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Datasheet for the decision of 5 February 2024

Case Number:	T 2702/19 - 3.5.04
Application Number:	13165052.5
Publication Number:	2621159
IPC:	H04N5/228, A61B1/00, A61B1/05, A61B17/29, G02B23/24, H04N5/225, A61B1/005
Language of the proceedings:	EN

Title of invention:
Small diameter medical devices containing visualization means

Patent Proprietor:
Odysight.AI Ltd

Opponent:
Keck, Stephan

Headword:

Relevant legal provisions:
EPC Art. 100(b), 111(1), 113(1)
EPC R. 106
RPBA 2020 Art. 11, 13(1), 13(2)
RPBA Art. 12(4) (2007)

Keyword:
Admissibility of the opposition (yes)
Main request (patent as granted) - admitted (yes)
Remittal - (no)
Main request (patent as granted) - insufficiency of disclosure (yes)
Auxiliary requests 1a, 1 and 2 - amendments after board's communication - give rise to a new objection - admitted (no)
Objection under Rule 106 EPC (dismissed)

Decisions cited:
G 0009/91, G 0010/91, R 0010/09, R 0011/11, J 0020/85, J 0003/90, T 0226/85, T 0034/90, T 0409/91, T 0435/91, T 0694/92, T 1123/04, T 1685/07, T 1705/07, T 0356/08, T 1067/08, T 1178/08, T 0144/09, T 0936/09, T 0023/10, T 0167/11, T 1400/11, T 0169/12, T 1697/12, T 1914/12, T 1401/13, R 0989/15, T 1193/15, T 0752/16, T 0954/17, T 2120/18, T 2773/18, T 2401/19, T 0149/21, T 0867/21, T 0953/21

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 2702/19 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 5 February 2024

Appellant: (Patent Proprietor)	Odysight.AI Ltd 7A Omer Industrial Park 8496500 Omer (IL)
Representative:	Bird & Bird LLP - Hamburg Am Sandtorkai 50 20457 Hamburg (DE)
Respondent: (Opponent)	Keck, Stephan Königstr. 5 70173 Stuttgart (DE)
Representative:	Witte, Weller & Partner Patentanwälte mbB Postfach 10 54 62 70047 Stuttgart (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 25 July 2019 revoking European patent No. 2621159 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chair	B. Willems
Members:	A. Seeger
	T. Karamanli

Summary of Facts and Submissions

I. The appeal is against the opposition division's decision to revoke European patent No. 2 621 159 ("the patent"). The patent was based on European patent application No. 13 165 052.5.

II. Notice of opposition to the patent had been filed on the following grounds for opposition.

(a) The subject-matter of the granted claims did not involve an inventive step (Articles 100(a) and 56 EPC).

(b) The patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art (Article 100(b) EPC).

(c) The subject-matter of the granted claims extended beyond the content of the application as filed (Article 100(c) EPC).

III. The opposition division revoked the patent pursuant to Article 101(2) EPC because the ground for opposition under Articles 100(a) and 56 EPC prejudiced the maintenance of the patent as granted.

IV. The patent proprietor (appellant) filed notice of appeal on 25 September 2019 and a statement of grounds of appeal on 4 December 2019. In both submissions, its sole request was that the decision under appeal be set aside and that the patent be maintained as granted.

V. The opponent (respondent) filed a reply to the statement of grounds of appeal by letter dated 27 April 2020. They argued that according to the established case law as in, for example, decision

T 1400/11, the appellant's sole request was not admissible and since there were no further requests on file, the appeal must be dismissed. As a precautionary measure, they provided arguments based, inter alia, on the ground for opposition under Article 100(b) EPC, i.e. why the disclosure of the patent specification was not sufficient to enable a person skilled in the art to carry out the claimed invention.

VI. By letter dated 3 November 2022, the appellant filed further arguments.

VII. The board issued a summons to oral proceedings and a communication under Article 15(1) RPBA. In this communication, the board invited the respondent to remedy the missing indication of their nationality and country of residence in the notice of opposition and gave, inter alia, the following preliminary opinion.

(a) With regard to the sub-authorisation on file for Mr Douma, a legal practitioner, the board noted that the file did not contain the required individual authorisation or a reference to a general authorisation which indicated that the patent proprietor's representative was entitled to sub-authorise.

(b) The board was not inclined to follow the approach taken in decision T 1400/11, in which the board, exercising its discretion under Article 12(4) RPBA 2007, held inadmissible the patent proprietor's request that the patent be maintained as granted. However, the appellant's submissions in its statement of grounds of appeal, which did not only deal with the findings in the contested decision, and new evidence filed by the appellant

on appeal could be held inadmissible by the board when exercising its discretion under Article 12(4) RPBA 2007. Hence, it would have to be discussed at the oral proceedings whether the sole request and the submissions and evidence filed by the appellant were admissible in view of Article 12(4) RPBA 2007.

(c) The board expressed doubts that the patent disclosed the invention in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art over the whole scope of the granted claims without undue burden and on the basis of their common general knowledge. The scope comprised all possible types of CMOS sensor and the open-ended range of diameter sizes of the medical device below 3.2 mm. It was therefore to be discussed at the oral proceedings whether the person skilled in the art would be able to carry out the invention as defined in the independent claims for any type of CMOS sensor and for any size of the medical device below 3.2 mm.

VIII. With its letters dated 16 January 2024, the appellant filed an authorisation for its newly appointed representatives which entitled them to give sub-authorisations, and amended claims of auxiliary requests 1 and 2, in claim 1 of which a maximum outer diameter of the visualisation probe (of the medical device) of between 1.0 and 2.8 mm or a minimum dimension of the CMOS sensor (of the medical device) of 0.5 x 0.5 mm was included. The appellant indicated a basis for these amendments in the application as filed (on which this patent was based) and argued that the amendments were allowable under Article 123(3) EPC and directly dealt with issues raised in the board's preliminary opinion. The appellant argued that its sole

request and all submissions made in its statement of grounds of appeal were admissible under Article 12(4) RPBA 2007. Further, it argued that the respondent had still not met their burden of proof and hence the objection of alleged insufficiency of disclosure should be dismissed. Decision T 2773/18 confirmed that values of a parameter not obtainable in practice could not justify an objection of insufficiency of disclosure. The patent disclosed at least one working example and based on the teaching of the patent the skilled person would be able to reproduce the invention over the scope they considered to be claimed. The appellant had demonstrated that starting from the Agilent sensor the person skilled in the art could arrive at a sensor within the scope of the claim. Even if the skilled person wanted to reproduce the claimed invention starting from an existing prior-art CMOS sensor, they would know which CMOS sensor to then use as a basis given the requirements of the CMOS sensor specified in the claim.

IX. In their letter dated 17 January 2024, the respondent indicated their nationality and country of residence. They maintained their request that the appellant's sole request not be admitted into the appeal proceedings. In support of this, they referred to case T 2120/18, in which the board had exercised its discretion under Article 12(4) RPBA 2007 and decided not to admit the patent proprietor's defence submissions into the appeal proceedings. None of the arguments and documents submitted by the appellant for the first time with its statement of grounds of appeal with respect to the grounds for opposition under Article 100(b) and (c) EPC were to be admitted into the appeal proceedings. The respondent argued that because four detailed expert opinions were necessary to explain how the skilled

person could carry out the invention, it was clear that the invention was not disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person. The experts could not be regarded as skilled persons having average knowledge and ability in the relevant technical field. The patent briefly disclosed multiplexing and the current method. It did not disclose how to apply these techniques to reduce the number of pads to three or four. Moreover, it was unclear how various components, such as multiplexers, drivers, oscillators and controllers, could be integrated into the imager chip without making the chip bigger. No details were provided in the patent specification as to how an upper limit of 3.2 mm for the maximum outer diameter of the medical device could be achieved. The opponent referred to decisions T 149/21 and T 867/21 and concluded that claim 1 of the granted patent specified a result to be achieved, rather than clearly defining a technical teaching as to how to achieve said result, in particular over the whole scope claimed and for all types of CMOS sensors. Hence, the requirements of Article 83 EPC were not fulfilled.

X. The board held oral proceedings on 5 February 2024.

As the case at hand is closely related to appeal cases T 2401/19 and T 953/21, the oral proceedings in these three cases were held consecutively, starting with case T 953/21 and continuing with cases T 2401/19 and T 2702/19. The board announced a final decision in each of these three appeal cases on 5 February 2024, after having heard the parties in the other related cases.

During the oral proceedings, the appellant filed an objection under Rule 106 EPC, which reads as follows:

"*Proprietor raises objection that there was a violation of the right to be heard (Art. 112a(2)(c) EPC in connection with Art. 113 EPC) during the appeal proceedings.*

Reasons: *During first instance opposition proceedings the opponent did not raise the argument that the patent would be insufficiently disclosed due to a claimed open-ended range, and the decision of the opposition division to revoke the patent was exclusively based on an alleged lack of inventive step. In the response to proprietor's grounds of appeal the opponent likewise did not specifically address this argument, but only generally mentioned that features 1F", 1H and 1I would not be sufficiently disclosed over the whole claimed range in the context of a lack of sufficiency objection regarding the question whether the skilled person would be able to reproduce the invention at all. At the oral proceedings of appeal the question of the correctness of the decision of the opposition division was not discussed at all. Rather, the Board started with a discussion of sufficiency further to the points in* [sic] *had raised on its own motion in the preliminary opinion circulated prior to the hearing. When the proprietor then tried to defend itself against this by also referring to auxiliary requests filed prior to and at the hearing, the Board decided not to admit these auxiliary requests for the reason that they would introduce new complex matters to be discussed. We submit that in those in* [sic] *circumstances, in which a completely new line of sufficiency arguments only surfaces in the preliminary opinion and at the hearing, the proprietor is deprived of the right to be heard in accordance with Art. 113 EPC in a fundamental manner if the proprietor is not allowed to defend itself based on*

auxiliary requests."

The parties' **final requests** were as follows.

The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), or alternatively, that the patent be maintained as amended according to auxiliary request 1a filed at the oral proceedings of 5 February 2024, or auxiliary request 1 filed by letter dated 16 January 2024 or auxiliary request 2 filed by letter dated 16 January 2024.

The respondent requested that the appeal be dismissed.

At the end of the oral proceedings, the Chair announced the board's decision.

XI. Claim 1 of the patent as granted reads as follows:

"A medical device adapted for at least one of monitoring, diagnosing, or therapy, said device comprising a visualization probe comprised of: illumination means (92), an objective lens assembly (20), and a CMOS sensor (1), wherein the CMOS sensor comprises a silicon substrate having:

a) a front side at which circuitry is created;
b) a back side comprising either conducting balls or pads; and
c) through silicon vias to provide electrical connections between the circuitry created on the front side of the silicon substrate and the back side;

wherein the back side is patterned to provide electrical conductivity between the bottoms of the

through silicon vias and either the conducting balls or pads;

wherein said medical device satisfies the condition that its maximum outer diameter is 3,2mm or less;

characterized in that the number of conducting balls or pads consists of one of:

i) four balls or pads respectively connected to voltage input (Vdd), ground (Vss), shutter timing (SHTR), and video signal output current (POUT); and

ii) three balls or pads respectively connected to voltage input (Vdd), ground (Vss), and video signal output current (POUT), whereby a predetermined value for the shutter timing (SHTR) is implemented in the circuitry of the silicon."

XII. Claim 1 of auxiliary request 1a reads as follows (features added compared with claim 1 of the patent as granted are underlined and deleted features are ~~struck through~~):

"A medical device adapted for at least one of monitoring, diagnosing, or therapy, said device comprising a visualization probe comprised of: illumination means (92), an objective lens assembly (20), and a CMOS sensor (1), wherein the CMOS sensor comprises a silicon substrate having:

a) a front side at which circuitry is created;
b) a back side comprising either conducting balls or pads; and

c) through silicon vias to provide electrical connections between the circuitry created on the front side of the silicon substrate and the back side;

wherein the back side is patterned to provide electrical conductivity between the bottoms of the through silicon vias and either the conducting balls or pads;

wherein said medical device satisfies the condition that its maximum outer diameter is 3,2mm ~~or less~~;

characterized in that the number of conducting balls or pads consists of ~~one of~~:

~~i)~~ four balls or pads respectively connected to voltage input (Vdd), ground (Vss), shutter timing (SHTR), and video signal output current (POUT)~~; and~~

~~ii) three balls or pads, respectively connected to voltage input (Vdd), ground (Vss), and video signal output current (POUT), whereby a predetermined value for the shutter timing (SHTR) is implemented in the circuitry of the silicon~~."

XIII. Claim 1 of auxiliary request 1 reads as follows (features added compared with claim 1 of the patent as granted are underlined and deleted features are ~~struck through~~):

"A medical device adapted for at least one of monitoring, diagnosing, or therapy, said device comprising a visualization probe comprised of: illumination means (92), an objective lens assembly (20), and a CMOS sensor (1), wherein the CMOS sensor comprises a silicon substrate having:

a) a front side at which circuitry is created;
b) a back side comprising either conducting balls or pads; and
c) through silicon vias to provide electrical connections between the circuitry created on the front side of the silicon substrate and the back side;

wherein the back side is patterned to provide electrical conductivity between the bottoms of the through silicon vias and either the conducting balls or pads;

wherein said medical device satisfies the condition that its maximum outer diameter is 3,2mm or less, and wherein the visualization probe satisfies the condition that its maximum outer diameter is between 1,0 mm and 2,8 mm or wherein a minimum dimension of the CMOS sensor is 0,5 x 0,5 mm;

characterized in that the number of conducting balls or pads consists of one of:

i) four balls or pads respectively connected to voltage input (Vdd), ground (Vss), shutter timing (SHTR), and video signal output current (POUT); and

ii) three balls or pads, respectively connected to voltage input (Vdd), ground (Vss), and video signal output current (POUT), ~~whereby~~ wherein a predetermined value for the shutter timing (SHTR) is implemented in the circuitry of the silicon."

XIV. Claim 1 of auxiliary request 2 reads as follows (features added compared with claim 1 of the patent as

granted are underlined and deleted features are ~~struck through~~):

"A medical device adapted for at least one of monitoring, diagnosing, or therapy, said device comprising a visualization probe comprised of: illumination means (92), an objective lens assembly (20), and a CMOS sensor (1), wherein the CMOS sensor comprises a silicon substrate having:

a) a front side at which circuitry is created;
b) a back side comprising either conducting balls or pads; and
c) through silicon vias to provide electrical connections between the circuitry created on the front side of the silicon substrate and the back side;

wherein the back side is patterned to provide electrical conductivity between the bottoms of the through silicon vias and either the conducting balls or pads;

wherein said medical device satisfies the condition that its maximum outer diameter is 3,2mm or less, and wherein the visualization probe satisfies the condition that its maximum outer diameter is between 1,0 mm and 2,8 mm or wherein a minimum dimension of the CMOS sensor is 0,5 x 0,5 mm;

characterized in that the number of conducting balls or pads consists of ~~one of~~:

~~i)~~ four balls or pads respectively connected to voltage input (Vdd), ground (Vss), shutter timing (SHTR), and video signal output current (POUT)~~; and~~

~~ii) three balls or pads, respectively connected to voltage input (Vdd), ground (Vss), and video signal output current (POUT), whereby a predetermined value for the shutter timing (SHTR) is implemented in the circuitry of the silicon~~."

Reasons for the Decision

1. The appeal is admissible.

2. Mr Douma's authorisation

It is clear from the authorisation on file that the appellant's representative was authorised to grant sub-authorisations. Mr Douma was therefore validly authorised.

3. Admissibility of the opposition

In order for an opposition to be admissible it must comply with Article 99(1) EPC and Rule 76(2)(a) in conjunction with Rule 41(2)(c) EPC. Rule 77(2) EPC states that if the opposition division notes that the notice of opposition does not comply with provisions other than those referred to in Rule 77(1) EPC, it must communicate this to the opponent and invite them to remedy the deficiencies noted within a set period. This wording covers the data required under Article 99(1) EPC and Rule 76(2)(a) in conjunction with Rule 41(2)(c) EPC, namely the particulars of the opponent (corresponding to those stipulated in Rule 41(2)(c) EPC for the applicant in the request for grant). These particulars are the name, address, nationality and state of residence (in the case of a natural person) or principal place of business (in the case of a legal entity). It is undisputed that the opponent did not

indicate their nationality or their country of residence in the notice of opposition. These details are obviously not necessary to identify the opponent within the opposition period, because if they are missing, these deficiencies can be remedied within a period to be set by the opposition division in accordance with Rule 77(2) EPC. It is clear from the file that the respondent had not been given an opportunity in the first-instance proceedings to remedy these deficiencies within a specified period, as the respondent had argued. Therefore, the board invited the respondent to remedy these deficiencies (missing indication of nationality and country of residence) within a period of two months. These deficiencies were remedied within that period.

In view of the above, and since there are no further objections to the admissibility of the opposition, the board finds that the opposition meets the requirements of Article 99(1) EPC and Rule 76(2)(a) in conjunction with Rule 41(2)(c) EPC and is therefore admissible.

4. Admittance into the appeal proceedings of the appellant's main request (previously its sole request) and of the appellant's defence submissions (Article 12(4) RPBA 2007)

4.1 In its notice of appeal, the appellant formulated a sole request. In its statement of grounds of appeal, the appellant maintained this request which at a later stage of the proceedings became its main request.

Since in the current case the statement of grounds of appeal was filed before the revised version of the Rules of Procedure of the Boards of Appeal (RPBA) entered into force, i.e. before 1 January 2020 (see

OJ EPO 2019, A63), in accordance with Article 25(2) RPBA, Article 12(4) to (6) RPBA does not apply. Instead, Article 12(4) of the Rules of Procedure of the Boards of Appeal in the version of 2007 (RPBA 2007 - see OJ EPO 2007, 536) continues to apply.

4.2 According to Article 12(4) RPBA 2007, everything presented by the parties under Article 12(1) RPBA 2007 has to be taken into account by the board if and to the extent it relates to the case under appeal and meets the requirements in Article 12(2) RPBA 2007. However, the board has the discretionary power to hold inadmissible facts, evidence and requests which could have been presented in the first-instance proceedings.

4.3 The respondent requested that the appellant's main request not be admitted into the appeal proceedings under Article 12(4) RPBA 2007.

The respondent referred to decision T 1400/11, and also to decisions R 10/09, R 11/11, T 144/09 and T 936/09, and argued as follows.

In view of the cited decisions, the appellant's main request should be "*excluded from the appeal proceedings*" because the patent proprietor had failed to participate in any way in the first-instance opposition proceedings. In particular, the appellant had not submitted arguments or requests during the first-instance proceedings. It could not be assumed by default that the appellant's main request was to maintain the patent as granted. Patent proprietors often file amended claims as their main request during first-instance opposition proceedings.

Delaying all arguments and requests until the appeal proceedings meant that a fresh case was brought to the board. This was a misuse of the appeal proceedings.

For the same reasons, the appellant's defence submissions, filed for the first time with the statement of grounds of appeal, should not be admitted into the appeal proceedings, as had been decided in case T 2120/18, which dealt with a situation identical to that in the current case.

4.4 The appellant argued as follows.

The facts in the case at hand were different to those in case T 1400/11 because in the current case:

(a) EPO Form 2344 had not been issued

(b) the opposition had been filed by a straw man

(c) the appellant had received a favourable opinion from the opposition division in another case pending before the EPO which was comparable to the current case

The main request could not have been filed before the decision under appeal had been issued.

If this main request were not admitted into the appeal proceedings, this would mean that an appeal would not be possible, in particular in the present situation where the patent as granted was the only issue in the decision under appeal and where the main request did not comprise amended claims. Therefore, the main request merely required a review of the findings in the first-instance decision under appeal without any change in the factual situation. The deficiencies of the decision under appeal had been addressed in the

appellant's defence submissions filed with its statement of grounds of appeal.

Furthermore, under Article 12(4) RPBA 2007 it was only possible not to admit facts and requests; it was not possible not to admit arguments.

4.5 The board does not find the respondent's arguments convincing for the following reasons.

4.6 The function of appeal proceedings is to give a judicial decision upon the correctness of a separate earlier decision taken by a first-instance department (see e.g. T 34/90, OJ EPO 1992, 454, and G 9/91 and G 10/91, OJ EPO 1993, 408, 420). It follows that the main purpose of the inter partes appeal procedure is to give the losing party an opportunity to challenge the decision of the opposition division on its merits and to obtain a judicial ruling on whether the decision of the opposition division is correct (G 9/91 and G 10/91, point 18 of the Reasons). The appeal proceedings are thus largely determined by the factual and legal scope of the preceding opposition proceedings and the parties have only limited scope to amend the subject of the dispute in appeal proceedings (T 1705/07, point 8.4 of the Reasons). It is not the purpose of the appeal to conduct the case anew and therefore the issues to be dealt with in appeal proceedings are determined by the dispute underlying the opposition proceedings (see e.g. T 356/08, point 2.1.1 of the Reasons). Thus, the appeal proceedings are not just an alternative way of dealing with and deciding upon an opposition. Parties to first-instance proceedings are therefore not at liberty to shift their case to second-instance proceedings as they please, thereby compelling the board of appeal either to give a first ruling on the critical issues or to

remit the case to the department of first instance (see also T 1067/08, point 7.2 of the Reasons). The filing of new submissions (requests, facts or evidence) by a party is not precluded in appeal proceedings, but the admission thereof is restricted, depending on, inter alia, the procedural stage at which the submissions are made (see e.g. T 356/08, point 2.1.1 of the Reasons; T 1685/07, point 6.4 of the Reasons).

4.7 The afore-mentioned principles are reflected in the provisions of Article 12(4) RPBA 2007.

According to Article 12(4) RPBA 2007, the board has discretionary power to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first-instance proceedings. Since almost every claim request could in fact have been presented before the department of first instance, the question within that context is whether the situation was such that the filing of this request should already have taken place at that stage (see Case Law of the Boards of Appeal of the European Patent Office, 10th edition, 2022, "Case Law", V.A.5.11.1 and V.A.5.11.4a). This discretionary power serves the purpose of ensuring the fair and reliable conduct of judicial proceedings (T 23/10, point 2.4 of the Reasons). The board exercises its discretion under Article 12(4) RPBA 2007 taking into account the particular circumstances of the individual case (see e.g. decision T 1178/08, point 2.3 of the Reasons).

4.8 Under the EPC, there is no legal obligation for patent proprietors to take an active part in opposition proceedings. However, patent proprietors are not free to present or complete their case at any time they wish during the opposition or opposition appeal proceedings,

depending, for example, on their procedural strategy or financial situation. In view of the judicial nature and purpose of inter partes appeal proceedings and in the interests of an efficient and fair procedure, it is necessary that all parties to opposition proceedings complete their submissions during the first-instance proceedings in so far as this is possible. If a patent proprietor chooses not to respond in substance at all to the opposition, for example by filing arguments or amended claims, or chooses not to complete its submissions during the first-instance proceedings, but rather presents or completes its case only in its notice of appeal or statement setting out the grounds of appeal, then it will need to face the prospect of being held to account for such conduct by the board when, for example, it exercises its discretion under Article 12(4) RPBA 2007 (see decision T 936/09, point 9 of the Reasons). This applies in particular if, as in the present case, all the reasons for revocation of the opposed patent were known to the patent proprietor before it received the impugned decision (for similar reasons as in decision T 936/09, point 10 of the Reasons).

4.9 According to the above and to the wording of Article 12(4) RPBA 2007, all of the parts of the current appellant's appeal case which were admitted into the first-instance proceedings and which relate to the case under appeal, i.e. to the requests, facts, objections, arguments and evidence on which the contested decision is based, are part of the appeal proceedings. This is necessary to give the losing party the opportunity to challenge the opposition division's decision on the merits and to obtain a judicial ruling on whether the contested decision is correct. If this were seen differently in the case at hand, then in fact

no appeal would have been possible for the losing patent proprietor. Hence, not admitting the appellant's main request in the case at hand would be equivalent to denying it the right to appeal. Moreover, the appellant's request that the decision under appeal be set aside, which was made in the notice of appeal, implies a request that the decision to revoke the patent be set aside and, as a consequence, that the patent be maintained as granted. In addition, the appellant's main request, which strictly speaking was made for the first time on appeal, only requires a review of the findings in the contested first-instance decision, without the factual situation having changed. Therefore, in the case at hand, the board sees no reason to hold the current main request inadmissible.

4.10 In view of the above, the board does not follow the approach taken in decision T 1400/11, in which the board, exercising its discretion under Article 12(4) RPBA 2007, held inadmissible the patent proprietor's main request, which was directed to setting aside the decision under appeal and to maintaining the patent as granted.

Furthermore, decision T 1400/11 appears to be an exception. Decision T 1400/11 was cited in decisions T 167/11, T 169/12, T 1401/13 and T 1193/15. However, these decisions did not follow the approach taken in decision T 1400/11, i.e. holding inadmissible the patent proprietor's request that the patent be maintained as granted, either, since in none of these cases were the facts comparable to those of case T 1400/11. In decisions T 167/11 and T 169/12, new lines of attack based both on documents not used or substantiated in the opposition proceedings and on newly filed documents were not admitted, and in cases

T 1401/13 and T 1193/15, amended claims were filed for the first time on appeal.

4.11 In view of the above, the board exercised its discretion under Article 12(4) RPBA 2007 and decided to admit the appellant's main request into the appeal proceedings.

4.12 Regarding the appellant's defence submissions, the board notes that in decision T 2120/18 it was held that the board had discretion under Article 12(4) RPBA 2007 not to admit the patent proprietor's defence submissions into the appeal proceedings (see point 5 of the Reasons). In the case at hand, however, the board did not have to decide on this issue since the discussion on the ground for opposition under Article 100(b) EPC was based on the parties' arguments on file, which did not create a new case. The board notes that under Article 12(4) RPBA 2007 only facts, evidence or requests can be held inadmissible and that according to the case law on the RPBA 2007, late-filed arguments which do not create a new case and which are based on facts and evidence that are already part of the proceedings are to be considered in the appeal proceedings (see, for example, decision T 1914/12; see also Case Law, V.A.5.10.1).

5. Request to remit the case to the department of first instance (Article 111(1), second sentence, EPC and Article 11 RPBA)

5.1 The appellant requested that the case be remitted to the department of first instance without deciding on the ground for opposition under Article 100(b) EPC.

It argued as follows.

In the decision under appeal, the opposition division had decided only on the grounds for opposition under Articles 100(a) and 56 EPC. Therefore, the case should be remitted to the opposition division so that the other grounds for opposition can be discussed at two instances.

No objection of insufficient disclosure had been raised with respect to the open-ended range in the notice of opposition or in the reply to the appeal. The objection raised on page 26 of the notice of opposition only addressed the number of pads, and not an open-ended lower limit of the maximum outer diameter of the medical device.

As far as the objection of insufficient disclosure was concerned, the issue with regard to an open-ended lower limit of the maximum outer diameter of the medical device was raised for the first time by the board in point 10.4 of its communication under Article 15(1) RPBA. Since this issue had never been discussed before, the case should be remitted to the opposition division.

5.2 The respondent objected to a remittal and argued as follows.

The objection that the person skilled in the art was not provided with sufficient information to carry out the invention over the whole scope claimed had already been raised in the notice of opposition, page 26, last paragraph. This objection did address the open-ended lower limit.

The appellant had submitted arguments relating to the issue of a "whole scope" under points 34 to 56 of its letter dated 16 January 2024. With regard to the same issue, the respondent had provided arguments under points 4.5 and 4.6 of their letter dated 17 January 2024.

5.3 Under Article 111(1), second sentence, EPC, the board may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.

Furthermore, under Article 11 RPBA, which applies in the case at hand in accordance with the transitional provisions of Article 25 RPBA, the board does not remit a case to the department whose decision was appealed for further prosecution unless special reasons present themselves for doing so. According to the explanatory remarks on Article 11 RPBA (Supplementary publication 2, OJ EPO 2020), the aim of the new provision is to reduce the likelihood of a ping-pong effect between the boards of appeal and the departments of first instance and a consequent undue prolongation of the entire proceedings before the EPO. When exercising their discretion under Article 111(1) EPC, the boards of appeal should take account of this aim. Whether special reasons within the meaning of Article 11 RPBA present themselves is to be decided on a case-by-case basis. The boards of appeal should not, as a rule, remit a case if they can decide on all of the issues without undue burden.

The appropriateness of a remittal to the department of first instance and the existence of special reasons within the meaning of Article 11 RPBA are matters for a

discretionary decision by the board, which assesses each case on its merits. Even if the primary purpose of the appeal proceedings is to review the decision under appeal in a judicial manner (Article 12(2) RPBA), it is established case law (see Case Law, V.A.9.2.1) that parties do not have a fundamental right to have their case examined at two instances and that accordingly, they have no absolute right to have each and every matter examined at two instances. When deciding whether to remit a case, the boards of appeal consider the specific facts of the case (see Case Law, V.A.9.1.1).

5.4 In the case at hand, both parties have addressed the issue of insufficiency of disclosure in the appeal proceedings. The appellant addressed it in section 3.5.3 of its statement of grounds of appeal and the respondent addressed it in section 3 of their reply. Furthermore, both parties have addressed the specific issue of insufficiency of disclosure of an open-ended range of the maximum outer diameter of the medical device. The appellant addressed this under points 34 to 56 of its letter dated 16 January 2024 and the respondent addressed it under points 4.5 and 4.6 of their letter dated 17 January 2024. On the basis of these arguments, the board is in a position to decide on all issues relating to the ground for opposition under Article 100(b) EPC.

5.5 In view of the above, the board holds that in the case at hand, there are no special reasons within the meaning of Article 11 RPBA that justify a remittal of the case to the department of first instance.

5.6 Against this background, and having exercised its discretion under Article 111(1), second sentence, EPC, taking into account the provision of Article 11 RPBA,

the board does not consider it appropriate to remit the case to the opposition division for further prosecution. Therefore, the case is not remitted to the opposition division under Article 111(1) EPC and Article 11 RPBA.

6. Patent as granted - insufficiency of disclosure (Article 100(b) EPC)

6.1 The ground for opposition under Article 100(b) EPC prejudices the maintenance of the European patent if it does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art.

The claimed invention must be sufficiently disclosed, based on the patent specification as a whole, including examples, and taking into account the common general knowledge of the person skilled in the art. At least one way of enabling the person skilled in the art to carry out the invention must be disclosed, but this is sufficient only if it allows the invention to be performed in the whole range claimed (see Case Law, II.C.1).

An objection of lack of sufficiency of disclosure presupposes that there are serious doubts, substantiated by verifiable facts, and it depends on the evidence available in each case whether or not a claimed invention can be considered as enabled on the basis of the disclosure of one worked example (see e.g. decisions T 226/85, OJ EPO 1988, 336; T 409/91, OJ EPO 1994, 653; and T 694/92, OJ EPO 1997, 408; see also Case Law, II.C.5.3).

It is established case law of the boards of appeal that the requirements of sufficiency of disclosure are met if the person skilled in the art can carry out the invention as defined in the independent claims over the whole scope of the claims without undue burden using their common general knowledge (see e.g. decisions T 409/91; T 435/91, OJ EPO 1995, 188; see also Case Law, II.C.5.4).

Claims may be considered insufficiently disclosed if they cover, through open-ended ranges, embodiments that could not be obtained with the process disclosed in the patent, but which might be obtainable with different methods still to be invented in the future (see decision T 1697/12, points 5.5.3 and 5.5.4 of the Reasons; see also Case Law, II.C.5.5.2).

6.2 In opposition proceedings, the burden of proof initially lies with the opponent, who must establish, on the balance of probabilities, that a skilled person reading the patent, using common general knowledge, would be unable to carry out the invention. This means that the opponent initially also bears the burden of proving that the invention cannot be carried out within the whole range claimed (see also Case Law, II.C.8.1).

When the patent does not give any information as to how a feature of the invention can be put into practice, only a weak presumption exists that the invention is sufficiently disclosed. In such a case, the opponent can discharge its burden of proof by plausibly arguing that common general knowledge would not enable the skilled person to put this feature into practice.

If the opponent has discharged its burden of proof and so conclusively established the facts, the patent

proprietor then bears the burden of proving the alleged facts. It is then up to the patent proprietor to prove the contrary, i.e. that the skilled person's common general knowledge would enable them to carry out the invention (see Case Law, II.C.9.1).

6.3 Claim 1 of the granted patent defines a medical device comprising a visualisation probe comprised of illumination means, an objective lens assembly and a CMOS sensor.

Claim 1 of the granted patent specifies that "*said medical device satisfies the condition that its maximum outer diameter is 3,2mm or less*".

6.4 The respondent argued that the patent did not disclose how to carry out the invention as defined in claim 1 over the whole scope thereof. In particular, it was not disclosed how to carry out the invention for very small values of the maximum outer diameter of the medical device, i.e. for values below 1 mm or even below 0.5 mm, which fell under the terms of claim 1.

Furthermore, no reasonable lower limit for the maximum outer diameter of the medical device was known or derivable from the patent.

6.5 The appellant argued that according to claim 1, the medical device comprised a visualisation probe which in turn comprised illumination means, an objective lens assembly and a CMOS sensor.

According to the patent, these components of the visualisation probe, and in particular the CMOS sensor having a certain number of pads, had certain minimum sizes.

The presence of these components and the minimum dimensions thereof as required by the claim defined an implicit lower limit for the maximum outer diameter of the medical device.

6.6 The board is not convinced by the patent proprietor's argument that the person skilled in the art would understand from the example given in the patent of a 0.5 x 0.5 mm CMOS sensor that this is the smallest implementable size of a CMOS sensor and that lower values would be nonsensical.

It would not be unreasonable to try to further reduce the size of the CMOS sensor by using fewer pixels at a given pixel size. This is because paragraph [0007] of the patent discloses that "*a compromise must be made based on the primary goal of the device, i.e. whether a small diameter is more important than a high-quality image*". Hence, the board finds that the person skilled in the art would have understood that the sensor size may be further reduced at the expense of image quality.

There is a lower limit to the number of pixels because otherwise the resolution would have been too low and the space needed for the illumination means would have been too large in relation to the size of the CMOS sensor. However, it is not apparent to the board where this limit is because there is no clear boundary between when a visualisation probe could and could not be considered to yield insufficient image quality. Therefore, no clear limit can be derived from this consideration as to which sensor sizes the person skilled in the art would exclude as nonsensical.
The board is also not convinced that the situation dealt with in decision T 2773/18 is comparable with the

case at hand because in that decision the relevant claim did not contain an open-ended range.

6.7 The board agrees with the patent proprietor that the number of pads on the back side of the silicon substrate specified in claim 1 (three or four) and their minimum size may imply a lower limit to the CMOS sensor size. However, even if the person skilled in the art were to interpret the phrase in paragraph [0009] of the patent "*Since current technologies suggest that each pad has a minimum dimension (150 to 350 microns)*" as defining what could be implemented on the priority date of the patent and take these values as read, the board is not convinced that the person skilled in the art would rule out any values below 150 microns as nonsensical. Therefore, the board is not convinced that the person skilled in the art could derive from this phrase an implicit lower limit for the maximum outer diameter of the medical device comprising a visualisation probe below which the person skilled in the art would consider the values to be nonsensical.

6.8 In conclusion, the person skilled in the art would not be able to derive from the patent, using their common general knowledge, a limit for the values of the maximum outer diameter of the medical device below which they would immediately exclude variants as being clearly outside the scope of practical application of the claimed subject-matter and thus could not justify an objection of insufficiency of disclosure. As argued by the respondent, the patent does not disclose how to carry out the invention over the whole effective claimed range of the maximum outer diameter of the medical device, i.e. also for values of this maximum outer diameter below 1 mm or even below 0.5 mm. Therefore, the ground for opposition under

Article 100(b) EPC prejudices the maintenance of the patent as granted.

7. Auxiliary request 1a - admittance (Article 13(2) RPBA)

7.1 Under Article 13(2) RPBA as in force from 1 January 2024 (see OJ EPO 2023, A103) any amendment to a party's appeal case after notification of a communication under Article 15(1) RPBA will, in principle, not be taken into account unless there are exceptional circumstances which have been justified with cogent reasons by the party concerned.

When exercising its discretion under Article 13(2) RPBA, the board may also rely on the criteria set out in Article 13(1) RPBA (see, for example, decisions T 954/17, point 3.10 of the Reasons; T 989/15, point 16.2 of the Reasons; T 752/16, point 3.2 of the Reasons; and Supplementary publication 2, OJ EPO 2020, Explanatory remarks on Article 13(2), fourth paragraph: "*At the third level of the convergent approach, the Board may also rely on criteria applicable at the second level of the convergent approach, i.e. as set out in proposed new paragraph 1 of Article 13*").

Under Article 13(1) RPBA, a board exercises its discretion as to whether to admit a new request in view of, inter alia, whether the party has demonstrated that any such amendment prima facie overcomes the issues raised by another party in the appeal proceedings or by the board and does not give rise to new objections.

7.2 Auxiliary request 1a was filed after notification of the board's communication under Article 15(1) RPBA and is therefore an amendment to the appellant's appeal case within the meaning of Article 13(2) RPBA.

Claim 1 of this request contains the following amended feature: "*wherein said medical device satisfies the condition that is maximum outer diameter is 3.2mm*".

7.3 The appellant argued as follows.

(a) The issue of an open-ended range was a new aspect under the objection of insufficient disclosure. This aspect had not been dealt with in the first-instance proceedings; it had only been introduced in the board's communication.

(b) The amendments in auxiliary request 1a were an attempt to address all of the issues raised by the respondent or the board in that:
- the issue of an open-ended lower range had been resolved by specifying that the maximum outer diameter was 3.2 mm; the outer diameter was an "effective diameter" as described in paragraph [0058] of the patent
- "whereby" had been deleted from claim 1
- the dependent claims to which objections had been raised had been deleted

(c) Amended claim 1 undoubtedly had a basis in the application as filed and thus could not give rise to an objection under Article 123(2) EPC.

7.4 The respondent argued as follows.

(a) Auxiliary request 1a was very late filed. This new request could have been filed directly in reply to the board's preliminary opinion.

(b) The issue of the open-ended range had already been addressed in the reply to the appeal and at the latest in the board's preliminary opinion.

(c) The appellant had not reacted at all in the first-instance proceedings. It was not the purpose of the appeal proceedings to deal with the case anew. This would not be fair to the respondent.

(d) The amended feature in claim 1 raised further questions, namely whether the term "maximum outer diameter" meant that the diameter could be lower or that the diameter could vary along the medical device.

7.5 The board takes the view that a new aspect with respect to the objection of insufficient disclosure had indeed been introduced for the first time in point 10.4 of its communication under Article 15(1) RPBA. Section 3 of the respondent's reply to the appeal addressed the issue of insufficient disclosure. However, this section only addressed the question of whether the patent sufficiently disclosed how to reduce the number of pads of a CMOS sensor to 3 or 4 and at the same time reduce the chip size. The respondent's reply to the appeal did not address the issue of an open-ended range of the maximum outer diameter of the medical device. Therefore, the board acknowledges that in the case at hand there are exceptional circumstances within the meaning of Article 13(2) RPBA.

7.6 According to the amended feature, the maximum outer diameter of the medical device is 3.2 mm. The respondent's argument that this amended feature could either mean

(a) that the medical device had a constant diameter along its axis and this constant diameter could be lower than 3.2 mm, i.e. between zero and 3.2 mm, or
(b) that the diameter of the medical device varied along its axis and the maximum diameter along this axis was 3.2 mm

is considered persuasive.

If the amended feature were to be understood as per option (b), a further question would arise, i.e whether a handling portion, an elongated portion 31 and a tip 32 as shown in Figures 3A to 3E all had to meet the formulated requirement for the maximum diameter.

Therefore, the board finds that the amended feature prima facie gives rise to a new objection of lack of clarity (Article 84 EPC).

7.7 In view of the above, the board exercised its discretion under Article 13(2) RPBA, taking into account the criteria of Article 13(1) RPBA, and decided not to admit auxiliary request 1a into the appeal proceedings.

8. Auxiliary requests 1 and 2 - admittance (Article 13(2) RPBA)

8.1 Auxiliary requests 1 and 2 were filed after notification of the board's communication under Article 15(1) RPBA and therefore constitute amendments to the appellant's appeal case within the meaning of Article 13(2) RPBA.

Claim 1 of auxiliary requests 1 and 2 contains the following amended features: "*and wherein the visualization probe satisfies the condition that its*

maximum outer diameter is between 1,0 mm and 2,8 mm or wherein a minimum dimension of the CMOS sensor is 0,5 x 0,5 mm".

8.2 The appellant argued as follows.

(a) Auxiliary requests 1 and 2 were filed as a direct response to the new objection of insufficient disclosure due to an open-ended range of the maximum outer diameter of the medical device as introduced by the board in point 10.4 of its communication under Article 15(1) RPBA. Prior to this communication, this aspect of insufficient disclosure had never been an issue in the proceedings.

(b) According to claim 1, the medical device comprised the visualisation probe, which in turn comprised the CMOS sensor. Specifying minimum sizes of the visualisation probe and the CMOS sensor thus defined an effective minimum size of the medical device. This resolved the issue of an open-ended lower range of the medical device's maximum outer diameter.

(c) The feature that the visualisation probe's maximum outer diameter was between 1.0 mm and 2.8 mm had a basis in paragraph [0104] of the patent. Furthermore, Figure 6 of the patent showed the relation between the outer diameters of the distal tip and the visualisation probe.

(d) The feature that a minimum dimension of the CMOS sensor was 0.5 x 0.5 mm had a basis in paragraph [0103] of the patent.

8.3 The respondent argued as follows.

(a) Auxiliary requests 1 and 2 were late filed.

(b) A pertinent objection of insufficient disclosure had already been raised in the respondent's reply to the appeal.

(c) The amendments did not resolve the issue at stake, namely the claimed open-ended range of the maximum outer diameter of the medical device, as there was no relationship between the maximum outer diameter of the visualisation probe or the minimum dimension of the CMOS sensor with the maximum outer diameter of the medical device.

(d) There was no disclosure in the patent that the maximum outer diameter of the visualisation probe was between 1.0 mm and 2.8 mm. Paragraph [0104] of the patent referred to a diameter of the distal tip. The distal tip was not the same as the visualisation probe.

(e) There was no disclosure in the patent that a CMOS sensor size of 0.5 x 0.5 mm was the minimum possible dimension.

8.4 The board takes the view that a new aspect of the objection of insufficient disclosure had indeed been introduced in point 10.4 of its communication under Article 15(1) RPBA. Section 3 of the respondent's reply to the appeal addressed the issue of insufficient disclosure. However, this section only addressed the question of whether the patent sufficiently disclosed how to reduce the number of pads of a CMOS sensor to three or four and at the same time reduce the chip size. The respondent's reply to the appeal did not address the issue of an open-ended range of the maximum outer diameter of the medical device. Therefore, the board acknowledges that in the case at hand there are exceptional circumstances within the meaning of Article 13(2) RPBA.

8.5 It is true that page 31, lines 20 to 22 of the application as filed (corresponding to paragraph [0103] of the patent) discloses using a sensor of the size of 0.5 x 0.5 mm. However, there is no disclosure in the patent that a CMOS sensor size of 0.5 x 0.5 mm is the minimum possible dimension.

8.6 Page 31, lines 24 to 26 of the application as filed (corresponding to paragraph [0104] of the patent) discloses that "*The above examples satisfy the following conditions 1.0mm < Tip's Diameter < 2.8mm*". Even in the example shown in Figure 6 of the application as filed and the patent, the diameter of the distal tip differs from the diameter of the optical assembly 82 (which is part of the visualisation probe) at least by some outer covering. Hence, the diameter of the distal tip is evidently not the same as the diameter of the visualisation probe.

8.7 In view of points 8.5 and 8.6 above, the amended features in claim 1 of auxiliary requests 1 and 2 prima facie give rise to a new objection under Article 123(2) EPC.

8.8 Therefore, the board exercised its discretion under Article 13(2) RPBA, taking into account the criteria of Article 13(1) RPBA, and decided not to admit auxiliary requests 1 and 2 into the appeal proceedings.

9. Appellant's objection under Rule 106 EPC

9.1 The appellant's objection was based on the ground under Article 112a(2)(c) EPC, i.e. that a fundamental violation of its right to be heard under Article 113 EPC had occurred during the appeal proceedings.

9.2 The appellant argued that it had not been able to fully defend its new auxiliary requests 1a, 1 and 2 because they had not been discussed in full. The appellant acknowledged that the admittance of these requests was discussed first. However, even the discussion on admittance of these requests was cut short, with the argument that they would introduce new complex matters to be discussed. However, in the circumstances of the case at hand, in which a completely new line of arguments regarding insufficient disclosure only surfaced in the board's preliminary opinion and at the oral proceedings, the appellant would be deprived of its right to be heard in accordance with Article 113 EPC in a fundamental manner if it was not allowed to defend itself on the basis of auxiliary requests.

9.3 The respondent submitted that the appellant's auxiliary requests had been discussed in the proceedings before the board. The fact that these requests gave rise to new objections lay entirely in the sphere of responsibility of the appellant.

9.4 Article 113(1) EPC states that the decisions of the EPO may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. This provision guarantees that proceedings before the EPO are conducted openly and fairly (see J 20/85, OJ EPO 1987, 102, point 4 of the Reasons; J 3/90, OJ EPO 1991, 550, point 12 of the Reasons). It is established case law of the boards of appeal that the opportunity to present comments and arguments guaranteed by Article 113(1) EPC is a fundamental principle of procedures before the EPO (see e.g. T 1123/04, point 2.2.4 of the Reasons).

9.5 Applying these principles to the case at hand, the board concludes that the parties' right to be heard under Article 113(1) EPC was respected, for the following reasons.

9.6 As is apparent from the minutes of the oral proceedings before the board, the parties had ample opportunity to present their comments on the issues discussed, including the question of admittance of the appellant's auxiliary requests. At the oral proceedings before the board, the appellant also confirmed that the parties had always been asked whether they had further comments or requests before the board deliberated and that the appellant had been given sufficient time when it had asked for a break. Moreover, it is evident from the minutes of the oral proceedings before the board that the appellant did comment on the respondent's objections to the admission of auxiliary requests 1a, 1 and 2 on the grounds that they would prima facie give rise to a new objection either of lack of clarity (Article 84 EPC) or of added subject-matter (Article 123(2) EPC). Therefore, the board cannot accept the appellant's argument that the discussion on the admittance of its auxiliary requests was cut short.

In addition, even if there are exceptional circumstances within the meaning of Article 13(2) RPBA, this does not mean that all new auxiliary requests filed by the appellant in response have to be admitted. The board has discretion under Article 13(2) RPBA and, in exercising that discretion, may also take into account the criteria of Article 13(1) RPBA and base its discretionary decision on the admittance of an auxiliary request on those criteria (see point 7.1 above).

Under Article 13(1) RPBA, a board exercises its discretion as to whether to admit a new request in view of, inter alia, whether the party has demonstrated that any such amendment prima facie overcomes the issues raised by another party in the appeal proceedings or by the board and does not give rise to new objections.

Therefore, the board finds that it was justified to discuss - on a prima facie level - whether the amendments to claim 1 of the appellant's auxiliary requests gave rise to new objections. The board agrees with the respondent that if amended claims give rise to new objections this is the sole responsibility of the party that filed those claims.

Moreover, the board is not convinced by the appellant's argument that its right to be heard under Article 113(1) EPC was violated because it was not able to defend its case as its auxiliary requests were not discussed in full at the oral proceedings. The appellant is in effect stating that it disagrees with the board's discretionary decision not to admit the appellant's auxiliary requests into the appeal proceedings. However, if a party disagrees with a discretionary decision of the board on the admittance of requests or documents, this cannot mean that its right to be heard under Article 113(1) EPC has therefore been violated. If it did, a party could deprive any such decision by the board unfavourable to it of its effect. This would clearly be unacceptable. Therefore, the board finds that the appellant's right to be heard under Article 113(1) EPC was not infringed.

9.7 In view of the above, the board dismissed the appellant's objection under Rule 106 EPC.

10. Conclusion

Since none of the appellant's requests is allowable, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

K. Boelicke B. Willems

Decision electronically authenticated