

The Notional Business Person - A New Actor on the IP Stage?

The two decisions are T 1463/11 ([Universal merchant platform/CardinalCommerce](#)) and T 1658/15 ([Universal merchant platform II/CardinalCommerce](#)). The cases concerned a parent and a divisional, both of which were rejected by the Examining Division as uninventive. Both inventions relate to e-commerce. Broadly speaking the inventions aim to solve problems arising from the need for an internet merchant to maintain software to deal with many different payment methods. In the prior art each different payment method is handled by a respective plug-in which the merchant has to keep up-to-date on their own server. The inventions shift the plug-ins to a “merchant authentication processing system”, adding an extra server to the system. In this extra server, the plug-ins can be updated centrally.

The Examining Division considered the inventions to be straightforward implementations of business processes, following the [Comvik](#) approach to examination of inventive step wherein non-technical aspects of an invention are assigned to a preliminary “requirements” phase and cannot contribute to (technical) inventive step. The Board however considered that the Examining Division’s approach did not correctly separate technical and non-technical aspects of the invention.

Just as the inventive step is to be judged by the hypothetical person skilled in the art, who will consider the technical features of the invention, the Board held that the non-technical aspects would be addressed by the “notional business person”. The notional business person is not a real business person but an artificial construct just like the person skilled in the art. As is well known, the person skilled in the art has no inventive ability and similarly the notional business person has no technical ability.

The Board indicated that there are two consequences of the artificiality of the notional business person:

- the notional business person would not require the use of specific technical means, whether known or even notorious, in the non-technical requirements, whereas a real business person might
- however, the notional business person might do things that a real business person would not, such as include requirements that go against business thinking at the time - “a sort of

business prejudice.”

The latter point seems contradictory to the behaviour of the person skilled in the art who is supposed to take account of technical prejudices. However, the Board held that disregarding business prejudices is essential as otherwise business requirements would need to be evaluated and would contribute to inventive step, contrary to the [Comvik](#) principle.

In the present cases, the Board therefore disregarded many of the applicant’s arguments as being business prejudices but still found that there were sufficient technical prejudices against relocation of the payment plug-ins to an extra server that the inventions were not obvious. The claims at issue included quite a lot of technical detail as to how this was achieved but the Board did not think it necessary to consider these in detail as the technical prejudice against relocation of the plug-ins was enough to establish an inventive step.

Declarations from several experts in the banking and payment industries were filed in support of the inventions but their statements were given “little value” by the Board on the ground that the experts were more like business people than technical experts and because they addressed specific embodiments rather than the generality of the claimed invention.

There are several useful lessons from this case for applicants with inventions relating to the technical implementation of all non-technical (e.g. business) methods:

- no technical features must be allowed to creep in to the “requirements” if the objective technical problem is to implement such requirements
- all technical prejudices must be taken into account, but not non-technical prejudices
- experts need to be selected for their technical expertise, not business experience and address the invention in the right level of generality.

The first of these points is particularly useful since Examiners in this field often formulate the technical problem in terms of requirements to be implemented and frequently include technical points in the requirements.

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