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**Datasheet for the decision
of 6 November 2019**

Case Number: T 2138/14 - 3.5.04

Application Number: 09826393.2

Publication Number: 2347576

IPC: H04N5/44, H04N5/445, G06F3/048

Language of the proceedings: EN

Title of invention:
Techniques for implementing a cursor for televisions

Applicant:
Saturn Licensing LLC

Headword:

Relevant legal provisions:
EPC Art. 56, 123(2), 111(1)
RPBA Art. 13(1)
EPC R. 103(1)(a)
Guidelines for examination G-VII, 3.1

Keyword:

Substantial procedural violation - (yes)
Remittal to the department of first instance - (no)
Inventive step - main and first auxiliary request (no)
Late-filed auxiliary requests - admitted (no)
Reimbursement of appeal fee - (no)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 2138/14 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 6 November 2019

Appellant: Saturn Licensing LLC
(Applicant) 25 Madison Avenue
New York, NY (US)

Representative: D Young & Co LLP
120 Holborn
London EC1N 2DY (GB)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 2 July 2014
refusing European patent application
No. 09826393.2 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman C. Kunzelmann
Members: R. Gerdes
B. Müller

Summary of Facts and Submissions

I. The appeal is directed against the decision to refuse European patent application No. 09 826 393.2, published as international application WO 2010/056276 A2.

II. The patent application was refused by the examining division on the grounds that claim 1 of the main request was not clear, contrary to Article 84 EPC and that the subject-matter of the independent claims of the main request lacked novelty or at least inventive step in view of document:

D6: US 2005/0156896 A1.

In its decision the examining division also referred to the following document:

D5: US 2008/0235737 A1.

The subject-matter of claim 1 of the first and the second auxiliary requests then on file was found to lack an inventive step in view of D6 in combination with the common general knowledge of the skilled person.

III. The applicant (appellant) appealed against this decision, requesting that it be set aside. It submitted claims of a main request and a first auxiliary request with the statement of grounds of appeal. The claims of the main request were identical to those of the main request underlying the decision under appeal.

Regarding the ground of lack of clarity of claim 1 of the main request, the appellant argued that its right to be heard had been infringed, the objection under

Article 84 EPC having been raised for the first time in the decision under appeal.

IV. In a communication under Article 15(1) RPBA, which was annexed to the summons to oral proceedings, the board agreed with the appellant that procedural violations had occurred before the department of first instance. The board indicated that it intended not to remit the case and instead examine the substance of the appeal. The board stated that it did not agree with the objection of lack of clarity regarding the independent claims of the main request in the decision under appeal. However, the subject-matter of the independent claims of both requests lacked an inventive step in view of D6. The board introduced the following documents as proof of the common general knowledge of the skilled person:

D7: Masui, T.: HyperSnapping, Proceedings IEEE Symposia on Human-Centric Computing Languages and Environments (Cat. No.01TH8587), 2001, IEEE, Piscataway, NJ, USA, doi: 10.1109/HCC.2001.995258, ISBN 0-7803-7198-4, pages 188 to 194, and

D8: US 6,031,531 A1.

V. With a reply to the summons dated 4 October 2019, the appellant submitted amended claims of a main request and first to third auxiliary requests and stated that these new claims replaced the claims on file.

VI. Oral proceedings were held before the board on 6 November 2019. As announced by letter dated 30 October 2019, the appellant did not attend.

The Chairman noted that the appellant had requested in writing that the decision under appeal be set aside and that a European patent be granted on the basis of the claims of the main request or, in the alternative, the first, second or third auxiliary request, all requests filed with the letter dated 4 October 2019.

VII. Claim 1 of the main request reads as follows:

"A method comprising:

outputting a graphical user interface including a widget and any combination of objects on a television (205), wherein the widget is a cursor;

receiving one or more key events from a remote control (210);

updating the graphical user interface by moving the widget over the objects a fixed distance in response to each direction key activation in a given direction corresponding to the direction key if the one or more key events indicate activation of one or more direction keys (215);

determining if the widget is proximate an object of the graphical user interface if the one or more key events indicate activation of an enter key (220); and

initiating a function designated by a given object in response to the activation of the enter key if the widget is proximate the given object (225)."

VIII. Claim 1 of the first auxiliary request reads as follows:

"A method comprising:

outputting a graphical user interface including a widget and any combination of objects on a television (205), wherein the widget is a cursor;

receiving one or more key events from a remote control (210);

updating the graphical user interface by moving the widget over the objects a fixed distance in response to each direction key activation in a given direction corresponding to the direction key if the one or more key events indicate activation of one or more direction keys (215);

determining if the widget is proximate an object of the graphical user interface if the one or more key events indicate activation of an enter key (220); and

initiating a function designated by a given object in response to the activation of the enter key if the widget is proximate the given object (225); the method further comprising:

receiving data for generating the graphical user interface (405);

determining if the graphical user interface presents a plurality of objects in a substantially uniform format (440) comprising a regular set of rows and columns or an asymmetric format comprising objects arranged in any order (410);

if the graphical user interface has an asymmetric format:

outputting the graphical user interface including the widget and the plurality of objects;

updating the asymmetric formatted graphical user interface by moving the widget in response to each direction key activation if the one or more key events indicate activation of one or more direction keys (425);

determining if the widget is proximate an object of the asymmetric formatted graphical user interface if the one or more key events indicate activation of an enter key (430); and

initiating a function designated by a given object in response to the activation of the enter key if the widget is proximate the given object in the asymmetric formatted graphical user interface (435); and

if the graphical user interface has a substantially uniform format:

outputting the graphical user interface including the plurality of objects;

updating the substantially uniform formatted graphical user interface by moving an indication of a currently active object in a predetermined order in response to each direction key activation if the one or more key events indicate activation of one or more direction keys (450); and

initiating a function designated by the currently active object in response to the activation of the enter key (455)."

IX. Claim 1 of the second auxiliary request differs from claim 1 of the main request in the following additional feature, which has been inserted after the updating, and before the determining feature of claim 1 of the main request:

"... updating the objects displayed on the graphical user interface if the widget is moved to a predetermined area; ...".

X. Claim 1 of the third auxiliary request corresponds to claim 1 of the second auxiliary request, with the following additional feature appended to it:

"..., wherein the updating the graphical user interface further comprises updating the graphical user interface by moving an object proximate the widget to reposition the object on the graphical user interface in response to the enter key being held down while a direction key is activated, the object being moved in the direction corresponding to the activation of the direction key."

XI. In the decision under appeal the examining division held that the term "proximate" in claim 1 of the main request was "too broad" and unacceptably put in doubt the extent of protection sought (Article 84 EPC). By using a broad interpretation of "proximate" to encompass a case where the widget was over the object, the subject-matter of claim 1 lacked novelty in view of D6.

Even if the term "proximate" was interpreted in a "strict sense", the claimed subject-matter did not involve an inventive step in view of D6 and common general knowledge, because it was one of the most

obvious achievements of a graphical user interface (GUI) to render a displayed object's selection immediate and easy for the user.

XII. Regarding the inventive step of the subject-matter of claim 1 of the main request, the appellant observed that no evidence for the extent of "knowledge in the art of GUI" was offered by the examining division. The appellant also disputed that D7 and D8 could be used to prove common general knowledge. The Guidelines for Examination in the EPO, part G-VII-3.1, indicated that "a single publication (e.g. a patent document) but also the content of a technical journal cannot normally be considered as common general knowledge" and referred to decision T 475/88. The Guidelines also indicated that "in special cases articles in technical journals can be representative of common general knowledge if such articles represent a broad review or survey of a topic." In the absence of any specific teaching showing that the proximate location of a cursor to select an object was well known, the appellant could not agree that the invention would have been obvious (see statement of grounds, pages 2 to 4 and letter dated 4 October 2019, section on main request).

Regarding claim 1 of the first auxiliary request, the appellant argued that in addition to those features that distinguish claim 1 of the main request from D6, claim 1 also differed by determining whether objects included in a GUI were arranged in a "substantially ordered format" or "an asymmetric format". D6 also did not disclose modifying the pointer function and selection function according to the GUI format. This made the inventive system and method more flexible. The associated technical problem was how to provide cursor movement and selection functions in a remote controlled

GUI that operate efficiently across different GUI formats.

D6 was not concerned with the layout of objects in a GUI and did not even disclose any particular format. D5 showed a regular format, but both D6 and D5 were only concerned with a single format. There was no recognition that different cursor control approaches might be beneficial for different GUI object formats (see statement of grounds, pages 5 and 6).

The appellant indicated that the amendment to claim 1 of the second auxiliary request was based on paragraph [0011], first sentence and paragraph [0015], final sentence (see letter of 4 October 2019, page 3).

