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**Datasheet for the decision  
of 17 December 2024**

**Case Number:** T 0123/23 - 3.5.05

**Application Number:** 14873437.9

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**Language of the proceedings:** EN

**Title of invention:**  
Systems, devices, and methods for authentication in an analyte  
monitoring environment

**Patent Proprietor:**  
Abbott Diabetes Care, Inc.

**Opponents:**  
Dexcom, Inc. ("opponent 1")  
Dexcom Deutschland GmbH ("opponent 2-intervener")

**Headword:**  
Authentication in an analyte-monitoring system/ABBOTT

**Relevant legal provisions:**

EPC Art. 123(2)

RPBA 2020 Art. 13(2)

**Keywords:**

Added subject-matter - main request and auxiliary requests 11, 23, 29, 34, 40, 45, 51, 56, 62, 67, 73, 78, 84, 89, 95 and 96 (yes)

Admittance of claim requests filed after Art. 15(1) RPBA communication - auxiliary request 1 (no): no cogent reasons justifying exceptional circumstances

**Decisions cited:**

T 2360/17, T 3258/19, T 1924/20, T 0614/21, T 0922/22



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Case Number: T 0123/23 - 3.5.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.05**  
**of 17 December 2024**

**Appellant:** Abbott Diabetes Care, Inc.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 28 October 2022  
revoking European patent No. 3087771 pursuant to  
Article 101(3)(b) EPC.**

**Composition of the Board:**

<b>Chair</b>	K. Bengi-Akyürek
<b>Members:</b>	J. Eraso Helguera
	F. Bostedt

## Summary of Facts and Submissions

- I. This case concerns the appeal filed by the proprietor against the decision of the opposition division to revoke the opposed patent under Article 101(2) and 101(3) (b) EPC.
- II. In a communication under Article 15(1) RPBA, the board gave its preliminary opinion that the ground for opposition under Article 100(b) EPC did not prejudice the maintenance of the granted patent but that the ground for opposition under Article 100(c) EPC did. It also indicated its preliminary view that it was minded to remit the case to the opposition division for further prosecution, on the basis of the claims of e.g. one of auxiliary requests 5, 11, 23 and 29.
- III. Oral proceedings before the board were held on 17 December 2024. The final requests of the parties were:
- The proprietor (appellant) requested that the patent be maintained on the basis of one of eighteen claim requests: **main request** (labelled as "auxiliary request 5"), **auxiliary request 1** (labelled as "amended auxiliary request 5"), **auxiliary requests 11, 23, 29, 34, 40, 45, 51, 56, 62, 67, 73, 78, 84, 89, 95 and 96**. The decision under appeal is based on all those claim requests except for auxiliary request 1, which was filed during the oral proceedings before the board.
  - Opponent 1 and opponent 2-intervener (respondents) requested that the appeal be dismissed.

At the end of those oral proceedings, the board announced its decision.

IV. Claim 1 of the **main request** (labelled "auxiliary request 5") reads as follows:

"A method of authentication in an in vivo analyte monitoring system (100), comprising:

receiving a private key (602) by a reader device (120), wherein the private key is supplied by a packaging for a sensor control device, wherein the sensor control device comprises a sensor (104) and analyte monitoring circuitry (110) and the sensor is adapted to be inserted into the body of a user, wherein receiving the private key (602) by the reader device (120) comprises one of:

scanning a barcode (502) or other printed indicia on the packaging (501) for the sensor control device with an optical scanner (505) of the reader device, wherein the barcode or other printed indicia is representative of the private key;

scanning the packaging for the sensor control device with a near field communication, NFC, device, wherein the packaging comprises a machine-readable element adapted to provide information representative of the private key in response to an NFC scan; or

wherein the private key is printed on the packaging for the sensor control device, reading, by a human, the private key from the packaging, and wherein the private key is input manually into the reader device (120);

authenticating the private key using a public key (604) stored within the reader device; and

if the private key is authenticated, reading sensed analyte data from the sensor control device by the reader device."

Claim 1 of **auxiliary request 1** (labelled "amended auxiliary request 5") differs from claim 1 of the main request in the deletion of the two occurrences of the phrase "or other printed indicia".

Claim 1 of **auxiliary request 23** differs from claim 1 of the main request in the insertion of the following wording immediately after the phrase "stored within the reader device":

", wherein the reader device (120) uses an algorithm stored thereon and the public key (604) to algorithmically verify whether the private key (602) is an authentic key".

Claim 1 of **auxiliary request 45** differs from claim 1 of the main request in

- the replacement of the term "analyte monitoring system" by "continuous glucose monitoring system"
- the replacement of the term "analyte monitoring circuitry" by "glucose monitoring circuitry"
- the replacement of the term "analyte data" by "glucose data" and
- the insertion of the expression "such that at least a portion of the sensor is positioned below a skin surface of the user" immediately after the phrase "into the body of a user".

Claim 1 of **auxiliary requests 11, 29, 40, 51, 62, 73, 84 and 95** differs from claim 1 of the main request and auxiliary requests 23, 34, 45, 56, 67, 78 and 89 respectively in the insertion of the term "corresponding" immediately after the expression "authenticating the private key using a".

Claim 1 of **auxiliary requests 34, 56 and 78** differs from claim 1 of the main request and auxiliary requests 29 and 56 respectively in the addition of the following wording at the very end of the claim:

"; further comprising sending an identification request from the reader device (120) over a local wireless communication path (140) to the sensor control device (102), wherein the sensor control device sends an identifier to the reader device in response to receipt of the identification request".

Claim 1 of **auxiliary requests 67 and 89** differs from claim 1 of auxiliary requests 45 and 78 respectively in the insertion of the following wording right after the phrase "stored within the reader device":

", wherein the reader device (120) uses an algorithm stored thereon and the public key (604) to algorithmically verify whether the private key (602) is an authentic key".

Finally, claim 1 of **auxiliary request 96** differs from claim 1 of the main request in that the expression "authenticating the private key using a public key" is replaced by the expression "authenticating the private key as corresponding to a public key storing within the reader device using the public key".

## **Reasons for the Decision**

### 1. MAIN REQUEST

Claim 1 of the **main request** comprises the following limiting features (board's outline):



- 1-A A method of authentication in an in-vivo analyte monitoring system, comprising:
  - 1-B receiving a private key by a reader device,
  - 1-B1 the private key is supplied by a packaging for a sensor control device,
  - 1-C the sensor control device comprises a sensor and analyte-monitoring circuitry
  - 1-D the sensor is adapted to be inserted into the body of a user,
  - 1-E receiving the private key by the reader device comprises one of:
    - 1-E1 scanning a barcode or other printed indicia on the packaging for the sensor control device with an optical scanner of the reader device, the barcode or other printed indicia is representative of the private key;
    - 1-E2 scanning the packaging for the sensor control device with an NFC device, the packaging comprises a machine-readable element adapted to provide information representative of the private key in response to an NFC scan; or
    - 1-E3 wherein the private key is printed on the packaging for the sensor control device, reading, by a human, the private key from the packaging, wherein the private key is input manually into the reader device;
  - 1-F authenticating the private key using a public key stored within the reader device;

1-G if the private key is authenticated, reading sensed analyte data from the sensor control device by the reader device.

1.1 *Claim 1 - added subject-matter (Article 123(2) EPC)*

1.1.1 In section 4.5.3.1 of its written reply to the statement of grounds of appeal, opponent 1 submitted, *inter alia*, that there was no disclosure in the application as filed as to "other printed indicia" being scanned with an "optical scanner" of the reader device - as required by **feature 1-E1**. The application was silent about how the "[p]rinted indicia other than barcodes" in the final sentence of paragraph [0132] ("Printed indicia other than barcodes can be used as well") were entered into the "reader device". During the oral proceedings before the board, opponent 1 added that the term "used" in that final sentence did not necessarily require an "optical scanner" and that other technical means such as magnetic or fluorescent ink could reasonably be meant.

1.1.2 At those oral proceedings, the proprietor replied that the disclosure of paragraphs [0131] and [0132] as filed was clear on its own. Paragraph [0131] explained that, in the embodiment of figures 5A and 5B, an optical scanner 505 was used to optically scan barcode 502. Paragraph [0132] added that barcode 502 could be a one-, two- or three-dimensional barcode of any format. The final sentence "[p]rinted indicia other than barcodes can be used as well" could only be interpreted as an alternative to the use of barcodes, i.e. the optical scanner could optically scan "printed indicia" which were not "barcodes". Such an interpretation was consistent with the disclosure of paragraph [0141] as filed, which taught that "[w]hile private key 602 is

shown and described here as being optically represented on packaging 501 in barcode format, it should be noted that private key 602 can be associated with packaging 501 in any of the manners described with respect to the embodiments of FIGs. 5A-B".

- 1.1.3 The board agrees with opponent 1. It is assumed - for the sake of argument and in the proprietor's favour - that the wording "as well" used in the last sentence of paragraph [0132] could only be construed as an alternative to the previously discussed "barcodes". However, the reference to "printed indicia" being "used" is too general to derive directly and unambiguously that such "printed indicia" should necessarily be scanned with "an optical scanner of the reader device" within the meaning of feature 1-E1. Indeed, the only limitations that can be derived from "[p]rinted indicia other than barcodes can be used as well" are that the "indicia" must be "printed" and that they must be "other than barcodes".

Besides that, the sentence - even read in context - contains no information whatsoever about the nature of the "indicia" or their intended "use". This is however not sufficient to establish a direct link with the "optical scanner of the reader device" as per feature 1-E1. As opponent 1 convincingly argued, such "use" may refer more generally to *other* available techniques equally suitable for interpreting "printed indicia".

- 1.2 In view of the above, the main request is not allowable under Article 123(2) EPC.

2. AUXILIARY REQUEST 1

Claim 1 of **auxiliary request 1** (labelled "amended auxiliary request 5") differs from claim 1 of the main request in the following deletions in feature 1-E:

1-E' scanning a barcode ~~or other printed indicia~~ on the packaging for the sensor control device with an optical scanner of the reader device, the barcode ~~or other printed indicia~~ is representative of the private key.

2.1 *Admittance into the appeal proceedings (Article 13(2) RPBA)*

2.1.1 The claims of auxiliary request 1 were filed during the oral proceedings before the board, i.e. after notification of the board's communication under Article 15(1) RPBA and thus at a very late stage of the overall proceedings.

2.1.2 Claim 1 of this auxiliary request differs from claim 1 of the main request solely in the deletion of the phrase "or other printed indicia" in feature 1-E. The deletion of this alternative constitutes an "amendment" to the appellant's case under Article 13(2) RPBA (see e.g. **T 922/22**, Reasons 3.1, referring to **T 2360/17**, Reasons 2.4). According to this provision, any amendment to a party's appeal case is, in principle, not taken into account, unless there are "exceptional circumstances" which have been justified with cogent reasons by the party concerned.

2.1.3 Thus, the next question to be answered is whether the proprietor provided cogent reasons justifying

"exceptional circumstances" for the late-filing of the present auxiliary request.

2.1.4 At the oral proceedings before the board, the proprietor submitted the following arguments:

- The added-matter objection to **feature 1-E** had not been discussed in the board's preliminary opinion. The board might have noted there (see point 7.2 of the board's communication under Article 15(1) RPBA) that further objections in relation to added subject-matter had been raised during the opposition proceedings. However, since the opposition division had not decided on any of these issues, the board's initial intention had been to remit the case on the basis of the claims of e.g. one of auxiliary requests 5, 11, 23 and 29 without conducting any further examination (see point 7.3).
- The opposition division had not addressed this issue at all in the appealed decision. Nor had the opposition division raised any added-matter objections to feature 1-E. In fact, the word "printed" had been introduced into this feature following an explicit indication of the opposition division (see the opposition division's annex to the summons dated 26 October 2021). Acting in good faith, the proprietor reacted to this indication by filing ninety-five auxiliary requests on 18 March 2022, most of them including the term "printed indicia" in feature 1-E.
- Contrary to its original intention, the board did examine the main request, i.e. the request initially referred to as "auxiliary request 5", for added subject-matter during the oral proceedings

before it for the first time. It then announced its conclusion that feature 1-E indeed contained added subject-matter. Thus, it was the first and only opportunity for the proprietor to reasonably react to this ruling by way of amendment. This however constituted an "exceptional circumstance" within the meaning of Article 13(2) RPBA.

- At any rate, the amendment was of low complexity. It ostensibly resolved the issue at stake without introducing any further issues. Furthermore, since this claim request had not been decided upon by the opposition division, it should at least be admitted into the proceedings and the case be remitted to the opposition division for further prosecution.

2.1.5 The opponents argued at the oral proceedings before the board as follows:

- The added-matter objections involving feature 1-E discussed during the oral proceedings before the board were not new. Opponent 1 had already raised the very same objections before the opposition division as early as in the notice of opposition (see section 4.1, item 2), but also in opponent 1's submission dated 18 March 2022 in response to the opposition division's annex to the summons (see page 2). Moreover, opponent 1 had specifically raised them also in the appeal proceedings, at least in section 4.5.3.1 of its written reply to the statement of grounds of appeal.
- It was thus apparent that the proprietor had had plenty of opportunities to react to opponent 1's objection concerning feature 1-E - by deleting the phrase "or other printed indicia" or otherwise -

both before the opposition division and before the board. But it deliberately refrained from doing so.

- The opponents acknowledged that they had no further added-matter objections against claim 1 of "amended auxiliary request 5". However, this did not mean that the amendment was of "low complexity". In fact, the amendment resulted in a more specific subject-matter, since "scanning a barcode" was now the only alternative claimed in feature 1-E'. Thus, the opponents would have to review the suitability of their outstanding novelty and inventive-step objections in the light of this specificity, should the claim request be admitted into the proceedings.
  
- The opponents had raised and maintained all the objections from the outset, also before the board. They had also obtained a favourable decision from the opposition division which the board intended to confirm on the basis of the claim requests on file. There was no reason to admit auxiliary request 1 and remit the case to the opposition division just because the proprietor decided to react only at such a late stage of the appeal proceedings. In any event, the proprietor did not have an absolute right to have this issue discussed before two instances.

2.1.6 The board agrees with the opponents, for the reasons set out below.

- (a) First of all, the board acknowledges that its preliminary opinion issued under Article 15(1) RPBA did not consider any added-matter objections to former "auxiliary request 5" (now the main request). In fact, the board's statement made in

point 7.2 of that opinion, according to which "[t]he opposition division did not decide on any of these issues, nor have the parties elaborated upon them in the appeal proceedings" is not entirely accurate. All the parties cursorily re-filed as annexes copies of their written submissions before the opposition division, but opponent 1, in connection with auxiliary request 96, specifically repeated the added-matter objection concerning feature 1-E in section 4.5.3.1 of its written reply to the statement of grounds of appeal. The present case is therefore not related to new or unforeseen developments in the appeal proceedings themselves, but instead the relevant objection was already part of the opponents' initial appeal case.

- (b) The mere fact that the board indicated in its preliminary opinion a certain intention of remittal does also not constitute "exceptional circumstances" which would justify as such the filing of a new claim request at the oral proceedings. In that context, the board recalls that any party to opposition appeal proceedings should take into account that a Board of Appeal may depart from its preliminary view. In any case, a patent proprietor should prepare the relevant "fallback positions" for that eventuality as early as possible, in line with the general obligation that its complete appeal case is provided as early as possible (see Article 12(3), first sentence, RPBA; see also e.g. **T 614/21**, Reasons 3.2). This is particularly true in the present case, as the opponents had raised the relevant objection at an early stage of the appeal proceedings, which the proprietor then attempted to overcome only at the latest possible stage, i.e. during the oral



proceedings before the board. Moreover, it cannot be the purpose of a hearing held in appeal proceedings to allow an applicant or proprietor, after having discussed, in writing or orally, multiple (higher-ranking) claim requests, to present yet another amended set of claims in a trial-and-error fashion for finally defining its actual "invention" (see e.g. **T 1924/20**, Reasons 5.1; **T 3258/19**, Reasons 1.1.4(b)).

- (c) Moreover, the board does not dispute the fact that the deletion of the phrase "or other printed indicia" in claim 1 of the main request amounts to the removal of an alternative from this claim which *prima facie* overcomes the added-matter objection discussed with the board for the first time during the oral proceedings before it. However, this fact alone likewise does not amount to "exceptional circumstances" which necessarily justify admitting the claim request into the appeal proceedings. Instead, the whole situation of the appeal must be taken into account.
  
- (d) Finally, the admittance of auxiliary request 1 - with a subsequent remittal of the case to the opposition division - would have the following consequences on the board and the parties in the present appeal case:
  - (i) If the board were to admit the new claim request, it could settle the appeal immediately by remitting the case to the opposition division for further examination of novelty and inventive step - as initially intended - or it could continue with the examination of those issues in

appeal, most likely in writing then due to the parties' need to present or amend their respective cases before the board. Both options would however be contrary to overall procedural economy.

- (ii) The opponents presented on appeal their complete case against each of the initially presented ninety-seven claim requests in appeal proceedings. If auxiliary request 1 were to be admitted, the board would then have to set aside a decision favourable to the opponents on those ninety-seven claim requests. The new claim request would therefore require a re-evaluation of subject-matter at issue (now without the alternative of "other printed indicia"), and may thus alter the factual and legal scope of the overall proceedings. This, however, is not a case where the admittance of the claim request would merely reduce the complexity of the proceedings by removing one of the issues in dispute.
  
- (iii) The proprietor could have filed this claim request already during the opposition proceedings, as it constitutes undeniably the safest defence against any possible objection to the presence of "indicia" in the former claims. A remittal would therefore give the proprietor a second opportunity to argue its case before the opposition division, including the possibility of filing even more claim requests if necessary.

- 2.2 In view of the above, the alleged "lack of complexity" and the "*prima facie* allowability of the amendment" - in respect of those issues discussed with the board up to the stage of the oral proceedings at which the filing was made - are not sufficient to establish the presence of "exceptional circumstances" which would indeed justify the admittance of the new claim request.
- 2.3 The board thus did not admit auxiliary request 1 into the appeal proceedings (Article 13(2) RPBA).
3. AUXILIARY REQUESTS 11, 23, 29, 34, 40, 45, 51, 56, 62, 67, 73, 78, 84, 89, 95 and 96
- 3.1 Claim 1 of each of the remaining auxiliary requests also comprises **feature 1-E1** (cf. point IV above).
- 3.2 Hence, the reasons set out in point 1.1.3 above apply *mutatis mutandis* to claim 1 of each of the remaining auxiliary requests. It follows that none of auxiliary requests 11, 23, 29, 34, 40, 45, 51, 56, 62, 67, 73, 78, 84, 89, 95 and - irrespective of admittance considerations - auxiliary request 96 is allowable under Article 123(2) EPC.
4. Since there is no allowable claim request on file, the appeal must be dismissed.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chair:



B. Brückner

K. Bengi-Akyürek

Decision electronically authenticated