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**Datasheet for the decision  
of 9 October 2017**

**Case Number:** T 0628/12 - 3.4.01

**Application Number:** 03794043.4

**Publication Number:** 1545697

**IPC:** A61N1/36

**Language of the proceedings:** EN

**Title of invention:**  
BLOOD GLUCOSE LEVEL CONTROL

**Applicant:**  
Metacure Limited

**Headword:**

**Relevant legal provisions:**  
EPC Art. 123(2)

**Keyword:**  
Amendments - allowable (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 0628/12 - 3.4.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.01**  
**of 9 October 2017**

**Appellant:** Metacure Limited  
(Applicant) Canon's Court  
22, Victoria Street  
12 Hamilton (BM)

**Representative:** Nederlandsch Octrooibureau  
P.O. Box 29720  
2502 LS The Hague (NL)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted on 31 October 2011  
refusing European patent application No.  
03794043.4 pursuant to Article 97(2) EPC.

**Composition of the Board:**

**Chairman** G. Assi  
**Members:** T. Zinke  
J. Geschwind

## **Summary of Facts and Submissions**

- I. The examining division refused European patent application No. 03 794 043.

In its decision the examining division held that a main request and a first to third auxiliary request then on file did not meet the requirements of Art. 84 EPC 1973, Art. 54(1) and (2) EPC 1973, and Art. 83 EPC 1973.

The examining division did not admit fourth to seventh auxiliary requests into the procedure.

- II. The appellant (applicant) filed an appeal against the decision.

With the appeal, the appellant requested that the decision be set aside and that a patent be granted on the basis of respective sole claims 1 according to a main request or one of a first to fourth auxiliary requests, all filed together with the statement setting out the grounds of appeal.

- III. At the appellant's request, a summons to attend oral proceedings was issued.

- IV. In a communication pursuant to Art. 15(1) RPBA, the appellant was informed of provisional objections under Art. 123(2) EPC, Art. 84 EPC 1973 and Art. 54(1), (2) EPC 1973.

- V. In reply, the appellant did not make any submissions concerning the issues raised. The Board was only informed that the appellant would not be attending the oral proceedings.

VI. The oral proceedings took place as scheduled in the absence of the appellant.

VII. Sole claim 1 of the main request reads as follows:

*"1. Apparatus for blood glucose control, comprising: at least one electrode (112, 300, 306, 312, 320, 324, 328, 334, 342), configured to apply an electric field to the pancreas; and circuitry (102) configured: with electrification means to electrify said at least one electrode according to a predetermined electrification sequence, the sequence configured to provide open loop stimulation to reduce high glucose levels and substantially to maintain normal glucose levels, said open loop stimulation being configured to define a field which is a bi-phasic and charge balanced time varying field, the configuration being for applying the field for a duration at an application frequency over a predetermined period, the application frequency being between 1Hz and 2000Hz, the period being between 30 minutes and 180 minutes, said predetermined electrification being further configured per patient, the electrification means configured to continue to apply said sequence independently of a blood glucose level, thereby permitting a stimulation series that reduces elevated glucose levels, thereby to compensate for a loss of acute response by said pancreas."*

VIII. Sole claim 1 according to the first auxiliary request differs from claim 1 of the main request in that it incorporates at the end of the claim the following feature:

*"the apparatus further comprising an automatic ingestion sensor for automatically detecting an*

*ingestion event and initiating said sequence on detection of said ingestion event".*

- IX. Sole claim 1 according to the second auxiliary request differs from claim 1 of the main request in that it changes the upper limit of the range for the application frequency from "2000Hz" to "150Hz".
- X. Sole claim 1 according to the third auxiliary request differs from claim 1 of the main request in that it incorporates both changes as made for the first and second auxiliary request.
- XI. Sole claim 1 according to the fourth auxiliary request differs from claim 1 of the third auxiliary request in that it additionally incorporates a feature that the sequence is applied  
*"using a fixed protocol without checking its effect at all"*  
and  
*"the fixed protocol comprising a series of pulses comprising pacing pulses of amplitude between 1 and 20mA, or non-excitatory pulses of between 1 and 7mA, or sub-threshold pulses of between 0.1 and 0.5mA, a duration of respective pulses being between 10ms and 50ms".*

### **Reasons for the Decision**

1. The appeal is admissible.
2. Admissibility of the requests

Since the requests were filed together with the statement setting out the grounds of appeal, they are

admitted into the appeal proceedings according to Art. 12(1)(a) RPBA.

