

**Internal distribution code:**

- (A) [ - ] Publication in OJ  
(B) [ - ] To Chairmen and Members  
(C) [ - ] To Chairmen  
(D) [ X ] No distribution

**Datasheet for the decision  
of 29 July 2019**

**Case Number:** T 2078/15 - 3.5.05

**Application Number:** 10776896.2

**Publication Number:** 2517130

**IPC:** G06F19/00

**Language of the proceedings:** EN

**Title of invention:**

EVENT DRIVEN CONFIGURATION OF A SURGICAL SYSTEM CONSOLE

**Applicant:**

Alcon Research, Ltd.

**Headword:**

Event-driven console/ALCON

**Relevant legal provisions:**

RPBA Art. 12(4), 13(1), 13(3)

**Keyword:**

Amendments - broadening of claim (yes)  
Late-filed request - request clearly allowable (no) - submitted  
during oral proceedings

**Decisions cited:**

T 1472/08, T 2000/09, T 1428/11

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 2078/15 - 3.5.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.05**  
**of 29 July 2019**

**Appellant:** Alcon Research, Ltd.  
(Applicant) 6201 South Freeway TB4-8  
Fort Worth, TX 76134 (US)

**Representative:** Hanna Moore + Curley  
Garryard House  
25/26 Earlsfort Terrace  
Dublin 2, D02 PX51 (IE)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 5 June 2015  
refusing European patent application No.  
10776896.2 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chair** A. Ritzka  
**Members:** E. Konak  
G. Weiss

## Summary of Facts and Submissions

I. The appeal is against the decision of the examining division to refuse the patent application in suit *inter alia* for lack of clarity (Article 84 EPC) and lack of inventive step (Article 56 EPC) with regard to the following document:

D3: EP 1 872 736 A2.

II. With its statement setting out the grounds of appeal, the appellant filed claims 1 to 11 of a main request and claims 1 to 10 of an auxiliary request. The appellant requested that the decision be set aside and a patent be granted on the basis of these requests. It requested oral proceedings as an auxiliary measure.

III. In its preliminary opinion annexed to the summons to oral proceedings, the board communicated that it did not intend to admit the requests filed with the statement setting out the grounds of appeal (Article 12(4) RPBA) and, even if the requests were to be admitted, they did not appear to meet the requirements of Articles 84, 83 and 56 EPC.

IV. In reply to the summons to oral proceedings, the appellant filed claims 1 to 11 of auxiliary request 2, claims 1 to 8 of auxiliary request 3 and claims 1 to 8 of auxiliary request 4.

V. Oral proceedings were held before the board. At the oral proceedings, the appellant filed claims 1 to 11 of auxiliary request 5 and amended page 2 of the description.

VI. Claim 1 of the main request and the auxiliary request is identical and reads as follows:

"An emulsification surgical system, comprising:  
a first subsystem configured to perform a portion of a phacoemulsification surgery;  
a second subsystem configured to cooperate with the first subsystem to perform a portion of a phacoemulsification surgery;  
a computer system (103) operatively associated with both the first and second subsystems, the computer system containing preprogrammed relationships between a plurality of subsystems (106,110,116,120,124) including the first and second subsystems, and adapted to control the first and second subsystems during the phacoemulsification surgery,  
wherein the relationships between subsystems are defined by specific subsystem responses to specific subsystem triggering events,  
wherein preprogrammed relationships comprise preprogrammed specific subsystem responses to specific subsystem triggering events,  
and wherein modifying the preprogrammed relationships comprises modifying a specific subsystem response by a responsive system to specific subsystem triggering events as monitored by a triggering subsystem;  
a display screen (104) associated with the computer system and configured to display data relevant to the emulsification surgical system;  
a user interface (400,500) displayable on the system display screen (104) configured to receive inputs that cause the computer system to modify the relationships on the computer system, the user interface comprising:  
one or more user-selectable options (606) shown on the display screen that represent subsystem triggering events (608,610,612), each one or more user-selectable

subsystem triggering events identifying a triggering subsystem condition that may occur during a surgical procedure performed with the surgical system; and one or more user-selectable options (614) shown on the display screen that each represent a subsystem responsive result (616,618,620) to a subsystem triggering event;

one or more user-selectable options (624) shown on the display screen that represent ending criteria (626,628,630) for one or more of the plurality of user-selectable responses, the ending criteria identifying conditions for ending the response to the triggering event and resuming control of the subsystems based on the preprogrammed relationships;

wherein selection of a user-selectable option representing a subsystem triggering event and a user-selectable option representing a subsystem response modifies the relationship between the triggering subsystem and the responsive subsystem of the surgical system."

VII. Claim 1 of auxiliary request 2 differs from claim 1 of the main request and the auxiliary request in that the word "preprogrammed" is added before the word "relationship" in the paragraph starting with "a user interface (400, 500)" and in the last paragraph.

VIII. Claim 1 of auxiliary request 3 reads as follows (with the additions with respect to auxiliary request 2 underlined):

"An emulsification surgical system, including: a footpedal subsystem (106) including a footpedal (108); a fluidics subsystem (110) including an aspiration vacuum (112) and an irrigation pump (114); an ultrasonic generator subsystem (116) including an

ultrasonic oscillation handpiece (118); and an intravenous (IV) pole subsystem (120) including a motorized IV pole (122), comprising:

a first subsystem configured to perform a portion of a phacoemulsification surgery, wherein the first subsystem is the fluidics subsystem (110);

a second subsystem configured to cooperate with the first subsystem to perform a portion of a phacoemulsification surgery, wherein the second subsystem is the ultrasonic generator subsystem (116);

a computer system (103) operatively associated with both the first and second subsystems, the computer system containing preprogrammed relationships between a plurality of subsystems (106,110,116,120,124) including the first and second subsystems, and adapted to control the first and second subsystems during the phacoemulsification surgery,

wherein the relationships between subsystems are defined by specific subsystem responses to specific subsystem triggering events,

wherein preprogrammed relationships comprise preprogrammed specific subsystem responses to specific subsystem triggering events,

and wherein modifying the preprogrammed relationships comprises modifying a specific subsystem response by a responsive system to specific subsystem triggering events as monitored by a triggering subsystem;

a display screen (104) associated with the computer system and configured to display data relevant to the emulsification surgical system;

a user interface (400,500) displayable on the system display screen (104) configured to receive inputs relating to subsystem control that cause the computer system to modify the preprogrammed relationships on the computer system, the user interface comprising:

one or more user-selectable options (606) shown on the display screen that represent subsystem triggering events (608,610,612), wherein the triggering subsystem is the fluidics subsystem and the subsystem triggering events comprises one of a full occlusion, an occlusion break or vacuum level exceeding or falling below set thresholds, each one or more user-selectable subsystem triggering events identifying a triggering subsystem condition that may occur during a surgical procedure performed with the surgical system; and

one or more user-selectable options (614) shown on the display screen that each represent a subsystem responsive result (616,618,620) to a subsystem triggering event, wherein the responsive subsystem is the ultrasonic generator subsystem and the subsystem response results including an adjust power option, an adjust timing option and a deliver pulse option;

one or more user-selectable options (624) shown on the display screen that represent ending criteria (626,628,630) for one or more of the plurality of user-selectable responses, the ending criteria including an end of event option, a number of times option and another event option, the ending criteria identifying conditions for ending the response to the triggering event and resuming control of the subsystems based on the preprogrammed relationships;

wherein selection of a user-selectable option representing a subsystem triggering event and a user-selectable option representing a subsystem response modifies the preprogrammed relationship between the triggering subsystem and the responsive subsystem of the surgical system."

- IX. Claim 1 of auxiliary request 4 differs from claim 1 of auxiliary request 3 in that it has the following additional text before the full stop at its end:



", and  
wherein the responsive results for the responsive  
subsystem are limited to specific selectable results  
that have been found to be within a range of safe  
adjustments"

- X. Claim 1 of auxiliary request 5 reads as follows (with  
the additions with respect to auxiliary request 2  
underlined and the deletions ~~struck through~~):

"An emulsification surgical system, comprising: a  
console including a plurality of subsystems including:  
a footpedal subsystem (106) including a footpedal  
(108); a fluidics subsystem (110) including an  
aspiration vacuum (112) and an irrigation pump (114);  
an ultrasonic generator subsystem (116) including an  
ultrasonic oscillation handpiece (118); an IV  
subsystem, and a pneumatic vitrectomy cutter subsystem  
(124);

a first subsystem configured to perform a portion of a  
phacoemulsification surgery;

a second subsystem configured to cooperate with the  
first subsystem to perform a portion of a  
phacoemulsification surgery;

a computer system (103) operatively associated with  
both the first and second subsystems, the computer  
system containing preprogrammed relationships between a  
plurality of subsystems (106,110,116,120,124) including  
the first and second subsystems, and adapted to control  
the first and second subsystems to cooperate during the  
phacoemulsification surgery, the preprogrammed  
relationships between subsystems being hard-coded into  
the surgical system;

