); ~~determining, by the user, whether~~ **until an indication to proceed is received (206), the indication being received from a user when** the current energy stored in the battery is sufficient to operate the portable computer (400) for **at least** a predetermined operating time period; and executing (208), by the processor (406), an operating system (420) loaded into a memory (410, 412) of the portable computer (400) when the user **indication is received** ~~indicates that the current energy stored in the battery is sufficient to operate the portable computer (400) for at least the predetermined operating time period."~~

"6. A portable computer (400) for displaying battery condition information to a user, the portable computer (400) comprising: a battery (408); a processor (406) retrieving battery condition information (202) of the battery (408), the battery condition information (202) comprising a current energy stored in the battery (408); a display (402) for displaying the battery condition information (204); and a memory (410, 412) for storing an operating system (420); **and** wherein the **processor (406) is configured to** ~~user determines whether the current energy stored in the battery is sufficient to operate the portable computer (400) for a predetermined operating time period and wherein the processor (406) executes the operating system (420) stored in the memory (410,412) when the user indicates~~ **a user indication is received, indicating** that the current energy stored in the battery is sufficient to operate the portable computer (400) for at least the predetermined operating time period."

- XV. Claims 1 to 6 according to the second auxiliary request are the same as claims 1 to 6 of the main request, independent apparatus claim 7 having been deleted.
- XVI. Claim 1 according to the third auxiliary request is the same as independent apparatus claim 7 of the main request, the method claims 1 to 6 having been deleted.

Reasons for the Decision

1. Procedural matters

1.1 The admissibility of the appeal

The appeal complies with the admissibility criteria under the EPC and is therefore admissible.

1.2 The request to re-schedule the oral proceedings and to hold them by video conference

1.2.1 According to Article 15(2) RPBA, a change of date for oral proceedings may exceptionally be allowed at the board's discretion on receipt of a written and reasoned request made as far as possible in advance of the appointed date. In the present case the appellant, in the letter received on 28 July 2015, gave no other reasons for the request to re-schedule the oral proceedings than the associated request to hold the oral proceedings by video conference. Hence the request to re-schedule the oral proceedings did not comply with Article 15(2) RPBA and was consequently refused.

1.2.2 As explained below, the board takes the view that it has a discretion regarding the organisation of oral proceedings, including, in principle, holding them by

video conference. This discretion is exercised according to the circumstances in any given case, including, in particular, whether the case at hand is *ex parte* or *inter partes*. A further important issue is the availability, in principle and in a specific case, of suitable rooms for oral proceedings before the board by video conference. This would typically require that provision also be made for the public (see T 1266/07).

1.2.3 In general, proceedings before the boards of appeal are written. This creates a "level playing field" for all parties and their representatives because submissions can be received from anywhere in the world at any time. Oral proceedings under Article 116 EPC are an exception to this general rule because they involve the parties or their representatives appearing before the board. In practice, this has traditionally been understood as the physical presence of a party or its representative before the board. The holding of oral proceedings as a video conference is not expressly provided for in the EPC, its implementing regulations or the RPBA, but neither is it excluded. In the board's view, while a video conference does not allow such direct communication as the face-to-face meeting involved in conventional oral proceedings, it nevertheless contains the essence of oral proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously. Thus each party's case can be presented to the board in real time, and the board can put questions to the parties/representatives. Since 1998, in the framework of "Information concerning interviews and oral proceedings to be held as a video conference", published in the EPO Official Journal (see OJ EPO 1997, 572, 2006, 585 and 2012, 354), the EPO has made it possible to carry out interviews and *ex parte*

oral proceedings by video conference, however only before examining divisions.

- 1.2.4 The appellant has argued that, as there are no legal obstacles preventing oral proceedings before the boards from being held by video conference, the appellant's right to be heard under Article 113 EPC has not been respected because the EPO has not made the necessary technical provisions to do so.
- 1.2.5 The board disagrees. In the present case the board finds that the appellant's right to oral proceedings, Article 116(1) EPC, does not imply a right to have oral proceedings in the form of its choice. Moreover a party's right to be heard under Article 113(1) EPC does not imply a separate right of the party's representative to be heard and therefore does not imply a right to have oral proceedings before the EPO held by video conference. The board does not accept the appellant's statement, insofar as it relates to proceedings before the boards, that "Representatives and applicants will only have truly equal access to Oral Proceedings when video conferences are almost always offered when requested, i.e. except in truly extreme circumstances.", since in this case the applicant/appellant chose to appoint a representative whose place of business is not near to the EPO's premises (see 1.3.17). The onus is on the appellant to persuade the board that conventional oral proceedings are not appropriate to properly present the appellant's case and that the board should exercise its discretion to, exceptionally, explore the possibility of holding oral proceedings by video conference. In the present case, the appellant was duly summoned to the conventional oral proceedings held on 30 July 2015. It

has not provided any reasons for, exceptionally, holding the oral proceedings by video conference.

1.2.6 Consequently the board did not allow the request to hold the oral proceedings as a video conference.

1.3 Possible immediate remittal of the case

1.3.1 Under Article 11 RPBA, a 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.

1.3.2 The alleged substantial procedural violations

The board is of the opinion that, in first instance proceedings, a substantial procedural violation (mentioned in Rule 103(1)(a) EPC) will in general result in a fundamental deficiency within the terms of Article 11 RPBA. As explained below, of the four substantial procedural violations alleged by the appellant, the board only agrees with the appellant regarding the first (relating to claim 2).

1.3.3 The first to third alleged substantial procedural violations

These concern whether the examining division properly considered the applicant's counter-arguments ("refutative arguments") and whether the decision is adequately reasoned.

1.3.4 The first alleged substantial procedural violation stems from the fact that point 17 of the reasons for the refusal, which summarises the applicant's arguments

in the response received on 30 April 2014, does not mention the applicant's argument that the expression "the current energy stored in the battery" was taken from original claim 2, which sets out that the "current energy stored in the battery" is battery information. According to the appellant, the decision thus did not address an important fact which spoke against the decision, contrary to Guidelines E-X 5 (presumably E-IX 5 (reasoning of decisions) is intended, since E-X 5 relates to persons entitled to appeal).

1.3.5 The version of the Guidelines applicable to the appealed decision is that of September 2013. According to E-IX 5, "It is particularly important that special attention should be paid to important facts and arguments which may speak against the decision made. If not, the impression might be given that such points have been overlooked." The board endorses this statement in the Guidelines, as it reflects the jurisprudence of the Boards of Appeal according to which there is an obligation on the part of the first instance to provide its analysis of the facts, evidence and arguments that were the subject of the proceedings before delivering its decision. The right to be heard covers all the factual and legal aspects which form the basis for the decision-making process. A party has a right to have its comments considered (see T 411/04, point 5).

1.3.6 In the present case the appellant drew attention in the letter received on 9 May 2013 (see point 2) to "the final line of claim 2 as originally filed" as *inter alia* providing a basis for the amendments to claims 1 and 8. The communication accompanying the summons to oral proceedings, dated 17 December 2013, in which the objection under Article 123(2) EPC was first raised,

does not mention the final line of claim 2 as originally filed, nor is it mentioned in the communication dated 14 January 2014. Claim 2 is also not mentioned in the minutes of the subsequent telephone interview on 28 April 2014. The applicant did not stand idly by. In the response received on 30 April 2014 the applicant again drew attention to the fact that the final line of original claim 2 set out that the current energy stored in the battery was battery information; see page 3. The decision does not mention the argument concerning the disclosure of claim 2.

1.3.7 The board finds that the examining division did not consider the applicant's argument that original claim 2 provided a basis for claims 1 and 8, so that the applicant was not properly heard, Article 113(1) EPC, and the decision is not properly reasoned, Rule 111(2) EPC. Following established case law, this is a substantial procedural violation and, therefore, also a fundamental deficiency in first instance proceedings, Article 11 RPBA.

1.3.8 Although the board concludes that a fundamental deficiency, Article 11 RPBA, did occur in the first instance proceedings, namely the first substantial procedural violation alleged by the appellant, the board considers the clarity objection raised by the board, Article 84 EPC, explained below, which is immediately apparent when examining the disclosure of the claimed subject-matter, to constitute "special reasons" justifying not remitting the case to the department of first instance. It would be contrary to the principles of legal certainty and efficiency to remit a case to the first instance when the appellant has not adequately addressed objections raised by the

board that would prejudice the grant of a European patent.

1.3.9 The second alleged substantial procedural violation stems from the fact that arguments made by the applicant in the response received on 25 July 2012 establishing novelty and arguing in favour of inventive step (see page 2, paragraphs 1 to 4), in particular stating that the subject-matter of claims 1 and 8 differed from the disclosure of D1 in not requiring two processing devices, thus increasing hardware efficiency, and stating that the invention addressed a different problem (quickly reading and displaying battery capacity before executing the operating system) to that of D1 (power saving while providing three operational modes with entertainment features), were not dealt with in the decision.

1.3.10 The arguments in question were made relating to a previous set of claims, which were subsequently extensively amended. The arguments were not repeated by the applicant in the context of the later claims. The board does not find this surprising, as in this case the amendments changed the difference features over D1 and thus the problem solved. While it is true that the reasons for the decision do not consider and provide counter arguments for the applicant's arguments, they are not particularly relevant and thus are not regarded as "important facts and arguments which may speak against the decision made" in the sense of the Guidelines. Under the circumstances the board finds that no procedural violation, and thus no fundamental procedural deficiency, occurred on this point.

1.3.11 The third alleged substantial procedural violation relates to the assessment of inventive step in the

decision, namely that points 18.1 and 18.2 of the reasons state that claims 1 and 8 were considered without the feature which was regarded as being added subject-matter and also a related feature. In other words, claim 1 was considered as if it did not set out the features of "determining, by the user, whether the current energy stored in the battery is sufficient to operate the portable computer (400) for a predetermined operating time period" and also "executing (208), by the processor (406), an operating system (420) loaded into a memory (410,412) of the portable computer (400) when the user indicates that the current energy stored in the battery is sufficient to operate the portable computer (400) for at least the predetermined operating time period." Corresponding features were considered to not be set out in claim 8. According to the appellant, this means that the decision is inadequately reasoned because it does not give reasons as to why the subject-matter of the whole of the independent claims lacks inventive step.

1.3.12 The board finds that the assessment of inventive step in the reasons for the decision is based on the correct version of the claims, so that Article 113(2) EPC was complied with. The board concludes that no procedural violation and thus no fundamental procedural deficiency occurred on this point.

1.3.13 The fourth alleged substantial procedural violation

This concerns the request made in the response to the summons by the examining division to oral proceedings to hold the oral proceedings as a video conference; see Guidelines E-11 11.1.1. The examining division refused this request in its communication dated 14 January 2014 on the basis that the subject-matter of the application

was unsuitable to be discussed by means of a video-conference, and that "objections (Articles 123(2) and 56 EPC) raised in the summons are such that it appears to be no possibility of overcoming them by a simple exchange of arguments during a video-conference".

- 1.3.14 The appellant has argued that, according to Guidelines E-II 11.1.1, a request to hold oral proceedings by video conference should normally, that is by default, be granted. The refusal of the request was a procedural decision by the first instance. Moreover the reasons given were inadequate because it was not made clear why the case was held to be complex.
- 1.3.15 As set out above, in the board's view, although the applicant has an absolute right to oral proceedings, Article 116 EPC, this is not the case for the holding of oral proceedings by video conference. The EPO offers applicants and their representatives the possibility in some cases of holding oral proceedings by video conference. According to the EPO's updated information in OJ EPO 2012, 354 to 357, "... the decision to accept the request for video-conference oral proceedings falls under the discretion of the examining division ..." The lack of an absolute right to such a video conference is reflected in the statement that, if oral proceedings are already scheduled, then "... the unavailability of video-conference facilities on that date is not a valid reason for postponement". The cited section in the EPO Official Journal further states in section 2 that "The ... examining division ... will, on a case-by-case basis, decide on the suitability of video-conferencing. If the request cannot be allowed, the person making the request will be informed by a communication indicating the reasons for the refusal". In the version of September 2013, Guidelines E-II 11.1.1, entitled

"Discretion regarding grant of requests for video-conferences" state *inter alia* that the examining division should normally grant a request for oral proceedings by video-conference unless there are specific reasons for refusing it. Criteria for refusing are, for example, the unsuitability of the subject-matter of the application, the high complexity of the case, or the need to see or handle samples or models.

- 1.3.16 The board agrees with the information in OJ EPO 2012, 354 to 357, and the appellant that the decision to refuse the request to hold the oral proceedings by video-conference was a discretionary, procedural decision by the examining division. This discretion has to be exercised properly, and, therefore, it cannot be excluded that, in a given case, there may indeed be only one correct way to exercise that discretion.
- 1.3.17 The Guidelines do provide, as a reason for refusal, the "unsuitability" of the subject-matter of the application for discussion by means of a video-conference, for instance if the case is highly complex or samples and models need to be seen or handled. However the examining division did not give detailed reasons for reaching this conclusion as provided for in OJ EPO 2012, pages 354 to 357, point 2, 3rd sentence.
- 1.3.18 The appellant has argued that this was a substantial procedural violation, in the sense that it affected the whole subsequent procedure, arguing that "From the representative's current location, the representative has been unable to reach any of the EPO's locations in less than eight hours of travelling, including driving, contingency time and flights. ... Applicants must then effectively arrange and pay for three days of time, travel costs, and accommodation for two overnight

stays, and must sometimes do this for more than one person ... Many applicants face additional costs of 2,500 - 5,000 Euros if they are not granted a request for a video conference, which sums exceed significantly even the examination fee". Hence, according to the appellant, some applicants decide against authorizing travel by the representative to oral proceedings who would have approved the smaller time commitment by the representative to take part in oral proceedings by video conference. The board does not find these arguments persuasive, as there is no such individual right on the part of the appellant's representative. Although the EPC safeguards an applicant's right to oral proceedings, it does not also ensure that the costs of attending the oral proceedings in person, possibly with a professional representative, are within the applicant's budget.

