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**Datasheet for the decision
of 10 January 2014**

Case Number: T 0820/10 - 3.5.05

Application Number: 05740146.5

Publication Number: 1743445

IPC: H04L1/18, H04Q7/38

Language of the proceedings: EN

Title of invention:

Packet data transmitting method and mobile communication system using the same

Applicant:

LG Electronics Inc.

Headword:

New evidence/LG

Relevant legal provisions:

EPC Art. 113(1), 111(1)

EPC R. 103(1)(a)

RPBA Art. 11

Keyword:

Evidence cited for the first time in appealed decision

Violation of the right to be heard - (yes)

Immediate remittal to first instance - (yes)

Reimbursement of appeal fee - (yes)

Decisions cited:

R 0012/12, J 0007/82

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 0820/10 - 3.5.05

**D E C I S I O N
of Technical Board of Appeal 3.5.05
of 10 January 2014**

Appellant: LG Electronics Inc.
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 30 November
2009 refusing European patent application
No. 05740146.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair: A. Ritzka
Members: K. Bengi-Akyuerek
F. Blumer

Summary of Facts and Submissions

I. The appeal is against the decision of the examining division, posted on 30 November 2009, to refuse European patent application No. 05740146.5 on the grounds of lack of inventive step (Article 56 EPC) with respect to a main request and first to third auxiliary requests, having regard to the disclosure of

D1: WO-A-02/065797

combined with the skilled person's common general knowledge as evidenced by

D1a: "report TR 25.832 published by the 3GPP standardisation body".

As regards the assessment of inventive step, the decision under appeal also makes reference to a textbook, labelled by the board as

D1b: excerpt from the textbook of S. Lin and D. J. Costello: "Error Control Coding: Fundamentals and Applications", chapter 15.4, pp. 477-478, 1983,

as support for the proper interpretation of D1.

A fourth auxiliary request was not admitted into the examination proceedings under Rule 137(3) EPC on the ground that it was late-filed and not clearly allowable under Articles 123(2) and 56 EPC.

II. Notice of appeal was received on 16 December 2009. The appeal fee was paid on the same day. With the statement setting out the grounds of appeal, received on

25 March 2010, the appellant re-filed the claims according to the main request underlying the appealed decision as a main request and submitted new claims according to first to fifth auxiliary requests. It requested that the decision of the examining division be set aside and that a patent be granted on the basis of the main request or any of the auxiliary requests. The appellant also stated that the applicant had not been given any opportunity to present its arguments with respect to document D1a, which was introduced in the decision under appeal to substantiate the common general knowledge of the skilled person. In addition, oral proceedings were requested as an auxiliary measure.

- III. With a communication of the board pursuant to Rule 100(2) EPC, the appellant was informed that the decision under appeal was based on evidence on which the applicant had not had an opportunity to present its comments, that therefore the examining division had committed a substantial procedural violation, and that the board intended to remit the case to the department of first instance in accordance with Article 11 RPBA and to order reimbursement of the appeal fee under Rule 103(1)(a) EPC. Furthermore, given that the board saw no reason to hold oral proceedings to arrive at its decision, the appellant was invited to indicate whether its request for oral proceedings was still maintained.
- IV. By letter dated 19 December 2013, the appellant withdrew its request for oral proceedings.
- V. Claim 1 of the main request reads as follows:

"A method for processing Hybrid Automatic Repeat Request, hereinafter HARQ, feedback information in a

mobile terminal of a mobile communication system, wherein the mobile terminal (120) communicates with one base station (110) via two or more sectors (y1-y3) associated with the one base station (110), the method comprising:

transmitting from the mobile terminal (120) an Enhanced Dedicated Channel, hereinafter E-DCH, signal to the base station (110) through two or more sectors (y1-y3);

receiving at the mobile terminal (120) one common ACK/NACK signal for each transmitted E-DCH signal from each of the two or more sectors by applying a HARQ transmission scheme, wherein the status of the common ACK/NACK signal is based on a decoding of the transmitted E-DCH signal at the one base station;

combining the multiple received common ACK/NACK signal into one combined ACK/NACK information when the mobile terminal knows that the mobile terminal is communicating with the one base station through the two or more sectors."

Reasons for the Decision

1. The appeal is admissible.
2. *Violation of the right to be heard*
 - 2.1 The procedural principle of the "right to be heard" is enshrined in Article 113(1) EPC. Article 113(1) EPC provides:

"The decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments."