~~wherein the relationships between subsystems are  
defined by specific subsystem responses to specific  
subsystem triggering events,~~

~~wherein preprogrammed relationships comprise preprogrammed specific subsystem responses to specific subsystem triggering events, and wherein modifying the preprogrammed relationships comprises modifying a specific subsystem response by a responsive system to specific subsystem triggering events as monitored by a triggering subsystem;~~  
a display screen (104) associated with the computer system and configured to display data relevant to the emulsification surgical system;  
characterized in that the system further comprises a user interface (400,500) displayable on the system display screen (104) configured to receive inputs relating to subsystem control that cause to allow the computer system to modify the preprogrammed relationships on the computer system, the user interface comprising:  
one or more selectable options (602) shown on the display screen that represent a listing of the plurality of subsystems (502, 602) of the surgical system, the user interface permitting a user to select a triggering subsystem (502, 602) to monitor for a triggering event, and a responsive subsystem (504, 604);  
one or more user-selectable options (606) shown on the display screen that represent subsystem triggering events (608,610,612), each one or more user-selectable subsystem triggering events identifying a triggering subsystem condition that may occur during a surgical procedure performed with the surgical system; and  
one or more user-selectable options (614) shown on the display screen that each represent a subsystem responsive result (616,618,620) to a subsystem triggering event;  
one or more user-selectable options (624) shown on the display screen that represent ending criteria

(626,628,630) for one or more of the plurality of user-selectable responses, the ending criteria including an end of event option, a number of times option and another event option, the ending criteria identifying conditions for ending the response to the triggering event and resuming control of the subsystems based on the preprogrammed relationships;

~~wherein selection of a user-selectable option representing a subsystem triggering event and a user-selectable option representing a subsystem response modifies the relationship between the triggering subsystem and the responsive subsystem of the surgical system~~

wherein, based on the user selection of a triggering subsystem and triggering events and a responsive subsystem and responsive results to the triggering events, and ending criteria, the console is configured to:

monitor the selected triggering subsystem for the triggering events;

operate the triggering subsystem and the responsive subsystem according to the preprogrammed relationships until the detection of the occurrence of a triggering event at the triggering subsystem;

control the responsive subsystem according to the selected responsive result, in a customized event control in response to detection of the triggering event;

determine whether the ending criteria are met;

exit the customized event control, if it is determined that the ending criteria are met and return to operation of the system according to the preprogrammed relationship."

## **Reasons for the Decision**

1. Admissibility of the main and the auxiliary requests
  - 1.1 Claim 1 of the main and the auxiliary requests is identical to claim 1 of the sole request on which the contested decision is based, except that two instances of the word "preprogrammed [relationships]" were deleted. This deletion defines the feature of modifying the "relationships" more broadly than in the request on which the contested decision is based.
  - 1.2 Under Article 12(4) RPBA, the board has discretion not to admit requests which could have been presented to the first instance, but were not. The boards have held that the purpose of examination appeal proceedings could not be to completely reopen the examination proceedings by admitting claims defining features more broadly if the broader definitions were not suitable for overcoming objections raised in the contested decision or by the board (see T 1472/08; T 2000/09; "Case Law of the Boards of Appeal", 8th edition, IV.E. 4.3.3.b).
  - 1.3 In the present case, the appellant did not provide reasons for this amendment in its statement setting out the grounds of appeal, but argued at the oral proceedings that the amendment was to overcome the clarity objection raised under point 11.2 of the contested decision, which questioned whether the "relationships" and "preprogrammed relationships" mentioned in claim 1 referred to the same entity. However, as the board already pointed out in its preliminary opinion annexed to the summons to oral proceedings, this objection was clearly directed to the text "wherein the relationships between subsystems are defined by specific subsystem responses to specific subsystem triggering events", which had the only

occurrence of the word "relationships" without a preceding "preprogrammed" in the then claim 1. Therefore, deleting later instances of the word "preprogrammed" from the claim cannot be an amendment suitable for overcoming the objection raised in the contested decision.

1.4 Therefore, the board does not admit the main and the auxiliary requests into the proceedings (Article 12(4) RPBA).

2. Admissibility of auxiliary requests 2, 3 and 4

2.1 Auxiliary request 2 is identical to the sole request on which the contested decision is based. In submitting the request, the appellant intended to address the objection, communicated in the preliminary opinion of the board annexed to the summons to oral proceedings, regarding the admissibility of the main and the auxiliary requests filed with the statement setting out the grounds of appeal.

2.2 The fact that the board raised concerns regarding the admissibility of the requests filed upon appeal does not give the appellant carte blanche to re-file a request which it had previously chosen not to maintain (see T 1428/11 by the same board in a different composition, point 2.3 of the reasons). Any amendment to an appellant's case after it has filed its the statement setting out the grounds of appeal may be admitted and considered at the board's discretion (Article 13(1) RPBA).

2.3 In its preliminary opinion annexed to the summons to oral proceedings, the board not only questioned the admissibility of the requests filed with the statement

setting out the grounds of appeal, but also raised objections *inter alia* under Article 84 EPC (see points 4.1 to 4.3 of the summons), on the basis of the objections under points 11.1 to 11.3 of the contested decision.

- 2.4 Re-filing the request on which the contested decision is based, in particular without providing any reasons why the objections under Article 84 EPC set out in the contested decision were not correct, is not suitable for overcoming the board's outstanding objections. Thus, auxiliary request 2 is clearly not allowable.
- 2.5 In auxiliary requests 3 and 4, the appellant made numerous amendments to claim 1, none of which was occasioned by the objections raised by the board in its preliminary opinion annexed to the summons to oral proceedings. In its letter of reply to the summons to oral proceedings, the appellant referred to unspecified recent developments in the case law relating to computer systems in medical device applications and a section of the Guidelines for Examination in the European Patent Office related to claim formulations for computer-implemented inventions. At the oral proceedings, it submitted that the amendments were occasioned by some issues discussed at the oral proceedings before the examining division. Therefore, the amendments do not address the board's outstanding objections, e.g. the complete failure to address the lack of conciseness in the text "wherein the relationships between subsystems are defined by specific subsystem responses to specific subsystem triggering events, wherein preprogrammed relationships comprise preprogrammed specific subsystem responses to specific subsystem triggering events", objected to under point 4.2 of the annex to the summons to oral

proceedings. For these reasons, auxiliary requests 3 and 4 are clearly not allowable either.

2.6 Therefore, the board does not admit auxiliary requests 2, 3 and 4 into the proceedings (Article 13(1) RPBA).

3. Admissibility of auxiliary request 5

3.1 According to Article 13(1) RPBA, the discretion to admit amendments to an appellant's case after it has filed its grounds of appeal shall be exercised in view of *inter alia* the complexity of the new subject matter submitted and the current state of the proceedings. Furthermore, according to Article 13(3) RPBA, amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the board cannot reasonably be expected to deal with without adjournment of the oral proceedings.

3.2 The appellant filed auxiliary request 5 at the oral proceedings, in the course of the discussion on the admissibility of auxiliary request 2. It submitted that the amendments were intended to address the board's objections raised in the annex to the summons to oral proceedings, but could not be filed earlier due to delays in getting feedback from the appellant. Claim 1 was rephrased to better reflect the technical features of the invention.

3.3 In the annex to the summons to oral proceeding (see point 6.2), the board informed the appellant that any amendment should be submitted at the latest one month before the scheduled date. In the present case, the appellant not only failed to respect the final date for making written submissions in preparation for the oral proceedings, but also waited until the actual oral

proceedings, namely when the admissibility of auxiliary request 2 was being discussed, to file a request expressly intended to overcome the board's objections raised in the annex to the summons to oral proceedings. Furthermore, the amendments involve extensive rephrasing of claim 1 and the addition of numerous features from the description. The board cannot be reasonably expected to deal with the issues raised by such extensive amendments in the course of oral proceedings.

- 3.4 For these reasons, the board does not admit auxiliary request 5 into the proceedings (Article 13(1) and (3) RPBA).
4. As there is no admissible request on file, the appeal should be dismissed.

## Order

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

The appeal is dismissed.

The Registrar:

The Chair:



K. Götz-Wein

A. Ritzka

Decision electronically authenticated