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**Datasheet for the decision
of 11 January 2024**

Case Number: T 0118/20 - 3.2.02

Application Number: 08781983.5

Publication Number: 2180915

IPC: A61M39/02

Language of the proceedings: EN

Title of invention:

VENOUS ACCESS PORT ASSEMBLY WITH X-RAY DISCERNABLE INDICIA

Patent Proprietor:

Medical Components, Inc.

Opponent:

BAUER WAGNER PRIESMEYER

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 83, 84, 123(2)

EPC R. 124(1)

Keyword:

Novelty - main request and auxiliary request 5 (yes)
Inventive step - main request and auxiliary request 5 (yes)
Sufficiency of disclosure - main request and auxiliary request
5 (yes)
Claims - clarity - main request and auxiliary request 5 (yes)
Amendments - added subject-matter - main request (yes) -
auxiliary request 5 (no)
Minutes of oral proceedings - request to correct minutes

Decisions cited:

T 1891/20, T 0212/97, T 0642/97, T 0468/99, T 1721/07,
R 0007/17

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 0118/20 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 11 January 2024

Appellant: BAUER WAGNER PRIESMEYER
(Opponent) Grüner Weg 1
52070 Aachen (DE)

Respondent: Medical Components, Inc.
(Patent Proprietor) 1499 Delp Drive
Harleysville, PA 19438 (US)

Representative: Mewburn Ellis LLP
Aurora Building
Counterslip
Bristol BS1 6BX (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
2 December 2019 concerning maintenance of the
European Patent No. 2180915 in amended form.**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: S. Böttcher
C. Schmidt

Summary of Facts and Submissions

- I. The opponent filed an appeal against the opposition division's interlocutory decision to maintain the European patent No. 2 180 915 as amended according to auxiliary request 3 then on file.
- II. Oral proceedings before the Board took place on 11 January 2024.
- III. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed and that the patent be maintained as found allowable by the opposition division (main request) or on the basis of one of auxiliary requests 5, 6 to 10 and 1 to 4 to be examined in this order, all filed with the letter dated 17 March 2023.

- IV. Claim 1 of the main request reads as follows:

"A venous access port assembly (10) for implantation into a patient, the assembly having a housing (12) having a discharge port (16), a needle-penetrable septum (14) and a cap (48) securable to the housing and retaining the septum securely in the assembly, the housing having a housing base (28, 106, 132, 206, 232) defining a bottom wall (44, 104, 130, 204, 230) of at least one reservoir (22), with the housing base having an outwardly facing bottom surface (54, 104, 230), characterized in that:
the housing base (28, 106, 132, 206, 232) includes a set of discrete X-ray discernable alphabetical letters

(202) that convey information indicative of an attribute of the assembly (10) on an X-ray when the X-ray of the patient is taken after implantation so that the practitioner can be advised after implantation of the attribute of the assembly; wherein the X-ray discernible alphabetical letters are embedded within the thickness of the bottom wall (44, 104, 130, 204, 230) of the housing base (28, 106, 132, 206, 232), are centered within a region directly beneath the needle-penetrable septum (14), and are defined in a disc of radiopaque material by cutouts (102) through a body of the disc."

V. Claim 2 of the main request reads as follows.

"The assembly (10) of claim 1, wherein the cutouts (102) are alphabetical letters."

VI. Claim 3 of the main request reads as follows.

"The assembly (10) of claim 1, wherein the disc (100) is affixed to and along the outwardly facing bottom surface (104) of the housing base (106), and the disc (100) is recessed into the bottom surface (104)."

VII. Auxiliary request 5 differs from the main request in that claim 3 has been deleted and claim 4 (i.e. claim 3 of auxiliary request 5) has been amended to read as follows.

"The assembly (10) of claim 1 or 2, wherein the disc (100) is embedded with the cutouts (102) in a mirror-image orientation when the bottom surface (104) of the housing base (106) is viewed from below."

Claim 5 of auxiliary request 5 reads as follows.

"The assembly (10) of any one of the previous claims, wherein the disc (100) is embedded within the thickness of the bottom wall (130) of the housing base (132)."

VIII. The following documents are referred to in this decision.

- D1 US 60/658,518 application for provisional letters patent
- D2 WO 2006/116438 A2
- D4 US 6 287 293 B1
- D5 Exhibit 1004 - PowerPort Guidelines for CT Technologists

IX. The appellant's arguments may be summarized as follows.

Main request - claim 1 - added subject-matter

- "discrete alphabetical letters"

Alphabetical letters being voids in a radiopaque disc could not be regarded as forming a discrete set of letters since "discrete" was to be understood as implying "independent from each other" and "unrelated to each other". The letters cut out from a disc were connected to each other by way of the disc and were not arbitrarily separately placeable relative to each other.

Furthermore, only the specific disclosure of the letters "CT" could be derived from Figure 8 of the application as originally filed. Hence, including the feature "discrete" in claim 1 constituted an unallowable intermediate generalisation.

- "letters are defined by cutouts" vs. "cutouts are letters"

The feature "the alphabetical letters are (...) defined in a disc of radiopaque material by cutouts" included an unallowable intermediate generalisation since the original application documents only disclosed letters being cutouts. The wording "defined by cutouts" also encompassed embodiments in which the letters were made of material but defined by cutouts.

- "information indicative of an attribute"

The feature "information indicative of an attribute" was more general than "indicia that visually indicate" in claim 1 as originally filed. The former allowed the attribute to be derived indirectly (for example, the letters might be a model number and the practitioner might then look up the model to determine the attribute); the latter required the indicia to actually indicate the attribute directly (e.g. "CT").

Hence, claim 1 included an unallowable intermediate generalisation.

- "centered within a region directly beneath the needle-penetrable septum"

The feature "the letters are centered within a region directly beneath the needle-penetrable septum" included added subject-matter since the application as originally filed (paragraph [0022]) only disclosed centering the letters within the (entire) region directly beneath the reservoir and the septum so as to minimize any obscuring by the structure of the port assembly.

Contrary to "the region", "a region" could be any region as long as some of it was beneath the septum, and the letters could be placed elsewhere such as on a side wall of the reservoir.

Furthermore, omitting the features "beneath the reservoir" and "such that any obscuring ... is minimized" constituted an unallowable intermediate generalisation.

- combination of "embedded" and "defined by cutouts"

The combination of the features "the letters are embedded within the thickness of the body wall" and "the letters are defined by cutouts through the disc" in claim 1 had no basis in the application as originally filed.

To be embedded within the thickness of the body wall, the letters had to be made of material. At the same time, they had to be formed by cutouts in a disc. However, no such combined embodiment was disclosed in the application as filed.

For these reasons, claim 1 of the main request did not meet the requirements of Article 123(2) EPC.

Main request - claim 2 - added subject-matter

There was a contradiction between claim 1, which implicitly required that the letters were made of material (since they were embedded) and therefore absorbed X-rays, and claim 2, which required that the letters were cut out and did not absorb X-rays. Therefore, the combination of claims 1 and 2 added

subject-matter.

Main request - claim 3 - added subject-matter

Claim 3 of the main request, representing the "first embodiment" mentioned in paragraph [0022] of the description, in which the disc was recessed into the bottom surface of the housing base, was incompatible with the feature "the letters are embedded within the thickness of the body wall" in claim 1, which related to the "alternate embodiment" (paragraph [0023]). This incompatible combination was not disclosed, so it added matter.

Claims 18 and 14 as originally filed could not be regarded as a basis for claim 3 as they did not disclose the feature "recessed into the bottom surface".

The application as filed consistently referred to "embedded" and "recessed" as mutually exclusive alternatives (paragraphs [0005], [0012], [0013], [0015], [0016], [0022], [0023] and [0024]).

Claim 1 required the letters to be embedded within, i.e. inside, the thickness of the bottom wall. A partially embedded, i.e. recessed, disc would not be "within" the thickness of the bottom wall as it would have a part outside the thickness of the bottom wall. In the embodiment of Figure 10, the disc was affixed in a recess and then covered by the skirt material, i.e. the disc was not embedded.

Thus, claim 3 of the main request did not meet the requirements of Article 123(2) EPC.

Auxiliary request 5 - sufficiency of disclosure

The term "discrete" meant unrelated and independent, and unrelated and independent letters could not be defined in a disc by cutouts. Hence, the person skilled in the art did not find any teaching in the patent as to how to provide alphabetical letters in a set of discrete X-ray discernible alphabetical letters in which the very same alphabetical letters were defined in a disc of radiopaque material by cutouts through a body of the disc.

The only disclosure of how to embed the disc or letters was by insert moulding (paragraphs [0005] and [0013]), in which the molten material would obviously enter the cutouts shaped as letters. The letters would therefore be made of the bottom wall material. As the voids would be filled with the bottom wall material, it would be impossible for the cut-out letters to be "embedded" (only a physical object, i.e. the disc, could be embedded).

