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**Datasheet for the decision
of 1 September 2023**

Case Number: T 2577/18 - 3.2.01

Application Number: 12196449.8

Publication Number: 2572676

IPC: A61F2/24

Language of the proceedings: EN

Title of invention:

Collapsible prosthetic heart valves

Patent Proprietor:

St. Jude Medical, Inc.

Opponents:

1. BIOTRONIK AG
2. Edwards Lifesciences Corporation
3. Symetis SA

Headword:

Relevant legal provisions:

EPC Art. 52(1), 54, 123(2)
RPBA 2020 Art. 12(3), 12(5), 13(2)

Keyword:

Novelty - main request (no) - auxiliary request (no)
Amendments - added subject-matter (yes) - intermediate
generalisation - unallowable intermediate generalisation (yes)
Discretion not to admit submission - requirements of Art.
12(3) RPBA 2020 met (no)
Use of the discretion not to admit submission - Article 12(5)
RPBA 2020 (yes)
Amendment after summons - exceptional circumstances (no) -
cogent reasons (no) - taken into account (no)

Decisions cited:

Catchword:



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Case Number: T 2577/18 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 1 September 2023

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
21 August 2018 concerning maintenance of the
European Patent No. 2572676 in amended form.**

Composition of the Board:

Chairman A. Pieracci
Members: V. Vinci
 O. Loizou

Summary of Facts and Submissions

I. The appeals filed by the appellant I (patent proprietor) and the appellants II and III (opponent 2 and 3) are directed against the interlocutory decision of the opposition division to maintain the European patent No. 2 572 676 in amended form. The respondent (opponent 1) did not participate in the appeal proceedings.

In its decision, the opposition division held that the ground for opposition pursuant to Article 100(a) in combination with Articles 52(1) and 54 EPC was prejudicial to the maintenance of the patent as granted, that the subject-matter of independent claim 1 of the auxiliary request 1 was not novel within the meaning of Articles 52(1) and 54 EPC, and that the auxiliary request 2 did not comply with the requirements of Article 123(2) EPC. Finally the opposition division decided to maintain the patent in amended form according to the auxiliary request 3. In the course of the first instance proceedings novelty was assessed, among others documents, in view of the following prior art:

D6: WO 2006/127765 A1.

II. With the communication pursuant to Article 15(1) RPBA dated 18 October 2022, the Board informed the parties of its preliminary, non-binding assessment of the appeal.

Oral proceedings pursuant to Article 116 EPC were held before the Board on 01 September 2023.

The appellant I (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or, in the alternative, that the patent be maintained in amended form on the basis of one of the auxiliary requests 7, 3, 1, 2, 4 to 6 and 8 as filed with the statement of grounds of appeal and to be considered in this order.

The appellants II and III (opponents 2 and 3) requested that the interlocutory decision of the opposition division be set aside and that patent be revoked in its entirety.

III. Independent claim 1 according to the main request reads as follows (labelling of the features introduced by the Board):

F1 *"A prosthetic heart valve, comprising:*

F2 *a supporting structure (10) that is annular about a longitudinal axis,*

F3 *the supporting structure being annularly collapsible and re-expandable and including a plurality of members (42a, 42b, 42c) disposed in a zig-zag pattern that extends in a direction annular of the supporting structure,*

F4 *at least two of the members meeting at an apex (440) that points in a first direction away from the supporting structure and parallel to the longitudinal axis;*

F5 *a sheet (70; 80) of flexible material secured to the supporting structure,*

F6 *the sheet being at least partly secured to the supporting structure via a suture attachment (90) at the apex, and*

F7 *the apex being shaped to prevent the suture attachment from moving away from the apex in a direction opposite to the first direction; and*

F8 *a plurality of flexible leaflets (60; 160) disposed inside the supporting structure and at least partly secured to the sheet."*

Independent claim 1 according to the auxiliary request 1 corresponds to claim 1 as granted, wherein feature F4 has been amended as follows:

F4 *"at least two of the members meeting at an apex (440) that is provided at an axial end of the supporting structure and points in a first direction away from the supporting structure and parallel to the longitudinal axis"*

Independent claim 1 according to the auxiliary request 2 corresponds to claim 1 as granted, wherein feature F4 has been amended as follows:

F4 *"at least two of the members meeting at an apex (440) that is provided at a top and/or bottom of the supporting structure, that points in a first direction away from the supporting structure and parallel to the longitudinal axis"*

Independent claim 1 according to the auxiliary request 3 corresponds to claim 1 of auxiliary request 3 filed at first instance and considered allowable by the opposition division. Compared to claim 1 as granted

feature F4 has been amended as follows:

F4 *"at least two of the members meeting at an axial end of the supporting structure at an apex (440) with a reduced neck (452) that points in a first direction away from the supporting structure and parallel to the longitudinal axis"*

The wording of claim 1 of auxiliary requests 4 to 8 needs not be referred to since these requests have not been admitted into the appeal proceedings.

Reasons for the Decision

MAIN REQUEST - PATENT AS GRANTED

Novelty: Articles 52(1) and 54 EPC

1. The Board confirms the conclusion of the opposition division that the subject-matter of claim 1 as granted is not novel within the meaning of Articles 52(1) and 54 EPC in view of the prior art.
- 1.1 With its appeal the appellant I (patent proprietor) contested the novelty assessment of the opposition division and, in particular, that features F4, F6 and F7 of claim 1 were directly and unambiguously disclosed in document D6.

Feature F4

- 1.2 In the decision under appeal the opposition division referred in particular the embodiment in Figure 38 of D6 and stated that the upper and lower corners of the quadrilateral cells of the support structure (314)

formed by pairs converging members (342) represented *"apices pointing in a first direction away from the supporting structure"* within the meaning of features F4 of claim 1 as a granted.

1.3 The appellant I (patent proprietor) disagreed with this conclusion and criticized that the opposition division, when construing the claim, did not take the wording of claim 1 as a whole into account, in particular that that the first part of feature F4, read in the context of feature F3, and required at least 2 members of the supporting structure meeting at an apex. In this regard the appellant I (patent proprietor) argued that the pairs of converging members (342) of the supporting structure (314) of the prosthetic valve shown in Figure 38 of D6 did not meet at all as required by feature F4, and in any event not at an apex, but rather merged into the legs of an U-shaped element which kept them spaced from each other.

1.4 Furthermore, contrary to the interpretation of the opposition division, the appellant I (patent proprietor) alleged that the wording of feature F4 that the apex *"points in a first direction away from the supporting structure and parallel to the longitudinal axis"* limited the claim only to apices located at the extreme upper and lower ends of the supporting structure. This was not the case of the alleged apices in Figure 38 of D6 which were axially located within the supporting structure and hence, according to the interpretation of the appellant I (patent proprietor) they did not point away therefrom.

1.5 The arguments of the appellant I (patent proprietor) are not convincing for the following reasons:

The Board, in agreement with the appellants II and III (opponents 2 and 3), concurs with the opposition division that the U-shaped elements forming the upper and lower corners of the quadrilateral cells of the support structure (314) in Figure 38 of D6 embody apices within the meaning of the contested patent at which at least two members of the supporting structure meet according to feature F4 of claim 1. The Board observes that the term "apex" is commonly understood as meaning the highest point of an object. However, as a point cannot be "shaped" as required by feature F7 of claim 1, the person skilled in the art would disregard this strict geometrical interpretation and understand the term "apex" in the technical context of claim 1 as meaning the uppermost portion/element of the cells forming the supporting structure and at which adjacent struts converge and are connected. The U-shaped elements forming the corners of the quadrilateral cells of the support structure (314) of the prosthetic heart valve shown in Figure 38 of D6 thus represent apices within the meaning of claim 1 as granted. In this regard the Board also observes that the embodiment in Figure 65 of the contested patent shows an identical U-shaped configuration of the uppermost and lowermost portions of the zig-zag pattern formed by the members (42a,42b,42c) and resulting in the supporting structure (10) according to claim 1. Therefore, in agreement with the conclusion of the opposition division, the Board does not see any difference between the apex as defined in claim 1 and the U-shaped uppermost elements forming the corners of the cells of the supporting structure (314) of the prosthetic valve disclosed in Figure 38 of D6.

1.6 Regarding the contested second part of feature F4 of claim 1 as granted stating that the apex "points in a

first direction away from the supporting structure and parallel to the longitudinal axis" the Board concurs with the opposition division and the appellants II and III (opponents 2 and 3) that the direction in which an apex of the supporting structure points says nothing regarding the axial position of the apex, whereby any apex axially located within the supporting structure, i.e. at any axial position between its ends, can also be said to point in a direction away, be downwardly or upwardly, from the supporting structure. It follows that, as correctly stated by the opposition division, there is no reason to read the second part of feature F4 in such a way to imply the limitation alleged by the appellant I (patent proprietor) that the apex of the supporting structure according to claim 1 is located only at the end of the supporting structure and not also therebetween. Therefore, the limitation alleged by the appellant I (patent proprietor) cannot be directly and unambiguously derived from the claim language.

Feature F6

- 1.7 The appellant I (patent proprietor) criticized that the opposition division came to the conclusion that feature F6 was directly and unambiguously derivable from D6 only on the basis of the plurality of "X" depicted in the schematic representation of Figure 38. By referring to paragraph [0009] of D6 the appellant I (patent proprietor) firstly observed that this prior art document did not deal at all with the problem to securely connect the sheet to the supporting structure. This circumstance did not thus support the speculative interpretation of Figure 38 of the opposition division. The appellant I (patent proprietor) stressed that the allegation of the opposition division and the appellants II and II (opponents 2 and 3) that the "X"

depicted in Figure 38 of D6 at the alleged apices of the supporting structure (314) were all suture attachments securing the sheet to the supporting structure according to feature F6 was based on a mere speculation regarding their nature and functionality not supported by any passage of D6. In this respect it was also argued that D6 described only the "X" labelled (328) in Figure 38 located not at the apex, but in the middle of the strut as a suture connecting the sheet (312) to the supporting structure (reference was made to paragraph [0157], last sentence). Finally it was observed that the speculations of the opposition division regarding the disclosure of feature F6 in document D6 were inconsistent with the other embodiments disclosed in this piece of prior art, for example in the embodiment in Figure 39.

- 1.8 The Board does not agree and follows the view of the opposition division and the appellants II and III (opponents 2 and 3) for the following reasons:

The last sentence of paragraph [0157] describing Figure 38 reads *"Valve 312 is attached to the valve support band 314 with a plurality of sutures 328, which can be a biologically compatible thread"* (emphasis added). This text thus describes that in the embodiment in Figure 38 a plurality of sutures 328 is provided all having the functionality to secure the valve support (sheet in the language of claim 1) to the supporting structure. While it is true as pointed out by the appellant I (patent proprietor) that in Figure 38 the labelling 328 is only assigned to a single "X" located in the middle of a a strut of the supporting structure, the Board is convinced that the person skilled in the art, in view of the reference of the above cited passage to a plurality of sutures 328, has no doubt

that all the other "X" depicted in Figure 38 but unlabelled, including those located at the apices of the supporting structure, equally are suture attachments securing the sheet to the supporting structure, in particular to the apex. Furthermore, the Board concurs with the argument of the appellants II and III (opponents 2 and 3) that, at best, the plurality of suture attachments indicated by an "X" in Figure 38 of D6 have a double function, namely on one hand to attach the sheet to the supporting structure (314) according to feature F6 and, on the other hand also additionally to reinforce/secure the attachment of the anchor band to the valve supporting structure as asserted by the appellant I (patent proprietor). Furthermore, as convincingly observed by the appellant II (opponent 2), a fixation of the sheet (312) only at the middle of the struts of the supporting structure (314) of D6, as suggested by the appellant I (patent proprietor), does not make any technical sense, because this solution would not sufficiently secure the sheet (312) but leave the upper and lower edges of the sheet flapping into the lumen of the prosthesis.

Feature F7

- 1.9 The appellant I (patent proprietor) argued that there was no passage of D6 from which the person skilled in the art could directly and unambiguously derive that the apex of the known supporting structure had to be shaped in such a way to prevent the suture attachment from moving away in a direction opposite to the first direction. It was criticised that the conclusions of the opposition regarding the disclosure of feature F7 in document D6 relied again on mere speculations based on information allegedly inferred only from the schematic representation in Figure 38. In any event, it

was argued that, contrary to the opposition division's view, a suture attachment provided at the U-shaped apex shown in Figure 38 could still slide axially along its legs, whereby the claimed functionality to prevent the suture attachment from moving away in a direction opposite to the first direction required by feature F7 was not achieved.

1.10 Also these arguments of the appellant I (patent proprietor) are not convincing for the following reasons:

The Board concludes that the technical effect to prevent the suture attachment from moving away from the apex is not only determined by the shape of the apex but also by the characteristics of the suture adopted and its arrangement on the apex. For example, as put forward by the appellants II and III (opponent 2 and 3), that the horizontal portion of the U-shaped apex connecting its legs shown in Figure 38 of D6 provides the claimed functionality if a cross-over shaped suture is arranged in such a way to embrace said horizontal portion, as it is indeed the case in Figure 38. In any event, as argued by the opposition division in the contested decision, the person skilled in the art, in view of the shape of the apices of the known supporting structure which are widening in the downward or upward direction (see Figure 38), would directly and unambiguously derive that the U-shaped apices of the supporting structure according to D6 in combination with the diverging struts connected thereto also prevent, to a large extent, the suture attachments identified by the "X" from moving away from the respective apex as required by feature F7.

1.11 Regarding this point, the appellant I (patent proprietor) objected that the length of the straight legs of the U-shaped apices of the supporting structure according to D6 allowed for a certain axial movement of the suture, thereby not fulfilling the functionality required by feature F7.

1.12 However, as correctly observed by the appellants II and III (opponents 2 and 3) a certain restricted amount of axial movement would be allowed, depending on the characteristics of the suture used and its arrangement on the apex, also by the shapes of the apex according to the contested patent as shown in Figures 66 to 68B. Therefore the expression *"to prevent the suture attachment from moving away from the apex"* must be read, at least in the technical context of the contested patent, to mean that the sheet is prevented to a large extent from moving in a direction opposite to the first direction, but that very restricted movements within the axial extension of the apex not majorly affecting the positioning of the sheet on the supporting structure can still take places.

1.13 In view of all the above the Board confirms the assessment of the opposition division that features F4, F6 and F7 of claim 1 as granted are directly and unambiguously disclosed in D6 which is thus prejudicial to novelty.

Ranking of the Auxiliary Requests

2. After the discussion of the main request the appellant I (patent proprietor) requested to change the original order of the auxiliary requests as filed with the statement of grounds of appeal and to discuss the auxiliary request 7 first and subsequently the

auxiliary request 3, the auxiliary requests 1 and 2 and the auxiliary requests 4 to 6 and 8. The appellants II and III (opponents 2 and 3) did not have any objection to the new ranking nor did the Board.

AUXILIARY REQUEST 7

Admittance into the appeal proceedings

3. The auxiliary request 7 filed with the statement of grounds of appeal of the appellant I (patent proprietor) corresponds to the auxiliary request 7 on file at the first instance proceedings. As a consequence of the decision of the opposition division to maintain the patent in amended form according to the higher-ranking auxiliary request 3 the auxiliary request 7 was not decided upon at the oral proceedings but maintained by the appellant I (patent proprietor). Therefore, the existence of this auxiliary request as part of the appeal proceedings is not in question (Article 12(2) RPBA 2020). The appellants II and III (opponents 2 and 3) requested not to admit this request because of lack of substantiation.

3.1 As a matter of fact, neither the statement of grounds of appeal nor the reply of the appellant I (patent proprietor) to the appeals of the appellants II and III (opponents 2 and 3) contain arguments in support of the allowability of this request, in particular as to why it should overcome the objections raised by the opposition division in respect of the main request and the auxiliary requests 1 and 2 as instead it is required by Article 12(3) RPBA 2020. This circumstance was not contested by the appellant I (patent proprietor) who however pointed out that sufficient substantiation was provided with the letter dated 5 May

2023, page 9, first and fourth paragraphs. As these submissions are subsequent to the notification of the summon to attend oral proceedings dated 20 July 2022, the statements presented in the letter dated 5 May 2023 represent an amendment to the appellant's I (patent proprietor's) appeal case, the admittance of which is subjected to the strict provisions of Article 13(2) RPBA 2020. In this regard the appellant I (patent proprietor) alleged at the oral proceedings that the fact that the Board in its preliminary opinion was surprisingly inclined to overturn the positive assessment of the opposition division regarding compliance of claim 1 according to the auxiliary request 3 with the requirements of Article 123(2) EPC, this amounted to exceptional circumstances justified with cogent reasons within the meaning of Article 13(2) RPBA 2020 thus supporting the admittance of the submissions filed on 5 May 2023.

4. The Board does not agree for the following reasons:

Irrespective of the question whether the passages of the letter dated 5 May 2023 indicated by the appellant I (patent proprietor) represent sufficient substantiation for the auxiliary request 7, which is contested by the appellants II and III (opponents 2 and 3), the fact that the Board after having considered the arguments presented by the parties arrived to different preliminary conclusions compared with those of the opposition division regarding the allowability of the auxiliary request 3 cannot be seen as a surprising and hence exceptional circumstance within the meaning of Article 13(2) RPBA 2020, but rather as one possibility to be expected by the party concerned and which is inherent to the nature of appeal proceedings the scope of which is indeed to review the decision of the

opposition division. Therefore, the Board decided to disregard the late filed submissions dated 5 May 2023 under Article 13(2) RPBA 2020.

5. As a consequence, the Board also decided not to admit the auxiliary request 7 under Article 12(5) in combination with Article 12(3) RPBA 2020 because of lack of substantiation.

AUXILIARY REQUEST 3 - PATENT AS MAINTAINED

6. The auxiliary request 3 corresponds to the auxiliary request 3 deemed to be allowable by the opposition division. The appeals of the appellants II and III (opponents 2 and 3) are directed to this interlocutory decision of the first instance department.

Article 123(2) EPC

7. Contrary to the conclusion of the opposition division in the decision under appeal, the subject-matter of claim 1 of the patent as maintained does not meet the requirements of Article 123(2) EPC.
 - 7.1 Compared with claim 1 as granted, independent claim 1 of the auxiliary request 3 specifies in feature F4 that at least two of the members meet "*at an axial end of the supporting structure at an apex (440) with a reduced neck (452)*".
 - 7.2 The appellants II and III (appellants) maintained that, contrary to the view of the opposition division and the the appellant I (patent proprietor), the omission of the feature that the "*reduced neck*" is provided with a knob or an enlarged head on its free end results in an unallowable intermediate generalisation of all the

specific embodiments originally disclosed infringing Article 123(2) EPC. In this context the appellants II and III (opponents 2 and 3) contested the interpretation of the opposition division that under "*reduced neck*" the person skilled in the art would understand a relatively narrow connecting portion between two wider portions of an object, whereby the term "*reduced neck*" inherently implies an enlarged portion at its end. Furthermore, it was alleged that there was no basis in the application as filed for the further limitation introduced in claim 1 that the reduced neck was located at an axial end of the supporting structure. The appellant I (patent proprietor) conversely shared the interpretation of the opposition division and additionally argued that a "*reduced neck*", in the technical context of the patent, was not inextricably linked to the presence of a knob or of other enlarged shapes at its end, as those shown in the specific embodiments in Figures 66 to 68B. Finally, regarding the support in the originally filed application for the location of the reduced neck now recited in claim 1, the appellant I (patent proprietor) referred to paragraph [0173] and to the position labelled with (440) in Figure 65 of the application as originally filed.

- 7.3 The Board cannot follow the conclusions of the opposition division and the arguments of the appellant I (patent proprietor) for the following reasons:

Interpretation of the expression "*apex with a reduced neck*"

- 7.4 Contrary to the view of the opposition division, the Board is convinced that the term "*neck*" referred to a portion of an object is commonly and unambiguously

understood by a person skilled in the art to mean a narrow connecting portion provided between two comparatively larger portions of the object. In this context the Board observes that the term "*reduced*" associated to "*neck*" in claim 1 is redundant because the fact that a neck is reduced compared to the rest of the object to which it belongs is inherent in the term "*neck*". A typical example of an object provided with a "*neck*" or, in the language of the patent, with a "*reduced neck*" is a bottle which normally comprises a so called "*bottle neck*". Therefore, in view of the considerations above and contrary to the interpretation adopted by the opposition division in the decision under appeal, the person skilled in the art understands the expression "*apex with a reduced neck*" in claim 1 as meaning an apex provided with a pointed or narrow tip at its end. As convincingly put forward by the appellants II and III (opponents 2 and 3), the originally filed application does not directly and unambiguously support an apex provided with a pointed/narrower tip at its end, i.e. without an enlarged head at its end, this undisclosed possibility being however now encompassed by claim 1 as amended. In fact the Board concurs with the appellants II and III (opponents 2 and 3) that the expression "*reduced neck*" introduced in claim 1 according to the patent as maintained is only present in paragraph [0017] and in claim 3 of the originally filed application in combination with an "*enlarged head*". According to paragraph [0173], lines 36-42 of the originally filed description Figures 66 to 68B show possible shapes that can be provided at the top and/or bottom of stent cells, i.e. at the tip of the apices, to help to securely connect the web (80) to the supporting structure. Regarding the embodiment in Figure 66, paragraph [0173] states that a knob is connected to the

the apex of the supporting structure by a "*small neck region*". In view of all above the Board concludes that a "*reduced neck*" is consistently disclosed throughout the application as filed in combination with an enlarged head at its end. Furthermore, contrary to the allegation of the appellant I (patent proprietor), the enlarged head is functionally inextricably linked to the "*reduced neck*" because these features achieve in combination the effect of securely attach the suture to the apex and hence the web to the supporting structure. This is confirmed for example by the information presented in paragraph [0173], lines 36-39 and by the arrangement of the suture of the differently shaped apices shown in Figures 66 to 68B. In view of all above the Board, contrary to the assessment of the opposition division and in agreement with the appellants II and III (opponents 2 and 3), concludes that the omission in claim 1 of the feature that the reduced neck is provided with an enlarged head on its free end results in an unallowable intermediate generalisation of the the specific embodiments presented in the application as originally filed infringing Article 123(2) EPC, and this irrespective of the assessment of the further issue raised by the appellants II and III (opponents 2 and 3) regarding the claimed location of the reduced neck at an axial end of the supporting structure.

AUXILIARY REQUESTS 1 and 2

8. Regarding these auxiliary requests at the oral proceedings the parties relied on the arguments presented in writing and did not wish to make any further submission. Consequently, the Board has no reason to deviate from the assessment of the auxiliary requests 1 and 2 presented in its preliminary opinion which is hereby confirmed and reads as follows:

Auxiliary request 1

8.1 This auxiliary request corresponds to the auxiliary request 1 underlying the decision under appeal which was rejected by the opposition division on the ground of lack of novelty over D6. The Board confirms this conclusion for the following reasons:

8.2 Compared with claim 1 as granted, claim 1 of the auxiliary request 1 specifies that *"the apex is provided at an axial end of the supporting structure"*. The Board agrees with the claim construction provided by the opposition division and shared by the appellants II and III (opponents 2 and 3) which allows for the presence of additional supporting structures beside the supporting structure (10) . This is the case of the prosthetic heart valve of document D6 that shows in Figure 38 a *"support band (314)"* which functionally equates to the claimed supporting structure (10) disposed between a *"distal anchor (316)"* and a *"proximal anchor (318)"*. There is no doubt that apices at which the struts meet are located at an axial end of the supporting structure as required by the amended feature F4, namely along its interface with the distal and proximal anchor structures. It follows that, contrary to the view of the appellant I (patent proprietor), the conclusion of the opposition division that the subject-matter of claim 1 of the auxiliary request 1 lacks novelty over D6 is correct and is herewith confirmed.

Auxiliary Request 2

9. This request corresponds to the auxiliary request 2 underlying the decision under appeal which was rejected by the opposition division under Article 123(2) EPC.

The Board confirms this decision for the following reasons:

- 9.1 Compared with claim 1 as granted, claim 1 of the auxiliary request 2 additionally specifies that *"the apex is provided at a top and/or bottom of the supporting structure"*.
- 9.2 The Board concurs with the opposition division and the appellants II and III (opponents 2 and 3) that the expression *"an apex that is provided at top and/ or bottom of the supporting structure"* is broader than the expression used in claim 1 of auxiliary request 1 reading *"at an axial end of the supporting structure"* and is not equivalent as asserted by the appellant I (patent proprietor). In this regard the Board shares the view of the opposition division that the expression adopted in claim 1 of the auxiliary request 1 for which basis can be found in the originally filed application indicates that the apex is axially located along the upper or lower edge of the supporting structure, whereas the expression adopted in claim 1 of the auxiliary request 2 covers any location within a bottom or top region/portion of the supporting structure extending slightly below or above the respective axial end thereof. This means that claim 1 now encompasses the possibility that the apex is located close to the extremities of the supporting structure, but not necessarily at its upper circumferential edge. As correctly observed by the opposition division and the appellants II and III (opponents 2 and 3), the passage indicated by the appellant (patent proprietor) as basis for the amendment introducing the wording *"at a top and/or bottom"* refers to the single stent cells and not to the supporting structure as a whole, whereby the information now introduced in claim 1 is not directly

and unambiguously derivable from the original filed description, thereby infringing Article 123(2) EPC.

10. In conclusion and and irrespective of the assessment of the further substantial issues raised by the appellants II and III (opponents 2 and 3), the auxiliary requests 1 and 2 are both not allowable as correctly decided by the opposition division.

Auxiliary requests 4 to 6 and 8

11. As the auxiliary request 7, the Board finds that also the auxiliary requests 4 to 6 and 8 have not been substantiated with the statement of grounds of appeal and/or with the reply to the appeals of the appellants II and III (opponents 2 and 3). Since the appellants II and III objected their admittance for the same reasons as for auxiliary request 7 also these requests are therefore not admitted for the same reasons presented above regarding the auxiliary request 7 namely lack of substantiation.
12. In conclusion, the appeal of the appellant I (patent proprietor) is dismissed and the appeals of the appellants II and III (opponents 2 and 3) are successful.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



A. Voyé

A. Pieracci

Decision electronically authenticated