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**Datasheet for the decision  
of 20 February 2019**

**Case Number:** T 0927/14 - 3.5.05

**Application Number:** 00989280.3

**Publication Number:** 1247229

**IPC:** G06F19/00

**Language of the proceedings:** EN

**Title of invention:**

METHOD AND APPARATUS FOR PATIENT MONITORING WITH WIRELESS  
INTERNET CONNECTIVITY

**Patent Proprietor:**

Koninklijke Philips N.V.

**Opponents:**

Fresenius Medical Care Deutschland GmbH  
Garmin Deutschland GmbH  
Fitbit Inc.

**Headword:**

Wireless patient monitoring/PHILIPS

**Relevant legal provisions:**

EPC Art. 56, 123(2)  
RPBA Art. 12(4), 13(1)  
EPC R. 106

**Keyword:**

Amendments - added subject-matter (yes)  
Inventive step - auxiliary request (no)  
Late-filed auxiliary requests - admitted (no)  
Objection under Rule 106 EPC - dismissed

**Decisions cited:**

R 0005/16, T 1685/07, T 0162/09, T 1382/09, T 1903/13



**Beschwerdekammern**

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Case Number: T 0927/14 - 3.5.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.05**  
**of 20 February 2019**

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**Decision under appeal:**      **Decision of the Opposition Division of the  
European Patent Office posted on 15 January 2014  
revoking European patent No. 1247229 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman**                    K. Bengi-Akyuerek  
**Members:**                    P. Cretaine  
                                      D. Prietzel-Funk

## Summary of Facts and Submissions

I. This appeal is against the decision of the opposition division, dispatched on 15 January 2014, to revoke European patent No. 1 247 229. Documents O1 to O20 were cited in this decision. The opposition was based on the grounds of Articles 100(a) and (c) EPC. The patent was revoked for lack of inventive step (Article 56 EPC) of claim 1 as granted, claim 1 of auxiliary request I, and claim 1 of auxiliary request II, with regard to the disclosure of document

O9: WO 98/24358

and the general knowledge of the skilled person, as illustrated by documents

O17: "Nokia unveils the world's first media phone for Internet access",

O18: "Nokia 7110" and

O20: "3Com Delivers the PALM VII<sup>tm</sup> Organizer for Out-of-The Box Wireless Internet Access".

Auxiliary requests III and IV were not allowed as they were not compliant with Article 123(2) EPC. Auxiliary request V was not admitted into the proceedings (Rule 116(2) EPC) as it was filed late and did not comply *prima facie* with Article 123(2) EPC.

II. The patentee's notice of appeal was received on 20 January 2014 and the appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 22 April 2014. The appellant (patentee) requested that the decision of the opposition division

be set aside and that the patent be maintained as granted, as a main request, or in amended form on the basis of the claims of one of auxiliary requests I to V on which the decision was based and which were resubmitted with the statement setting out the grounds of appeal.

- III. In a letter of reply dated 28 October 2014, the opponent (respondent 1) requested that the appeal be dismissed. It argued that the main request did not meet the requirements of Articles 123(2), 54 and 56 EPC and that auxiliary requests I to V did not meet the requirements of Articles 123(2), 84, 54 and 56 EPC. A new document O21 was cited.
- IV. In a letter dated 24 February 2015, the appellant presented arguments in response to the objections raised by respondent 1.
- V. In a letter dated 9 May 2017, the appellant requested accelerated proceedings, which were then granted by the board on 2 August 2017.
- VI. An intervention under Article 105(1)(a) EPC was filed by opponent 2 (respondent 2) on 12 December 2017, within the three-month time limit under Rule 89(1) EPC. The notice of intervention was filed on 9 February 2018 and the opposition fee was paid on the same date. The intervention was based on the grounds for opposition of Articles 100(a) (Articles 54 and 56 EPC) and 100(c) EPC and it cited new documents, in particular, B1 to B5. Respondent 2 requested the dismissal of the appeal. It argued that the main request did not meet the requirements of Articles 123(2), 54 and 56 EPC and that auxiliary requests I to V did not meet the requirements of Articles 123(2), 84, 54 and 56 EPC.

- VII. A further intervention under Article 105(1)(a) EPC was filed by opponent 3 (respondent 3) on 2 July 2018 within the three-month time limit under Rule 89(1) EPC. The notice of intervention was filed and the opposition fee was paid on the same date. The intervention was based on the grounds for opposition of Articles 100(a) (Articles 54 and 56 EPC) and 100(c) EPC. Respondent 3 appointed the same representative as respondent 2, requested the dismissal of the appeal, and based its objections on the same facts and arguments as respondent 2.
- VIII. In a letter dated 4 July 2018, the appellant responded to the intervention of respondent 2. The appellant filed new auxiliary requests Ia to Id to precede auxiliary requests I to V.
- IX. A summons to oral proceedings was issued on 2 August 2018.
- X. In a letter dated 6 November 2018, the appellant responded to the intervention of respondent 3.
- XI. In a letter dated 18 December 2018, respondents 2 and 3 replied to the appellant's responses of 4 July 2018 and 6 November 2018. They cited new prior-art documents, in particular B6 and B7, and raised objections under Articles 54, 56 and 123(2) EPC against all the requests, objections under Article 84 EPC against auxiliary requests Id and II to V, and objections under Article 83 EPC against auxiliary requests II to V. Further, respondents 2 and 3 requested that the case be remitted to the opposition division for an assessment of the new documents cited in the intervention, in

particular B1 to B7, and the newly filed auxiliary requests Ia to Id.

