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Datasheet for the decision of 28 June 2013

Case Number: T 1469/10 - 3.5.05

Application Number: 06007523.1

Publication Number: 1679817

IPC: H04L1/18, H04L12/56, H04L1/00

Language of the proceedings: EN

Title of invention:
Hybrid ARQ system with data and control channel for packet data transmission

Patent Proprietor:
Panasonic Corporation

Opponent:
Nokia Corporation

Headword:
Hybrid ARQ system/PANASONIC

Relevant legal provisions:
EPC Art. 56, 76(1), 123(2)
RPBA Art. 12(4), 13(1)

Keyword:
Added subject-matter - main request (no)
Clarity, conciseness, support by description - main request (yes)
Inventive step - main request (no)
Admission of late-filed document - (yes)
Admission of auxiliary requests - (no)

Decisions cited:
T 1002/92, T 0656/07

Catchword:
Publication dates indicated on documents published by the ETSI 3GPP organisation, which is regarded as a reputable standardisation body having clear and reliable rules for their publications, are of a high probative value and thus may serve as prima-facie evidence that a document was published on the date indicated (see point 2.3).

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Case Number: T 1469/10 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 28 June 2013

Appellant: (Opponent)	Nokia Corporation KEILALAHDENTIE 4 02150 NOKIA GROUP (FI)
Representative:	Ruuskanen, Juha-Pekka Page White & Farrer Bedford House John Street London WC1N 2BF (GB)
Respondent: (Patent Proprietor)	Panasonic Corporation 1006, Oaza Kadoma Kadoma-shi Osaka 571-8501 (JP)
Representative:	Grünecker, Kinkeldey, Stockmair & Schwanhäusser Leopoldstrasse 4 80802 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 5 May 2010 concerning maintenance of European Patent No. 1679817 in amended form.**

Composition of the Board:

Chair: A. Ritzka
Members: K. Bengi-Akyuerek
D. Prietzel-Funk

Summary of Facts and Submissions

I. The appeal of the opponent is against the interlocutory decision of the opposition division, posted on 5 May 2010, to maintain European patent No. 1679817 (based upon a divisional application of the parent application No. 00110551.9) as amended according to an auxiliary request, in view of the invoked opposition grounds of lack of novelty and inventive step (Article 100(a) in conjunction with Articles 54 and 56 EPC), insufficient disclosure (Article 100(b) in conjunction with Article 83 EPC) and added subject-matter (Article 100(c) in conjunction with Articles 123(2) and 76(1) EPC).

II. The following documents were *inter alia* cited in the opposition proceedings:

D1: "Feasibility study of Advanced techniques for High Speed Downlink Packet Access", TSG-RAN Working Group 1 meeting #12, TSGR1#12 R1-556, Motorola, April 2000;

D3: "Signaling methods for Hybrid ARQ Type II", 3GPP TSG RAN WG2 #12, R2-000833, Siemens, April 2000;

D10: 3G TS 25.301 V3.4.0, Technical Specification, March 2000.

III. Notice of appeal was received on 5 July 2010. The appeal fee was paid on the same day. With the statement setting out the grounds of appeal, received on 3 September 2010, the appellant (opponent) submitted the following new document:

D14: "Support of Hybrid ARQ Type II/III in the Physical Layer", TSG-RAN Working Group 1

meeting #4, TSGR1#4(99)355, Siemens, April 1999.

The appellant requested that the decision under appeal be set aside and that the patent be revoked in its entirety on the grounds of added subject-matter (Article 123(2) EPC), extension of scope of protection (Article 123(3) EPC), lack of clarity and support by the description (Article 84 EPC), and lack of novelty (Articles 52(1) and 54 EPC) in view of D14 and/or D3 with respect to the auxiliary request as maintained. In addition, oral proceedings were requested as an auxiliary measure.

IV. With a response letter dated 18 January 2011, the respondent (patent proprietor) filed claims according to a main request (corresponding to the claims as maintained) and auxiliary requests I to III together with amended description pages. It requested that the appeal be dismissed and that the patent be maintained on the basis of the main request or any of the auxiliary requests. Furthermore, it submitted that the late-filed document D14 should not be admitted into the appeal proceedings and that D1, D3, and D14 might not be considered as prior art under Article 54(2) EPC.

V. A summons to oral proceedings scheduled for 20 June 2013 was issued on 27 February 2013 and - upon receipt of requests for postponement by the appellant - the oral proceedings were re-scheduled to 28 June 2013. In an annex to this summons, the board expressed its preliminary opinion on the appeal pursuant to Article 15(1) RPBA. In particular, observations were made on the grounds of Articles 123(2), 123(3), and 84 EPC, the question whether D1, D3, and D14 could be considered as state of the art under Article 54(2) EPC, the admissibility of late-filed document D14, and the

questions of novelty and inventive step (Articles 54 and 56 EPC) having regard to D1, D3, and D14.

VI. By letter dated 28 May 2013, the appellant advanced arguments as to the grounds of Articles 76(1) and 84 EPC, the admissibility of D14, and the admissibility of auxiliary requests I to III.

VII. With a letter dated 28 May 2013, the respondent submitted claims according to auxiliary requests I to V together with amended description pages and the new document

D16: "HSDPA - Physical Layer Status Report", TSG-RAN WG1, TSG RAN#13, Tdoc RP-010678, September 2001,

as support for the interpretation of document D14. It requested that the patent be maintained on the basis of the main request or any of the auxiliary requests I to V and provided its observations on the board's communication under Article 15(1) RPBA.

VIII. Oral proceedings were held on 28 June 2013, during which the respondent submitted new sets of claims as auxiliary requests I and II replacing the former ones and withdrew auxiliary requests III to V. The patentability of the main request, the admissibility of D14, and the admissibility of auxiliary requests I and II were discussed.

The appellant's final request was that the decision under appeal be set aside and that the European patent be revoked in its entirety.

The respondent's final request was that the appeal be dismissed (i.e. that the patent be maintained according

to the claims of the main request), or that the patent be maintained according to the claims of one of auxiliary requests I or II submitted in the oral proceedings before the board.

At the end of the oral proceedings, the decision of the board was announced.

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

"A hybrid ARQ transmission method comprising the steps of:
transmitting (250) data on a data channel in form of a protocol data unit,
setting a sequence number for the protocol data unit, and
transmitting (240) the sequence number on a control channel,
wherein the sequence number is transmitted on the control channel multiplexed with a resource allocation message of the data channel,
wherein the data channel and the control channel are separate physical channels, and
wherein the resource allocation message includes information indicating a transport format of the data channel."

Claim 1 of auxiliary request I reads as follows:

"A hybrid ARQ transmission method comprising the steps of:
transmitting (250) data on a data channel in form of a protocol data unit, wherein the data channel is a channel shared by several users,
setting a sequence number for the protocol data unit, and

transmitting (240) the sequence number on a control channel,
wherein the sequence number is transmitted on the control channel multiplexed with a resource allocation message of the data channel,
wherein the data channel and the control channel are separate physical channels, and
wherein the resource allocation message includes information indicating a transport format of the data channel including information including the data rate of the data channel."

Claim 1 of auxiliary request II comprises all the features of claim 1 of the main request and further adds
"wherein the resource allocation message includes a transport format indicator of the data channel, and wherein the Quality of Service of the control channel is independent from that of the data channel by controlling at least one of a transmission power, a coding rate and a spreading factor of the data channel."

Reasons for the Decision

1. Admissibility of the appeal

The appeal complies with the provisions of Articles 106 to 108 EPC (cf. point III above) and is therefore admissible.

2. MAIN REQUEST

This request corresponds to auxiliary request I underlying the appealed decision (i.e. claims 1 to 19

as maintained) and differs from the claim set as granted essentially in that independent claims 1, 6, 11, and 16 as amended further specify that

a) the sequence number is transmitted on the control channel multiplexed with a resource allocation message of the data channel (emphasis added);

b) the data channel and the control channel are separate physical channels;

c) the resource allocation message includes information indicating a transport format of the data channel.

2.1 Articles 123(2) and 76(1) EPC

In the board's judgment, this request complies with the provisions of Articles 123(2) and 76(1) EPC, for the following reasons:

2.1.1 The appellant argued that feature a), specifying that the sequence number is transmitted on the control channel multiplexed with a resource allocation message of the data channel, was neither disclosed in the divisional application as filed nor in the corresponding parent application (cf. point I above) as filed, contrary to the requirements of Articles 123(2) and 76(1) EPC, since those applications disclosed multiplexing of an SNDU (Sequence Number Data Unit), i.e. of *multiple* sequence numbers, with an allocation message rather than a *single* sequence number according to page 4, third paragraph and page 8, second paragraph of both the divisional and the parent application as filed.

As regards the objection under Article 123(2) EPC, the board however considers that the combination of claim 1 ("... setting an indicator for the protocol data

unit ...") and claim 2 ("... the indicator is a sequence number") of the divisional application as filed provides sufficient support for feature a). As to the objection under Article 76(1) EPC, the board concurs with the respondent that at least the disclosure of page 8, second paragraph, ninth sentence of the parent application, which teaches that the number of sequence numbers being transmitted on the control channel may vary from 1 to more than 100, constitutes a clear basis with regard to feature a).

2.1.2 Moreover, the appellant held that feature c), specifying that the resource allocation message includes information indicating a transport format of the data channel, amounted to an inadmissible generalisation of both the divisional and the parent application as filed, according to which the resource allocation message specifically included a Transport Format Control Indicator (TFCI) rather than merely information on a transport format.

In this regard, the board is satisfied that claim 3 of the divisional application as filed ("... the allocation message includes information indicating a transport format of the data channel ...") and page 6, lines 3-5 ("... TFCI ... to indicate the transport format ...") of the parent application as filed, implying that the TFCI included in a resource allocation message represents nothing more than information indicating the transport format, provide a sufficient basis for feature c).

2.1.3 In conclusion, the amendments made are admissible under Articles 123(2) and 76(1) EPC.

2.2 Article 84 EPC

The board considers that this request meets the requirements of Article 84 EPC, the reasons being as follows:

2.2.1 It is first noted that the board agrees with the appellant that this request contains amendments arising from both the description and the granted claims (e.g. feature c) taken from claim 3 as granted) and that it is therefore open to objections under Article 84 EPC in accordance with the cited case law (see e.g. T 656/07, point 2.2), even if the contested feature c) as such was already present in the granted claim set, albeit, in another combination.

2.2.2 The appellant argued that the claim set of this request was unclear, not supported by the description, and/or not concise, since feature c) and the feature of dependent claims 2, 7, 12, and 17 (i.e. the resource allocation message including a transport format indicator of the data channel) provided two different, mutually exclusive alternatives with regard to the resource allocation message, namely that the resource allocation message included either "information indicating a transport format" or a "transport format indicator" according to e.g. claims 3 and 4 as granted.

The board however accepts the argument of the respondent that the term "transport format indicator" is to be construed as more specific and limiting, although slightly so, than the expression "information indicating a transport format". Accordingly, the board concludes that those terms are neither mutually exclusive alternatives nor redundant features, contrary

to the assertion of the appellant.

2.2.3 Therefore, the board is satisfied that the present claims are clear, supported by the description, and concise as required by Article 84 EPC.

2.3 *Consideration of D1, D3, and D14 as state of the art under Article 54(2) EPC*

2.3.1 The respondent contended in its letter of 18 January 2011 that documents D1, D3, and D14 might not be considered as prior art under Article 54(2) EPC, as the evidence on file (such as the minutes of the respective 3GPP meetings, printouts of the 3GPP's FTP directories, and printouts of email distributions) was insufficient to justify the conclusion that the respective publication dates of those documents was ahead of the filing date of the patent. In particular, the "last modified date" field indicated in the FTP directories did not provide any evidential value as to the actual publication date of the documents, contrary to the finding in the decision under appeal in relation to D1 and D3 (cf. section 2).

2.3.2 As regards the publication dates of 3GPP meeting contributions in general, the board notes that the corresponding FAQ page of the official 3GPP web site (http://www.3gpp.org/FAQ#outil_sommaire_63) says:

"Meeting contributions ('TDocs') are uploaded to the public file server shortly before, or during, or shortly after the meeting at which they were discussed (or intended to be discussed). The timestamp of the file can be relied upon as a precise indication of the moment of upload. TDocs created very shortly before or during a meeting may not be uploaded until after the

meeting, but will have been made available locally to the participants during the meeting. The timestamp of the Word (or whatever) file within the containing Zip file is a good indication of the earliest moment that the document could have been available. However, some authors will circulate draft or final copies of their TDocs on the relevant group's email exploder some days or even weeks prior to this time. This would be revealed by an examination of the exploder's archive."

From this, the board understands that the respective dates ("timestamps") indicated on the 3GPP document lists reliably correspond to the dates on which a certain document was uploaded to the 3GPP file server and thus was available on the server to be accessed by the public. Further, in case of doubt, the email distributions may be checked to reveal the actual publication date. Therefore, the board holds that the publication dates indicated on documents D1, D3, and D14 published by the ETSI 3GPP organisation, which is regarded as a reputable standardisation body having clear and reliable rules for their publications (see the cited FAQ page information above), can be considered to have a high probative value and thus may serve as prima-facie evidence that those documents and their contents were published on the date indicated.

2.3.3 Accordingly, the board regards the above documents as having been published before the filing date of the patent in suit and thus as representing state of the art under Article 54(2) EPC. It is also noted that the above reasoning, which had been communicated as preliminary opinion of the board in its communication under Article 15(1) RPBA (cf. point V above), was not contested by any party at the oral proceedings before

the board.

2.4 *Admission of document D14 into the appeal proceedings*

The board decided to admit late-filed document D14 into the appeal proceedings, for the following reasons:

2.4.1 Document D14 was submitted for the first time with the statement setting out the grounds of appeal (see point III above), i.e. it was filed belatedly. The appellant argued that D14 could not be filed earlier since the former auxiliary request (corresponding to the pending main request comprising the claims as maintained) was filed only one month before the first-instance oral proceedings and contained amendments to the claims which had been taken from the description. Furthermore, the appellant submitted that D14 was more relevant than D3 for the assessment of novelty and inventive step, in particular due to the disclosures of page 1, section "Overview on Hybrid ARQ schemes", fifth paragraph and page 2, section "Hybrid ARQ Type II/III at the receiving side", second bullet point with regard to feature b) of claim 1 as amended, according to which the data channel and the control channel are required to be separate physical channels, and which was not present in claim 1 as granted. Also, D14 was referenced in D3 under item "[8]" of the section "References" and thus constituted merely an extension of the standardisation document D3.

2.4.2 The respondent argued that late-filed document D14 should not be admitted into the appeal proceedings, since its teaching did not go beyond that of D3, in which the use of different physical channels was already discussed, and since it could have been cited

at an earlier stage by the appellant.

2.4.3 In this context, the board had to determine whether D14 could have been presented in the first-instance proceedings under Article 12(4) RPBA and, in accordance with the case law cited by the respondent (see e.g. T 1002/92, point 3.4), whether it happens to be *prima facie* more relevant than the prior-art documents on file, in particular than document D3, such that it would be highly likely to prejudice the maintenance of the patent in suit.

Concerning the first criterion, the board notes that the claims, whose subject-matter was found by the opposition division to be novel and inventive in view of the prior-art documents on file, were submitted by the former patent proprietor one month before the first-instance oral proceedings and comprise added features a) to c), taken from the description, which were, according to the opposition division, apparently neither disclosed in combination nor rendered obvious by the most pertinent documents D1 and D3 on file (cf. minutes of the first-instance oral proceedings, items 14 to 16; appealed decision, section 9). Hence, the board finds that it was appropriate and necessary for the appellant, in order to prevent the maintenance of the patent in suit, to react to the new situation by searching for and submitting a new document addressing those added features. Moreover, since the claims as amended were discussed at the first-instance oral proceedings for the very first time, the board holds that, in the present case, the former opponent could not objectively have been expected to present a new document in the opposition proceedings in response to the submission of new claims by the former patent proprietor one month *before* and their discussion *during*

the first-instance oral proceedings.

As to the relevance of document D14, the board notes that document D3 references D14 (see D3, section 5, item [8]) and that both standardisation documents refer to the Hybrid ARQ Type II/III schemes (see e.g. D3, section 1 and D14, section "Introduction"). More specifically, it is immediately apparent that D3 and D14 rely on identical definitions and consist of complementary teachings. Hence, the relevant content of D14 can be established without undue burden. Moreover, it can readily be derived from D14, firstly, that the "redundancy version" is associated with different coding rates for the respective transmissions (see, in particular, page 2, section "Redundancy Selection") and can therefore apparently be read onto the term "transport format" as claimed, and secondly, that the sequence number ("PDU number") and the redundancy version are supposed to be transmitted on different physical channels (see page 1, section "Overview on Hybrid ARQ schemes", fifth paragraph in conjunction with page 2, section "Hybrid ARQ Type II/III at the receiving side", second bullet point).

Thus, compared to documents D1 and D3, which had been considered as the most pertinent ones during the opposition proceedings, and which, according to the opposition division, failed to disclose features a) and c) in the case of D1 (cf. minutes of the first-instance oral proceedings, item 14.3; appealed decision, page 7, last paragraph) or features a) and b) in the case of D3 (cf. minutes of the first-instance oral proceedings, item 15.3; appealed decision, page 9, second paragraph), the board found that late-filed document D14 appeared *prima facie* to disclose at least features b) and c) of claim 1 and thus was likely to prejudice

the novelty and/or inventive step of the claimed subject-matter. Consequently, D14 was considered more relevant than D1 or D3.

2.4.4 In view of the above, the board exercised its discretionary power to admit document D14 into the appeal proceedings.

2.5 Article 52(1) EPC: Novelty and inventive step

In the board's judgment, claim 1 of this request does not meet the requirements of Article 52(1) EPC, for the following reasons:

2.5.1 It was common ground during the oral proceedings before the board that D14, like the present invention, relates to a Hybrid ARQ (HARQ) method using the incremental redundancy technique and discloses, with regard to the terminology of claim 1, transmission of data ("PDU data") on a data channel and transmission of a sequence number ("PDU number") on a control channel, while those channels may optionally be separate physical channels according to D14 (see page 1, section "Overview on Hybrid ARQ schemes", fifth paragraph).

2.5.2 The respondent however contended that the redundancy version used in D14 could not be equated with a "resource allocation message including information indicating a transport format of the data channel" as claimed, since that redundancy version information related only to the coding rates of the transmitted PDU *data* according to the teaching of page 2, section "Redundancy Selection" in D14 and not to the transport format of the data *channel*. Therefore, the redundancy version of D14 represented a typical HARQ parameter as referred to in D3 (page 2, fourth dash) and in the

post-published document D16 (pages 4 and 5) rather than a transport format indicator. In particular, the transport format according to the present invention corresponded to the data rate of the underlying data channel, i.e. the current capacity of that channel. Furthermore, the PDU number and the redundancy version were not transmitted on the control channel in a multiplexed fashion in D14. Accordingly, D14 failed to disclose features a) and c).

2.5.3 Concerning feature c), it was not disputed by the parties that, in D14, the redundancy version of a PDU is indicative of the respective coding rates to be used for data transmissions and receptions in the incremental redundancy scheme under consideration (see e.g. page 2, section "Redundancy Selection"). Moreover, the board agrees with the appellant that, since the coding rate inherently indicates the amount of redundant data per PDU transported from the sending to the receiving side for being subsequently decoded at the receiving side in D14, this rate can readily be read onto the term "transport format" (as also supported e.g. by the standardisation document D10, page 14, second paragraph: "... Transport Format is defined as a combination of encodings ...").

In this context, it was extensively discussed during the oral proceedings before the board whether or not this transport format could be considered as a "transport format of the data channel" as claimed. The board accepts, in principle, the following line of argument of the appellant. According to D14, the redundancy versions, transmitted over the control channel and associated with different coding rates, convey the transport format of the respective PDU data, which in turn is transferred over the data channel to

the receiving side. Due to the fact that the transport format of the PDU data sent, i.e. the amount of transmitted redundant data per PDU, at least at the time of its transmission over the data channel, corresponds to the transport format of the data channel carrying that PDU data, those coding rates are related not only to the transmitted content, as asserted by the respondent, but also to the "transport format of the data channel" in the light of the breadth of that expression.

2.5.4 The argument of the respondent that the "transport format of the data channel" may only be understood as the actual data rate of the data channel according to the present invention and not that of the PDU data is not convincing, since this is neither reflected in present claim 1 nor unambiguously supported by the description as filed. To the contrary, the description rather indicates, with reference to the flow chart of Fig. 5, that the transport format indicator sent during the actual HARQ operation via the control channel informs the receiving side "about the data to be decoded ... and its transport format" (cf. page 11, fourth paragraph, seventh sentence; Fig. 5, step 240 of the application as filed), while only the transport format indicator sent during the initialisation phase provides "possible data rates" with regard to the data channel to the receiving side (cf. page 11, third paragraph and Fig. 5, step 100 of the application as filed).

Furthermore, in the absence of any further and more detailed specification of the term "resource allocation message", the redundancy version indicating the coding rate information falls within the broad scope of this term, irrespective of whether that redundancy version

is considered as an HARQ parameter or something else. In this regard, the board notes that, for example, a proper allocation of CPU and/or memory *resources* at the receiving side may be performed based on the obtained redundancy version data, which alone justifies the interpretation of the redundancy version as a "resource allocation message", contrary to the assertion of the respondent. Thus, feature c) is held to be disclosed in D14.

2.5.5 As to feature a), however, the board does not agree with the appellant that the mere teaching of D14 to the effect that the PDU number and the redundancy version are supposed to be transmitted and received separately from the data (see e.g. page 2, section "Hybrid ARQ Type II/III at the receiving side", second bullet point; page 3, third and sixth paragraphs) directly and unambiguously evidences that they are indeed transmitted together, i.e. in a multiplexed way, on the same control channel. Thus, the board considers that D14 fails to disclose feature a).

2.5.6 Hence, the only difference between the subject-matter of claim 1 and the disclosure of D14 is considered to be that the sequence number is transmitted on the control channel multiplexed with a resource allocation message of the data channel.

Consequently, the subject-matter of claim 1 of this request is found to be novel over D14 (Article 54 EPC).

2.5.7 According to the application as filed, the above distinguishing feature, i.e. feature a), is supposed to yield the technical effect of saving channel resources (cf. page 4, third paragraph) and to minimise the signalling overhead needed for the shared-channel

packet transmission and the incremental redundancy scheme, while keeping the resulting delays at a minimum (cf. page 7, second paragraph and page 8, first paragraph). The appellant formulated the objective problem to be solved by claim 1 as how to send signalling information in an efficient way.

2.5.8 Starting from the disclosure of D14, which teaches that the PDU number (i.e. the sequence number) and the redundancy version (corresponding to the transport format of the data channel for the reasons given above) are both transmitted separately from the actual PDU data (see page 1, section "Overview on Hybrid ARQ schemes", fifth paragraph in conjunction with page 2, section "Hybrid ARQ Type II/III at the receiving side", second bullet point), the board considers that the skilled person would, in principle, envisage only two possible options with regard to transmitting those signalling items. They are to be transmitted either (i) separately over two distinct control channels or (ii) jointly over a single control channel. The fact that the skilled person would know from his common general knowledge in the field of data communications that, due to the added complexity and synchronisation problems incurred by option (i), only option (ii) would be suitable for achieving the technical effect and solving the objective problem according to section 2.5.7, constitutes sufficient reason for the board that the distinguishing feature may not contribute to an inventive step over D14.

2.5.9 Accordingly, the subject-matter of claim 1 of this request does not involve an inventive step having regard to D14 and the skilled person's common general knowledge (Article 56 EPC).

2.6 In conclusion, this request is not allowable under Article 56 EPC.

3. AUXILIARY REQUEST I

This request differs from the main request in that independent claims 1, 6, 11, and 16 as amended further specify that

d) the data channel is a channel shared by several users;

e) the transport format of the data channel includes the data rate of the data channel.

The respondent provided page 3, last paragraph of the application as filed as the basis for feature d) and page 6, penultimate paragraph as support for feature e).

3.1 *Admission into the appeal proceedings*

The board decided not to admit this request of the respondent into the appeal proceedings, for the following reasons:

3.1.1 This request was submitted for the first time during the oral proceedings before the board (cf. point VIII above), i.e. at a relatively late stage of the procedure. Accordingly, it had never been discussed or examined in the first-instance proceedings.

3.1.2 As to the substance of this request, it comprises amendments to the claims, taken from the description, which further limit the underlying subject-matter and which address the objections of the board as to inventive step. Therefore, it is conceded that this request may objectively be considered as a serious

attempt to overcome the outstanding objections raised by the board under Article 56 EPC.

However, the board shares the view of the appellant that the added feature e), *prima facie*, gives rise to further objections under Article 123(2) EPC. In particular, feature e) implies that the transport format only includes the data rate of the data channel, whereas the application as filed specifically teaches that the TFCI information, i.e. the transport format, includes information about "the spreading factor, the data rate and channelisation code" of the data channel (cf. page 6, penultimate paragraph). Thus, the original content of the application fails to provide any explicit statement or unambiguous implication that only the data rate is transmitted as transport format information to the receiving side. Moreover, for the same reasons as given in point 2.5.4 above, the disclosure of page 11, third paragraph of the application as filed, cited by the respondent, cannot provide a valid basis for feature e), since the corresponding transport format indicator signalling the possible data rates is only related to the communication initialisation phase rather than to the HARQ operation phase in question.

3.1.3 Therefore, the board finds that feature e) constitutes an intermediate generalisation of the original content. Hence, this request is not clearly allowable at least under Article 123(2) EPC.

3.2 In view of the above, this request was not admitted into the appeal proceedings by the board in the exercise of its discretionary power under Article 13(1) RPBA.

4. AUXILIARY REQUEST II

This request differs from the main request in that independent claims 1, 5, 9, and 13 as amended further specify that

f) the resource allocation message includes a transport format indicator of the data channel;

g) the Quality of Service of the control channel is independent from that of the data channel by controlling at least one of a transmission power, a coding rate and a spreading factor of the data channel.

The respondent provided claim 4 of the application as filed as the basis for feature f) and page 4, second paragraph as support for feature g).

4.1 *Admission into the appeal proceedings*

The board decided not to admit this request of the respondent into the appeal proceedings either, for the following reasons:

4.1.1 This request was submitted at a very late stage of the oral proceedings before the board and had never been discussed or examined before.

4.1.2 Concerning its substance, the amendments to the claims arise from the description (i.e. feature g) taken from page 4, second paragraph of the description as filed) and the granted claims (i.e. feature f) taken from e.g. claim 4 as granted) and further limit the underlying subject-matter. They also partly address the objections of the board raised at the oral proceedings as to inventive step.

4.1.3 However, except for the incorporation of feature f) of the respective dependent claims into the present independent claims 1, 5, 9, and 13, this request corresponds to auxiliary request VII, which was filed (cf. former patent proprietor's letter dated 22 January 2010) and subsequently withdrawn by the former patent proprietor without having been discussed and examined during the opposition proceedings (cf. minutes of the first-instance oral proceedings, item 18.1).

Moreover, the board takes the view that this request is *prima facie* not clearly allowable under Article 56 EPC. Feature f) merely adds that the resource allocation message not only includes "information indicating a transport format" but also a "transport format indicator" of the data channel, which does not affect the reasoning given in sections 2.5.3 and 2.5.4 in view of D14. As to feature g), the board notes that using separate physical channels in a data transmission system inherently implies that they may also be controlled separately and thus independently as required by that feature, thereby apparently rendering the underlying subject-matter obvious.

4.2 In view of the above, this request was not admitted into the appeal proceedings under Article 13(1) RPBA either.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chair:

K. Götz A. Ritzka

Decision electronically authenticated