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**Datasheet for the decision  
of 19 June 2018**

**Case Number:** T 0224/18 - 3.5.05

**Application Number:** 06825991.0

**Publication Number:** 1949285

**IPC:** G06F19/00

**Language of the proceedings:** EN

**Title of invention:**

SYSTEMS AND METHODS FOR TREATING, DIAGNOSING AND PREDICTING  
THE OCCURRENCE OF A MEDICAL CONDITION

**Applicant:**

Fundação D. Anna Sommer Champalimaud E  
Dr. Carlos Montez Champalimaud

**Headword:**

Prostate Cancer/CHAMPALIMAUD

**Relevant legal provisions:**

RPBA Art. 11  
EPC Art. 111(1)

**Keyword:**

Remittal to the department of first instance - fundamental  
deficiency in first instance proceedings (yes)

**Decisions cited:**

G 0010/93

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 0224/18 - 3.5.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.05**  
**of 19 June 2018**

**Appellant:** Fundação D. Anna Sommer Champalimaud E  
(Applicant) Dr. Carlos Montez Champalimaud  
Avenida Brasilia  
1400-038 Lisboa (PT)

**Representative:** Johnson, Richard Alan  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 2 August 2017  
refusing European patent application No.  
06825991.0 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairwoman** A. Ritzka  
**Members:** E. Konak  
D. Prietzel-Funk

## **Summary of Facts and Submissions**

I. The appeal is against the decision of the examining division to refuse the application for lack of novelty (Article 54(1) and (2) EPC) of claim 1 and lack of inventive step (Article 56 EPC) of claim 7 of the main and the auxiliary requests with regard to the following document:

D4: WO 2005/091203 A2.

II. With its statement setting out the grounds of appeal, the appellant requested that the decision be set aside and a patent be granted on the basis of the main or the first auxiliary request that were the subject of the contested decision or that the case be remitted for further prosecution. Oral proceedings were requested as an auxiliary measure. The appellant further alleged a substantial procedural violation in the examination proceedings and requested the reimbursement of the appeal fee.

III. In a written communication to the appellant the board expressed doubts about the alleged procedural violation. According to the board's preliminary opinion, a fundamental deficiency was nevertheless apparent in the examination proceedings that would justify a remittal to the examining division for further prosecution.

IV. In reply to this communication the appellant withdrew its request for the reimbursement of the appeal fee and agreed to the remittal of the case to the examining division without any need for oral proceedings.

V. Claim 1 of the main request reads as follows:

"Apparatus for evaluating a risk of prostate cancer recurrence in a patient, the apparatus comprising: a model predictive of prostate cancer recurrence configured to evaluate a dataset for a patient to thereby evaluate a risk of prostate cancer recurrence in the patient, wherein the model is based on: seminal vesicle involvement; surgical margin involvement; lymph node status; a measurement of androgen receptor (AR); a first morphometric measurement indicative of epithelial nuclei area relative to total tissue area; and a second morphometric measurement indicative of area occupied by stroma divided by total tissue area, wherein the first morphometric measurement and the second morphometric measurement are derived from a tissue image."

VI. Claim 7 of the main request reads as follows:

"An apparatus for evaluating a risk of clinical failure in a patient subsequent to the patient having a radical prostatectomy, the apparatus comprising: a model predictive of clinical failure configured to evaluate a dataset for a patient to thereby evaluate a risk of clinical failure for the patient, wherein the model is based on: a biopsy Gleason score; lymph node involvement; specimen (prostatectomy) Gleason score; intensity of androgen receptor (AR) in racemase (AMACR)-positive epithelial cells; and three morphometric features derived from a tissue image, the three morphometric features comprising:

a first morphometric measurement indicative of mean intensity of epithelial cytoplasm as expressed in the blue channel of the tissue image,  
a second morphometric measurement indicative of variation in stromal texture within stroma as expressed in a red channel of the tissue image, and  
a third morphometric measurement indicative of variation in texture between epithelial nuclei as expressed in the red channel of the tissue image."

VII. Claim 1 of the first auxiliary request differs from claim 1 of the main request in that the expression "a measurement of androgen receptor (AR)" is replaced by the expression "androgen receptor (AR) staining index of tumour".

VIII. Claim 7 of the first auxiliary request is identical to claim 7 of the main request.

### **Reasons for the Decision**

1. According to Article 11 RPBA, a board shall remit a case to the department of first instance if fundamental deficiencies are apparent in the first-instance proceedings.
2. In the contested decision the examining division "*dismissed the alleged advantage*" of the invention as "*the technical effect proposed by the applicant cannot be derived from the application, the only reference therein being a study performed by the applicant itself.*"
3. As the appellant rightly argues, it is established case law that the verification of whether or not the claimed subject-matter actually provides the alleged effect

must be based on the data in the application (see "Case Law of the Boards of Appeal", 8th Edition, I.D.4.6). The assumption of the contested decision to the contrary is an error of judgement on the part of the examining division and constitutes a fundamental deficiency in the examination proceedings. This error of judgement has apparently impeded the examining division from assessing the data provided in the application and hence hindered the proper examination of the application from the very outset. It cannot be ruled out that this error of judgement has even impeded the examining division from properly construing the claimed invention. Thus, the case has to be examined afresh, based on data available in the application as originally filed. Further, the submissions and arguments of the appellant have to be reassessed.

4. The board, however, will not assume the examination of the application itself, since this is the task of the examining division (see G 10/93, point 4 of the reasons). Thus, the board remits the case for further prosecution to the examining division (Article 111(1) EPC; Article 11 RPBA).

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chair:



K. Götz-Wein

A. Ritzka

Decision electronically authenticated