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**Datasheet for the decision
of 18 March 2025**

Case Number: T 1987/23 - 3.5.05

Application Number: 19879585.8

Publication Number: 3835936

IPC: G06F3/06, G06F15/167

Language of the proceedings: EN

Title of invention:

Method and device for memory data migration

Applicant:

HUAWEI TECHNOLOGIES CO., LTD.

Headword:

Right to be heard and incomplete reasoning/HUAWEI

Relevant legal provisions:

EPC Art. 111(1), 113(1), 116(1)

EPC R. 103(1)(a), 111(2)

RPBA 2020 Art. 11, 12(8)

Keyword:

Substantial procedural violation - (yes): introduction of new documents with written decision and lack of reasoning

Remittal - fundamental deficiency in first-instance proceedings (yes)

Reimbursement of appeal fee - (yes): ordered on board's own motion

Decision in written proceedings - (yes): oral proceedings not necessary or appropriate

Decisions cited:

R 0003/13, R 0002/14, J 0007/82, T 0292/90, T 1051/20



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Case Number: T 1987/23 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 18 March 2025

Appellant:
(Applicant)

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Decision under appeal:

**Decision of the Examining Division of the
European Patent Office posted on 18 July 2023
refusing European patent application
No. 19879585.8 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair K. Bengi-Akyürek
Members: N. H. Uhlmann
F. Bostedt

Summary of Facts and Submissions

- I. The applicant appealed against the examining division's decision to refuse the present European patent application. The examining division found that the sole claim request on file did not meet the requirement of Article 56 EPC.
- II. With its statement of grounds of appeal, the appellant re-filed the sole claim request underlying the appealed decision. It requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims of that **sole request**. The appellant also requested oral proceedings before the board in the event that the board considers not to grant a patent based on the sole request on file.
- III. Claim 1 of the **sole request** reads as follows (board's labelling):
 - (a) "A data migration method, wherein the method is applied to a computing system, the computing system comprises a first memory and a second memory, and the method comprises:
 - (b) classifying (S302) to-be-migrated data into first to-be-migrated data and second to-be-migrated data, wherein the to-be-migrated data is located in the first memory;
 - (c) migrating (S303) the first to-be-migrated data to the second memory; and
 - (d) writing (S304) the second to-be-migrated data into a storage device, wherein the storage device is a shared storage device of the first memory and the second memory;

- (e) wherein migrating (S303) the first to-be-migrated data to the second memory is performed by using a multithreading mode when the to-be-migrated data is discontinuous in the first memory, comprises:
- (f) dividing a plurality of threads into a first part and a second part, wherein each the first part and the second part of threads comprises two or more of the plurality of threads;
- (g) migrating the first to-be-migrated data from the first memory to the second memory using the first part of threads; and
- (h) flushing the second to-be-migrated data from the first memory to the storage device using the second part of threads."

Reasons for the Decision

1. Substantial procedural violations

1.1 The board holds that the examining division committed two substantial procedural violations. The *first* one occurred by introducing and relying on three new prior-art documents, namely D12 to D14, into the examination proceedings for the first time with the examining division's written decision (cf. Article 113(1) EPC). The *second* one is due to the fact that the written decision is not reasoned within the meaning of Rule 111(2), first sentence, EPC. The reasons are as follows.

1.2 The procedural principle of the "right to be heard" is enshrined in Article 113(1) EPC, which stipulates that

"[t]he decisions of the European Patent Office may only be based on grounds or evidence on which the

parties concerned have had an opportunity to present their comments".

This implies that a party may **not be taken by surprise** by the reasons of a written decision, referring to unknown grounds or evidence (see e.g. **R 3/13**, Reasons 2.2; **R 2/14**, Reasons 6). In this context, it is generally accepted that the term "grounds or evidence" is to be understood as meaning the *essential legal and factual reasoning* on which the decision under appeal is based.

- 1.3 Moreover, according to Rule 111(2), first sentence, EPC, decisions of the EPO which are open to appeal must be **reasoned**. This means that the decision must address the facts, evidence and arguments which were relevant for reaching the respective decision, and must contain a logical chain of reasoning which led to the relevant conclusions (see e.g. **T 292/90**, Reasons 2).

- 1.4 In the present case, the appellant was summoned to oral proceedings before the examining division. Thereafter, it submitted amended claims together with an amended description and withdrew its request for oral proceedings. The examining division then cancelled the arranged hearing. The decision under appeal was subsequently issued as a next official action. In that decision, new evidence, i.e. prior-art documents D12 to D14, were cited for the very first time (see the last paragraph of point 9 of the decision), which were attached to the decision in full (encompassing 404 pages in total) and relied on in the examining division's inventive-step analysis (see appealed decision, point 10.1.8). In addition, the arguments relating to the "discontinuous" aspect defined in feature (e) of claim 1

(see point 10.2) were not presented in any previous official communication of the examining division.

1.5 As to the requirement of Article 113(1) EPC, it is apparent to the board that the appellant (then applicant) did not had any opportunity to present comments on this inventive-step analysis and on the teaching of the new evidence D12 to D14. As a consequence, viewed objectively, the appellant was indeed **taken by surprise** by the reasons of the appealed decision for essentially two reasons:

- First, the newly cited documents **D12 to D14** were referred to for the first time in the written decision (see point 10.1.8) with regard to the "multi-threading mode" recited in **feature (e)** of claim 1, while the same feature was objected to in the examining division's communication attached to the summons to the first-instance oral proceedings ("the communication") on the basis of document **D11** (cf. points 4.1.2 to 4.1.9 of the communication).
- Secondly, the "discontinuous" aspect defined in **feature (e)** was likewise objected to in the communication on the basis of document **D11** (see points 4.1.2 to 4.1.9 of the communication) while the impugned decision, with regard to the same "discontinuous" aspect, sets out completely new arguments.

1.6 As to the requirement of Rule 111(2), first sentence, EPC, the board notes that, according to the impugned decision, the distinguishing features were found to be **features (e) to (h)** (see point 10.1.2). However, the grounds for the decision do not include any specific reasoning regarding distinguishing features (f), (g)

and (h). Hence, a substantive and decisive part of the inventive-step reasoning, which should certainly have addressed all claimed features, is in fact missing.

1.7 Moreover, the above-detailed procedural violations are of a substantive nature because they relate to the substance of the objection under Article 56 EPC, which was the only ground for refusing the present application. Hence, the examination proceedings suffers from two substantive procedural violations within the meaning of Rule 103(1) (a) EPC.

1.8 For the sake of completeness, the board would also like to add that a section in a written decision titled "Obiter dicta" is generally not to be used for introducing an entirely new line of arguments based on further new prior-art documents (i.e. "Doc 1" to "Doc 6").

2. Remittal for further prosecution

2.1 The above-detailed substantive procedural violations also amount to a "fundamental deficiency" apparent in the first-instance proceedings within the meaning of Article 11, second sentence, RPBA which, as a rule, constitutes "special reasons" for remitting a case for further prosecution.

2.2 For these reasons, the board has decided to set aside the appealed decision and to remit the case to the examining division for further prosecution (Article 111(1) EPC).

3. Reimbursement of the appeal fee

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

3.2 Since the decision under appeal has to be set aside (cf. point 2.2 above) and, thereby, the board effectively follows the relief sought by the appellant, albeit only in part, the appeal is considered to be allowable.

3.3 In the present case, there is also a causal link between the substantial procedural violations and the necessity of filing an appeal against the examining division's decision. Thus, the reimbursement of the appeal fee in full is also equitable within the meaning of Rule 103(1)(a) EPC.

3.4 Hence, even if the appellant has not requested reimbursement of the appeal fee, such reimbursement is ordered on the board's own motion (cf. **J 7/82**, Reasons 6).

4. Decision in written proceedings

4.1 The appellant requested oral proceedings before the board in the event that the board considers not to grant a patent based on the sole request on file (cf. point II above).

4.2 The board's decision to set aside the decision under appeal and to remit the case to the examining division

for further prosecution (cf. point 2 above) is not adverse in substance to the appellant. A hearing before the board for the sole purpose to discuss whether or not to remit the case to the first-instance department is not considered necessary or appropriate (see e.g. **T 1051/20**, Reasons 4.2, and the decisions cited there).

- 4.3 Therefore, the decision may be handed down in written proceedings without holding oral proceedings (Article 12(8) RPBA).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division for further prosecution.
3. The appeal fee is reimbursed.

The Registrar:

The Chair:



B. Brückner

K. Bengi-Akyürek

Decision electronically authenticated