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**Datasheet for the decision  
of 26 July 2016**

**Case Number:** T 1824/15 - 3.5.06

**Application Number:** 02001500.4

**Publication Number:** 1225501

**IPC:** G06F1/16

**Language of the proceedings:** EN

**Title of invention:**

Adapter unit having a handle grip for a personal digital assistant

**Applicant:**

Symbol Technologies, LLC

**Headword:**

Adapter unit for PDA/SYMBOL TECHNOLOGIES

**Relevant legal provisions:**

RPBA Art. 11, 20(1)

EPC R. 103(1) (a)

European Convention on Human Rights (ECHR) Art. 6(1)

EPC 1973 Art. 56

**Keyword:**

Fundamental procedural defect - (no)  
Substantial procedural violation - (no)  
T 0823/11 - not followed  
Violation of Article 6(1) ECHR (not established)  
Referral to the Enlarged Board of Appeal - (no)  
Inventive step - (no)

**Decisions cited:**

G 0001/05, G 0002/08, T 0261/88, T 0315/03, T 0823/11

**Catchword:**

Point 2 of the reasons refers to the decision "Kristiansen and Tyvik AS v. Norway" dated 2 May 2013, European Court of Human Rights (ECtHR), application no. 25498/08.  
Points 2.3.10 to 2.3.15 refer to T 0823/11.



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Case Number: T 1824/15 - 3.5.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.06**  
**of 26 July 2016**

**Appellant:** Symbol Technologies, LLC  
(Applicant) One Zebra Plaza  
Holtsville, NY 11742 (US)

**Representative:** Treleven, Colin  
Optimus Patents Limited  
Grove House  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted on 19 May 2015  
refusing European patent application No.  
02001500.4 pursuant to Article 97(2) EPC.

**Composition of the Board:**

**Chairman** W. Sekretaruk  
**Members:** A. Teale  
M. Müller

## Summary of Facts and Submissions

- I. This is an appeal against the decision, dispatched with reasons on 19 May 2015, to refuse European patent application No. 02 001 500.4.
- II. In an annex to a summons to oral proceedings (referred to as "C3" in the decision), the examining division raised an inventive step objection based on D1 combined with common general knowledge, as exemplified by D2, these documents being:  
  
D1: US 5 349 497 A and  
D2: US 5 900 875 A.
- III. On 19 September 2014 the examining division issued a communication ("C4" in the decision) in which *inter alia* it for the first time raised an inventive step objection in view of the following document:  
  
D3: EP 0 945 818 A2.
- IV. During the oral proceedings before the examining division, held by video conference on 8 October 2014, the applicant filed amended claim 1 according to a main and an auxiliary request. The examining division withdrew its inventive step objection based on D1; see minutes, point 2a.
- V. According to the reasons for the appealed decision, the subject-matter of claim 1 according to the main and auxiliary requests did not involve an inventive step, Article 56 EPC, in view of D3 and common general knowledge, as exemplified by D2.

- VI. A notice of appeal was received on 13 July 2015, requesting that the decision be set aside. The appeal fee was paid on the same day.
- VII. With a statement of grounds of appeal, received on 11 August 2015, the appellant filed claims according to a main and an auxiliary request and requested, regarding the examining division (in decreasing order of preference), interlocutory revision, grant of the main request and a phone call or a communication. Regarding the board of appeal, the appellant requested (in decreasing order of preference) grant based on the claims of said main request, grant based on the claims of said auxiliary request, a communication from the board and, "if the case is not resolved in written proceedings to the applicant's satisfaction", oral proceedings. The appellant argued that a substantial procedural violation had occurred during examination proceedings and requested that the following question be referred to the Enlarged Board of Appeal:

"Should a renewal fee be refunded to an applicant by reason of equity if:

- (i) A patent application is refused at Oral Proceedings;
- (ii) An applicant pays a renewal fee that falls due more than three months after the Oral Proceedings, without having received notification of the refusal and minutes of the Oral Proceedings; and
- (iii) The applicant does not file a notice of appeal at the end of the time limit in Art. 108 EPC?"

The appellant argued that, if the question to the above question was "yes", then this would marginally reduce the number of appeals filed and contribute both to

equity for applicants and to reducing the backlog at the boards of appeal.

VIII. In an annex to a summons to oral proceedings the board expressed doubts *inter alia* as to whether the application according to both the main and the auxiliary request complied with Article 56 EPC 1973 regarding inventive step in view of D3, combined with D2 and the common general knowledge of the skilled person. The board however stated that the claimed subject-matter seemed to involve inventive step in view of D1.

IX. With a submission received on 24 June 2016 the appellant filed amended claims according to a new main and auxiliary request and amended the description and drawings. The appellant also requested reimbursement of the appeal fee and referred to the following decision of the European Court of Human Rights (ECtHR), referred to below as the "ECtHR decision":

Kristiansen and Tyvik AS v. Norway, application no. 25498/08.

The appellant also stated that "As a final request, the appellant requests grant of a patent on the basis of the independent claim of either the main or auxiliary claim sets, with deletion of any dependent claims, wording in the description or parts of the drawings to which the Board finds objections. The appellant will supply an amended copy of the dependent claims, pages of the description or drawings, within 24 hours of the Board indicating the need for any such changes, if typed amendments are required".

X. In a communication dated 3 July 2016 the board informed the appellant that the oral proceedings would take place as scheduled.

XI. In a letter received on 20 July 2016 the appellant stated that it would not attend the oral proceedings.

XII. Oral proceedings were held on 26 July 2016 in the absence of the appellant, as announced in advance. At the end of the oral proceedings the board announced its decision.

XIII. The application is being considered in the following form:

Description (both requests):

pages 2, 3, 5, 8, 10, 14, 16 to 18, 20 to 22 and 24 to 26, as originally filed,  
pages 1, 4, 4a, 4b and 6, received on 9 August 2006,  
and pages 7, 9, 11, 12, 15, 19, 23, 27 and 28 (pages 13 and 29 being deleted), received on 24 June 2016.

Claims (all received on 24 June 2016):

Main request: 1 to 13.

Auxiliary request: 1 to 9.

Drawings (both requests):

pages 2 to 13, 15 to 23 and 25 to 29, as originally filed, and  
pages 1, 14 and 24, received on 24 June 2016.

