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**Datasheet for the decision
of the Enlarged Board of Appeal
of 1 October 2010**

Case Number: R 0017/09
Appeal Number: T 1465/08 - 3.5.03
Application Number: 04737113.3
Publication Number: 1743499
IPC: H04Q 7/32
Language of the proceedings: EN

Title of invention:

Mobile phones combined with the wireless technology using
protocol 802.11

Applicant:

Bassi, Giuliano

Opponent:

-

Headword:

Appeal deemed not filed/BASSI

Relevant legal provisions:

EPC Art. 24(3), 107, 109, 112a, 112a(2)(c), 112a(2)(d), 113,
122
EPC R. 104, 136(1)

Keyword:

"Petition for review - clearly unallowable"

Decisions cited:

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Catchword:

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Case Number: R 0017/09

D E C I S I O N
of the Enlarged Board of Appeal
of 1 October 2010

Petitioner: Bassi, Giuliano
(Applicant) Via Molinetto 126
I-47017 Rocca San Casciano (IT)

Representative: -

Decision under review: **Decision of the Technical Board of Appeal
3.5.03 of the European Patent Office of
27 July 2009.**

Composition of the Board:

Chairman: P. Messerli
Members: S. Perryman
S. Crane

Summary of Facts and Submissions

- I. By a decision dated 26 March 2008 the examining division refused European patent application No. 04737113.3 of the petitioner on the grounds that the claims lacked clarity (Article 84 EPC), the subject-matter of the claims was insufficiently disclosed (Article 83 EPC) and the subject-matter of claim 1 lacked novelty (Articles 52 and 54 EPC).
- II. A notice of appeal against this decision was filed on 26 May 2008 by the professional representative then representing the petitioner, with an indication that "the fee for appeal will be paid within the time limit", but the appeal fee was not paid by 5 June 2008, that is within the period of two month and ten days from the date of the refusal decision.
- III. On 15 July 2008, the petitioner himself telephoned the EPO and was informed by a formalities officer according to the written note dated 15 July 2008 of the Consultation by Telephone on file that inter alia "the appeal fee was not paid and the time limit has now expired."
- IV. On 16 July 2008 an amount of Euro 1120, equivalent to an appeal fee, and a further fee of Euro 560 were paid in relation to the present application.
- V. On 4 August 2008 the professional representative then representing the petitioner filed grounds of appeal and stated in the covering letter "as already sent with our faxed letters of July 15 and July 18, the fee for appeal and the surcharge (total Euro 1.680) were paid

to [sic] the Appellant". This letter and accompanying grounds of appeal contained no request for re-establishment into the period for paying the appeal fee, nor any statement of the grounds on which such a request would be based or the facts relied on.

VI. An undated request for re-establishment was filed by the petitioner himself and received by the EPO on 25 November 2008. In this letter the petitioner *inter alia* indicated that he was removing his previous representative from the proceedings and taking over the matter himself. That no re-establishment had been asked for earlier was chiefly attributed to the previously authorized representative's lack of complete knowledge of Article 108 EPC. The petitioner expressed his belief that re-establishment under Article 122 EPC should be possible where the delay in paying the fee was not the applicant's fault but that of the then authorized representative, and this was beyond the applicant's control.

VII. In a communication dated 9 February 2009 Board of Appeal 3.5.03 gave its preliminary opinion that the request for re-establishment of rights with respect to the payment of the appeal fee did not meet the requirements of Article 122 and Rule 136 EPC, the board stating *inter alia* that:

- According to Rule 136 EPC the request for re-establishment of rights shall be filed within two months of the removal of the cause of non-compliance. The request shall not be deemed to have been filed until the prescribed fee has been paid.

- The Board noted that there was, in addition to the appeal fee, a fee "surcharge" paid on 15 or 16 July [2008] but not accompanied by any request. This additional fee was apparently intended to support a request for further processing, but was arguably relevant to the request for re-establishment of rights which was filed on 25 November 2008 without payment of the prescribed fee.
- Further processing was however excluded by Article 121(4) EPC in respect of the time limit provided by Article 108 EPC (appeal fee).
- No fee having been paid with the request for re-establishment of rights, the board was of the provisional opinion that the only legally possible request, namely that for re-establishment of rights, should not be deemed to have been filed pursuant to Rule 136(1) EPC last sentence, despite the payment of the surcharge. The following reasons were given for this.
- The "surcharge" paid on 15 or 16 July 2008, at the same time as the appeal fee and apparently intended to support a request for further prosecution, cannot be considered as a request for re-establishment of rights. Reference was directed to the case law for the analogous case of filing an appeal, (see J 19/90 not published; and T 778/00, OJ 2001, 554). When the surcharge was paid there was no accompanying request specifying

what was being requested, in particular no request for re-establishment of rights.

- Even if for the sake of argument, the "surcharge" paid with the appeal fee were considered as a fee for the later filed request for re-establishment of rights, the appropriate request was filed too late because it was filed more than two months after the removal of the cause of non compliance: as [the representative of the] appellant recognized in her letter of 4 August 2008 she was aware that the appeal fee was not paid in due time and wanted to remedy the deficiency by paying it with a surcharge. It was thus immediately apparent that the period from the payment on 15 or 16 July - or, giving the appellant the benefit of the doubt, from the letter of 4 August 2008 in which it was clear that the appellant knew about the removal of the cause of non compliance - to the request filed on 25 November 2008, was greater than two months and thus outside the above mentioned time limit of two months from the removal of the cause of non compliance specified by Rule 136(1) EPC. Thus even if the "surcharge" paid with the appeal fee were held to be relevant for re-establishment of rights, the request would be inadmissible.
- Accordingly Board 3.5.03 was of the opinion that on the facts at its disposal, the request for re-establishment of rights was filed without payment of the relevant fee, and thus should not be deemed to have been filed. In such case the question of its late filing was not an issue.

- If the request for re-establishment of rights was deemed not to have been filed, it followed that the appeal would also not be deemed to have been filed (Article 108 EPC second sentence) and the appeal fee as well as the "surcharge" and the renewal fee paid for what was in fact a refused application, would be refunded."

VIII. In its communication the Board of Appeal 3.5.03 further commented on the merits of the request for re-establishment of rights to the effect that even if for the sake of argument the request for re-establishment were held to be admissible, the provisional opinion of the board was that the request would have to be refused because the ground put forward by the appellant was not a reason for re-establishment since it did not appear that all due care was taken. It appeared rather that the appeal was not deemed to have been filed precisely because inadequate care had been taken.

IX. Oral proceedings took place before Board of Appeal 3.5.03 on 10 July 2009, at the end of which the board indicated that the decision would be given in writing. The written decision issued on 27 July 2009, the board deciding that:

- "1. The request for re-establishment of rights is deemed not to have been filed.
2. The appeal is deemed not to have been filed.
3. The appeal fee and the additional fee paid on 16 July 2008 and the renewal fees paid on

25 August 2008 and 17 June 2009 shall be reimbursed."

- X. The reasons given for this decision were the same as those already indicated as a provisional opinion in the Board's communication of 9 February 2009 (see point VII above).
- XI. A further submission mentioned as being made by the then appellant, now the petitioner, at these oral proceedings before Board 3.5.03 was indicated in point VIII of that Board's decision as being that the then appellant referred to Articles 113 and 112a EPC in connection with his former representative's behaviour before the examining division and in filing the appeal. He was reported as stating that the representative dealt wrongly with his patent application, misunderstood the invention and thus failed to make a good case before the first instance.
- XII. The Petitioner filed a petition for review by facsimile on 8 October 2009 and by post on 13 October 2009, and paid the petition fee. Reference is made to the file for the full contents of this lengthy submission. The essential points and objections raised under Article 112a EPC are the following:
- Under Article 112a(2)(a) EPC it was alleged that members of the Board took part in the case despite the provisions of Article 24(3) EPC in view of a suspicion that the Board's actions and decisions could be linked to the interests of multinational companies opposed to the petitioner's patent

application, particularly because they used the expression "man in the street" of the petitioner.

- Under Article 112a(2)(c) EPC the following fundamental violations of Article 113 EPC were alleged:
 - In Section DI of the petition it was alleged that Board 3.5.03 relied in its communication of 9 February 2009 and in its decision for determining the latest date on which the representative must have become aware that the appeal fee was not paid in time, on a document dated 4th August 2008 in which the EPO communicates to the representative the amount of the surcharge fee for the renewal for the fifth year, and that this document was not shown to the appellant at the oral proceedings.
 - In Section DII it was alleged *verbatim* that "As concerns the representative's responsibilities, during the oral proceedings it was said that the representative's work did not concern the Board, and this point could not be influence the re-establishment of rights. As the representative and appellant are considered one person, the Board president also described a complex example to support his reasons (see page letter dated July 20th). On the contrary, in its written grounds, the Board does not say the same thing. In the written form the Boards states that the

representative had been charged of the application (he had all responsibilities for it) until November 25th (see point 2.2)."

- In Section DIII it was alleged that quotations from unknown documents in Board 3.5.03's decision, in particular decisions T 315/90 and T 170/04, contravened Article 113 EPC because they were not cited to the appellant at the oral proceedings nor was he afforded an opportunity to comment on them.
- Under Article 112a(2)(d) EPC concerning other fundamental procedural defects alleged, the petitioner indicated in his conclusions that his points E I, E III, E V and E VIII related to other fundamental procedural defects as follows:
 - In E I it was alleged "The chairman started describing all the grounds related to the refusal of re-establishment, saying why the re-establishment was not admissible, without making the necessary presentations."
 - E III related to the Board's refusal to allow the recordal of the oral proceedings.
 - E V related to a complaint that "During the oral proceedings, other terminologies were used, terminologies not used in the EP0 proceedings. Among the different words used there was the word "Extratax". This element clearly complicated the results of a good

translation and comprehension (see letter dated July 20th)."

- E VIII related that "At the end of the oral proceedings, the validation of the minutes was not demanded."

XIII. Further submissions were made by the petitioner dated 8 February 2010 and 22 March 2010. The Enlarged Board of Appeal sent a communication dated 9 September 2010 in preparation of the Oral Proceedings, indicating *inter alia* that:

- the conclusions which Board of Appeal 3.5.03 came to in its decision 27 July 2009, namely that the request for re-establishment is deemed not to have been filed, and that the appeal is deemed not to have been filed seemed inevitable on the facts;
- no case appeared to have been made out that the decision was arrived at involving some form of fundamental procedural violation or defect;
- that on the established case law of the Boards of Appeal, for the purpose of applications for re-establishment of rights under Article 122 EPC, both the applicant and his professional representative must be shown to have acted with all due care required by the circumstances. That the failure to take the necessary action in this case in time might be due to some fault of the professional representative thus would not assist the petitioner in obtaining re-instatement.

XIV. Oral proceedings took place before the Enlarged Board of Appeal on 1 October 2010. The petitioner presented a written summary of his case in the form of a text in Italian with an English translation after each paragraph, for details of which reference is made to the file. In particular the petitioner again queried whether lack of due care by the former representative can be attributed to the petitioner.

At the oral proceedings the petitioner indicated his final requests to be the following:

1. the re-establishment of his appeal rights
2. the refund of his fee payment for the "petition for review"
3. that the deadlines for the following payments be clarified:
 - 3.1 The payment of the appeal fee and re-establishment fee must be clarified. The refund of the petition fee is important for the appellant (and the refund is available one month after the cheque receipt). For this reason the appellant would like that one part of the petition fee refund was considered as the amount necessary for the payment of both the appeal fee and the re-establishment fee).
 - 3.2 The payment of the year fees must be clarified.
4. that if none of the above requests are accepted, the appellant be given a clear explanation about the cases on which re-establishment request can be presented after one year, as mentioned in the Art. 122(2).

The Chairman then closed the debate and adjourned the oral proceedings. After deliberation by the Enlarged Board and the re-opening of the proceedings the decision was announced.

Reasons for the Decision

Admissibility of petition (Article 107 EPC)

1. Although the petitioner in his requests (see point XIV above) does not explicitly seek to have the decision of Board 3.5.03 of 27 July 2007 set aside and the proceedings before that board re-opened, the Enlarged Board can assume in favour of the petitioner that this is implicitly intended.
2. The petition was filed in due time, and the petition fee was paid in due time.
3. Of the objections raised in the petition (see point XII above) at least the objection raised under Articles 112a(2)(a) and 24(3) EPC concerning a suspicion that the actions and decisions of Board 3.5.03 could be linked to the interests of multinational companies opposed to the petitioner's patent application, or the objection raised under Article 112a(2)(c) EPC that there was a fundamental violation of Article 113 EPC by quoting in the decision documents unknown to appellant (petitioner), are objections which arguably could not reasonably have been raised before the petitioner saw Board 3.5.03's decision.

4. The petition can thus not be regarded as clearly inadmissible.

Allowability of petition

5. The first ground raised in the petition is under Article 112a(2)(a) EPC, namely that members of the Board 3.5.03 took part in the case despite the provisions of Article 24(3) EPC in view of a suspicion that the Board's actions and decisions could be linked to the interests of multinational companies opposed to the petitioner's patent application. The only evidence relied on for any such link is that Board 3.5.03 used the term "man in the street" of the petitioner. But this was in the context of Board 3.5.03 stating that it treated all parties equally. In English the term "man in the street" has no pejorative associations, but is commonly used to describe an average citizen. The Enlarged Board can see no support whatsoever for the allegation that members of Board 3.5.03 were influenced in their decision by any bias against the petitioner or any bias in favour of large multinational companies. The petition thus cannot succeed on this ground.
6. The second ground raised in the petition is under Article 112a(2)(c) EPC that Board 3.5.03 was relying on a document dated 4th August 2008 which was not shown to the petitioner during the oral proceedings before Board 3.5.03. It is quite clear from Board 3.5.03's decision that the document that Board was referring to was the covering letter of 4th August 2008 filed by the petitioner's then professional representative with the statement of grounds of appeal (see point V above), and

not to the communication, also dated 4th August 2008, from the EPO concerning the surcharge fee for the fifth yearly renewal fee. This is a document that the petitioner must have been aware of, or deemed to be aware of, as it was an essential part of the appeal case put forward on his behalf. Reference to this document in Board 3.5.03's decision cannot be treated as amounting to any form of procedural violation under the provisions of Article 112a(2)(c) EPC, so the petition cannot succeed on this ground.

7. The third ground raised in the petition is again under Article 112a(2)(c) EPC, the petitioner alleging that Board 3.5.03 said something different at the oral proceedings to what they then went on to say in their decision namely to quote the petitioner:

"As concerns the representative's responsibilities, during the oral proceedings it was said that the representative's work did not concern the Board, and this point could not be influence the re-establishment of rights. As the representative and appellant are considered one person, the Board president also described a complex example to support his reasons (see page letter dated July 20th). On the contrary, in its written grounds, the Board does not say the same thing...."

This allegation by the petitioner is contradictory in itself in that if the representative and appellant were considered one person why should the representative's work not concern the Board. The Enlarged Board can only assume that the petitioner, or his interpreter, misunderstood what was actually said. The Enlarged

Board cannot treat this allegation as sufficient foundation for there being a fundamental procedural violation in the sense of Article 112a(2)(c) EPC.

8. The fourth ground raised in the petition is again under Article 112a(2)(c) EPC, referring to documents unknown to the petitioner being referred to in the decision, namely decisions T 315/90 and T 170/04. The reference to decisions in a decision, even decisions not cited to the party earlier in writing or at the oral proceedings, cannot support an objection of there being a fundamental procedural violation under Article 112a(2)(c) EPC. The parties to EPO proceedings are presumed to know the law relating to the EPC, including the relevant decisions.
9. The remainder of the objections are based on Article 112a(2)(d) in conjunction with Rule 104 EPC. However, Rule 104 EPC contains a closed list of only two more grounds for objection, i.e. "...where the Board of Appeal, (a) contrary to Article 116, failed to arrange for the holding of oral proceedings requested by the petitioner, or (b) decided on the appeal without deciding on a request relevant to that decision", neither of which grounds applies to the grounds raised by the petitioner.

In more detail, the fifth ground raised in the petition concerns an allegation that

"The chairman started describing all the grounds related to the refusal of re-establishment, saying why the re-establishment was not admissible, without making the necessary presentations."

It is unclear whether this is meant to be a separate complaint or not, and quite what is meant by "presentations". Taking this statement by itself, the Enlarged Board cannot see any objection under Article 112a(2)(d) EPC as even identified let alone made out.

The sixth ground raised in the petition, again under Article 112a(2)(d) EPC, relates to the Board's refusal to allow the recordal of oral proceedings. To allow or refuse such recordal is a matter of discretion for the board concerned, and refusal to allow recording cannot be treated as a procedural violation, and certainly not as one under Article 112a(2)(d) EPC.

The seventh ground raised in the petition, again under Article 112a(2)(d) EPC, relates to the terminology used at the oral proceedings. Whereas it is appreciated that a party not well acquainted with any of the official languages of the EPO may have difficulties in following the proceedings in what to them is a foreign language, particularly where in the debate equivalents are used to words actually appearing in the EPC, the use of such equivalent words cannot be regarded as amounting to any form of procedural violation, and certainly not as one under Article 112a(2)(d) EPC.

The eighth and final ground raised in the petition, again under Article 112a(2)(d) EPC, relates to the fact that at the end of the oral proceedings before Board 3.5.03, the validation of the minutes was not demanded. The validation of the minutes is not required by the EPC, nor is it the usual practice of the boards of

appeal. No procedural violation can be seen here, and again certainly not one under Article 112a(2)(d) EPC.

In his petition (point EII), the petitioner seems to criticise that the oral proceedings before Board 3.5.03 were not held in due time. However, he does not rely on this as an objection under Article 112a EPC (see point Conclusions G III in petition). In any event this objection would be unfounded since it is based on an erroneous understanding of the interlocutory revision under Article 109 EPC which imposes a time limit only on the department whose decision is contested, and not on the Board of Appeal considering the appeal.

10. To summarize, nothing alleged in the petition can be regarded as showing that the decision of Board 3.5.03 involved some fundamental procedural violation or defect as would be required for the petitioner to succeed with his petition under Article 112a EPC.
11. It rather seems that the petitioner is questioning the application of the law by the Board. However, apart from the specific grounds for objections mentioned in Article 112a and Rule 104 EPC, this is not a matter for the Enlarged Board of Appeal to review. In view of the petitioner's repeated queries whether the lack of care of the former representative can be attributed to the petitioner, the Enlarged Board of Appeal would only like to emphasize that this has for more than twenty years been the established case law of the boards of appeal of the EPO. That Board 3.5.03 applied this view of the law to refuse the request for re-establishment cannot be considered as any form of procedural violation.

12. The Enlarged Board of Appeal thus concludes that the present petition is clearly unallowable. The petition being unallowable the request for repayment of the petition fee must also be rejected. Requests 3 and 4 of the petitioner do not concern matters for decision by the Enlarged Board of Appeal and are thus unallowable.

Order

For these reasons it is decided that:

1. The petition for review is unanimously rejected as clearly unallowable.
2. The request for reimbursement of the fee for the petition for review is rejected.

The Registrar:

The Chairman:

P. Martorana

P. Messerli