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**Datasheet for the decision
of the Enlarged Board of Appeal
of 18 October 2013**

Case Number: R 0015/13

Appeal Number: T 2198/10 - 3.5.03

Application Number: 97904465.8

Publication Number: 885532

IPC: H04Q 3/00, H04M 3/42,
H04M 15/00

Language of the proceedings: EN

Title of invention:
Method for call set-up and a telecommunication system

Patent Proprietor:
Ladybird Innovations Oy

Opponent:
Vodafone Group Services Limited

Headword:
Petition for review/LADYBIRD

Relevant legal provisions:
EPC Art. 112a(2)(c)(d)(4), 113
EPC R. 104, 106, 107(1)(b)(2)
RPEBA Art. 12(1)

Keyword:

"Reason for not accepting argument not an "undisclosed version" of common general knowledge nor an "assertion" not put to the parties"

"Non-discussion of argument not a denial of right to be heard - petitioners own evidence demonstrates argument was heard"

"Petition for review - clearly unallowable"

Decisions cited:

R 0002/08, R 0005/08, R 0018/09, R 0006/11, R 0013/11

Catchword:

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Case Number: R 0015/13

DECISION
of the Enlarged Board of Appeal
of 18 October 2013

Petitioner: Ladybird Innovations Oy
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Other party: Vodafone Group Services Limited
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Decision under review: Decision of the Technical Board of Appeal
3.5.03 of the European Patent Office of
21 February 2013.

Composition of the Board:

Chairman: W. van der Eijk
Members: C. Rennie-Smith
U. Oswald

Summary of Facts and Submissions

- I. The petition for review concerns the decision T 2198/10 of the Technical Board of Appeal 3.5.03 of 21 February 2013 to allow the appeal of the opponent and to revoke the petitioner's European patent No. 0885532, after the opponent had appealed against the interlocutory decision of the Opposition Division to maintain the patent in amended form. The written decision was issued on 16 April 2013. The petitioner filed the petition by fax on 14 June 2013 and paid the petition fee on the same date.
- II. The petition was filed by Papst Licensing GmbH & Co, KG, which was the patent proprietor at the time of both the decision under review and the filing of the petition, but during the petition proceedings Ladybird Innovations Oy was recorded as proprietor. The petition was filed by Dr. Mikko Väänänen who is a European Patent Attorney and the petitioner's professional representative, the inventor of the patent in suit and the managing director of Ladybird Innovations Oy. According to the petitioner's sub-authorized representative, Dr. Väänänen has over seventeen years personally invested considerable funds in the invention the subject of the patent.
- III. The patent in suit was entitled "Method for call set-up and a telecommunication system". The opposition division held that claim 1 of the eighth auxiliary request before it was novel and inventive over *inter alia* document D1 (WO-A-94/28683) and maintained the patent on the basis of that request. The opponent (appellant in the appeal proceedings) appealed and

requested revocation of the patent. The petitioner (respondent in the appeal proceedings) requested dismissal of the appeal (and thus that the patent be maintained with the claims allowed by the Opposition Division) or alternatively maintenance of the patent on the basis of one of thirteen auxiliary requests. In a preliminary opinion dated 14 September 2012 the Board of Appeal observed that D1 appeared to be more relevant for inventive step than for novelty. At the end of the oral proceedings the Board decided that the main request was novel but not inventive over document D1 and that none of the first to third auxiliary requests overcame the inventive step objection. Of the remaining requests, only the eleventh auxiliary request contained subject-matter suitable to overcome that objection and that request was admitted into the proceedings but also held not to be inventive over D1. The other auxiliary requests were held inadmissible. The petitioner's request to refer questions to the Enlarged Board, as to whether Article 113(1) EPC means a patentee must be allowed to file auxiliary requests in response to a board's preliminary opinion, was refused.

IV. By a fax dated 10 April 2013 the opponent withdrew its opposition. The petitioner then sent a letter dated 15 April 2013 addressed to both the Board of Appeal and the Enlarged Board of Appeal referring to the withdrawal of the opposition and Article 105(b) (3) EPC and continuing:

"So the Proprietor now wonders, whether the Boards of Appeal is now effecting a decision of its own motion to revoke the patent. After deliberating the Oral Proceedings a strong impression of partiality remains.

