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**Datasheet for the decision
of 11 December 2024**

Case Number: T 1841/23 - 3.5.05

Application Number: 10700814.6

Publication Number: 2387844

IPC: H04L65/1069, H04L65/401,
H04L65/1083, H04L65/1094

Language of the proceedings: EN

Title of invention:
Managing associated sessions in a network

Patent Proprietor:
Koninklijke KPN N.V.

Opponents:
(1) Beijing Xiaomi Software Co., Ltd ("opponent 1")
(2) Oropo Germany GmbH ("opponent 2")

Headword:
Intervention during parallel UPC proceedings/KPN

Relevant legal provisions:
EPC Art. 105, 112a(1), 113(1), 123(2)
EPC R. 76(2)(c), 89, 106
RPBA 2020 Art. 10(5), 10(6), 14, 15(2), 15(6)
Explanatory remarks to RPBA 2020 (EPO OJ, Suppl. 2/2020)

Keywords:

Postponement of oral proceedings - (no): no "serious reasons"
Postponement of decision on appeal - (no): no "serious reasons"
Added subject-matter (yes)
Objection under Rule 106 EPC - dismissed

Decisions cited:

G 0001/94, T 0392/97, T 1961/09, T 1414/18

Catchword:

1. While an admissible intervention is to be treated as an opposition (Article 105(2) EPC), its filing shortly prior to the oral proceedings before a board does not generally excuse the proprietor (or the other parties), and in particular it does not hand them a voucher for more time. Its concrete implications for opposition appeal proceedings are rather to be determined on a case-by-case basis, under the provisions of the EPC and the RPBA (see Reasons 4.5).
2. Nor are opposition appeal proceedings designed to serve as a placeholder for tactical considerations in parallel proceedings for infringement. They are rather an existential challenge to the title, on the basis of which enforcement is pursued in the infringement proceedings, and parameters such as legal certainty and procedural economy are also involved. Any difficulties for the proprietor in drafting auxiliary requests that also provide the best scope of protection, considering the ongoing infringement proceedings, are not a reason to delay the opposition appeal proceedings (see Reasons 4.6).



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Case Number: T 1841/23 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 11 December 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
28 September 2023 concerning maintenance of the
European Patent No. 2387844 in amended form.**

Composition of the Board:

Chair	K. Bengi-Akyürek
Members:	J. Eraso Helguera
	C. Almberg

Summary of Facts and Submissions

- I. This case concerns the appeal filed by opponent 1 (appellant) on 26 October 2023 against the interlocutory decision to maintain the opposed patent as amended in accordance with a "main request" filed during the opposition proceedings.
- II. On appeal, opponent 1 sought revocation of the patent, introducing a new technical document. In reply, the proprietor (respondent) sought dismissal of the appeal, submitting fourteen auxiliary requests.
- III. Following information from the Unified Patent Court (henceforth "the UPC") that the opposed patent was the subject of parallel infringement proceedings, the board indicated, by the registrar's communication of 24 September 2024, that it had accelerated the present appeal proceedings of its own motion, adopting a strict framework (see Article 10(5) and (6) RPBA).

On the same day, the board summoned the proprietor and opponent 1 to oral proceedings to be held before the board on 11 December 2024.
- IV. By communication of 21 October 2024, the board informed the parties of its preliminary opinion that the patent was most likely to be revoked as the proprietor's main request was not allowable for added subject-matter, and for lack of an inventive step over prior-art document D3, and as the auxiliary requests were not to be admitted, or, in any case, were not allowable for added subject-matter (henceforth "the preliminary opinion").

- V. By letter of 8 November 2024, the proprietor responded to the preliminary opinion, withdrawing some auxiliary requests, maintaining others and introducing a new one.
- VI. A notice of intervention was filed on 18 November 2024, however with an evidential deficiency, which the board, by communication of 21 November 2024, invited the intervener to remedy: the provision of the UPC's docket number was not sufficient to prove that proceedings for infringement of the opposed patent had been instituted before the UPC, against the intervener, not more than three months earlier (see Article 105(1)(a) and Rule 89 EPC). To save time, the proprietor and opponent 1 were informed, by a further communication of 21 November 2024, of the (not yet deemed admissible) intervention.

By letter of 21 November 2024, the proprietor requested postponement of the oral proceedings to get sufficient time to respond to the new submissions made in the notice of intervention, providing arguments relating to the right to be heard, the board's issuing of a new substantive communication, and the unavailability of a technical expert (henceforth "the first postponement request").

With a further letter of 21 November 2024, the intervener submitted proofs to overcome the evidential deficiency (see statement of claim; notification of service; confirmation of service).

- VII. By communication of 26 November 2024, the board stated that it deemed the intervention admissible, treating it as an opposition and renaming the intervener as "opponent 2". It invited the proprietor and opponent 1 to file observations on the notice of intervention by no later than 4 December 2024, indicating, in

particular, that it maintained its preliminary opinion dated 21 October 2024 (see point IV above). The board further refused the first postponement request as neither the intervention nor the expert's unavailability amounted to serious reasons within the meaning of Article 15(2) RPBA; as its decision was likely to be based only on grounds and evidence addressed in said opinion, i.e. on which the parties had been and would be heard; and as there was no need for a further substantive communication.

By letter of 26 November 2024, which crossed with the board's communication of the same date, opponent 1, *inter alia*, contested the first postponement request.

VIII. By letter of 4 December 2024, the proprietor requested that the board reconsider its refusal to postpone the oral proceedings (henceforth "the reconsideration request", see pages 1 and 2 of that letter). At the same time, the proprietor provided "a provisional response to the additional points raised in the intervention", introducing two new technical documents (see pages 2 to 32). In support of its request, it argued in essence as follows. Even in accelerated proceedings, merely two weeks to fully respond to the notice of intervention, corresponding to a new opposition, would violate Article 113(1) EPC. Any procedural decision taken prior to the oral proceedings before the board that assumes a particular outcome of those proceedings would prejudge the final decision and violate the very aim and purpose of the right to be heard under Article 113(1) EPC. Each of these procedural violations would be substantial.

By a further letter of 4 December 2024, opponent 1 responded to the notice of intervention.

IX. By letter of 6 December 2024, opponent 2 made further submissions, however not in respect of the reconsideration request.

By another letter of 6 December 2024, the proprietor recalled the reconsideration request, and replied to opponent 1's letter of 4 December 2024.

X. By communication of 9 December 2024, the board rejected the proprietor's reconsideration request, basically for the following reasons. Whether to postpone the oral proceedings was a discretionary matter, and the present circumstances resembled those listed in Article 15(2) (c) RPBA. The proprietor's two arguments invoking Article 113(1) EPC were unconvincing: any insufficient time to fully respond to the notice of intervention had no direct bearing on the date for oral proceedings; any procedural decision assuming the outcome of oral proceedings would not be prejudicial. Rather, preliminary, non-binding appreciations were prescribed and practised. On postponement, which was the subject of said decision, the proprietor had indeed been heard.

XI. Oral proceedings before the board were held on 11 December 2024 as originally scheduled.

At the outset, the proprietor requested again that the oral proceedings be postponed. In the alternative, it requested that the board's decision on the appeal be postponed. In each scenario, the proceedings should continue in writing to give the proprietor enough time to respond to the notice of intervention.

The opponents contested these requests.

After the postponement requests had been discussed and a negative conclusion conveyed, and after the objection of added subject-matter had been debated and a negative conclusion conveyed for all pending claim requests, the proprietor submitted an objection under Rule 106 EPC that was first discussed and then dismissed.

The final requests of the parties were as follows.

- The opponents requested that the appealed decision be set aside and that the patent be revoked.
- The proprietor requested that the appeal be dismissed, i.e. that the patent be maintained as amended based on the claims of the **main request** found allowable in the appealed decision. In the alternative, it requested that the patent be maintained as amended based on the claims of one of **auxiliary requests XIII, XIV, XIV-A and XV**, all filed with the letter dated 4 December 2024.

At the end of the oral proceedings, the chair announced the board's decision, *inter alia*, to revoke the opposed patent.

XII. The next day, the chair informed the panel of the UPC, before which the parallel infringement proceedings were pending, by email that the patent had been revoked.

XIII. Claim 11 of the **main request** reads as follows:

"A user equipment for use in a system for managing associated sessions forming a group of sessions, from within a network, separate from other sessions that are not part of the group, the system comprising:

- a user equipment configured for providing a composition session identifier for associating sessions between the network and the user equipment in a network,

wherein said providing comprises the user equipment generating the composition session identifier;

the user equipment further configured for initiating the composition session,

wherein said initiating comprises the user equipment sending a request for initiating the composition session to the network element,

the request comprising the composition session identifier,

the composition session being a signaling session between the user equipment and the network element for the managing of associated sessions;

and the user equipment further configured for exchanging the composition session identifier with the network element;

- a network element configured for managing associated sessions between the network and the user equipment;

for receiving a request for initiating a composition session from the user equipment, the request comprising the composition session identifier,

the composition session being a signaling session between the user equipment and the network element for the managing of associated sessions;

for exchanging the composition session identifier with the user equipment; and,

for associating two or more sessions between the network and the user equipment with the composition session identifier by exchanging the composition session identifier;

the user equipment configured for initiating the composition session;

the user equipment comprising:

- an ID generator for generating the composition session identifier for associating, in a network, sessions between the network and the user equipment;

- a multimedia client configured for receiving the composition session identifier from the ID generator;

for sending a request for initiating the composition session to a network element,

the request comprising the composition session identifier,

the composition session being a signaling session between the user equipment and the network element for the managing of associated sessions;

for exchanging the composition session identifier with the network element;

for initiating one or more sessions with the network element; and for exchanging the composition session identifier with the network element during the set up of the sessions."

Claim 11 of **auxiliary request XIII** differs from claim 11 of the main request in the insertion of the wording *"wherein the signaling session only needs exchange of signalling messages"* right after the phrase *"for the managing of associated sessions"*.

Claim 10 of **auxiliary request XIV** differs from claim 11 of auxiliary request XIII in

- the insertion of the term *"media"* right before each occurrence of the term *"sessions"*,
- the replacement of the phrase *"wherein the signaling session"* by *"wherein the signalling session"*,

- the deletion of the word "and" right before the expression "*for exchanging the composition session identifier*" and
- the addition of the following wording at the very end of the claim:
"; wherein the user equipment is further configured for modifying the composition session by adding one or more media sessions to the composition session, by terminating, or modifying one or more media sessions in the composition session and/or by transferring one or more media sessions from the composition session to a further composition session or outside the composition session".

Claim 10 of **auxiliary request XIV-A** differs from claim 10 of auxiliary request XIV in the insertion of the wording "*the composition session identifier identifying a composition session,*" right after the phrase "*between the network and the user equipment in a network,*".

Claim 10 of **auxiliary request XV** differs from claim 10 of auxiliary request XIV in the deletion of the clause "*modifying the composition session by adding one or more media sessions to the composition session, by terminating, or modifying one or more media sessions in the composition session and/or by*".

Reasons for the Decision

1. EARLY REQUESTS FOR POSTPONEMENT
 - 1.1 In support of its requests for postponement of the oral proceedings before the board or of the board's decision on the appeal, the proprietor submitted, at the outset

of those oral proceedings, essentially the following arguments.

- The proprietor had not yet had a full opportunity to respond to the notice of intervention. In particular, two weeks to submit written comments on it was not sufficient, neither under Article 113(1) EPC nor under Article 14 RPBA, which refers to a time period of four months (see Article 12(1)(c) RPBA) also taking into account the acceleration of the appeal proceedings.
- The intervention was to be treated as a new opposition. Although the objections were the same, new arguments were put forward in the notice of intervention. As the proceedings continued, the arguments of the two opponents also became entangled and the discussion turned into a tripartite debate. The appeal was thus not ready for a decision.
- According to decision **T 1961/09**, continuing oral proceedings could only be fair to the proprietor if the intervener did not make any submissions at all.
- Continuing with the oral proceedings, and deciding on the appeal would amount to substantial procedural violations.

1.2 Opponent 1 stressed that the objection of added subject-matter was simple and had been part of the opposition proceedings from the beginning. The board's preliminary opinion merely aligned with the notice of opposition. Opponent 2 agreed that the question to be answered was simple, contending that its own arguments were essentially the same as those of opponent 1.

- 1.3 As a first observation, the board notes that the two procedural requests made by the proprietor at the outset of the oral proceedings before it effectively asked it, at that early juncture, to either call off the hearing that had just begun, or to withhold, in advance, the final decision on the appeal.
- 1.4 *Board's exercise of discretion*
 - 1.4.1 Under Article 15(2) RPBA, a request of a party for a change of the date fixed for oral proceedings "may" be allowed if the party has put forward "serious reasons" which justify the fixing of a new date.
 - 1.4.2 Hence, the matter of postponement of the arranged oral proceedings is at the board's discretion.
 - 1.4.3 As guidance for the exercise of this discretion, two non-exhaustive ("include") lists of circumstances are provided, one in Article 15(2)(b) RPBA (henceforth "the b-list"), another in Article 15(2)(c) RPBA (henceforth "the c-list").
 - 1.4.4 The circumstance basically relied on by the proprietor, namely that a notice of intervention was lodged shortly before the scheduled oral proceedings before the board, does not appear expressly in either of the two lists. As acknowledged by the proprietor, the intervention is to be treated as an opposition (Article 105(2) and Rules 76, 77 and 89 EPC). However, contrary to the proprietor's claim that the newly filed opposition is something fundamentally different (see proprietor's letter of 4 December 2024, page 1), this circumstance indeed resembles the first item appearing in the c-list, i.e. the "filing of new requests, facts, objections, arguments or evidence" (item (i)), far more

than any item appearing in the b-list. Especially when considering the elements constituting an opposition (see Rule 76(2)(c) EPC).

- 1.4.5 Notably, the negative c-list is also more indicative ("as a rule, do not justify") than the positive b-list ("may justify"), and their juxtaposition suggests an overall restraint concerning changes of the date fixed for oral proceedings.
- 1.4.6 Already for this reason, the board found, at that stage of the oral proceedings, in its exercise of discretion, no reason to postpone the hearing.
- 1.5 *Assessment of proprietor's further arguments*
 - 1.5.1 The proprietor's argument, in effect invoking the right to be heard, that two weeks was an insufficient period to fully respond to the notice of intervention, has no bearing on the question of the date for oral proceedings as governed by Article 15(2) RPBA. The same applies to its complaint that new arguments were put forward in the notice of intervention, and that the discussion had developed into an intertwined tripartite debate.
 - 1.5.2 As the proprietor's core concern is the right to be heard, and since oral proceedings serve to protect that very right by providing another (and normally the final) opportunity for parties to present their comments, the continuation of the oral proceedings before the board could hardly and did not adversely affect the parties to the appeal proceedings, including the proprietor. Nor would the continued oral proceedings invariably lead to a situation where a decision was later taken on a basis on which the

parties had not been properly heard (see the board's caution in its communication of 9 December 2024, point 13.4.2). In this respect, the request for postponement of the arranged oral proceedings would seem counterproductive.

- 1.5.3 The proprietor's suggestion, invoking decision **T 1961/09**, that continuing the oral proceedings before the board could only be fair to the proprietor if the intervener did not make any submissions at all is not convincing. The implications of an intervention filed shortly before the arranged oral proceedings should reasonably be determined on a case-by-case basis. Fairness is certainly one consideration. Given the reservations indicated in Catchword 2 of said decision ("normally"; "may"), there seems to be no appreciable disagreement between the two boards in methodological terms. The different circumstances may explain why that board and the present one may have taken somewhat different paths, one hearing the arguments of the intervener, the other not, in the latter case as *agreed* by the intervener. Yet each board decided its case taking fairness into account (as discussed below), without adjourning the hearing, thereby also promoting procedural economy and legal certainty.

In the present case, unlike the one underlying **T 1961/09**, the notice of intervention did, in the now relevant parts, not raise any further objections or new issues, but only argued on old topics. At oral proceedings before the board, opponent 2 was also free to put forward and develop such arguments, which it also did to some extent, as had the proprietor. Further, to ensure fairness between the parties, the present board had taken pains, in the run-up to the oral proceedings before it, to concentrate the debate

on a few old, limited and highly relevant issues (see point 4.4.10 below, as well as the board's preliminary opinion, points 6.1 to 6.4 and 7.1 to 7.4; the board's communications of 26 November 2024, points 2.2 to 2.5, and of 9 December 2024, point 13.5.2). Hence, this board's views and those taken in the decision in **T 1961/09** do not contradict, rather the opposite.

- 1.5.4 In written proceedings (see the proprietor's letter of 4 December 2024, section II.4), the proprietor made the correct observation that an intervention filed shortly before the oral proceedings could lead to delays, referring to statements in decision **G 1/94** (see Reasons 7 and 8). However, those statements are not at odds with the statutory law entrusting the board with discretionary powers, and they do not add any weight to the proprietor's plea for postponement in the present case.
- 1.5.5 Further, in written proceedings (see the proprietor's letter of 4 December 2024, section II.5), the proprietor argued, again invoking the right to be heard, that a procedural decision (such as on postponement of oral proceedings), assuming the outcome of oral proceedings (such as the revocation of the patent), would prejudice the final decision and thus violate said right.

This argument is not persuasive either. If the proprietor were to argue that a refusal to grant a request for postponement of oral proceedings, such as the current (or the first postponement request, or the reconsideration request), is a "decision" within the meaning of Article 113(1) EPC, there would be no doubt that the proprietor has been heard; the present decision bears direct witness to that (as do the

proprietor's letters of 21 November and 4 December 2024, and the board's communications of 26 November and 9 December 2024). To communicate preliminary, non-binding views of the case, and its outcome, is indeed prescribed (Articles 15(1), second paragraph, and 17(2) RPBA), and commonplace in practice. In the present case, the board has expressed its view that the patent would "most likely" be revoked (the preliminary opinion, point 8.1), and that it was "likely" that the board's decision is to be based on its preliminary opinion, and not on the notice of intervention (board's communication of 26 November 2024, point 3.5). These opinions are not categorical, as implied by the proprietor, like the statement "will be refused", which was disqualified by the deciding board in decision **T 1414/18** (Reasons 5.1). Rather, they constitute open-ended statements, as stressed in said decision, using "likely consequence" as a contrast (Reasons 5.2).

1.5.6 As regards the upfront request for postponement of a decision on the appeal, the board notes that oral proceedings and the announcement of such a decision often coincide, but they are not the same. Under Article 15(6) RPBA, the board shall ensure that each case is "ready for decision at the conclusion of the oral proceedings", unless there are "special reasons" to the contrary. Before the oral proceedings are closed, the decision "may be announced" orally by the chair of the board.

1.5.7 It is thus only towards the end of oral proceedings before it that a board assesses whether the case is ready for decision, not at their beginning. If the case is not ready, for example because the right to be heard could not be respected, the proceedings are typically continued in writing (as emphasised in the board's

communication of 9 December 2024, point 13.4.2). In this respect, the request for postponement of the decision on the appeal seemed premature.

1.5.8 As a result, the proprietor's requests for postponement were to be refused and the oral proceedings continued, with the objection of added subject-matter as the next issue to be discussed.

2. MAIN REQUEST

Claim 11 of the main request includes, *inter alia*, the following feature (see point XIII above):

F3 a multimedia client configured [...] for sending a request for initiating the composition session to a network element, the request comprising the CSID.

2.1 *Added subject-matter (Article 123(2) EPC)*

2.1.1 In Reasons 14.3 of the appealed decision, the opposition division found that the application as filed disclosed at page 7, lines 14 to 18, that the method comprised the "UE sending a request for initiating a composition session from the user equipment to the network element, the request comprising the CSID". It also disclosed at page 10, lines 25 to 33, that the "multimedia client" was comprised in the "user equipment" and that the "multimedia client" was configured "for initiating a composition session". Since the initiation of the composition session involved the "sending of a request for initiating the session" by the "user equipment" (page 7, lines 14 to 18) and the "multimedia client" of the user equipment was configured "for initiating the composition

session" (page 10, lines 25 to 33), it was directly and unambiguously derivable that the "multimedia client" was configured for sending the "request for initiating the composition session".

2.1.2 Opponent 1 submitted that the application as filed did not disclose a "multimedia client" configured "for *sending a request* for initiating the composition session to a network element" (board's emphasis), i.e. **feature F3**.

2.1.3 The proprietor acknowledged that the application as filed did not provide a literal basis for feature F3. However, this was not required by the established jurisprudence of the Boards of Appeal. In particular, the proprietor submitted the following arguments.

- Feature F3 had a direct and unambiguous basis in the application as filed. It did not provide the skilled person with new information that was not part of this original application. Page 7, lines 14 to 18, of the original application already disclosed that the user equipment was "configured to send a request for initiating the composition session". Furthermore, page 10, lines 25 to 33, taught the skilled person that the user equipment contained a "multimedia client configured for initiating a composition session". The skilled person was therefore directly and unambiguously taught that "a user equipment comprises a multimedia client that may send a request to initiate the composition session" in accordance with feature F3. This was so because the skilled person was aware that the user equipment needed *software* (i.e. a client in relation to a network element) to send the "request for initiating the

composition session". The application as filed involved the management of multimedia sessions and, therefore, such a client would be understood by the skilled person to be a "multimedia client". The proprietor had not improved its position with respect to other parties by specifying that the user equipment applied a "multimedia client" to send the request.

- Page 10, lines 25 to 33, referred to a "further aspect" of the invention regarding user equipment. Such an "aspect" should be understood as a general reference for describing the invention, in this case from the perspective of the "user equipment". The embodiment disclosed at page 7, lines 14 to 18, referred to a "request for initiating a composition session" for such user equipment, which accordingly linked this request to the "multimedia client" of the generally disclosed "user equipment". That is, the embodiment described at page 7, lines 14 to 18, was in fact disclosed under the "umbrella disclosure" of the "user equipment aspect" taught at page 10, lines 25 to 33, and was therefore disclosed in combination. The "aspect" and the "embodiment" taught the same concept to the skilled person as far as feature F3 was concerned. Each "aspect" and "embodiment" in a disclosure had to be construed with the knowledge and understanding aptitude of the skilled person in the art in the light of the whole application. As a consequence, the skilled person understood from the application that the user equipment might use a "multimedia client" for "sending the request for initiating the composition session".

- Furthermore, the application as filed recited in its section "Field of the invention", page 1, lines 3 to 7, that the user equipment managed "associated multimedia sessions". The skilled person was aware that a "multimedia client" was merely a piece of software in a client device, such as the claimed "user equipment". A "multimedia client" was known to handle multimedia sessions in connection with a network element. Since page 7, lines 14 to 18, taught that the user equipment sent a "request to initiate the composition session", the skilled person would have known that such a request was transmitted through the "multimedia client" as part of its handling task for managing the multimedia sessions. The skilled person was however not aware of any other feasible way to initiate the composition session.

- Unambiguous support for this position was also given in claim 19 of the original application. Original claim 19 was directed to a "computer program" with "software code" for a user equipment. The software for the user equipment that interacted with a network element would be considered a "client" by the skilled person. In the context of the present application, such a client would have been understood to be a "multimedia client". Claim 19 referred back to claim 3 of the original application, which defined the user equipment (thus running the "multimedia client") to send a "request for initiating the composition session".

- Figure 2 showed a "PSC session initiation request". This message was however an example using the well-established Session Initiation Protocol (SIP). Page 17, lines 19 and 20, disclosed that this

message was a "SIP INVITE". Such a SIP INVITE was a request originating from a "multimedia client". SIP INVITE messages were also used for establishing the "BC multimedia session" mentioned at page 20, lines 10 to 12, and to setup the "COD session" addressed at page 20, lines 29 to 31. The skilled person would have necessarily come to the conclusion that the user equipment had a "multimedia client" sending the request. However, such knowledge was not specific to the example using the SIP scheme. Rather, it showed that all the examples set out in the original description were in line with the general teaching provided by the passages of pages 7 and 10 already indicated.

- 2.1.4 The board concurs with opponent 1. The "embodiments" disclosing the "sending of a request for initiating a composition session" do not specifically require the presence of a "multimedia client". Conversely, in the "further aspect" of the invention, wherein the "user equipment" comprises a "multimedia client", the latter may be configured "for initiating a composition session", but not specifically by "sending a request" for this very purpose. In other words, the original application teaches merely that the claimed "multimedia client" is, at best, configured for "initiating a composition session" but not for "sending a request for initiating a composition session". Rather, as one of several other examples, "initiating a composition session" could arguably involve only the establishment of a (logical) connection between the "user equipment" and the "network element" claimed prior to the transmission of the actual "request" by any system entity. As submitted by opponent 1, a person skilled in the art reading "a multimedia client [...] for initiating a composition session" in the original

description does not necessarily read therein "sending a request from the user equipment". For example, the initiation of the respective composition session could well be started by an *implicit* message (e.g. implicitly triggered by some other message), by meeting a certain condition (e.g. automatically started) or by a *different* message instead of a "request" (see in particular the last two paragraphs of section 3.3.1 on page 17 of opponent 1's statement of grounds of appeal). Moreover, the proprietor's assertions concerning the alleged special meaning of "multimedia client" - in particular within the specific context of the SIP scheme - are not convincing. Such a "client" - possibly implemented using "software code" as per original claim 19 - does indeed interact with a "network element" by means of the features explicitly appearing in the original description and claims. But there is no evidence that a "multimedia client" should necessarily entail more than that. Rather, the board concurs with opponent 1 that the term "multimedia client" constitutes an "oddity" which only appears twice in the original description. In addition, as argued by opponent 1, even if the "multimedia client" were to be the software entity sending the "SIP INVITE requests", present claim 11 is not limited to "SIP". At any rate, this would still constitute an unallowable intermediate generalisation.

In conclusion, it cannot be inferred unequivocally that the claimed "multimedia client" should mandatorily "initiate a composition session" by "sending a request". Thus, there is no direct and unambiguous disclosure of **feature F3** in the application as filed.

2.2 In view of the above, the main request is not allowable under Article 123(2) EPC.

3. AUXILIARY REQUESTS XIII, XIV, XIV-A, and XV

The independent user-equipment claim of each of the present auxiliary requests differs from claim 11 of the main request, *inter alia*, in the following features (board's emphasis):

- (a) the sessions are media sessions [claim 10 of **auxiliary requests XIV, XIV-A and XV**],
- (b) the user equipment is further configured for modifying the composition session by: adding one or more media sessions to the composition session, by terminating, or modifying one or more media sessions in the composition session and/or by transferring one or more media sessions from the composition session to a further composition session or outside the composition session [claim 10 of **auxiliary requests XIV and XIV-A**];
- (c) the signalling session only needs the exchange of signalling messages [claim 11 of **auxiliary request XIII**; claim 10 of **auxiliary requests XIV, XIV-A and XV**];
- (d) the user equipment is further configured for transferring one or more media sessions from the composition session to a further composition session or outside the composition session [claim 10 of **auxiliary request XV**].

3.1 *Added subject-matter (Article 123(2) EPC)*

The reasoning set out in point 2.1.4 above - concerning added subject-matter as to feature F3 - applies *mutatis mutandis* to claim 11 of **auxiliary request XIII** and to

claim 10 of **auxiliary requests XIV, XIV-A and XV**.

3.2 As a consequence, irrespective of any admittance issues connected to these claim requests, none of **auxiliary requests XIII, XIV, XIV-A and XV** is allowable under Article 123(2) EPC either.

4. OBJECTION UNDER RULE 106 EPC

4.1 During the oral proceedings before the board, after the conclusion that all claim requests were unallowable for added subject-matter, and after the indication that it was soon time to assess whether the case was ready for decision, but before any decision was announced, the proprietor submitted, in writing, the following objection under Rule 106 EPC:

"As discussed in the oral proceedings, the proprietor objects to a decision on the appeal being given after the oral proceedings of 11 December on the ground of opposition relating to article 123(2) EPC, or any other ground, which was raised also in the Notice of Intervention of 18 November notified on 21 November, to be treated as a new opposition in itself. The proprietor and original opponent were only given until 4 December to respond, with oral proceedings held on 11 December. This time provided was not in accordance with Article 14 RPBA referring to Article 12(1)(c) RPBA, stating a term in appeal of four months to reply in writing. In any case, this term was too short for the proprietor to exercise its right to be heard in accordance with Article 113 EPC, which is not changed by the fact that the proprietor did attempt to file a reply within this time - while at the same time

indicating that the time provided was not sufficient. It is of no relevance that the ground of opposition was also raised by the original opponent. The intervener having also made submissions in this regard and relying on the facts and arguments of the original opponent, and the original opponent having supported the intervention in its reply thereto, and both having made submissions in the oral hearing, means that it is procedurally unfair to the proprietor to base a decision on any ground of opposition raised also in the notice of intervention. That is: without an opportunity for the proprietor to respond in writing with a term of more than 2 weeks. This constitutes a substantial procedural violation."

4.2 In support of this written objection (henceforth "the Rule 106 objection"), the proprietor put forward, at oral proceedings before the board, essentially the following further arguments.

- The notice of intervention itself raised the objection of added subject-matter, providing its own arguments. The time to respond to this new opposition, in writing, should be at least two months, which was in fact what it took opponent 2 to file the intervention after service of the statement of claim in the infringement proceedings; this would still be compatible with the acceleration of the appeal proceedings, a state of affairs which the proprietor accepted as such. However, the mere two weeks provided in the appeal proceedings meant an inequality of arms, an unfairness between parties.

- As every issue had to be addressed within a very short time, it was difficult to know how to focus the proprietor's written response. In particular, such limited time, without any progress before the UPC, made it hard to carve out auxiliary requests that both satisfied the EPC, and provided the best scope of protection considering the ongoing infringement proceedings.

4.3 The opponents disagreed. In particular, opponent 2 made the point that the proprietor's objection would imply a deceleration of the appeal proceedings if granted, which in turn would be unfair to the opponents.

4.4 *Board's assessment of Rule 106 objection*

4.4.1 The Rule 106 objection as submitted obviously serves the purpose of addressing the requirements (under Rule 106 EPC) relating to the admissibility of a later petition for review under Article 112a EPC.

4.4.2 The board also understood it as a request to the effect that the board refrained from deciding on the appeal on any ground that was raised also in the notice of intervention.

4.4.3 From its wording, and from its last-minute submission, the Rule 106 objection was not to be construed as a request for postponement of the then still ongoing oral proceedings.

4.4.4 The proprietor's right to be heard is undoubtedly at the heart of the Rule 106 objection. The right to be heard in proceedings before the EPO is mainly governed by Article 113(1) EPC stipulating:

"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."

- 4.4.5 At issue is the decision to set aside the appealed decision and revoke the patent because the recurring **feature F3** ("a multimedia client configured [...] for sending a request for initiating the composition session to a network element") was not originally disclosed, thus contravening Article 123(2) EPC; this is basically the factual and legal reasoning, or ground, on which the decision is based (henceforth "the added-matter objection"). The decision is thus to be based on a very distinct and limited *ground* (or "simple question", as the opponents put it), and the very distinct and limited *evidence* of the pending claim sets and the application as filed.
- 4.4.6 Not only have this ground and evidence been around since the beginning of the opposition proceedings, the evidence is entirely by the proprietor's own hand. Every assertion, one way or the other, on the original disclosure of said contested feature, if within the factual framework of the pending claim sets and the application as filed, is merely an "argument" concerning said issue of added subject-matter.
- 4.4.7 Whereas Article 113(1) EPC appears to settle with a single ("an") opportunity to present comments, the ground and evidence underlying this decision were addressed time and again prior to the filing of the notice of intervention, i.e. providing numerous such opportunities, see:

- notice of opposition of 24 May 2022, pages 7 to 9, section III;
- annex to summons of 7 February 2023 to oral proceedings before the opposition division, pages 2 and 3, points 7.1 to 7.5;
- opponent 1's letter of 28 June 2023, page 4, section 1.2 (maintaining section III of the notice of opposition);
- minutes of oral proceedings before the opposition division on 31 August 2023, point 2;
- appealed decision, Reasons 14.1 to 14.4;
- opponent 1's statement of grounds of appeal of 8 February 2024, pages 16 and 17, effectively referring to pages 7 to 9;
- proprietor's written reply to the statement of grounds of appeal of 14 June 2024, pages 23 to 26, sections III.71 to III.84, in particular section III.83;
- board's communication of 21 October 2024, points 6.1, 6.2 and 7.3.1;
- proprietor's letter of 8 November 2024, pages 2 and 3, sections III.8 to III.16.

4.4.8 In the notice of intervention, and after its filing, the added-matter objection was also repeatedly discussed, see:

- notice of intervention of 18 November 2024, page 4, sections III and IV; pages 5 to 6, section V;
- board's communication of 26 November 2024, points 2.3 to 2.5;
- opponent 1's letter of 26 November 2024, page 5, fourth paragraph; page 7, second paragraph and page 8, first paragraph;
- proprietor's letter of 4 December 2024, pages 3 to 5, sections III.10 to III.16;

- opponent 2's letter of 6 December 2024, pages 1 and 2, sections I.1 to I.3; pages 9 and 10, sections IX.1 and IX.2;
- proprietor's letter of 6 December 2024, pages 2 and 3, sections II.3 to II.6;
- board's communication of 9 December 2024, page 6, point 13.5.2;
- minutes of oral proceedings before the board of 11 December 2024, pages 2 and 3;
- this decision, Reasons 2 and 3.

4.4.9 As indicated twice in the foregoing, the board cannot agree with the proprietor's view, namely, in effect, that any late-refining or further developing of the arguments on the same old ground and evidence would raise concerns with respect to the right to be heard. On the contrary, such limited dynamics are to be expected even as late as during oral proceedings.

4.4.10 Notwithstanding this, and regarding the proprietor's assertion that two weeks were not sufficient to respect the right to be heard and that it was difficult to know how to focus its written response to the notice of intervention, the guidance provided by the board, in particular after the receipt of the notice of intervention, should be recalled.

A first indication of what the board found particularly relevant in this case had already been given in the preliminary opinion, in which the added-matter objection was one of merely two substantive objections addressed (see the board's communication of 21 October 2024, points 6.1, 6.2 and 7.3.1). The board's communication of 26 November 2024 was quite informative in this respect (see points 2.2 to 2.5 and 3.5, emphasis added here):

"2.2 With the intervention now deemed admissible, the proprietor and opponent 1 are hereby invited to file observations on the intervention, if any, no later than 4 December 2024. (In this regard, the board recalls that these proceedings are accelerated, see Article 10(6) RPBA).

2.3 Having considered the intervention, the board still stands by its preliminary opinion as set out in the communication dated 21 October 2024 (see EPO Form 3305).

2.4 The further appeal proceedings [are] thus very likely to focus on the issues of whether claim 11 of the main request contains added subject-matter, whether claim 1 of the main request is inventive in view of D3 and whether the auxiliary requests should be admitted, or whether they are allowable in view of said objections.

2.5 Consequently, it is the arguments in sections V (pages 5 and 6), VIII (pages 14 to 16), and X (pages 17 to 20) of the notice of intervention that would seem relevant for any filing of observations."

[...]

3.5 As stated above, the board has not changed its preliminary opinion after reading the notice of intervention. In other words, it is likely that the board's decision is only to be based on grounds and evidence on which the parties have already had an opportunity to present their comments. Those grounds and that evidence are only discussed in some parts of the notice of intervention, which the parties have already had time to look at in more detail, and this communication gives them additional time (see Article 113(1) EPC)."

The board's communication of 9 December 2024 is also rather outspoken (see point 13.5.2, emphasis added here):

"13.5.2 [...] In the present case, the board has appreciated that the patent will *most likely* be revoked (board's communication of 21 October 2024, point 8.1), and that it is likely that the board's decision is to be based on its preliminary opinion, and not on the notice of intervention (board's communication of 26 November 2024, point 3.5)."

At this juncture, it should be evident that the proprietor's repeated reference to the "two weeks" overlooks that the notice of intervention was evidently never considered relevant as a basis for the decision on the appeal, since an objection being most likely prejudicial to the opposed patent's maintenance was already in the proceedings. If the notice of intervention were, at all, to turn relevant, it would most likely only have been in some limited parts, to which the board had already pointed. Against this background, it was inconceivable that the proprietor would have been taken by surprise by the grounds and evidence forming the basis of the present decision, or otherwise would not have had an opportunity to present its comments on them within the meaning of Article 113(1) EPC. In other words, the proprietor's right to be heard has indeed been respected.

As a last observation in this respect, the proprietor's reference to "Article 113 EPC" when mentioning, in the Rule 106 objection, the right to be heard cannot be understood as anything other than a reference to "Article 113(1) EPC". There is nothing to suggest that there would be an issue as to which text is to be examined and decided upon within the meaning of Article 113(2) EPC.

- 4.4.11 On the proprietor's allegation of inequality of arms and unfairness between the parties, the board recalls that it was not the proprietor, but opponent 2, that entered the proceedings shortly before the oral proceedings before the board. Opponent 2 asked for nothing more than the continuation of the proceedings as scheduled (and, anyhow, entered the proceedings at the stage they were in at the date of intervention, including pending time limits; see decision **T 392/97**,

Reasons 4.4, third paragraph). By contrast, (naturally) the proprietor participated in the opposition proceedings from the outset. If opponent 2 needed two months after service of the statement of claims in the proceedings before the UPC to lodge the intervention here, as stressed by the proprietor, the proprietor itself has been engaged for more than two years in the debate on the added-matter objection.

- 4.4.12 The proprietor further argues that, under Article 14 RPBA, Articles 12 and 13 RPBA apply to the present intervention, whilst Article 12(1)(c) RPBA affords four months of notification for the written reply to any statement of grounds of appeal.

However, this is only true "in so far as justified by the circumstances of the case" (see Article 14 RPBA). The tangible circumstances here, in temporal terms, are the ongoing acceleration and the adopted strict framework, measures which, by the way, are undisputed as such (see Article 10(5) and (6) RPBA and the registrar's communication of 24 September 2024). The board is thus free to set bespoke time periods, provided that the parties are heard and the proceedings are fair (see EPO OJ, Suppl. 2/2020, Explanatory remarks to the RPBA, page 30/65). As apparent from the preceding reasons, the board is convinced that these standards have been met. It follows that the time period prescribed in Article 12(1)(c) RPBA simply does not apply to the written replies to the notice of intervention.

- 4.5 While an admissible intervention is to be treated as an opposition (Article 105(2) EPC), its filing shortly prior to the oral proceedings before a board does not generally excuse the proprietor (or the other parties),

and in particular it does not hand them a voucher for more time. Its concrete implications for opposition appeal proceedings are rather to be determined on a case-by-case basis, under the provisions of the EPC and the RPBA.

4.6 Nor are opposition appeal proceedings designed to serve as a placeholder for tactical considerations in parallel proceedings for infringement. They are rather an existential challenge to the title, on the basis of which enforcement is pursued in the infringement proceedings, and parameters such as legal certainty and procedural economy are also involved. Any difficulties for the proprietor in drafting auxiliary requests that also provide the best scope of protection, considering the ongoing infringement proceedings, are not a reason to delay the opposition appeal proceedings.

4.7 For these reasons, which also translate into a lack of "special reasons" under Article 15(6) RPBA, the board did not refrain from deciding on the appeal on a ground for opposition that appeared also in the notice of intervention. It follows that there was no question of a return to written proceedings (see the board's communication of 9 December 2024, point 13.4.2).

4.8 As a result, the objection submitted by the proprietor under Rule 106 EPC was dismissed.

5. OVERALL CONCLUSION

5.1 It follows from the refusal and dismissal of the proprietor's procedural requests that no fundamental violation of Article 113 EPC or any other fundamental procedural defect defined in the Implementing Regulations within the meaning of Article 112a(2)(c)

and (d) and Rule 104 EPC has occurred in these appeal proceedings.

5.2 Since there is no allowable claim request on file, 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