

**Internal distribution code:**

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

**Datasheet for the decision  
of 19 December 2023**

**Case Number:** T 1920/20 - 3.4.02

**Application Number:** 15714033.6

**Publication Number:** 3123457

**IPC:** G08B21/22, G07C3/00, G06Q10/06

**Language of the proceedings:** EN

**Title of invention:**

System for Tracking the Location and Activities of Persons

**Applicant:**

ACTIFINE NV

**Relevant legal provisions:**

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

**Keyword:**

Amendments - extension beyond the content of the application  
as filed (yes)  
Amendment after summons - exceptional circumstances (no) -  
amendment overcomes issues raised (no)  
Reimbursement of appeal fee - substantial procedural violation  
(no)

**Decisions cited:**

T 0790/20, T 2426/19, T 2465/19



**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 1920/20 - 3.4.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.02**  
**of 19 December 2023**

**Appellant:** ACTIFINE NV  
(Applicant) C-Mine 12  
3600 Genk (BE)

**Representative:** V.O.  
P.O. Box 87930  
Carnegieplein 5  
2508 DH Den Haag (NL)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 12 June 2020  
refusing European patent application No.  
15714033.6 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** R. Bekkering  
**Members:** F. Giesen  
G. Decker

## **Summary of Facts and Submissions**

- I. The present appeal by the applicant (appellant) lies from the decision of the examining division dated 12 June 2020 to refuse European patent application No. 15 714 033.6, published as WO 2015/145326 A1.

The reasons for the decision were that the subject-matter of claim 1 of the sole request was considered to lack novelty and furthermore not to involve an inventive step.

- II. In a communication pursuant to Article 15(1) RPBA 2020 dated 24 July 2023, the board informed the appellant of its preliminary opinion, according to which the board was not minded to order the requested reimbursement of the appeal fee, and that claim 1 appeared to have been amended so as to contain subject-matter extending beyond the content of the application documents as originally filed.

- III. Oral proceedings before the board took place on 19 December 2023.

The appellant requests

as a main request that the decision under appeal be set aside and that a patent be granted on the basis of the claims filed with the statement of grounds of appeal, or alternatively,

on the basis of the claims according to the first auxiliary request filed with the letter dated 18 December 2023, or according to the second

auxiliary request filed during the oral proceedings on 19 December 2023.

As a further auxiliary measure, it requested that the case be remitted to the examining division for further prosecution, if the board were to set aside the decision under appeal while considering that the application does not meet all conditions of the EPC.

It further requested that the appeal fee be reimbursed because of a substantial procedural violation.

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

*"A system for managing and tracking activities and tasks of one or more persons, wherein each person wears an anklet, bracelet or wristlet comprising a sensor for determining the position of that person, characterized by:*

- (a) one or more tools associated with each person, wherein these one or more tools each comprises one or more sensors,*
- (b) the one or more sensors being arranged to register the relative position of each tool with respect to the person with the anklet or bracelet and motion data of each tool, such that movements of the tool relative to the person to which the tool has been associated are determined and activity data of each person are registered,*
- (c) a central server for storing, tracking and managing of the position of each person in combination with the activity data of this person."*

Claim 11 of the main request is a corresponding method claim.

- V. In claim 1 of the first auxiliary request (filed as "auxiliary set of CLAIMS") feature (b) of claim 1 according to the main request was amended as follows:

*"the one or more sensors being arranged to register the relative position of each tool with respect to the person with the anklet or bracelet and motion data of each tool, such that relative positions ~~movements~~ of the tool relative to the person to which the tool has been associated are determined and activity data, including the relative position of the tool with respect to the person with the anklet or bracelet and motion data of the tools, of each person are registered"*

Strike through indicates deletions of and underlining indicates addition of features. The remaining features were not amended.

- VI. In claim 1 of the second auxiliary request (filed as "Second auxiliary set of CLAIMS") feature (a) of claim 1 of the first auxiliary request was further amended as follows:

*"one or more tools associated with and used by each person, wherein these one or more tools each comprises one or more sensors"*

## **Reasons for the Decision**

### 1. *Admissibility of the appeal*

The appeal meets the requirements of Articles 106 to 108 EPC as well as those of Rule 99 EPC. It is therefore admissible.

### 2. *Reimbursement of the appeal fee*

2.1 The appellant requested that the appeal fee be reimbursed under Rule 103(1) (a) EPC because the examining division had committed a substantial procedural violation. The appellant submitted that the examining division had sent a communication on 20 May 2020, i.e. only nine days before the date of the oral proceedings, in which it had not given the appellant a period of at least two months to react to the objections newly raised in this communication. This was contrary to Article 94(3) and Rules 71(1), 132(2) EPC. Since a period of nine days was too short to adequately reply to this communication, the examining division had at the same time violated the appellant's right to be heard under Article 113(1) EPC.

2.2 The board does not order reimbursement of the appeal fee since the alleged procedural violation would in any case not be substantial within the meaning of Rule 103(1) (a) EPC.

2.3 The majority of the grounds for refusal of the application were notified to the appellant in the annex to the summons to oral proceedings before the examining

division dated 13 December 2019. The examining division informed the appellant in a further brief communication dated 20 May 2020 of objections of lack of clarity and provided a further comment on inventive step.

The two aforementioned objections are not the only grounds for refusal of the application. If these objections and comments had not been included in the decision, the outcome would still have been the refusal of the application, e.g. for lack of novelty over D1. Since there is no causal link between the grounds on which the appellant considers not to have had a chance to comment and the outcome of the decision under appeal, any procedural violation hypothetically associated with it at least could not be considered to be substantial, and hence it would not justify the reimbursement of the appeal fee under Rule 103(1)(a) EPC (see Case Law of the Boards of Appeal of the European Patent Office, 10th ed., 2022, V.A.11.6.2).

- 2.4 The board wishes to add that it does not consider a brief communication, such as the communication of 20 May 2020, to be a communication within the meaning of Article 94(3) EPC, but a service to the applicant for informal communication at short notice. In particular, such a communication does not set a time limit or require a reply. Therefore, the examining division did not have to respect the time limit requirements under Rule 71(1) EPC and Rule 132(2) EPC for the brief communication.

### 3. *Main Request - Amendments*

- 3.1 Claim 1 of the main request has been amended so as to contain subject-matter going beyond the content of the



application documents as originally filed, which is in contravention of Article 123(2) EPC.

3.2 The feature

*"the one or more sensors being arranged to register the relative position of each tool with respect to the person with the anklet or bracelet and motion data of each tool, such that movements of the tool relative to the person to which the tool has been associated are determined and activity data of each person are registered"*

expresses that the "relative position sensors" register the relative position with respect to the person, and from this registered relative position, the relative movement of the tool with respect to the person is determined ("such that movements [...] are determined").

3.3 There is no basis for this amended feature in the application as originally filed. References in the following are to the WO publication.

To paraphrase the objection, the original application only contains a disclosure of detecting the relative position of the tool and the person as well as detection of the movement of the tool. However, there is no disclosure of detecting relative movement between the tool and the person.

The passage on page 3, lines 4 to 8, discloses that the location of a tool, the relative position of a tool with regard to the anklet and specific movements of the tool can be registered. However, this passage does not disclose that movements of the tool relative to the

person are detected. Rather, it discloses that registration of the relative position, and the registration of movements (but not necessarily relative to the person) are detected separately.

The passage on page 3, lines 12 to 15, merely discloses that movement - not movement relative to a person - can be the basis for activity recognition.

The passage on page 3, line 25 to page 4, line 1 also discloses detecting movement, however not movement relative to the prisoner. The detection of the relative position of the tool with respect to the prisoner is different from the detection of movement, see in particular page 4, line 1.

Furthermore, according to page 4, lines 19 to 31, the anklet and the tool have senders and receivers to communicate. The detection of the relative position of the tool and the prisoner and the movements of the tool are disclosed to be separate from one another. There is no disclosure that the registered movement is movement relative to the person.

According to page 4, lines 27 to 29, the tools have one or more motion sensors, acceleration sensors and weight sensors. Clearly, none of these sensors can be considered relative position sensors. Rather, this passage discloses that there are dedicated sensors for movement of the tool in addition to relative position sensors. This is not reconcilable with amended claim 1, which expresses that the relative position sensors detect the movement of the tool.

Lastly, the passage on page 6, lines 3 to 5, concerns the specific situation of insufficient GPS reception,

and discloses that activity data, such as the relative position of the tool with respect to the anklet and motion data of the tool, can be determined in such environments and can be temporarily stored. Again, it does not follow from this disclosure that movement of the tool relative to the person is detected. Rather, this passage consistently suggests that the determination of the relative position of tool and prisoner and the determination of movement be separate. It also does not follow that movement relative to the person is registered.

Original dependent claims 2 and 7 are consistent with this view.

The original application documents teach that the movement of a tool is used as the basis for some pattern recognition in order to deduce a certain activity, such as painting, sweeping etc. It is plausible to the board that the relative movement of a tool and a person are irrelevant for this purpose. At most, the relative position is used for determining whether a tool is associated to a given person. The board does not see any disclosure concerning the purpose in determining the relative movement. Therefore, the above analysis of the content of the application documents as originally filed is also consistent with a reasonable technical understanding of the invention.

- 3.4 The same applies to independent method claim 11 of the main request.
- 3.5 The arguments of the appellant did not persuade the board. According to the appellant feature (b) of claim 1 of the main request should be read to refer to

relative positions that have been registered. The series of relative registered positions could be considered to be movement. This was originally disclosed in the passage on page 3, lines 4 to 8.

The passage referred to reads as follows:

*"[a] further advantage is that, when a prisoner with an anklet has to execute a task using tools and/or equipment, the location of these tool(s) and/or equipment, the relative position of these tool(s) and/or equipment with regard to the anklet and specific movements of these tool(s) and/or equipment can be registered in combination with data of the anklet, such as the position of the prisoner".*

This passage cannot be understood as equating but, rather, as making a clear distinction between relative positions and movement due to the conjunction "and". Furthermore, the appellant's interpretation is not reconcilable with the other passages listed in point 3.3 above, which clearly express that the sensors for detecting relative position are different from the sensors for detecting motion.

4. *First auxiliary request - admittance*

4.1 The board did not take the first auxiliary request into account under Article 13(2) and (1) RPBA 2020.

4.2 The appellant argued that the first auxiliary request should be admitted into the proceedings because the board had raised new objections in its communication under Article 15(1) RPBA 2020. The appellant relied on decisions with an allegedly similar underlying case,

namely T 0790/20, T 2426/19 and T 2465/19, in which amendments were admitted after the respective boards had raised new objections in the communication accompanying the summons.

- 4.3 The board notes that the first auxiliary request was filed on the evening of 18 December 2023, that is one day before the oral proceedings, and it was received by the board only on the day of the oral proceedings. The objections raised in the communication pursuant to Article 15(1) RPBA 2020 dated 24 July 2023 annexed to the summons to the oral proceedings concerned added subject-matter and clarity. The appellant did not explain why a reaction to these objections could not have been filed earlier. The board is of the opinion that a party, in providing its "cogent reasons", should not only identify the circumstances invoked and explain why they are to be regarded as "exceptional", it should also explain why these circumstances had the direct result of preventing the party from filing its requests at an earlier stage. The reasons put forward by the appellant in the present case failed to do so.

Moreover, this case differs from the cases underlying the cited decisions where the amendments were filed in good time in advance of the oral proceedings, one month in the case of T 0790/20, almost two months in the case of T 2426/19 and almost three months in the case of T 2465/19, so that the respective boards had sufficient time to familiarise themselves with the amendments and consequently cancel the oral proceedings. Furthermore, in T 2426/19 and T 2465/19, the respective boards had expressly invited the appellant to file amendments, which is not the case in the present appeal proceedings.

While the objections raised by the board may in principle justify an amendment to the appeal case, the very late point in time of filing it is not justified.

- 4.4 Moreover, the criteria of Article 13(1) RPBA 2020 can supplement those of Article 13(2) RPBA 2020. One of these criteria is the suitability of the amendment to resolve the issues which were raised by the board. The board raised an objection of lack of clarity against the feature "tool(s) associated with each person" in the communication pursuant to Article 15(1) RPBA 2020. However, the appellant chose not to amend the claims so as to deal with this objection.

The appellant argued that the feature in question was clear. The question in this regard was whether this was a technical feature of the invention or not. A person operated a particular tool for performing a task. The association may be a mental act. But according to the claim the relative position sensors determined the position relative to the associated person. So it had a technical aspect relating to the functionality of the sensors.

- 4.5 This argument is not persuasive. According to Rule 43(1) EPC, the claims shall define the matter for which protection is sought in terms of the technical features of the invention. In the board's view the expression "tool(s) associated with each person" leaves it unclear whether it is a technical feature of the invention implying a structural limitation of the claimed system. Association could imply a technical implementation, e.g. by pairing the tool and anklet or by a logic determining association based on proximity. However, the feature could also refer to a purely administrative process, such as a prison warden having

a list assigning a tool to a prisoner, which would not limit the claimed subject-matter.

The appellant's argument merely demonstrated that it remained unclear whether the association was a limiting technical feature, or whether the association was a purely administrative method step without limiting effect.

4.6 It follows that the board maintained the clarity objection and, consequently, that the first auxiliary request is not suitable to deal with all objections raised by the board in the appeal proceedings. It was therefore not admitted, since it did not meet the conditions for admittance of Article 13(2) and (1) RPBA 2020.

5. *Second auxiliary request*

5.1 The board did not take into account the second auxiliary request under Article 13(2) and (1) RPBA 2020.

5.2 With this request filed during the oral proceedings before the board, the appellant attempted to clarify the unclear technical feature "one or more tools associated with each person" by the amendment "one or more tools associated with and used by each person". The appellant argued that in practice it was clear if a third party was infringing the claim. If there was a pairing between the tool and the person, the person was also using the tool. The claim covered technical and non-technical interpretations of the feature. According to the claim the position of the tool relative to the associated person was monitored as well as motion to

monitor the activity. The amended claim defined an association which included association by means of a prepared or dynamic list. All variants were covered by the amended claim language.

5.3 The board is not persuaded by this argument. The appellant attempts to amend an ambiguity as to whether or not the feature "tool(s) associated with each person" is technical and limiting by a reference to the envisaged use in a system claim. This cannot resolve the ambiguity, but is considered to represent a lack of clarity in itself. The expression "tool used by a person" does not clarify whether or not association of the tool and the person implies any technical limitation. As the appellant argued itself, the wording of the claim still covered association by an administrative list, and therefore still does not meet the requirements of Article 84 EPC in conjunction with Rule 43(1) EPC.

5.4 It follows that the second auxiliary request, filed only during the oral proceedings, is the second attempt to respond to an objection raised by the board and is still not suitable to overcome this objection. It therefore does not satisfy the conditions for admission under Article 13(2) and (1) RPBA 2020.



**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



L. Gabor

R. Bekkering

Decision electronically authenticated