XII. In a communication pursuant to Article 15(1) RPBA dated 20 December 2018, the board listed the points to be discussed in succession during the oral proceedings. It also mentioned which prior-art documents on file were, in its opinion, particularly relevant for the issue of inventive step. In this respect, the board cited in particular O9 and

B3: EP 0 918 423.

The board further indicated that it was minded to admit the newly filed auxiliary requests Ia to Id into the appeal proceedings and that their compliance with the requirements of the EPC should be discussed.

XIII. In a letter of reply dated 18 January 2019, the appellant submitted new auxiliary requests Ib(new), Ic(new) and Id(new) to replace previously filed auxiliary requests Ib, Ic, and Id. The appellant also provided a new document to illustrate the general knowledge of the skilled person and arguments relating to auxiliary requests Ia, Ib(new), Ic(new) and Id(new).

XIV. In a letter of response dated 30 January 2019, respondents 2 and 3 requested that the newly filed auxiliary requests Ib(new), Ic(new) and Id(new) not be admitted into the appeal proceedings, and, alternatively, that the case be remitted to the opposition division or that the oral proceedings be postponed.



- XV. In a letter of reply dated 4 February 2019, the appellant requested that the requests of respondents 2 and 3 of 30 January 2019 be dismissed.
- XVI. In a letter dated 18 February 2019, i.e. two days before the scheduled oral proceedings, the appellant filed new sets of claims according to auxiliary requests Ib, Ic and Id to replace previous requests Ib(new), Ic(new), and Id(new), which included the correction of an obvious mistake in these previous requests.
- XVII. Oral proceedings were held on 20 February 2019. During the course of the proceedings, the appellant withdrew its main request to maintain the patent as granted, filed new auxiliary requests Ie, Ie', and I', and submitted a written objection according to Rule 106 EPC.

The parties' final requests were as follows:

The appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the claims of the new main request (former auxiliary request Ia filed with the letter dated 4 July 2018), or of auxiliary requests Ib, Ic or Id filed with the letter dated 18 February 2019, or of auxiliary requests Ie or Ie' filed during the oral proceedings, or of auxiliary request I on which the decision under appeal was based and which was re-filed with the statement setting out the grounds of appeal, or on auxiliary request I' filed during the oral proceedings, or on auxiliary requests II to V on which the decision under appeal was based and which were re-filed with the statement setting out the grounds of appeal.

The respondents requested that the appeal be dismissed.

The decision of the board was announced at the end of the oral proceedings.

XVIII. Claim 1 of the **main request** (former **auxiliary request Ia**) reads as follows:

"A wireless health-monitoring system for monitoring a state or condition of a patient, comprising:  
a wireless health monitoring apparatus (10) that is linked in a wireless fashion, said apparatus (10) including:  
a health monitoring device (11), the health monitoring device (11, 160) including a health parameter determining means for determining a health parameter, the health monitoring device (11, 160) further comprising an output port to deliver data corresponding to the health parameter;  
an Internet-enabled wireless web device (12) that is either an internet-enabled mobile phone, a handheld computer, or a hybrid device of a handheld computer and mobile telephone, the internet-enabled wireless web device (12) including a first communications port having a generic input/output port (164) and a second communications port (60) having a circuit for wireless communications with a network, wherein the output port of the health monitoring device (11, 160) and the generic input/output port (164) communicate via a wireless link;  
wherein the Internet enabled wireless web device (12) is configured to store the health parameter, the health parameter is corresponding to a state or condition of a patient;  
a base wireless device application (70); and

a user interface (68) allowing the user to choose inputs and to generally operate the device, the wireless health-monitoring system further comprising:

a server application (62), residing on a computer readable medium and disposed on a server (22) in communication with the wireless network, for causing the server (22) to:

receive the determined health parameter (122);  
calculate a response based in part on the determined health parameter (126); and  
provide the response to the internet-enabled wireless web device (12)."

Claim 1 of **auxiliary request Ib** reads as follows:

"A wireless health-monitoring system configured to monitor a state or condition of a patient while exercising, comprising:

a wireless health monitoring apparatus (10) that is linked in a wireless fashion, said apparatus (10) including:

a health monitoring device (11), the health monitoring device (11, 160) further including a health parameter determining means for determining a health parameter of the patient while exercising, wherein the health monitoring device (11, 160) further comprises an output port to deliver data corresponding to the health parameter;

an Internet-enabled wireless web device (12) that is either an internet-enabled mobile phone, a handheld computer, or a hybrid device of a handheld computer and mobile telephone, the internet-enabled wireless web device (12) including a first communications port having a generic input/output port (164) and a second communications port (60) having a circuit for wireless

communications with a network, wherein the output port of the health monitoring device (11, 160) and the generic input/output port (164) communicate via a wireless link;

wherein the Internet enabled wireless web device (12) is configured to store the health parameter, the health parameter is corresponding to a state or condition of a patient;

a base wireless device application (70); and  
a user interface (68) allowing the user to choose inputs and to generally operate the device,  
the wireless health-monitoring system further comprising:

a server application (62), residing on a computer readable medium and disposed on a server (22) in communication with the wireless network, for causing the server (22) to:

receive the determined health parameter (122);

calculate a response based in part on the determined health parameter (126); and

provide the response to the internet-enabled wireless web device (12)."

Claim 1 of **auxiliary request Ic** adds to claim 1 of auxiliary request Ib, after the wording "corresponding to a state or condition of a patient;" the wording ";a server (22) in communication with the wireless network, a computer for input of supplemental health data, the computer in signal communication with the internet-enabled wireless web device (12) or the server (22)," and also replaces the wording "disposed on a server (22) in communication with the wireless network" by the wording "disposed on the server (22)".

Claim 1 of **auxiliary request Id** reads as follows:

"A wireless health-monitoring system configured to monitor a state or condition of a patient while exercising, comprising:

a wireless health monitoring apparatus (10) that is linked in a wireless fashion, said apparatus (10) including:

a health monitoring device (11), wherein the health monitoring device (11, 160) is configured to monitor the heart rate of the patient while exercising, wherein the health monitoring device (11, 160) further comprises an output port to deliver data corresponding to the heart rate;

an Internet-enabled wireless web device (12) that is either an internet-enabled mobile phone, a handheld computer, or a hybrid device of a handheld computer and mobile telephone, the internet-enabled wireless web device (12) including a first communications port having a generic input/output port (164) and a second communications port (60) having a circuit for wireless communications with a network,

wherein the output port of the health monitoring device (11, 160) and the generic input/output port (164) communicate via a wireless link;

wherein the Internet enabled wireless web device (12) is configured to store the heart rate, the heart rate is corresponding to a state or condition of a patient;

a server (22) in communication with the wireless network,

a computer for input of supplemental health data, the computer in signal communication with the internet-enabled wireless web device (12) or the server (22),

a base wireless device application (70); and

a user interface (68) allowing the user to choose inputs and to generally operate the device,

the wireless health-monitoring system further comprising:

a server application (62), residing on a computer readable medium and disposed on the server (22), for causing the server (22) to:  
receive the determined heart rate (122);  
calculate a response based in part on the determined heart rate (126); and  
provide the response to the internet-enabled wireless web device (12)."

Claim 1 of **auxiliary request Ie** corresponds to claim 1 of the main request with the deletion of the wording "the health monitoring device (11, 16) including a health parameter determining means" and the replacement of the wording "to store the health parameter, the health parameter is corresponding to a state or condition of a patient" by the wording "to store a health parameter, the health parameter is corresponding to a state or condition of a patient and determined by a health parameter determining means".

Claim 1 of **auxiliary request Ie'** corresponds to claim 1 of auxiliary request Ie with the wording "corresponding to the health parameter" replaced by the wording "corresponding to a health parameter" and the wording "to store a health parameter" replaced by the wording "to store the health parameter".

Claim 1 of **auxiliary request I** reads as follows:

"A wireless health-monitoring system for monitoring a state or condition of a patient, comprising:  
a wireless health monitoring apparatus (10) that is linked in a wireless fashion, said apparatus (10) including:  
a health monitoring device (11);

an internet-enabled wireless web device (12) that is either an internet-enabled mobile phone, a handheld computer, or a hybrid device of a handheld computer and mobile telephone, the internet-enabled wireless web device (12) including a first communications port having a generic input/output port (164) and a second communications port (60) having a circuit for wireless communications with a network, wherein the internet enabled wireless web device (12) is configured to store a health parameter, the health parameter is corresponding to a state or condition of a patient and determined by a health parameter determining means; a base wireless device application (70); and a user interface (68) presenting a menu of options to the user, the user interface (68) allowing the user to choose inputs and to generally operate the device, the wireless health-monitoring system further comprising:  
a server application (62), residing on a computer readable medium and disposed on a server (22) in communication with the wireless network, for causing the server (22) to:  
receive the determined health parameter (122);  
calculate a response based in part on the determined health parameter (126); and provide the response to the internet-enabled wireless web device (12)."

Claim 1 of **auxiliary request I'** adds to claim 1 of auxiliary request I after the wording "a health monitoring device (11)" the wording ", the health monitoring device (11, 160) comprising an output port to deliver data corresponding to a health parameter".

Claim 1 of **auxiliary request II** adds to claim 1 of auxiliary request I, after the wording "provide the response to the internet-enabled wireless web device

(12)" the wording "; wherein the server application (62) is an application employing a plurality of nodes, and wherein the device application acts as a node of the server application (62); and wherein the node is a node of a system selected from the group consisting of: an algorithm, an artificial intelligence system, an expert system, a rules-based system, a case-based reasoning system, and combinations thereof".

Claim 1 of **auxiliary request III** adds to claim 1 of auxiliary request II, after the wording "to generally operate the device," the wording "and a sensor for measuring the health parameter, the sensor having an output coupled to the health monitoring device (11), said sensor being at or within a patient;".

Claim 1 of **auxiliary request IV** replaces in claim 1 of auxiliary request III the wording "said sensor being at or within a patient" by the wording "said sensor being within a patient".

Claim 1 of **auxiliary request V** adds to claim 1 of auxiliary request IV after the wording "and combination thereof" the wording "; wherein the health monitoring device (11, 160) includes the health parameter determining means, the health monitoring device (11, 160) further comprising an output port to deliver data corresponding to the health parameter".

## **Reasons for the Decision**

### 1. Admissibility of the appeal

The appeal complies with the provisions of



Article 106 to 108 EPC (cf. point II above) and is therefore admissible.

2. Admissibility of the interventions of respondents 2 and 3

The interventions comply with the provisions of Article 105 EPC (see points VI and VII above) and are therefore admissible.

3. Main request (former auxiliary request Ia)

- 3.1 The new main request was admitted into the appeal proceedings since it was filed, as auxiliary request Ia, in direct response to the notices of intervention (see point VIII above).

- 3.2 The following numbering of the features of claim 1 will be used in this decision:

1.0 A wireless health-monitoring system for monitoring a state or condition of a patient.

1.1 [The wireless health-monitoring system comprises] a wireless health monitoring apparatus (10) that is linked in a wireless fashion.

1.2 [The wireless health-monitoring apparatus comprises] a health monitoring device (11).

1.2a The health monitoring device (11, 160) including a health parameter determining means for determining a health parameter.

1.2b The health monitoring device (11, 160) further comprising an output port to deliver data corresponding to the health parameter;

1.3 [The wireless health monitoring apparatus (10) includes] an internet-enabled wireless web device (12) that is either an internet-enabled mobile phone, a

handheld computer, or a hybrid device of a handheld computer and mobile telephone.

1.4 The internet-enabled wireless web device (12) includes a first communications port having a generic input/output port (164).

1.5 [The internet-enabled wireless web device (12) includes] a second communications port (60) having a circuit for wireless communications with a network,

1.5a The output port of the health monitoring device (11, 160) and the generic input/output port (164) communicate via a wireless link;

1.6 The Internet enabled wireless web device (12) is configured to store the health parameter, the health parameter is corresponding to a state or condition of a patient

1.7 [The wireless health monitoring apparatus (10) includes] a base wireless device application (70).

1.8 [The wireless health monitoring apparatus (10) includes] a user interface (68) allowing the user to choose inputs and to generally operate the device.

1.9 [The wireless health-monitoring system comprises] a server application (62), residing on a computer readable medium and disposed on a server (22) in communication with the wireless network,

1.10 [The server application (62) is for causing the server (22) to] receive the determined health parameter (122).

1.11 [The server application (62) is for causing the server (22) to] calculate a response based in part on the determined health parameter (126).

1.12 [The server application (62) is for causing the server (22) to] provide the response to the internet-enabled wireless web device (12).

3.3 As support for amended claim 1, the appellant referred to claims 11 and 19 as well as lines 10 to 13 on

page 24 of the application documents as originally filed.

- 3.4 In their responses dated 18 December 2018 (see page 28, last paragraph to page 29, first two paragraphs), respondents 2 and 3 argued that original claim 11 specified that the claimed wireless health monitoring system comprised a "health device ... including the health parameter determining means", whereas claim 1 as amended specified that the claimed system comprised a "health monitoring device including a health parameter determining means" (emphasis added by the board). Therefore, the health device of original claim 11 was no longer included in claim 1 and the claimed system comprised a new entity, the "health monitoring device".

In its response dated 18 January 2019, the appellant referred to the passage from page 4, line 28 to page 5, line 5 and original claims 29 and 32. The appellant maintained that this proved that the term "health device" as used in the claims as originally filed corresponded to the "health monitoring device", also designated by the acronym "HMD", according to the description, and concluded that, based on the original claim 1, it could be derived directly and unambiguously from the application as originally filed that the "health monitoring device" might include a "health parameter determining means".

During the oral proceedings, respondents 2 and 3 maintained the objection that, according to the original disclosure, the health parameter determining means was not included in the health monitoring device, as defined by feature 1.2a, but, according to original claim 11, in a "health device", which was no longer present in claim 1.

The appellant further argued that Figure 2 and the relevant passage in page 12, lines 16 to 25, showed that the wireless health monitoring apparatus 10 comprised the health monitoring device 11, which might itself include a sensor 24, the sensor being used for measuring a health parameter as defined in claim 28 as filed. The appellant added that page 10, lines 26 to 27 clearly indicated that HMDs included means for determining a health parameter, i.e. a health parameter determining means.

3.5 The board is, however, not convinced by the arguments of the appellant for the following reasons:

The description of the embodiments of the invention in relation to Figures 1 to 8 starts on page 12, line 6, and does indeed state that the wireless health monitoring system comprises a health monitoring device (reference number 11 in Figure 2 and 160 in Figures 7 and 8). However, it does not state that the health monitoring device includes a health parameter determining means. A health parameter as such is first mentioned in the passage in lines 23 to 28 on page 13. However, the health parameter is described as being measured by a sensor and wirelessly communicated to the wireless health monitoring apparatus. Even if the sensor, as argued by the appellant, were to be considered as a health parameter determining means, this passage clearly describes how the health parameter determining means would be external to the wireless health monitoring apparatus and *a fortiori* external to the health monitoring device. This is also corroborated by the positioning of sensor 24 outside the wireless health monitoring apparatus in Figure 4. A health parameter is further mentioned in the passage from

page 15, line 30, to page 16, line 10. The health parameter is described here as being determined by an external data source 74, clearly located outside the wireless health monitoring apparatus (see Figure 4). Furthermore, the passage on page 18, lines 11 to 14, describes health parameters that may be determined by a medical device or manual input. However, this passage does not mention a health monitoring device, nor does it specify where exactly the medical or the manual input means are located within the wireless health monitoring system. In the following passage, on page 18, lines 15 to 18, it is in fact mentioned that the medical device is the entity which sends the health parameter to the wireless web device. It is not mentioned, however, that the medical device has determined the health parameter but rather that the medical device has received the health parameter from a sensor. Even the passage on page 20, lines 12 to 21, relating to a system for monitoring a patient while exercising on an exercise machine, mentions that a health parameter is received rather than determined by a health monitoring device which is an exercise machine (see also page 5, lines 1 to 5, in this respect).

The sentence on page 10, lines 26 to 27, stating that "In general, HMDs include some means for determining a health parameter", although included in the chapter "Detailed description of the preferred embodiments", represents a statement which is separate from the detailed description of the embodiments on which claim 1 is allegedly based. As explained above, it is not mentioned in the passages following this isolated sentence that a health parameter is determined by a health monitoring device, or a medical device, which communicates wirelessly with the wireless web device.

Finally, claim 11 as originally filed in combination with claim 1 as filed teaches that the "health device" is part of the health monitoring system (which also includes the "server") and is supposed to include the health parameter determining means. It does not teach that a "health monitoring device" is part of a health monitoring apparatus and that it includes the respective health parameter determining means. This implies directly that feature 1.2a, according to which the health parameter monitoring device is included in the "health monitoring device" rather than only in the health monitoring system, is in fact an unallowable limitation of the patent's original content (see also point 3.4 above).

3.6 The board thus maintains that feature 1.2a of claim 1 is not disclosed **clearly and unambiguously** in the originally filed application documents. The main request is therefore not allowable under Article 123(2) EPC.

4. Auxiliary requests Ib to Id

4.1 These requests were filed on 18 February 2019 as auxiliary requests Ib to Id and are based on auxiliary requests Ib(new) to Id(new), respectively, filed on 18 January 2019. With respect to the admissibility of these requests under Article 13(1) RPBA, the appellant explained that these requests were filed in direct response to the new prior-art documents B1 to B5 cited by respondent 2 on 9 February 2018 and B6 and B7 cited by respondents 2 and 3 on 18 December 2018, shortly before the oral proceedings (see point XVI above). The appellant further argued that these requests were related to a second embodiment concerning the health management of a subject while exercising, that they

were based on granted claims, and that they were clearly supported by the originally filed application documents, in particular by page 4, line 19 to page 6, line 20, and by page 10, line 32 to page 11, line 15. The appellant added that the filing of these requests was justified in order to balance its procedural rights with the rights of the interveners to file new documents at a late stage of the appeal proceedings.

Respondents 2 and 3 argued that these auxiliary requests related to the second embodiment of the present application (see page 20, line 6 to page 21, line 14; Fig. 6), namely a system for monitoring a state or condition of a patient while exercising and had been filed for the first time on 18 January 2019, i.e. after the notification of the summons to oral proceedings and not in direct response to the notices of intervention.

The board notes that the appellant, when filing such requests, acknowledged (see letter of 18 January 2019, page 18, last paragraph) that the prior-art documents, cited by respondents 2 and 3 and considered relevant by the board, were not all related to the monitoring of a healthy subject while exercising. The board therefore concurs with the respondents that auxiliary requests Ib, Ic, and Id each constitute a fresh case in the present appeal proceedings, which is not admissible according to the case law of the boards of appeal (see Case Law of the Boards of Appeal of the EPO, 8th edition 2016, IV.E.4.4.1).

- 4.2 Furthermore, with regard to the substantive aspects of those requests - inconclusive but mentioned here for the sake of completeness - the board concurs with respondents 2 and 3 that auxiliary requests Ib and Ic

do not *prima facie* comply with the requirements of Article 123(2) EPC, due to the presence of feature 1.2a, i.e. the "health monitoring device including a health parameter determining means" in claim 1 (see point 3.5 above). In this regard, the board notes that the appellant's assertion that the criterion of *prima facie* allowability was not applicable to accelerated proceedings is not supported anywhere in the EPC or in the case law of the boards of appeal.

4.3 For these reasons, the board exercising its discretion under Article 13(1) RPBA has decided not to admit auxiliary requests Ib, Ic, and Id into the appeal proceedings.

5. Auxiliary request Ie

This request was filed during the oral proceedings before the board. With respect to the main request, claim 1 was amended by deleting feature 1.2a and adding to feature 1.6 that the health parameter is determined by a health parameter determining means.

With respect to the admissibility of this request under Article 13(1) RPBA, the appellant argued that it was filed in direct response to the "surprising" finding of the board during the oral proceedings that feature 1.2a constituted added subject-matter under Article 123(2) EPC (see point 3.5 above).

5.1 The board maintains that this auxiliary request was filed at a very late stage of the overall proceedings. Thus, it is within the discretion of the board to admit the new auxiliary request according to criteria which have been developed by the boards of appeal in their



established case law.

5.2 As to the appellant's argument that it was surprised by the board's assessment of added subject-matter relating to feature 1.2a, the board points out that procedural developments which are objectively unforeseeable and thus can be reasonably taken as surprising over the course of the proceedings may justify the admission of a newly filed request. However, the board cannot accept that its finding on the main request could indeed be seen as an unforeseeable event in the proceedings. An objection under Article 123(2) EPC against feature 1.2, including feature 1.2a, had already been raised by respondents 2 and 3 in their letter dated 18 December 2019 (see page 28, last paragraph to page 29, first two paragraphs), so that the appellant was aware of this issue and objectively could not have been surprised by the finding of the board, which was established by taking into consideration and evaluating all of the arguments presented by all parties in an open discussion of this issue during the oral proceedings.

5.3 Also, the appellant's argument that the board's communication under Article 15(1) RPBA suggested that there were no problems with regard to added subject-matter of the then auxiliary request Ia (i.e. the present main request) is not persuasive. Firstly, such a communication is not strictly binding (Article 17(2) RPBA) but only serves as a preliminary opinion in order to prepare for the oral proceedings in an efficient manner, as was pointed out in the respective communication. The fact that the board decided against the appellant cannot be taken as a surprise. Secondly, it was not indicated that claim 1 of the then auxiliary request Ia fulfilled the requirements of Article 123(2)

EPC (see the board's communication, point 11.2), so that there could also not have been any legitimate expectation in this regard.

5.4 Moreover, the board further maintained that the deletion of the structural feature 1.2a from claim 1 did not further limit the scope of the claim but rendered auxiliary request Ie different from the main request (and also at least from the non-admitted auxiliary requests Ib and Ic), contrary to the requirement of "convergence" of admissible claim requests according to the established case law of the boards of appeal (see, for instance, T 1685/07, Reasons 6.5; T 162/09, Reasons 7.3; T 1382/09, Reasons 2.2.3 and T 1903/13, Reasons 3.3.4). In this respect, the appellant's argument that auxiliary request Ie was convergent with the previous main request, i.e. the claims as granted, is not valid, since the previous main request had been withdrawn at the beginning of the oral proceedings before the board and was thus no longer on file. The board maintains that the "convergence" criterion can be applied in the present case to the main request on file (submitted as auxiliary request Ia on 4 July 2018), the latter being admitted into the proceedings and immediately preceding auxiliary request Ie at the point in time when a decision was to be made on its admissibility.

5.5 Lastly, the admittance of auxiliary request Ie would have necessitated highly controversial discussions, at least, with regard to objections under Article 123(3) EPC, raised by respondents 2 and 3 against dependent claims 6, 8 and 15 during the oral proceedings, which would have further increased the complexity of the case.

5.6 For these reasons, the board, exercising its discretion under Article 13(1) RPBA, has decided not to admit auxiliary request Ie into the appeal proceedings.

6. Auxiliary requests Ie' and I' were also filed before the board during the oral proceedings, after the filing of auxiliary requests Ib to Ie and after the board had decided not to admit these requests into the appeal proceedings.

6.1 With respect to the main request, claim 1 of those requests was amended by deleting feature 1.2a and adding to feature 1.6 that the health parameter is determined by a health parameter determining means.

6.2 Exercising its discretion under Article 13(1) RPBA, the board has also decided not to admit auxiliary requests Ie' and I' into the appeal proceedings, in view of the very late stage of the proceedings and a lack of convergence with the main request, for the same reasons as set out in points 5.1 to 5.4 above.

7. Auxiliary request I

7.1 This request was filed with the statement setting out the grounds of appeal and is identical to auxiliary request I on which the decision under appeal was based. Thus, its admissibility under Article 12(4) RPBA was not an issue.

7.2 As to the assessment of inventive step, document 09 had been considered in the decision under appeal as the closest prior art. The appellant identified features 1.3, 1.11, and 1.12 as differences between the subject-matter of claim 1 and the disclosure of 09. As to features 1.11 and 1.12, the appellant argued that

the response sent from the server to the web device in O9 was feedback from a physician and not a calculated response issued by a computer on the server. The appellant pointed to Figure 1A, line 32 on page 7, and line 24 on page 15, which all mention the involvement of a physician in issuing the report. The board, however, agrees with the respondents that several passages in O9 clearly mention that the server generates a result page or report file, which is then sent to the patient's computer (see page 7, lines 4 to 7 and 16 to 18; page 10, lines 12 to 16; page 15, lines 8 to 20). This result page or report file is considered to fall under the definition of a calculated response given by the patent itself (see paragraphs [0057] and [0064] of the patent specification), which may be the result of a simple calculation by the server, i.e. a simple processing of the received health parameter.

Therefore, the only difference between the subject-matter of claim 1 and the disclosure of O9 resides in feature 1.3, namely that the internet-enabled wireless web device is either an internet-enabled mobile phone, a handheld computer, or a hybrid device of a handheld computer and mobile telephone.

7.3 The technical effect of this distinguishing feature is that the response of the server is provided to the patient on a mobile, portable device, whereas the system device of O9 uses a personal computer as illustrated in Figures 1A, 1B, and 4. The patient, healthy or not, is thus able to consult health information sent by the server in different locations, provided that there is wireless internet access (see paragraph [0030] of the patent specification).

The objective technical problem can thus be formulated as being how to increase the user-friendliness and flexibility of the wireless health-monitoring system.

- 7.4 The appellant argued that the skilled person would not deviate from the essential teaching of O9 of using a personal computer with a large display to compensate for the small display of the "Airwatch respiratory monitoring system" for which the system was designed. The skilled person would thus not be prompted to look for internet-enabled wireless web devices with small displays such as the mobile devices available on the patent's priority date. The board agrees with the respondents, however, that O9 requires only internet access without "full browsing" capability (see O9, page 6, lines 6 to 8; page 7, lines 15 to 18). The skilled person would thus look for prior-art systems in the same that provide such functionality and would *a priori* not exclude systems that use mobile devices if this functionality is achieved. B3, for instance, discloses that a mobile phone, having web-browsing capability on its display, receives medical data from a measuring device and transmits it through the internet to a server which provides instructions in return (see B3, paragraphs [0012], [0023], and [0033]; Figure 3). The mobile telephone of B3 is thus able to provide the functionalities required by O9 as regards the internet-enabled wireless web device. The skilled person would immediately see the advantages in terms of user mobility, and user-friendliness, when replacing the personal computer of O9 with the internet-enabled mobile phone of B3. By thus incorporating this feature of B3 into the system of O9, the skilled person would arrive at the subject-matter of claim 1, without demonstrating any inventive skills.

7.5 The appellant argued that the mobile phone described in B3 could not be used in O9 since it did not provide internet access when needed. Furthermore, it argued that B3 used the mobile phone as a server whereas the system of claim 1 relied on a server separate from the internet-enabled wireless web device. It also argued, based on paragraphs [0035] and [0037] of B3, that the Service-Computer ("Authorisierter Browser 5") did not represent a server since it was controlled by a person and did not comprise a server application. However, the board maintains that the Service-Computer 5 in Figure 1 of B3, which is able to periodically request medical data ("von dem Glukosemeßsensor gemessenen Daten") from the mobile phone and to send back instructions (see paragraph [0023] of B3), represents a server within the meaning of claim 1. In this respect, the Service-Computer 5 is identified as a "client" in Figure 1 and paragraph [0022] of B3, while a "client" is defined in paragraph [0013] as software which requests data from a server. It is thus clear that the Service-Computer 5 is not controlled by a person, contrary to the appellant's view.

7.6 The board therefore judges that claim 1 does not meet the requirements of Article 56 EPC, having regard to the disclosure of O9 in combination with B3.

8. Auxiliary request II

Claim 1 of this auxiliary request adds to claim 1 of auxiliary request I the features that the server application is an application employing a plurality of nodes, that the device application acts as a node of the server application, and that the node is a node of a system selected from the group consisting of: an algorithm, an artificial intelligence system, an expert

system, a rules-based system, a case-based reasoning system and combinations thereof.

Firstly, the board notes that the term "node" and the relationships between the server application, device application and nodes, are not defined in the description at all. The appellant argued that these additional features have to be construed, based on paragraphs [0026] and [0054] to [0056] of the patent specification, to mean that the server application operates as a back-end server for the wireless web device, physically resides on an array of servers, and interacts with systems such as an AI system, an expert system, etc. The appellant further argued that these features provided a distribution of intelligence within the system, implying a shift from the wireless web device to the external server, which compensates for the shortage of computing resources within the wireless web device.

However, even if these additional features were seen to be as put forward by the appellant and regardless of whether they relate only to a mathematical model devoid of any technical effect, the board maintains that they do not confer on claim 1 the required inventive step. In this respect, the application on the external server of 09 is able to generate medical reports based on data received from the client computer, i.e. it acts as a back-end server involving more intelligence than the client computer. Furthermore, distributing the external-server application between a plurality of servers is within the general design competence of the skilled person.

For these reasons, claim 1 of auxiliary request II also does not meet the requirements of Article 56 EPC,

having regard to the disclosure of O9 in combination with B3.

9. Auxiliary request III

Claim 1 of this auxiliary request adds to claim 1 of auxiliary request II the feature that the wireless health monitoring apparatus includes a sensor for measuring the health parameter, the sensor having an output coupled to the health monitoring device, said sensor being at or within a patient.

The board agrees with the respondents that this feature is already known from O9 (see page 6, lines 13 to 18: "thermometer", "blood pressure cuff", "tympanic compliance") and also from B3 (see paragraph [0023]: "Glukosemeßsensor").

For these reasons, claim 1 of auxiliary request III does not meet the requirements of Article 56 EPC either, having regard to the disclosure of O9 in combination with B3.

10. Auxiliary request IV

Claim 1 of this auxiliary request differs from claim 1 of auxiliary request III only in that the sensor is defined as being "within", instead of "at or within", a patient.

The board agrees with the respondents that some sensors disclosed in O9 ("thermometer") and B3 ("Glukosemeßsensor") fall perfectly within the broad definition of "as sensor within a patient".



For these reasons, claim 1 of auxiliary request IV does not meet the requirements of Article 56 EPC, having regard to the disclosure of 09 in combination with B3.

11. Auxiliary request V

This request was filed during the oral proceedings before the opposition division and was not admitted into the proceedings under Rule 116(2) EPC on the grounds that it was late-filed and *prima facie* not allowable under Article 123(2) EPC.

Claim 1 of this auxiliary request essentially adds to claim 1 of auxiliary request II the use of a sensor for measuring the health parameter.

With respect to the admissibility of this request under Article 12(4) RPBA, which gives the board the authority to deem inadmissible (facts, evidence or) requests which (could have been presented or) were not admitted into the proceedings before the department of first instance, the appellant argued that the opposition division incorrectly applied the provisions of the EPC and the conclusions of the established case law of the boards of appeal, since auxiliary request V was based on auxiliary request III and was submitted as a direct response to the objection under Article 123(2) EPC, raised by the opposition division against auxiliary request III.

The board agrees with the respondents, however, that the opposition division correctly applied its discretion under Rule 116(2) EPC not to admit auxiliary request V into the opposition proceedings, since it considered that, *prima facie*, claim 1 contained added subject-matter and gave its reasons therefor (see

Reasons 16).

It can be concluded that the opposition division exercised its discretion correctly. As to the substance of the present auxiliary request, it is apparent to the board that the combination of the feature relating to the "plurality of nodes" and the feature relating to the use of a "sensor" was not originally disclosed, since the use of nodes is only disclosed in claims 26 and 27 as originally filed, while the use of a sensor according to claim 28 as filed only refers back to claim 1 as filed. Hence, given that the board also maintains *prima facie* that the added feature was not originally disclosed, there is no reason to overrule the correctly applied discretion of the opposition division not to admit this auxiliary request into the proceedings.

Thus, the board has decided not to admit auxiliary request V into the proceedings (Article 12(4) RPBA).

12. Objection under Rule 106 EPC

During the oral proceedings before the board, the appellant raised the following objection relating to a fundamental procedural defect:

"During today's oral proceedings I put forward the objection of a fundamental procedural defect. In view of the fact that the objection on auxiliary request Ia regarding original disclosure was raised by the Boards of Appeal during the oral proceedings for the first time, the Board should have applied its discretion in such a way so as to allow the appellant to appropriately react. It should thus have admitted

auxiliary requests Ie, Ie' and/or auxiliary request I' into the proceedings".

No further comments were made by the appellant in this respect.

The respondents considered the request to be unfounded and requested that the objection be dismissed.

The board considered this objection to be an objection under Rule 106 EPC where it is required that - in order to prepare an admissible petition under Article 112a, paragraph 2(a) to Article 112a, paragraph 2(d) EPC - an objection in respect of a procedural defect within the meaning of Article 112a(2)(c) and (d) EPC be raised during the appeal proceedings. In this regard, the board understands that the appellant objected to the non-admission of auxiliary requests Ie, Ie' and/or I' on the grounds that the board should have exercised its discretion and admitted these requests into the proceedings to give the appellant a fair chance to react to the objection of the board according to Article 123(2) EPC which was allegedly only raised for the first time during the oral proceedings. Even though this is not mentioned explicitly by the appellant in its objection, this obviously relates to the board's preceding negative decision regarding the new main request.

The board could not conclude that the negative finding on the new main request or the non-admission of the auxiliary requests in question constituted a fundamental procedural violation. As already expressed above under points 5 and 6 above, the board summarises the following:

Auxiliary request Ia, which subsequently became the new main request, was submitted by the appellant on 4 July 2018 in response to the intervention of respondent 2 dated 9 February 2018. The annex to the summons to oral proceedings was finalised on 17 December 2018, before the letter from respondents 2 and 3 dated 18 December 2018 was received by the EPO, and issued on 20 December 2018. In it, the board made the general observation in point 11.2 that "it will have to be discussed whether these requests [*including auxiliary request Ia*] meet the requirements of the EPC". Then, in their letter dated 18 December 2018, respondents 2 and 3 raised an objection under Article 123(2) EPC against auxiliary request Ia, in particular based on the amendments made in feature 1.2 with respect to the "health parameter determining means" (see pages 28 and 29).

Overall, the board could not see any procedural defect in deciding as it did regarding the claims of the new main request. It thus maintains that:

- On an objective basis, the appellant should not have been surprised by the discussion about the objection under Article 123(2) EPC during the oral proceedings and should have been prepared for different possible outcomes; a mere "subjective surprise" cannot imply a violation of the right to be heard (see e.g. R 5/16, Reasons 19).
- The criteria and the reasons (see points 5 and 6 above) for not admitting auxiliary requests Ie, Ie' and I' into the proceedings were communicated by the board at the oral proceedings.

- Those criteria, i.e. state of the proceedings, complexity of the new subject-matter, convergence of claim requests, are well-established criteria in the context of admissibility considerations under Article 13(1) RPBA
  
- The appellant had the opportunity during the oral proceedings to comment on those criteria and the reasons given by the board (see minutes of the oral proceedings).

For these reasons, the board decided that the objection according to Rule 106 EPC was unfounded and should thus be dismissed.

## Order

### For these reasons it is decided that:

1. The appeal is dismissed.
2. The objection in respect of a fundamental procedural defect is dismissed.

The Registrar:

The Chairman:



K. Götz-Wein

K. Bengi-Akyuerek

Decision electronically authenticated