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**Datasheet for the decision  
of 11 March 2014**

**Case Number:** T 2022/12 - 3.2.08

**Application Number:** 02704340.5

**Publication Number:** 1365707

**IPC:** A61F2/06

**Language of the proceedings:** EN

**Title of invention:**

Implant delivery system with interlock

**Patent Proprietor:**

ev3 Peripheral, Inc.

**Opponent:**

Vondrovsky, Gabriel

**Headword:**

**Relevant legal provisions:**

RPBA Art. 12(4)  
EPC Art. 123(2), 123(3), 54, 111(1)

**Keyword:**

Late-filed request - admitted (yes)  
Amendments - added subject-matter (no) - broadening of claim  
(no)  
Novelty - (yes) - after amendment  
Remittal to the department of first instance - (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern  
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Case Number: T 2022/12 - 3.2.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.08**  
**of 11 March 2014**

**Appellant:**  
(Patent Proprietor)

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**Respondent:**  
(Opponent)

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**Representative:**

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 23 July 2012  
revoking European patent No. 1365707 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman:** T. Kriner  
**Members:** C. Herberhold  
D. T. Keeling

## Summary of Facts and Submissions

- I. By decision posted on 23 July 2012 the Opposition Division revoked the European patent EP-B 1 365 707 on the basis of Article 100(a) EPC in combination with Article 54 EPC.

The Opposition Division held that the subject-matter of claim 1 of the Main and Auxiliary Requests then on file was not novel, *inter alia* in view of D2: EP-A-1 000 590.

- II. The appellant (patent proprietor) lodged an appeal against that decision on 19 September 2012, paying the appeal fee on the same day. The statement setting out the grounds of appeal was filed on 22 November 2012.

- III. Oral proceedings took place on 11 March 2014.

At the end of the oral proceedings the requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and that the patent be maintained in accordance with the Main Request (formerly the corrected Second Auxiliary Request filed on 7 February 2014) or in accordance with the Auxiliary Request (formerly the corrected Third Auxiliary Request filed on 7 February 2014).

The respondent (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

- IV. Claim 1 of the Main Request reads as follows:

"A stent delivery system (10) comprising:  
a catheter including an inner tubular member (14)  
having a stent attachment location (26), said inner  
tubular member having a proximal end (14a) and a distal  
end (14b);  
a stent (12) mounted on the inner tubular member at the  
stent attachment location (26), the stent being  
expandable from an undeployed compressed orientation to  
a deployed expanded orientation, the stent including  
proximal and distal ends (12a, 12b), the stent also  
including one or more male interlock structures (82),  
the one or more male interlock structures being  
positioned at the proximal end (12a) and/or the distal  
end of the stent;  
an outer tubular member (16) mounted on the inner  
tubular member, the outer tubular member being  
positionable in a transport position in which it covers  
the stent being mounted at the stent attachment  
location, the outer tubular member (16) also being  
positionable in a deploy position in which the stent is  
exposed;  
the inner tubular member including one or more female  
interlock structures (84) that receive the one or more  
male interlock structures when the stent is in the  
compressed orientation to constrain axial movement of  
the stent relative to the inner tubular member and  
wherein the said one or more female interlock  
structures have a complementary mating geometry with  
respect to the male interlock structures, characterised  
in that said one or more female interlock structures  
(84) comprise a radiopaque material (27)."

Claim 1 of the First Auxiliary Request differs from the  
Main Request by the addition of the following wording:

"and wherein said distal end (16b) of said outer tubular member (16) has a radiopaque marking (16b')." "

- V. The essential arguments of the appellant can be summarised as follows:

*Admissibility of the Main and Auxiliary Request*

During the oral proceedings the Opposition Division had changed its mind with respect to the novelty evaluation put forward in its preliminary opinion. As a consequence, the Auxiliary Request that had been submitted was no longer appropriate to the new situation and it was impossible to contact the client about how to further proceed. The appellant had thus not been in a position to submit further auxiliary requests during said oral proceedings, but did so at the very beginning of the appeal procedure. The present requests should therefore be admitted.

*Article 123(2) EPC*

The subject-matter of the amended requests was disclosed clearly and unambiguously in the application as filed. In particular, the combination of claims 1 and 7 to 9 as originally filed disclosed a combination of a plurality of male interlock structures inter-engaging with a single female interlock structure, whereas claims 1 and 12 to 14 disclosed a plurality of female interlock structures inter-engaging with a single male structure. Moreover, a single male bead interlock structure could well inter-engage with different complementary female interlock structures, not at the same time, but when in different rotational positions.

This disclosure was further supported by the description, which on page 11, lines 27 to 29 and page 6, lines 6 to 9 disclosed inter-engagement of a single "collar" structure with a plurality of interlock structures. Consequently, the claims of the amended requests fulfilled the requirements of Article 123(2) EPC.

*Article 123(3) EPC*

According to the description page 5, lines 13, 14 the terms "inner tubular member" and "elongated member" were used synonymously throughout the application. The replacement of one of these terms by the other was thus in accordance with the requirements of Article 123(3) EPC.

*Novelty and inventive step*

The stents defined in claim 1 of the Main Request differed from the disclosure of prior art D2 in that the male interlock structures were provided on the distal end of the stent - contrary to the disclosure of D2 which showed the male interlock structures at the distal end of leg structures which did not form part of the stent - and in that the one or more female interlock structures comprised a radiopaque material. The subject-matter defined in the claims of the Main and Auxiliary Requests was therefore new over prior art D2.

Inventive step had not yet been discussed before the Opposition Division. In order to allow the appellant to have this point discussed by two instances it was therefore requested to refer the case back to the

Opposition Division for examination of the presence of an inventive step.

VI. The essential arguments of the respondent can be summarised as follows:

*Admissibility of the Main and Auxiliary Requests*

It was the principal function of a Board of Appeal to review the decision of the first instance department. However, the presently pending requests had not been decided on by the Opposition Division because the appellant had not yet submitted them, although it had been explicitly given the possibility to file new requests during the oral proceedings before the Opposition Division. The new requests thus could and should have been filed at first instance and therefore should not be admitted into the appeal proceedings under Article 12(4) RPBA.

*Article 123(2) EPC*

The only disclosure of the term "complementary mating geometry" with respect to interlock structures was in the description page 11, lines 13, 14 and page 12, lines 32, 33. These passages however only disclosed a one-to-one relationship of the male and female interlock structures. Therefore, there was no disclosure of one male interlock structure inter-engaging with a plurality of female interlock structures and also no disclosure of one female interlock structure inter-engaging with a plurality of male interlock structures. In this context, the "collar" referred to by the appellant did not qualify as an interlock structure in the sense of the patent



specification. Consequently, the amended requests were in breach of Article 123(2) EPC.

*Article 123(3) EPC*

With the term "elongated member" being replaced by the term "inner tubular member", the subject-matter of the independent claim now comprised a short, i.e. ring-shaped tubular member, said member not necessarily being elongated. Such a short tubular member did not fall under the scope of claim 1 as granted, such that a breach of Article 123(3) EPC resulted.

*Novelty and inventive step*

Male interlock structures at the distal end of a stent were known from prior art D2. However, it was true that D2 did not show the one or more female interlock structures to comprise a radiopaque material.

Although inventive step had not yet been dealt with by the Opposition Division, this was due to the fact that the appellant had filed the presently pending requests for the first time during the appeal proceedings. It was thus requested that the Board exercise a power within the competence of the Opposition Division and decide immediately on the presence of an inventive step, thereby preventing unnecessary lengthening of the proceedings and contributing towards a more economic and cost efficient procedure.

**Reasons for the Decision**

1. The appeal is admissible
2. Admissibility of the Main and Auxiliary Requests

The Main and the Auxiliary Requests presently on file correspond to the corrected Second and Third Auxiliary Requests filed on 7 February 2014, which - apart from the correction of a spelling error - correspond to the Second and Third Auxiliary Requests filed with the grounds of appeal. The requests have thus been filed for the first time in the appeal proceedings and were not present during the opposition proceedings.

Article 12(4) RPBA gives the Board the discretionary power to hold inadmissible facts, evidence or requests which could have been presented in the first instance proceedings. However, the amended requests have been filed at an early stage of the appeal proceedings and their subject-matter cannot be considered overly complex. Moreover, the Board cannot identify any abusive behaviour on the appellant's part. There is thus no reason to hold these requests inadmissible, and - in accordance with the second part of Article 12(4) RPBA - the amended requests are to be taken into account.

3. Article 123(2) EPC

Claim 1 (lines 14,15) as filed discloses that the implant includes a first interlock structure and the elongated body includes a second interlock structure. In accordance with the teaching of dependent claims 8 and 9 as filed said male interlock structure may include a plurality of enlargements at the first end of the implant. The claim set thus supports the inter-engagement of a plurality of beads, i.e. male interlock structures with a single female interlock structure.

Equally, in accordance with the teaching of dependent claims 12 to 14 as originally filed, said female interlock structure may include a plurality of post openings. The claim set thus also supports the inter-engagement of a plurality of post openings, i.e. female interlock structures with a single male interlock structure.

It is true that the term "complementary mating geometry" is disclosed only in the description and only in the context of male and female interlock structures being in a 1 to 1 correspondence (see page 11, lines 13, 14; page 12, lines 32,33; page 13, lines 19-25). It is also true that the "collar" mentioned on page 11, lines 27-29 and page 6, lines 6-9 is a structure different from the entity referred to as "female interlock structure" in the patent and that these passages thus do not disclose a plurality of male interlock structures inter-engaging with a single female interlock structure.

However, interlock structures with "complementary mating geometry" are shown in the drawings of all embodiments, and the term "complementary" may even be considered as synonymous with the terms "male/female" already present in claim 1 as originally filed. The Board is thus satisfied that the interlock structures defined in claims 1 together with 7 to 9 and 1 together with 12 to 14 are clearly and unambiguously disclosed as being of complementary mating geometry. As pointed out by the appellant, a single interlock structure could well inter-engage with more than one complementary interlock structure, not simultaneously, but when in different angular orientation. Consequently, the requirements of Article 123(2) EPC are fulfilled.

4. Article 123(3) EPC

In accordance with established case law, the terms used in a claim should be given their ordinary meaning in the context of the claim in which they appear. The Board is of the opinion that a ring-like structure does not qualify as a "tube" in the ordinary meaning of the word. As also confirmed by the Oxford English Dictionary, a tube is understood to be a "hollow body, usually cylindrical, and long in proportion to its diameter". With this interpretation, the term "tubular member" used in claim 1 as presently on file is synonymous with the term "elongate tubular member" and thus narrower than the term "elongate member" used in claim 1 as granted.

Consequently, the requirements of Article 123(3) EPC are also fulfilled.

5. Novelty and inventive step

The Board agrees with both parties that document D2 does not disclose the characterizing features according to these requests. Claim 1 of both pending requests is thus novel over prior art D2.

It is however noted that, contrary to the view of the appellant, document D2 discloses all features of the pre-characterising portion of claim 1 of the Main Request, in particular a "stent including one or more male interlock structures, the one or more male interlock structures being positioned at the proximal end and/or the distal end of the stent": The longitudinal legs (Figure 1, No. 20) comprise male interlock structures (No. 28) at their distal end.

These longitudinal legs are part of the stent, which is disclosed as a monolithic structure cut from a tubular piece (paragraph [0029], lines 35 to 38) and which is furthermore explicitly disclosed to "include" the longitudinal legs (paragraph [0029], lines 17 to 20).

In accordance with Article 111(1) EPC second sentence, "the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution." In the present case, in order to allow both sides the possibility to appeal and the treatment of the case in two instances, the Board therefore exercises its discretion to remit the case to the Opposition Division for further prosecution.

## **Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution on the basis of the Main Request (formerly the corrected Second Auxiliary Request filed on 7 February 2014) or the Auxiliary Request (formerly the corrected Third Auxiliary Request filed on 7 February 2014), as renamed at the oral proceedings.

The Registrar:

The Chairman:



V. Commare

T. Kriner

Decision electronically authenticated