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Datasheet for the decision of 3 July 2019

Case Number: T 2072/16 - 3.5.05

Application Number: 10003062.6

Publication Number: 2234316

IPC: H04L5/00

Language of the proceedings: EN

Title of invention:
Method and apparatus for power headroom reporting

Patent Proprietor:
Innovative Sonic Limited

Opponent:
Telefonaktiebolaget L M Ericsson (publ)

Headword:
Power-headroom reports/INNOVATIVE

Relevant legal provisions:
EPC Art. 54(3), 87(1)
RPBA Art. 12(4), 13(1)

Keyword:
Priority - "same invention" (no)
Novelty - main, auxiliary requests 1 to 4 and 12 to 14 (no)
Admission of auxiliary requests filed with grounds of appeal - (no)
Admission of auxiliary request filed during oral proceedings - (no)
Substantial procedural violation in opposition proceedings - (no)

Decisions cited:
G 0002/98, G 0002/10, T 1990/07, T 1033/10, T 1354/11, T 2219/12

Catchword:
See point 4.1.7 of the Reasons.

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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 2072/16 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 3 July 2019

Appellant: (Patent Proprietor)	Innovative Sonic Limited 2nd Floor, The Axis 26 Cybercity Ebene 72201 (MU)
Representative:	Grünecker Patent- und Rechtsanwälte PartG mbB Leopoldstraße 4 80802 München (DE)
Respondent: (Opponent)	Telefonaktiebolaget L M Ericsson (publ) 164 83 Stockholm (SE)
Representative:	Hoffmann Eitle Patent- und Rechtsanwälte PartmbB Arabellastraße 30 81925 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 28 June 2016 revoking European patent No. 2234316 pursuant to Article 101(3)(b) EPC**

Composition of the Board:

Chair	A. Ritzka
Members:	K. Bengi-Akyuerek
	D. Prietzel-Funk
	P. Cretaine
	G. Weiss

Summary of Facts and Submissions

I. The appeal of the patent proprietor was lodged against the decision of the opposition division to revoke the present European patent as granted (main request) and as amended according to the claims of auxiliary requests 1 to 4 and 12 to 14 for lack of novelty (Article 54(3) EPC), having regard to the disclosure of

A2: WO-A-2010/135699.

Document A2, published on 25 November 2010 and claiming a priority date of 22 May 2009, was taken to be state of the art under Article 54(3) EPC because the opposition division held that the patent proprietor was not entitled to enjoy the right to claim the priority date derived from US provisional application

P: US 61/162,337 (filed on 23 March 2009),

on the grounds that it could not prove that it was the "successor in title" to the right to claim priority from that application within the meaning of Article 87(1) EPC. In its notice of opposition, the opponent had also contested the validity of the priority claim on the further ground that the priority application did not relate to the "same invention" within the meaning of Article 87(1) EPC. The opposition division did not take a decision on that matter.

II. With the statement setting out the grounds of appeal, the appellant filed four additional claim sets (auxiliary requests 0, 1A, 14A and 14B). It requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims as granted (main request) or one of auxiliary requests 1,

2, 3, 4, 12, 13, 14, 0, 14B, 1A and 14A. In addition, it contended that the opposition division committed a substantial procedural violation, essentially on the ground that it "did not positively decide on the applicable national law" as regards the transfer of the right to priority that had been claimed by the appellant.

III. In its reply to the statement setting out the grounds of appeal, the respondent requested that the appeal be dismissed. It also requested that newly filed auxiliary requests 0, 1A, 14A and 14B not be admitted into the appeal proceedings.

IV. In a communication under Article 15(1) RPBA following the summons to oral proceedings, the board gave its preliminary opinion on the appeal. In particular, it indicated that the opposed patent did not seem to disclose the "same invention" within the meaning of Article 87(1) EPC and that therefore document A2 was to be regarded as state of the art under Article 54(3) EPC. Moreover, the board stated that the main request appeared to lack novelty over A2 and made observations with regard to the admissibility and allowability of the eleven auxiliary requests on file.

V. With a letter of reply, the appellant submitted five additional claim sets (auxiliary requests 3C, 13C, 14C, 14AC and 14BC) and advanced its arguments and observations on the board's communication under Article 15(1) RPBA.

VI. By its letter of reply, the respondent raised further objections under Articles 123(2) and 84 EPC to the claims of auxiliary requests 0 and 14B.

VII. Oral proceedings were held on 3 July 2019, during which the appellant filed a new claim set as auxiliary request 15 and withdrew its auxiliary requests 3C, 13C, 14A, 14B, 14C, 14AC and 14BC. Further, the appellant indicated that it pursued its arguments on the alleged substantial procedural violation (see point II above).

- The appellant's final request was that the decision under appeal be set aside and that the patent be maintained as granted (main request) or in amended form on the basis of auxiliary requests 1 to 4 or 12 to 14, all of them underlying the decision under appeal, or auxiliary request 15 submitted in the oral proceedings before the board, or auxiliary requests 0 or 1A, both submitted with the statement setting out the grounds of appeal.

- The respondent's final request was that the appeal be dismissed.

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

VIII. Claim 1 of the **patent as granted (main request)** reads as follows:

"A method for performing Power Headroom Reporting, named PHR hereinafter, in a user equipment, named UE hereinafter, of a wireless communication system (10), the wireless communication system (10) supporting Carrier Aggregation, named CA hereinafter, such that the UE is able to perform transmission through multiple carriers, the method comprising:

configuring a plurality of uplink carriers (410); and

characterized by generating at least one PH values, each corresponding to one of the plurality of uplink carriers (420),

wherein the at least one PH values are carried by PHR Control Elements and the PHR Control Elements each have an identification field for identifying which uplink carrier the carried PH value is corresponding to."

Claim 1 of **auxiliary request 1** comprises all the features of claim 1 of the main request, with the only difference that its last paragraph has been replaced by the following phrase (amendments to claim 1 of the main request underlined by the board):

"wherein the at least one PH values are carried by PHR MAC Control Elements and the PHR MAC Control Elements each have an identification field for identifying which uplink carrier the carried PH value is corresponding to."

Claim 1 of **auxiliary request 2** comprises all the features of claim 1 of the main request, and further adds the following clause at its end:

"and the identification field is in the PHR Control Element."

Claim 1 of **auxiliary request 3** comprises all the features of claim 1 of the main request, and further adds the following clause at its end:

"and the at least one PH values are all carried by a single PHR Control Element."

Claim 1 of **auxiliary request 4** comprises all the features of claim 1 of the main request, and further adds the following clause at its end (emphasis added by the board):

> "and the number of the at least one PH values is equal to the number of the plurality of uplink carriers, **or** is equal to the number of uplink carriers with activated PHR functionality in the plurality of uplink carriers."

Claim 1 of **auxiliary request 12** comprises all the features of claim 1 of the main request, and further adds the following clause at its end:

> "and the number of the at least one PH values is equal to the number of the plurality of uplink carriers."

Claim 1 of **auxiliary request 13** comprises all the features of claim 1 of auxiliary request 12, and further adds the following clause at its end:

> "and the at least one PH values are all carried by a single PHR Control Element."

Claim 1 of **auxiliary request 14** comprises the features of claim 1 of auxiliary requests 1 and 13 in combination.

Claim 1 of **auxiliary request 15** reads as follows (amendments to claim 1 of the main request underlined by the board):

"A method for performing Power Headroom Reporting, named PHR hereinafter, in a user equipment, named UE

hereinafter, of a wireless communication system (10), the wireless communication system (10) supporting Carrier Aggregation, named CA hereinafter, such that the UE is able to perform transmission through multiple carriers, the method comprising:

> configuring a plurality of uplink carriers (410) for performing transmission through the plurality of uplink carriers according to CA by the UE; and characterized by generating at least one PH values, each corresponding to one of the plurality of uplink carriers (420),

wherein the at least one PH values are carried by PHR Control Elements and the PHR Control Elements each have an identification field for identifying which uplink carrier the carried PH value is corresponding to, and

the at least one PH values are all carried by a single PHR Control Element."

Claim 1 of **auxiliary request 0** comprises all the features of claim 1 of the main request, and further adds the following clause at its end:

> "and wherein the PHR Control Elements each do not have an indication field for indicating the number of the at least one PH values."

Claim 1 of **auxiliary request 1A** comprises all the features of claim 1 of auxiliary request 1, and further adds the following clause at its end:

> "and wherein the PHR MAC Control Elements are carried by a MAC Protocol Data Unit, PDU, further consisting of a MAC header, zero or more MAC

Service Data Units, SDUs, zero or more MAC Control Elements and optionally padding, wherein the MAC PDU header consists of one or more MAC PDU sub-headers, each corresponding to either a MAC SDU, a MAC Control Element or padding, wherein the MAC PDU sub-headers have the same order as the corresponding MAC SDUs, MAC Control Elements and padding."

Reasons for the Decision

1. *The opposed patent*

The opposed patent is concerned with the transmission of so-called power headroom reports (PHRs) for multiple uplink carriers in a carrier-aggregated wireless system. The transmission is performed through medium access control packet data units (MAC PDUs). The power headroom reports are supposed to indicate to the respective base station the difference between the maximum user equipment (UE) transmission power and an estimated transmission power for an uplink shared channel. According to the patent, the problem to be solved is to report the relevant power headroom values (PHs) for *different* carriers in the underlying carrier-aggregated system.

2. MAIN REQUEST

Claim 1 as granted comprises the following features (as labelled in the decision under appeal):

(a) A method for performing Power Headroom Reporting (PHR), in a user equipment (UE), of a wireless communication system,

(b) the wireless communication system supporting Carrier Aggregation (CA), such that the UE is able to perform transmission through multiple carriers, the method comprising:
(c) configuring a plurality of uplink carriers;
(d) generating at least one PH values, each corresponding to one of the plurality of uplink carriers,
(e) wherein the at least one PH values are carried by PHR MAC Control Elements,
(f) wherein the PHR Control Elements each have an identification field for identifying which uplink carrier the carried PH value is corresponding to.

2.1 *Validity of priority claim - "same invention" (Article 87(1) EPC)*

2.1.1 The board concurs with the respondent that priority application P fails to disclose the "same invention" as the opposed patent within the meaning of Article 87(1) EPC (see respondent's written reply of 27 March 2017, section III, in conjunction with the notice of opposition, page 8, item (2) to page 11, item (2.6)).

2.1.2 In particular, as to the use of an "identification field" in feature (f), priority application P discloses the following (see page 3, "Invention 2", "Option 1 (by Roger)", seventh to ninth bullets; emphasis added by the board):

> "7. A method of reporting PHR in a wireless communication system, comprising: characterized by there is an **indication** to indicate which carrier that a power headroom in a PHR MAC control element corresponds to.

8. Based on bullet 7, the said **indication** is in the PHR MAC control element.
9. Based on bullet 7, the said **indication** is in a MAC subheader that corresponds to the PHR MAC control element."

2.1.3 Contrary to the appellant's assertion, the board holds that the mere "indication" of corresponding carriers does not necessarily imply that there is a specific identification field located within a PHR control element. This is because, in the relevant technical field of telecommunication networks, an information "field" of a data packet is commonly characterised by a pre-defined location within the data packet or a sub-part of it (such as a header) into which data *may* be inserted by a transmitter. Thus, whether or not such a field indeed includes (i.e. is filled with) data, the "field" as such is always existent in the packet. Moreover, the precise location of that packet field within the packet has to be ensured by the transmitter and to be known to the respective receiver such that the latter is able to detect and properly process the content of that field.

Conversely, an "indication" of some data, for example, in a MAC sub-header alone, as taught in the underlying priority application (see passage above), solely implies that this indication may be inserted and transmitted *anywhere* within this sub-header, without requiring any pre-assigned "identification field" as recited in feature (f) of present claim 1. Hence, priority application P does not directly and unambiguously disclose the use of an "identification field", contrary to claim 1. This was also communicated in point 5.2 of the board's communication under

Article 15(1) RPBA.

2.1.4 For the above reasons alone, priority application P does not disclose the "same invention" as the opposed patent under Article 87(1) EPC, on the basis of the "disclosure test" according to G 2/98 (OJ EPO 2001, 413, Reasons 1 and 9) and G 2/10 (OJ EPO 2012, 376, Reasons 4.3).

As a consequence, the effective filing date of the opposed patent is considered to be 23 March 2010 (rather than 23 March 2009), and therefore document **A2**, published on 25 November 2010 and claiming a priority date of 22 May 2009, constitutes state of the art under Article 54(3) EPC.

2.2 *Novelty over document A2 (Article 54(3) EPC)*

2.2.1 The board finds that document **A2** discloses the following limiting features of claim 1 of the main request (with the acronyms used in point 1 above):

(a) A method for performing PHR, in a UE ("UA"), of a wireless communication system ("LTE-A system") *(see e.g. Fig. 2)*,
(b) the wireless communication system supporting CA, such that the UE is able to perform transmission through multiple carriers ("reporting carriers") *(see e.g. paragraphs [0021] and [0033]; Fig. 1)*, the method comprising:
(c) configuring a plurality of uplink carriers ("configured carriers") *(see e.g. paragraph [0021]: "... carriers are aggregated and can be allocated in a subframe to a UA ..." and paragraph [0033])*;
(d) generating PH values (e.g. "PH1", "PH2", etc., in Fig. 9; "PH for indexed carrier 1", "PH for indexed

carrier 2" in Fig. 10), each corresponding to one of the uplink carriers *(see e.g. Figs. 9 and 10)*,

(e) wherein the PH values are carried by PHR control elements ("MAC Control Elements 900, 1000") *(see e.g. paragraph [0039]; Figs. 9 and 10)*,

(f) wherein the PHR control elements each have an identification field (e.g. "bitmap"; "carrier index") for identifying which uplink carrier the carried PH value is corresponding to *(see e.g. Fig. 9: "bitmap 910" or Fig. 10: "carrier index $1030_{a,b}$")*.

2.2.2 As to features (c) and (d), the appellant persistently argued in the written and oral proceedings that they were to be construed as requiring that *one* PH value be generated for *each* of the configured uplink carriers, such that *all* the configured uplink carriers are associated with exactly one PH value. Since, moreover, the relevant embodiments illustrated by Figures 9 and 10 of A2 were exclusively related to generating PH values for only a subset of configured uplink carriers (referring to the accompanying text in paragraphs [0058] and [0061] of A2) and not for all carriers, the novelty of claim 1 over A2 had to be acknowledged.

The board is not persuaded by this line of argument for basically two reasons:

Firstly, the board concurs with the respondent that the wording of features (c) and (d) does not reflect that a certain PH value generated is uniquely assigned to a different uplink carrier for *all* configured carriers (i.e. in the sense of a "bijective" assignment in mathematical language). It only says that any generated PH value corresponds to *one* of the available configured carriers, rather than to all of them. This

interpretation is further corroborated by the covered option of generating only one PH value ("at least one PH values") in feature (d). In other words, the present wording also encompasses the case that, for example, two PH values generated may be assigned to one and the same carrier (i.e. corresponding to an "injective" assignment), such that not all carriers need to be assigned to a generated PH value. Most importantly, it does not necessarily imply that all configured carriers are associated with one certain PH value (i.e. as a "surjective" assignment), as argued by the appellant. By the same token, feature (f) does not require that the identification field include the identification of *all possible* uplink carriers for which a PH value is transmitted, as apparently suggested by the appellant (see statement of grounds of appeal, section C.II.2).

Secondly, even if it were assumed in the appellant's favour that claim 1 implied that all the configured uplink carriers were associated with a dedicated PH value, this would not distinguish it from the teaching of A2. The relevant passages of A2, referred to by the appellant and relating to the embodiments illustrated by Figures 9 and 10, read as follows (emphasis added by the board):

> *"[0058] In yet another alternative ..., a UA transmits the PH of only a certain reporting carrier or of only certain reporting carriers."*
>
> and
>
> *"[0061] As another technique for transmitting PH values for a subset of the reporting carriers, the UA indicates ... a corresponding carrier index for each of the carriers transmitting a PH value."*

However, it is apparent to the board that A2 further indicates the following in paragraph [0058], antepenultimate sentence (emphasis added by the board):

> *"In some embodiments, if the allocated UL [Uplink] resources cannot accommodate the MAC control element of all PHs ..., then the UA can decide not to transmit all PHs or transmit PHs of a subset of carriers in the MAC control element ..."*

From the above, the skilled reader would conclude that a *subset* of carriers is taken only in a situation where not all PH values can be accommodated, and that, generally, the PH values of *all* available reporting carriers are supposed to be generated and included in the respective control elements (see in this regard also paragraph [0059], emphasis added: *"An example of this technique is shown in Figure 9 ... In this case, there are five reporting carriers, so the bitmap 910 includes five bits ..."*, and, most notably, paragraph [0063]: *"It should be noted that a combination of the above approaches can be used depending on the operation. For example, a UA might report PH values for all carriers periodically ..."*, and, lastly, paragraph [0087], second sentence: *"... power headroom-related information is reported for a number of the aggregated carriers that is ... equal to the total number of aggregated carriers."*, in conjunction with Fig. 12, block 1210).

2.2.3 Accordingly, the board judges that prior-art document A2 discloses all the features of present claim 1.

2.3 In conclusion, the subject-matter of claim 1 of the main request lacks novelty over document D1 and is thus not allowable under Article 100(a) in conjunction with Article 54(3) EPC.

3. AUXILIARY REQUESTS 1, 2, 3, 4, 12, 13, 14

Claim 1 of each of auxiliary requests 1 to 4 and 12 to 14 differs from claim 1 of the main request essentially in that it further limits its scope by specifying that (emphasis added by the board):

(g) the PH values are carried by PHR MAC control elements (**auxiliary requests 1 and 14**);
(h) the identification field is in the PHR control element (**auxiliary request 2**);
(i) the PH values are all carried by a single PHR (MAC) control element (**auxiliary requests 3, 13 and 14**);
(j) the number of the PH values is equal to the number of the plurality of uplink carriers (**auxiliary requests 4, 12, 13 and 14**).

3.1 *Validity of priority claim - "same invention" (Article 87(1) EPC)*

3.1.1 Given that claim 1 of each of auxiliary requests 1 to 4 and 12 to 14 includes feature (f) reciting an "identification field", and that the incorporation of that field in a PHR control element has already been taken into account in the analysis set out in points 2.1.2 and 2.1.3 above, the observations for the main request equally apply to the present auxiliary requests.

3.1.2 Hence, document A2 is state of the art under Article 54(3) EPC for those auxiliary requests, too.

3.2 *Novelty over document A2 (Article 54(3) EPC)*

3.2.1 As to new feature (g), the appellant argued that it implied that the single PHR control element included just one identification field and did not encompass several carrier index fields as was the case in Figure 10 of A2. However, it is apparent to the board that, for example, in Figure 9 of A2, a single identification field ("bitmap 910") is in fact used for identifying the uplink carriers whose PH values are transmitted (see also A2, paragraph [0059]).

3.2.2 As to added features (h) and (i), A2 evidently discloses that the PH values are *all* carried by a *single* PHR MAC control element (e.g. "MAC Control Element 900, 1000") and that the identification field (e.g. "bitmap"; "carrier index") is located *within* that control element (see e.g. Figs. 9 and 10).

3.2.3 As to feature (j), the board holds, contrary to the appellant's view, that at least paragraph [0058], antepenultimate sentence, and Figure 12 of A2 teach that the PH values of all reporting carriers may indeed be transmitted (see also point 2.2.2 above).

3.3 In sum, auxiliary requests 1 to 4 and 12 to 14 are not allowable under Article 54(3) EPC either.

4. AUXILIARY REQUEST 15

Claim 1 of auxiliary request 15 differs from claim 1 of the main request essentially in that it includes

feature (i) and further specifies that (emphasis added by the board):

(c') the plurality of uplink carriers are configured <u>for performing transmission through the plurality of uplink carriers according to CA by the UE</u>.

4.1 *Admission into the proceedings (Article 13(1) RPBA)*

4.1.1 The claim set of auxiliary request 15 was submitted for the first time at a late stage of the oral proceedings before the board (see minutes of those proceedings). The appellant argued that the filing of that claim set was an appropriate reaction to the board's claim interpretation and novelty objection under Article 54(3) EPC. It only now understood the interpretation, in particular of features (c), (d) and (f) of claim 1, as given in the board's preliminary opinion and thus had to be given an opportunity to react properly. As regards the compliance with Article 123(2) EPC, it conceded that there was no literal support for the amendment made in feature (c') but that it was at least implicitly based on page 4, last paragraph to page 5, first paragraph, of the underlying application as filed.

4.1.2 In appeal proceedings, the admissibility of claim requests filed *after* an appellant has submitted its statement setting out the grounds of appeal, which "shall contain a party's complete case" (Article 12(2) RPBA), is governed in particular by Article 13(1) and (3) RPBA. By virtue of Article 13(1) RPBA, a board's discretion in admitting any amendment to a party's case "shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for

procedural economy".

4.1.3 As to the factual situation of the present case, the claims of auxiliary request 15 were freshly submitted at the oral proceedings before the board, i.e. after a total of seventeen claim requests had been filed during the appeal proceedings. Moreover, the amendments made are not taken from the granted claims but from the description of the opposed patent.

4.1.4 The board first notes that this new auxiliary request was submitted at a very late stage of the overall proceedings, during which the appellant had had ample opportunity to file a potentially allowable set of claims, e.g. in direct response to the board's communication under Article 15(1) RPBA.

4.1.5 Moreover, given that claim 1 no longer includes features (g), (h) and (j), the board agrees with the respondent that auxiliary request 15 apparently does not further limit the underlying scope and thus fails to converge with the present higher-ranking claim requests.

4.1.6 As regards the issue of whether filing the new auxiliary request was indeed an "appropriate reaction" to any unforeseeable development or objection becoming apparent during the oral proceedings, the board has to establish whether a development was unforeseeable and whether the reaction was indeed filed at the earliest point in time, i.e. whether it was an immediate reaction to an objection (see e.g. T 1990/07, Reasons 7; T 1354/11, Reasons 11.1.2) and whether it attempts to at least address - if not resolve - the outstanding objections, i.e. whether it is causally

linked to the features objected to.

4.1.7 The board first recalls that, in general terms, a board's communication under Article 15(1) RPBA has a preliminary character pursuant to Article 17(2) RPBA, mainly serving the purpose of preparing for the oral proceedings in an efficient manner. In the present case, the board's communication (points 7.1.2 and 7.1.3) clearly indicated the board's interpretation of claim 1 and its provisional opinion that features (a) to (f) and (i) did not appear to establish novelty over document A2 (see points 7.1 and 8.4.2). The fact that the board confirmed its preliminary opinion in the oral proceedings after having heard the parties on this issue cannot thus be taken as a surprise or an unforeseeable event (see e.g. T 2219/12, Reasons 6 and T 1033/10, Reasons 5.9).

In other words, the earliest point in time at which a party should make new submissions (such as an amended claim set) cannot be the instant at which it eventually believes that it cannot indeed convince the board. Rather, it must be the time at which - on an objective basis - an unforeseeable event (such as a fresh objection) becomes apparent during the proceedings. Accordingly, the earliest point in time for filing the amendment according to feature (c') could have been, for example, upon submitting the appellant's response to the board's communication under Article 15(1) RPBA.

4.1.8 As to the substantive aspects of the present auxiliary request, i.e. the question whether it actually attempts to address or even resolve the outstanding objections, the board holds that new feature (c'), taken from the patent's description, merely emphasises further that the configured uplink carriers are indeed used for data

transmissions. However, the board finds that it is self-evident that in the system of A2 the configured or reporting carriers are likewise used for data transmissions (see e.g. paragraph [0026]: *"An LTE-A UA is able to transmit using multiple carriers simultaneously ... However, the uplink transmit power would be expected to be different for each carrier ..."*, and paragraph [0033]: *"... the number of carriers for which the ... PH-related information is reported is less than or equal to the total number of configured carriers ..."*). Consequently, the board concludes that amended feature (c') in no way addresses, let alone resolves, the objections raised under Article 54(3) EPC (see points 2.2 and 3.2 above), since it was already assumed in the examination of claim 1 of the higher-ranking claim requests that transmissions are to be performed through the configured uplink carriers.

4.2 In view of the above observations, the board decided not to admit auxiliary request 15 into the appeal proceedings under Article 13(1) RPBA.

5. AUXILIARY REQUESTS 0, 1A

Claim 1 of each of auxiliary requests 0 and 1A differs from claim 1 of the main request basically in that it further specifies that (emphasis added by the board):

(k) the PHR control elements each do not have an indication field for indicating the number of the PH values (**auxiliary request 0**);

(l) the PHR MAC control elements are carried by a MAC PDU, further consisting of a MAC header, zero or more MAC SDUs, zero or more MAC control elements and optionally padding, wherein the MAC PDU header

consists of one or more MAC PDU sub-headers, each corresponding to either a MAC SDU, a MAC control element or padding, wherein the MAC PDU sub-headers have the same order as the corresponding MAC SDUs, MAC control elements and padding (**auxiliary request 1A**).

5.1 *Admission into the proceedings (Article 12(4) RPBA)*

5.1.1 The claims of auxiliary requests 0 and 1A were submitted for the first time with the statement setting out the grounds of appeal. The appellant argued that the claim requests were an appropriate reaction to the outcome of the opposition proceedings and that the new features were based on page 5, second and penultimate paragraphs, of the underlying description as filed. Given that there were other complex outstanding issues, such a reaction to the objections raised under Article 54(3) EPC by the opposition division having regard to document A2 was conducive to the procedural economy of the overall proceedings.

5.1.2 In appeal proceedings, the admissibility of claim amendments filed *with* the statement setting out the grounds of appeal, is mainly governed by Article 12(4) RPBA, which confers on a board the discretionary power "to hold inadmissible facts, evidence or requests which **could have been presented** or were not admitted in the first instance proceedings" (emphasis added).

5.1.3 As to the factual situation regarding the present auxiliary requests, the board notes that features (k) and (l) are evidently taken from the description of the opposed patent rather than from the claims as granted.

5.1.4 Concerning auxiliary request 0, the board concurs with the respondent that the incorporation of feature (k), which relates to the negation of a certain packet field and thus corresponds to a negative limitation, significantly amends the claimed subject-matter and could not realistically be conceived by the respondent. In other words, this auxiliary request amounts to a "fresh case" that should have indeed been filed before the opposition division within the meaning of Article 12(4) RPBA, so that the appellant would have obtained a first-instance ruling and thus an appealable decision on it.

5.1.5 As regards auxiliary request 1A, the board shares the respondent's view that the consideration of feature (l), taken solely from the underlying description, would similarly open up a "fresh case", entailing lengthy discussions on whether the detailed definition of the underlying packet structure according to feature (l) would render the claimed subject-matter novel over A2, thereby adding new issues to the present subject-matter. In particular, it would be necessary to establish for the first time in these appeal proceedings whether, on the one hand, the referenced telecommunications standard "3GPP TS 36.321" cited on page 6, item [3] of priority application P was to be considered to be "incorporated by reference" and thus could provide a basis for feature (l) of claim 1 (see appellant's letter of 3 June 2019, page 5, last paragraph) and whether, on the other hand, the reference to the same standard document in A2 (see paragraphs [0036] and [0099]) failed to anticipate the use of the packet structure according to that feature (see appellant's letter of 3 June 2019, page 22, penultimate paragraph). Thus, the claims of auxiliary request 1A should have already been filed in the

first-instance proceedings in order to avoid such a situation.

5.2 Overall, the board decided not to admit auxiliary requests 0 and 1A into the appeal proceedings under Article 12(4) RPBA.

6. *Appellant's allegation of a substantial procedural violation*

6.1 The appellant contended that the opposition division committed a substantial procedural violation on the grounds that it "did not positively decide on the applicable national law" as regards the respective transfer of the right to priority.

6.2 In that regard, the board notes that no *procedural* requirements are provided in the EPC as to the selection of the applicable national law regarding priority transfers and that thus a failure to properly establish the applicable national law, if at all, would qualify as a violation of *substantive* rather than *procedural* law.

6.3 Hence, the board cannot see that any procedural violation, let alone any *substantial* one within the meaning of Rule 103(1)(a) EPC, occurred in the opposition proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

K. Götz-Wein A. Ritzka

Decision electronically authenticated