This is evidenced by the alleged ground itself: if the construct from three embodiments that does not end up in the claimed invention could be used to invalidate a patent, every European Patent is invalid. This was further exemplified by the Board of Appeal violating Article 113 EPC. All the documents (16) on file showed polling from the terminal, and the Board of Appeal explicitly argued non-polling to be an equivalent choice and explicitly said that all the 16 documents were being ignored. Nobody believes the Board's arguments, as evidenced by the current legal situation of the sole appellant withdrawing.

The Boards are urged to not effect wrong decisions of their own motion. Therefore, the Proprietor requires that without an Appellant the wrong decision of the Oral Proceedings of 21 February 2013 cannot be effected. The Proprietor is not opposed to the Boards publishing their analysis per se. It is therefore suggested that the Board of Appeal publish their own attacks against the claim in a decision, but note at the end of the decision that the patent is maintained in the absence of an Appellant. This will allow every alleged infringer to solicit these grounds in their own jurisdiction, should they so choose.

It is noted that effecting this wrong decision intentionally will directly cause the Proprietor considerable financial damage. If the Boards of the Appeal continue to persecute the Proprietor by effecting wrong decisions of their own motion, a referral to the Enlarged Boards of Appeal is to be expected."

After the Board of Appeal's written decision was issued on 16 April 2013, the petitioner wrote a further letter to the Board of Appeal on 18 April 2013 in which it stated that, in view of the Enlarged Board's order in decision G 8/93, the appellant's withdrawal had ended the proceedings. It suggested that the Board should halt the publication in the Patent Bulletin of the mention of the decision and maintain the patent as amended in the Opposition Proceedings by adding the addendum "Appellant withdrew" to its decision.

The Board of Appeal replied to the petitioner's letters of 15 and 18 April 2013 in a communication dated 6 May 2013. It observed that the decision publicly announced at the end of the oral proceedings was binding and there was no legal means for the board to change its decision which had become *res judicata*.

- V. The following is a summary of the petition, to the extent its contents were still relied on at the oral proceedings before the Enlarged Board. The petition, which was written in an emotive style, began with general comments critical of the Board of Appeal and then set out five alleged fundamental procedural violations in five sections numbered with Roman numerals and each headed with a one-sentence summary of the alleged violation and a question, both of which indicate the petitioner's opinion.

1. The Board of Appeal's written decision reveals that the Board had decided to revoke the patent regardless of facts or arguments, for whatever reason, probably because the patent owner at that time was a "patent troll" (an apparent reference to Papst Licensing GmbH &

Co. KG). In doing so, the Board conducted a series of five fundamental and serious procedural violations, which were needed for fabricating the basis for the decision. The petition for review was based on the grounds of Article 112a(2)(c) EPC and Article 112a(2)(d) EPC for the time being. Additional grounds might be raised later if those were not sufficient, but only if the current petition failed to bring the stolen patent back. The petitioner took Board member partiality very seriously and could not and would not tolerate the current decision. It requested acceleration of the petition proceedings because of related proceedings in Finland.

2. The first alleged substantial procedural violation was described thus:

I Article 112a(2)(c) EPC – Violation of Article 113 EPC by insertion of subject matter in the written decision after the final decision

Q: Is it permissible for the Boards to add grounds into the written decision after the decision?

The petition referred to paragraph 2.8 on pages 14 to 15 of the Board's written decision which read:

"The respondent argued that even if for the sake of argument D1 disclosed a non-polling ("push") variant of the first embodiment (which the respondent did not accept), the skilled person would not have contemplated pushing data onto the mobile phone of the second embodiment at the priority date of the invention. For

example, pushing emails to a mobile phone was used for the first time with Blackberry phones many years later.

The board however does not see that the skilled person would have had any technical difficulty at the priority data of the patent in setting up a connection to a mobile phone initiated by the network. For example, the board notes that this was done for incoming calls or text messages to a mobile phone."

The petition stated that the first of those paragraphs was discussed at the oral proceedings before the Board but that the second paragraph, which was not discussed at the oral proceedings, had been inserted by the Board after the final decision. Two statements of Mr. Hutter and Dr. Schneider said to testify to this were filed with the petition.

This insertion of material in the written decision for the first time after the final decision clearly violated Article 113(1) EPC because, if the petitioner had been aware of this ground, it would have contested it with facts to the contrary. The ground could have been proven as completely bogus. A statement of Dr. Esmael Dinan, a technical expert, was also filed with the petition and showed that this post-inserted ground was wrong as a technical fact. Phone calls and messages had been incoming to mobile phones for years before the invention, but why did the inventive feature only occur six to seven years after the priority of the patent? Clearly because it was non-obvious.

Further, the fact that the Board "does not see technical difficulty" is no indication of obviousness.

There are many inventions that are not ring-fenced by technical difficulty. The Board should have considered whether the skilled person **would have** arrived at the invention based on the evidence, which was now of course lacking due to the procedural violation.
[Emphasis in petition]

The petitioner only became aware of this ground when the written decision reached him. Therefore it was impossible to comply with Rule 106 EPC because the Board had withheld grounds from the petitioner. This fundamental procedural defect had the effect of deciding the entire case, so the defect was fundamental and needed to be rectified by the Enlarged Board of Appeal by re-opening the appeal proceedings.

3. The second alleged substantial procedural violation was described thus:

II Article 112a(2) (c) EPC – Violation of Article 113 by suppressing materially relevant subject matter

Q: Is it permissible for the Board to completely suppress Opponent's evidence, when the Respondent insists that it be taken into account?

The petitioner had emphasised the fact that the opponent itself had verified the inventiveness of the claim as all the fifteen prior art publications it produced showed polling which was the opposite alternative of "push" update.

The Board alleged that the first embodiment of D1 did "propose" a non-polling update when it clearly did not.

The petitioner argued that this embodiment contained two alternatives which were unambiguously and directly derivable from D1. If a feature is not unambiguously and directly derivable from a disclosure, it is not there. The Examining Division and the Opposition Division in this case, and the Examining Division in the case of two divisionals, had concluded the same objective fact, namely that a non-polling update is not present in D1. These were undisputed facts.

However, the Board's written decision reveals that it excised all material and arguments relating to the other fifteen publications and refused to consider them. The written decision makes no mention of what was the key observation in the entire opposition and appeal process: that the prior art was littered with polling solutions, and the skilled person consistently chose polling when it came to configuration data updates in call setup. The statements of Mr. Hutter and Dr. Schneider also verify this fact. Mr. Hutter repeated this observation, with the consequence of the Board staying silent. During the oral proceedings there was still a *bona fide* assumption that the Board was deliberating this.

The petitioner only discovered after receiving the written decision that the board was actively suppressing its key argument which fell on deaf ears. This clearly violated Article 113 EPC, but it was impossible to comply with Rule 106 EPC because the board did not give any indication of how this fact would be dealt with in the decision. The right to be heard can only be established when there is a willingness to listen. In this case there was none.

The causal link between the violation and the wrong decision is also beyond any doubt, as it is clear that evidence has to be evaluated as a whole from the perspective of both sides. In essence the Board was picking evidence suitable for the opponent's case and ignoring the same evidence if it was used to prove the respondent's case. This procedural defect had the effect of deciding the entire case, so the defect was fundamental and needed to be rectified by the Enlarged Board by reopening the appeal proceedings.

4. The petition then set out three further complaints III to V which were not subsequently maintained. The heading of each of those complaints referred to both Article 112a(2)(c) and (d) EPC.

5. The petition then concluded with further general remarks as follows:

After receiving the written decision the petitioner saw that the decision had been fabricated against it in bad faith and felt it was the victim of a fraud. The petitioner would understand a strict approach but that taken by the Board had nothing to do with the EPC or the European method of evaluating obviousness. The petitioner discovered only afterwards that the Board was applying a logically impossible standard of patentability which relied on a series of Article 113 EPC violations which are such that all European patents ever issued would be invalidated. The patent system cannot credibly exist if this petition is not allowed.

The requests in the petition were to re-open the appeal proceedings with a different composition of the Board

of Appeal due to the *prima facie* corrupt or incompetent nature of some of the Board members, to hold oral proceedings and to accelerate the petition proceedings. As the opponent had withdrawn, the patent should then be maintained in the form allowed by the opposition division.

VI. Enclosed with the petition were three signed statements.

One is from a technical expert, Dr. Esmael Dinan, who says that "to [his] best knowledge, Over-the-Air=radio configuration data updates controlling the choice of the roaming operator from the subscriber terminal appeared first in 2002-2003. It is also described in the 3GPP standard at that time. [He] gained this knowledge when [he] worked with Clearwire, the pioneering 4G company".

The other two statements are from professional representatives who attended the oral proceedings before the Board of Appeal together with Dr. Väänänen. The earlier is a statement of a Dutch and European patent attorney, Mr. Hutter, dated 5 June 2013 of which the relevant part reads:

"....

2. I was one of the European patent attorneys representing Papst Licensing GmbH & Co. KG during oral proceedings held on 21 February 2013 before the Boards of Appeal relating to appeal number T 2198/10-3.5.03. I was present during the entire oral proceedings.

3. Paragraph 2.8 of the written decision of T 2198/10 states:

(The statement then reproduces the first paragraph of

point 2.8 of the decision under review - see section V.2 above.)

I declare that, as I remember best, this statement was, indeed, made from the side of the respondent.

4. Paragraph 2.8 of the written decision of T 2198/10 also states:

(The statement then reproduces the second paragraph of point 2.8 of the decision under review - see section V.2 above.)

*As I remember best, this statement was **not** made during the course of the oral proceedings.*

5. The opponent filed in total 15 prior art documents D1-D15 in the course of the opposition and appeal proceedings. Some of these documents were Art. 54(3) documents, so only relevant from the perspective of novelty. During the oral proceedings, I put forward the fact that none of the prior art documents published before the priority date of European Patent No. 0 885 532 discloses a pushing mechanism from a network to a mobile terminal. I indicated that that should be born in mind when assessing whether D1, page 10, lines 33-39, can be interpreted to disclose/suggest a pushing mechanism to persons skilled in the art. As I remember best, the Board of Appeal did not reply to this argument in any way."

(A final paragraph 6 relates to Violation III which was not maintained at the oral proceedings on 18 October 2013.)

The last statement is that of Dr. Schneider, a German and European patent attorney, dated 12 June 2013 which is *verbatim* the same as Dr. Hutter's statement except that in paragraph 5 he says "Mr. Hutter who was also present as an attorney of the patentee put forward...",

and he omits the last sentence of paragraph 6 in Mr. Hutter's statement which contained opinion.

- VII. In a letter dated 24 July 2013, the petitioner again requested acceleration of the petition proceedings.
- VIII. The Enlarged Board appointed oral proceedings on 18 October 2013. Together with the summons to those oral proceedings, the Enlarged Board sent a communication dated 1 August 2013 informing the petitioner of its provisional opinion that if, or to the extent that, the petition might be admissible, it appeared to be clearly unallowable. It also observed that the petition was written in a highly emotive style and included a large volume of derogatory language, much of which was excessive and without apparent basis in the petition. The question arose whether the petition was "in a reasoned statement" as required by Article 112a(4) EPC.
- IX. The Enlarged Board received a letter dated 30 July 2013 from Papst Licensing GmbH & Co. KG in which that company dissociated itself from "unangemessene oder diffamierende Äußerungen" (inappropriate or defamatory comments) made in the petition by Dr. Väänänen.
- X. In reply to its preliminary opinion the Board received a letter from a new representative of the petitioner dated 18 September 2013 who had been appointed to present its case at the oral proceedings on 18 October 2013 in place of Dr. Väänänen, in direct response to the comments made in the preliminary opinion about the emotive language used in the petition. The letter stated that Dr. Väänänen now recognized that such

language has no place in EPO proceedings before the European Patent Office and wished to apologise unconditionally for any offence that language might inadvertently have caused.

The letter continued by stating that written representations would be limited to the ground set out in Article 112a(2)(c) EPC but the petitioner reserved the right to present arguments concerning other grounds at the oral proceedings should it appear necessary or expedient to do so. From the preliminary opinion, the petitioner believed Violation I of the Petition was admissible, that Rule 106 EPC was impossible to observe during the proceedings, and that left the question whether Article 113 EPC was violated as the only outstanding issue with regard to Violation I.

The letter then referred to the second paragraph in point 2.8 of the written decision (see section V.2 above) and said this contained an assertion which, as attested by the Hutter and Schneider statements, was not presented to the petitioner during the appeal proceedings and as a consequence the petitioner was not provided with an opportunity to challenge it contrary to Article 113 EPC.

The statement made in the Board of Appeal's decision might, at first sight, appear to be an "argument" that the Board is entitled to present without first having put it to the petitioner but this is not in fact the case. While the language used is couched in terms of an argument, it is clear on closer inspection that this statement is actually a factual assertion. Specifically, the Board is asserting that the skilled

person would at the priority date have the necessary skills to set up a connection to a mobile phone that is initiated by the network (i.e. a so-called "push" notification). In other words, the Board is making an assertion concerning what would constitute common general knowledge at the priority date. That is quite clearly a factual matter, not a mere argumentative re-interpretation of facts that were previously presented. By making this assertion in the written decision, the Board deprived the petitioner of the opportunity to comment on its veracity during the oral proceedings or earlier during the written procedure in clear contravention of Article 113 EPC.

This assertion was key to the Board's justification for revoking the patent for a lack of inventive step based on the combination of three embodiments set out in D1 and the common general knowledge ascribed by the Board to the man skilled in the art. The issue of whether a skilled person would have been motivated to instigate push notifications at the priority date is one that had previously been considered during Finnish court proceedings as illustrated by a transcript of proceedings (enclosed with the letter of 18 September 2013) in which Dr. Esmael Dinan provided expert evidence accepted by the Finnish court concerning the exact same issue - namely when push notifications from a network to a mobile telephone had first been proposed - and stated that such techniques first appeared in 2003, some seven years after the priority date of the revoked patent. Thus had the petitioner been heard, the decision should have not been and would have not been the revocation of the patent. If the Board had put its assertion to the petitioner at the oral proceedings,

the petitioner would have had an opportunity to present this testimony to the Board. The fact that the petitioner did not present the transcript, which it had at the oral proceedings, to the Board is testimony to the fact that the Board's factual assertion was not put to the petitioner during the appeal proceedings.

- XI. Oral proceedings before the Enlarged Board of Appeal took place on 18 October 2013 at the end of which the decision was announced. Both the newly-appointed representative of the petitioner and Dr. Väänänen appeared as representatives.

The petitioner was asked by the chairman at the outset if, in addition to the apology in the letter of 18 September 2013, the abusive language in the petition was withdrawn which was confirmed. The petitioner was also asked to confirm that the proceedings were now confined to Article 112a(2)(c) EPC as the only ground and to what the letter of 18 October 2013 referred to as "Violation I". This was also confirmed although, at a later point in the proceedings, Dr. Väänänen insisted on discussing "Violation II", which the Enlarged Board allowed.

- XII. The petitioner's additional arguments submitted at the oral proceedings are summarised below:

1. The patent was revoked at the end of oral proceedings before the Board of Appeal on the basis of D1. The discussion had been about the combination of three embodiments of D1 with the knowledge of the skilled person at the priority date in 1996. It was put to the petitioner that the additional functionality

required was a Blackberry push-button device and the petitioner had argued that Blackberry hand-held devices were not available in 1996. The written decision now shows, in the second paragraph of point 2.8, that the Board subsequently changed from a combination of the three embodiments of D1 plus the Blackberry technology to those three embodiments plus text messaging to a mobile phone. The Board modified its view of what was the common general knowledge of the skilled person without allowing the petitioner to comment on that new view. In answer to questions from the Enlarged Board, the petitioner agreed that it did have the opportunity to discuss inventive step and the common general knowledge of the skilled person but not the combination of the three embodiments of D1 with text messaging.

2. As regards Violation II, Dr. Väänänen submitted that the petitioner was robbed of the opportunity to present arguments on the fact that none of the fifteen prior art documents disclosed the feature considered by the Board to be obvious. In answer to the Enlarged Board's observation that the evidence showed that the Board, rather than preventing the petitioner from speaking, was just silent on the issue, Dr. Väänänen said Mr. Hutter tried to discuss the prior art documents but the Board continued to discuss D1. The Board had decided and so prevented discussion. Mr. Hutter tried two or three times to present his argument. His statement means he did not have the chance to speak.

XIII. The petitioner requested the Enlarged Board of Appeal to set aside the decision under review, to re-open the proceedings before the Board of Appeal, to order that the members of the Board who participated in the

decision under review be replaced, and to order reimbursement of the petition fee.

Reasons for the Decision

Procedural matters

1. The petitioner requested accelerated processing of the petition (see petition, page 2 and last page and the petitioner's subsequent letter of 24 July 2013). According to the case-law of the Enlarged Board such a request is unnecessary (see R 18/09 of 27 September 2010, reasons, point 21).
2. The petition stated (see page 2):

"The petition for review is based on the grounds of Art. 112a(2)(c) EPC and Art. 112a(2)(d) EPC for the time being. Additional grounds may be raised later if current grounds are not sufficient, but only if the current petition fails to bring the stolen patent back."

Article 112a(4) EPC requires a petition for review to be filed in a reasoned statement in accordance with the Implementing Regulations within two months of the notification of the decision to be reviewed - in this case, by 26 June 2013. The Implementing Regulations (see Rule 107(2) EPC) provide that the petition shall indicate the reasons for setting aside the decision and the facts and evidence on which the petition is based. The Enlarged Board's decision in R 5/08 of 5 February 2009 (see reasons, point 22) shows that the petition

must be substantiated within the two months time limit. The Enlarged Board may pursuant to Article 12(1) RPEBA consider any later submissions "if this is justified for special reasons". In the opinion of the Enlarged Board "special reasons" could not extend to the late introduction of grounds not relied on unless or until the grounds in the petition prove insufficient since to allow otherwise would defeat the purpose of both Article 112a(4), second sentence and Article 12(1) RPEBA itself. Accordingly, in the present case, the petition had to be assessed as it was filed.

3. The petition referred on page 2 (see the passage cited in point 2 above) to grounds under both Article 112a(2)(c) and (d) EPC. Article 112a(2)(c) EPC was mentioned in the headings of each of the five alleged fundamental procedural violations described in the petition but Article 112a(2)(d) EPC was only mentioned in the headings of those numbered III, IV and V. Article 112a(2)(d) EPC provides as grounds only those defined in the Implementing Regulations and Rule 104 EPC, which provides that definition, mentions only failure to hold oral proceedings when requested and deciding an appeal without deciding on a relevant request, neither of which was referred to anywhere in the petition. Thus as regards Article 112a(2)(d) EPC the petition was unsubstantiated. The petition therefore had to be treated as confined to the ground of Article 112a(2)(c) EPC, namely a fundamental violation of Article 113 EPC. In the event, at the oral proceedings the petitioner confirmed that its case was confined to the first two alleged violations.

Admissibility

4. It appears to the Enlarged Board that the petition was filed within two months of notification of the decision in question, that the petitioner was adversely affected thereby, that the prescribed fee has been paid in time, and that the petition complies with Rule 107(1)(b) EPC.

5. As regards Rule 106 EPC, the Enlarged Board notes that the petitioner argued, as regards the alleged fundamental procedural violations to which it ultimately confined its case, that it could not make an objection under Rule 106 EPC because it only knew of the violations on reading the written decision. That argument is called into question by the petitioner's own letter of 15 April 2013 (see section IV above) in which Dr. Väänänen makes allegations about the reasons for the decision (and the partiality of the Board of Appeal) even before the written decision was issued. However, since the petition is in any event clearly unallowable, this matter need not be decided.

6. The petition was written in a highly emotive style and included a large volume of derogatory language, much of which (for example, "fabricating the decision", "partiality", "stolen patent", "jealousy and outright bad faith", "aggressive and corrupt", and "fraud") was excessive and without apparent basis in the petition. The Enlarged Board considered accordingly whether the petition was "in a reasoned statement" as required by Article 112a(4) EPC. However, in view of Dr. Väänänen's apology (in his representative's letter of 18 September 2013) for his use of such language and the actual withdrawal of the offensive allegations at the

commencement of the oral proceedings, the Enlarged Board did not pursue this further.

7. Accordingly, the Enlarged Board does not find that the petition is clearly inadmissible.

Allowability

8. Article 113(1) EPC provides:

"(1) The 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."

The petitioner claims that it was denied such an opportunity in two ways which, stripped of all the emotive language and repetitive rhetoric in which they were originally presented, can be summarized quite simply.

9. First, it is said that point 2.8 of the written decision shows that the Board of Appeal used in the written decision a version of the skilled person's common general knowledge at the priority date which was not put to the petitioner. While the argument continues that this version was wrong as a matter of fact and that the petitioner could have demonstrated it was wrong if it had been put, the question which the Enlarged Board must first answer is whether point 2.8 of the decision does show that in fact the Board had such an "undisclosed version". This is "Violation I".

10. Second, it is said that the Board of Appeal prevented discussion of the petitioner's argument that none of the fifteen prior art documents produced by the opponent (the appellant in the appeal proceedings) disclosed a pushing mechanism and that this should be born in mind when interpreting D1 (the Enlarged Board takes that summary from the statement of Mr. Hutter who advanced the argument at oral proceedings before the Board of Appeal - see section VI above). This is "Violation II".

Violation I

11. As outlined above, the Enlarged Board must answer the question whether point 2.8 of the decision shows that the Board of Appeal had a version of the skilled person's common general knowledge which it did not put to the petitioner and on which therefore the petitioner did not have an opportunity to comment. The alleged version of the general knowledge is one which would allow the skilled person to combine the three embodiments of D1 (which were identified and discussed) with text messaging technology. Both the petition itself - which, minus the emotive language and exaggeration, reflects Dr. Väänänen's recollection of the proceedings - and the statements of the two other representatives present at the oral proceedings before the Board of Appeal - Mr. Hutter and Dr. Schneider - all provide the same account. They cite the entire text of point 2.8 of the Board's written decision (see section V.2 above) and say, in the case of Mr. Hutter and Dr. Schneider, that the "statement" of the second paragraph was not, to the best of their memory, made during the oral proceedings and, in the case of

Dr. Väänänen in the petition, that this paragraph was inserted after the final decision. In as much as the entire written decision will have been prepared after the decision was announced at the end of the oral proceedings, it is literally true that the second paragraph of point 2.8 was inserted after the final decision but that is quite clearly not the thrust of that observation. All three accounts are saying that the content of the second paragraph was not discussed at the oral proceedings.

12. Not only is that agreed by all three persons who were present and who have provided an account of what happened, but the Enlarged Board also considers it likely that the second paragraph was not discussed. However, the Enlarged Board takes that view because it cannot accept that the paragraph can be interpreted in the manner that the petitioner suggests. The first paragraph of point 2.8 appears on its face to be a straightforward record of a general argument of the petitioner about what the skilled person would have contemplated at the priority date together with a reference, by way of example, to the petitioner's stance that Blackberry phones came many years later. This is then followed by the second paragraph which, in corresponding terms, gives the Board's own view on the argument in the first paragraph, also in the form of a summary together with an example. Thus the argument in the petition itself that the second paragraph was not discussed at the oral proceedings leads only to the conclusion that one would indeed not expect it to have been discussed at any point in time prior to it being written because it is quite simply the Board of

Appeal's reason for not accepting an argument of the petitioner.

13. If the Enlarged Board was to confine itself to the arguments in the petition, that would be the end of the matter. However, the new representative who appeared for the petitioner at the oral proceedings before the Enlarged Board of Appeal advanced the additional argument that, while the second paragraph appears to be just an argument (which the Enlarged Board understands to mean reasons for not accepting the petitioner's argument), it is in fact none the less an "assertion". The form this new assertion takes is that the Board of Appeal adopted a new version of the skilled person's common general knowledge which substituted text messaging technology for the Blackberry technology previously discussed and married that text messaging to the three embodiments of D1 which were discussed during the oral proceedings to arrive at a state of the prior art which was not previously raised and was not put to the petitioner.

14. With all due respect to the petitioner's new representative, the Enlarged Board just cannot interpret the second paragraph of point 2.8 of the decision as saying anything as broad as that. Point 2.8 is quite simply an explanation of why the Board of Appeal did not accept the petitioner's arguments. That the petitioner, and Dr. Väänänen in particular, did not agree with the Board's view of those arguments is quite clear but that does not mean that the Enlarged Board must put an interpretation on the Board of Appeal's reasons which they simply will not bear.

15. The fact that the Board of Appeal did not agree with the petitioner means neither that the petitioner was not heard nor that the petitioner was entitled to know in advance the Board's reasons why it did not agree with the petitioner. It appears on the face of point 2.8 of the decision that the petitioner was in fact heard on the issue of what the skilled person would have contemplated at the priority date and that the Board, as would be expected, then explained in its written decision why it disagreed with the petitioner. The fact that the Board may not, prior to its written decision, have expressed its own views on the arguments raised by the parties (in this case, the petitioner) cannot be a ground for complaint since the Board is under no obligation to inform the parties in advance of its decision what the reasons for that decision will be (see for example R 6/11 of 4 November 2011, reasons, point 8.3 and the several earlier decisions there cited). The Enlarged Board made that observation in its provisional opinion but heard no satisfactory submission in response.

Violation II

16. The question which the Enlarged Board must ask in relation to the alleged Violation II is whether the Board of Appeal prevented discussion of the petitioner's argument that none of the fifteen prior art documents produced by the opponent (the appellant in the appeal proceedings) disclosed a pushing mechanism and that this should be born in mind when interpreting D1. The evidence that this happened is said to be in the statements of Mr. Hutter (who says he

presented the argument at the oral proceedings before the Board of Appeal) and of Dr. Schneider.

17. The Enlarged Board can find no basis in the statements of Mr. Hutter and Dr. Schneider, whether read separately or taken together and even if given the most generous interpretation, for the proposition that the petitioner was not heard in this respect. Their statements say that Mr. Hutter put forward the argument and that, as both gentlemen remember, the Board of Appeal did not reply to the argument in any way. Thus, on the face of the petitioner's own evidence, the petitioner was in fact heard on the very issue on which it now claims it was not heard.

18. If, and to the extent that, the petitioner's complaint is that the Board of Appeal "did not reply" to the argument, the Enlarged Board's only observation is that this is of no consequence. There are many arguments advanced in many appeal cases which are not the subject of subsequent questioning by the Boards of Appeal. If the petitioner wished the Board of Appeal in this case to take a greater interest in this particular argument, it was for the petitioner and its representatives to make their case thereon accordingly. As the jurisprudence of the Enlarged Board in petition cases has made quite clear, the petitioner and its representatives were responsible for the conduct of their case and it was for them to submit the necessary arguments to support their case on their own initiative and at the appropriate time (see R 2/08 of 11 September 2008, reasons, points 8.5 and 9.10; and R 13/11 of 20 April 2012, reasons, point 18).

19. Although the evidence on which the petition relies goes no further than to say that the Board did not reply to the petitioner's argument, the petition alleges that the Board of Appeal suppressed evidence (see section V.3 above). The Enlarged Board can see no basis at all for that allegation. The statements of Mr. Hutter and Dr. Schneider on which the petitioner relies show beyond any doubt that the argument in question was put to the Board of Appeal. That in itself demonstrates that in this respect the petitioner had an opportunity to comment and thus that Article 113(1) EPC was complied with - the argument in question was an argument of the petitioner and its own evidence establishes that the argument was heard by the Board.

20. The Enlarged Board notes that, in his letter of 15 April 2013 (see section IV above), Dr. Väänänen wrote that the Board of Appeal explicitly said that all the documents "were being ignored". If that was the case, it is startling that Mr. Hutter and Dr. Schneider do not mention it in their statements. In any event it is not mentioned in the petition and was not relied on at any point in the petition proceedings. At the oral proceedings before the Enlarged Board Dr. Väänänen said that those statements meant that Mr. Hutter tried two or three times to present his argument but did not have a chance to speak. However, if that was the case, it is again surprising that the statements of those who were present do not say that is what happened. The Enlarged Board simply cannot interpret the statements of professional representatives, which have been filed by the petitioner in support of its own case, as saying something which they do not say and which is not even remotely implied by what they say.

21. Accordingly, the Enlarged Board concludes, entirely on the basis of the petitioner's own case, that Violation II is without foundation.

22. The petition does not show that any denial of opportunity to comment occurred and consequently it is clearly unallowable.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as clearly unallowable.

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk