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**Datasheet for the decision
of the Enlarged Board of Appeal
of 22 May 2015**

Case Number: R 0018/14
Appeal Number: T 0786/11 – 3.5.05
Application Number: 05016910.1
Publication Number: 1641169
IPC: H04L1/18
Language of the proceedings: EN

Title of invention:

Enhanced SDU discard procedure for a special data segmentation
in a wireless communication system

Patent Proprietor:

Innovative Sonic Limited

Opponent:

Telefonaktiebolaget LM Ericsson

Headword:

-

Relevant legal provisions:

EPC Art. 112(a)
EPC R. 106, 107

Keyword:

Petition clearly unallowable.

Decisions cited:

G 0006/95, R 0001/08, R 0010/10, R 0012/09, R 0020/10

Catchword:

Substantial procedural violation – right to be heard –
arguments and logic of a line of reasoning.



Case Number: R 0018/14

D E C I S I O N
of the Enlarged Board of Appeal
of 22 May 2015

Petitioner:
(Patent Proprietor)

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Decision under review:

**Decision of the Technical Board of Appeal
3.5.05 of the European Patent Office of
12 June 2014.**

Composition of the Board:

Chairman: W. van der Eijk
Members: C. Vallet
U. Oswald

Summary of Facts and Submissions

- I. The present petition for review relates to decision T 0786/11 dated 12 June 2014 issued by Board 3505 revoking European patent No. 1641169. The petitioner is the patent proprietor Innovative Sonic Limited.
- II. The opposed patent related to an enhancement of the packet discarding algorithm of the prior art for discarding service data units (SDUs) transmitted from a wireless sender to a receiver via one or more packet data units (PDUs) in GPP-based networks. This enhancement is focused on the very specific feature that the last discarded SDU fits perfectly into a PDU so that the following PDU contains only padding data which avoids an unnecessary reset procedure. The decision under review found in particular that granted claim 1 was not allowable under Article 54 EPC, which is at issue in the present case.
- III. The petitioner argued that its right to be heard has been fundamentally violated in that the Board held during the oral proceedings that the embodiment explained on page 7, lines 15 to 18 of document A1 fell within the broad ambit of claim 1 of the opposed patent as a specific embodiment thereof. However, the reasoning supporting this view, based on incorrect findings, has not been exposed during the oral proceedings and became only evident through the written decision, so that the procedural defect could not be raised at the oral proceedings.

The petitioner identified three main findings in the written decision on which it allegedly had no effective

opportunity to comment before said decision was notified, which are as follows:

- It is in principle entirely irrelevant for the assessment of novelty whether a specific embodiment of a prior-art document provides the same result as the solution claimed for each and every condition or scenario devisable. The argument that different results necessarily mean different solutions is incorrect from a logical point of view.

- The check for "no new SDUs" according to the claims could be done in different ways.

- The phrase in A1 page 7, line 7 "the rest of the AMD PDU ... is padding" does not mean that the respective PDU may include a new, undiscarded SDU besides padding data by virtue of the teaching of A1, especially in view of the fact that also A1 attempts to avoid wasting radio resources by unnecessary re-transmissions of PDUs.

Thus in the petitioner's view the debate which took place during oral proceedings lacked essential aspects in respect of novelty of independent claim 1; these only appeared in the reasoning of the written decision and were entirely new for the petitioner.

IV. The Enlarged Board of Appeal issued a communication setting out its provisional opinion that the petition, although admissible, was not allowable due to a lack of convincing reasoning and evidence as regards the alleged procedural violation. The Enlarged Board expressed the view that the decision under review was based on grounds on which the petitioner had had the

opportunity to comment and cited the established jurisprudence under which no EPC provision required that a Board of Appeal advise a party in advance on all foreseeable arguments in favour or against a request.

V. Oral proceedings were held on 22 May 2015. In order to clarify its written submissions the petitioner explained that when a Board of Appeal intends, as in the present case, to depart from a common logical reasoning, it should inform the parties in advance so that they have an opportunity to react in an appropriate manner. The petitioner drew a distinction between the existing case law as regards simple arguments and a reasoning conducted on the basis of a different logic than the one the parties could have expected, which came as a surprise when reading the written decision.

VI. The petitioner's requests are as follows:

- To set aside the contested decision and to reopen the appeal proceedings before the Board of Appeal,
- To order that the members of the Board of Appeal who participated in the decision under review be replaced,
- To conduct oral proceedings in case the Enlarged Board of Appeal considers the petition for review as inadmissible or unsubstantiated,
- To order the reimbursement of the fee for petition for review if the proceedings before the Board of Appeal are reopened.

Reasons for the Decision

Admissibility of the petition

1. The provisions of Article 112a(4) and Rule 107 EPC have been complied with.
2. Rule 106 EPC provides that a petition under Article 112a, paragraph 2(a) to (d) is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings.
3. In the present case the petitioner did not raise any objection in the course of oral proceedings before the Board.
4. The minutes of the oral proceedings provide no indication as regards the content of the discussion as to the merit of the case relating to novelty of claim 1. However, as the petitioner's argumentation stand, the Enlarged Board understands that the above cited three main issues, raised by the petitioner during the written phase of the proceedings, were actually discussed during the oral proceedings, which is indeed undisputable when reading the decision itself (point 3 of the reasons), but that the petitioner takes the view that the written reasoning was based on an unusual logic which came entirely as a surprise and deprived him of the opportunity to comment.

5. To the extent that the petition can be understood in the way explained during the oral proceedings before the Enlarged Board, and in the petitioner's interest, it has to be considered that the provision of Rule 106 EPC *in fine* applies.
6. The petition is therefore admissible to that extent.

Allowability of the petition

7. To succeed under the ground of Article 112a(2)c) EPC, the petitioner has to establish firstly that the decision under review is based on an assessment or a reasoning relating to grounds or evidence which it was not aware of and had no opportunity to comment upon, and secondly that a causal link exists between this procedural defect and the final decision; otherwise the alleged defect could not be considered decisive and hence not fundamental (see R 01/08, point 3 of the reasons).
8. No provision of the EPC requires that a Board of Appeal should provide a party in advance with all foreseeable arguments for or against a request (see G 6/95, OJ EPO 1996, point 5 ff., page 657; R 01/08, point 2 of the reasons; R 10/10, point 2.5 of the reasons; R 12/09, point 13 of the reasons; and R 20/10, points 6 and 7 of the reasons).
9. The reasoning developed by the Board of Appeal in respect of independent claim 1 contains a detailed line of argumentation provided by the respondent/patent proprietor itself during the written procedure and the oral proceedings relating to the novelty objection (see

points 3.1.4 and 3.1.5 of the reasons). This shows that the debate concentrated precisely on the three points mentioned in the petition for review.

The petitioner not only did not challenge the way the arguments have been reported in the decision but also admitted that this debate really did take place as mentioned. It is thus beyond any doubt that the outcome of the decision under review regarding claim 1 of the patent as granted, which was found to lack novelty, is based on grounds on which the petitioner had the opportunity to comment. In point 3.1.6 of the reasons the board answered all the arguments under scrutiny.

10. The argument emphasised at the oral proceedings before the Enlarged Board, namely that the written decision was based on an unexpected or unforeseeable chain of logic which led to a mistaken outcome which the petitioner had no opportunity to contest, is not convincing. The Enlarged Board understands that the petitioner disagrees with the reasoning, which is obviously not a matter for a petition for review since it is related to the substance of the decision itself and not to an infringement of Article 113(1) EPC. As a matter of fact, the logic of a deciding body and the logic of a party might differ and lead to discontent on the latter's part. However, this does not mean that the arguments of the party have not been heard. It only means that the deciding body has another understanding of the issue.

The difference the petitioner attempts to draw between an argument and the logic of a line of reasoning appears to be artificial. In both cases it concerns the way the deciding body has understood and/or construed

the issue it had to decide upon, and has formulated this in the grounds for the decision.

If the Enlarged Board were to rule otherwise this would mean that the Boards of Appeal should send a draft to the parties before issuing a decision. The right to be heard does not extend that far.

The situation might be different if the board had clearly misunderstood or ignored an argument put forward by a party and thus issued a decision the reasoning of which did not take into account the true debate. This is however clearly not the case here.

11. The Enlarged Board of Appeal considers that no fundamental procedural violation occurred in the present case. Consequently, the petition for review is clearly unallowable.

Order

For these reasons it is decided that:

The petition is unanimously rejected as being clearly unallowable.

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk