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**Datasheet for the decision
of 3 November 2020**

Case Number: T 0944/15 - 3.4.01

Application Number: 10711384.7

Publication Number: 2550061

IPC: A61N5/10

Language of the proceedings: EN

Title of invention:

CONTROLLING A PROCESS OF MONITORING THE POSITION OF A PATIENT
DURING A RADIATION TREATMENT

Relevant legal provisions:

EPC Art. 52(2), 52(2)(c), 53(c), 56, 78, 83, 84
EPC R. 42, 43
RPBA 2020 Art. 13(1)
Guidelines for examination G II 4.2.1
TRIPS Article 28

Keyword:

Late-filed request - admitted (yes)
Claims - clarity - main request (no)
Exceptions to patentability - (yes)
Patentable invention - computer implemented invention
Disclaimers

Decisions cited:

G 0002/88, G 0001/03, G 0001/07, G 0001/08, G 0003/08,
G 0001/16, T 0775/97, T 1173/97, T 0641/00, T 1680/08,
T 1731/12, T 1631/17



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Case Number: T 0944/15 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 3 November 2020

Appellant: Brainlab AG
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Representative: SSM Sandmair
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 15 December
2014 refusing European patent application No.
10711384.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman P. Scriven
Members: T. Alecu
D. Rogers

Summary of Facts and Submissions

- I. This appeal is against the Examining Division's decision to refuse the application.
- II. The applicant was seeking a patent on the basis of a main request, or one of six auxiliary requests.
- III. The Examining Division found the methods defined by claim 1 of the main and first auxiliary requests, as well as the data processing methods defined by claim 1 of the second and third auxiliary requests, unallowable under Article 53(c) EPC, because they were "indissociably linked to" a method of therapy.
- IV. The Examining Division also found that the main request, the second auxiliary request, and the fourth auxiliary request were not allowable under Article 84 EPC, due to claims directed to "A digital signal wave carrying information which represents the program of ...". The program itself was defined such that it would cause a computer to perform a method that the Examining Division considered excluded under Article 53(c) EPC (when discussing the main and the second auxiliary request), but they did not take a position on allowability of the program claims under Article 53(c) EPC.
- V. The fifth auxiliary request was rejected under Article 84 EPC, as the disclaimer "wherein the method does not

encompass steps having any functional link between the methods and effects produced by the device on the patient's body" in claim 13 was considered unclear.

- VI. The sixth auxiliary request was found allowable, but the applicant did not approve the text proposed under Rule 71(3) EPC, and appealed the decision to refuse the higher ranking requests.
- VII. With the grounds of appeal, the applicant requested that the Board set aside the decision of the Examining Division and order the grant a patent on the basis of a main request or one of first to fourth auxiliary requests identical to those before the Examining Division; of a fifth auxiliary request with the same claims as in the fourth, except for the deletion of the claim directed to the digital signal wave; or of one of sixth and seventh auxiliary requests, identical, respectively, to the fifth and sixth auxiliary requests before the Examining Division.
- VIII. In a communication accompanying a summons to Oral Proceedings, the Board indicated that it was inclined to uphold the objections of the Examining Division, and introduced the following documents in view of possible discussions on novelty and inventive step.

D2: Murphy M J, et al. 2007, *The management of imaging dose during image-guided radiotherapy: report of the AAPM Task Group 75*, Medical Physics, Volume 34, Issue 10, 2007, pages 4041-4063

D3: Martin J Murphy et al., *Patterns of patient movement during frameless image-guided radiosurgery*, International Journal of Radiation Oncology*Biology*Physics, Volume 55, Issue 5, 2003, Pages 1400-1408

D4: Hoogeman MS, et al., *Time dependence of intrafraction patient motion assessed by repeat stereoscopic imaging*, International Journal of Radiation Oncology*Biology*Physics, Volume 70, Issue 2, 2008, pages 609-18

- IX. The appellant filed a new main request and six new auxiliary requests. Other than the seventh, the requests filed with the grounds for appeal were maintained and renumbered as seventh to thirteenth auxiliary requests.
- X. A claim to a digital signal wave is included in the main request, and in the second, fourth, seventh, ninth and eleventh auxiliary requests. For each of these, the immediately succeeding requests have the same set of claims, except for the deletion of the claim directed to a digital signal wave.
- XI. Claim 1 of the main request, with reference signs removed, reads:

A data processing method for controlling a process of monitoring the position of at least a part of a patient's body during a radiation treatment by means of a computer,

the data processing method running on the computer and comprising the following steps:

a) providing energy data to be ready for use by the data processing method, the energy data describing an energy value which is dependent on the radiation energy which has been applied to the patient's body; and

b) determining, by the computer, control data in accordance with the energy data, wherein the control data are to be issued by the computer to a monitoring device and are designed to control the time at which monitoring is performed in accordance with the energy value;

wherein the radiation energy is the radiation energy which has been applied to at least a part of the patient's body since a previous monitoring process; and

wherein threshold data are provided to be ready for use by the data processing method, the threshold data describing a threshold value, and the control data include a control statement for initiating the monitoring process when the energy value described by the energy data reaches the threshold value.

XII. Claim 1 of the second auxiliary request differs by the replacement of *running on the computer* by *being only concerned with operating a computer*.

XIII. Claim 1 of the fourth auxiliary request defines a *program which, when running on a computer or when loaded into a computer, causes the computer to perform*

the following method: The method then defined is that of claim 1 of the main request, without the words running on a computer and.

XIV. Claim 1 of the sixth auxiliary request defines a method as in claim 1 of the main request, without the words *running on a computer and*, but adding the following disclaimer:

*... and
wherein the method does not encompass any of the following steps:
a) controlling a direction and/or intensity of a treatment beam;
b) controlling an intensity of a treatment beam;
c) avoiding an application of treatment radiation above a certain equivalent dose;
d) avoiding a certain local dose to body regions which are not to be irradiated;
e) interrupting the radiation treatment if it is determined that the patient's body is not lying at a desired position; and
f) stopping the radiation treatment if it is determined that the patient's body is not lying at a desired position.*

XV. Claim 1 of the seventh (previously main) request, without reference signs, reads:

A method for controlling a process of monitoring the position of at least a part of a patient's body during a radiation

treatment, the method comprising the following steps:

- a) providing an energy value which is dependent on the radiation energy applied to the patient's body; and*
- b) controlling the time at which the monitoring process is performed, in accordance with the energy value.*

XVI. Claim 1 of the ninth (previous second) auxiliary request differs from the seventh in that steps a) and b) are defined as follows.

...

- a) providing energy data which describe an energy value which is dependent on the radiation energy applied to the patient's body; and*
- b) determining control data in accordance with the energy data, wherein the control data are designed to control the time at which monitoring is performed in accordance with the energy value.*

XVII. Claim 1 of the eleventh (previous fourth) auxiliary request defines

A program which, when running on a computer or when loaded into a computer, causes the computer to perform the following method:

...

the method being then defined as in claim 1 of the ninth auxiliary request.

XVIII. Claim 13 of the thirteenth (previous sixth) auxiliary request defines a method as in the ninth auxiliary request, with the addition of the following disclaimer.

...

wherein the method does not encompass steps having any functional link between the method and effects produced by the device on the patient's body and the method does not encompass the following steps:

a) controlling a direction and/or intensity of a treatment beam;

b) avoiding an application of treatment radiation above a certain equivalent dose and/or a certain local dose to body regions which are not to be irradiated; and

c) interrupting or stopping the radiation treatment if it is determined that the patient's body is not lying at a desired position.

Reasons for the Decision

Main request: admission, Rule 13 RPBA 2007

1. According to the appellant, a first category of amendment was intended to clarify that the claimed method is confined to a computer, and hence did not

have a functional link with the therapy method.

2. A second category of amendment was the inclusion of features from originally-filed dependent claims 8 and 9. This had been triggered by the prior art brought forward by the Board and was an attempt to delimit the claim over the teachings of these documents, in particular over D4.
3. The Board agrees that the second category, at least, was a response to new (potential) objections contained in the Board's communication, and admits this request for reasons of procedural fairness.

Main request: clarity, Article 84 EPC

4. Claim 1 defines, in step b), the *control data* as follows (emphasis by the Board):

... determining, by the computer, control data in accordance with the energy data, wherein the control data are to be issued by the computer to a monitoring device and are designed to control the time at which monitoring is performed in accordance with the energy value ...
5. Here, the control data vary in accordance with the energy data. The straightforward reading is that the control data are timing information, set depending on the energy data level.
6. These data are to be issued to a monitoring device. This implies that they are written somewhere (e.g. an output buffer) while waiting to be transmitted to the

monitoring device; when the data are transmitted is not specified.

7. In the last feature of claim 1, *control data* are further defined: they *include a control statement for initiating the monitoring process when the energy value described by the energy data reaches the threshold value.*

8. It is unclear, in this statement, whether the *when* clause relates to the inclusion of a control statement, or to the initiation of the monitoring process. In the first case, this would mean that a control statement is included only when the threshold is reached - this control statement could be, then, just a simple "start monitoring" command. In the second, a "start monitoring" command could always be included (which might mean that the data are not actually determined), but the data would not be output until the threshold is reached. These possibilities (and others) are plausible in combination with different data transmission schemes between the (controlling) computer and the monitoring device.

9. It is also unclear what else is included in the data, and, in connection with the definition in step b), which parts of the data are determined *in accordance with the energy data.*

10. The skilled person, therefore, cannot clearly understand the limits of the scope of protection. They cannot be sure what statements, in the output buffer for transmission to the monitoring device, would fall within the given definitions.

11. The appellant argued it was clear that the monitoring would be initiated when the energy value reached the threshold, and pointed to page 5 of the description.
12. Although the Board agrees that the role of the control data is clear, this does not mean that the scope of the claim is. There can be different formats of the control data that could initiate monitoring, and it is not clear from the claim which are meant. Nor is it clear that all possibilities are covered. The description at page 5 does not help, as it does not contain a clear definition of control data, but only statements as to what the control data *preferably* or *also* comprise (see lines 8 to 22).
13. The Board thus concludes that claim 1 of the main request does not fulfil the requirements of Article 84 EPC.

Main request, Article 53(c) EPC

14. The appellant referred to T 0641/00, "Two identities/COMVIK", OJ 2003, 352 and argued that the claim scope was clearly restricted to something that happened only in a computer. It was the prerogative of the applicant to define the scope of protection and thereby the invention. Here, the invention was a data processing method confined to the computer, i.e. a computer-implemented method, and was technical because it processed technical data. So it was an invention that could be completely defined by what happened in the computer.
15. Furthermore, even if a step of initiating the monitoring device were to be considered, the method

remained one of operating a device, which G 1/07 "Treatment by surgery/MEDI-PHYSICS", OJ 2011, 134 (Reasons 4.3.2) did not consider to be excluded from patentability. There were no therapeutical effects caused by the computer, either on its own or with the monitoring device, on the body.

16. The Board agrees that the claim is restricted to a method implemented on a computer, and that it is the prerogative of the applicant to define the scope of protection sought. However, there is a distinction to be made between what the *invention* for which a patent *shall be granted or shall not be granted* is, as in Articles 52 and 53 EPC, and the claimed scope of protection.
17. A patent application provides a description of the invention, including a teaching of a technical solution providing a technical effect (Articles 78 and 83 EPC, Rule 42 EPC). Based on this teaching, a request can be made for a time-limited monopoly. The role of the claims is to define this *matter for which protection is sought* - (Article 84 EPC). They must be examined for compliance with the provisions of the EPC. They do not, in themselves, define what the invention is. Instead, it is the corresponding teaching in the application which does that.
18. This definition of the invention as what the application teaches was adopted by the Enlarged Board in G1/08 "Tomatoes/STATE OF ISRAEL" OJ 2012, 206 (Reasons 6.4.2.1), when referring to the "Rote Taube" (BGH, 27.03.1969 - X ZB 15/67) definition of the invention as being in conformity with the EPC. The Rote Taube decision namely stated (end of section II.A.3) that *als patentierbar eine gewerblich verwertbare neue,*

fortschrittliche und erfinderische Lehre zum planmäßigen Handeln unter Einsatz beherrschbarer Naturkräfte zur Erreichung eines kausal übersehbaren Erfolges angesehen werden kann (An industrially exploitable, new, progressive, and inventive teaching on systematic action using controllable natural forces to achieve a causally foreseeable result can be regarded as patentable).

19. Importantly for the present case, the role of the teaching in determining the nature of the invention in respect of Article 53(c) EPC was emphasised by the Enlarged Board in G 1/07 (4.3.2):

Methods which are merely directed to the operating of a device without themselves providing any functional interaction with the effects produced by the device on the body are teachings in which the performance of a physical activity or action that constitutes a method step for treatment of a human or animal body by surgery or therapy is not required in order for the teaching of the claimed invention to be complete.

20. It is, therefore, not the claimed scope, but the corresponding teaching of the invention which is decisive for establishing what the invention is, and, for the purpose of Article 53(c) EPC, *whether or not a claimed invention only concerns the operation of a device without any functional link to the effects of the device on the body (G 1/07 4.3.2).*
21. If this teaching requires features beyond those claimed, then these are also considered in assessing what the invention is (see T 1631/17, paragraphs 2.1

and 2.2, referring to G 1/07). If any of the features making up the complete teaching are method steps that provide for effects on the body, then they establish a functional link to these effects and the claimed invention is one for which a patent shall not be granted under Article 53(c) EPC.

22. In the present case, the Board first notes that it sees no technical effect in the claimed data processing steps: the result is just data stored in memory, with no influence on the computer's functioning or structure. It is necessary to turn to the description of the invention to understand what the technical effect may be and what the invention is.
23. The invention, as described, relates to monitoring the position of a patient during radiation treatment and addresses the problem that a patient's movement during treatment can result in the radiation no longer being effectively delivered to the targeted region (page 1, first paragraph), or in it being delivered to other body parts which can be damaged by it (page 9, lines 4 to 6).
24. To prevent this, depending on the amount of movement detected, the radiation beam could be interrupted or stopped (application as published, page 22, line 7 from the bottom), or changed in intensity or direction (page 11, line 5 from the bottom, although it is noted that this passage has been removed in the current version). However, the monitoring itself requires further exposure to radiation, e.g. x-rays, which should also be avoided.
25. According to the description (application as published, paragraph bridging pages 1 and 2):

The object of the invention is to monitor the position of a patient in a way which represents an optimum compromise between the drawbacks and advantages of monitoring. The invention is in particular directed to improving the quality of radiation treatment. Advantageously, the period of time over which a patient is subject to monitoring and in particular the associated x-ray exposure is minimised, while still ensuring that the treatment radiation effectively hits the desired target.

26. The solution proposed and claimed is to control the timing of position monitoring in accordance with the radiated energy (claim 1 and page 2 second complete paragraph), more precisely by comparison of this energy with a threshold (claim 1 and the paragraph bridging pages 8 and 9).
27. The object of minimising exposure *while still ensuring that the treatment radiation effectively hits the desired target* cannot be attained, if the result of the initiated position monitoring is not taken into account for controlling the radiation treatment in one or more of the ways noted above. This information can be used either in an automated manner, by the radiation delivery system; or by bringing it to the attention of the medical practitioner.
28. In the former case, its automatic use to perform any of the radiation controlling steps above makes it a step that necessarily influences the result of the treatment.

29. This is also the case if the information is simply brought to the attention of the practitioner. The timing of the monitoring influences how much control the practitioner can exercise over the delivery of the treatment, and thus the result of the treatment. At the very least, it impacts how much radiation can be given without adjustment, which has a direct effect on the treatment result by increasing or diminishing the possibility that the radiation is not targeted correctly (see page 9, line 5 "avoid damage to body parts which are not meant to be irradiated").
30. Thus, irrespective of any automated control of the radiation treatment beam (which the appellant seeks to exclude by deleting the passage on page 11), merely controlling the timing of the monitoring has an effect on the therapy.
31. In summary, in the light of the disclosure of the invention, the skilled person cannot conceive of the invention without the steps of initiating the monitoring and using the result, which create a functional link to the method of treatment.
32. It is instructive to consider the invention under the Comvik approach (T 641/00), as suggested by the appellant. The fact that the claimed method runs on a computer is sufficient to escape the exclusion under Article 52(2) EPC. An inventive step, however, requires some further technical effect, which can be within the computer or outside it. In the present case, there is no technical effect inside the computer (see point 22, above), and the only effects outside are those related to the object of the invention discussed above. In order to obtain these effects, the steps linking the

data processing method to the radiation treatment need to be taken into account.

33. For the sake of completeness, the Board also notes that the fact that the method is computer-implemented does not change the assessment as to its exclusion as a method of treatment, as already concluded in T 1680/08, reasons 2.2.
34. In conclusion, paraphrasing G 1/07, the claimed method is not merely directed to the control of the device, because the teaching of the invention is not complete without the steps of initiating the monitoring and using the result; their necessary consideration as part of the teaching of the invention means that claim 1 of the main request defines a method of treatment excluded under Article 53(c) EPC.

First, second, and third auxiliary requests

35. These requests, which remove the claims directed to a *signal wave* and define the method as *being only concerned with operating a computer*, address neither the clarity of what the *control data* are, nor the exclusion from patentability.
36. The appellant has not argued otherwise.
37. The Board sees no reason to consider these requests and declines to admit them (Article 13(1) RPBA 2020).

Fourth auxiliary request

38. The appellant submitted that the claimed subject matter was not excluded from patentability as a method for treatment, because it was not a computer-implemented method, but a computer program; and referred to the Guidelines for Examination (November 2019 edition) G.II, 4.2.1, which state, in the last paragraph:

Claims to medical devices, computer programs and storage media which comprise subject-matter corresponding to that of a method for treatment of the human or animal body by surgery or therapy or to that of a diagnostic method practised on the human or animal body are not to be objected to under Art. 53 EPC, because only method claims may fall under the exception of Art. 53(c) EPC.

39. The appellant also submitted that the patentability of the computer program should be assessed according to the Comvik approach. The claimed invention had technical character and was not obvious from the prior art.

40. Article 53(c) EPC states:

European patents shall not be granted in respect of:

...

(c) methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body; this provision shall not apply to products, in particular substances or

compositions, for use in any of these methods.

41. According to G 1/07 point 3, the reason for this provision was that medical practice must not be hindered by patent protection. Its formulation appears to establish a dichotomy in relation to methods of treatment: methods are on the excluded side, and products to be used in such methods are on the allowed side.
42. Computer programs are not explicitly addressed in this provision, although at the drafting of the EPC 1973 both exclusions were discussed in the context of Article 52. The Travaux Préparatoires for this Article do not show evidence of any discussion as to the relationship between the two exclusions.
43. The Travaux Préparatoires do show that it was unclear to the Working Group what a computer program was, and when it should be excluded from patentability. A definition was proposed by the UK delegation (BR/135 e/71 prk point 96) as *merely the mathematical application of a logical series of steps in a process which was no different from a mathematical method*, but this detailed definition was not accepted as it was felt that, *although the term "computer programmes" might need some clarification, it was not desirable here to do more than lay down general principles so as not to tie the hands of the European Patent Office and of the national courts which would have to settle these questions.*
44. In the same vein, when discussing whether to include computer programs in the list of exclusions from patentability, in what ended up being paragraph (c) of

Article 52(2) EPC 1973 (BR/177 e/72 oyd/AH/prk point 8), the emphasis was on allowing *the free development of precedents ... in this still very uncertain field*, the majority opinion being that including them in the list *would, as a matter of fact, make for the exclusion or computer programs as such, while allowing precedents to be used to assess the patentability of any related inventions.*

45. It is, then, the task of the Office to consider, according to the case at hand, the nature and the patentability of an invention related to a computer program. When the computer program is related to a method of treatment or surgery, these considerations extend to whether it is to be excluded as such a method or allowed as a product for use in one.

46. The Board notes that it is not only methods that can fall within the exclusion under Article 53(c) EPC. For instance, products can be claimed in at least two ways: they can be claimed in terms of their physical characteristics, but they can also be claimed in terms of, for example, specific fabrication steps. In the latter case, the product is actually defined by method steps, which can lead to exclusion under Article 53(c) EPC. This was the case in T 1731/12, *Implantat/Forschungszentrum Jülich* and T 775/97, where it was concluded that a device is excluded from patentability if it only takes on the claimed form by means of a surgical step, even (in T 1731/12) if that step is not defined in the claim. As explained above, it is the complete teaching that determines the nature of the invention, not the particular form in which it has been claimed.

47. In the Board's view, the second leg of the provision in Article 53(c) EPC refers essentially to products defined in terms of their physical characteristics, e.g. a drug with a certain composition or a scalpel with a specific shape, in line with the intention expressed in the *Travaux Préparatoires* to protect *medical instruments* (MUNICH DIPLOMATIC CONFERENCE, page 28, points 36 to 38). Such a product can be used in a method of treatment, in order to achieve a certain therapeutic effect, but it is the medical practitioner who determines what sequence of therapeutic actions are taken using the product.
48. A computer program, as defined in auxiliary request 4, is not such a product. It is only defined by reference to what the programmed method does when run. It is characterised by actions; it is a thing that is defined by what it does, and it has no other use than the execution of the programmed method. The program is only the necessary description of the method in a manner that can be understood by the computer. The invention, as the skilled person understands it from the provided teaching, is the method.
49. Again, *arguendo*, one can also look at the matter from the point of view of the case-law regarding patentability of computer programs: it is the potential effects of the method which warrant the grant of a patent with such a claim (T 1173/97 "Computer program product/IBM", 9.4 to 9.6), whatever its form may be, i.e. computer implemented method, computer program, computer program product, or even a computer with the computer program (G 3/08 "Programs for computers" OJ EPO 2011, 10, points 10.7.1 and 10.13). So claiming, in the manner of the present request, a computer program instead of the computer-implemented method does not

change what the invention is, because the teaching supporting the claim still resides in the method.

50. It is important not to conflate the exclusions from patentability under Articles 52(2) and (3) EPC with those of Article 53(c) EPC. The first serve to define what can be defined as an invention, the second to define exceptions from patentability for certain sorts of invention. The latter do not negate the quality of the excepted matter as an invention under Article 52 EPC, but deny patentability for societal, ethical, or other reasons. If a claim to a computer-implemented method escapes exclusion as a computer program as such under Article 52(2)(c) EPC, and even if it involves an inventive step under Article 56 EPC, it may nevertheless be excluded under Article 53(c) EPC. That is a separate assessment, on the basis of what the invention is, in view of the teaching provided.
51. Furthermore, as G 2/88 "Friction reducing additive" explained (Reasons 5), the grant of a product claim also provides protection for all its uses. This is also clear in TRIPS article 28 (TRIPS applies for almost all EPC contracting states as WTO members). In providing protection for a computer program which is designed to implement a method of treatment, de facto protection is provided for the method of treatment, because running the program is using the method.
52. As the method is excluded, so the computer program should also be excluded: even if indirectly conferred, a protection for a method of treatment goes against the ratio legis of Article 53(c) EPC (G 1/07, point 3):

... that medical practice must not be hindered by patent protection ... Any factor

which could interfere with this, such as licence fee considerations, should therefore be carefully ruled out which might however prove difficult, if patents were granted on medical methods.

53. All of the above reasons lead to the conclusion that, the computer program of claim 1 of the fourth auxiliary request is an invention only by virtue of the property that, when running, it implements a method of treatment excepted from patentability under Article 53(c) EPC. It is, for that reason, excluded from patentability.
54. For the same reasons, the Board disagrees with the statement in the Guidelines for Examination (November 2019) at G.II, 4.2.1, to which the appellant referred.

The fifth auxiliary request

55. The amendment carried out in this request (removal of the *signal wave* claim) does not affect the situation as to exclusion from patentability. The Board does not admit this request (Article 13(1) RPBA 2020).

The sixth auxiliary request

56. The amendments to the data processing method claim do not affect the clarity objection as to what the *control data* is.
57. The explicit disclaimer of steps to be performed as a result of the monitoring process cannot change the analysis as to whether the claimed method is excluded from patentability, because a complete invention cannot

be defined without defining steps linking the method to the radiation treatment, as explained above; this analysis remains the same whether the steps creating the functional link are not claimed or are disclaimed.

58. The Board declines to admit this request (Article 13(1) RPBA 2020).

Seventh to twelfth auxiliary request

59. For all these requests, the arguments as to the method claims (see discussion of the main request above) being excluded from patentability under Article 53(c) EPC remain valid, because at least the control of the timing of the monitoring device remains a necessary part of the definition of the invention, creating a functional link to the radiation treatment.
60. Therefore, the invention defined in claim 1 of each of these requests is excluded from patentability under Article 53(c) EPC.

Thirteenth auxiliary request

61. The disclaimer in claim 13 of this request is set out in the form of a legal test. While disclaimers may be used to disclaim subject matter that is excluded from patentability (G 1/16 "Disclaimer/III", OJ EPC 2018, 70 and G 1/03 "Disclaimer/PPG", OJ EPO 2004, 413, point 2.1), they should be formulated in terms of technical features (Rule 43 EPC), as any other claim features, and not as legal requirements.

62. The Board finds thus the claim to be unclear to the skilled person (Article 84 EPC).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



H. Jenney

P. Scriven

Decision electronically authenticated