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**Datasheet for the decision  
of 8 June 2009**

**Case Number:** T 0633/06 - 3.5.04

**Application Number:** 96301363.6

**Publication Number:** 0730381

**IPC:** H04N 7/10

**Language of the proceedings:** EN

**Title of invention:**

Upstream communications for interactive networks

**Applicant:**

AT&T Corp.

**Opponent:**

-

**Headword:**

-

**Relevant legal provisions:**

RPBA Art. 13(1)

**Relevant legal provisions (EPC 1973):**

EPC Art. 54, 56, 84, 108

**Keyword:**

"Form of appeal - grounds - substantiation (yes)"

"Novelty (yes) after amendment"

"Inventive step (yes) after amendment"

"Clarity (yes) after amendment"

**Decisions cited:**

-

**Catchword:**

see Reasons section 2



Case Number: T 0633/06 - 3.5.04

**D E C I S I O N**  
of the Technical Board of Appeal 3.5.04  
of 8 June 2009

**Appellant:** AT&T Corp.  
32 Avenue of the Americas  
New York, NY 10013-2412 (US)

**Representative:** Reichl, Wolfgang  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 13 December 2005  
refusing European application No. 96301363.6  
pursuant to Article 97(1) EPC 1973.

**Composition of the Board:**

**Chairman:** F. Edlinger  
**Members:** C. Kunzelmann  
T. Karamanli

## Summary of Facts and Submissions

- I. The appeal is against the decision of the examining division posted 13 December 2005 to refuse European patent application No. 96 301 363.6.
- II. The application was refused for lack of clarity (Article 84 EPC 1973), lack of novelty (Article 54(1) and (2) EPC 1973) and lack of inventive step (Article 56 EPC 1973).
- III. Claim 1 on which the impugned decision was based reads as follows.

"A method comprising:

- (a) receiving an initial upstream signal from a user terminal device at a multiuser interactive processor, the initial upstream signal being associated with a frequency within an upstream spectrum;
- (b) based upon a measure of interference associated with at least a portion of the upstream spectrum, selecting an upstream channel, the upstream channel being contained within the upstream spectrum; and
- (c) transmitting from the multiuser interactive processor to the user terminal device a second signal representative of the upstream channel."

- IV. The reasons for the decision under appeal referred to document

D1: WO 92/17010 A1

and, in so far as they are relevant to the amended claims under consideration, can be summarized as follows.

Under point 8 of the reasons the formulation "the initial upstream signal being associated with a frequency within an upstream spectrum" in claim 1 then on file was considered unclear (Article 84 EPC 1973) because it could have at least two different meanings:

- a) the initial upstream signal was sent at a particular frequency within an upstream spectrum or
- b) the initial upstream signal comprised information regarding a frequency within an upstream spectrum.

In the decision under appeal it was also noted that the meaning as presented in point b) did not appear to be supported by the description. When considering the issue of novelty, the examining division assumed that the above formulation had the meaning as specified in point a) above.

Concerning novelty, it was held that D1 disclosed a method according to claim 1 and an apparatus for interactive communications according to claim 7 then on file. The examining division considered that the claims of the application then on file did not indicate that the upstream signal was sent when a subscriber at a remote location activated a user terminal. Furthermore the examining division considered that the mere sending of a message using particular band resources was implicitly a request to use particular bandwidth. Hence the examining division found that the subject-matter of independent claims 1 and 7 was not new (Article 54(1) and (2) EPC 1973).

Concerning inventive step, it was held that even if the mere sending of a message using particular band resources were not considered as being an implicit request to use particular bandwidth, it was considered to be obvious for a person skilled in the art. The means for transmitting in D1 were in any case suitable for transmitting upstream data messages which were explicitly indicative of a requested bandwidth. Hence the examining division found that the subject-matter of claim 7 did not involve an inventive step (Article 56 EPC 1973).

- V. By letter dated 27 January 2006 the applicant (appellant) filed a notice of appeal and requested that the decision be set aside and a patent granted. With a letter dated 10 April 2006 the appellant filed new claims 1 to 12 in accordance with a main request and an auxiliary request, respectively. In this letter the lack of clarity objection raised in the decision under appeal was dealt with in a paragraph headed "Grounds of Appeal" by stating: "With respect to item 8 of the Decision, the Examiner's understanding of the feature "the initial upstream signal being associated with a frequency within an upstream spectrum" as illustrated in item a) and referenced in the specification at page 5, lines 25-29, is correct." The appellant also indicated features of the subject-matter of the independent claims which it considered not to be disclosed in D1 and stated that the application met the requirements of Articles 84 and 52(1) EPC 1973 for the reasons given in the letter.

VI. In a communication accompanying the summons to oral proceedings the board noted that the application had been refused for three different reasons. The board expressed doubts, relating only to the reason of lack of clarity (Article 84 EPC 1973) given in the decision under appeal, whether the statement of grounds of appeal indicated sufficiently the reasons for setting aside the impugned decision and so could be considered a statement setting out the grounds of appeal within the meaning of Article 108 EPC, third sentence, EPC 1973 even if the amended claims according to the new requests were considered together with the letter dated 10 April 2006. Consequently the board had doubts as to whether the appeal was admissible.

The board also noted that the reasons for lack of clarity given in the decision under appeal applied to claim 1 of both the main and the auxiliary request filed with the letter dated 10 April 2006. Furthermore the board expressed doubts whether the subject-matter of the independent claims of the main request was new with respect to the subject-matter disclosed in D1 and raised the issue of inventive step both in respect of the main and the auxiliary request.

VII. In a letter dated 9 January 2009 the appellant *inter alia* referred to decision T 213/85 where it was held that it was not a matter of whether arguments put forward in the grounds of appeal were actually effective, but rather that circumstances were demonstrated which support the view held and which by their nature may in principle be considered to upset the reasons for the contested decision. It was submitted that in the present statement setting out the

grounds of appeal the lack of clarity of claim 1 was addressed, and it was indicated that understanding a) of the questioned feature put forward in item 8 of the contested decision was correct. Thus the grounds of appeal expressed the appellant's disagreement with the examining division's construction of the claim which led to the clarity objection. The appellant was evidently of the opinion that understanding b) of the disputed feature (see point IV above) was incorrect and would not be considered by the skilled person when interpreting the claim language. Thus in the statement of grounds of appeal it was at least implicitly argued that the objected formulation of claim 1 did not cause a lack of clarity, thereby demonstrating the appellant's view on the reasons for refusing the application and presenting a reason why the contested decision should be set aside. Hence, in the appellant's view, the statement of grounds of appeal complied with the requirements of Article 108, third sentence, EPC 1973. With the letter dated 9 January 2009 the appellant also filed claims according to a main and two auxiliary requests and arguments as to why objections raised in the decision under appeal were deemed to be moot or incorrect.

VIII. Oral proceedings before the board were held on 10 February 2009. During the oral proceedings the appellant filed a new main request comprising claims 1 to 11, a new auxiliary request comprising claims 1 to 10 and amended page 3 of the description. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request, or in the alternative, on the basis of the auxiliary request, both filed during the

oral proceedings of 10 February 2009. At the end of the oral proceedings the chairman informed the appellant that the proceedings would be continued in writing.

IX. The text of the currently valid independent claims which are relevant for the present decision reads as follows.

Claim 1 according to the main request.

"A method of operating a multiuser interactive processor to allocate a set of upstream channels to a set of user terminal devices, the set of upstream channels being within an upstream spectrum, the multiuser interactive processor and the set of user terminal devices forming a communications system, the multiuser interactive processor being currently in communication via an allocated upstream channel with a first user terminal device from the set of user terminal devices, the method comprising:

(a) receiving, at a receiver from a set of initialization receivers (118) that are tuned to a plurality of initialization frequencies, from a second user terminal device in the set of user terminal devices an initial upstream signal representing a request for an upstream channel, the initial upstream signal being received at an initialization frequency that is randomly selected from the plurality of initialization frequencies by the second user terminal device;

(b) based upon a set of one or more measures of interference associated with one or more upstream channels in the upstream spectrum, selecting an



available upstream channel from within the upstream spectrum;

(c) transmitting to the second user terminal device a signal representative of the upstream channel over which the second user terminal should communicate with the multiuser interactive processor;

(d) tuning a receiver from a set of other receivers (120) to the allocated upstream channel; and

(e) accepting at the receiver from the set of initialization receivers (118) another initial upstream signal from another user terminal device."

Claim 6 according to the main request.

"A user terminal device for interactive communications comprising:

means (302) for transmitting, when the user terminal is activated, an initial upstream signal on one of a plurality of predetermined initialization frequencies that is randomly selected by the user terminal device, the initial upstream signal representing a request for an upstream channel and comprising information

indicative of a requested upstream channel bandwidth;

means (304) for receiving a second signal

representative of an available upstream channel

allocated to the user terminal device wherein the

allocated upstream channel is selected based upon a

measure of interference associated with at least a

portion of an upstream spectrum, the upstream channel

being contained within the upstream spectrum, wherein

if there is no response to the initial upstream signal

received within a predetermined amount of time, another

initial upstream signal is transmitted on another

initialization frequency;

means (306) for controlling a transmission frequency of the transmitting means (302) according to a frequency of the allocated upstream channel when transmitting upstream signals in the allocated upstream channel."

Claims 2 to 5 and 7 to 11 are dependent on claims 1 and 6, respectively.

- X. The appellant's arguments made orally, as far as they are relevant to this decision, can be summarised as follows.

*Admissibility of the appeal*

The important point with regard to the requirements of a sufficient reasoning of a statement of grounds of appeal was that the board could understand what the requests and the addressed points of law were so that it could arrive at a decision. However it was not necessary for an admissible appeal that the appellant's reasoning and arguments were successful and rendered the appealed decision incorrect.

First of all the appellant had dealt with the clarity objection raised by the examining division under Article 84 EPC 1973. Hence the present case differed from case law where a specific point of law had not been addressed at all. The question at issue was how much argumentation was necessary for a sufficient reasoning. From the case law it was not clear what level of argumentation was required. Any doubt as to this should be to the benefit of the appellant. Since the reasoning in the appealed decision regarding clarity was not very detailed, it could not be expected

from the appellant to deal with the same issue in more detail.

The very short reasoning in the appealed decision indicated that there were two possibilities to read claim 1, namely alternatives a) and b). At the same time, it was stated that alternative a) was disclosed in the description, whereas alternative b) was not. Thus this reasoning also indicated that the person skilled in the art would take only the alternative which found a basis in the description, which was alternative a). There might be a linguistic ambiguity, but, when it came to the technical teaching, alternative a) was the natural reading whereas alternative b) was an artificial one.

Although the statement of grounds of appeal was very short with regard to the clarity objection, it was clear that in the appellant's opinion claim 1 could only be read as indicated in alternative a) which was the only interpretation of claim 1 having a basis in the description. From this it was clear that alternative b), which had no basis in the description, was incorrect. This reasoning led to the appellant's opinion stated in the grounds of appeal that the requirements of Article 84 EPC 1973 were met. This was sufficient for the board to understand the appellant's position, since under point 2.1 of its communication the board expressed the view that claim 1 filed with the statement of grounds of appeal did not necessarily have to be interpreted as being restricted to what is disclosed in the description and, therefore, was not clear.

## **Reasons for the Decision**

### 1. *Introductory note*

The present decision is being taken after the entry into force of the revised European Patent Convention (EPC) on 13 December 2007. At that time, the present European patent application was already pending. The board has therefore applied the transitional provisions in accordance with Article 7(1), second sentence, of the Revision Act of 29 November 2000 and the decisions of the Administrative Council of 28 June 2001 (Special edition No. 1, OJ EPO 2007, 197) and 7 December 2006 (Special edition No. 1, OJ EPO 2007, 89). Articles and Rules of the revised and former texts of the EPC are cited in accordance with the practice described on page 4 of the 13th edition of the Convention.

### 2. *Admissibility of the appeal*

2.1 Articles 106 to 108 and Rule 64 EPC 1973 are to be applied in the present case with regard to the admissibility of the appeal, since all the time limits for complying with the conditions for filing an appeal had expired before the revised EPC entered into force (see also J 10/07, OJ EPO 2007, 567, Reasons, point 1.2).

2.2 As far as the admissibility of the present appeal is concerned, the only question at issue is whether the statement of grounds of appeal contains a sufficient reasoning as to why the decision under appeal should be set aside with regard to the legal reason for refusal

lack of clarity to thereby fulfil the requirements of Article 108, third sentence, EPC 1973.

2.3 It is established case law (see Case Law of the Boards of Appeal of the European Patent Office, 5th edition 2006, VII.D.7.5.1) that the grounds of appeal must specify the legal or factual reasons why the impugned decision should be set aside. The arguments must be clearly and concisely presented to enable the board and the other party or parties to understand immediately why the decision is alleged to be incorrect, and on what facts the appellant bases its arguments, without first having to make investigations of their own. According to decision J 22/86 (OJ EPO 1987, 280), the question of whether a particular written statement alleged to be a statement of grounds of appeal in a particular case meets the minimum requirement of Article 108 EPC 1973 can only be decided in the context of that particular case, and the context of a particular case will normally include the contents of the decision under appeal. However the appellant's arguments do not have to be convincing for the appeal to be admissible.

2.4 In the present case, the reasoning contained in the appellant's statement of grounds of appeal can fairly be described as minimal as far as the legal reason for refusal lack of clarity of claim 1 is concerned. However it is clear that the appellant took the position that the correct interpretation of the formulation "the initial upstream signal being associated with a frequency within an upstream spectrum" in claim 1 was the one according to alternative a) having a basis in the description and

that Article 84 EPC 1973 was fulfilled. This alone would not be sufficient for the requirements of Article 108, third sentence, EPC 1973 to be fulfilled. However, looking at the contents of the appealed decision, it becomes apparent from the also very short reasoning that the examining division identified two possibilities for interpretation of said formulation, namely alternatives a) and b), and did not explain why they considered that the formulation could have "at least two different meanings". It was also stated that alternative a) was disclosed in the description, whereas alternative b) was not. Moreover for the purpose of examining novelty the examining division considered that said formulation had the meaning of alternative a). In view of this the appellant's confirmation of alternative a) as the correct interpretation and its statement that the requirements of Article 84 EPC 1973 were met had to be understood as meaning that the appellant considered only one interpretation of said formulation to be correct in the context of the particular case and that the clarity objection of the examining division was thus unfounded. The fact that the board in its communication (point 2.1) did not share the appellant's position that only one of the (mutually exclusive) alternatives was a proper interpretation of said formulation is a matter of the allowability of the appeal and is not decisive for its admissibility.

- 2.5 In view of the above, the board comes to the conclusion that the arguments set out in the grounds of appeal enabled the board to understand why the impugned decision should be set aside, and on what facts the appellant based its arguments. Therefore the board has

decided that the statement of grounds of appeal which was filed in the present case satisfies the final sentence of Article 108 EPC 1973. The appeal is consequently admissible.

3. *Admissibility of the amendments made in oral proceedings (Article 13(1) RPBA)*

During the oral proceedings of 10 February 2009 the appellant filed amended application documents in reaction to the board's objections against the sets of claims filed with the letter dated 9 January 2009. In particular the main request dated 9 January 2009 was effectively withdrawn. The first auxiliary request dated 9 January 2009 with minor amendments relating to objections by the board was made the main request, and the second auxiliary request dated 9 January 2009 with an amendment relating to a formal objection by the board was made the auxiliary request. The amended description page 3 was filed in an attempt to provide the board with documents which allowed the grant of a patent. Hence the board, exercising its discretion under Article 13(1) RPBA, admitted the application documents filed during the oral proceedings into the appeal proceedings.

4. *Amendments (Article 123(2) EPC)*

Claim 1 of the main request is based on claim 7 as originally filed with clarifying amendments derived from page 5, lines 5 to 21, page 6, lines 4 to 9, and page 8, lines 7 to 15, in conjunction with figures 1 and 2 as originally filed. Claim 6 of the main request is based on claims 7 and 13 as originally filed, with

clarifying amendments derived from page 5, line 25 to page 6, line 1, page 8, lines 1 to 6 and lines 10 to 15, and page 9, lines 20 to 27, as originally filed. The dependent claims correspond to dependent claims as originally filed, and the description has been modified to bring it in conformity with the claims. Thus the board is satisfied that the amendments made to the European patent application meet the requirements of Article 123(2) EPC.

5. *Clarity (Article 84 EPC 1973)*

5.1 The formulation which led to the lack of clarity objection in the decision under appeal (see point IV above) is not present in the claims of the main request.

5.2 Claim 1 of the main request specifies that the method of operating a multiuser interactive processor comprises receiving, at a receiver from a set of initialization receivers, from a user terminal device an initial upstream signal representing a request for an upstream channel. The initial upstream signal is at an initialization frequency randomly selected by the second user terminal device from the plurality of initialization frequencies to which the initialization receivers are tuned. The multiuser interactive processor is then operated to select an available upstream channel from within the upstream spectrum, to transmit to the user terminal device a signal representative of the upstream channel over which the second user terminal should communicate with the multiuser interactive processor and to tune a receiver from a set of other receivers to the allocated upstream channel. Thus the method of claim 1 of the main request



considers two distinct phases: first an initialization phase in which a user terminal requests an upstream channel and is informed by the multiuser interactive processor over which upstream channel it should communicate with the multiuser interactive processor and later a proper communication phase. The initialization phase comprises receiving an initial upstream signal at an initialization receiver and the later communication phase involves a different receiver which is tuned to the allocated upstream channel. Thus, in the board's judgment, claim 1 of the main request is clear (Article 84 EPC 1973).

- 5.3 Claim 6 of the main request specifies a user terminal device for interactive communications. The user terminal device comprises means for transmitting, when the user terminal is activated, an initial upstream signal on one of a plurality of predetermined initialization frequencies that is randomly selected by the user terminal device. In operation the upstream signal represents a request for an upstream channel and comprises information indicative of the requested upstream channel bandwidth. The user terminal device also comprises means for receiving a second signal representative of an available upstream channel allocated to the user terminal device and means for controlling a transmission frequency of the transmitting means according to a frequency of the allocated upstream channel. The user terminal device is operable so that if there is no response to the initial upstream signal received within a predetermined amount of time, another initial upstream signal is transmitted on another initialization frequency. Thus, in the

board's judgment, claim 6 of the main request is clear (Article 84 EPC 1973).

5.4 The board does not see any other problems relating to Article 84 EPC 1973 in the documents according to the main request.

6. *Novelty (Article 54(1) EPC 1973)*

6.1 Document D1

D1 is the only prior art document considered in the decision under appeal. D1 discloses a communications system, namely an interactive cable television system (see figure 1). The system comprises a multiuser interactive processor (the system manager 310 of the interactive cable television system and an associated processor 322) and a set of user terminal devices (set-top terminals 315, see figure 3). The system manager is operated to allocate a set of, for instance, four upstream channels to the set-top terminals, the set of upstream channels being within an upstream spectrum (page 10, lines 4 to 17). In particular, the system is operated so that upstream communication channels which contain significant interference are avoided (page 25, lines 23 to 26). The allocation process is initiated by the system manager by sending out data requests for groups of the total population of set-top terminals ("polling", page 32, lines 18 to 28). The data request indicates which four frequencies to use (page 10, lines 19 and 20, and page 30, lines 11 to 18). The system manager 310 and the processor 232 jointly analyze the data returned by the set-top terminals with respect to data quality thereby evaluating the

performance of the return channels. The best four upstream channel frequencies are selected in an iterative process ("Frequency Selection", page 26, line 6, to page 31, line 4) and can be changed as often as necessary to deal with time varying interference (page 25, lines 27 and 28). The processor 232 associated with the system manager has four receiver modules (A to D, see figure 8) for accepting the signals returned by the set-top terminals (page 57, line 27, to page 58, line 6).

6.2 Concerning claim 1 according to the main request

D1 does not disclose a set of initialization receivers distinguished from a set of other receivers (see features (a) and (d) of claim 1 of the main request). D1 discloses neither receiving, at a receiver from the set of initialization receivers, an initial upstream signal representing a request for an upstream channel, nor tuning a receiver from the set of other receivers to an allocated upstream channel.

Thus, in the board's judgment, the method of claim 1 according to the main request is new (Article 54(1) EPC 1973).

6.3 Concerning claim 6 according to the main request

D1 does not disclose a user terminal device comprising means for transmitting, when the user terminal device is activated, an initial upstream signal on one of a plurality of predetermined initialization frequencies that is randomly selected by the user terminal device. Neither does D1 disclose that the upstream signal

represents a request for an upstream channel and comprises information indicative of a requested upstream channel bandwidth. Nor does D1 disclose that a user terminal device is operable so that if there is no response to the initial upstream signal received within a predetermined amount of time, another initial upstream signal is transmitted on another initialization frequency.

Thus, in the board's judgment, the user terminal device of claim 6 according to the main request is new (Article 54(1) EPC 1973).

6.4 The argument given in the decision under appeal that the mere sending of a message using particular band resources was implicitly a request to use particular bandwidth did not convince the board. Upon being polled by the system manager the set-top terminals send data return messages. The data return messages do not request anything. Sending the data return messages implicitly requires some upstream channel bandwidth, but this does not mean that the upstream signal comprises information indicative of a requested upstream channel bandwidth which, in operation, will be required for a later communication phase.

7. *Inventive step (Article 56 EPC 1973)*

7.1 Concerning claim 1 according to the main request

As set out in the context of novelty in paragraph 6.2 above, the method of claim 1 differs from that of D1 *inter alia* in that it uses a set of initialization receivers distinguished from a set of other receivers

and in that it comprises receiving, at a receiver from the set of initialization receivers, an initial upstream signal representing a request for an upstream channel, and also comprises tuning a receiver from the set of other receivers to an allocated upstream channel.

These distinguishing features reflect an essential difference between the method of claim 1 and the method disclosed in D1. Whereas the present application concerns an initialization of a user terminal device which may be part of an interactive cable television system, D1 concerns the polling of user terminal devices by the system manager of an interactive cable television system. According to the teaching of D1, the user terminal devices do not send any requests for an upstream channel. Instead they send the data requested by the system manager. This difference is also reflected in the processor which is designed to receive the upstream data. The processor has a small number of (four) receiver modules tuned to four frequencies because the method of D1 is designed so that polling the user terminal devices gives an acceptably high throughput rate by having a calculated tolerance for collisions (see page 32, lines 12 to 28) when the user terminal devices send the data requested by the system manager. Providing other receiver modules over which user terminal devices should communicate with the processor would not have been considered in the context of D1 because the four receiver modules were already designed so that they allowed the types of communication considered in D1.

- 7.1.1 D1 only marginally considers the situation that a user terminal device attempts to transfer stored data to a

central location without being polled. Examples are burglar alarms, energy management, and home shopping (see the paragraph bridging pages 41 and 42). But D1 does not describe how these examples may be implemented.

Furthermore D1 considers the situation on power-up of a user terminal device (see page 49, line 17, to page 51, line 15). In this situation a "Power-Up Initiated Calibration Auto-Reply Transmission" (PICART) may be performed. It is also considered that a "Manually Initiated Calibration Auto-Reply Transmission" (MICART) may be performed (see page 50, lines 2 to 7). But neither the PICART nor the MICART is a request for an upstream channel. Instead they are used because it is necessary that the data carrier output levels for the upstream channel be set to near optimum (see page 42, lines 6 to 16).

D1 also considers that a subscriber may decide to purchase an event at any time (see the paragraph bridging pages 52 and 53). But, according to the teaching of D1, neither in this situation is there a need for a request for an upstream channel because the upstream channels have already been allocated to the user terminal devices.

- 7.1.2 Thus also in the situations in which a user terminal device transfers stored data upstream without being polled D1 does not teach that the user terminal device requests an upstream channel. The reason is that the system manager has already allocated a set of upstream channels to the user terminal devices and tuned its associated receiver modules accordingly. Thus the measures of transmitting an initial request for an

upstream channel from a user terminal device to the system manager and providing the processor associated with the system manager with other receiver modules over which the user terminal devices should communicate with the system manager and its associated processor would have been contrary to the teaching of D1. Hence a person skilled in the art would not have considered these measures as obvious modifications of the prior art disclosed in D1. Nor does the board see any other teaching in the available prior art which would render these modifications obvious.

7.1.3 Thus, in the board's judgment, the method of claim 1 according to the main request involves an inventive step (Article 56 EPC 1973).

7.2 Concerning claim 6 according to the main request

7.2.1 The user terminal device according to claim 6 comprises a number of features which enable the user terminal device to be used in the method according to claim 1 of the main request. In particular, it comprises means for transmitting, when the user terminal is activated, an initial upstream signal on one of a plurality of predetermined initialization frequencies that is randomly selected by the user terminal device, the initial upstream signal representing a request for an upstream channel. Moreover claim 6 specifies that the initial upstream signal comprises information indicative of a requested upstream channel bandwidth. For the reasons given in point 7.1 above, a person skilled in the art, in the context of D1, would not have considered providing user terminal means with means for transmitting such an initial upstream signal

when the user terminal is activated. In particular the measure of providing the user terminal devices of D1 with initial upstream signal transmitting means having the functionality of transmitting a signal which comprises information indicative of a requested upstream channel bandwidth would have been contrary to the teaching of D1. Likewise the user terminal device's functionality specified in claim 6 that "if there is no response to the initial upstream signal received within a predetermined amount of time, another initial upstream signal is transmitted on another initialization frequency" would not have been considered in the context of D1. For these reasons the board sees no obvious reason which, in view of the available prior art, would have led a person skilled in the art to the subject-matter as claimed.

7.2.2 Thus, in the board's judgment, the user terminal device of claim 6 according to the main request involves an inventive step (Article 56 EPC 1973).

8. For the subject-matter of the remaining claims the requirements of novelty and inventive step are fulfilled because the remaining claims depend on claims 1 or 6. Furthermore the board does not see any other objections against the grant of a patent on the basis of the main request. Under these circumstances no decision concerning the auxiliary request admitted in the appeal proceedings is needed.



## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
  
2. The case is remitted to the first instance with the order to grant a patent in the following version:  
Description:  
Pages 1, 2 and 4 to 10 as originally filed,  
Page 3 received during the oral proceedings of 10 February 2009;  
Claims:  
No. 1 to 11 according to the new main request received during the oral proceedings of 10 February 2009;  
Drawings:  
Sheets 1/3 to 3/3 as originally filed.

The Registrar:

The Chairman:

L. Fernández Gómez

F. Edlinger