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**Datasheet for the decision  
of 27 May 2022**

**Case Number:** T 2031/19 - 3.2.02

**Application Number:** 09755752.4

**Publication Number:** 2280636

**IPC:** A61B5/00

**Language of the proceedings:** EN

**Title of invention:**

CLOSE PROXIMITY COMMUNICATION DEVICE AND METHODS

**Patent Proprietor:**

Abbott Diabetes Care Inc.

**Opponents:**

Roche Diabetes Care GmbH  
Dexcom, Inc. (intervener)

**Headword:**

**Relevant legal provisions:**

EPC Art. 54(3)  
RPBA Art. 12(4)  
RPBA 2020 Art. 13(2)

**Keyword:**

Novelty - auxiliary requests 1 to 7, 9 and 11 (no)  
Late-filed auxiliary requests - submitted with the statement  
of grounds of appeal - admitted (yes)  
Late filed auxiliary request - submitted after summons -  
exceptional circumstances (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 2031/19 - 3.2.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 27 May 2022**

**Appellant:** Abbott Diabetes Care Inc.  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
2 May 2019 concerning maintenance of the  
European Patent No. 2280636 in amended form.**

**Composition of the Board:**

<b>Chairman</b>	M. Alvazzi Delfrate
<b>Members:</b>	S. Böttcher
	N. Obrovski

## **Summary of Facts and Submissions**

- I. Both the patent proprietor and opponent 1 filed an appeal against the opposition division's interlocutory decision to maintain European patent No. EP 2 280 636 in amended form.
- II. A notice of intervention was filed on 11 October 2021 on behalf of Dexcom, Inc. (hereafter: "the intervener").
- III. Oral proceedings were held on 27 May 2022.
- IV. The patent proprietor requested that the decision be set aside and that the patent be maintained on the basis of auxiliary request 3 (new main request) or, in the following order, one of auxiliary requests 1, 2, 4, 5, 6 or 7, all filed with the statement of grounds of appeal (SGA), or one of auxiliary requests 9 or 11, both filed with the reply to the notice of intervention, or auxiliary request 11a filed during the oral proceedings before the board, or one of auxiliary requests 8a, 8b, 10 and 12 to 30, all filed with the reply to the notice of intervention.

Both opponent 1 and the intervener (opponent 2) requested that the decision be set aside and that the patent be revoked.

- V. The following documents are referred to in this decision.

E1: WO 2008/138006 A2

E20: Specification of the Bluetooth system, version 1.1, published 22 February 2001

V11D: The Mobile Communications Handbook (Second Edition), ed. Gibson, 1999 (excerpt)

VI. Claim 1 of auxiliary request 3 reads as follows:

"A method, comprising:  
establishing a communication range between a transmitter unit (102) and a receiver unit (104) by placing the receiver unit within a predetermined distance from the transmitter unit;  
receiving an encoded data packet at the transmitter unit when the receiver unit is within the predetermined distance, the encoded data packet including at least one close proximity command and a communication identifier;  
decoding the received data packet;  
validating the decoded received data packet;  
executing one or more routines associated with the respective one or more close proximity commands when the decoded received data packet is validated; wherein the executed one or more routines includes transmitting analyte related data; and wherein validating the decoded received data packet includes performing error detection on the data packet."

Claim 1 of auxiliary request 1 reads as follows:

"A method, comprising:  
establishing a communication range between a transmitter unit (102) and a receiver unit (104) by placing the receiver unit physically close to, that is within a predetermined distance from the transmitter unit;  
receiving an encoded data packet at the transmitter unit when the receiver unit is within the predetermined distance, the encoded data packet including at least

one close proximity command and a communication identifier;  
decoding the received data packet;  
validating the decoded received data packet;  
executing one or more routines associated with the respective one or more close proximity commands when the decoded received data packet is validated; wherein the executed one or more routines includes transmitting analyte related data."

Claim 1 of auxiliary request 2 reads as follows:

"A method, comprising:  
establishing a communication range between a transmitter unit (102) and a receiver unit (104) by placing the receiver unit within a predetermined distance from the transmitter unit; the predetermined distance being no greater than 30.5 cm (1 foot);  
receiving an encoded data packet at the transmitter unit when the receiver unit is within the predetermined distance, the encoded data packet including at least one close proximity command and a communication identifier;  
decoding the received data packet;  
validating the decoded received data packet;  
executing one or more routines associated with the respective one or more close proximity commands when the decoded received data packet is validated; wherein the executed one or more routines includes transmitting analyte related data."

Claim 1 of auxiliary request 4 is a combination of claim 1 of auxiliary request 1 and claim 1 of auxiliary request 3.

Claim 1 of auxiliary request 5 is a combination of

claim 1 of auxiliary request 2 and claim 1 of auxiliary request 3.

Claim 1 of auxiliary requests 6 and 7 reads as follows:

"A method, comprising:  
establishing a communication range between a transmitter unit (102) and a receiver unit (104) by placing the receiver unit within a predetermined distance from the transmitter unit; the predetermined distance being no greater than 30.5 cm (1 foot);  
receiving an encoded data packet at the transmitter unit when the receiver unit is within the predetermined distance, the encoded data packet including at least one close proximity command and a communication identifier;  
decoding the received data packet;  
validating the decoded received data packet;  
executing one or more routines associated with the respective one or more close proximity commands when the decoded received data packet is validated; wherein the transmitter unit (102) is coupleable to a transcutaneous glucose sensor unit (101) positioned on the body of a user; and the executed one or more routines includes transmitting glucose analyte related data sampled by the transcutaneous glucose sensor unit (101) from the transmitter unit (102) to the receiver unit (104); and wherein validating the decoded received data packet includes performing error detection on the data packet."

Claim 1 of auxiliary request 9 reads as follows:

"A method, comprising:  
establishing a communication range between a transmitter unit (102) and a receiver unit (104) by



placing the receiver unit within a predetermined distance from the transmitter unit;  
receiving an encoded data packet at the transmitter unit when the receiver unit is within the predetermined distance, the encoded data packet including at least one close proximity command and a communication identifier;  
decoding the received data packet;  
validating the decoded received data packet;  
executing one or more routines associated with the respective one or more close proximity commands when the decoded received data packet is validated; wherein the executed one or more routines includes transmitting analyte related data; and wherein  
validating the decoded received data packet includes:  
performing error detection on the data packet; and  
comparing the received communication identifier in the data packet with a stored value."

Claim 1 of auxiliary request 11 reads as follows:

"A method, comprising:  
establishing a communication range between a transmitter unit (102) and a receiver unit (104) by placing the receiver unit within a predetermined distance from the transmitter unit;  
receiving an encoded data packet at the transmitter unit when the receiver unit is within the predetermined distance, the encoded data packet including at least one close proximity command and a communication identifier, wherein the communication identifier includes a device identification information;  
decoding the received data packet;  
validating the decoded received data packet;  
executing one or more routines associated with the respective one or more close proximity commands when

the decoded received data packet is validated; wherein the executed one or more routines includes transmitting analyte related data; and wherein validating the decoded received data packet includes: performing error detection on the data packet; and comparing the received communication identifier in the data packet with a stored value."

Claim 1 of auxiliary request 11a reads as follows:

"A method, comprising:  
establishing a communication range between a transmitter unit (102) and a receiver unit (104) by placing the receiver unit within a predetermined distance from the transmitter unit;  
receiving an encoded data packet at the transmitter unit when the receiver unit is within the predetermined distance, the encoded data packet including at least one close proximity command and a communication identifier, wherein the communication identifier is a serial number of the transmitter;  
decoding the received data packet;  
validating the decoded received data packet;  
executing one or more routines associated with the respective one or more close proximity commands when the decoded received data packet is validated; wherein the executed one or more routines includes transmitting analyte related data; and wherein validating the decoded received data packet includes: performing error detection on the data packet; and comparing the received communication identifier in the data packet with a stored value."

The text of claim 1 of auxiliary requests 8a, 8b, 10 and 12 to 30, which were not admitted into the appeal

proceedings, has not been reproduced here.

VII. The patent proprietor's arguments can be summarised as follows.

*Admittance of auxiliary requests 3, 1, 2 and 4 to 7*

All the requests are based on auxiliary requests introduced and discussed during the opposition proceedings. Some amendments were made to address the points raised by the opposition division in the decision.

The requests should therefore be admitted.

*Auxiliary requests 3, 1, 2, and 4 to 7 - novelty in view of E1*

It was not directly and unambiguously derivable from E1 that the data packet received at the transmitter unit was encoded. Therefore, the step of decoding the data packet was not derivable either.

Furthermore, E1 did not disclose the feature of validating the data packet including performing error detection on the data packet.

There was no evidence that Bluetooth was used in the transmission of the close proximity command mentioned on page 26, lines 12 to 30, of E1. On page 9, lines 1 to 7, Bluetooth was mentioned as one of five possible protocols. This passage related to the data monitoring and management system in Figure 1, which was a special arrangement including multiple devices, rather than merely the receiver unit and the transmitter unit referred to on page 26. Hence, in E1, Bluetooth was

taught only for multiple devices.

Furthermore, it could be derived from pages 47 and 48 of E20 that some Bluetooth data packets did not have a header. Hence, these data packets did not include an error check. In some cases, the payload of the data packet did not comprise error checking, either.

Hence, the subject-matter of claim 1 of auxiliary requests 3, 1, 2, and 4 to 7 was novel over E1.

*Admittance of auxiliary requests 9 and 11*

These requests were filed in response to the filing of the intervention with the aim of establishing novelty over E1. In the notice of intervention, the arguments in relation to E1 had been elaborated upon in more detail, in particular the novelty objection against claim 1 of auxiliary request 3.

Auxiliary requests 9 and 11 were convergent and based on dependent claims as granted.

Hence, the requests were to be admitted.

*Auxiliary requests 9 and 11 - claim 1 - novelty in view of E1*

E1 did not disclose the step of comparing the communication identifier with a stored value (claim 1 of auxiliary request 9) or that the communication identifier included a device identification information (claim 1 of auxiliary request 11). In E1, the encoded data packet merely comprised a "generated key" (page 26, lines 25 to 27); however, this key did not include a device identification information.

Hence, the subject-matter of claim 1 of auxiliary requests 9 and 11 was not anticipated by E1.

*Admittance of auxiliary request 11a*

This request was filed in response to the new arguments submitted by the opponents during the oral proceedings. In particular, with regard to auxiliary request 11, the intervener had referred for the first time to the embodiment described on page 10, line 17.

The feature that the communication identifier is a serial number of the transmitter was disclosed on page 31, lines 17 to 19.

Hence, the filing of auxiliary request 11a was justified.

*Admittance of auxiliary requests 8a, 8b, 10 and 12 to 30*

These requests were submitted in response to the new objections and arguments raised with the intervention, and should be admitted.

VIII. The arguments by opponent 1 can be summarised as follows.

*Admittance of auxiliary requests 3, 1, 2 and 4 to 7*

Auxiliary requests 1 to 7 were filed late since they could have been filed as early as during opposition proceedings. These requests should not be admitted.

In particular, auxiliary request 3 corresponded to the

former auxiliary request 1, which was filed during the opposition proceedings and replaced with another auxiliary request during oral proceedings. According to the established case law of the boards of appeal, the request was therefore formally withdrawn in the first-instance proceedings. Its re-introduction into the appeal proceedings should not be admitted.

Furthermore, auxiliary request 3 did not address the objection under Article 123(2) EPC raised during the opposition proceedings.

*Auxiliary requests 3, 1, 2, and 4 to 7 - novelty in view of E1*

The term "encoding" in computing merely referred to converting information or instructions into a particular form, such as a data packet. Hence, any transmitted digital data packet referred to in E1 was inherently encoded.

With regard to the error detection, it could be derived from page 4, first paragraph, that the data communication using close proximity commands in Figure 7 was performed with the system in Figure 1, i.e. with the bi-directional communication link 103. According to page 9, lines 1 to 7, this communication link had to provide a secure wireless communication, as provided by a Bluetooth protocol. Since error detection was an intrinsic feature of every data transmission based on the Bluetooth protocol (E20: page 56, Figure 4.6; page 66, section 5.2), the person skilled in the art had to assume that error detection was performed at both ends of the bi-directional communication link, i.e. also at the transmitter unit. Hence, the method step "performing error detection on the data packet" was

implicitly disclosed in E1.

Therefore, the subject-matter of claim 1 of auxiliary request 3 lacked novelty over E1.

The subject-matter of claim 1 of auxiliary requests 1, 2, 4 and 5 also lacked novelty over E1.

*Admittance of auxiliary requests 9 and 11*

Auxiliary requests 9 and 11 did not overcome any of the objections and introduced clarity issues.

Therefore, the requests should not be admitted.

*Auxiliary requests 9 and 11 - claim 1 - novelty in view of E1*

Comparing a received communication identifier in the data packet with a stored value was disclosed in E1 (page 10, line 17; page 27, lines 1 to 5; Figure 7).

The "identification information for the transmitter unit" mentioned in the same passages was the device identification information according to claim 1.

Hence, E1 anticipated the subject-matter of claim 1 of auxiliary requests 9 and 11.

*Admittance of auxiliary request 11a*

Claim 1 of auxiliary request 11a included subject-matter in respect of which a search had not been performed. The amendment made did not comply with the requirements of Article 123(2) EPC.

This request should not be admitted.

*Admittance of auxiliary requests 8a, 8b, 10 and 12 to 30*

These requests should not be admitted since none of them served to overcome the novelty objection in view of E1.

IX. The intervener's arguments can be summarised as follows.

*Admittance of auxiliary requests 3, 1, 2 and 4 to 7*

Auxiliary request 3 had been formally withdrawn during the oral proceedings before the opposition division. Its re-introduction into the appeal proceedings should not be admitted.

Auxiliary requests 1, 2 and 4 to 7 should not be admitted either since they could have been filed during the opposition proceedings.

*Auxiliary requests 3, 1, 2, and 4 to 7 - novelty in view of E1*

Encoding was a prerequisite for the transmission of digital data (V11D: chapter 6, "Line Coding"). Therefore, the data packets in E1 were somehow encoded before they were transmitted, and had to be decoded after transmission to recover the digital data.

Applying error detection to determine the validity of a received data packet was disclosed in E1. On page 8, lines 10 to 26, it was mentioned that the transmitter unit and the receiver unit were configured for bi-



directional wireless communication via the communication link 103, and on page 9, lines 1 to 4, it was mentioned that the communication link might include a Bluetooth enabled communication protocol. No other communication link was disclosed for the transmission of the close proximity commands mentioned on page 29, lines 7 to 12.

A Bluetooth data packet which included a payload (i.e. the actual intended message) also included a header. This header was always protected by error correction (E20: pages 41, 47, 51, 53, 66 and 72).

Hence, E1 anticipated the subject-matter of claim 1 of auxiliary request 3.

The subject-matter of claim 1 of auxiliary requests 1, 2, 4 and 5 also lacked novelty, since E1 disclosed placing the receiver unit physically close to the transmitter unit (AR1 and AR4) or no more than 30.5 cm from the transmitter unit (AR2 and AR5) (page 26, lines 3 to 8).

E1 also disclosed implementing the method with transcutaneous glucose sensors (page 22, line 32; page 23, line 12; page 27, line 20; page 33, line 29). Hence, the subject-matter of claim 1 of auxiliary requests 6 and 7 was not novel over E1.

#### *Admittance of auxiliary requests 9 and 11*

E1 was already referred to during the opposition proceedings. Hence, the auxiliary requests could already have been filed at that point.

Therefore, the requests should not be admitted.

*Auxiliary requests 9 and 11 - claim 1 - novelty in view of E1*

In E1, the close proximity key referred to in the description was the communication identifier mentioned in claim 1.

The step of comparing the communication identifier with a stored value was disclosed on page 26, lines 21 to 25.

On page 26, lines 16 to 20, it was disclosed that the key was based on transmitter identification information. Therefore, the communication identifier included a device identification information.

Therefore, the subject-matter of claim 1 of auxiliary requests 9 and 11 lacked novelty over E1.

*Admittance of auxiliary request 11a*

There were no exceptional circumstances justifying the late filing of this request, and in particular there were no new arguments from the opponents. The objections in view of E1 had already been made earlier in the proceedings. The board had referred to page 26 of E1 in its communication.

Furthermore, the amendment made to claim 1 gave reason for new objections under Articles 123(2) and 84 EPC, and required an additional search.

This request should not be admitted.

*Admittance of auxiliary requests 8a, 8b, 10 and 12 to*

30

These requests should not be admitted since they did not overcome the novelty objection with regard to E1. The additional features of claim 1 of these requests were known from E1.

### **Reasons for the Decision**

1. Subject-matter of the invention

The invention relates to a close proximity communication method and apparatus. (Wireless) close proximity communication is established between a transmitter unit (which can be connected to a transcutaneous glucose sensor) and a receiver unit (which can be a smartphone) to transmit glucose level data.

After establishing a communication range between the transmitter and the receiver by placing the receiver unit within a predetermined distance from the transmitter unit, a data packet, including a close proximity command and a communication identifier, is received at the transmitter. Error detection is performed on the received data packet to validate it. Upon successful validation, analyte related data, for instance data related to the glucose level in the patient's blood, is transmitted to the receiver unit.

The claimed apparatus (the transmitter) comprises a communication interface, one or more processors and a memory for storing instructions which, when executed by

the one or more processors, perform the method in claim 1 when the receiver is placed within a predetermined distance.

2. Admittance of auxiliary requests 3, 1, 2 and 4 to 7

The board exercised its discretion under Article 12(4) RPBA 2007 to admit these requests, but did not consider them allowable.

3. Auxiliary requests 3, 1, 2, and 4 to 7 - claim 1 - novelty in view of E1

E1 was filed by the same applicant as the patent in question, and its content is largely identical to that of this patent. It is prior art under Article 54(3) EPC.

It is not disputed that E1 discloses (page 26, lines 1 to 27; Figure 7) establishing a communication range between a transmitter unit and a receiver unit and receiving, at the transmitter, a data packet including a close proximity command and a communication identifier ("generated key" based on identification information, page 26, lines 16 to 20).

Contrary to the patent proprietor's view, the board considers the data packet to be inherently encoded, since transforming a binary code into a temporal waveform is to be regarded as "encoding" (see Figure 6.1 of V11D). Hence, all digital data has to be encoded before it can be transmitted and it has to be decoded when it is received. Therefore, the step of decoding the received data packet is implicitly disclosed in E1.

In the board's view, the feature of validating the data

packet, including performing error detection on the data packet, is implicitly disclosed in E1 as well. From page 9, lines 1 to 7, the person skilled in the art learns that they could use a Bluetooth enabled communication protocol for the bi-directional communication between the receiver unit and the transmitter unit. Although this passage refers to the system in Figure 1, it can be derived from page 4, lines 1 to 3, that the data communication in Figure 7, which relates to the transmission of close proximity commands, uses the same system. Hence, E1 discloses that a Bluetooth communication protocol is used for the transmission mentioned on page 26.

From the "Specification of the Bluetooth System" (E20) it can be derived that a standard Bluetooth data packet includes a header (page 47; Figure 4.1), and that the header always has a header error check (HEC, page 51). On page 53, E20 discloses that error checking is performed upon receipt of a data packet and that the packet is disregarded if the HEC does not check.

The board agrees with the patent proprietor that E20 mentions that some Bluetooth data packets do not comprise a header and thus no error check (page 47, last sentence; page 48, Figure 4.2); however, these data packets consist only of the access code and do not have a payload, which is required for the transmission of a close proximity command as defined in the claim. Hence, such data packets are not used for the communication mentioned on page 26.

It follows that the subject-matter of claim 1 of auxiliary request 3 lacks novelty over E1.

The subject-matter of claim 1 of auxiliary requests 1,

2, 4 and 5 also lacks novelty, since E1 discloses placing the receiver unit physically close to the transmitter unit, as stipulated in auxiliary request 1 and auxiliary request 4, in particular no more than 30.5 cm from the transmitter unit, as required by auxiliary request 2 and auxiliary request 5 (page 26, lines 3 to 8). This was not contested by the patent proprietor.

Furthermore, E1 discloses that the transmitter can be coupled to a transcutaneous glucose sensor unit positioned on the body of a user, and transmits glucose data sampled by the sensor unit (page 23, lines 5 to 12; page 33, line 28). This was not contested by the patent proprietor. Hence, the subject-matter of claim 1 of auxiliary requests 6 and 7 also lacks novelty.

4. Admittance of auxiliary requests 9 and 11

The board exercised its discretion under Article 12(4) RPBA 2007 to admit these requests, but did not consider them allowable.

5. Auxiliary requests 9 and 11 - claim 1 - novelty in view of E1

Claim 1 of auxiliary request 9 includes the additional step of comparing the received communication identifier in the data packet with a stored value.

It is mentioned in E1 (page 26, lines 21 to 25) that the communication including the generated key (which corresponds to the communication identifier (page 26, lines 16 to 20)) allows the recipient of the data communication to recognise the sender and to confirm that it is the intended sending device. The board is

convinced that this can only be done by comparing the key with a stored value. Therefore, the claimed step is inherently disclosed in E1.

Claim 1 of auxiliary request 11 includes the additional feature that the communication identifier includes a device identification information.

It is mentioned in E1 (page 26, lines 27 to 30) that the generated key, i.e. the communication identifier, may be based on the transmitter ID or other suitable unique information. The board holds that this corresponds to a device identification information. The fact that the key is "based" on said information means that said information can be derived from the key, so that in E1 the communication identifier "includes" a device communication information.

It follows that the subject-matter of claim 1 of auxiliary requests 9 and 11 lacks novelty over E1.

6. Admittance of auxiliary request 11a

Auxiliary request 11a was filed during the oral proceedings before the board. Its admittance is therefore subject to Article 13(2) RPBA, according to which any amendment to a party's case made after the notification of a summons to oral proceedings will, in principle, not be taken into account, unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

The novelty objection in view of E1 had already been submitted in the opposition proceedings, and the opponents did not introduce a new line of argument in the oral proceedings before the board. They instead

referred to the same passage of E1 (page 26, lines 16 to 30) on which the board's preliminary opinion was also based (point 3, first paragraph of the communication dated 8 April 2022). The reference to page 10, line 17, of E1 was already made by opponent 1 in its written submissions (point 2.9.2.1 of the letter dated 18 May 2022). A mere change to the board's opinion in view of the oral discussion of an objection already known from the written procedure does not justify the filing of amended claims only at the oral proceedings before the board.

Furthermore, claim 1 of auxiliary request 11a has been amended to include a feature taken from the description of the patent ("the communication identifier is a serial number of the transmitter"). Therefore, the assessment of novelty and inventive step of the subject-matter of claim 1 would probably have required an additional search. For this reason, the amendment is detrimental to procedural economy as well.

In conclusion, the board considers that there are no exceptional circumstances as required by Article 13(2) RPBA. Auxiliary request 11a was not admitted into the appeal proceedings.

7. Admittance of auxiliary requests 8a, 8b, 10 and 12 to 30

These requests were filed in response to the intervention.

It was undisputed by the patent proprietor that, *prima facie*, none of these claim requests is suitable for overcoming the novelty objection based on E1. Hence, the board exercised its discretion under Article 12(4)



RPBA and decided not to admit these requests.

## 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:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated