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**Datasheet for the decision
of 16 May 2025**

Case Number: T 2524/22 - 3.2.02

Application Number: 12170105.6

Publication Number: 2497415

IPC: A61B5/00, G01N31/00, A61B5/145,
G01N27/327, A61B5/1495,
A61B5/1486

Language of the proceedings: EN

Title of invention:
Processing analyte sensor data

Patent Proprietor:
DexCom, Inc.

Opponent:
Roche Diabetes Care GmbH

Headword:

Relevant legal provisions:
EPC Art. 113(2)
EPC R. 103(1)(a)

Keyword:

Basis of decision - revocation of the patent at request of the
patent proprietor

Reimbursement of appeal fee - substantial procedural violation
(no)

Decisions cited:

T 2578/17

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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European Patent Office
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Case Number: T 2524/22 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 16 May 2025

Appellant:

(Opponent)

Roche Diabetes Care GmbH
Sandhofer Strasse 116
68305 Mannheim (DE)

Representative:

Grünecker Patent- und Rechtsanwälte
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Respondent:

(Patent Proprietor)

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Representative:

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 29 September
2022 rejecting the opposition filed against
European patent No. 2497415 pursuant to Article
101(2) EPC**

Composition of the Board:

Chairman

M. Alvazzi Delfrate

Members:

D. Ceccarelli

Y. Podbielski

Summary of Facts and Submissions

I. The opponent appealed against the Opposition Division's decision to reject the opposition against the European patent.

It requested that the decision under appeal be set aside and that the patent be revoked. It requested the reimbursement of the appeal fee because of a number of substantial procedural violations. It also requested oral proceedings as an auxiliary measure.

II. The Board summoned the parties to oral proceedings and sent its preliminary opinion.

III. By letter of 2 April 2025 the appellant announced that it will not be attending the scheduled oral proceedings.

IV. By letter of 29 April 2025 the respondent/proprietor unconditionally withdrew "approval of the text on which the patent was granted" and "all requests including the main and all auxiliary requests pending during the present appeal proceedings".

V. The Board cancelled the scheduled oral proceedings.

Reasons for the Decision

1. Under Article 113(2) EPC, the European Patent Office must examine, and decide upon, the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.

2. Since the respondent withdrew its agreement to the text of the patent in any form, there is no text of the patent on which the Board can base its consideration of the appeal.
3. Under these circumstances a decision ordering revocation of the patent is to be issued (Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, IV.D.2), in accordance with the appellant's request.
4. With its statement setting out the grounds of appeal, the appellant also requested the reimbursement of the appeal fee and, as an auxiliary measure, oral proceedings.
 - 4.1 The appellant's announcement that it would not be attending the oral proceedings originally scheduled by the Board must be understood as a withdrawal of its request for oral proceedings. It is also noted that the appellant did not contest the Board's preliminary view that the Opposition Division committed no substantial procedural violations justifying the reimbursement of the appeal fee.
 - 4.2 In the impugned decision, the Opposition Division provided a feature analysis of claim 1 of the patent as granted as follows:
 - M1 A method for continuously evaluating the quality of a calibration of an analyte sensor after subcutaneous implementation into a user, the method including:
 - M2 receiving a data stream from an analyte sensor, including one or more sensor data points;

- M3 receiving reference data from a reference analyte monitor, including two or more reference data points;
 - M4 providing at least two matched data pairs by matching reference analyte data to substantially time corresponding sensor data;
 - M5 forming a calibration set including the at least two matching data pairs;
 - M6 creating a conversion function based on the calibration set;
 - M7 receiving additional sensor data from the analyte sensor;
 - M8 converting sensor data into calibrated data using conversion function; and
- characterised by
- M9 evaluating the quality of the calibration set by determining a statistical association of the matched data pairs in the calibration set used to create the conversion function
 - M10 using one of linear regression, non-linear regression, rank correlation, least mean square fit, mean absolute deviation, and mean absolute relative difference.

The Opposition Division explained that the subject-matter of claim 1 was novel over WO 00/49941 A1 by virtue of all the features of the characterising portion of the claim (features M9 and M10 of the

feature analysis). According to the appellant, in the oral proceedings the Opposition Division had announced that the only distinguishing feature was M9 instead.

However, feature M10 further specifies feature M9. It defines ways in which a statistical association of matched data pairs is determined. It follows that if M9 is novel over WO 00/49941 A1, so must be M10. Hence, there was no need for the Opposition Division to explicitly announce this. Moreover, in general, it cannot be asked that Opposition Divisions must explain all the reasons for a conclusion on novelty during the oral proceedings. These should be exhaustively given in the decision itself.

For these reasons the Opposition Division committed no substantial procedural violation in this respect.

- 4.3 A further alleged substantial procedural violation was that the Opposition Division had not considered the appellant's arguments concerning an intermediate generalisation in the feature of the method according to claim 1 being for continuously evaluating the quality of a calibration of an analyte sensor after subcutaneous implementation into a user (feature M1 of the feature analysis).

However, in the impugned decision the Opposition Division explained that paragraphs [0382] et seq. related "to precisely the same problem as the 23rd embodiment" (point 13.2.1). Hence, these paragraphs were not "in a different context" or "outside the 23rd embodiment". As derivable from point 13.2 of the decision, last paragraph, this meant that the objection of an intermediate generalisation was not successful. It follows that the Opposition Division considered the

appellant's arguments and provided reasons why they were not convincing. Whether these reasons are correct is a different matter, and irrelevant for establishing whether a procedural violation occurred.

- 4.4 A further alleged procedural violation was that the Opposition Division had not provided sufficient reasoning in the analysis of inventive step of claim 1. The Opposition Division had not explained why feature M9 was technical in view of the appellant's arguments to the contrary.

However, the Opposition Division explained that "the skilled person would understand the claim as implicitly requiring the use of a computer". This was enough to confer technical character to the claim. In the last paragraphs of point 14.3 of the decision it is explained that feature M9 corresponded to the evaluation of the quality of the calibration of an analyte sensor, which was a common problem in the art. For this reason the feature had technical merit. The appellant argued that the Opposition Division had reached its conclusions disregarding the appellant's arguments with reference to a technical effect mentioned in T 2578/17. However, the Opposition Division expressly stated that the effect mentioned in this decision formed part of a summary of the subject-matter of the application but was not to be considered as a technical effect in the problem-solution approach (point 14.3.1 of the impugned decision). This shows that the appellant's arguments were taken into account. Whether the Opposition Division's conclusions are correct in their merit is irrelevant for establishing whether a procedural violation occurred.

- 4.5 Finally, the appellant stated that it had never argued that the term "implantable" was "more narrow than the term 'implementation'" in claim 1, but rather the opposite had been argued. However, even accepting the appellant's statement, this would have had no consequence on the Opposition Division's assessment of added subject-matter and the explanation why, in its view, the term "subcutaneous implementation" was based on paragraph [0299] of the parent and the original application as filed (point 13.3.2 of the decision).
- 4.6 In conclusion, the Opposition Division committed no substantial procedural violations justifying the reimbursement of the appeal fee under Rule 103(1)(a) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The appellant's request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



G. Magouliotis

M. Alvazzi Delfrate

Decision electronically authenticated