1.3.19 Even if the board came to the conclusion that there was a lack of reasoning, a question which can be left undecided in the case at hand, this procedural violation would not be a substantial one, since it did not affect the whole subsequent procedure. The applicant had no absolute right to such a video-conference under the EPC and still had the possibility of being heard, Article 113(1) EPC, at the oral proceedings, which it chose not to attend.

1.4 The appellant's non-attendance at the oral proceedings

As announced in advance, the duly summoned appellant did not attend the oral proceedings. In accordance with Article 15(3) RPBA, the voluntary absence of the appellant was not a reason for delaying a decision, and the board relied for its decision on the appellant's written submissions. The board was in a position to

decide at the conclusion of the oral proceedings, since the case was ready for decision, Article 15(5, 6) RPBA.

2. The context of the invention
 - 2.1 The application relates to displaying information on the state of the battery of a portable computer (see figure 4), such computers having a battery which can be removed and replaced; see page 3, line 24. The application lists various measures of battery condition, including "the current energy stored in the battery"; see original page 5, lines 14 to 18, and claim 2.
 - 2.2 Previous approaches, illustrated in figure 1, required the operating system to be loaded and running before the battery condition could be displayed on the user interface (UI); see page 4, lines 4 to 23. This meant that the user had to wait a considerable amount of time, after turning the computer on, before the state of the battery could be determined; see page 1, lines 21 to 27.
 - 2.3 The application seeks to reduce the time taken from "power on" to displaying battery condition information. This is achieved by interrupting the boot sequence of the operating system once the state of the battery can be displayed, as shown in figures 2 and 3. Only if the user gives an indication to proceed, for instance by pressing a key (see page 6, lines 13 to 14), does the boot sequence continue. In this way the computer can be used to assess the suitability of a particular battery for selection; see page 6, lines 18 to 19.
 - 2.4 The application lists various uses and locations for portable computers and mentions (see page 1, lines 5 to

11), for example, "food chain/cold chain" and "warehouse/distribution". The claims have been directed to such an embodiment, set out from page 6, line 21, to page 7, line 2, relating to the use of a portable computer during a shift in a "cold storage setting". The user inserts a battery into the computer, causing the computer to power on and display battery condition information; see page 6, lines 23 to 25. The user "may see that the battery is unsuitable for use and select another battery". According to page 6, lines 21 to 23, the user "may select a battery to use in the portable computer for the duration of a shift". The board understands the expression "unsuitable for use" to mean that the battery will not power the computer until the end of the shift. If it will not, then the user selects another battery. If it will, then the user gives an indication to proceed, for example by pressing a key on the computer, causing the computer to "continue the boot sequence, for example by locating a boot device, loading and executing an operating system from the boot device".

3. The clarity of the independent claims, Article 84 EPC
- 3.1 Although clarity was not mentioned in the decision, the board put it to the appellant in the annex to the summons to oral proceedings that the references in the independent claims to acts carried out by the user made them unclear. In the case of independent method claim 1 it was unclear what method steps were implied by the user deciding whether the current energy stored in the battery was sufficient to operate the portable computer for a predetermined time period, since this was merely an aim to be achieved without an indication of the steps taken to achieve it. In particular, no criteria were given for deciding whether the battery energy was

sufficient. In the context of the independent apparatus claim, which was directed to a portable computer, it was not clear what features of the portable computer were implied by the actions carried out by the user of the computer. As with claim 1, the criteria that the user applied to decide whether the current energy stored in the battery was sufficient to operate the portable computer for at least a predetermined operating time period were not specified.

3.2 These objections still apply to the independent claims of the present main and first to third auxiliary requests. The board finds that the amendment of the active expressions in claims 1 and 7 of the main request that the user indicates whether/that the current energy stored in the battery is sufficient to operate the portable computer for at least the predetermined operating time period, to the passive expression in claims 1 and 6 of the first auxiliary request, namely "the indication being received from a user when the current energy stored in the battery is sufficient to operate the portable computer for a predetermined operating time period" makes no technical difference to the claimed subject-matter and thus does not overcome the clarity objection.

3.3 The appellant has argued that decision G1/04 requires that a user be mentioned when a user is involved in one of a sequence of steps in order that the claims be clear. The board is however not objecting that the mention of the user in the independent claims *per se* causes a lack of clarity, Article 84 EPC, but rather that the claims do not set out the steps implied and the criteria applied by the user to achieve the aim to be achieved set out in the claims, namely to decide whether the current energy stored in the battery is

sufficient to operate the portable computer for a predetermined time period.

- 3.4 The appellant has also argued that each user of a portable computer in a widely varying range of industries and circumstances will only be considering starting the computer if he has a task in mind. Hence, according to the appellant, the terms "user" and "predetermined time period" need not be further clarified, and the appellant should not be restricted to only claiming the "shift" example given in the description. The board takes the view that the lack of clarity does not stem from the use of these terms. Rather it stems from the fact that the independent claims do not specify the steps taken by the user or the criteria applied to decide whether the battery energy is sufficient.
- 3.5 Claims 1 and 7 according to the main request, 1 and 6 according to the first auxiliary request and claim 1 according to the second and third auxiliary requests set out the portable computer displaying battery condition information comprising a current energy stored in the battery, the user then deciding whether the current energy stored in the battery is sufficient to operate the portable computer for a predetermined time period. The boundaries of this definition are unclear, since the claims do not specify whether and if so, how, the user's decision is based on the displayed information. Even if the skilled person were to interpret the claims in this way, the claims do not set out the steps the user takes and what criteria are applied to reach this decision.
- 3.6 The appellant has argued that the board is not applying a "mind willing to understand". The board disagrees,

since the clarity objection stems from a lack of features in the independent claims which would prevent the skilled person from understanding what is claimed.

3.7 A further lack of clarity results in apparatus claim 7 of the main request, the identically worded claim 1 of the third auxiliary request and claim 6 of the first auxiliary request because it is unclear what apparatus features are implied by the method steps carried out by the user set out in these claims. In particular, it is not clear what features are implied by the processor of the portable computer waiting for a user indication before executing the operating system.

3.8 The board concludes that the independent claims of the main and first to third auxiliary requests are unclear, Article 84 EPC.

4. The request for reimbursement of the appeal fee

As the appeal is not allowed, the request for reimbursement of the appeal fee, Rule 103(1)(a) EPC, has to be rejected.

5. The request to refer questions to the EBOA

5.1 In the responses received on 29 June and 28 July 2015 the appellant requested that the following questions be referred to the Enlarged Board of Appeal:

Q1. Under what circumstances should an examining division grant an applicant's request that an Oral Proceedings be by video conference?

- Q2. When must an examining division respond to an applicant's request that an Oral Proceedings be by video conference?
- Q3. In accordance with the principle of Equity for applicants located throughout Europe, should Oral Proceedings be allowed by video conference for ex-part[e] Oral Proceedings before the Boards of Appeal?
- 5.2 According to Article 112(1) and (1)(a) EPC, a board of appeal shall refer a question to the Enlarged Board of Appeal if it considers that a decision is required to ensure uniform application of the law or if a point of law of fundamental importance arises.
- 5.3 In the present case the board does not consider that, for the purposes of deciding on the present case, a decision is required on any of the above questions either to ensure uniform application of the law or because a point of law of fundamental importance has arisen.
- 5.4 Moreover a question involving an important point of law need not be referred to the Enlarged Board of Appeal if the board of appeal hearing the case considers itself able to answer it beyond any doubt; see J5/81 (OJ EPO 1982, 155), headnote 2). As the board considers this to be the case, an answer by the Enlarged Board of Appeal to the appellant's questions is not required. Concerning Q1, the board finds that the "Information of the European Patent Office in OJ EPO 2012, 354 to 357" is a reasonable starting point for assessing a request by a party to hold oral proceedings by video conference. Concerning Q2, a general answer is not required, as the decision of the examining division to

reject the request to hold the oral proceedings by video conference was issued several months before the appointed date of the oral proceedings, this being an adequate time frame for such a decision. The answer to Q3 is that the principle of Equity does not provide for a right for applicants located throughout Europe to have oral proceedings by video conference before the Boards of Appeal at their choice (see point 1.2.5 above).

Order

For these reasons it is decided that:

The request to refer questions to the Enlarged Board of Appeal is refused.

The appeal is dismissed.

The request to reimburse the appeal fee is refused.

The Registrar:

The Chairman:



B. Atienza Vivancos

W. Sekretaruk

Decision electronically authenticated