Reasons for the Decision

1. The appeal is admissible.

Alleged procedural violations

2. The appellant argued in the statement of grounds of appeal that its right to be heard had been infringed, since no objection regarding lack of clarity of the term "proximate" had been raised in the examination proceedings prior to the decision.
 - 2.1 The relevant procedural steps in the present case may be summarised as follows.

In the European search opinion the examining division cited documents D1 to D5. It argued that the subject-matter of independent claims 1 and 9 lacked novelty in view of D1. The subject-matter of the dependent claims

was considered to lack an inventive step in view of D1 in combination with documents D2 to D5. Subsequently, the applicant submitted amended claims and arguments addressing the objections.

The examining division issued a communication on 25 June 2013, in which an objection of lack of inventive step in view of D1 and D2 was raised. In reply the applicant submitted further arguments.

The examining division issued summons to oral proceedings and introduced document D6 into the proceedings. It raised an objection of lack of novelty in view of D6 against the subject-matter of the independent claims. The division also stated that the objections made in the previous communications in view of D1 to D5 were maintained. The applicant replied by maintaining its main request. In addition, it filed claims of first and second auxiliary requests.

Oral proceedings before the examining division were held as scheduled on 15 May 2014. As announced in a letter dated 7 May 2014 the applicant did not attend the proceedings. During the oral proceedings the examining division discussed objections of lack of clarity and inventive step and came to the conclusion that the requirements of Articles 84 and 56 EPC were not fulfilled (see minutes of the oral proceedings).

The decision regarding the main request is based on an objection of lack of clarity of the term 'proximate' and an objection of lack of novelty of the subject-matter of claim 1 in view of D6. In a strict interpretation of the term 'proximate' the subject-matter of the independent claims was considered to lack an inventive step in view of D6 and common general

knowledge (see decision under appeal, points II.1 and II.2). The division also found that the subject-matter of claim 1 of the first and second auxiliary requests did not involve an inventive step in view of D6 (see points II.3 and II.4 of the decision under appeal). It appears from point III of the decision that the examining division considered the objection of lack of clarity to apply to all requests.

- 2.2 Hence, as argued by the appellant, no clarity objection was raised or discussed in the written proceedings, in particular, no such objection was raised regarding the term "proximate" which had been present in claim 1 of all claim sets submitted in the proceedings before the department of first instance. This objection was discussed for the first time during the oral proceedings that were held in the absence of the applicant (see minutes of the oral proceedings).

Similarly, no objection of lack of inventive step of the subject-matter of claim 1 of the main request and the first and second auxiliary requests in view of D6 and common general knowledge was raised prior to the oral proceedings.

Both of these objections of non-compliance with Article 84 EPC and Article 56 EPC, respectively, are based on new grounds within the meaning of Article 113(1) EPC.

3. According to Rule 115(2) EPC if a party duly summoned to oral proceedings before the EPO does not appear as summoned, the proceedings may continue without that party.

- 3.1 In line therewith several decisions by the boards confirm that an applicant should expect the amendments it has made to be examined at oral proceedings held in the applicant's absence with regard to their conformity with the requirements of the EPC, in particular those of Article 123(2) EPC (see Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019 (hereinafter "CLBoA"), III.B.2.7.2). This principle is reflected in the Notice from the European Patent Office concerning non-attendance at oral proceedings before the examining division, which stipulates that an appellant should expect a decision based on either "objections [which] are still outstanding" or "objections which arise against the amended claims" (see OJ 10/2008, 471).
- 3.2 However, these decisions and the Notice do not concern new objections against claims which were not amended as in the present case. Nor do they stipulate that a non-attending party has generally given up its right to be heard under Article 113(1) EPC.
- 3.3 On the contrary, it is established case law that a non-attending party's right to be heard under Article 113 (1) EPC must not be ignored (CLBoA, III.B.2.7).
- 3.4 This view is confirmed by analogy to Opinion G 4/92 (OJ EPO 1994, 149) of the Enlarged Board of Appeal. According to G 4/92 a decision against a party who has been duly summoned but who fails to appear at oral proceedings may not be based on facts put forward for the first time during those oral proceedings (see Conclusion of G 4/92). Although Opinion G 4/92 explicitly only concerns *inter partes* proceedings (see point 1 of the Reasons), the same principle has been

applied in *ex parte* proceedings (see CLBoA, III.B.2.6.1 and III.B.2.7.1).

