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**Datasheet for the decision  
of 13 July 2021**

**Case Number:** T 1869/17 - 3.5.03

**Application Number:** 11008366.4

**Publication Number:** 2432293

**IPC:** H04W76/02

**Language of the proceedings:** EN

**Title of invention:**

Methods for synchronizing PDCP operations after RRC connection re-establishment in a wireless communication system and related apparatuses thereof

**Patent Proprietor:**

HTC Corporation

**Opponent:**

Nokia Solutions and Networks Oy

**Headword:**

Synchronising PDCP operations II/HTC

**Relevant legal provisions:**

EPC Art. 76(1), 87(1), 116, 123(3)

EPC R. 106, 115(1)

RPBA 2020 Art. 10(2), 13(1), 15(2)(a), 15a(2)

**Keyword:**

Postponement of the arranged oral proceedings - (no): not requested as soon as possible and not allowable  
Objection under Rule 106 EPC - dismissed: no bar to holding two oral proceedings on the same day  
Added subject-matter - main request (yes) : intermediate generalisation  
Admittance - auxiliary requests (no): not prima facie allowable under Art. 76(1), 123(3) and/or 56 EPC

**Decisions cited:**

G 0002/10, G 0001/21, T 1852/13, T 1870/16



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Case Number: T 1869/17 - 3.5.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.03**  
**of 13 July 2021**

**Appellant:** Nokia Solutions and Networks Oy  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
3 July 2017 concerning maintenance of the  
European Patent No. 2432293 in amended form.**

**Composition of the Board:**

**Chair** K. Bengi-Akyürek  
**Members:** T. Snell  
W. Sekretaruk

## Summary of Facts and Submissions

- I. This case concerns the appeal of the opponent (henceforth, "appellant") against the interlocutory decision of the opposition division maintaining the patent in amended form in accordance with the claims of the fifth auxiliary request.
- II. The appellant requests that the decision under appeal be set aside and that the patent be revoked.
- III. The patent proprietor (henceforth, "respondent") requests that the appeal be dismissed (**main request**), i.e. that the patent be maintained in accordance with the **fifth auxiliary request**.

Alternatively, the respondent requests that the patent be maintained in amended form in accordance with one of **sixth to twelfth auxiliary requests**, all as filed with the submission dated 21 May 2021.

- IV. The following documents are relevant to the board's decision:
- D2:** 3GPP TS 36.331 V8.4.0 (2008-5) - 3rd Generation Partnership Project; Technical Specification Group Radio Access Network; Evolved Universal Terrestrial Radio Access (E-UTRA); Radio Resource Control (RRC); Protocol specification (Release 8);
- D3:** 3GPP TS 36.331 V8.4.0 (2008-12) - 3rd Generation Partnership Project; Technical Specification Group Radio Access Network; Evolved Universal Terrestrial Radio Access (E-UTRA); Radio

Resource Control (RRC); Protocol specification (Release 8);

**D4:** 3GPP TS 36.323 V8.4.0 (2008-12) - 3rd Generation Partnership Project; Technical Specification Group Radio Access Network; Evolved Universal Terrestrial Radio Access (E-UTRA); Packet Data Convergence Protocol (PDCP) specification (Release 8).

V. In accordance with the appellant's auxiliary request, the board appointed oral proceedings to be held in a so-called "mixed-mode" format (cf. Article 15a(2) RPBA) on the same day as oral proceedings in related case T 1870/16 concerning a "sister" divisional application. In advance of the oral proceedings, the respondent requested that the appeal proceedings be stayed in view of case G 1/21 pending before the Enlarged Board of Appeal and/or the scheduled oral proceedings be postponed to a later date.

The respondent further objected to two allegedly "unrelated" cases being heard on the same day, and to the fact that the board apparently intended to consolidate these cases within the meaning of Article 10(2), second sentence, RPBA 2020. The respondent further submitted that the summons for case T 1870/16 contained errors of form and substance to such an extent that the parties had been "not duly summoned". It was therefore requested that a new summons be issued for the present case.

VI. In communications dated 28 May 2021 and 17 June 2021, the board clarified that cases T 1870/16 and T 1869/17 were not consolidated within the meaning of Article 10(2), second sentence, RPBA 2020, but would be heard "consecutively and independently".

VII. Oral proceedings were held as mixed-mode proceedings on 13 July 2021 following the closure of the debate in case T 1870/76. The appellant attended the proceedings via videoconference, whereas the respondent and the board were physically present.

In the course of the oral proceedings, the respondent raised an objection pursuant to Rule 106 EPC, namely that "there was no legal provision allowing to summon parties to oral proceedings with the same starting date. Consequently, there was no proper summons to these oral proceedings". The board dismissed the objection.

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

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

"A communication device (350) of a wireless communication system (300) for synchronizing Packet Data Convergence Protocol, PDCP, operations corresponding to a Radio Resource Control, RRC, Connection Re-establishment procedure with another communication device (310), the communication device (350) comprising:  
means for resuming a signaling radio bearer 1, SRB1;  
characterized by:  
means for resetting state variables of Next\_PDCP\_TX\_SN and TX\_HFN corresponding to a resumed SRB1 to 0;  
wherein the communication device (350) is an Evolved UMTS Terrestrial Radio Access Network, E-UTRAN, (350), and the other communication device (310) is a user equipment, UE, (310).

IX. Claim 1 of the **sixth auxiliary request** is the same as claim 1 of the fifth auxiliary request except that the last feature of the preamble reads

"means for resuming a signaling radio bearer 1, SRB1, and a signaling radio bearer 2, SRB2",

and the first feature of the characterising part reads

"means for resetting state variables of Next\_PDCP\_TX\_SN and TX\_HFN corresponding to a resumed SRB1 and a resumed SRB2 to 0" (board's underlining).

X. Claim 1 of the **seventh auxiliary request** is the same as claim 1 of the fifth auxiliary request except that the first feature of the characterising part reads

"means for resetting state variables of Next\_PDCP\_TX\_SN and TX\_HFN corresponding to a resumed SRB1 to 0 after the SRB1 is resumed" (board's underlining).

XI. Claim 1 of the **eighth auxiliary request** is the same as claim 1 of the fifth auxiliary request except that the first feature of the characterising part reads as follows:

"means for resetting state variables of Next\_PDCP\_TX\_SN and TX\_HFN corresponding to a resumed SRB1 to an initial value of 0" (board's underlining).

XII. Claim 1 of the **ninth auxiliary request** is the same as claim 1 of the fifth auxiliary request except that the last feature of the preamble reads

"means for resuming a signaling radio bearer 1, SRB1, and a signaling radio bearer 2, SRB2",

and the first feature of the characterising part reads

"means for resetting state variables of Next\_PDCP\_TX\_SN and TX\_HFN corresponding to a resumed SRB1 and a resumed SRB2 to 0 after the SRB1 and the SRB2 are resumed" (board's underlining).

- XIII. Claim 1 of the **tenth auxiliary request** is the same as claim 1 of the fifth auxiliary request except that the last feature of the preamble reads

"means for resuming a signaling radio bearer 1, SRB1, and a signaling radio bearer 2, SRB2",

and the first feature of the characterising part reads

"means for resetting state variables of Next\_PDCP\_TX\_SN and TX\_HFN corresponding to a resumed SRB1 and a resumed SRB2 to an initial value of 0" (board's underlining).

- XIV. Claim 1 of the **eleventh auxiliary request** is the same as claim 1 of the fifth auxiliary request except that the first feature of the characterising part reads

"means for resetting state variables of Next\_PDCP\_TX\_SN and TX\_HFN corresponding to a resumed SRB1 to an initial value of 0 after the SRB1 is resumed" (board's underlining).

- XV. Claim 1 of the **twelfth auxiliary request** is the same as claim 1 of the fifth auxiliary request except that the last feature of the preamble reads



"means for resuming a signaling radio bearer 1, SRB1, and a signaling radio bearer 2, SRB2",

and the first feature of the characterising part reads

"means for resetting state variables of Next\_PDCP\_TX\_SN and TX\_HFN corresponding to a resumed SRB1 and a resumed SRB2 to an initial value of 0 after the SRB1 and the SRB2 are resumed" (board's underlining).

## **Reasons for the Decision**

### *1. Procedural matters*

1.1 The appellant requested that the appeal proceedings should be stayed in order to await the outcome of case G 1/21 pending before the Enlarged Board of Appeal with respect to the holding of oral proceeding via videoconference *without* the consent of all the parties.

1.2 This objection is dealt with in co-pending case T 1870/16 decided on the same day (cf. Reasons 1). These reasons apply, *mutatis mutandis*, to the present case. The request was therefore refused.

1.3 The appellant raised a number of objections with respect to being summoned to oral proceedings on the same day as the oral proceedings in case T 1870/16 as well as to the content of the summons dated 27 January 2021. These objections can be summarised as follows:

- (i) At the oral proceedings, the respondent raised the following objection pursuant to

Rule 106 EPC: "There was no legal provision allowing to summon parties to oral proceedings with the same starting date. Consequently, there was no proper summons to these oral proceedings" (cf. point VII above).

- (ii) The summons to oral proceedings (i.e. EPO Form 3011.1) dated 27 January 2021 indicated the same start time "09:00 hrs" as another case, namely T 1870/16. It was impossible for the respondent to attend two proceedings at the same time (referred to as "bilocality" by the respondent). Furthermore, a summons to another proceedings at the same time was a reason for postponing the oral proceedings under Article 15(2)(b)(i) RPBA 2020.
- (iii) The summons contained the statement "This case will be heard **together with** appeal case T 1870/16-3503" (emphasis added). Thus, the board had apparently decided to consolidate the proceedings with T 1870/16 in accordance with Article 10(2), second sentence, RPBA 2020. This was objected to since the cases were not related to each other, and the parties had not been heard on whether to consolidate the proceedings.
- (iv) The communication of the board dated 28 May 2021 contained the statement "oral proceedings will take place **independently and consecutively** on 13 July 2021". However, neither the parties nor the public were informed as to when the oral

proceedings for the present case would start. The summons therefore was formally incomplete and thus null and void.

- (v) Holding the two oral proceedings on the same day, whether or not the cases were consolidated, was inappropriate as the two cases T 1870/16 and T 1869/17 were entirely different. The cases were too complex and difficult to be heard on the same day and that there was a risk of mixing the cases up. There was a corresponding doubt that the board would be able to judge the cases independently.

1.4 In view of these objections, the respondent requested that the oral proceedings be postponed and a new summons issued for a later date.

1.5 The board finds these arguments unconvincing for the following reasons:

1.5.1 The board clarified in its communications dated 28 May and 17 June 2021 that the proceedings in cases T 1870/16 and T 1869/17 were not consolidated but would be heard *independently* and *consecutively*, i.e. not simultaneously. The reason for holding both oral proceedings on the same day was that both cases concerned *divisional* applications deriving from the same *parent* application. Although the claims are directed to different aspects, the description of both patents is essentially the same, so that any reasonable person would conclude that the cases are strongly related to each other. For such related cases, it is more efficient to hold both oral proceedings on the same day in order to avoid the board having to

re-familiarise itself with the subject-matter at a later date. Such a situation is self-evidently different to that arising from an accidental conflict of dates, e.g. a summons from two different boards, which is addressed by Article 15(2)(b)(i) RPBA 2020.

- 1.5.2 As regards above objections (ii) and (v), the respondent was informed with the board's communication dated 17 June 2021 that, pursuant to Article 15(2)(a) RPBA 2020, such a "request shall be filed **as soon as possible** after the summons to oral proceedings has been notified and the serious reasons in question have arisen" and that if the requirements under this provision are not met, the board may reject the request **for this reason alone** (referring also to the explanatory remarks to the RPBA 2020). In the present case, the summons to oral proceedings was dispatched on 27 January 2021. The "serious reasons" advanced by the respondent were that the "Respondent's representative is not in a position to provide bilocality and cannot attend two proceedings at the same time as summoned", that "the Respondent does not have sufficient time to prepare for both cases simultaneously and immediately switch from one case to another", that "the Board is likely to be influenced by the first case when discussing and deciding on the second case immediately thereafter" and that "according to Art. 15(2) RPBA, reasons which may justify a change of the date for Oral Proceedings include the notification of a summons to Oral Proceedings in other proceedings before the European Patent Office or a national court received before notification of the summons to Oral Proceedings before the Board". However, the board considers that all of these reasons could, and should, have been submitted much earlier, i.e. as soon as possible after

receiving the summons.

- 1.5.3 With respect to the **objection raised under Rule 106 EPC**, the board notes that the respondent has not pointed to any provision of the EPC which would prevent a board from issuing two summons in accordance with Article 116 and Rule 115 EPC for different cases involving the same parties to be heard on the same day. Rule 115(1) EPC merely stipulates that "[t]he parties shall be summoned to oral proceedings under Article 116 ... At least two months' notice of the summons shall be given, unless the parties agree to a shorter period."
- 1.5.4 In fact, the board considers that it alone has the discretion to determine whether cases are suitable for being heard on the same day. In the present case, as already stated, the cases clearly are related to each other and the issues were judged to be neither especially complex or unusually difficult to be discussed on the same day. Indeed, in the event, there was ample time available on the day to hear both cases, and the respondent did not raise any objection that they had not had sufficient time to present their case (cf. Article 113(1) EPC). It is also not clear why the appellant considers that issues raised in the course of the first oral proceedings should not influence the board's deliberations in the other case. On the contrary, harmonisation in such co-pending divisional applications is clearly conducive to a uniform application of the law and to legal certainty as a whole.
- 1.5.5 With respect to the common start time of "09:00 hrs" set in the summons, this was chosen since it could not be known at which time the first hearing would finish.

The board can not recognise any procedural violation here, since a summons to oral proceedings indicating a time of 9:00 hrs does not mean that oral proceedings actually has to be opened at this time. The board also notes in passing that the appellant confirmed at the hearing before the board that they had had no difficulty at all in understanding in which order the two oral proceedings would be held.

- 1.5.6 Also, the respondent's argument that members of the public could - in breach of Article 116(4) EPC - effectively not attend the present oral proceedings after the closure of the oral proceedings in case T 1870/16 (cf. objection (iv) above), since they had no possibility to know when and where the oral proceedings in the present case would take place, must fail. This is mainly because, according to the current policy of the Boards of Appeal, interested members of the public may attend such "mixed-mode proceedings" on the premises of the Boards of Appeal in Haar. At the time of the present oral proceedings held before the board, such members of the public were further encouraged by the official website of the Boards of Appeal to announce their attendance well in advance by email, so that they could e.g. be informed about any changes or delays as to the start time of the respective oral proceedings. Moreover, interested members of the public could have readily taken notice of the arrangement of such "mixed-mode proceedings" by e.g. online access to the European Patent Register (e.g. by typing the associated application number) or via the EPO's online oral proceedings calendar (which is provided for information purposes only, without any guarantee for its completeness). In fact, one member of the public physically attended the entire hearings in both cases

(T 1870/16 and the current case T 1869/17).

1.5.7 Lastly, according to the EPC, the only *fundamental procedural defect* under Article 112a(2) EPC relating to arranging oral proceedings (Article 116 EPC) may arise from a board failing to arrange for the holding of oral proceedings requested by a party (cf. Rule 104(a) EPC). However, in the present case, the board indisputably did arrange oral proceedings as requested by the respondent.

1.6 The objection pursuant to Rule 106 EPC was therefore dismissed and the request to postpone the oral proceedings refused.

## 2. *Technical context*

2.1 The present patent concerns generally LTE ("Long Term Evolution") systems, and more particularly the recovery process from a disconnection due to radio link failure.

2.2 For ease of comprehension, the meaning of relevant LTE-based acronyms are as follows:

E-UTRAN = evolved universal terrestrial radio access network (NB: this includes a base station)

UE = user equipment

RRC = radio resource control

PDCP = packet data convergence protocol

SDU = service data unit

SRB = signaling radio bearer

DRB = data radio bearer

Next\_PDCP\_TX\_SN = next PDCP transmit sequence number

TX\_HFN = transmit hyper frame number.

2.3 The technical background is set out in paragraph [0003] of the parent application as published (EP 2 139 292 A2):

"If an RRC connection is disconnected due to radio link failure, an RRC re-establishment procedure needs to be initiated to re-establish the RRC connection. During the RRC re-establishment procedure, a UE resumes a signal radio bearer 1 (SRB1) and configures a lower layer to re-activate security (including integrity protection and ciphering) using the previously configured algorithm immediately when receiving an RRC Connection Re-establishment message from an E-UTRAN. To resume all radio bearers other than the SRB1, the E-URTAN shall initiate an RRC Connection reconfiguration procedure after the RRC connection is re-established, wherein the RRC Connection reconfiguration procedure is to modify the RRC connection. However, it is not clearly specified how to resume SRBs and data radio bearers (DRBs) after the RRC Connection re-establishment procedure and the subsequent RRC connection reconfiguration in some scenarios. Hence, a mechanism for synchronizing PDCP operations after RRC connection re-establishment needs to be improved".

3. ***Fifth auxiliary request - claim 1 - Article 76(1) EPC***

3.1 The appellant raised the following objection pursuant to Article 76(1) EPC:

The parent application only discloses that the variables Next\_PDCP\_TX\_SN and TX\_HFN are initialised when the SRB1 and the SRB2 are resumed. There is no



basis in the parent application for only the SRB1 being resumed.

3.2 The board agrees with the appellant that there is only support for both SRB1 and SRB2 being resumed for this embodiment (cf. Fig. 11, paragraphs [0012] and [0034] to [0036] of the description of the parent application as published, concerning "solution-10"). In this respect, omitting SRB2 results in an intermediate generalisation. An intermediate generalisation may be allowable where there is no structural or functional relationship linking the omitted feature with the remaining features of the claim. That is however not clearly and unambiguously the case here, since, for example, the processing as regards the variable TX\_HFN may be common to SRB1 and SRB2 (cf. e.g. **D2**, page 24, lines 15-19 and column 6, lines 42-44 of the parent application as published). The same processing of the variables Next\_PDCP\_TX\_SN and TX\_HFN for both SRB1 and SRB2 as set out in the original parent application (cf. "solution-10") is therefore a concept to be seen as a whole, with no suggestion that the processing may be applied to a resumed SRB1 *alone*.

3.3 The respondent counter-argued that the skilled person with an in-depth knowledge of an LTE system under the 3GPP standard would directly and unambiguously be aware that it is sufficient that SRB1 is resumed, and that the resumption of SRB2 is not an essential feature. Further, the skilled person knew that SRB1 and SRB2 were not inextricably linked to each other. On the contrary, they were handled differently under the standard.

3.4 However, the test for compliance with Article 76(1) EPC is not an essentiality test (cf. e.g. T 1852/13,

Reasons 2.2.7), but the "gold standard", i.e. whether there is a direct and unambiguous basis in the parent application as filed (see e.g. G 2/10). Here, the disclosure of the parent application as filed is that the resetting of the variables Next\_PDCP\_TX\_SN and TX\_HFN to initial values applies to SRB1 *and* SRB2. If the skilled person were to apply this concept to SRB1 (or SRB2) alone, this would be their own (possibly inventive) idea rather than the concept disclosed in the application as filed.

3.5 Consequently, claim 1 of the fifth auxiliary request does not comply with Article 76(1) EPC.

4. ***Fifth auxiliary request - claim 1 - Article 123(3) EPC***

4.1 The characterising part of claim 1 as granted reads

"means for resetting at least one of state variables of Next\_PDCP\_TX\_SN and TX\_HFN ... corresponding to SRB1 to 0 to initial values" (board's underlining).

In claim 1 of the fifth auxiliary request, the term "initial values" has been replaced by "0", i.e. zero. Since "zero" need not necessarily be an "initial value", the scope of claim 1 has shifted, and hence extended within the meaning of Article 123(3) EPC.

4.2 The respondent argued that "zero" is comprised within the set of "initial values", so that there was no shifting or extension of the scope. The board however does not agree, since "initial values" can be arbitrarily defined as a set not including zero.

4.3 Claim 1 of the fifth auxiliary request therefore does also not comply with Article 123(3) EPC.

5. ***Sixth to twelfth auxiliary requests - admittance***  
*(Article 13(1) RPBA 2020)*

5.1 The requests were filed in response to the board's preliminary opinion, i.e. after the filing of the response to the statement of grounds of appeal. Amendments filed at this late stage of the proceedings may only be admitted at the discretion of the board (Article 13(1) and (2) RPBA 2020). Although the board has severe doubts whether the filing of the respective auxiliary requests at such a late stage of the proceedings could indeed be justified by exceptional circumstances within the meaning of Article 13(2) RPBA 2020, it applied - in the respondent's favour - mainly the criteria of Article 13(1) RPBA 2020 when exercising its discretion in the present case.

5.2 In accordance with Article 13(1) RPBA 2020, "[t]he Board shall exercise its discretion in view of, inter alia, the current state of the proceedings, the suitability of the amendment to resolve the issues which were admissibly raised by another party in the appeal proceedings or which were raised by the Board, whether the amendment is detrimental to procedural economy, and, in the case of an amendment to a patent application or patent, whether the party has demonstrated that any such amendment, prima facie, overcomes the issues raised by another party in the appeal proceedings or by the Board and does not give rise to new objections" (board's emphasis).

In other words, amended requests need not be admitted if they comprise claims which are not *prima facie* allowable.

5.3 Claim 1 of each of the sixth to twelfth auxiliary requests is not *prima facie* allowable for reasons of non-compliance with either Article 76(1), 123(3) or 56 EPC. The reasons are the following:

5.3.1 Re the **sixth and ninth auxiliary requests:**

The objection pursuant to Article 123(3) EPC applies, *mutatis mutandis* (cf. point 4 above).

5.3.2 Re the **seventh, eighth and eleventh auxiliary requests**

The objection pursuant to Article 76(1) EPC applies, *mutatis mutandis* (cf. point 3 above).

5.3.3 Re the **tenth and twelfth auxiliary requests**

Although the objections raised above pursuant to Articles 76(1) and 123(3) EPC are considered to be overcome, claim 1 of each of these requests is still not *prima facie* allowable as their respective subject-matter does apparently not involve an inventive step (Articles 52(1) and 56 EPC). The essential reasons are as follows:

- Claim 1 of each request does not validly claim priority as it does not relate to the "same invention" as the priority document within the meaning of Article 87(1) EPC.

- The relevant part of the priority document **US 61/074,989** on page 8/9, last paragraph, sets out the context of the claimed embodiment as follows:

"Resumption of SRB1 and SRB2 - It is specified in [1] that a new AS base-key (KeNB) is always derived" (NB: reference [1] = **D2**).

This embodiment as disclosed in the priority document is therefore described in the context of an E-UTRAN "specified by D2", especially the aspect that a new AS base-key (KeNB) is always derived. Claim 1 of each of the tenth and twelfth auxiliary requests is however not limited to an E-UTRAN specified by document D2. Consequently, claim 1 respectively of the tenth and twelfth auxiliary requests is more general than the disclosure of the priority document, since, *inter alia*, an E-UTRAN is embraced in which a new AS base-key is not always derived following a re-establishment procedure. The "same invention" requirement of Article 87(1) EPC is therefore not met.

The respondent counter-argued that claim 1 comprised the feature "E-UTRAN", from which the limitations were implicit. However, the board notes that the term "E-UTRAN" is not a clearly defined entity since, at the patent's priority date, the specifications of the E-UTRAN were not settled but in a continuous state of development, as is indeed shown by the content of the priority document itself.

- As the priority is not valid, documents **D3** and **D4** belong to the state of the art within the meaning

of Article 54(2) EPC.

- As these documents have the same date and are both specifications for different aspects of an E-UTRAN, the skilled person would have considered them in combination.

In accordance with **D4**, at re-establishment, signal bearer SRB1 is resumed (cf. D4, section 5.3.7.1). Subsequently, SRB2 is re-established, i.e. resumed (cf. D4, section 5.3.5.3). Further, in accordance with D4, section 5.3.1.2, last paragraph, the HFN needs to be synchronised between the UE and the eNB (i.e. E-UTRAN). This is in any case self-evident in order that SDUs ciphered by the E-UTRAN can be correctly deciphered by the UE (i.e. for downlink communication), since the ciphering key is related to the value COUNT, which is itself dependent on HFN (idem). Finally, **D3** discloses that, for SRBs at re-establishment, the UE resets the variables Next\_PDCP\_RX\_SN and RX\_HFN to zero (cf. D3, section 5.2.2.3). Therefore, it would apparently have been obvious that the variables Next\_PDCP\_TX\_SN and TX\_HFN in the E-UTRAN must also be reset to zero in order to maintain synchronisation, exactly as is explicitly defined for these variables in the UE for the uplink direction (cf. D3, section 5.2.1.3).

Consequently, the subject-matter of claim 1 of respectively the tenth and twelfth auxiliary requests *prima facie* does not involve an inventive step (Articles 52(1) and 56 EPC).

- 5.4 With regard to admittance of the present auxiliary requests, the appellant argued that these should be

admitted in view of the inconsistency throughout the examination, opposition and appeal proceedings with regard to the objections raised, so that it was unfair that an applicant or patent proprietor had to anticipate every possible development of the appeal proceedings by filing auxiliary requests in response to the appeal. In this light, the very strict application of the new Rules of Procedure of the Boards of Appeal, in particular Article 13(2) RPBA 2020, should not be applied, all the more so as the appeal had been filed before the new RPBA had come into force.

5.5 However, the board notes that in accordance with case law, the admittance criterion of "*prima facie* allowability" was well-established under the previous Rules of Procedure of the Boards of Appeal (cf. Article 13(1) RPBA 2007). Therefore, it is not necessary to apply Article 13(2) RPBA 2020 to the present case when deciding whether to admit the auxiliary requests. That notwithstanding, the new RPBA including its transitional provisions under Article 25 RPBA 2020 were publicly known and had been available well in advance of their entering into force, which was again almost 18 months before the present auxiliary requests were filed.

5.6 Consequently, the board did not admit any of the **sixth to twelfth auxiliary requests** into the appeal proceedings (Article 13(1) RPBA 2020).

6. As there is no allowable request, it follows that the patent must be revoked.

## Order

### For these reasons it is decided that:

1. The objection under Rule 106 EPC is dismissed.
2. The decision under appeal is set aside.
3. The patent is revoked.

The Registrar:

The Chair:



B. Brückner

K. Bengi-Akyürek

Decision electronically authenticated