Furthermore, since discrete letters were unclaimed in paragraph [0018] of the amended description filed on 1 October 2019, the person skilled in the art was unable to identify teaching with respect to "discrete" letters for putting the invention into practice, as "discrete letters" could only be identified in connection with disclosure expressly not relating to the invention.

Claim 5 of auxiliary request 5 required both the disc and the letters to be embedded. This was insufficiently disclosed.

Auxiliary request 5 - Article 84 EPC

Claim 1 was not supported by the amended description filed on 1 October 2019 since paragraph [0018] referred to discrete letters as an "unclaimed example".

Auxiliary request 5 - novelty in view of D1

Document D1 disclosed a venous access port with a housing 20, a discharge port 31, a needle-penetrable septum 18 and a cap 14 forming a reservoir 36 (Fig. 1B, paragraph [0038]). It also disclosed in Annex A that the port "may incorporate a metal disc in the bottom of the plastic port", where the disc could have "an alphanumeric message etched on the port disc, that would be visible on radiograph (X-ray)" under the headline "How to determine port type".

The person skilled in the art would inevitably have inferred that the alphanumeric message etched in the disc included the letters "CT" as paragraph [0034] explicitly disclosed the letters "CT", indicating the suitability of the port for power injection during computed tomography. Therefore, D1 disclosed a set of alphabetical letters as required by claim 1.

A disc "incorporated in" the bottom might be a disc at least partially embedded in the bottom. Hence, the metal disc of the port in D1 fell under the subject-matter of the claim.

Since "a" region had to be interpreted to mean any part of the entire region beneath the septum, the alphanumeric message of D1 was inevitably centered within a region beneath the septum.

Etching encompassed embodiments in which material was

entirely etched away, resulting in through-holes in a disc, such as cutouts. Hence, D1 disclosed that the message was defined by cutouts through a disc.

Therefore, the subject-matter of claim 1 lacked novelty in view of D1.

Auxiliary request 5 - inventive step starting from D1

The distinguishing features "alphabetical letters", "embedded within the thickness of the bottom wall", "centered within a region directly beneath the septum" and "defined by cutouts through the body of the disc" did not have a synergistic effect. Furthermore, it was obvious from the common general knowledge to include the features "alphabetical letters", "embedded within the thickness of the bottom wall" and "defined by cutouts through the body of the disc" in the access port of D1. In view of D2 (Figure 35) or D4 (Figure 1), it was obvious to include the feature "centered within a region directly beneath the septum" in order to minimize obscuring by the structure of the port.

Thus, the subject-matter of claim 1 lacked an inventive step when starting from D1 and considering the common general knowledge and D2 or D4.

Auxiliary request 5 - inventive step starting from D5

None of the features "embedded within the thickness of the bottom wall", "centered within a region directly beneath the septum" and "defined by cutouts through the body of the disc" could be regarded as a distinguishing feature of claim 1 in view of D5.

Even if they were regarded as distinguishing features,

none of them rendered the subject-matter of claim 1 patentable. Providing the alphabetical letters within the thickness of the bottom was an obvious choice for the person skilled in the art. On the basis of D2 or D4, centering the letters within a region directly beneath the septum was obvious for the person skilled in the art. Defining the letters by cutouts through the body of the disc was an obvious alternative since there was no technical advantage of using a disc as a starting point.

Thus, the subject-matter of claim 1 lacked an inventive step when starting from D5.

Auxiliary request 5 - claims 3 and 5 - added subject-matter

The original application documents did not disclose an embedded disc with the cutouts in a mirror-image orientation when viewed from below. Hence, claim 3 of auxiliary request 5 did not meet the requirements of Article 123(2) EPC.

Claim 5 required both the disc and the letters to be embedded. Furthermore, claim 5 was dependent on claim 3, which required the cutouts of the disc to be visible from below. The application as filed did not provide any basis for a combination of such mutually exclusive embodiments.

Adaptation of the description

The access port of Figure 10 did not fall under the scope of the amended claims according to auxiliary request 5. For the sake of clarity, it should therefore expressly be referred to in the description as an

"unclaimed example".

Request to amend the minutes

The fourth complete paragraph of sheet 3 of the minutes of the oral proceedings, which reads "With reference to the description, the appellant requested that it should be adapted so that Figure 10 did not represent an embodiment of the patent", should be deleted and replaced with the following: "With reference to the description, the appellant requested that it should be amended so that Figure 10 was explicitly referred to as an unclaimed example".

Furthermore, an additional paragraph should be added, which should read "The respondent (patent proprietor) stated that the amendment was not necessary because Figure 10 was not described as an embodiment".

The minutes were to be corrected since the opponent's submission regarding the adapted description was incorrectly reflected in the current version of the minutes, and the respondent's counter-submissions had been omitted.

- X. The respondent's arguments may be summarized as follows.

Main request - claim 1 - added subject-matter

- "discrete alphabetical letters"

The meaning of the term discrete was distinct, individual and separate. Hence, the letters in the disc of Figure 8 of the application as filed were discrete. The feature "discrete alphabetical letters" in

connection with the cutout disc was therefore implicitly disclosed in Figures 8 to 12 and paragraph [0022] of the application as filed.

- "letters are defined by cutouts" vs. "cutouts are letters"

A combination of claims 11 and 12 as originally filed could be regarded as a basis for the feature "letters are defined by cutouts". Furthermore, paragraphs [0004], [0005], [0011] and [0014] of the application as originally filed disclosed that the indicia were alphabetical letters.

- "information indicative of an attribute"

The feature "X-ray discernible alphabetical letters that convey information indicative of an attribute of the assembly" could be derived from paragraph [0004] of the description as originally filed without any reference to "visually".

- "centered within a region directly beneath the needle-penetrable septum"

The appellant's interpretation as to the location of the region was technically illogical. In accordance with the literal meaning of the wording and the disclosure of the application as filed, such as Figures 8 to 12, it was clear that this feature required the alphabetical letters to be centered beneath the septum.

Furthermore, as the alphabetical letters were centered in a region beneath the septum and the alphabetical letters were embedded within the bottom wall of the reservoir, it followed that the alphabetical letters

would also be centered in a region beneath the reservoir. Hence, omitting the feature "beneath the reservoir" did not constitute an unallowable intermediate generalisation.

- combination of "alphabetical letters embedded" and "defined by cutouts"

The combination of the features "the letters are embedded within the thickness of the body wall" and "the letters are defined by cutouts through the disc" could be derived from claim 11 as originally filed in combination with paragraph [0023].

As the alphabetical letters were defined in the disc, and as the disc was embedded within the thickness of the bottom wall, the letters were embedded within the thickness.

Therefore, claim 1 of the main request did not include added subject-matter.

Main request - claim 2 - added subject-matter

There was no contradiction between claims 1 and 2 since claim 1 did not require the letters to absorb X-rays.

Main request - claim 3 - added subject-matter

There was an explicit basis for the combination of features of a disc being affixed to and embedded within the thickness of the housing base in original claim 18, which referred back to original claim 14.

The phrase "embedding within the thickness" did not require the alphabetical letters or disc to be

surrounded on all sides by the bottom wall of the housing. "Embedding within the thickness" also encompassed embedding by being affixed within a recess, as shown in Figure 10 of the application as filed. In this regard, Figure 10 provided a basis for the disc being both embedded within the thickness of the bottom wall and recessed into the bottom surface.

Auxiliary request 5 - sufficiency of disclosure

The meaning of the word "discrete" was distinct, individual and separate, and Figure 8 and the corresponding part of the description in paragraph [0016] of the patent clearly disclosed how a set of discrete X-ray discernible alphabetical letters could be defined in a disc by cutouts through a body of the disc. The skilled person would therefore be able to carry out the invention as defined in claim 1.

Furthermore, Figures 8 to 12 of the patent taught how to provide discrete letters.

Hence, the invention was sufficiently disclosed to be carried out by the person skilled in the art.

Auxiliary request 5 - Article 84 EPC

Claim 1 was supported by paragraph [0007] and Figures 8 to 12 of the patent. The requirements of Article 84 EPC were therefore met.

Auxiliary request 5 - novelty in view of D1

In D1, there was no direct and unambiguous disclosure that there were a plurality of characters, that the characters were alphabetical letters or that the

characters were discrete characters.

There was no direct and unambiguous disclosure of the alphanumeric message being embedded within the thickness of the bottom wall of the housing base. D1 did not disclose where the disc was positioned in the bottom of the port, or where the alphanumeric message on the disc was positioned. As such, there was no direct and unambiguous disclosure in D1 of alphabetical letters being centered within a region directly beneath the needle-penetrable septum.

There was no direct and unambiguous disclosure in D1 that the etched message had to extend all the way through the disc in order to form cutouts through the body of the disc.

Therefore, the subject-matter of claim 1 was novel in view of D1.