- 3.5 Consequently, the board agrees with the appellant that its right to be heard under Article 113(1) EPC has been infringed. This applies to the objection under Article 84 EPC and equally to the objections under Article 56 EPC based on D6 and common general knowledge. Hence, procedural violations occurred in the proceedings before the department of first instance.
- 3.6 The objections of lack of clarity and lack of inventive step relating to the main and auxiliary requests were decisive for the outcome of the decision to refuse the application. Hence, the procedural violations are substantial ones (see CLBoA, III.B.2.2.2).
- 3.7 According to Article 11 RPBA a board shall remit a case to the department of first instance if fundamental deficiencies are apparent in the first instance proceedings, unless special reasons present themselves for doing otherwise. The substantial procedural violations found constitute fundamental deficiencies in the meaning of Article 11 RPBA.
- 3.8 In the present case, the appellant did not request that the case be remitted. Moreover, concerning the issue of (lack of) novelty of the subject-matter of the independent claims of the main request over D6, the reasoning of both the examining division and the appellant had been presented during the written phase of the examination proceedings, so that the board is aware of the examining division's opinion on this issue. Furthermore, a remittal of the case would not have served procedural economy. In view of these special reasons, the board considered it appropriate to

exercise its power according to Article 111(1) EPC in examining the appeal in substance.

The invention

4. The application relates to a method and system for implementing a graphical user interface (GUI) on a television. A remote control can be used to move a widget, such as a cursor, and select objects (menu items, icons, thumbnails) on the television screen. In response to each direction key activation on the remote control, the widget is moved a fixed distance. In addition, if the widget is proximate to a given object and the remote control's enter key is pressed, a function designated by the object is initiated (see figures 1 and 2, paragraphs [0001] to [0003], [0009], [0010] and [0016]).

In one embodiment, the system distinguishes between an asymmetric format with objects arranged in an unordered manner on the screen and a substantially uniform format, in which the objects are presented as a regular set of rows and columns. If it is determined that the GUI has an asymmetric format, the widget is displayed and control is effected according to the method described above. In case of a substantially uniform format, a currently active object is highlighted or indicated in a similar manner. An activation of a direction key on the remote control results in a movement of the indication of a currently active object. A function designated by the currently active object is initiated in response to pressing the enter key on the remote control (see figures 4A, 4B and paragraphs [0014] to [0019]).

Main request

5. D6 may be considered the closest prior art for the subject-matter of claim 1.
- 5.1 D6 discloses a GUI similar to the one of the present application, which allows interaction between a user having a remote control and a television. Similarly to the present application, D6 is concerned with improving the pointing operation using the direction keys on the remote control. According to D6, the television screen may be divided into coarse and fine intervals using division increase/decrease keys on the remote control. The remote control also includes direction keys which are used to control the motion of a pointer in accordance with the division intervals of the screen. A selection key functions like clicking a mouse when the pointer reaches a desired position. Since the division interval can be finely adjusted in the course of moving a pointer to a desired position, it is possible to accurately point a desired position (see figures 1 to 3 together with paragraphs [0003] to [0010], [0027], [0033] to [0035], [0051] and [0052]).
- 5.2 It is common ground that D6 does not disclose the following features of claim 1 (see appellant's letter of 4 October 2019, page 2):
 - (a) determining if the widget is proximate to an object of the graphical user interface if the one or more key events indicate activation of an enter key; and
 - (b) initiating a function designated by a given object in response to the activation of the enter key if the widget is proximate to the given object.

- 5.3 The distinguishing features relate to the determination of a condition and the reaction to it. The invention is distinguished from the prior art known from D6 in that the condition relates to proximity instead of requiring a desired position to be pointed to accurately.
- 5.4 The board agrees with the appellant's argument that these differences make the GUI easier to use, with the corresponding technical problem being "how to simplify the use of a remote control to operate a GUI" (see statement of grounds, penultimate paragraph on page 3 and first paragraph on page 4 and letter of 4 October 2019, page 2).
- 5.5 The board agrees with the decision under appeal that one of the most obvious achievements of a GUI is to render a displayed object's selection immediate and easy for the user (see decision under appeal, point II.2.5). Problems with GUIs related to accuracy of pointing were generally known to the skilled person at the priority date of the present invention. This fact is illustrated by D7 (see abstract) and D8 (abstract, column 1, lines 9 to 63).
- 5.6 D7 refers to "snapping" as one of the most frequently used techniques with which users can snap the mouse cursor or dragged objects to existing objects to make the graphical user interface easier to use (see D7, abstract and chapter: "Related Work"). D8 discloses a "magnetised domain" around an icon such that a cursor is snapped toward the icon when entering the domain (see abstract). Snapping is not identical to the operation performed in the present application. However, the documents show a step of determining whether a widget is proximate to an object. The documents also disclose that a widget snaps to the

object if it is proximate to the object and that a function is initiated if the object is subsequently selected (see D7, abstract and D8, abstract, figures 6a, 6b and column 7, lines 28 to 43). Hence, in essentially the same manner as in the present invention, a selection operation requires only that the widget approaches a selectable object up to a certain distance. The additional "snapping" to the object provides visual feedback to the user indicating that the cursor has entered the "domain of the object" and may be considered as a further improvement with respect to the present invention.

- 5.7 The appellant disputed that D7 and D8 could serve as proof of common general knowledge and referred to the Guidelines for Examination in the EPO, G-VII 3.1 (see letter dated 4 October 2019, pages 1 and 2). The relevant sentences of the November 2019 edition of the Guidelines read as follows:

"A single publication (e.g. a patent document, but also the content of a technical journal) cannot normally be considered as common general knowledge (see T 475/88). In special cases, articles in technical journals can be representative of common general knowledge (see T 595/90). This applies in particular to articles providing a broad review or survey of a topic (see T 309/88)."

- 5.8 There is no obligation on the part of a board of appeal to follow the Guidelines (see, for example T 1090/12, Reasons, point 6.1). While the board endorses the requirements set out in the cited passage, this does not preclude D7 from being suitable of proving common general knowledge.

D7 may not be an article providing a broad review of a topic, but it refers to snapping as "one of the most frequently used techniques". In the board's view, the reference in an article of a technical journal to a certain technique as being "one of the most frequently used techniques" has the effect that the technique can be considered to be part of the common general knowledge of the skilled person. As in the case of a review article, D7 is not cited for the document's own contribution to the art, but as a reference to what is common in the technical field. As a consequence, D7 proves what an experienced person in the field in question is expected to be aware of (see CLBoA, I.C.2.8.1).

- 5.9 Patent document D8 serves as a further example reinforcing that "snapping" was well known before the priority date of the present application, since it uses exactly the same term "snapping" for the function in question (see D8, figures 6a, 6b and column 7, lines 28 to 43).
- 5.10 The appellant also argued that a person skilled in the art had many problems to solve when attempting to transfer functionality which was allegedly known from computer GUIs to another platform such as a television (see statement of grounds of appeal, the paragraph bridging pages 2 and 3 and the first full paragraph on page 3).
- 5.11 The board is not convinced by that argument because the proximity determination and function initiation are only expressed as functional features in the independent claims. Thus, the implementation of these functional features is not an essential aspect of the claimed invention. The board is also of the opinion

that computer technology, including the use of graphical user interfaces, has penetrated into many fields of technology including consumer electronic devices such as televisions, the cursor-like pointer of document D6 being one example of this. Hence, the transfer of the GUI functionality specified in claim 1 to a TV would have been straightforward.

- 5.12 The board concludes that the subject-matter of claim 1 was obvious to a person skilled in the art in view of D6 and common general knowledge as represented by documents D7 and D8. Thus, it lacks inventive step (Article 56 EPC).

First auxiliary request

6. Claim 1 according to the first auxiliary request has been amended with respect to claim 1 of the main request to distinguish between an asymmetric format and a uniform format of the graphical user interface. It corresponds essentially to the first auxiliary request filed with the statement of grounds of appeal.
- 6.1 The method steps relating to the determination of the formats and to GUI control using the uniform format are not disclosed in D6.
- 6.2 The appellant argued that these method steps allowed the GUI operation to be modified in response to the format of the GUI. The corresponding technical problem was how to provide cursor movement and selection functions in a remote-controlled GUI that operate efficiently across different GUI formats (see page 6 of the statement of grounds).

- 6.3 The board is not convinced that the combined method employing different methods for the asymmetric and the uniform formats is more efficient than a solution based on the asymmetric format only. In other words, it may be easier for the user to employ the widget/cursor-based solution both to a screen with unordered and ordered objects.
- 6.4 However, for the sake of argument, the formulation of the technical problem may be accepted.
- 6.5 Document D5 discloses methods for scrolling through TV-presented video icons or thumbnails. In particular, it shows in figures 3 and 4 the use of a "regular format" of thumbnails and navigation from thumbnail to thumbnail using direction keys on the TV's remote control which causes a cursor to highlight the thumbnail of an object on the TV display. D5 also discloses a select key on the remote control, which serves to initiate a function associated with the active object (i.e the object with the highlighted thumbnail) (see D5, paragraphs [0019] to [0027]).
- 6.6 The appellant argued that D6 was not concerned with the layout of objects in a GUI and did not even disclose any particular format. D5 showed a regular format, but both D6 and D5 were only concerned with a single format. There was no recognition that different cursor control approaches might be beneficial for different GUI object formats (see statement of grounds, pages 5 and 6).
- 6.7 The board is not convinced by these arguments. D5 is in the same technical field as D6, i.e. both documents relate to the control of television sets using a remote control. It is correct that D6 is not concerned with

the layout of objects on the TV screen, but this also means that the pointer navigation method of D6 is independent of an arrangement of any such objects. D5 discloses two alternate display formats for the same TV in figures 3 and 4, albeit two regular ones. In addition, the skilled person acquainted with user interfaces knows (e.g. from personal computers) that different mechanisms for GUI control may be combined, for example, many application programs and operating systems allow the alternative use of a mouse and (shortcut) keys. Hence, the board is of the opinion that the skilled person would combine D6 with D5 and common general knowledge and thereby arrive at the invention as claimed without inventive effort.

- 6.8 It follows that the subject-matter of claim 1 according to the first auxiliary request lacks an inventive step (Article 56 EPC).

Second and third auxiliary requests

7. According to Article 13(1) RPBA, any amendment to a party's case after it has filed its grounds of appeal may be admitted and considered at the board's discretion. The discretion shall be exercised in view *inter alia* of the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. Further, according to Article 15(3) RPBA, the board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned, who may then be treated as relying only on its written case.

- 7.1 Claims 1 of the second and third auxiliary requests were filed late in the appeal proceedings, after the

board had issued its communication annexed to the summons to oral proceedings. When compared with claim 1 of the main request, they both contain the following additional step:

"updating the objects displayed on the graphical user interface if the widget is moved to a predetermined area;".

- 7.2 The appellant argued that this amendment was based on paragraph [0011], first sentence, as well as paragraph [0015], last sentence (see letter dated 4 October 2019, page 3, first paragraph).
- 7.3 The cited passages refer to an update of the graphical user interface and not to an update of the objects. According to these passages "one or more menus, sub-menus, icons, thumbnails and/or the like" may be displayed as part of the update, but there is no clear indication whether the objects are updated. The cited passages also disclose the update in the context of moving the widget "to a predetermined area". It is questionable whether the additional feature of claim 1 may be extracted from that context and whether the updating of objects is the same as an update of the GUI. Hence, the amendment raises questions concerning its compliance with Article 123(2) EPC.
- 7.4 In addition, dependent claim 5 specifies a step of "updating the graphical user interface to display one or more additional objects in a predetermined area when the widget is moved to the predetermined area (235)." This feature corresponds more closely to the cited passages in paragraphs [0011] and [0015]. It is questionable whether this correspondence of claim 5 with the cited passages implies that the feature in

claim 1 is to be understood in a generalised manner compared to claim 5. Thus, the amendment also raises questions of clarity (Article 84 EPC).

7.5 It follows from the above that the claims of the second and third auxiliary requests introduce a number of new complex issues at a time when this was not appropriate from the point of view of procedural economy and the state of the proceedings and could not be dealt with in the absence of the appellant.

7.6 In view of the above the board has decided not to admit the second and third auxiliary requests into the appeal proceedings in application of Article 13(1) RPBA.

Conclusion

8. Since none of the appellant's requests is allowable, the appeal must be dismissed.

Reimbursement of the appeal fee

9. Pursuant to Rule 103(1)(a) EPC, a prerequisite for reimbursement of the appeal fee is that the appeal is deemed to be allowable. Thus, despite the fact that substantial procedural violations occurred in the proceedings before the department of first instance (see points 2 and 3 above), the appeal fee cannot be reimbursed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



K. Boelicke

C. Kunzelmann

Decision electronically authenticated