The principle of the right to be heard under Article 113(1) EPC is so fundamental that denial of it with respect to the *ratio decidendi* of any decision taken by a department of the EPO constitutes - in itself - a substantial procedural violation and justifies, for that reason alone, that the decision under appeal is set aside, that the case is remitted to the first-instance department, and that reimbursement of the appeal fee is to be considered equitable pursuant to Rule 103(1)(a) EPC. The right to be heard self-evidently also applies to evidence related to establishing the skilled person's common general knowledge at the application's filing date (see e.g. R 12/12, point 2). Furthermore, even if the appellant has not requested reimbursement of the appeal fee, the Boards of Appeal may order such a reimbursement in accordance with Article 114(1) EPC (cf. J 7/82, OJ 1982, 391, point 6).

2.2 In the present case, the decision of the examining division to refuse the application was based on the ground of lack of inventive step (Article 56 EPC) in view of D1 combined with the skilled person's common general knowledge as regards the former main request and first to third auxiliary requests. The skilled person's common general knowledge was evidenced by documents D1a and D1b (cf. appealed decision, sections 1.1 and 5.1). However, evidence D1a, which was annexed to the appealed decision, and evidence D1b had never been referred to during the examination proceedings, i.e. they were both cited for the very first time in the appealed decision itself (cf. section 1.1, first paragraph, page 4, third paragraph and section 5.1, second paragraph). As a matter of fact, the applicant has had no opportunity to present its comments in relation to D1a and D1b. In this context,

the appellant pointed out, in its statement setting out the grounds of appeal, that the applicant had not been given any opportunity to present its arguments with respect to D1a (see section 3.8) but did not request reimbursement of the appeal fee.

2.3 For the purpose of assessing whether or not the appealed decision was based on grounds or evidence on which the applicant has had an opportunity to present its comments, the board finds it necessary to determine if D1a and D1b were presented only as additional, voluntary information, e.g. for illustration purposes, or as evidence on which the finding of lack of inventive step at least with regard to the main request was effectively based.

2.4 In this regard, it is apparent to the board that D1b was cited as evidence that the disclosure of page 7, lines 13-16 in D1 represented a "hybrid ARQ" system as claimed in claim 1 in view of the common general knowledge of the skilled person (cf. appealed decision, page 2, section 1.1, first paragraph), while D1a was quoted as evidence that "softer handovers" as supposedly implied by the features of claim 1 formed part of the skilled person's common general knowledge (cf. appealed decision, page 4, third paragraph). As a consequence, the main request was refused by the examining division based on the evidence D1, D1a, and D1b. Apparently, documents D1a and D1b were sufficiently relevant to the examining division to cite them in order to develop its chain of reasoning as regards the question of inventive step. In particular, D1b seems to have been cited in the appealed decision as a direct response to the counter-arguments provided by the applicant in relation to the definition of a hybrid ARQ (HARQ) scheme (cf. minutes of the

first-instance oral proceedings, section 6: "... The applicant vehemently objected to this analysis, arguing that D1 merely suggests to combine ARQ with FEC which, in his view, is not equivalent to HARQ ...").

2.5 For the sake of completeness, the board also notes that the statement setting out the grounds of appeal signifies that the applicant could have reasonably been expected to put forward potentially persuasive arguments on the relevance of at least document D1a regarding the assessment of inventive step - if it had actually been given the opportunity to comment on it (cf. page 11, section 3.8). However, for whatever reasons, the examining division did not give this opportunity, nor did it rectify the appealed decision by way of interlocutory revision under Article 109(1) EPC.

2.6 In conclusion, the decision under appeal relied upon evidence on which the applicant did not have an opportunity to present its comments. This clearly violates the right to be heard within the meaning of Article 113(1) EPC and therefore constitutes a substantial procedural violation in the sense of Rule 103(1)(a) EPC as well as a fundamental deficiency apparent in the first-instance proceedings within the meaning of Article 11 RPBA. For this reason alone, the appeal is to be considered allowable, the appeal fee is to be reimbursed, and the case is to be immediately remitted to the department of first instance without any further examination as to its merits.

3. In view of the above, the board has decided to set the decision under appeal aside, to order reimbursement of the appeal fee under Rule 103(1)(a) EPC, and to remit

the case to the examining division pursuant to Article 11 RPBA and Article 111(1) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. Reimbursement of the appeal fee is ordered.

The Registrar:

The Chair:



K. Götz

A. Ritzka

Decision electronically authenticated