XIV. Claim 1 according to the main request reads as follows:

"A combination of a personal digital assistant (50) and an adapter unit (100) for removably receiving said personal digital assistant (50), the personal digital

assistant (50) having a back surface, two side surfaces defining a width of the personal digital assistant (50), a top surface and a bottom surface defining a length of the personal digital assistant (50), a scanning window for reading a product identification code in a direction which is outward from the top surface and a module for reading a product identification code, said adapter unit (100) comprising: a body portion having a bottom wall (108) and two side walls (110), said bottom wall (108) having a top section and a bottom section, said top section of said bottom wall (108) being configured to conform to the back surface of the personal digital assistant (50) and said two side walls (110) configured to prevent side to side movement of the personal digital assistant (50); and a handle grip (150) extending from said bottom section of said bottom wall (108), said handle grip (150) being joined to said body portion at a selected angle with respect to said body portion to cause a proximal end of said bottom section of said bottom wall (108) to rest on a radial surface of a user's hand when the user grasps the handle portion; the combination comprising: means configured to change the functionality of one or more application buttons on the personal digital assistant (50) upon attaching the adapter unit (100) to the personal digital assistant (50) by changing application button mapping within the personal digital assistant (50); an interface circuit board (227) housed between a cover and said bottom wall of said body portion, said interface circuit board (227) including circuitry; and the personal digital assistant (50) being adapted to determine when the adapter unit (100) is attached to the personal digital assistant (50)."



- XV. Claim 1 according to the auxiliary request has been restricted with respect to that of the main request by adding the feature that the adapter unit includes a non-volatile memory comprising a configuration program having routines operable to automatically change said application button mapping.

### **Reasons for the Decision**

1. The admissibility of the appeal

In view of the facts set out at points I, VI and VII above, the appeal complies with the admissibility requirements under the EPC and is therefore admissible.

2. The alleged substantial procedural violations

- 2.1 Summary of the allegations

The appellant has argued that two different delays in the first instance proceedings each amounted to a substantial procedural violation, Rule 103(1)(a) EPC, namely the delay of over eleven years in raising an inventive step objection based on D3 and the delay of seven months in issuing the written decision and minutes after the oral proceedings. In view of these issues, the board took this case considerably out of turn, well before it would otherwise have been started. As set out below, the board finds that, in particular because neither delay was contrary to a provision of the EPC, no fundamental deficiency, Article 11 RPBA, or procedural violation, let alone a substantial procedural violation, Rule 103(1) EPC, occurred. This

does not however mean that the board is indifferent to the consequences of unjustified procedural delays.

## 2.2 Provisions in the EPC relating to procedural delay

Before going into the facts of the two allegations, the board notes that, although the EPC sets out time limits applicable to the applicant, for instance the time limit for replying to an Official communication, Article 94(4) EPC, the EPC does not set out time limits applicable to the examining division in the two situations relied upon by the appellant. It could be argued that this is an "absence of procedural provisions", Article 125 EPC. However the appellant has provided no arguments as to how such time limits are derivable from principles of procedural law generally recognised in the contracting states. The board finds no basis either. The legal basis relied upon by the appellant, namely Rule 103(1)(a) EPC, concerns the reimbursement of the appeal fee, but can provide no relief for the appellant in the two situations relied upon by the appellant, since the appeal is not being allowed, a further condition for reimbursement under Rule 103(1)(a) EPC. Also Article 11 RPBA provides no suitable remedy against unreasonable delays in first instance proceedings, since remittal can only increase the duration of the first instance proceedings and thus cannot provide any relief to the applicant or third parties.

## 2.3 The delay in raising an objection based on D3

### 2.3.1 The appellant has criticized the fact that, although D3 was categorized as technological background ("A") in the partial European Search Report dated 24 February 2003, an inventive step objection starting

from D3 was nevertheless raised for the first time in the communication dated 19 September 2014, after the summons to oral proceedings had been issued and three weeks before the oral proceedings. Moreover in the oral proceedings the examining division conceded errors in the arguments based on D3 and revised them.

- 2.3.2 The question arises whether the examining division was entitled to raise the new objection so late in the first instance proceedings. The board finds that it was. Although, in the interests of a fair procedure, an examining division should raise objections as early as possible, firstly to give the applicant time to react properly and secondly for reasons of procedural economy, these considerations do not prevent the raising of new objections by the examining division at any time, nor does it prevent any member of the examining division from changing his/her mind. Indeed how could it be any other way? It is a precondition of a fair examination procedure that the members of the examining division be free to change their minds at any point in the procedure, including during the oral proceedings, as long as the requirements of Article 113(1) EPC 1973 are fulfilled by giving the applicant an opportunity to present his comments before a decision is taken. In the present case D3 became more important as the applicant succeeded in demonstrating the lack of relevance of D1. Hence the examination division had good reason, in view of the changed factual situation, to raise a new objection based on D3 even late in the examination procedure, Article 114(1) EPC. Under these circumstances, the board questions whether one can even speak of a "delay" in this context. Also the fact that, during the oral proceedings, the examining division changed its argumentation in the light of the applicant's arguments

speaks for, rather than against, the examining division: the division heard and reacted to the applicant's arguments.

2.3.3 As to whether the applicant was able to comment properly on the new objection, Article 113(1) EPC 1973, the board notes that the inventive step objection starting from D3 was raised for the first time in the communication dated 19 September 2014, deemed received by the applicant ten days later on 29 September 2014, Rule 126(2) EPC. Hence the applicant was made aware of the new objection at least nine days before the oral proceedings on 8 October 2014. While it is true that, as the appellant has pointed out, the objection was raised around 3000 days after D3 was first mentioned in the partial European Search Report, this is not contrary to any provision of the EPC. Moreover the appellant has not shown why he, as applicant, could not properly present his comments within nine days. The board cannot discern any such reasons either. Hence the board finds that the applicant's right to be heard, Article 113(1) EPC 1973, was respected.

2.3.4 In the submission received on 24 June 2016 the appellant referred to the decision (cited above) of the European Court of Human Rights (ECtHR), based on Article 6(1) European Convention on Human Rights (ECHR) (formerly the "Convention for the Protection of Human Rights and Fundamental Freedoms"), and decision T 0823/11, which also cites said ECtHR decision. The appellant argued that in T 0823/11 a delay of twelve years between filing and a decision of the examining division was found to be too long and that the logic of that decision applied to the present case in which there had been an even greater delay of twelve and a half years between filing and the first raising of the

objection based on D3. Hence the delays in the present case were more egregious than in T 0823/11. The ECtHR decision had found a national patent office to be responsible for nearly six years of delays. In the present case the objection based on D3 had been first raised eleven years after the publication of the search report, a delay almost twice that in the ECtHR case. Hence, according to the appellant, in the light of either of these decisions, a substantial procedural violation had occurred.

