Internal distribution code:

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

Datasheet for the decision of 12 October 2021

Case Number: T 2608/16 - 3.2.08

Application Number: 08847674.2

Publication Number: 2205184

IPC: A61F2/24, A61F2/82, A61F2/95

Language of the proceedings: EN

Title of invention:
COLLAPSIBLE/EXPANDABLE PROSTHETIC HEART VALVES WITH NON-EXPANDING STENT POSTS AND RETRIEVAL FEATURES

Patent Proprietor:
St. Jude Medical, LLC

Opponent:
Sadra Medical, Inc.

Relevant legal provisions:
EPC Art. 54(2), 54(3), 83

Keyword:
Novelty - main request (no) - auxiliary request (yes)
Sufficiency of disclosure - (yes)

Decisions cited:
T 1305/15, T 0626/14

Europäisches Patentamt
European Patent Office
Office européen des brevets

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 2608/16 - 3.2.08

D E C I S I O N
of Technical Board of Appeal 3.2.08
of 12 October 2021

Appellant: (Opponent)	Sadra Medical, Inc. 160 Knowles Drive Los Gatos, CA 95032 (US)
Representative:	Peterreins Schley Patent- und Rechtsanwälte PartG mbB Hermann-Sack-Strasse 3 80331 München (DE)
Respondent: (Patent Proprietor)	St. Jude Medical, LLC 100 Abbott Park Road Abbott Park IL 60064 (US)
Representative:	Valea AB Box 1098 405 23 Göteborg (SE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 8 November 2016 concerning maintenance of the European Patent No. 2205184 in amended form.**

Composition of the Board:

Chairwoman	P. Acton
Members:	G. Buchmann
	Y. Podbielski

Summary of Facts and Submissions

I. With the decision posted on 8 November 2016 the opposition division decided that European patent No. 2 205 184 in amended form fulfilled the requirements of the EPC.

The opposition division found that the subject-matter of claim 1 according to the then valid main request was novel and inventive.

II. The opponent filed an appeal against that decision.

III. Oral proceedings took place before the Board on 12 October 2021.

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

V. The respondent (patent proprietor) requested that the appeal be dismissed and the patent be maintained in the form held allowable by the opposition division (main request) or, as an auxiliary measure, that the patent be maintained on the basis of one of auxiliary requests 3, 4, 5, 7, 10, 11 or 12 filed with the reply to the grounds of appeal.

VI. In the present decision, reference is made to the following documents:

D2: WO 2008/029296 A2
D3: WO 2005/062980 A2
D4: WO 2008/010817 A1

D7: WO 2009/029199 A1

VII. Claim 1 of the current **main request** reads:

"A frame structure (10,100,200) for a prosthetic heart valve comprising:

a plurality of Y-shaped structures disposed in an annular array in which the Y-shaped structures are spaced from one another in a direction that is annular of the array, each of the Y-shaped structures including a base member (50) having a first free end portion and an opposite second end to which a first end of each of two arms (63a, 63b) of the Y-shaped structure is connected, the arms (63a, 63b) of each of the Y-shaped structures diverging from one another in a direction away from the second end to define a space (62) between the arms, which space extends in the annular direction; and

a plurality of connecting structures, each of which extends between a respective pair of annularly adjacent ones of the Y-shaped structures, and each of which interconnects the Y-shaped structures in the associated pair, each of the connecting structures being collapsible and re-expandable in the annular direction, and wherein each of the connecting structures is connected to the arms (63a, 63b) of the Y-shaped structures in the associated pair but not to the base members of those Y-shaped structures,

characterised in that each of Y-shaped structures being sufficiently strong to maintain at least 75% of the space between its arms when the array is subjected to an annular collapsing force that collapses it to 50% of

an initial annular size."

VIII. In claim 1 of **auxiliary request 3**, the feature has been added according to which

"each of the Y-shaped structures further includes a linking member (63c) that interconnects the arms (63a, 63b) of that Y-shaped structure at a location that is spaced from the second end."

IX. **The arguments of the appellant can be summarised as follows:**

Main Request - Novelty

D7

The subject-matter of claim 1 lacked novelty over D7. In particular, the frames shown in Figures 8 and 9 of D7 included Y-shaped structures wherein the arms were separated by the lowermost of the spaces 5239. A linking member between the arms prevented any reduction of the space between the arms, whereas the frame as a whole was suitable to be compressed to 50% of its initial size.

D2

The subject-matter of claim 1 lacked novelty over D2. Figures 1-4 and 29-34 showed a frame having all features according to claim 1. Even if not every Y-shaped structure of that frame comprised an eyelet stabilising the space between the arms of the Y-shaped structure, still the specification of the claim was fulfilled. The wording according to which the frame comprised a plurality of Y-shaped structures included

the possibility of further Y-shaped structures which might not fall under the definition of the claim. This was for example the case for the connecting struts 40 which formed - together with parts of the frame - such a Y-shaped structure.

Auxiliary Request 3 - Novelty

D7

The portion of the frame extending from one arm of the Y-shaped structure to the other (Figure 9) represented a linking member in the sense of claim 1. Therefore claim 1 of auxiliary request 3 lacked novelty over D7.

D3, Figure 1

The subject-matter of claim 1 lacked novelty over the embodiment shown in Figure 1 of D3. In particular, the diamond shaped area, enclosed by the arms of the Y-shaped structure and the linking member, could be regarded as the (2-dimensional) space between the arms in the sense of the claim. This area did not change when the frame was collapsed from the expanded state shown in Figure 1B to the collapsed state shown in Figure 1A. Page 49, line 30 - page 50, line 3 of D3 described that the frame was compressed by at least 50%.

D3, Figure 50

The subject-matter of claim 1 lacked novelty over the embodiment shown in Figure 50B of D3. The figure showed a collapsible frame structure 30 for a prosthetic heart valve comprising a plurality of posts 32 having a slot 33 so that they could be regarded as Y-shaped

structures. The arms surrounding the slot 33 were connected to the anchor braid which formed a connection between corresponding pairs of posts. The Y-shaped structures comprised all features of the characterising portion of the claim.

D4

The subject-matter of claim 1 lacked novelty over D4. Figures 6C and 7 of D4 showed a frame structure for a prosthetic heart valve comprising a plurality of Y-shaped structures. The arms extending along the slot 21 were connected to the "valleys 27 of the outflow rim 23", which formed a connecting structure between the pairs of adjacent support posts 22.

Alternatively, the proximal ends 25 of the support posts 22 of Figure 7 represented the Y-shaped structures in the sense of the claim. The Y-shape was formed by the triangular elements 31 which were connected to the peaks 29 of inflow rim 20, the latter forming a connecting structure between the pairs of support posts.

Auxiliary Request 3 - Sufficiency of Disclosure

The subject-matter of claim 1 was so ill-defined that it could not be carried out.

The "space" mentioned in the claim could be a one-dimensional or a two-dimensional quantity. The patent did not give a clear indication as to how and where this quantity should be measured.

Additionally, the "initial annular size" of the frame was not defined, and no measuring method was specified

for it.

It put an undue burden on the skilled person to find a construction which fulfilled the unclear criteria of the claim.

X. **The arguments of the respondent can be summarised as follows:**

Main Request - Novelty

D7

The subject-matter of claim 1 was novel over the disclosure of D7. The Y-shaped structure shown in Figure 9 extended down to the bottom end of the frame and the space between its arms collapsed in the same way as the adjacent connecting structures of the frame.

The shape of the lowermost opening 5239 was not unambiguously disclosed.

Even if one accepted that the Y-shaped structure in Figure 9 ended at the opening 5239, the connecting structures would not "extend between a respective pair of annularly adjacent ones of the Y-shaped structures", since they were attached below the Y-shaped structures.

Finally, D7 did not disclose a compression of the array down to 50% of an initial size.

D2

The subject-matter of claim 1 was novel over the disclosure of D2.

The frame according to the preamble of claim 1 comprised "a plurality of Y-shaped structures" and "a plurality of connecting structures, each of which extends between a respective pair of annularly adjacent ones of the Y-shaped structures".

D2 disclosed these features of the preamble of the claim wherein some of the Y-shaped structures fulfilled the definition of the characterising portion of the claim, and some did not. The characterising portion of the claim was, however, valid for each of the Y-shaped structures. Ignoring some of the Y-shaped structures shown in D2 was an arbitrary selection and could not be derived from D2.

Auxiliary Request 3 - Novelty

D7

In figures 8-9 of D7, the material portion extending from one arm of the Y-shaped structure to the other formed part of the undulated ring, i.e. the connecting structure. Therefore, this material portion could not be regarded as an additional linking member in the sense of claim 1. Such a separation of portions of the undulated ring would be arbitrary and could not be derived from D7.

D3, Figure 1

The frame in Figures 1A and 1B was drawn by hand, and the diamond shaped areas varied in a way that no compression ratio between the frames of the two figures could be derived. Therefore, it could not be derived from the Figures 1A and 1B that the Y-shaped structures maintained at least 75% of the space between the arms

when the array is subjected to an annular collapsing force that collapses it to 50% of an initial annular size.

The collapsing ratios disclosed on page 49, line 30 - page 50, line 3 of D3 belonged to a different embodiment and could not be applied to the frame shown in Figure 1A.

D3, Figure 50

The braid shown in Figure 50B formed, according to the appellant, the connecting structure between the Y-shaped structures of the frame of figure 50. However, the base member of the post 32 was also attached to the braid via the openings 36b. This contravened the specification of claim 1 according to which the connecting structures are not connected to the base members of the Y-shaped structures.

D4

The structures called Y-shaped structures by the appellant were in fact tuning-fork-shaped structures (support posts 22 with axially extending slot 21). The arms of these tuning-fork-shaped structures did not diverge from one another in a direction away from the second end (of the base member) as required by claim 1.

Regarding the alternative interpretation of Figure 7, the connecting structures 20, 29 were not connected to the diverging arms of the Y-shaped structures but to the end of an extension of the base member.

Auxiliary Request 3 - Sufficiency of Disclosure

The description gave clear guidance how to measure the space by measuring the distance between the arms of the Y-shaped structure.

Even if the "space" was considered to be a two-dimensional area, it was clear to the skilled person how it could be measured.

The initial annular size of the frame was the one before compression of the frame, as explained in paragraph [0031] of the patent.

It was a routine matter for a skilled person to design the different regions of the frame in a way that the compression characteristics were fulfilled.

Reasons for the Decision

1. **Main Request - Novelty**

1.1 **Lack of novelty over D7**

1.1.1 Document D7 discloses (see Figures 8, 9 and paragraphs [0041], [0042]) a frame structure 5010e for a prosthetic heart valve.

1.1.2 Paragraph [0041] describes a commissure region "like a single upstanding post 5237". This "single structural member 5237 ... is cantilevered from a respective single point (emphasis added) on remaining structure of annulus inflow portion 5200". This means that in Figure

9 the single upstanding post 5237 ends at a point where it is connected to the undulated ring structure at the bottom of Figure 9 at a vertex of one of its loops. This is not - as argued by the respondent - an arbitrary interpretation of the figure, but it results from the description paragraph [0041].

The interpretation of the respondent, according to which the Y-shaped structure extends down to the bottom end of the frame shown in Figure 9, is not derivable from D7. In particular, such an interpretation would imply that the post 5237 would be cantilevered from two points, not a single point as described in paragraph [0041].

Figure 9 shows that the lower end of said upstanding post 5237 has two diverging arms with a longitudinal opening 5239 in between. These two arms are connected to the vertex of one of the loops.

Therefore, D7 discloses (in the words of claim 1):

A plurality of Y-shaped structures 5237 disposed in an annular array in which the Y-shaped structures are spaced from one another in a direction that is annular of the array, and each of the Y-shaped structures includes a base member (the upper portion of post 5237) having a first free end portion and an opposite second end to which a first end of each of two arms (at the sides of the lowermost opening 5239) of the Y-shaped structure is connected. Said arms of each of the Y-shaped structures diverge from one another in a direction away from the second end to define a space (said lowermost opening 5239) between the arms, which space extends in the annular direction (i.e. tangential to the cylindrical overall shape of the frame).

The respondent argued that the shape of the opening 5239 was not unambiguously disclosed because in the different figures of D7 it was drawn in different shapes. However, Figure 9 shows the opening to be longitudinal and having diverging side rims.

1.1.3 The three upstanding posts 5237 shown in Figure 9 are connected by the undulated ring structure shown at the bottom of the figure. A portion of the undulated ring structure extends between each pair of annularly adjacent ones of the Y-shaped structures. Each of these connecting structures is collapsible and re-expandable in the annular direction (Figures 8-9), and each of the connecting structures is connected to the arms of two adjacent Y-shaped upstanding posts 5237. In accordance with claim 1, this connection is at the (tips of the) arms, not at the base member of the upstanding post 5237.

The respondent argued that the connecting structures according to this interpretation of D7 would not "extend between a respective pair of annularly adjacent ones of the Y-shaped structures", as required by claim 1, but that they were attached below the Y-shaped structures.

In this context, the term "between" can have either a purely geometrical meaning in the sense that the connecting structure is positioned "exactly in the space between" the Y-shaped structures; or it can have a more functional meaning in the sense that the structures extend from one Y-shaped structure to the next and have the function of connecting the Y-shaped structures. In the figures of the patent, one half of the connecting structures is located below the Y-shaped

structures and one half is located in the space there between. Therefore, assuming that the claim wording is in accordance with the figures, the term "between" must be interpreted according to the second possibility, i.e. the connecting structures extend from one Y-shaped structure to the next. The strictly geometric interpretation of the respondent cannot be derived from the patent.

1.1.4 Due to the connection of both of the arms to the vertex of the undulated structure, the distance between the arms is fixed. Therefore, each of the Y-shaped structures shown in Figure 9 is sufficiently strong to maintain at least 75% of the space between its arms when the array (and in particular the undulated structure at the bottom of Figure 9) is subjected to an annular collapsing force that collapses it to 50% of an initial annular size.

The respondent argued that D7 did not disclose a compression down to 50% of an initial size. The claim wording does, however, not require that such a compression is really performed. The claim only requires that the frame must be suitable to be compressed to 50% and that, "when" such compression is carried out the space between the arms of the Y-shaped structure is maintained by at least 75%. It is correct that a compression of the frame of figures 8 and 9 down to 50% of an initial size is not explicitly disclosed by D7. However, it can be derived from the figures, the overall construction of the frame shown, and from the skilled person's general knowledge, that the frame of D7 is suitable for such a compression.

1.1.5 Therefore, D7 shows all features of claim 1 and the subject-matter of claim 1 lacks novelty over D7.

1.2 **Novelty over D2**

In terms of the preamble of claim 1, D2 discloses a frame comprising "a plurality of Y-shaped structures" and "a plurality of connecting structures, each of which extends between a respective pair of annularly adjacent ones of the Y-shaped structures".

Only some of the Y-shaped structures shown in D2 include an eyelet 23 which renders these structures stiffer. Therefore, in contrast to the characterising portion of the claim, not each of the Y-shaped structures shown in D2 is sufficiently strong to maintain at least 75% of the space between the arms when the array is collapsed to 50% of an initial size.

Neither the other figures nor the description of D2 disclose that each of the Y-shaped structures of the frame fulfils the characterising portion of the claim.

The appellant argued that the frame according to claim only "comprises" a plurality of Y-shaped structures which had to fulfil the requirements of the claim. This allowed for further, different Y-shaped structures. This was particularly the case since the frame of the patent comprised Y-shaped structures which did not fulfil the specification of the claim as well.

However, in order to match the wording of the claim with the disclosure of D2 one would have to ignore some of the Y-shaped structures shown in D2. This would be an arbitrary selection and cannot be derived from D2. The appellant's argument that also the frame of the

patent comprised further Y-shaped structures, is not convincing because these Y-shaped structures (connecting struts 40 with an attached pair of struts) do not fulfil the preamble of claim 1, and therefore do not belong to the "plurality of Y-shaped structures" of the claim.

Therefore, the subject-matter of claim 1 is novel with respect to D2.

2. **Auxiliary Request 3 - Novelty**

2.1 **Novelty over D7**

The appellant's novelty attack was based on the argument that the portions of the frame which extend from one arm of the Y-shaped structure to the other arm (Figure 9) represented a linking member in the sense of the amended claim 1.

As discussed above, the subject-matter of claim 1 of the main request lacks novelty over D7 because the connecting structures are formed by the undulated ring structure at the bottom of the frame (Figure 9) and the Y-shaped structures are formed by the posts 5237 being connected to a vertex of the undulated ring.

Given this interpretation, the portion of the frame which extends from one arm of the Y-shaped structure to the other forms part of the undulated ring, i.e. the connecting structure. Therefore, this portion cannot be regarded as an additional, separate linking member in the sense of claim 1. Such a separation of portions of the undulated ring would be arbitrary and cannot be derived from D7.

Also the suggested separation of said portion of the frame in a part forming the linking member and a part forming the connecting structure, would be arbitrary.

The appellant argued that even in the patent the arms of the Y-shaped structure were attached to the linking member and the connecting structure at the same point, which corresponded to the situation shown in D7, Figure 9. In the patent, the connecting structures can, however, clearly be distinguished from the linking member (63c) because they have a different thickness and are shaped as a continuation of the arms. This is not the case in D7.

Therefore, the subject-matter of claim 1 of auxiliary request 3 cannot be derived from D7 and is therefore novel over D7.

2.2 **Novelty over D3, Figure 1**

Figure 1 of D3 shows a frame structure 30 for a prosthetic heart valve comprising a plurality of Y-shaped structures (including commissure posts 38 and parts of the skirt region 34 of the frame) which are connected by the undulated bottom row of struts of the frame, these struts forming connecting structures between the Y-shaped structures.

The appellant's novelty attack was based on the argument that the diamond shaped area, enclosed by the space between the arms of the Y-shaped structure and by parts of the undulated bottom row of struts, could be regarded as the space between the arms in the sense of the characterising portion. This area did not change when the frame was collapsed from the expanded state shown in Figure 1B to the collapsed state shown in

Figure 1A.

The frames in Figures 1A and 1B are drawn by hand, and in particular the dimensions of the diamond shaped areas vary in each of the figures in a way that no exact area and also no compression ratio between the frames of the two figures can be derived. Additionally, a possible further compression of the frame shown in Figure 1A, which might be needed to achieve the collapsing ratio, would result in a significant reduction of the diamond shaped areas. Therefore, it cannot be derived from the Figures 1A and 1B that the Y-shaped structures maintain at least 75% of the space between the arms when the array is subjected to an annular collapsing force that collapses it to 50% of an initial annular size.

The collapsing ratios disclosed on page 49, line 30 - page 50, line 3 of D3 belong to a different embodiment and cannot be applied to the frames shown in Figures 1A and 1B.

Therefore, the subject-matter of claim 1 of auxiliary request 3 is novel over the embodiment of Figure 1 of D3.

2.3 **Novelty over D3, Figure 50**

According to the appellant, Figure 50B of D3 shows a frame structure 30 for a prosthetic heart valve comprising a plurality of posts 32 having a slot 33 so that they had to be regarded as Y-shaped structures. The arms surrounding the slot 33 were connected to the anchor braid which formed a connection between corresponding pairs of posts.

Accepting the appellant's view that the braid forms the connecting structure between the Y-shaped structures, it must be noted that the complete braid forms the connecting structure. Due to the structure of the braid the connection cannot be formed by a single wire of the braid.

Furthermore, the base member of the post 32 is attached to the braid via the openings 36b (page 53, lines 10-15). Consequently, the feature of the claim, according to which "each of the connecting structures is connected to the arms of the Y-shaped structures in the associated pair but not to the base members of those Y-shaped structures", is not fulfilled in D3, Figure 50B.

The appellant argued that also in the patent the base member could be connected to the frame (paragraph [0039]). This paragraph describes, however, a connection between the base member (tip of the post 50) and the connecting struts 40 which do not form part of the connecting structures between the Y-shaped structures. It is therefore not related to the above cited feature of claim 1.

Therefore, the subject-matter of claim 1 of auxiliary request 3 is novel over the embodiment of Figure 50B of D3.

2.4 **Novelty over D4**

Regarding D4, the Figures 6 and 7 were discussed.

Both figures show a frame structure for a prosthetic heart valve comprising a plurality of tuning-fork-shaped structures (support posts 22 with axially

extending slot 21). The arms extending along the slot 21 are connected to the "valleys 27 of the outflow rim 23" (page 18, lines 4-7), which forms a connecting structure between the pairs of adjacent support posts 22.

The arms of the tuning-fork-shaped structures do not diverge from one another in a direction away from the second end (of the base member) as it is required by claim 1.

For Figure 7, the appellant suggested a second interpretation according to which the proximal ends 25 of the support posts 22 represent the Y-shaped structures in the sense of the claim. The Y-shape was formed by the triangular elements 31 which were connected to the peaks 29 of inflow rim 20, the latter forming a connecting structure between the pairs of support posts.

However, the connecting structures 20, 29 are not connected to the diverging arms of the Y-shaped structures but to the end of an extension of the base member (Figure 7).

Therefore, the subject-matter of claim 1 of auxiliary request 3 is novel over D4.

3. **Auxiliary Request 3 - Sufficiency of Disclosure**

3.1 The appellant contested sufficiency of disclosure because the subject-matter of claim 1 was so ill defined that the skilled person could not carry out the invention.

Claim 1 specifies a space between the arms of the Y-

shaped structures. The claim requires that this space is maintained to at least 75% when the array is subjected to a collapsing force that collapses it to 50% of an initial size.

The appellant argued that a "space" could be a one-dimensional or a two-dimensional quantity. The patent did not give a clear indication how and where this quantity should be measured in order to see whether the definition of the claim was fulfilled or not. On the one hand, the description mentioned a "typical" way of measuring the space by using the width W between the arms (paragraph [0038]). On the other hand, it could not be excluded that the space was a two dimensional quantity for which no measuring method was given.

3.2 The term "space" can represent a one-dimensional, two-dimensional, or even a three-dimensional quantity. In the present claim, the one- and two-dimensional meanings technically make sense and must be regarded as covered by the claim. For the one-dimensional meaning, the description gives a clear indication that the space can be measured by the distance between the arms of the Y-shaped structure.

Regarding the two-dimensional area present between the arm of the Y-shaped structure, it is clear to the skilled person how it can be measured. It may be that there are different possibilities of how to choose the area to be measured, e.g. the area between the arms of the Y-shaped structure or the area included by the arms and the linking member. But the skilled person is nevertheless able to measure an area enclosed by metallic structures.

In summary, the claim specification is formulated

broadly with respect to the "space". However, the skilled person can find a way to measure the change of the space for every possible interpretation.

3.3 The appellant further argued that the "initial annular size" of the frame was not defined and it was not described how it should be measured. The same frame structure could or could not fulfil the specification of the claim, depending on the size taken as the "initial annular size". Moreover, the patent did not specify whether the measurements had to be taken at the inner or outer diameter of the frame.

As discussed above (point 1.1.4), the claim wording requires that the frame must be suitable to be compressed to 50% of an initial size. In order to carry out the invention, i.e. to achieve this suitability, the description may be consulted. Paragraphs [0031] and [0032] explain that the frame has its original size after production. The frame is then collapsed for integration into a delivery system. Together with the geometric information from the figures, the skilled person is given sufficient information to produce a frame which is suitable to be collapsed to 50% of its initial size.

Regarding the question of how to measure the size of the frame, it goes without saying that the two measurements for the two states of the frame must be taken at the same location on the frame, e.g. at the inner diameter or at the outer diameter.

3.4 Finally, the appellant argued that it put an undue burden on the skilled person to find a construction which fulfilled the unclear specification of being sufficiently strong to maintain 75% of the space

between the arms of the Y-shaped structure.

However, the figures of the patent provide guidance to the approximate geometry of the frame. The patent indicates that the stiffness can be controlled e.g. by varying the width and thickness of the arms (paragraph [0037]). Therefore, it is a routine matter for a skilled person to design the thickness and geometry of the different portions of the frame in a way that the desired compression characteristics are fulfilled. Even if the Y-shaped structures were too weak in a first attempt, then a simple reinforcement would lead the skilled person to a frame fulfilling the requirements of the claim.

Therefore, the invention of the patent is sufficiently disclosed to be carried out by a skilled person, and the requirements of Article 83 EPC are fulfilled.

3.5 Decisions T 1305/15 and T 626/14 cited by the appellant are not applicable to the present case.

In T 1305/15, the measurement carried out in order to verify the achievement of a certain parameter was a complex procedure and the opponent in that case showed that the skilled person was not aware of the fact that the measured value could be different from the actual characteristics of the material. This is in contrast to the present case where a simple geometric value is measured.

T 626/14 dealt with the measurement of the thickness of an absorbent article having a fluffy surface. In that case, it was not possible to know under which conditions this parameter could be measured. Additionally, a quite narrow range of 1-2 mm was

required by the claim. In contrast to that, the discussion in the present case is not about the conditions under which the parameter "space" can be measured but it is unclear if this parameter is to be measured in one or in two dimensions.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the opposition division with the order to maintain the patent on the basis of auxiliary request 3 filed with letter dated 20 April 2017 and a description to be adapted thereto.

The Registrar: The Chairwoman:

C. Moser P. Acton

Decision electronically authenticated