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**Datasheet for the decision  
of 31 March 2014**

**Case Number:** T 0834/13 - 3.2.02

**Application Number:** 04788749.2

**Publication Number:** 1662971

**IPC:** A61M5/32, A61B17/34, A61M39/02

**Language of the proceedings:** EN

**Title of invention:**  
IMPLANTABLE DEVICE FASTENING SYSTEM

**Patent Proprietor:**  
APOLLO ENDOSURGERY, INC.

**Opponent:**  
withdrawn

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(c), 111(1)

**Keyword:**  
Grounds for opposition - added subject-matter (no)  
Appeal decision - remittal to the department of first instance  
(yes)

**Decisions cited:**  
T 1321/04, T 1906/11, T 0462/94

**Catchword:**



**Beschwerdekammern  
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Case Number: T 0834/13 - 3.2.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 31 March 2014**

**Appellant:** APOLLO ENDOSURGERY, INC.  
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**Representative:** HOFFMANN EITLE  
Patent- und Rechtsanwälte  
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**Respondent:** withdrawn  
(Opponent)

**Representative:**

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted on 25 January 2013  
revoking European patent No. 1662971 pursuant to  
Article 101(3) (b) EPC.

**Composition of the Board:**

**Chairman:** E. Dufrasne  
**Members:** D. Ceccarelli  
P. L. P. Weber

## **Summary of Facts and Submissions**

- I. The patent proprietor has appealed the Opposition Division's decision, dispatched on 25 January 2013, to revoke European patent No. 1 662 971.
- II. The opposition had been filed on the grounds of added subject-matter, insufficiency of disclosure, lack of novelty and lack of inventive step.

In the impugned decision, which was taken during oral proceedings on 30 November 2012, the Opposition Division held that claim 1 of the main request and of auxiliary requests 1 to 7 contained subject-matter extending beyond the content of the application as filed. It also decided that auxiliary requests 8 to 15, filed during the oral proceedings, were not admitted into the proceedings. Although it briefly mentioned the grounds of insufficiency of disclosure, lack of novelty and lack of inventive step in an obiter dictum, they were not analysed in detail and were not formally part of the reasons for the impugned decision.

- III. The notice of appeal was received on 4 April 2013 and the appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 31 May 2013.
- IV. The opponent withdrew the opposition on 11 December 2012.
- V. The appellant requested reversal of the impugned decision and maintenance of the patent as granted. In the event that the Board was unable to satisfy this request or considered any adverse decision, the appellant requested oral proceedings. As a further

auxiliary measure, the appellant requested that the patent be maintained on the basis of one of the first to fifteenth auxiliary requests, all filed with letter dated 31 May 2013.

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

"An implantable injection port (10) including attaching means for attaching the injection port to bodily tissue, the injection port comprising:

a housing (12), wherein the housing surrounds the perimeter of the injection port;

fastening means (14, 114, 501) pivotally attached to the housing, wherein the fastening means may be rotated from a first position to a second position to secure the device in bodily tissue; and

a rotating disc (520) for rotating the fastening means from the first position to the second position,

**characterised in that**

the fastening means comprise a plurality of fasteners (14, 114) that simultaneously pivot from the first position to the second position."

VII. The appellant's arguments that are relevant for the present decision are summarised as follows:

The main basis for the subject-matter of claim 1 of the patent as granted was original claim 38 depending on original claim 17. Moreover, the description provided a general basis, especially the embodiments illustrated

in figures 58 to 62.

More particularly, claims 17 and 38 together with page 1, first paragraph, page 2, first paragraph, page 8, second full paragraph, to page 9, second paragraph, and page 18, last paragraph, of the application as filed provided a basis for "an implantable injection port including attaching means for attaching the injection port to bodily tissue" as defined in claim 1 of the patent as granted.

A basis for the "housing (12), wherein the housing surrounds the perimeter of the injection port" was found in claims 17 and 38 together with page 2, first paragraph, page 5, last but one paragraph, and page 9, third paragraph, of the application as filed. The embodiment of figure 58 would also support such a definition of the housing.

Original claims 17 and 38 respectively provided a basis for the definition of the "fastening means" and the "rotating disc", such definitions also covering the embodiment of original figure 58.

The feature of the characterising portion of claim 1 of the patent as granted was directly and unambiguously based on the embodiment of figure 58, in particular its description on page 17, last paragraph, of the application as filed.

The removal of the feature of the "notches or openings", which was present in the combination of original claims 17 and 38, was acceptable in view of the Guidelines for Examination in the EPO, Section H-V, 3.1, since the skilled person would directly and unambiguously recognise that this feature

was not explained as being essential in the disclosure, was not, as such, indispensable for the function of the invention in the light of the technical problem the invention served to solve, and its removal required no real modification of other features to compensate for the change.

Hence, the subject-matter of claim 1 of the patent as granted was based on the application as filed.

### **Reasons for the Decision**

1. The appeal is admissible.
  
2. The patent in suit relates to an implantable injection port of the kind that may be connected to a gastric band used in the treatment of obesity. Such a gastric band comprises an expandable tubular element to be implanted around a patient's stomach. By introducing a fluid within the tubular element the gastric band is expanded and tightened around the stomach in order to reduce the size of the latter. The amount of food that the patient can eat is thereby reduced. To adjust the degree of tightness and, hence, the size of the stomach, fluid is introduced or removed from the interior of the gastric band via the injection port.

Claim 1 of the patent as granted defines such an injection port and focuses on fastening means for securing the injection port in bodily tissue. In particular, the claimed implantable injection port is characterised by the fastening means, which comprise a plurality of fasteners that simultaneously pivot from a first position to a second position. The application as filed explains various advantages deriving from the

fastening means that it describes (page 8, second full paragraph, to page 9, first paragraph). A particular advantage is the fact that the fixation of the port to bodily tissue requires less time than suturing into place (page 8, second full paragraph, first and second sentence).

3. *Claim 1 of the patent as granted: extension of subject-matter (Article 100(c) EPC)*

3.1 Claim 17 of the application as filed defines an attaching means comprising a housing and fastening means. Claim 38 as filed, which directly depends on claim 17, further specifies that the attaching means comprises a rotating disc.

Claim 1 of the patent as granted is not directed to an attaching means as such, but to an implantable injection port including attaching means.

However, in the application as filed, a combination of the attaching means as defined in claims 17 and 38 with another device is directly and unambiguously derivable from claim 17, which specifies that the attaching means is "for attaching an associated device to bodily tissue". Moreover, page 2, first paragraph, which discloses the invention in general terms, makes clear that an implantable device either "contains a plurality of fasteners" or "may have a housing fitted over the device, wherein the housing contains a plurality of fasteners".

It follows that the application as filed provides a basis for an implantable device including the attaching means, the housing, the fastening means and the rotating disc as defined in claims 17 and 38.



3.2 Claim 1 of the patent as granted specifies a particular implantable device in the form of an implantable injection port.

In the application as filed, page 9, second paragraph, discloses that the invention "may be used with any type of implantable device" and provides examples of such devices, including "ports". It is further stressed that, "for ease of explanation", the invention is "described as depicted in Figures 1-40, wherein the invention is shown used in conjunction with an access port".

The description of the embodiments of figures 41 to 57 on pages 16 and 17 refers to the device to be implanted, calling it simply a "port".

The description of the embodiments of figures 58 to 62 refers only to a "device to be implanted" (paragraph bridging pages 17 and 18).

On page 18, last paragraph, it is generally stated that the invention "has been particularly shown [...] with reference to an access or injection port".

Irrespective of whether the skilled person would always consider the terms "access port", "port" and "injection port" to be synonymous, the Board notes that it is the established case law that a patent document, being a legal document, may be its own dictionary. In other words, for understanding the meaning of terms used in a patent document, the skilled person is not limited to their literal meaning but considers the content of the patent document as a whole (T 1321/04, points 2.2 and 2.3 of the Reasons). From the passages mentioned in the

previous four paragraphs, it is clear that the terms "access port", "port" and "injection port" are used interchangeably. Hence, the skilled person, at least based thereon, directly and unambiguously derives that all embodiments of the invention may concern an implantable injection port within the meaning of the application as filed.

It follows that there is a basis for claiming an implantable injection port as a specific implantable device.

3.3 The features of the housing and the fastening means as recited in the preamble of claim 1 of the patent as granted find a literal basis in claim 17 of the application as filed. The features of the rotating disc as recited in the preamble of claim 1 of the patent as granted find a literal basis in claim 38 of the application as filed.

3.4 In the application as filed, the embodiment of figures 58 to 62, which is described in the paragraph bridging pages 17 and 18, is the only embodiment comprising a rotating disc according to claim 38.

The attaching means according to the combination of claims 17 and 38 comprise fastening means pivotally attached to the housing.

It follows that the skilled person directly and unambiguously understands that the baseplate (510, figure 58) of this embodiment, which lodges the fastening means (curved hooks 501, figure 58), is originally meant to be part of the housing. Generally, the Board sees no technical contradiction with this construction, since the baseplate contributes to

housing at least a side of the implantable injection port. As a consequence, the embodiment of figures 58 to 62 is within the scope of claim 1 of the patent as granted.

Based on these considerations, the feature of the characterising portion of claim 1 of the patent as granted, i.e. the fastening means comprising "a plurality of fasteners (14, 114) that simultaneously pivot from the first position to the second position", finds a basis in the embodiment of figures 58 to 62, which is described in the paragraph bridging pages 17 and 18 of the application as filed. In particular, it is stated on page 17, last paragraph, third sentence, that as the disc rotates the "curved hooks" (i.e. the fasteners as claimed) "rotate about their fixed axis". Also in the light of figures 58 to 62, this implies that the hooks simultaneously rotate. In other words, according to the terms used in claim 17 as filed, which recites that the fastening means are "pivotally attached to said housing," there is a basis for a plurality of fasteners that simultaneously pivot from the first position to the second position.

- 3.5 Compared to the combination of claims 17 and 38 as filed, claim 1 of the patent as granted does not specify that the housing includes a plurality of notches or openings comprising the fastening means. Furthermore, the embodiment of figures 58 to 62 and its related description in the application as filed comprise more features than the concept of simultaneous pivoting of the fasteners as claimed in claim 1 of the patent as granted.

The removal of a feature from a claim as filed as well as the extraction of only one feature from an

originally disclosed combination of features may result in added subject-matter. However, this has to be assessed on a case-by-case basis. The Board shares the view expressed in decision T 1906/11, according to which it is essential to establish the technically relevant information conveyed to the skilled person by the application as filed in its entirety. In particular, it has to be established whether the non-included features are inextricably linked to the claimed features for the solution of a common technical problem.

As already explained in point 2 above, on page 8, second full paragraph, the application as filed generally refers to the fastening systems of the invention in connection with the technical problem of allowing an implantable device to be fastened "into bodily tissue in less time than would be required to suture the device into place". In the light of this problem, the technical significance of the simultaneous placement of the plurality of fasteners is clearly independent of the presence of notches or openings in the housing of the implantable device or the particular shape of the fasteners and their deployment elements. In fact, in the application as filed said notches or openings are disclosed in connection with another problem, i.e. adequately housing the fasteners while allowing their movement (page 9, last paragraph, second to fourth sentence). The particular shape of the fasteners in the form of curved hooks (501, figure 58) concerns the problem of insuring a durable fixation of the implanted device, whereas the particular baseplate (510, figure 58) and the lever arms (525, figure 58) are merely parts of one typical mechanical transmission in order to perform the deployment of the curved hooks.

It follows that the application as filed, from a technical point of view, provides a clearly independent disclosure of the pivoting fasteners as claimed in claim 1 of the patent as granted, without the need for notches or openings or for further specific elements of the embodiment of figures 58 to 62.

- 3.6 The Board therefore concludes that claim 1 of the patent as granted does not include subject-matter extending beyond the content of the application as filed.
  
4. In the reasons for the impugned decision, the Opposition Division only considered the issue of extension of subject-matter with respect to claim 1 of each admitted request. Hence, following the conclusion that the subject-matter of claim 1 of the patent as granted does not extend beyond the content of the application as filed, the Board finds it appropriate to remit the case to the department of first instance for further prosecution, in accordance with Article 111(1) EPC.
  
5. Since the appellant's request that the decision under appeal be reversed can be allowed, and since the remittal is not a final decision on the substantive issues but rather implies the continuation of the procedure before the Opposition Division, in accordance with the conclusions reached in decision T 462/94, the Board sees no reason to consider the appellant's request for oral proceedings for the time being. The appellant will again have an opportunity to have oral proceedings before the Opposition Division, should it still be deemed necessary.

## 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 Chairman:



G. Rauh

E. Dufrasne

Decision electronically authenticated