#### 2.3.5 The European Convention on Human Rights (ECHR)

Article 6(1) ECHR, first sentence, states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Although the European Patent Organisation is not a party to the ECHR, all the EPC contracting states are. Article 6(1) ECHR has also been recognised by the boards of appeal of the EPO as relevant to decisions under the EPC, in particular in the context of Article 125 EPC, as an indicator of principles of procedural law generally recognised in the contracting states; see interlocutory decision in case T 0261/88 (OJ EPO 1992, 627, reasons, point 3.2, last two paragraphs), interlocutory decision in case G 0001/05 (OJ 2007, 362, reasons, point 22) and interlocutory decision in case G 2/08 (not published, reasons, point 3.3). When, accordingly, Article 6(1) ECHR is applied in EPO proceedings, it must be interpreted by the EPO and its boards of appeal. In particular, it has to be determined and decided by the EPO and its boards of

appeal whether the "reasonable time" requirement according to Article 6(1) ECHR is satisfied or not.

2.3.6 The case law of the European Court of Human Rights (ECtHR)

One source for the interpretation of Article 6(1) ECHR in EPO proceedings may be the case law of the ECtHR. In order to understand the context of the ECtHR decision, the board first briefly reviews the case law of the ECtHR regarding Article 6 ECHR. This is reviewed on the court's website in the following document:

"Guide on Article 6 of the European Convention on Human Rights", URL: [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf), copyright 2013, text finalised on 30 April 2013.

The Guide summarizes the approach taken by the ECtHR (hereinafter referred to as "the court") regarding the right to a court (pages 14 to 19) and the length of proceedings; see pages 50 to 54. It may be summarized as follows. Article 6(1) ECHR embodies the "right to a court", of which the right of access, the right to institute proceedings before courts in civil matters, constitutes one aspect. The right to a court and the right of access are not absolute and may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired; see point 43. In considering procedural length, the starting point is normally taken to be the moment the action was instituted before the competent court, although exceptionally in cases where, for example, certain preliminary steps were necessary before an administrative authority as a preamble to

court proceedings, the starting point can be that of the mandatory preliminary administrative procedure; see points 271 and 272. The end of proceedings is taken to be the end of the entire proceedings, including appeal proceedings, which disposes of the dispute; see point 274. The reasonableness of the length of proceedings must be assessed in each case according to the particular circumstances, which may call for a global assessment; see point 278. Delays which are, taken alone, acceptable may nevertheless result in an unreasonable total delay; see point 279. A delay during a particular phase of the proceedings may be permissible if the total duration of proceedings is not excessive. Long periods during which the proceedings stagnate without any explanations being forthcoming are not acceptable. According to the court's case law, the reasonableness of the length of proceedings must be assessed in the light of the following criteria: the factual, procedural and legal complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute. Cases involving issues such as civil status, child custody and employment disputes are regarded as particularly urgent; see points 282, 283, 300 and 301. Regarding the applicant's conduct, Article 6(1) ECHR does not require applicants to cooperate with the judicial authorities, nor can they be blamed for making full use of the remedies available to them under domestic law; see point 285. The applicant is only required to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings; see point 286. Regarding the conduct of the relevant authorities, only delays attributable to the state may justify a failure to comply with the

reasonable time requirement; see point 290. Even in legal systems applying the principle that the procedural initiative lies with the parties, the latter's attitude does not absolve the courts from the obligation to ensure the expeditious trial required by Article 6(1) ECHR; see point 291. It is for the contracting states to organise their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time; see point 293. The fact that backlog situations have become commonplace does not justify the excessive length of proceedings; see point 295.

2.3.7 For the purposes of a decision on the present appeal, the facts of the case leading to the ECtHR decision, set out in section I of that decision, may be summarized as follows. The case concerned an application by the applicants to the ECtHR regarding the examination of a patent application by the Norwegian Industrial Property Office (NIPO) involving two complaints to the Parliamentary Ombudsman for Civil Matter and two appeals to NIPO's Board of Appeals. In total these proceedings lasted just under eighteen years, whereupon the applicants chose not to appeal to the Norwegian courts but instead filed an application with the ECtHR. The court did not allow a request by the respondent (Norway) to declare the application inadmissible on the basis that the applicants had failed to exhaust domestic remedies, stating that, in disputes regarding the lawfulness of the procedure under national law or its compatibility with the ECHR, complaints could be raised as soon as the applicants had an arguable claim that their Convention rights were violated; see point 42. The applicants argued that NIPO had neither performed a novelty search nor an



examination during the first fifteen years of the proceedings. The respondent argued that "the general complexity of the search and patentability examination had accounted for a significant part of the total period in question" and that the applicants were themselves responsible for the greater part of the total period, since they had made the case more complex by repeatedly contesting NIPO's requests for test results on the invention and by refusing to amend the claims as proposed by NIPO. The respondent however accepted responsibility for nearly six years of procedural delay due to matters of examiner workflow and preparation by the Board of Appeals; see point 50.

2.3.8 In its decision the court stated that the issuing of the NIPO Board of Appeals' final decision less than two years before the term of the patent, had it been granted, would have lapsed under section 40 of the Norwegian Patents Act meant that, in practical terms, the length of the administrative proceedings before NIPO in effect rendered meaningless any exercise by the applicants of their right of access to a court; see points 53 and 57. The exceptional duration of the procedure, compared to the average of two to three years (see point 54), was found to be largely attributable to a dispute between NIPO and the first applicant regarding the need to provide test results on the invention, the first applicant having repeatedly refused to carry out such testing. The length of the proceedings was however not solely the first applicant's responsibility, as the respondent had admitted that the patent authorities were responsible for delays totalling six years; see point 56. The court found that there had been a violation of the right of access to a court, Article 6(1) ECHR (see tenor, point 2), but stated (see tenor, point 3) that "no separate

issue arises" as to whether there had been a violation of the entitlement to a hearing within a reasonable time", Article 6(1) ECHR, and that "it is not necessary to examine this matter under this provision". The present board understands points 2 and 3 to mean that, based on the facts of the case, the court could already conclude that a violation of Article 6(1) ECHR had occurred due to a denial of access to a court. Hence it was unnecessary to also consider whether a further violation of Article 6(1) ECHR arose from unreasonable procedural delays.

#### 2.3.9 The present case in the light of the ECtHR decision

The board finds that caution is required in interpreting the ECtHR decision for two reasons. Firstly, in view of the court's own case law, in particular points 271 and 272, discussed above, the ECtHR decision concerns exceptional circumstances, since the procedural duration under consideration only concerned administrative proceedings, the usual court proceedings being entirely missing. Secondly, the board is unclear as to whether all of the administrative steps discussed in the ECtHR decision qualify as matters of "mandatory preliminary administrative procedure", as point 272 of the Guide puts it.

In the reasons for its decision the ECHR does not find that the delay of six years attributable to the patent authorities was the sole cause of a violation of Article 6(1) ECHR. Instead the court found that this was a minor contributor to the total duration, the major contributor being the dispute regarding the provision of test results on the invention. Moreover, according to the ECtHR's case law, what is a "reasonable time" must anyway be assessed according to

the particular circumstances of the case; see point 278. Hence, for both of these reasons, the ECtHR decision cannot be understood as a blanket finding that six years of delay attributable to patent authorities constitute a violation of Article 6(1) ECHR. The board is also not persuaded that the period of eleven years referred to by the appellant can be considered as a "delay" comparable to the six years in the ECtHR case that the applicant waited for responses from NIPO. In the present case three substantive communications were issued by the examining division and three corresponding responses were received from the applicant in the period of eleven years in question. Consequently the board finds that, in the light of the ECtHR decision, the eleven years that elapsed in the present case between the publication of the Partial Search Report and the first raising of the objection based on D3, even though eleven years is longer than six years, is not necessarily an unreasonably long delay under the circumstances violating Article 6(1) ECHR.

#### 2.3.10 Decision T 0823/11

This decision concerns the refusal of a Euro-PCT application, the supplementary European Search Report being completed on 18 February 1999. The first communication by the examining division was issued over five years later on 7 June 2004. There followed two further official communications and two corresponding substantive responses, the last being dated 10 August 2007. Over two years later the examining division sent a summons dated 8 March 2010 to oral proceedings at which the application was refused, the decision being deemed notified on 10 October 2010. On appeal the appellant requested a decision on the state

of the file. The board decided to set aside the decision, to remit the case and to reimburse the appeal fee.

2.3.11 According to the reasons for the decision (see point 5),

"The Board hence concludes that the duration of the first-instance proceedings was excessive, the written reasoning given in the communications was inadequate, and the contested decision is insufficiently reasoned within the meaning of Rule 111(2) EPC. These deficiencies amount to substantial procedural violations."

The present board understands this statement to mean that *inter alia* an excessive procedural duration was found to be a substantial procedural violation. As set out below, the present board deviates from this interpretation of the EPC, Article 20(1) RPBA.

2.3.12 According to point 2 of the reasons for decision T 0823/11, it followed from the summary of the first-instance proceedings (section II of the decision) that their length was affected by "unacceptable delays", in particular the delay of more than five years between completion of the supplementary European Search Report and the examining division's first communication and the delay of more than two years between the applicant's reply of 10 August 2007 and the summons to oral proceedings. The delays could not be "justified by the particular circumstances of the case", and the duration of the first-instance proceedings of more than twelve years after entry into the European phase had to be regarded as "excessive".

The present board notes that the reasons for decision T 0823/11 do not explain why the delays in the examination procedure could not be justified by the particular circumstances of the case, were "unacceptable", "excessive" or amounted to a substantial procedural violation, Rule 103(1)(a) EPC.

2.3.13 The board went on to state (see reasons point 2, 2nd paragraph) that

"According to decision T 315/03, even a shorter delay of ten years in a much more complex opposition case amounted to a procedural violation (points 15.5 and 15.6 of decision T 315/03 [...]). The Board in that case found that such a delay was not "within a reasonable time" and therefore infringed Article 6(1) of the European Convention on Human Rights (ECHR)." See also point 34 of the reasons in T 0823/11, 3rd paragraph, last sentence.

The present board puts a different interpretation on the cited passage in T 0315/03 ("Transgenic animals/HARVARD", OJ EPO 2006, 15) to that given in decision T 0823/11. Point 15.5 of the reasons in T 0315/03 states that

"That there was unjustified delay, as alleged by the parties, is clear - on any view, ten years to dispose of first instance proceedings is far too long. ... Ten years to dispose of proceedings at one instance is much longer than some periods which have been found not to be "within a reasonable time" contrary to Article 6(1) [ECHR] ..."

The present board does not understand the statement in T 315/03 as a finding that a duration of ten years for

first instance proceedings is a violation of Article 6(1) ECHR. Hence the board does not agree with the finding in T 0823/11 that "According to decision T 315/03, even a shorter delay of ten years in a much more complex opposition case amounted to a procedural violation ..."

2.3.14 Decision T 0823/11 also states (see reasons, point 2, 3rd paragraph) that

"The Board's considerations in the present case are also in line with a judgment in the case of [the ECtHR decision] ..."

The present board notes that decision T 0823/11 does not further explain how its reasoning was "in line with" that of the cited ECtHR decision, in particular why circumstances leading to a finding of a violation under Article 6(1) ECHR would necessarily also lead to a finding of a substantial procedural violation under Rule 103(1)(a) EPC.

2.3.15 The present case in the light of T 0823/11

In the submission received on 24 June 2016 the appellant argued that in T 0823/11 a delay of twelve years "between filing and a decision" was found to be too long. This is factually incorrect. The period of twelve years referred to in case T 0823/11 (see reasons, point 2, paragraph 2) as "excessive" was that between the entry into the European phase and the date of the appealed decision. The period "between filing and a decision" in case T 0823/11 was actually fourteen years. Hence, contrary to the appellant's argument, the period in the present case of twelve years between the

filing date and the appealed decision is less than, not greater than, that in T 0823/11.

The appellant has also argued that the logic of the decision in T 0823/11 also applied to the present case. As set out above, the board takes the view that T 0823/11 does not explain how the conclusions of "excessive" delay and "substantial procedural violation" were reached. Hence the board is unable to apply the logic of that decision to the present case.

2.3.16 The board concludes that the raising of the objection based on D3 led to neither a fundamental deficiency, Article 11 RPBA, nor a procedural violation, let alone a substantial procedural violation, Rule 103(1)(a) EPC, in the first instance proceedings. The appellant has also not established that a violation of Article 6(1) ECHR occurred.

2.4 The time taken by the examining division to issue the written decision and minutes

2.4.1 The appellant has argued that the decision to appeal could only be made once the reasons for the examining division's decision and the minutes had been issued in writing. This was particularly important in the present case where the final arguments based on D3 were only explained orally in the oral proceedings. The written decision and minutes were issued seven months after the oral proceedings. This delay was greater than the appellant's estimate of a "reasonable period" of four weeks and amounted to a substantial procedural violation, since "no original work" was involved in putting the decision reached in the examiners' minds at the oral proceedings onto paper. The appellant argued that an "applicant loses out in three aspects when

seven months lapse between an Oral Proceedings and receiving the refusal". Firstly, as a result of the delay, the applicant may be, and in the present case had been, forced to pay a further renewal fee while waiting for the written decision and minutes, which he required in order to fully understand the examining division's reasoning so that he could decide whether or not to appeal. On this point the appellant also requested that the board refer a question relating to the reimbursement of renewal fees to the Enlarged Board of Appeal, which is dealt with at the end of this decision. The appellant did not however request that a renewal fee be reimbursed. Secondly, the representative is forced to make "considerably more extensive notes during an Oral Proceedings, if the representative has no idea when the minutes and refusal decision are likely to arrive ..." This prolonged proceedings, which was neither in the applicant's nor the division's interest. Thirdly, there was a diminishing chance, over time, that "all of the representative, the first examiner, the instructing attorney for an applicant, and the inventor, [...] remain available", increasing the chance that other staff would need to start considering a case "from scratch".

- 2.4.2 The board points out that the EPC does not specify how soon after oral proceedings the written decision and minutes are to be issued. Moreover a delay in issuing the decision does not reduce the time available to the applicant to decide whether to appeal, since the time limit for filing a notice of appeal, Article 108(1) EPC, starts to run when the written decision is notified, Rule 111(1) EPC, rather than on the date of the announcement of the decision in oral proceedings. It is, of course, desirable, for reasons of legal certainty, also for third parties, that an examining



division issue the written decision and minutes within a reasonable time after oral proceedings, and excessively long delays in any procedural step may in principle indeed amount to a denial of justice. At the very least, long delays can indeed give rise to the availability problems mentioned by the appellant in his third point. Nevertheless an examining division must properly draft, discuss and agree on the text of the decision to fulfil its obligations under the EPC, in particular Rule 111(2) EPC, that the decision be reasoned. Hence the board does not accept the appellant's argument that "no original work" is involved in issuing the written decision. In the present case there is no indication in the file that the period between the hearing and the issuing of the decision and minutes was, under the circumstances, excessively long. Regarding the appellant's second point, the board is not persuaded that the taking of notes during oral proceedings is necessarily affected by procedural delays or that it prolongs the oral proceedings themselves. As mentioned above, the appellant's first point is dealt with at the end of this decision.

- 2.4.3 In the past, boards of appeal have found that long delays by the first instance between oral proceedings and the issuing of the written decision can constitute a substantial procedural violation; see section IV.E. 8.4.6 of the Case Law of the Boards of Appeal of the EPO, 8th Edition 2016. The present board takes the view that the effects of long delays, for instance having to change the composition of an opposition division due to the non-availability of the original members, a consequence of delays highlighted by the appellant himself, rather than the delays themselves, have often been seen as the root cause of a substantial procedural

violation. The board is unaware of any decision by a board of appeal in which a delay of seven months (or less) between oral proceedings and the issuing of the written decision and minutes was found to be a substantial procedural violation.

2.4.4 In view of the above considerations, and particularly because the EPC does not specify how soon after oral proceedings the written decision and minutes are to be issued, the board finds that the delay of seven months was not a procedural violation of any sort, let alone a substantial one, Rule 103(1)(a) EPC, and also not a fundamental deficiency, Article 11 RPBA.

3. Technical summary of the invention

3.1 The application relates to an adapter unit having a handle grip (see, for example, figures 7 and 18) which can removably receive a personal digital assistant (PDA), the PDA comprising a scanning window and a module for reading a product identification code, for instance a bar code. The adapter makes the PDA easier to hold when it is used to scan the bar codes on items.

3.2 The description acknowledges as prior art the iPAQ PDA having an expansion connector for attaching various compatible modules, such as a scanning module; see page 2, lines 13 to 23. This arrangement suffers from the disadvantage that the combination of the PDA and the scanning module is not rugged enough to be used in an industrial environment, since the scanning module may become detached from the PDA. Moreover the combination becomes difficult for the typical user to grasp; see page 3, lines 1 to 7. As additional functions are added to the PDA, there is a greater need to change the functionality of the application buttons on the PDA,

which in the prior art required the user to change the PDA settings to reassign or "remap" the buttons to new functions, this being time-consuming and prone to human error; see page 3, lines 8 to 13.

3.3 According to the application, the combination of a PDA and an adapter unit, set out in claim 1 of the main request, solves these problems by the adapter unit comprising surfaces conforming to the dimensions of the PDA, and a handle grip so that part of the bottom wall of the adapter unit rests on a radial surface of a user's hand when the user grasps the handle portion. The PDA can also determine whether the adapter unit is attached to it, the adapter unit comprising an interface circuit board and the combination comprising means to change the functionality of one or more PDA application buttons by changing application button mapping when the adapter unit is attached to the PDA. Claim 1 according to the auxiliary request sets out the additional feature that the adapter unit comprises a non-volatile memory including a configuration program including routines for automatically changing said application button mapping.

4. Document D3 (EP 0 945 818 A2)

4.1 D3 concerns adding a data collection module having a bar code reader to a PDA (see, for instance, paragraph [0003]), the PDA itself having no bar-code-reading capability. D3 states that incorporating such capability into the PDA itself would necessitate extensive hardware and software reconfiguration and be unlikely to be cost effective; see column 4, lines 3 to 7.

4.2 Figure 1 shows a PDA with a display/screen 12, keyboard 14 and serial interface 18; see paragraph [0004]. A data collection module in the form of a cradle receives the PDA, the module comprising a bar code reader; see paragraphs [0008-0009]. Figure 2 shows a cradle 20 having a recess 26 in its upper surface for receiving the PDA/terminal 10 and a grip/handle 24 and a serial interface at the rear of the recess for connection to the serial interface 18 of the terminal; see paragraph [0019], lines 13 to 16. As illustrated in figure 3, the grip/handle 24 is provided with a trigger 25 to control scanning, implying a link between the trigger of the cradle and the terminal; see paragraph [0029], lines 15 to 19. As shown in figure 5, the cradle 20 includes a processor 30 for processing information to and from the cradle, and controlling *inter alia* a scanner/scan engine 34, the processor being connected to a memory 32 comprising *inter alia* programs and user input and/or software applications; see paragraph [0020], lines 32 to 35. The scan engine comprises a scan window 21 facing forward; see figure 2 and paragraph [0021], lines 39 to 48.

4.3 The terminal can recognise when it is installed in the cradle and automatically run a data collection program; see paragraph [0030], lines 27 to 29. The terminal can also automatically revert to its PDA functions when it is removed from the cradle; see paragraph [0030], lines 30 to 32. The board understands this to mean that the terminal is adapted to determine when it is attached to the cradle. The scanner function can be controlled via the terminal keyboard 14; see paragraph [0030], lines 34 to 36. The terminal can communicate with the cradle to display data received from the scanner.

4.4 The cradle 20 can be regarded as the adapter unit set out in the claims, figure 2 disclosing the combination of the cradle and a PDA 10. In view of figure 1, the PDA has a back surface, two side surfaces defining a width of the PDA, a top surface and a bottom surface defining a length of the PDA. In the light of figure 2, the cradle comprises a body portion having a bottom wall and two side walls, said bottom wall having a top section and a bottom section, said top section of said bottom wall being configured to conform to the back surface of the PDA and said two side walls configured to prevent side to side movement of the PDA, and a handle grip (24) extending from said bottom section of said bottom wall, said handle grip being joined to said body portion at a selected angle with respect to said body portion to cause a proximal end of said bottom section of said bottom wall to rest on a radial surface of a user's hand when the user grasps the handle portion.

4.5 The appealed decision cites paragraphs [0020] to [0024] as disclosing an interface circuit board housed between a cover and the bottom wall of the body portion, said interface circuit board including circuitry. In the board's opinion, although the cited paragraphs mention the cradle containing circuitry comprising a processor 30 and a memory 32, the location of this circuitry is not directly and unambiguously derivable from D3. The board understands the term "cover" as used in the application to mean a removeable cover; see figure 9; 204 and page 12, line 15. Although figure 5 shows that the cradle comprises a battery 42 and the skilled person would understand the label "AAA (4)" in figure 3 to refer to a battery of four "AAA" cells, those cells could either be rechargeable or not. It would only be implicit in D3 that the PDA/terminal had a removeable

cover if the cells were non-rechargeable. Also paragraphs [0019] and [0025] to [0032], relating to the embodiments in figures 2 to 5, mention neither a circuit board nor a cover. Thus the board agrees with the appellant that D3 does not disclose a cover in the meaning of claim 1.

4.6 The appellant has challenged the finding in the decision that the bottom wall of the adapter unit known from D3 had no "top section" or "bottom section" in the sense of the claims. The board disagrees, since the skilled person would understand from figure 3 of D3 that the PDA lies on the inside of the lower surface of the cradle 20 as a "bottom wall", the bottom wall having a "top section" adjacent the "screen end" of the PDA and a "bottom section" adjacent the "keyboard end" of the PDA.

4.7 The appellant has also disputed the statement in the decision that a non-volatile memory including a configuration program including routines operable to automatically change the functionality of the application buttons of the PDA was known from D3, in particular column 4, lines 30 to 38. In the board's view the skilled person would understand the reference in D3 to memory 32 storing "read only basic control information and programs ..." to mean that memory 32 comprises non-volatile memory. However the reference to the terminal automatically reverting to its PDA functions when it is removed from the cradle does not go as far as disclosing or hinting at the programs including a configuration program having routines operable to automatically change the application button mapping within the PDA; see paragraph [0030], lines 30 to 32.

4.8 In the annex to the summons to oral proceedings the board stated that the subject-matter of claim 1 according to the previous main request (received with the grounds of appeal) differed from the disclosure of D3 in the following features:

- a. the PDA has a scanning window for reading a product identification code in a direction which is outward from the top surface,
- b. means configured to change the functionality of one or more application buttons on the PDA upon attaching the adapter unit to the PDA and
- c. an interface circuit board housed between a cover and the bottom wall of said body portion, said interface circuit board including circuitry.

Hence the subject-matter of claim 1 differed from the disclosure of D3 in more features, in particular feature "c", than had been identified in the appealed decision. The board also stated that claim 1 according to the auxiliary request differed from that according to the main request in additionally setting out the features that:

- d. the interface circuit board includes a processor that detects the connection of the adapter unit to the PDA and
- e. said means configured to change the functionality of one or more PDA application buttons comprising a non-volatile memory including a configuration program including routines operable to automatically change said button functionality.

4.9 With a submission received on 24 June 2016 the appellant filed amended claims according to the present main and auxiliary requests. In claim 1 of the main request feature "a" had been amended to now mention that the PDA comprises a module for reading a product identification code. The board regards this change as merely stating explicitly what had already been assumed in view of the scanning window. Claim 1 of the main request had also been amended to now mention in feature "b" that the functionality of one or more PDA application buttons is changed by "changing application button mapping within the personal digital assistant (50)". The term "mapping" is understood in the light of steps 308, 319 and 328 in figures 14 to 16, respectively, in which the configuration program changes the "application button mapping in the PDA" to change the functionality of one or more application buttons from an original function to a reconfigured function; see, for example, page 16, lines 7 to 10. Hence the board understands "mapping" in this context to mean the assignment of functions to the PDA application buttons. No amendments were made to difference feature "c". Regarding the present auxiliary request, claim 1 has been amended with respect to that upon which the annex to the summons was based by amending feature "a" in the same way as in the present main request. In feature "b" the reference to the processor detecting the connection of the adapter unit has been deleted and changing application button mapping has been added, as in the main request. No amendments were made to difference features "c" and "e", and difference feature "d", mentioning a processor on the interface circuit board, was deleted.

5. Document D2 (US 5 900 875 A)



- 5.1 According to its abstract, D2 concerns a palmtop computer having multi-purpose mechanical buttons (see figure 1; 121, 123, 125, 127, column 3, lines 1 to 12, and column 4, lines 40 to 44), which can be used, for instance, to turn the computer on and start a particular application. The application buttons are programmable to change the applications assigned to each application button; see column 3, lines 10 to 12.
  
- 5.2 In addition, connecting external devices, such as a PC and synchronization cradle (see figure 3; 310, 320) to the computer allows the external hardware devices to initiate application programs that cooperate with the external device; see column 5, lines 30 to 36. Synchronization is initiated by pressing the "synchronize" button on the cradle, there being no disclosure of detecting the connection of the adapter unit to the PDA.
  
6. Inventive step, Article 56 EPC 1973
  
- 6.1 Main request
  
- 6.1.1 According to the reasons for the appealed decision, the subject-matter of claim 1 of the then main request lacked inventive step in view of D3 and the common general knowledge of the skilled person. D3, like the present application, addressed the problem of providing an adapter unit for attachment to a PDA so that the combination could be conveniently used with one hand as a bar code scanner, while minimizing the number of user interface buttons. The subject-matter of claim 1 differed from the disclosure of D3 in that:
  - a. both the scanning window and the scanning module were located in the PDA and that

- b. changing the functionality of the PDA comprised changing the functionality of one or more application buttons.

6.1.2 Feature "a" added scanning capabilities to the PDA, solving the problem of allowing the PDA to be used as a scanner while it was not connected to the adapter unit. The skilled person in the field of portable electronic devices would always consider increasing the functionality of a device, such as that in D3, so that the problem was obvious. The claimed solution resulted from a trade-off between two obvious alternatives, each having known advantages and disadvantages. The first option, known from D3, was to integrate the scanning module and window into the adapter unit, thus making the PDA smaller and simpler. Moreover a standard PDA could be used, making the adapter unit simpler and cheaper to produce. This option had the disadvantages that the PDA alone could not be used for scanning and that the adapter unit had to comprise PDA interface circuitry and be supplied with more power, increasing its complexity and cost. The second option, set out in claim 1, was to integrate the scanning window and module into the PDA, with the advantage that the PDA could be used alone as a scanning device. The adapter unit was also simpler, lighter and consumed less power. This option had the disadvantage that the PDA would be heavier, bulkier and more complex. No inventive step was involved in selecting the second, claimed option over the first option known from D3, trade-offs between known constraints being usual for the skilled person.

6.1.3 Feature "b" had the effect of changing the functionality of one or more PDA button depending on whether or not the adapter unit was attached. This

solved the problem of reducing the number of buttons on the PDA. Context-dependent buttons were widely used; see, for example, D2 (column 4, lines 42 to 44), concerning a PDA with context sensitive application buttons. Attaching the adapter unit was such a change of context.

6.1.4 According to the grounds of appeal, D3 is directed to adding a bar code scanner to an existing device, such as a PDA, and thus teaches away from adding difference features "a" and "b". The decision did not follow the problem-solution approach, in particular because it did not explain why the skilled person would have changed the D3 arrangement into the claimed one. Feature "a" was not obvious, since integrating scanning functions into the PDA involved extensive reconfiguration and cost, as stated in D3 itself; see column 4, lines 5 to 7. It also involved adding fragile components to a device intended for rough environments. Feature "b" was also not obvious, since D3 was silent on changing the functionality of the numerous PDA buttons, or indeed their functions at all. Differences "a" and "b" did not solve independent problems, since they were both directed to adding scanning functionality to the PDA without increasing the number of buttons; see figure 18.

6.1.5 In the annex to the summons to oral proceedings the board expressed the view that the subject-matter of claim 1 also differed from the disclosure of D3 in feature "c" (see above). Features "a", "b" and "c" all addressed different problems, namely ("a") where to locate the scanner, ("b") realizing the user interface and ("c") realizing the circuitry in the adapter unit. The board questioned whether there was a technical connection between locating the scanner in the PDA

(difference "a") and automatically changing the functions of the PDA application buttons when the adapter unit was attached to the PDA (feature "b"). The PDA in the application could carry out scanning without the adapter unit being attached, and the application only mentioned the application buttons in connection with the flow charts in figures 14, 15 and 16 (see page 15, line 13, to page 18, line 3), but did not specify their locations. The skilled person would interpret keys 422 in figure 18 as examples of application buttons; see page 24, line 5 to 9. Figure 18 showed that the PDA application buttons (422) were accessible to the user with or without the adapter unit being attached. The problem formulated by the appellant was not considered to be the objective technical problem, since it contained a pointer to the solution, namely not increasing the number of buttons.

6.1.6 The board also stated that it did not accept the appellant's argument that D3 specifically taught away from incorporating the bar code reader in the PDA on the grounds of the extensive hardware and software configuration involved; see column 4, lines 3 to 7. The passage cited by the appellant was seen as selling the advantages of adding adapters to PDAs to increase their functionality. However the technical reasons given were unspecific, the alleged "extensive reconfiguration in relation to hardware and software" not being explained further. Even the commercial argument was questionable in D3, since it stated that such reconfiguration "would be **unlikely** to be cost effective" (emphasis by the board). Hence the board did not understand the cited statement in D3 as biasing the skilled person against adding difference feature "a".

6.1.7 The board also pointed out that the reasons for the decision discussed two options for locating a scanning module/window: either in the adapter unit (first option, known from D3) or in the PDA (second option, as claimed). The decision stated that "the solution proposed, constitutes a mere trade-off between known advantages and disadvantages of obvious alternatives" and set out the advantages and disadvantages of the two options assuming that the skilled person was starting with "a clean slate", implying that neither had been implemented in D3. This was however not the case in D3 where one of the two options had already been implemented, namely locating the scanner in the adapter unit. Hence the options would actually be, firstly, to leave the scanner in the adapter unit (the cradle) and, secondly, to move the scanner to the PDA. The advantages and disadvantages of these two options were however not compared in the decision.

6.1.8 Hence the board took the view that the skilled person, starting from D3 and solving the problem of increasing the functionality of the PDA, a usual problem for the skilled person, would have considered moving the bar code scanner from the cradle to the PDA as a matter of usual design. Hence feature "a" could not lend inventive step to claim 1. Turning to difference feature "b", according to the appealed decision, providing means configured to change the functionality of one or more application buttons on the PDA upon attaching the adapter unit to the PDA solved the problem of reducing the number of buttons on the PDA. The board disagreed that the number of buttons was reduced. Instead the functions provided by the existing buttons were increased. The board took the view that the skilled person, realizing the keyboard functions in D3, would have applied the teaching of D2 which, as set

out in the decision, teaches changing the functionality of PDA application buttons according to context (see column 4, lines 42 to 44), without inventive step. Hence feature "b" could not lend inventive step to claim 1. Difference "c" was not mentioned in the decision. In the board's opinion, providing an interface circuit board including circuitry and housed between a cover and the bottom wall of the body portion of the adapter unit solved the problem of realizing the circuitry in the adapter unit. While figure 5 of D3 disclosed circuitry in the adapter unit, there was no disclosure of its implementation, in particular its location. In adding difference feature "a", the scanner 34 would be removed from the circuits in the cradle. However most of the functionality in the cradle, for instance the PCMCIA or IRDA I/O 44, terminal I/O 36 and trigger 24, would remain. The realization of these circuits on a circuit board housed between a cover and the bottom wall of the body portion of the adapter unit was regarded as a matter of usual design for the skilled person. Hence also feature "c" could not lend inventive step to claim 1. Consequently the subject-matter of claim 1 seemed not to involve an inventive step, Article 56 EPC 1973.

6.1.9 In the submission received on 24 June 2016 the appellant argued that patent applications such as D3 had to be concise, which explained why D3 provided no further details of the extensive reconfiguration required to incorporate an optical reader into an existing portable data terminal; see column 4, lines 3 to 7. Regardless of the brief explanation, D3 disclosed a prejudice. The board does not accept this argument, since the disclosure of D3 must be seen through the eyes of the skilled person. Given the lack of any technical explanation in D3 as to why extensive

reconfiguration would be required to incorporate an optical reader into an existing portable data terminal, the board finds that the skilled person would not be technically prejudiced against making such a change.

- 6.1.10 Regarding the question of whether D2, in particular column 4, lines 43 to 44 and 57 to 65, disclosed context-dependent PDA application buttons, the appellant argued in the submission received on 24 June 2016 that in D2 the "context" was limited to the status of the particular underlying application. The application button mapping in D2 remained the same, since a given button always remained associated with a given application. A particular button could either turn on its respective application, if that application had not previously been running, or could execute an assigned function in said application, if the application was already running. Hence the context change in D2 related to a particular application already running or not. It would be a hindsight analysis to equate this context change to the changing of PDA application button mapping when the adapter unit is attached to the PDA, set out in claim 1 (difference feature "b"). D2 emphasised the need for the user of a palmtop computer system to quickly access the appropriate information, which was different from the problem of changing PDA button functionalities upon attaching the adapter unit to the PDA; see column 1, lines 29 to 42, in particular lines 37 to 40. There was no reason to combine D2 and D3 and, even if the skilled person were to do so, the combination did not provide the steps of claim 1, since D2 did not disclose a change of application button mapping. The board notes that the appellant accepts that D2 discloses context-dependent application button mapping in a PDA. Although the context-changes in D2 are different to that in

feature "b", namely attaching the adapter unit to the PDA, the skilled person would recognise that the teaching of D2 could be applied to any context-change, such as that involved in D3 once feature "a" has been added, not just those in D2.

6.1.11 Consequently the board finds that the subject-matter of claim 1 does not involve an inventive step, Article 56 EPC 1973, starting from D3 in view of D2 and the common general knowledge of the skilled person.

6.2 The auxiliary request

6.2.1 According to the reasons for the appealed decision, claim 1 only differed from that of the main request in setting out a non-volatile memory including a configuration program which included routines operable to automatically change the functionality of the application buttons on the PDA. These features were known from D3; see paragraph [0020], column 4, lines 30 to 38, and memory 32 of cradle 20 shown in figure 5. Hence the subject-matter of claim 1 of the then auxiliary request lacked inventive step in view of D3 and the common general knowledge of the skilled person.

6.2.2 In the annex to the summons to oral proceedings the board stated that claim 1 according to the then auxiliary request differed from that according to the main request in additionally setting out the difference features that:

d. the interface circuit board includes a processor that detects the connection of the adapter unit to the PDA and



e. said means configured to change the functionality of one or more PDA application buttons comprise a non-volatile memory including a configuration program including routines operable to automatically change said button functionality.

6.2.3 Difference feature "d" has now been deleted. The board stated in the annex to the summons that difference feature "e" seemed to set out a routine implementation of difference feature "b" discussed above. In the context of the cradle having its own battery (see figure 5; battery 42), the use of a non-volatile memory in the cradle appeared to be a usual choice to minimize battery drain. Since the application button functions were only changed when the adapter was attached to the PDA, the skilled person would have chosen to store a configuration program including routines operable to automatically change said button functionality in said non-volatile memory in the cradle to save memory in the PDA. Hence feature "e" was unable to lend inventive step to claim 1.

6.2.4 In the submission received on 24 June 2016 the appellant argued that there was no reason to combine D2 and D3. Moreover it would not have been obvious to store the configuration program in a non-volatile memory in the adapter (difference feature "e"), since this required a durable, re-connectable data link of sufficient speed between the PDA and the adapter. The appellant accepted that the skilled person "could" have added feature "e" but disputed whether he/she would have done so. The board takes the view that, as stated above for the main request, the skilled person would have recognised that the teaching of D2 could be applied to any context-change, such as that involved in D3 once feature "a" has been added, not just those in

D2. Hence it would have been obvious to combine D3 and D2. Regarding the link between the PDA and the adapter in D3, it is implicit in view of the trigger 25 in the cradle (see figure 5) that there is a re-connectable data link between the cradle and the PDA. The skilled person would, as a usual matter of design, ensure that this link is durable and of sufficient speed without inventive skill.

6.2.5 Hence the board finds that the subject-matter of claim 1 does not involve an inventive step, Article 56 EPC 1973, starting from D3 in view of D2 and the common general knowledge of the skilled person.

7. The appellant's "final request"

7.1 As a "final request", the appellant requested grant of a patent on the basis of the independent claim of either the main or auxiliary claim sets, with deletion of any dependent claims, wording in the description or parts of the drawings to which the board found objections. The appellant stated that he would supply an amended copy of the dependent claims, pages of the description or drawings, within 24 hours of the board indicating the need for any such changes, if typed amendments were required.

7.2 Since, as set out above, claim 1 of both the main and the auxiliary request does not comply with Article 56 EPC 1973 regarding inventive step, and the deletion of dependent claims, parts of the description or drawings could not overcome this objection, the appellant's own preconditions for this request are not satisfied. The appellant was not invited to submit amended application documents.

8. The proposed question for referral to the EBOA
- 8.1 The appellant has requested that the following question be referred to the Enlarged Board of Appeal:
- "Should a renewal fee be refunded to an applicant by reason of equity if:
- (i) A patent application is refused at Oral Proceedings;
  - (ii) An applicant pays a renewal fee that falls due more than three months after the Oral Proceedings, without having received notification of the refusal and minutes of the Oral Proceedings; and
  - (iii) The applicant does not file a notice of appeal at the end of the time limit in Art. 108 EPC?"
- 8.2 The board notes that this question need not be answered for the purposes of a decision in this case, since an appeal was indeed filed, meaning that condition (iii) of the question is not fulfilled.
- 8.3 It follows that the conditions under Article 112(a) EPC 1973 for a referral to the Enlarged Board of Appeal are not met.

## Order

### For these reasons it is decided that:

1. The request to refer a question to the Enlarged Board of Appeal is rejected.
2. The appeal is dismissed.
3. The request to reimburse the appeal fee is rejected.

The Registrar:

The Chairman:



B. Atienza Vivancos

W. Sekretaruk

Decision electronically authenticated