3. Main request

3.1 Amendments (Art. 123(2) EPC)

3.1.1 Independent claim 1 comprises the amendment that the application frequency is between 1Hz and 2000Hz. Such a range is not disclosed originally.

3.1.2 Hence, the amendment does not comply with Art. 123(2) EPC.

3.2 The main request is not allowable.

4. First auxiliary request

4.1 Amendments (Art. 123(2) EPC)

4.1.1 Since claim 1 of the first auxiliary request also comprises the amendment that the application frequency is between 1Hz and 2000Hz, the above-mentioned objection applies as well.

4.1.2 Claim 1 of the first auxiliary request has been further amended by introducing the feature "*the apparatus further comprising an automatic ingestion sensor for automatically detecting an ingestion event and initiating said sequence on detection of said ingestion event*".

No basis for this amendment is given in the statement setting out the grounds of appeal. It is noted that there would be an original disclosure of an "*automatic ingestion sensor for automatically detecting an*

*ingestion event"* on page 21, lines 15 to 16. However, there is no disclosure of the additional feature "*and initiating said sequence on detection of said ingestion event"*.

4.1.3 Hence, the amendments made to claim 1 of the first auxiliary request do not comply with Art. 123(2) EPC.

4.2 The first auxiliary request is not allowable.

5. Second auxiliary request

5.1 Amendments (Art. 123(2) EPC)

5.1.1 Claim 1 of the second auxiliary request includes the amendment that the application frequency is in a range between 1Hz and 150Hz. Such a range is not disclosed originally. In the statement setting out the grounds of appeal, original page 42, line 42 is given as a basis for the boundary of 150 Hz for the range of frequencies. In that passage, however, the range is given as being between 50 and 150 Hz and not between 1Hz and 150 Hz.

5.1.2 Hence, the amendments made do not comply with Art. 123(2) EPC.

5.2 The second auxiliary request is not allowable.

6. Third auxiliary request

6.1 Amendments (Art. 123(2) EPC)

Independent claim 1 of the third auxiliary request is a combination of respective claims 1 of the first and second auxiliary request. In particular, it is claimed



that the application frequency is between 1Hz and 150Hz and that *"the apparatus further comprising an automatic ingestion sensor for automatically detecting an ingestion event and initiating said sequence on detection of said ingestion event"*.

As discussed above there is no original disclosure for these amendments, which, consequently, do not comply with Art. 123(2) EPC.

6.2 The third auxiliary request is not allowable.

7. Fourth auxiliary request

7.1 Amendments (Art. 123(2) EPC)

7.1.1 Claim 1 of the fourth auxiliary request comprises also the amendment that the application frequency is between 1Hz and 150Hz. As stated above with regard to the second and the third auxiliary request, there is no original disclosure for this feature.

7.1.2 A further amendment includes the feature that the pulse duration is between 10ms and 50ms. As a basis for this amendment, original page 43, lines 5 to 9 is given. However, there is no disclosure of this particular range in this passage, since it only mentions several - different - ranges and particular single values for the pulse duration. Hence, there is no basis for the amended feature of the pulse duration range.

7.1.3 Hence, the amendments made do not comply with Art. 123(2) EPC.

7.2 The fourth auxiliary request is not allowable.

8. Right to be heard (Art. 113(1) EPC)

The reasons for the present decision are all mentioned in the Board's communication of 29 August 2017. The appellant, however, failed to make any substantive submissions in reply. The Board has no reason to change its opinion as set out in this communication.

**Order**

**For these reasons it is decided that:**

1. The appeal is dismissed.

The Registrar:

The Chairman:



R. Schumacher

G. Assi

Decision electronically authenticated