Auxiliary request 5 - inventive step starting from D1

There was a synergistic effect between the features "alphabetical letters", "embedded within the thickness of the bottom wall", "centered within a region directly beneath the septum" and "defined by cutouts through the body of the disc" in claim 1 since all these features helped to ensure that the characters on an access port were discernible on an X-ray.

The subject-matter of claim 1 involved an inventive step since it was not obvious for the person skilled in the art to embed the disc within the thickness of the bottom wall, to provide cutouts through the body of the disc and to center the letters beneath the septum.

Auxiliary request 5 - inventive step starting from D5

The features "embedded within the thickness of the bottom wall", "centered within a region directly beneath the septum" and "defined by cutouts through the body of the disc" were not disclosed in D5, and the subject-matter of claim 1 involved an inventive step.

Auxiliary request 5 - claims 3 and 5 - added subject-matter

Paragraph [0023] of the application as originally filed disclosed that, in Figure 12, the disc was embedded within the thickness of the bottom wall and that the X-ray would appear very similar to that shown in Figure 11, i.e. in a mirror-image orientation.

Hence, claims 3 and 5 of auxiliary request 5 did not include added subject-matter.

Adaptation of the description

The access port of Figure 10 was not referred to as an embodiment of the invention in the description. Thus, it was not necessary to amend the description.

Request to amend the minutes

The requested corrections were unnecessary. The opponent's reasons for the corrections were not agreed with.

Reasons for the Decision

1. Subject-matter of the patent

The patent relates to a venous access port assembly for implantation into a patient. Such ports are typically used for drug infusion or for withdrawal of small amounts of blood.

The ports (as shown in Figures 1 to 7 of the patent) are assemblies of a needle-impenetrable housing with a discharge port (16) in fluid communication with an implanted catheter and a reservoir (22) within the port housing. They provide a subcutaneous self-sealing septum (14) that defines an access site for multiple needle sticks through the covering skin tissue of the patient, through the septum and into the reservoir, without the need to continuously search for new access sites.

According to claim 1, the housing base (28, 132) of the port has a set of discrete X-ray discernible alphabetical letters that convey information indicative of an attribute of the assembly. The alphabetical letters are embedded within the thickness of the bottom wall of the housing base, are centered within a region directly beneath the needle-penetrable septum and are defined in a disc of radiopaque material by cutouts through the body of the disc (Figure 8).

2. Main request - claim 1 - added subject-matter

2.1 "discrete alphabetical letters"

The appellant argues that the application as originally filed did not disclose a set of discrete alphabetical letters that were defined by cutouts through a body of a disc.

The meaning of the term discrete is distinct, individual and separate, as also established by the opposition division. Hence, the letters in the disc of Figure 8 of the application as filed are discrete. The Board does not share the appellant's view that discrete letters have to be unrelated to each other so that they can be freely positioned relative to each other.

The Board considers that Figures 8 to 12 and paragraph [0022] of the application as filed provide a basis for the combination of the features "a set of discrete X-ray discernible alphabetical letters" and "the letters are defined in a disc of radiopaque material by cutouts through the body of the disc".

Moreover, the Board does not see any inextricable link between the letters being discrete and being disclosed as "CT" in Figure 8, nor has the appellant pointed to any such link. Furthermore, paragraph [0011] of the application as filed mentions letters without reference to the specific letters "CT". Hence, omitting "CT" does not constitute an unallowable intermediate generalisation.

2.2 "letters are defined by cutouts" vs. "cutouts are letters"

A combination of claims 11 and 12 as originally filed provides a basis for the feature "the alphabetical letters are (...) defined in a disc of radiopaque material by cutouts". Claim 11 specifies that the indicia are defined by cutouts through the body of the disc. Alphabetical letters as specific indicia are disclosed not only in claim 12, but also in several other passages (e.g. claim 5 or paragraph [0004])

without requiring said letters to be the cutouts.

Hence, the feature "the alphabetical letters are (...) defined in a disc of radiopaque material by cutouts" does not include an unallowable intermediate generalisation.

2.3 "information indicative of an attribute"

In agreement with the respondent, the Board considers that the feature "X-ray discernible alphabetical letters that convey information indicative of an attribute of the assembly" can be derived from paragraph [0004] of the description as originally filed without any reference to "visually".

Furthermore, information conveyed by X-ray discernible indicia is inherently visual information. In this regard, it is irrelevant whether an attribute can be derived directly or indirectly.

Hence, omitting the term "visually" does not constitute an unallowable intermediate generalisation.

2.4 "centered within a region directly beneath the needle-penetrable septum"

The Board agrees with the respondent that the appellant's interpretation of "a region" as regards the location of the region is technically illogical. In accordance with the literal meaning of the wording and the disclosure, such as Figures 8 to 12, this feature requires the alphabetical letters to be centered beneath the septum.

Furthermore, as the alphabetical letters are centered

in a region beneath the septum and the alphabetical letters are embedded within the bottom wall of the reservoir, it follows that the alphabetical letters would also be centered in a region beneath the reservoir. Hence, omitting the feature "beneath the reservoir" does not constitute an unallowable intermediate generalisation.

The technical effect of having the indicia centered within a region directly beneath the septum is that of helping to minimize any obscuring by the structure of the venous access port assembly. Hence, the features providing this effect have not been omitted in claim 1.

Although paragraph [0022] refers to Figure 11, the technical effect of centering the disc below the septum is independent of the way in which the disc is embedded or affixed. Furthermore, all the figures show the letters centered within a region directly beneath the septum.

2.5 Combination of "embedded" and "defined by cutouts"

The Board agrees with the respondent that the combination of the features "the letters are embedded within the thickness of the body wall" and "the letters are defined by cutouts through the disc" can be derived from claim 11 as originally filed in combination with paragraph [0023].

Contrary to the appellant's assertion, the Board considers that letters formed by cutouts in a disc can be embedded; it is not necessary for embedded letters to be made of material.

2.6 It follows from the above that claim 1 of the main request meets the requirements of Article 123(2) EPC.

3. Main request - claim 2 - added subject-matter

3.1 The appellant argued that there was a contradiction between claim 1, which allegedly required that the letters absorbed X-rays, and claim 2, which required that the letters did not absorb X-rays, and that therefore the combination of claims 1 and 2 added subject-matter.

3.2 The Board agrees with the respondent that there is no contradiction between claims 1 and 2 since claim 1 does not require the letters themselves to absorb X-rays. Claim 1 specifies rather that the letters are discernible on an X-ray image as they are defined by cutouts in a disc of radiopaque material.

As mentioned in point 2.5 above, embedded letters do not have to be made of material.

3.3 Thus, claim 2 of the main request and auxiliary request 5 meets the requirements of Article 123(2) EPC.

4. Main request - claim 3 - added subject-matter

4.1 According to claim 3 of the main request, the disc is affixed to and along the outwardly bottom surface of the housing base and recessed into the bottom surface. According to claim 1, the letters, which are defined by cutouts through the body of the disc, have to be embedded within the thickness of the bottom wall of the housing base.

- 4.2 The Board holds that the application as originally filed refers to these features as belonging to different, mutually exclusive embodiments.

In the embodiment of Figures 9 and 10, described in paragraph [0022], the disc is affixed within a shallow recess in the bottom surface of the housing base and covered by the silicone material of the skirt. Contrary to the proprietor's view, in the arrangement of Figure 10 the disc cannot be regarded as embedded within the thickness of the housing base as it is not completely surrounded on all sides by the bottom wall.

In the embodiment of Figure 12, described in paragraph [0023], the disc is completely embedded within the bottom wall of the housing base, as required by claim 1. However, in this arrangement the disc is not recessed into the bottom surface.

- 4.3 The proprietor argues that original claim 18, which refers back to claim 14, provided support for claim 3.

However, the combination of claims 14 and 18 as originally filed does not provide a basis for the feature "the disc is recessed into the bottom surface". This feature was only included in claim 15 as originally filed.

Hence, claims 14 and 18 as originally filed cannot provide a basis for the combination of features in claim 3.

- 4.4 In conclusion, an embodiment according to claim 3 in which the disc is embedded within the thickness of the bottom wall and recessed into the bottom surface cannot be derived from the original application documents.

Consequently, claim 3 of the main request does not meet the requirements of Article 123(2) EPC. It follows that the main request is not allowable.

5. Auxiliary request 5

After the re-ordering of the requests at the oral proceedings, auxiliary request 5 is the highest-ranking auxiliary request. Hence, the objection to its admittance raised under point F.1 of the appellant's letter of 6 December 2022, which was based on the former ranking of the auxiliary requests, is no longer applicable. The objection under Rule 80 EPC under point A.1 of the same letter is not applicable either since it related to claim 3 of the main request, which is not present in auxiliary request 5. Moreover, claim 1 of auxiliary request 5 complies with the requirements of Article 123(2) EPC for the reasons explained above in connection with claims 1 and 2 of the main request.

6. Auxiliary request 5 - sufficiency of disclosure

6.1 The appellant's objection against claim 1 is based on the assumption that "discrete" means unrelated and independent, and that unrelated and independent letters could not be defined in a disc by cutouts.

However, the Board agrees with the respondent that the meaning of the word "discrete" is distinct, individual and separate, and that Figure 8 and the corresponding part of the description in paragraph [0016] of the patent clearly disclose how a set of discrete X-ray discernible alphabetical letters can be defined in a disc by cutouts through a body of the disc.

6.2 The appellant further argued that since discrete letters were unclaimed in paragraph [0018] of the description filed on 1 October 2019, the person skilled in the art was unable to identify teaching with respect to "discrete" letters in order to put the invention into practice, as "discrete letters" could only be identified in connection with disclosure expressly not relating to the invention.

As mentioned above, Figure 8, which relates to an embodiment of the invention, and the corresponding part of the description in paragraph [0016] of the patent clearly disclose how a set of discrete X-ray discernible alphabetical letters can be defined in a disc by cutouts through a body of the disc.

Paragraph [0018] of the amended description relates to the embodiment of Figures 13 to 18. In this embodiment, which does not fall under the scope of the claims of the patent, the letters are made from a radiopaque material rather than being cut out from a disc. Moreover, as explained above, the description discloses embodiments of the invention with discrete letters.

6.3 Paragraphs [0016] and [0017] of the patent disclose how a set of discrete X-ray discernible alphabetical letters can be defined in a disc by cutouts through a body of the disc and how the disc with the cutouts can be embedded. The subject-matter of claim 5 of auxiliary request 5 is therefore sufficiently disclosed.

6.4 The skilled person would therefore be able to carry out the invention as defined in the claims of auxiliary request 5. The requirements of Article 83 EPC are met.

7. Auxiliary request 5 - Article 84 EPC

According to the appellant, claim 1 was not supported by the amended description filed on 1 October 2019 since paragraph [0018] referred to discrete letters as an "unclaimed example".

The Board shares the respondent's view that claim 1 was supported by paragraph [0007] and Figures 8 to 12, which show embodiments according to the invention.

Paragraph [0018] of the amended description relates to the embodiment of Figures 13 to 18. In this embodiment, which does not fall under the scope of the claims of the patent, the letters are made from a radiopaque material rather than being cut out from a disc.

Claim 1 of auxiliary request 5 is therefore supported by the description, and the requirements of Article 84 EPC are met.

8. Auxiliary request 5 - novelty in view of D1

8.1 D1 is a US provisional application, the benefit of which was claimed by US patent application US 2006/224129, so D1 was made public at the latest on the publication date of said US application, namely 5 October 2006. D1 discloses a venous access port with a housing 20, a discharge port 31, a needle-penetrable septum 18 and a cap 14 forming a reservoir 36 (Figure 1B, paragraph [0038]). In Annex A under the headline "How to determine port type", it also discloses that the port "may incorporate a metal disc in the bottom of the plastic port", where the disc could have "an alphanumeric message etched on the port disc, that

would be visible on radiograph (X-ray)".

- 8.2 The Board agrees with the opposition division and the respondent that D1 does not disclose the following features.

Feature 5: a set of alphabetical letters

There is no direct and unambiguous disclosure in D1 that the alphanumeric message comprises a set of discrete alphabetical letters. The reference to the letters "CT" in paragraph [0034] relates not to the alphanumeric message but to the process (computer tomography) in which the port could be used.

Feature 7: the letters are embedded within the thickness of the bottom wall

There is no direct and unambiguous disclosure of the alphanumeric message being embedded within the thickness of the bottom wall of the housing base. A disc could be incorporated in the bottom of the plastic port without necessarily being embedded in the thickness of its bottom wall.

Feature 8: the set of letters is centered within a region beneath the septum

As explained above, this feature requires that the letters are centered beneath the septum. There is no disclosure in D1 of where the disc is positioned in the bottom of the port, or of where the alphanumeric message on the disc is positioned. Thus, there is no direct and unambiguous disclosure in D1 of alphabetical letters being centered within a region directly beneath the needle-penetrable septum.

Feature 9: the letters are defined by cutouts through the body of the disc

There is no direct and unambiguous disclosure in D1 that the etched message must extend all the way through the disc in order to form cutouts through the body of the disc.

Hence, the subject-matter of claim 1 is novel in view of D1.

9. Auxiliary request 5 - inventive step starting from D1

9.1 The Board agrees with the respondent that there is a synergistic effect between features 7, 8 and 9 of claim 1 (as referred to in point 7 above) since all these features help to ensure that the characters on an access port are more easily discernible on an X-ray.

9.2 D2 discloses that an alphabetical letter should be positioned in the septum (paragraph [0110], Figure 35). Hence, D2 teaches away from embedding alphabetical letters within the thickness of the bottom wall of the housing base.

D4 discloses that a radiopaque ring may be positioned at the bottom wall of the housing base (Figure 1 and claims 1, 7 and 8). However, D4 does not prompt the person skilled in the art to provide a set of alphabetical letters as cutouts through the body of the disc of D1.

9.3 Thus, the Board considers that it was not obvious for the person skilled in the art to embed the disc of D1 within the thickness of the bottom wall, to provide

cutouts through the body of the disc and to center the letters beneath the septum. Hence, the subject-matter of claim 1 involves an inventive step in view of D1.

10. Auxiliary request 5 - inventive step starting from D5

D5 is a brochure of a triangular power port. In its left-hand column it discloses two rows of CT images. In the lower row, a triangle with the letters C and T below the triangle can be seen.

The Board agrees with the respondent that features 7, 8 and 9 (as referred to in point 7 above) are not disclosed in D5. The letters C and T could be incorporated in the bottom of the port without necessarily being embedded in the thickness of its bottom wall as required by feature 7. The letters C and T are not centered beneath the septum as required by feature 8. D5 does not imply that the alphabetical letters have been formed, starting from a disc of radiopaque material, by cutouts through the body of the disc as required by feature 9.

Furthermore, the person skilled in the art would not find any teaching in D2 or D4 that would lead them to modify the access port of D5 to include these features.

As mentioned above, D2 teaches away from embedding alphabetical letters within the thickness of the bottom wall of the housing base.

D4 discloses that a radiopaque ring may be positioned at the bottom wall of the housing base. However, D4 does not prompt the person skilled in the art to provide a set of alphabetical letters as cutouts through the body of a disc.

Hence, the subject-matter of claim 1 involves an inventive step when starting from D5 since it was not obvious for the person skilled in the art to embed a disc within the thickness of the bottom wall, to provide cutouts through the body of the disc and to center the letters beneath the septum.

11. Auxiliary request 5 - claims 3 and 5 - added subject-matter

11.1 According to claim 3 of auxiliary request 5, the disc is embedded with the cutouts in a mirror-image orientation when the bottom surface of the housing base is viewed from below. According to claim 5, the disc is embedded within the thickness of the bottom wall of the housing base.

11.2 The Board does not share the appellant's view that these combinations of features are not disclosed in the original application documents.

The Board refers rather to paragraph [0023] of the application as originally filed, which states that in the embodiment in which the disc is embedded within the thickness of the bottom wall, "the X-ray would appear very similar to that shown in Figure 11". As explained in paragraph [0022], Figure 11 shows the cutouts in a mirror-image orientation when viewed from below. Hence, the combination of features of claims 3 and 5 can be derived directly and unambiguously from the description of the application as originally filed.

11.3 Claims 3 and 5 of auxiliary request 5 therefore meet the requirements of Article 123(2) EPC.

12. Adaptation of the description

According to the appellant, the description should be amended to refer to the access port of Figure 10 as an "unclaimed example".

The Board notes that, as pointed out by the respondent, the embodiment of Figure 10 is not referred to as an embodiment of the invention in the description. Therefore, it is not necessary to amend the description.

13. None of the objections put forward by the opponent prejudices the maintenance of the patent on the basis of auxiliary request 5.

14. Amendment of the minutes of the oral proceedings

14.1 By its submission dated 25 January 2024, the appellant requested a correction of the minutes as indicated in point IX. above. The request concerned an allegedly incorrect reproduction of the opponent's submissions regarding the adapted description in the current version of the minutes and the omission of the respondent's counter-submissions in this regard.

14.2 The appellant also requested oral proceedings to be held if the Board was inclined not to correct the minutes accordingly. The Board has issued a summons for such oral proceedings. However, the present decision could be issued before those oral proceedings.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in the following version:
 - claims 1 to 5 filed as auxiliary request 5 with the letter dated 13 March 2023
 - description: pages 2 to 4 filed as "AMENDED DESCRIPTION AR 5 - AR 10" with the letter dated 17 March 2023
 - drawings of the patent specification

The Registrar:

The Chairman:



A. Chavinier-Tomsic

M. Alvazzi Delfrate

Decision electronically authenticated