

Internal distribution code:

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

**Datasheet for the decision
of 20 January 2020**

Case Number: T 1187/15 - 3.2.02
Application Number: 05786636.0
Publication Number: 1824380
IPC: A61B5/02, A61B5/024, A61B5/087,
A61B5/0205, A61B5/0404
Language of the proceedings: EN

Title of invention:

METHOD AND APPARATUS FOR RECORDING AND PRESENTATION OF
PHYSIOLOGICAL DATA

Applicant:

Medicus Engineering ApS

Headword:

Relevant legal provisions:

EPC Art. 123(2)
EPC R. 103(1)(a)
RPBA Art. 13
RPBA 2020 Art. 13(1), 25(3)

Keyword:

Main request and auxiliary requests I to X - added subject-matter (yes)

Late filed auxiliary request XI - admitted (no)

Reimbursement of appeal fee - (no)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1187/15 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 20 January 2020

Appellant: Medicus Engineering ApS
(Applicant) c/o JC
Skovbrynet 32
8000 Aarhus C (DK)

Representative: Zwicker, Jörk
ZSP Patentanwälte PartG mbB
Hansastraße 32
80686 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 15 January 2015
refusing European patent application No.
05786636.0 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: S. Böttcher
Y. Podbielski

Summary of Facts and Submissions

- I. The applicant (appellant) filed an appeal against the decision of the Examining Division to refuse European patent application No. 05786636.0. The decision was dispatched on 15 January 2015.

The examining division considered that, in respect of the requests then on file, claim 1 of the main request and claim 1 of each of auxiliary requests 1 to 5 did not meet the requirements of Article 123(2) EPC. Furthermore, the examining division considered that the subject-matter of claim 1 of auxiliary request 6 lacked novelty and that the subject-matter of claim 1 of auxiliary request 7 did not involve an inventive step.

- II. At the end of the oral proceedings before the Board, held on 20 January 2020, the requests were as follows:

The appellant requested that the decision be set aside and a patent be granted on the basis of the main request or one of auxiliary requests I to VI, all filed with letter dated 26 May 2015, or on the basis of one of auxiliary requests VII to X filed with letter dated 20 December 2019, or on the basis of auxiliary request XI filed during the oral proceedings. The appellant requested, furthermore, reimbursement of the appeal fee because of a substantial procedural violation in the proceedings before the Examining Division.

- III. Claim 1 of the main request and of auxiliary request I (which differs from the main request by the deletion of a dependent claim) reads as follows:

"A single measurement device with one or more integrated pressure transducers, the measurement device being

capable of measuring and recording physiological examinations sequences including one or more of: resting heart rate; beat-to-beat heart rate variation; heart rate response to standing; heart rate response to Valsalva maneuver; systolic blood pressure response to standing; diastolic blood pressure response to isometric exercise, the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences, wherein the measurement device is handheld."

IV. Claim 1 of auxiliary request II reads as follows:

"A single measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object with one or more integrated pressure transducers, the measurement device being capable of measuring and recording physiological examinations sequences including one or more of: resting heart rate; beat-to-beat heart rate variation; heart rate response to standing; heart rate response to Valsalva maneuver; systolic blood pressure response to standing; diastolic blood pressure response to isometric exercise, as well as being provided with means for recording and processing the blood pressure signal and calculating Heart Rate Variability (HRV), the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences."

V. Claim 1 of auxiliary request III reads as follows:

"A single handheld measurement device which can emit an

electrical signal proportional to the blood pressure of a measuring object and which contains a ECG unit and one or more integrated pressure transducers, the measurement device being capable of measuring and recording physiological examinations sequences including one or more: resting heart rate; beat-to-beat heart rate variation; heart rate response to standing; heart rate response to Valsalva maneuver; as well as being provided with means for recording and processing the blood pressure signal and calculating Heart Rate Variability (HRV), the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences; wherein the device is configured to assess the physiological state in a person's daily environment."

VI. Claim 1 of auxiliary request IV reads as follows:

"A single measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object and which contains a ECG unit and one or more integrated pressure transducers, the measurement device being capable of measuring and recording physiological examinations sequences including one or more: resting heart rate; beat-to-beat heart rate variation; heart rate response to standing; heart rate response to Valsalva maneuver; as well as being provided with means for recording and processing the blood pressure signal and calculating Heart Rate Variability (HRV), the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences; wherein the device is configured

to assess the physiological state in a person's daily environment."

VII. Claim 1 of auxiliary request V reads as follows:

"A single handheld measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object and which contains a ECG unit, one or more integrated pressure transducers, and means for guiding a user and data presentation, the measurement device being capable of measuring and recording physiological examinations sequences including one or more: resting heart rate; beat-to-beat heart rate variation; heart rate response to standing; heart rate response to Valsalva maneuver; as well as being provided with means for recording and processing the blood pressure signal and calculating Heart Rate Variability (HRV), the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences; wherein the device is configured to assess the physiological state in a person's daily environment."

VIII. Claim 1 of auxiliary request VI reads as follows:

"A single measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object and which contains a ECG unit, one or more integrated pressure transducers, and means for guiding a user and data presentation, the measurement device being capable of measuring and recording physiological examinations sequences including one or more: resting heart rate; beat-to-beat heart rate variation; heart rate response to standing; heart rate response to Valsalva

maneuver; as well as being provided with means for recording and processing the blood pressure signal and calculating Heart Rate Variability (HRV), the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences; wherein the device is configured to assess the physiological state in a person's daily environment."

IX. Claim 1 of auxiliary request VII reads as follows:

"A single measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object and which contains

- a ECG unit,
- integrated pressure transducers,
- and means for guiding a user and data presentation,
- the measurement device being capable of measuring and recording physiological examinations sequences including one or more of:
 - o resting heart rate;
 - o beat-to-beat heart rate variation;
 - o heart rate response to standing;
 - o heart rate response to Valsalva maneuver;
 - o systolic blood pressure response to standing;
 - o diastolic blood pressure response to isometric exercise,
- as well as being provided with means for recording and processing the blood pressure signal and calculating Heart Rate Variability (HRV),
- the measuring device further being capable of measuring and recording exhalation air pressure and

conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences, wherein

- the device is configured to assess the physiological state in a person's daily environment," [sic]

X. Claim 1 of auxiliary request VIII reads as follows:

"A single measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object and which contains

- a ECG unit,
- integrated pressure transducers,
- and means for guiding a user and data presentation,
- the measurement device being capable of measuring and recording physiological examinations sequences including one or more of:
 - o resting heart rate;
 - o beat-to-beat heart rate variation;
 - o heart rate response to standing;
 - o heart rate response to Valsalva maneuver and the corresponding time;
 - o systolic blood pressure response to standing;
 - o diastolic blood pressure response to isometric exercise,
- as well as being provided with means for recording and processing the blood pressure signal and calculating Heart Rate Variability (HRV),
- the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences, wherein

- the device is configured to assess the physiological state in a person's daily environment," [sic]

XI. Claim 1 of auxiliary request IX reads as follows:

"A single measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object and which contains

- a ECG unit,
- integrated pressure transducers,
- and means for guiding a user and data presentation,
- the measurement device being capable of measuring and recording physiological examinations sequences including one or more of:
 - o resting heart rate;
 - o beat-to-beat heart rate variation;
 - o heart rate response to standing;
 - o heart rate response to Valsalva maneuver and the corresponding time;
 - o systolic blood pressure response to standing;
 - o diastolic blood pressure response to isometric exercise,
- as well as being provided with means for recording and processing the blood pressure signal and calculating Heart Rate Variability (HRV),
- the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences, wherein
- the device is configured to assess the physiological state in a person's daily environment,
- wherein the measurement device is configured to guide the user to place his hands on the device."

XII. Claim 1 of auxiliary request X reads as follows:

"A single measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object and which contains

- a ECG unit,
- integrated pressure transducers,
- and means for guiding a user and data presentation,
- the measurement device being capable of measuring and recording physiological examinations sequences including one or more of:
 - o resting heart rate;
 - o beat-to-beat heart rate variation; to measure an expiration: inspiration R-R ratio
 - o heart rate response to standing; to measure R-R interval at beat 15 and 30 after the patients stands
 - o heart rate response to Valsalva maneuver and the corresponding time; to measure the ratio of longest to shortest R-R interval
 - o systolic blood pressure response to standing;
 - o diastolic blood pressure response to isometric exercise,
- as well as being provided with a digital signal processor for calculation of Heart Rate Variability (HRV),
- the measuring device further being capable of measuring and recording exhalation air pressure and conveying information on said measurement to a user thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences, wherein
- the device is configured to assess the physiological state in a person's daily environment,"[sic]

XIII. Claim 1 of auxiliary request XI reads as follows:

"A single measurement device which can emit an electrical signal proportional to the blood pressure of a measuring object and which contains

- integrated pressure transducers,
- and means for guiding a user and data presentation,
- the measurement device being capable of measuring and recording physiological examinations sequences including one or more of:
 - o resting heart rate;
 - o beat-to-beat heart rate variation;
 - o heart rate response to standing;
 - o heart rate response to Valsalva maneuver and the corresponding time, including measuring and recording exhalation air pressure and conveying information on said measurement to a user, thereby guiding the user to the correct exhalation air pressure in the physiological examinations sequences;
 - o systolic blood pressure response to standing;
 - o diastolic blood pressure response to isometric exercise,
- as well as being provided with means for recording and processing the blood pressure signal as well as algorithms for processing the data
- and calculating Heart Rate Variability (HRV), wherein
- the device is configured to assess the physiological state in a person's daily environment," [sic]

XIV. On the issue of Article 123(2) EPC the appellant submitted that none of the main request and auxiliary requests I to X comprised added subject-matter. The amendments of claim 1 of each of these requests in respect of the original independent device claim 2 were based on the originally filed application. In particular

the appellant argued as follows:

Blood pressure measurement

The omission of the feature "blood pressure measurement" did not contravene Article 123(2) EPC since the application disclosed embodiments wherein no blood pressure measurement was required (page 1, lines 6 to 7 and 10 to 12). Out of the six examinations listed on page 8, lines 9 to 20, only two related to blood pressure measurement. The skilled person would have known that tests in which the measuring device could be used were based on ECG measurements, pressure measurement, blood pressure and handgrip squeeze pressure. Figures 6, 7 and 8 disclosed measurements which did not include blood pressure measurement.

The feature "blood pressure measurement" was not an essential feature since it was not required by the person skilled in the art to practise the invention.

It was well known in the art that the heart rate might be determined independently of the blood pressure.

The device being handheld

With regard to the feature that "the measurement device is handheld" it was disclosed on page 3, lines 8 to 12 of the application as filed that the device was configured such as to assess the physiological state in a person's daily environment.

Moreover, it was clear from the size of the ECG electrodes shown in Figure 4, which depicted an exemplary device of the present invention, that the device was sized to be held by handgrip. Picture 2 of Figure 6

disclosed the instruction "Sit down and place hands" on a display of the device. In picture 3 of Figures 7 and 8 the device was depicted in relation to the two hands of the patient. Hence the device had a size allowing for it to be handheld.

One or more pressure transducers

The feature "with one or more integrated pressure transducers" was based on claim 3 or on page 4, lines 21 to 27. On page 6, lines 5 to 8, a transducer for measuring blood pressure was disclosed. Hence, the alternative with a device having only one pressure transducer could be derived from the original application documents.

Exhalation air pressure and hand grip squeeze pressure

The exhalation air pressure and the hand grip squeeze pressure referred to in claim 3 and on page 4, lines 21 to 27 as originally filed were to be considered as examples of pressure transducers the device could be provided with. Hence, the omission of these features did not add subject-matter. Moreover, the same pressure transducer could carry out different measurements (e.g. blood pressure, exhalation air pressure and the hand grip squeeze pressure), so that it could even be considered that no feature had been omitted in this respect.

Algorithms for user control and data processing for carrying out test and/or examinations sequences

Algorithms for user control and data processing for carrying out test and/or examinations sequences, as recited in originally filed claim 3, were implicitly included in present claim 1 since measuring and recording

of physiological examinations sequences implied the use of algorithms.

"Heart rate response to Valsalva maneuver" examination

It could be derived from page 9, lines 5 to 9, that the time measurement was not compulsory for the "Heart rate response to Valsalva maneuver" examination. Hence, it was not necessary, in order to comply with the requirements of Article 123(2) EPC, to mention said time measurement in the claim.

- XV. The appellant also argued that auxiliary request XI, filed at the oral proceedings in response to the Board's conclusion that none of the higher-ranking requests complied with the requirements of Article 123(2) EPC, was prima facie allowable and should be admitted into the proceedings. In case that the auxiliary request XI could not be admitted and allowed, an interruption of the oral proceedings to prepare a further auxiliary request should be granted.

Reasons for the Decision

1. The appeal is admissible.
2. The subject-matter of the application

The application relates to recording and presentation of physiological data on the basis of blood pressure measurement. The blood pressure data is used to derive the heart rate therefrom and to calculate further data such as heart rate variability and baroreflex sensitivity (claim 2 as originally filed). Hence, a single

measurement device is provided for the measurement of physiological data. A parallel application of an ECG for measuring heart pulse is not necessary.

According to preferred embodiments, the device further comprises additional pressure sensors, algorithms for carrying out various examination sequences, means for guiding a user to run a specific examination correctly, and wireless communication means.

3. Main request - added subject-matter

Claim 1 of the main request (corresponding to the main request underlying the appealed decision) has been amended in respect of the original independent device claim (claim 2 of the original application) in a way that extends beyond the content of the application as originally filed. At least the following amendments introduce added subject-matter.

3.1 Blood pressure measurement

The examining division held in its decision that the omission of the feature "blood pressure measurement" from claim 1 of the main request infringed Article 123(2) EPC. The Board agrees with that position.

The invention as defined in claim 2 as originally filed relates to an apparatus that "emits an electric signal, which is proportional to the blood pressure of the measuring object" and that is "provided with means ... for recording and processing the blood pressure signal as well as algorithms for derivation of data". The same is stated on page 4, lines 8 to 15, of the description. It is noted that this paragraph describes an apparatus of the invention.

These features are not mentioned in claim 1 of the main request. They are not implicit in the claim either. Even if pressure transducers are mentioned in the claim, said transducers could be used for measuring something else than the blood pressure (e.g. the hand grip squeeze pressure). No direct and unambiguous disclosure can be found in the originally filed application for a device without said omitted features.

On the contrary, it is mentioned on page 4, lines 4 to 6, and on page 7, lines 7 to 10 (referring to Figure 2), that the measurement device is capable to measure both the blood pressure and the heart pulse.

It is further stated on page 8, lines 5 to 20, that the examinations listed in present claim 1 can be carried out by the measurement device shown in Figure 2, i.e. with a measurement device that receives data from a blood pressure monitoring device (page 7, lines 23 to 25).

The Board shares the appellant's view that some of the physiological examination sequences mentioned in claim 1 require measurement of blood pressure, while the others require the determination of the heart rate, which might be determined independently of the blood pressure. However, the application as originally filed consistently discloses that the heart rate can be derived from the blood pressure measurement (page 6, lines 27 to 31, and page 7, lines 23 to 25). Hence, even the sequences that require the determination of the heart rate can be obtained by relying on the measurement of the blood pressure to derive the heart rate therefrom. This is corroborated by the fact that it is stated several times in the description that a separate ECG measurement to determine the heart rate is not necessary (page 7, lines

1 to 5, and page 8, lines 18 to 20).

Hence, contrary to the appellant's view, the Board considers that the originally filed application solely discloses embodiments that require the measurement of the blood pressure, which is an essential feature required to practise the invention.

Thus, by omitting the features concerning the blood pressure measurement, the processing of the blood pressure signal and the algorithms for derivation of data, claim 1 of the main request does not meet the requirements of Article 123(2) EPC.

3.2 The device being handheld

The Examining Division considered the feature "wherein the measurement device is handheld" in claim 1 of the main request not to be directly and unambiguously derivable from the application as originally filed. The Board concurs with this view.

The appellant referred to Figure 4, allegedly depicting an exemplary embodiment of the invention. According to the appellant, it was clear that the device of Figure 4 is sized to be held by handgrip.

The Board does not share this position. The photo in Figure 4 shows a device having a processing unit, a user interface, a display, some control buttons and two ECG electrodes. None of these features is present in claim 1. In the description, Figure 4 is only referred to on page 5, lines 19 and 20, reading that "Fig. 4 shows attachment of input signal mediums to a central calculation-, interface- and display unit." Furthermore, it cannot be derived from Figure 4 whether the device is capable of

measuring and recording the examinations sequences mentioned in present claim 1. Hence, neither from the figure itself nor from the description can it be derived that Figure 4 shows an embodiment according to the invention as presently claimed. Consequently, it is irrelevant which size the device shown in Figure 4 has, since this figure does not directly and unambiguously show a device as defined in claim 1 of the main request.

The appellant further referred to Figure 6 (picture 2) and Figures 7 and 8 (picture 3), showing a measuring device (allegedly according to the invention) in the hands of a user. Again, it cannot be derived from the application as originally filed that the device shown in these pictures is a device according to present claim 1.

Also the fact that the measurements are performed "in the person's daily environments" (page 3, lines 8 to 12) does not necessarily imply that the device is handheld.

Hence, the feature "wherein the measurement device is handheld" in claim 1 introduces added subject-matter.

3.3 One or more pressure transducers

The feature "with one or more integrated pressure transducers" is allegedly based on claim 3 or on page 4, lines 21 to 27. However, in both passages it is stated that the device is provided with "pressure transducers" (plural). Hence, there is no basis for a device having only one integrated pressure transducer, as in one of the alternatives of present claim 1.

The appellant referred to the passage on page 6, lines 5 to 8, disclosing a transducer for measuring blood pressure. It is noted that this paragraph relates to

Figure 1 showing the correlation between the blood pressure signal and the ECG signal. However, it cannot be derived that the blood pressure signal is measured with the device according to claim 1. Therefore, this passage cannot be considered as a disclosure of a single measurement device having only one pressure transducer.

3.4 Exhalation air pressure and hand grip squeeze pressure

Claim 3 and page 4, lines 21 to 27, of the originally filed application, which provide a basis for pressure transducers, disclose also that the transducers include ones for recording of the exhalation air pressure and the hand grip squeeze pressure. These measurements cannot be performed by the same pressure transducer that measures the blood pressure, since each measurement requires a differently configured transducer.

Contrary to the appellant's view these are not to be considered as mere examples of pressure transducers the device could be provided with. The wording in claim 3 is "pressure transducers, including ones for recording of exhalation air pressure and hand grip squeeze pressure". The same is stated on page 4, lines 21 to 27. Hence, the disclosed device includes at least these two types of pressure transducers. Furthermore, Figures 2 and 4 show devices having as input signals the exhalation air pressure and the hand grip squeeze pressure, in addition to the blood pressure. Consequently, there is no basis for the pressure transducers not including ones for recording of exhalation air pressure and hand grip squeeze pressure. The omissions of these features constitutes an unallowable intermediate generalisation.

3.5 Algorithms for user control and data processing for carrying out test and/or examinations sequences

According to claim 3 as originally filed, the device comprises also algorithms for user control and data processing for carrying out the examination sequences. It is further mentioned on page 8, lines 26 to 29, that it is part of the invention that the device contains such algorithms. In contrast, claim 1 of the main request merely requires that the device is capable of measuring and recording physiological examination sequences. These sequences were included in claim 4 as originally filed, which depends on claim 3.

The Board does not agree with the appellant's position that the algorithms were implicitly included in the present claim. In the context of the application it is rather clear that the algorithms use the data measured and recorded to perform the user control and data processing for carrying out the various examinations sequences mentioned in the claim. Hence, measuring and recording of physiological examinations sequences, as in present claim 1, does not necessarily imply the use of algorithms.

Therefore, the feature "algorithms for user control and data processing for carrying out the examination sequences" has been omitted from present claim 1 and constitutes a further unallowable intermediate generalisation.

3.6 "Heart rate response to Valsalva maneuver" examination

According to the description (page 8, line 31 to page 9, line 9), the apparatus shown in Figure 2 is used to measure the exhaled air pressure and the lapse of time, and to graphically represent both in order to guide the user to maintaining the correct pressure for a sufficient

time period in the "Heart rate response to Valsalva maneuver" examination.

In contrast, claim 1 requires merely that the device, which is capable of measuring and recording a heart rate response to Valsalva maneuver, is capable of measuring the exhaled air pressure (and not the lapse of time).

In the appellant's view, it can be derived from page 9 lines 5 to 9, that the time measurement is not compulsory for the Heart rate response to Valsalva maneuver.

The Board does not agree with this position. It is mentioned in the paragraph preceding this passage that the Heart rate response to Valsalva maneuver is "based on that the examined person exhales air with a pressure of 40 mmHg in a period of 15 seconds". Hence, the Heart rate response to Valsalva maneuver cannot be performed without the measurement of the lapse of time. The omission of this feature therefore constitutes an unallowable intermediate generalisation.

3.7 It follows that the main request is not allowable since the amendments made to claim 1 do not meet the requirements of Article 123(2) EPC.

4. Auxiliary requests - added subject-matter

At least the objections mentioned under points 3.4 and 3.5 above are present in claim 1 of each of auxiliary requests I to X. It follows that none of these auxiliary requests meets the requirements of Article 123(2) EPC.

5. Admittance of auxiliary request XI

- 5.1 Auxiliary request XI was filed during the oral proceedings before the Board. It was filed as a response to the Board's conclusion reached during the oral proceedings that neither claim 1 of the requests filed with the grounds of appeal (main request and auxiliary requests I to VI) nor claim 1 of the requests filed in response to the communication of the Board (auxiliary requests VII to X) complied with the requirements of Article 123(2) EPC.
- 5.2 The revised Rules of Procedure of the Boards of Appeal ("RPBA 2020", OJ EPO 2019, A63) entered into force on 1 January 2020 (Article 24(1) RPBA 2020). Save for Articles 12(4) to (6) and Article 13(2), to which transitional provisions apply, they are applicable to pending appeal proceedings (Article 25(1) RPBA 2020) and thus also to the case in hand.
- 5.3 Under Article 13(1) RPBA 2020 any amendment to a party's appeal case after it has filed its grounds of appeal may be admitted only at the discretion of the Board. In the exercise of its discretion the Board takes into account, inter alia, *"whether the party has demonstrated that any such amendment, prima facie, overcomes the issues raised.. by the Board and does not give rise to new objections."*
- 5.4 This criterion is also a key criterion developed in the case law of the Boards of Appeal on the exercise of the Board's discretion under Article 13(1) RPBA 2007 (Case law of the Boards of Appeal, 9th edition, V.A.4.4.2). Article 13 RPBA 2007 also applies in the case in hand as the summons to oral proceedings had been notified prior to 1 January 2020 (Article 25(3) RPBA 2020).
- 5.5 The Board found that auxiliary request XI, prima facie, did not overcome the objections under Article 123(2) EPC

since the omission of the features "pressure transducers for recording of exhalation air pressure and hand grip squeeze pressure" and "algorithms for user control and data processing for carrying out the examination sequences" constitutes an unallowable intermediate generalisation (see points 3.4 and 3.5).

- 5.6 The Board is conscious of the fact that it raised some objections under Article 123(2) EPC of its own motion. These were communicated to the appellant in the Board's communication dated 23 October 2019. The appellant was given the opportunity to respond to the objections made therein and the appellant did so by filing auxiliary requests VII to X. The appellant's right to be heard under Article 113(1) EPC was thus respected.
- 5.7 In view of the fact that claim 1 of auxiliary request XI does not prima facie overcome the Board's objections under Article 123(2) EPC and that the appellant had an opportunity to respond to the points raised by the Board of its own motion, the Board exercised its discretion not to admit auxiliary request XI into the proceedings.
6. Request for further interruption
- 6.1 During the discussion of whether auxiliary request XI should be admitted into the proceedings the Chairman indicated that there were clearly still several objections under Article 123(2) EPC which had not been overcome in claim 1 of the request. The appellant then stated that they would withdraw auxiliary request XI and file a new request if another interruption of the proceedings could be given so that they could prepare a further request which would then replace auxiliary request XI.

- 6.2 The appellant explained that they had attempted in auxiliary request XI to overcome those objections of the Board that they had remembered from the discussion with the Board, but that they needed additional time to include the remaining ones. The reason for not filing, already before the oral proceedings, an auxiliary request which overcame all objections raised in the Board's communication was that the appellant thought they could convince the Board that some of these objections should not be maintained.
- 6.3 The Board decided not to interrupt the oral proceedings for the purpose of giving the appellant time to prepare another request, as all the objections under Article 123(2) EPC which had prima facie not been overcome by claim 1 of auxiliary request XI had not only been discussed during the oral proceedings before the filing of auxiliary request XI, but had already been raised in the Board's communication.
- 6.4 If a party decides to file requests before the oral proceedings which only overcome some objections of the Board in the hope of convincing the Board with its arguments, then they run the risk that additional requests filed during the oral proceedings are not admitted into the proceedings. In the present case, the proceedings had been interrupted once to allow the appellant to file a new request. That this request was prima facie not allowable cannot be a reason for giving the appellant yet another opportunity to file another request. It is not compatible with the principle of procedural economy that oral proceedings are conducted in such a way that the appellant is given the opportunity to repeatedly file new requests until a version of the claims is found that is acceptable to the Board.

7. Reimbursement of the appeal fee

7.1 Reimbursement of the appeal fee under Rule 103(1)(a) EPC is subject to three conditions:

- (i) the Board considers the appeal to be allowable;
- (ii) there was a substantial procedural violation during the proceedings before the examining/opposition division;
- (iii) reimbursement is equitable.

7.2 As shown above, the Board has concluded that the appeal is not allowable, so that condition (i) is not satisfied. For that reason alone, there is no legal basis for reimbursing the appeal fee and the request for its reimbursement must be refused. There is therefore no need for the Board to ascertain whether the alleged procedural violation took place.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated