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**Datasheet for the decision
of 6 July 2023**

Case Number: R 0018/22
Appeal Number: T 1198/17-3.2.02
Application Number: 06779901.5
Publication Number: 1909678
IPC: A61B18/18
Language of the proceedings: EN

Title of the invention:
ESOPHAGEAL ELECTROCATHETER

Patent Proprietor:
Fiab S.P.A.

Opponent:
CIRCA Scientific, Inc.

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 83, 112a(2)(c)(d), 113(1), 123(2)
EPC R. 104(b), 106
RPEBA Art. 13, 14(2)

Keyword:
Petition for review - clearly unallowable
Written reasoned decision - Fundamental violation of
Article 113(1) EPC (no)

Decisions cited:
R 0006/14



**Große Beschwerdekammer
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Grande Chambre de recours**

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Case Number: R 0018/22

D E C I S I O N
of the Enlarged Board of Appeal
of 6 July 2023

Petitioner:
(Patent Proprietor)

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Decision under review:

**Decision T 1198/17 of the Technical Board of
Appeal 3.2.02 of the European Patent Office of
6 May 2022.**

Composition of the Board:

Chairman: C. Josefsson
Members: D. Rogers
J.-M. Schwaller

Summary of Facts and Submissions

I. The Petition is filed against the decision T 1198/17 of board 3.2.02 ("the Board") to revoke the patent ("the Decision"). The oral proceedings in this case were held in person on 6 May 2022 and the minutes of this hearing were sent to the parties on 18 May 2022. The opponent-appellant and the Petitioner (the proprietor of the patent) were both represented at these oral proceedings.

Oral proceedings not held as a videoconference

- II. The oral proceedings before the Board were summoned on 10 December 2021 for a hearing on 6 May 2022. The intention was to hold in-person oral proceedings.
- III. On 6 April 2022, the Board asked the parties, "...whether they request, agree or disagree that the oral proceedings are possibly held by videoconference...". The opponent stated that it wished to have in-person oral proceedings, the Petitioner that it wished to have the oral proceedings held as a videoconference. The Petitioner filed a statement regarding the personal situation of its representative, Mr Aldè, in support of this request. Mr Aldè's reasons for wanting a videoconference were connected with the COVID-19 situation.
- IV. The Board decided to maintain the original arrangements and hold the oral proceedings in person. Mr Aldè therefore did not attend the oral proceedings, instead the Petitioner was represented at the in-person oral proceedings by two colleagues of Mr Aldè, Mr Weigel and Mr Huber.

- V. The Petitioner argues that the refusal of the Board to hold the oral proceedings as a videoconference led to consequences which amounted to a violation of the right to be heard.
- VI. At the oral proceedings Mr Weigel and Mr Huber filed a complaint under Rule 106 EPC. Point 2 of the complaint concerns an alleged violation of the right to be heard due to the holding of in-person oral proceedings, which meant that Mr Aldè could not attend. The violation of the Petitioner's right to be heard arose because the opponent made statements regarding the oral proceedings before the opposition division that Mr Weigel and Mr Huber could not respond to, because, unlike Mr Aldè, they had not been present at these oral proceedings. Such a situation would not have arisen if the oral proceedings before the Board had been held by videoconference which would have meant that Mr Aldè could have attended them.
- VII. The Board addressed this issue at point 8.3 of the Decision. At point 8.3.2 the Board points out that the only issues raised by the opponent as regards the oral proceedings before the opposition division concerned the opponent's request for refund of its appeal fee due to an alleged violation of its right to be heard before the opposition division. The Board decided against the opponent on this point and noted:
- "... It is thus not apparent to the Board how the respondent [the Petitioner] could be adversely affected by the fact that Mr Aldè did not participate in the discussion".
- VIII. The Petitioner addressed this part of the Decision at the top of page 6 of the Petition, where it stated that:

"In this context it has to be considered that even several points are separately discussed throughout the oral proceedings, they are somehow strictly linked together, both by a temporal point of view and by a subjective point of view. Each argument influences the next arguments, even if they appear to be separate each other...".

The Petitioner then goes on to suggest that the change of representative from Mr Aldè to Mr Weigel and Mr Huber in itself negatively affected the Petitioner, this implicitly being a violation of the right to be heard.

- IX. On page 5, third paragraph of the Petition, the Petitioner claims that the paragraph on page 1 of the minutes of the oral proceedings before the Board is false: Mr Weigel and Mr Huber never said they no longer objected to in-person oral proceedings. The Enlarged Board notes that no request was made to correct the minutes.

The Petitioner was not able to react to the Board's change of mind, compared to its preliminary opinion, on the issue of compliance with Article 123(2) EPC

- X. The opposition division found that the patent as granted (the main request before the Board) fulfilled the requirements of Article 123(2) EPC. On appeal, the opponent again attacked the main request on this ground. In response the Petitioner filed auxiliary requests 1 to 22 to address this. The preliminary opinion expressed by the Board was that auxiliary requests 12 and 13 satisfied the requirements of Article 123(2) EPC, see communication of 14 February 2022. The minutes record that whether the main request and auxiliary requests 1 to 22 contained added matter was discussed with the parties.

- XI. The minutes state that after deliberation, the Chairman announced the opinion of the Board that all of these requests contained added matter. The Petitioner then submitted that its right to be heard had been violated as it had only presented arguments on auxiliary requests 12 and 13. The Chairman decided to reopen discussions on this point. The Petitioner requested an interruption of the oral proceedings. After an interruption of three quarters of an hour, the minutes state that the Petitioner said it would not present any further arguments on auxiliary requests 1 to 22 and submitted auxiliary requests 23 to 28.
- XII. The above is reflected in the Rule 106 EPC complaint filed by the Petitioner at the oral proceedings before the Board. Page 1 of this complaint, in the ninth to twelfth paragraphs, in particular the eleventh and twelfth paragraphs, state that the Petitioner was given a second opportunity to address added matter and auxiliary requests 14 to 22. On page 2, first paragraph of the Rule 106 EPC complaint, the Petitioner states that Mr Weigel explained to the Board that he was surprised by the Board's opinion on auxiliary requests 1 to 22, given the preliminary opinion of the Board on added matter, and that he had not been given the chance to comment on auxiliary requests 14 to 22. The Petitioner then sought the opportunity to submit further auxiliary requests 23 to 28.
- XIII. The Petitioner argues that as the Board admitted the opponent's new added matter arguments filed on 21 February 2022, it was only fair to admit auxiliary requests 23 to 28 that addressed these new arguments.
- XIV. The Board in point 3.3 of the Decision found that the appellant had not filed new arguments, and thus had not amended its case. Hence there were no exceptional

circumstances justifying the admission of auxiliary requests 23 to 28.

XV. In its reply to the Enlarged Board's preliminary assessment of the petition, the Petitioner repeated the above arguments that the Board had incorrectly exercised its discretion in deciding not to admit auxiliary requests 23 to 28. This was because the opponent-appellant had effectively amended its case, (the Board described this as "... merely refined the arguments ..." see para 3.3 of the Decision) and the Petitioner should have been allowed to respond to this by filing auxiliary requests 23 to 28.

XVI. The Petitioner argues that it was not able to react to the Board's change of mind, compared to its preliminary opinion, on the issue of compliance with Article 123(2) EPC. Further the Board should have admitted Auxiliary Requests 23 to 28 into the proceedings. The Petitioner states that this amounts to a ground for petition under Article 112a(2) (d) EPC in combination with Rule 104(b) EPC, that the Board decided on the appeal without deciding on a request relevant to that decision.

XVII. In the Petition pages 8 and 9, the Petitioner argues that the Board's decision on Article 123(2) EPC as regards the main request and auxiliary requests 1 to 22 is wrong.

No reasoning in the Decision on the Petitioner's technical statement, filed during the oral proceedings, and its relation to Article 83 EPC

XVIII. The Petitioner argues that there was no reasoning in the Decision on the Petitioner's technical statement, filed during the oral proceedings before the Board, and its relation to Article 83 EPC. The Petitioner states

that this amounts to a ground for petition under Article 112a(2)(d) EPC in combination with Rule 104(b) EPC, that the Board decided on the appeal without deciding on a request relevant to that decision.

XIX. On page 6 of the Petition, the Petitioner states that at the oral proceedings before the Board it brought forward:

"... detailed technical reasons why the last feature of granted claim 1 " ... 'wherein said three equidistant temperature sensors (4) are adapted to detect a central value and the deviation from this value at two symmetrical, equidistant points' has to be considered as a specific function of the catheter per se and not a result from an external entity ...".

XX. The minutes of the oral proceedings, page 3, state that the Board came to the view that the claimed invention was sufficiently disclosed and that claim 1 of the main request was interpreted as set out in the Board's preliminary opinion.

XXI. On page 7, fourth paragraph of the Petition, the Petitioner states that the minutes contain a further false statement: it was not that Mr Weigel and Mr Huber did not wish to give an interpretation of claim 1 of the main request, they rather stated that it was the task of the Board to determine this interpretation. The Enlarged Board notes that no request to correct the minutes was made.

XXII. The Petitioner notes that the Decision neither contains arguments concerning Article 83 EPC, nor reasoning as to whether the expression:

"adapted to detect a central value and the deviation"

was considered to be an intended use by an external entity and not a property of the catheter per se. This feature was an essential feature in the discussion of novelty and inventive step, hence this lack of reasoning is a procedural defect under Rule 104(b) EPC.

Withdrawal of request for oral proceedings

XXIII. In the reply, the Petitioner withdrew its request for oral proceedings and requested that the proceedings be continued in writing.

Requests

XXIV. The Petitioner's requests are set out verbatim below:

"In particular, it is requested that the Enlarged Board of Appeal sets aside the Decision T 1198/17 and re-opens proceedings before the Board of Appeal, in particular with by admittance of Auxiliary Requests 23rd to 28th into the proceedings and in a way (in presence or ViCo) properly arranged to establish a balanced capability of all parties to present arguments of the interpretation of the expression "wherein said three equidistant temperature sensors (4) are adapted to detect a central value and the deviation from this value at two symmetrical equidistant points" of claim 1 is requested, in the light of the technical submissions given by Mr. Weigel and Mr. Huber during the oral hearing of appeal.

...

Refund of the petition fee is also requested according to Rule 110 EPC".

Reasons for the Decision

Admissibility of the Petition

1. The Enlarged Board considers the Petition to be admissible.

Allowability of the Petition

2. The Enlarged Board considers the Petition to be unallowable for the reasons set out below.

Minutes of the oral proceedings before the Board

3. The Petitioner did not seek any corrections of the minutes of the oral proceedings before the Board. For the first time in the Petition, it questions the accuracy of these minutes.
4. Parties are obliged to submit a request for correction of the minutes of oral proceedings promptly after receipt of the minutes (R 6/14, Reasons 7). The Enlarged Board understands this to require a party to submit a request for correction of the minutes in the shortest time possible after their receipt. Hence, if a party considers that the essentials of the oral proceedings or relevant statements within the meaning of Rule 124(1) EPC are incorrect or missing in the minutes of oral proceedings, they must file a request for correction of the minutes in the shortest time possible after their receipt. This ensures that the relevant facts and submissions are still fresh in the minds of the members of the deciding body and, if applicable, the other party or parties.
5. The Petitioner has not filed any request to correct the minutes. Its objections to the accuracy of the Board's

minutes are belated. The Enlarged Board therefore considers the Board's minutes to be an accurate account of the oral proceedings before the Board.

Oral proceedings not held as a videoconference

6. Under this heading the Petitioner alleges a violation of the right to be heard on the basis that it was represented by Mr Weigel and Mr Huber at the oral proceedings before the Board, and not by Mr Aldè, who had been the representative throughout the opposition proceedings. A Rule 106 EPC complaint was filed at the oral proceedings on this point.
7. The Enlarged Board is unable to identify any basis in the Petitioner's arguments for finding that its representation by Mr Weigel and Mr Huber, instead of by Mr Aldè, infringed its right to be heard. The sole ground put forward is that Mr Weigel and Mr Huber were not able to recall the events of the oral proceedings before the opposition division as well as Mr Aldè would have been able to. This was because Mr Aldè had attended these oral proceedings, whereas Mr Weigel and Mr Huber had not.
8. The Enlarged Board notes that the issue from these opposition division oral proceedings that was before the Board did not concern the Petitioner, but the opponent. In addition, the Board found against the opponent.
9. The Enlarged Board therefore notes that the discussion on what happened at the oral proceedings before the opposition division resulted in an outcome favourable to the Petitioner, thus even if a violation of the right to be heard could be found on this issue, there was no prejudice to the Petitioner.

10. As set out in the facts and submissions, the Petitioner has argued further on this point in the following terms:

"In this context it has to be considered that even several points are separately discussed throughout the oral proceedings, they are somehow strictly linked together, both by a temporal point of view and by a subjective point of view. Each argument influences the next arguments, even if they appear to be separate each other..."

In the above, the word "somehow" carries the burden of convincing the Enlarged Board that a violation of the right to be heard took place. The Enlarged Board, however, needs to be told "how" the points are strictly linked together, and not left to fill in, ex officio, the details of the Petitioner's "somehow". The Petitioner's argument, to the extent that it is understandable, appears to lack any logical force. The Enlarged Board sees no violation of the right to be heard.

Hence, the Petition is clearly unallowable on this point.

The Petitioner was not able to react to the Board's change of mind, compared to its preliminary opinion, on the issue of compliance with Article 123(2) EPC

11. The Enlarged Board first notes that the Petitioner did in fact react, by filing auxiliary requests 23 to 28.

This head of argument appears to be mainly concerned with the Board's opinion that the main request and auxiliary requests 1 to 22 had added matter problems, and its decision not to admit auxiliary requests 23 to 28 into the proceedings.

12. The minutes and the Rule 106 EPC complaint of the Petitioner confirm that the Petitioner had the opportunity to make submissions on the above issues. A violation of the right to be heard does not appear to be the issue here and has not been raised by the Petitioner. The Petitioner bases its Petition on this point on Rule 104(b) EPC, that the Board decided on the appeal without deciding on a request relevant to that decision. The Petitioner has not identified which of its requests were not decided upon. The Enlarged Board itself is unable to identify any such requests.
13. In its reply, the Petitioner suggests that the Board did not correctly exercise its discretion when considering whether to admit auxiliary requests 23 to 28. The Enlarged Board notes that improper exercise of such a discretion is not a ground for a petition for review, under Article 112a(2) (d) EPC in combination with Rule 104(b) EPC.
14. The Petition thus also appears to be clearly unallowable under this head.

No reasoning in the decision on the Petitioner's technical statement

15. The Petitioner's technical statement, in the context of Article 83 EPC, was discussed at the oral proceedings before the Board.
16. The Enlarged Board first notes that this issue was discussed, and that no question of a violation of the right to be heard appears to arise. In fact, the Petitioner again bases its Petition on this point on Rule 104(b) EPC, that the Board decided on the appeal without deciding on a request relevant to that decision. The Petitioner has not identified which of

its requests were not decided upon. The Enlarged Board itself is unable to identify any such requests.

17. The Decision of the Board contains no discussion of sufficiency, novelty or inventive step. The Decision found the main request and auxiliary requests 1 to 22 to contain added matter. No other requests were admitted into the proceedings.
18. The Enlarged Board notes that the Board was, from the Petitioner's point of view, positive on sufficiency of disclosure, as set out in the minutes, see minutes, page 6, second paragraph, and negative on added matter. Thus, the Board was able to write its Decision dealing with the case purely upon considerations of added matter. There was hence no need for the Decision to contain reasoning on the Petitioner's technical statement.
19. The Petition is thus also clearly unallowable under this head.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as being clearly unallowable.

The Registrar:

N. Michaleczek

Decision electronically authenticated



The Chairman:

C. Josefsson: