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**D E C I S I O N**  
**of 7 February 2006**

**Case Number:** T 0330/03 - 3.2.02

**Application Number:** 98959566.5

**Publication Number:** 1037554

**IPC:** A61B 5/00

**Language of the proceedings:** EN

**Title of invention:**  
Multiplex sensor and method of use

**Applicant:**  
ABBOTT LABORATORIES

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**  
EPC Art. 52(4)

**Keyword:**  
"Diagnostic method (no) "

**Decisions cited:**  
G 0001/04

**Catchword:**  
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Case Number: T 0330/03 - 3.2.02

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.02  
of 7 February 2006

**Appellant:** ABBOTT LABORATORIES  
Chad 0377/AP6D-2  
100 Abbott Park Road  
Abbott Park, IL 60064-6500 (US)

**Representative:** Modiano, Micaela Nadia  
Modiano, Josif, Pisanty & Staub Ltd.  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 23 October 2002  
refusing European application No. 98959566.5  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** T. Kriner  
**Members:** S. Chowdhury  
A. Pignatelli

## Summary of Facts and Submissions

- I. This appeal is against the decision of the examining division dated 23 October 2002 to refuse European patent application No. 98 959 566.5.

The ground of refusal was that claims 1 to 17 then on file related to a diagnostic method performed on the human body, which fell under the exclusion of Article 52(4) EPC.

- II. On 20 December 2002 the appellant (applicant) lodged an appeal against the decision and paid the prescribed fee on the same day. On 3 March 2003 a statement of grounds of appeal was filed.

The appellant requests that the decision under appeal be set aside and that the application be remitted to the examining division for further prosecution on the basis of claim 1 underlying the contested decision.

- III. Independent claim 1 reads as follows:

"A method for measuring at least one parameter of a sample comprising the steps of:

- (a) illuminating said sample with light;
- (b) performing at least two spectroscopic measurements, wherein said at least two spectroscopic measurements are different members of the group:  
infrared absorbance,  
scattering,  
diattenuation,  
emission spectroscopy,  
photoacoustic spectroscopy,

provided that said photoacoustic spectroscopy relates acoustic signal intensity directly to the measurement of said at least one parameter of said sample by comparison to a calibration curve; and  
(c) analyzing said spectroscopic measurements to determine a measurement of said at least one parameter of said sample."

### **Reasons for the Decision**

1. The appeal is admissible.
2. The application was refused only on the basis of Article 52(4) EPC, and this will be the only point considered in this decision.
3. *The application*

The application relates to a method for measuring at least one parameter of a biological sample, for example the concentration of an analyte in a biological sample. More specifically, the application concentrates on the determination of concentrations of glucose in blood. Both *in-vivo* and *in-vitro* methods are envisaged (see WO-A-99/27848, page 15, lines 20 to 23).

The method involves illuminating a sample with light and investigating some property of the light after it irradiates and is influenced by the sample.

4. The Enlarged Board of Appeal states in the opinion G 1/04, *inter alia*, the following:

1. In order that the subject-matter of a claim relating to a diagnostic method practised on the human or animal body falls under the prohibition of Article 52(4) EPC, the claim is to include the features relating to:

(i) the diagnosis for curative purposes *stricto sensu* representing the deductive medical or veterinary decision phase as a purely intellectual exercise, and

(ii) the preceding steps which are constitutive for making that diagnosis.

4.1 The presently claimed method may be performed on a human body, but the information which it yields provides only intermediate results by measuring at least one parameter of a sample. However, it includes neither the comparison of this parameter with a standard value, nor the finding of any significant deviation (a symptom) during the comparison (see (ii) above). Therefore, the claimed method does not enable a decision to be made on the treatment necessary. The claimed method does not include any features relating to the diagnosis for curative purposes *stricto sensu* representing the deductive medical or veterinary decision phase as a purely intellectual exercise (see (i) above).

4.2 For these reasons the claimed method is not to be considered a diagnostic method practised on the human or animal body which is excluded from patentability by Article 52(4) EPC.

**Order**

**For these reasons it is decided that:**

The case is remitted to the department of the first instance to resume the examination on the basis of claim 1 filed with the letter dated 1 July 2002.

The Registrar:

The Chairman:

V. Commare

T. K. H. Kriner