

**Internal distribution code:**

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

**Datasheet for the decision  
of 5 December 2023**

**Case Number:** T 2165/19 - 3.2.02

**Application Number:** 14834060.7

**Publication Number:** 3030141

**IPC:** A61B5/00, G06Q30/02

**Language of the proceedings:** EN

**Title of invention:**

DEVICES, METHODS AND SYSTEMS FOR ASSESSMENT AND RECORDATION OF REACTIONS TO STIMULI

**Applicant:**

Opertech Bio, Inc.

**Relevant legal provisions:**

EPC Art. 56, 111(1)  
RPBA 2020 Art. 11, 12(2)

**Keyword:**

Inventive step - mixture of technical and non-technical features - inappropriate starting point  
Remittal to the department of first instance (yes)

**Decisions cited:**

T 0641/00, T 0619/02



**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 2165/19 - 3.2.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 5 December 2023**

**Appellant:** Opertech Bio, Inc.  
(Applicant) 5501 Old York Road  
Philadelphia, PA 19141 (US)

**Representative:** Glawe, Delfs, Moll  
Partnerschaft mbB von  
Patent- und Rechtsanwälten  
Postfach 13 03 91  
20103 Hamburg (DE)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 14 March 2019  
refusing European patent application No.  
14834060.7 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** M. Alvazzi Delfrate  
**Members:** S. Dennler  
Y. Podbielski

## Summary of Facts and Submissions

I. This appeal was filed by the applicant against the Examining Division's decision to refuse the patent application in suit on the ground that the subject-matter of claims 1 and 8 of each of the main request and the first and second auxiliary requests did not involve an inventive step over the following documents:

D1 Wikipedia article "Automated pipetting system", in its version of 22 March 2013 (XP055335599)

D2 Screenshot of the YouTube video entitled "the liquid handling robot using manual pipettes: Andrew.", by Piero Zucchelli, published on 28 June 2013 (XP054977074)

II. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims of one of the main request, first auxiliary request and second auxiliary request on which the decision was based, all filed again with the statement of grounds of appeal.

Oral proceedings were requested as an auxiliary measure "in the event that the Board of Appeal does not set aside the decision and also intends to refuse the present application" (page 1 of the statement of grounds of appeal, section "I. Requests").

III. Claims 1 and 8 of the main request read as follows:

*"1. A device for human taste testing comprising:  
(a) a user interface comprising a touch screen, wherein*

*the touch screen comprises a visible or invisible multidimensional response grid comprising a first dimension indicating a first taste-testing characteristic and a second dimension indicating a second taste-testing characteristic, wherein the response grid is configured to indicate, upon a single touch thereof, a level of the first and the second taste-testing characteristics present in a taste testing sample;*

- (b) a source of taste testing samples;*
- (c) a processor component;*
- (d) a memory component; and*
- (e) an automated pipette component configured to withdraw a taste testing sample from the source of taste testing samples and to deliver the taste testing sample to a human subject;*  
*wherein the processor component is configured to record and to associate a single touch of the response grid with a taste testing sample."*

*"8. A method of measuring objective responses from a human subject to test stimuli comprising:*

- (a) providing a taste test sample to a human subject using the device of claim 1."*

IV. The appellant's arguments relevant for this decision can be summarised as follows.

D1 and D2 were concerned solely with the controlled transfer of liquids from one reaction container of the working area to another for the purpose of carrying out laboratory experiments. None of the documents disclosed a possible use of the disclosed pipetting system for human taste testing, let alone the distinguishing features identified in point 1.2 of the contested decision, nor did these documents contain the slightest

hint in that direction. The inventive-step objection starting from D1 and D2 against the main request was in fact based on hindsight. The decision under appeal also failed to contain any appropriate substantiation for the allegation in point 1.5 that the subject-matter of claim 1 was obvious starting from D1.

Furthermore, the combination of features b), c) and f) enabled the subject to enter two taste-testing characteristics of the tested sample in the device with a single touch, i.e. simultaneously, and thus in an efficient and fast manner. This effect was technical. These features therefore contributed to the technical character of the invention and, contrary to the Examining Division's reasoning (point 1.3 of the decision), had thus to be taken into account in the assessment of inventive step.

## **Reasons for the Decision**

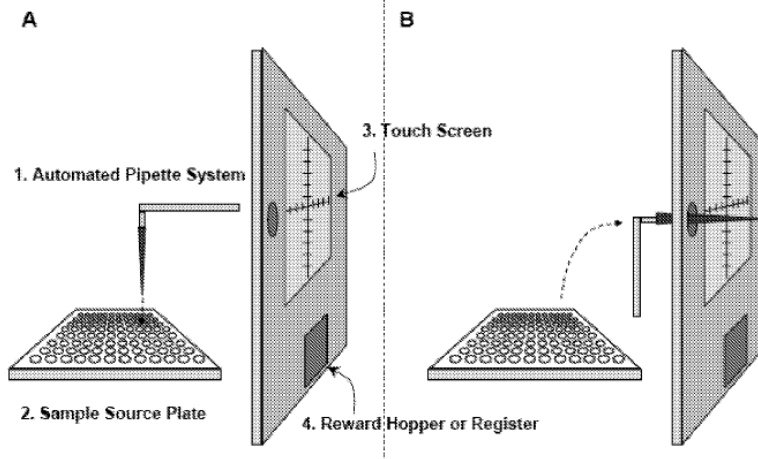
### **1. The subject-matter of the application in suit**

The application in suit is directed to a device for conducting human taste sample testing and to a corresponding method using this device (see, for example, page 4, lines 20-25 of the description as published). The device and the method are defined in independent claims 1 and 8 respectively.

An example of the claimed device is shown in Figure 1, reproduced below. It comprises a source of taste testing samples and an automated pipette system configured to withdraw a sample from the source and to deliver it to a human subject. The device also comprises a user interface comprising a touch screen by means of which the subject can provide a feedback on at

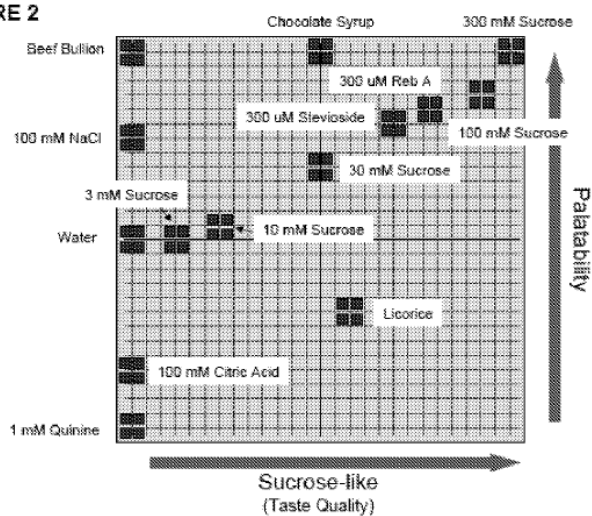
least two taste-testing characteristics of a sample (such as taste quality and palatability), and a processor component configured to record this feedback and associate it with the sample, i.e. store it in a memory component of the device (page 4, lines 20-25).

FIGURE 1



A feature of the device is the particular configuration of the touch screen, which comprises a visible or invisible multidimensional response grid having a first dimension indicating a first taste-testing characteristic and a second dimension indicating a second taste-testing characteristic, as shown for example in Figure 2, reproduced below, where these characteristics are sucrose-likeness and palatability.

FIGURE 2



The response grid is configured to indicate, upon a single touch thereof, a level of the first and the second taste testing characteristics present in a sample. In this way, with a single touch of the touch screen, the subject can simultaneously provide feedback on the levels of both the first and second taste-testing characteristics related to a sample, both of which are then associated with the sample by the processor component.

Thus, feedback on various taste-testing samples can be directly and quickly collected from a subject and stored in the device, which is described as, *inter alia*, facilitating the accumulation of large amounts of statistically relevant information by the device (page 1, line 33 - page 2, line 14). In particular, the claimed device can be used in a method of measuring objective responses from a human subject to test stimuli as defined in claim 8.

## **2. Inventive step starting from D1**

2.1 The Board agrees with the Examining Division that the subject-matter of claim 1 of each of the appellant's requests comprises a mixture of technical and non-technical features. In essence, this subject-matter defines a device aimed at technically implementing a taste-testing procedure in which a taste sample is presented to a human subject for tasting and feedback is then gathered from the subject, in particular verbally, on various characteristics relating to the taste of that sample (see "Background" section on page 1 of the description as published).

While, in principle, such a taste-testing procedure is not of a technical nature *per se* (similarly, for example, to the odour selection procedure discussed in T 619/02; see section 2 of the reasons), this procedure is concretely implemented in the claimed device in that (i) an automated pipette component is configured to deliver a sample to a human subject, and (ii) the device is configured to record a taste feedback from the subject via the touch screen and associate it with the sample.

- 2.2 Following the Comvik approach applicable to such mixed-type inventions (see T 641/00) and considering that D1 was the closest prior art, the Examining Division argued that the subject-matter of claim 1 of the main request did not involve an inventive step starting from that document.

The Board does not find this objection convincing.

- 2.2.1 Although D1 does disclose an "automated pipetting system" having a touch screen (see page 2, paragraph "User Interface") - and is thus structurally close to the subject-matter of claim 1 - this known automated pipetting system, commonly used in molecular biology and analytical chemistry, is only configured to perform laboratory experiments by transferring defined amounts of liquids between preselected groups of reaction containers of a working area (see for example page 1). As the appellant pointed out, D1 is silent on any possible use of this system to deliver a sample to a test subject, let alone for the purpose of tasting it, and to record a sensory feedback from the subject about the liquids contained in the reaction containers. The automated pipetting systems disclosed in D1 are not intended to be used for these purposes.



In fact, the Board holds the view that the person skilled in the art seeking to technically implement the above taste-testing procedure would not have considered D1 as a starting point without a *priori* knowledge of the present invention. In other words, D1 is not an appropriate starting point for assessing inventive step of claim 1. Instead, the starting point for the present invention should be considered to be prior art in the field of devices and methods for assessing a subject's response to stimuli, in particular for assessing the sense of taste, as explained in the introductory part of the application in suit (section "Field" on page 1).

Indeed, the objective technical problems that the Examining Division formulated on the basis of D1, namely "saving/retrieving and displaying information related to taste testing experiments on the technical infrastructure defined on D1" (point 1.5 of the decision under appeal) and "how to deliver a sample in an automated manner by the pipette component to a human subject" (point 1.6.1), are based on an *ex post facto* approach, which artificially distorts the proper technical contribution of the claimed invention.

D2 merely shows how pipetting with manual pipettes works in practice in a system as described in D1. Therefore, like D1, D2 is not a suitable starting point either.

No document other than D1 and D2 was cited in the decision under appeal or in the Supplementary European search report and the search opinion drawn up for the application in suit.

2.2.2 Furthermore, the Board finds that the reasoning on inventive step in the decision under appeal is based on a misinterpretation of the features a), b), c) and f) of claim 1 set out in point 1.2 of the decision.

Contrary to the Examining Division's assertion (see points 1.3, 1.5 and 1.10 of the decision), features a), b) and c) do not relate to the display on the touch screen of information (namely "values related to taste testing characteristics") which would be "retrieved" from a memory component of the claimed device. Rather, as argued by the appellant, features b) and c), in combination with feature f), form a two-dimensional input field which allows the subject to enter into the device two items of input data with a single touch of the touch screen - this input field being "visible or invisible" depending on whether feature a) is present or not.

Using this two-dimensional input field, the subject can enter their feedback on both levels of the first and second taste-testing characteristics of a sample at the same time with a single touch of the touch screen, rather than having to do so sequentially. This streamlines the process of entering these data into the device. In this context, the Board concurs with the appellant that features a), b), c), although non-technical *per se*, make a credible technical contribution. This applies irrespective of the cognitive content assigned to the data to be entered via the touch screen. Therefore, contrary to the Examining Division's view, these features cannot be disregarded when assessing inventive step.

The Board notes that this does not exclude the possibility that these features, to the extent that

they distinguished the claimed subject-matter from an appropriate starting point, may be obvious to the person skilled in the art. In this respect, the Board notes that no prior art relevant to this aspect, such as prior art relating to user interfaces specifically adapted for inputting data into a system, in particular for facilitating such input, was cited in the decision or the Supplementary European search report and the search opinion drawn up for the application in suit. This prejudices a proper assessment of a potential inventive step or lack of inventive step based on these features.

- 2.3 In each of the appellant's requests, claim 8 defines a method comprising the step of providing a taste test sample to a human subject using the device of claim 1. The above considerations therefore apply indirectly to these claims.

### **3. Remittal to the Examining Division**

Due to the above deficiencies, the decision under appeal is to be set aside and the assessment of inventive step is to be carried out anew.

Therefore, and given that the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020), the Board considers that there are special reasons within the meaning of Article 11 RPBA 2020 for remitting the case to the Examining Division for further prosecution under Article 111(1) EPC.

In view of this conclusion, holding oral proceedings before the Board is not needed.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division for further prosecution.

The Registrar:

The Chairman:



C. Moser

M. Alvazzi Delfrate

Decision electronically authenticated