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**Datasheet for the decision
of 31 July 2025**

Case Number: T 0262/23 - 3.4.03

Application Number: 08833456.0

Publication Number: 2194385

IPC: G01N35/02, B01L3/00, G01N35/10,
G01N35/04

Language of the proceedings: EN

Title of invention:
REAGENT CONTAINER

Patent Proprietor:
FUJIFILM Wako Pure Chemical Corporation

Opponent:
Siemens Healthcare Diagnostics Products GmbH

Relevant legal provisions:
EPC Art. 54(3), 123(2)
RPBA 2020 Art. 12(6)

Keyword:
Novelty - main request (no)
Amendments - auxiliary request 2 - added subject-matter (yes)
Late-filed auxiliary requests 1, 2A, 3, 3A - admitted (no) -
should have been submitted in first-instance proceedings (yes)



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Case Number: T 0262/23 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 31 July 2025

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 9 December 2022
revoking European patent No. 2194385 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman T. Häusser
Members: M. Ley
C. Schmidt

Summary of Facts and Submissions

I. The patent proprietor's appeal is against the opposition division's decision revoking the opposed European patent No. EP 2 194 385 pursuant to Article 101(3) (b) EPC.

II. The following document is cited:

D3 EP 2 030 683 A1 published on 4 March 2009

D3 is prior art under Article 54(3) EPC.

III. In the impugned decision, the opposition division held that the former main request (filed with letter dated 8 September 2022) did not comply with Article 123(2) EPC and that the subject-matter of claim 1 of the former auxiliary request (identical to the granted version of the opposed patent) lacked novelty over D3 (Article 54(3) EPC).

IV. As its main request, the appellant requests that the impugned decision be set aside and the opposition be rejected. This corresponds to the auxiliary request underlying the impugned decision.

Auxiliarily, the appellant requests that the impugned decision be set aside and the patent be maintained on the basis of one of auxiliary requests 1, 2, 2A, 3, 3A.

The auxiliary requests were filed with the statement setting out the grounds of appeal. A corrected version of auxiliary request 2 was filed a week later (on 25 April 2023). The claims according to auxiliary request 2 are those filed with letter dated

8 September 2022 and thus correspond to the main request underlying the impugned decision.

- V. The respondent requests to dismiss the appeal and not to admit late filed auxiliary requests 1, 2A, 3 and 3A.
- VI. Claim 1 as granted has the following wording (reference signs removed by the board for better readability, board's feature labelling "(a)" to "(g3)"):

A reagent container, comprising:

(a) a container body having **(a1)** a plurality of open holding sections, each holding a reagent and **(a2)** into which a probe of an automatic analyzing device is insertable to suck the reagent, **(a3)** with an opening of each of the holding sections sealed with at least one sheet-like seal member; and

(b) a lid having **(b1)** a plurality of hollow piercing sections, formed on a lower surface of the lid, protruding downward for piercing the seal member at each of the openings, and **(b2)** openings, formed in an upper surface of the lid, communicating with the piercing sections respectively to allow the probe to be inserted therethrough or withdrawn therefrom,

(c) wherein the reagent container is configured such that the seal member of the container body is pierced by the piercing sections of the lid by pressing the lid onto the container body from above and the probe is allowed to be inserted into the holding sections through hollow sections of the piercing sections, characterized in that

(d) at least one of the openings of the plurality of holding sections has a size different from the size of the rest of the openings and

(e) each of the piercing sections has the same outer dimension and that

(f) at least one of the piercing sections is disposed at a position where the shortest distance from an inner wall surface of the corresponding opening of the container body to an outer circumferential surface of the piercing section is not greater than 1/2 of the shortest distance from the inner wall surface to the center of the piercing section when the piercing section is in the corresponding opening, and

(g) each piercing section has a **(g1)** first length from a lower surface of the lid to an end, and **(g2)** a second length from the lower surface of the lid to a tip, **(g3)** wherein of each of the piercing sections the first length is shorter than the second length and is more than zero.

Claim 1 of auxiliary request 1 corresponds to granted claim 1, wherein only features (a3) and (d) have been amended as follows (amendments underlined by the board):

(a3)_{AR1} with an opening cross-section of an opening of each of the holding sections sealed with at least one sheet-like seal member;

(d)_{AR1} at least one of the opening cross-sections of the openings of the plurality of holding sections has a size different from the size of the rest of the openings cross-sections and

Claim 1 according to auxiliary request 2 corresponds to granted claim 1, wherein only features (g1) to (g3) have been amended as follows (amendments underlined/struck through by the board):

(g) each piercing section has a **(g1)_{AR2}** ~~first~~ shortest length from a lower surface of the lid to an end, and

(g2)_{AR2} a ~~second~~ greatest length from the lower surface of the lid to a tip, **(g3)**_{AR2} wherein of each of the piercing sections the ~~first~~ shortest length is shorter than the ~~second~~ greatest length and is more than zero.

Claim 1 of auxiliary request 2A includes a combination of the amendments made in claim 1 according to auxiliary request 1 and 2.

Claim 1 of auxiliary request 3 corresponds to granted claim 1 with the the following features (h) and (i) added at the end of the claim:

(h) wherein the lengths from the lower surface of main body [sic] of the lid to the ends, are not less than 80% of a punching diameter, i.e. the diameter of pierced holes, and **(i)** the tips have a length that does not reach liquid levels of reagents after piercing.

Claim 1 of the auxiliary request 3A corresponds to claim 1 of auxiliary request 3 with the amendments made for auxiliary request 1.

VII. The appellant argued that document D3 did not disclose the subject-matter of granted claim 1 and that the requirements of Article 123(2) EPC were met for auxiliary request 2.

In the appellant's view auxiliary request 1, 2A, 3 and 3A should be admitted into the appeal proceedings.

Reasons for the Decision

1. Procedural matters

In a communication pursuant to Article 15(1) RPBA, the board informed the parties about its preliminary view and concluded that the appeal was likely to be dismissed.

The appellant reacted by announcing that it would not be attending the scheduled oral proceedings before the board. The board takes it that this statement is to be interpreted as a withdrawal of the appellant's request for oral proceedings.

No further arguments to support its case were provided by the appellant. As the board is not aware of any reasons to deviate from its preliminary view and as it grants the respondent's main request, oral proceedings were no longer necessary and were thus cancelled by the board.

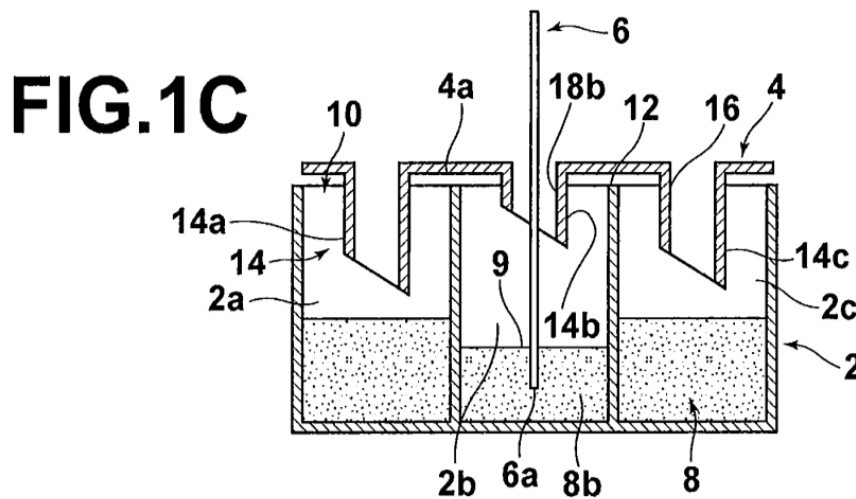
2. The invention

The invention relates to a reagent container for use with an automatic analysing device for analysing blood samples or the like, and more particularly to a reagent container for use with an automatic analysing device that uses a dispensing probe for sucking a small amount of a reagent from a reagent container and dispensing the reagent on a microchip or the like, see paragraph [0001] of the opposed patent.

According to paragraphs [0011] to [0015] of the opposed patent, it is an object of the invention to provide a

reagent container capable of holding a plurality of reagents therein and yet reduced size, to provide a reagent container that allows easy opening, i.e. easy piercing, to provide a reagent container that does not require a strong probe, to provide a reagent container capable of reducing contamination of a probe and the like by a sample and to provide a reagent container that constantly allows accurate liquid level detection by a general capacitance measurement.

As claimed, the reagent container has a container body 2 with a plurality of open holding sections 2a, 2b, 2c, each holding a reagent 8 and with an opening sections 10a, 10b, 10c of each of the holding sections sealed with a sheet-like seal member 12, see Figure 1C of the opposed patent reproduced below.



The container also has a lid 4 with a plurality of hollow piercing sections 14a, 14b, 14c, as further defined by features (g) to (g3), protruding downward for piercing the seal member at each of the openings and with openings, formed in an upper surface of the

lid, communicating with the piercing sections respectively to allow the probe 6 to be inserted therethrough or withdrawn therefrom.

At least one of the openings of the plurality of holding sections has a size different from the size of the rest of the openings and each of the piercing sections has the same outer dimension.

Due the position of the the piercing sections as defined by feature (f), the seal member can be sheared more easily as the inner wall surface of the opening section and the outer circumferential surface of the piercing section are in more close proximity, see paragraph [0054] of the opposed patent. This renders the piercing less difficult.

3. Appellant's main request - novelty over D3
 - 3.1 According to the impugned decision, it was only disputed during the opposition proceedings whether feature (d) was disclosed in D3. The opposition division held that feature (d) was indeed disclosed in D3, see points 3.1 and 3.2 of the impugned decision. Hence it concluded that the subject-matter of granted claim 1 lacked novelty over D3 (Articles 52(1) and 54(3) EPC).
 - 3.2 The appellant first noted that the opposition division found in its preliminary opinion that the subject-matter of claim 1 was novel over D3 and that they surprisingly changed their view by stating that the term "opening" in claim 1 included three-dimensional structures so that Figure 3a of D3 allegedly disclosed feature (d).

For the appellant, claim 1 defined that an opening of each of the holding sections was sealed with at least one sheet-like seal member. The wording of claim 1 clearly defined where the "opening" was positioned, namely the place where the seal member was fixed. This was where element 40 ("Öffnungsfläche") was positioned in Figure 3b of D3. Since all elements 40 in D3 had the same size, feature (d) was not disclosed in D3.

Moreover, according to paragraph [0008] of the D3, there was a "friction fit" ("reibschlüssige[r] Sitz") of the tube within the lid. By contrast, claim 1 defined a shortest distance from an inner wall surface of the corresponding opening of the container body to an outer circumferential surface of the piercing section. Since D3 disclosed a "friction fit", there was no "distance" as defined by claim 1.

3.3 The board agrees with the respondent that the term "opening" has a broader meaning than "opening area" ("Öffnungsfläche") and includes a three-dimensional structure sealed by a sheet-like seal member in accordance with feature (a3). Claim 1 does not state that the area defined by said sheet-like seal member is to be considered as the opening.

As pointed out by the opposition division, D3 discloses a three-piece system: the first component includes holding sections (i.e. "Einsätze (70)") with openings ([0039], Figure 2a). Each of these openings are covered by a second component, namely a cover ("Deckel (30)") which in turn also has opening areas ("Öffnungsflächen (40)") (D3, Figures 2a and 3a). These opening areas (40) may be sealed ([0049], Figure 3b) and pierced by the third component, namely the tubes (110) with oblique endings (140), see Figures 4a and 4b, [0044].

The "opening" in D3 is not only defined by the two-dimensional opening-area ("Öffnungsfläche (40)") of the cover ("Deckel (30)") that carries the seal, but also includes the upstanding ribs ("Führungen (35)", [0043], Figures 3a and 3b) extending out from the opening-area (40). An opening which is structured three-dimensionally helps to guide the objects to be inserted (D3, [0043]) and therefore fulfils the function of an "opening" as defined in claim 1 and the patent.

The volumes of these three dimensional structures differ in size. One of the four openings as depicted in Figure 3a comprises cut-off corners, which are not merely accidental as they are also depicted in Figure 2a so as to leave room for the depicted posts (75). There is therefore no doubt that some of the openings in D3 have a different shape from the rest of the openings. Such cut-off corners in the openings will inevitably result in a size difference, e.g. in terms of volume of the opening.

Hence, Figure 3a of D3 discloses one opening having a size different from the size of the rest of the openings, as explained by the opposition division.

With respect to the appellant's view that D3 also lacks feature (f) in view of paragraph [0008], the respondent might have a point when stating that this is a late-filed alleged fact that could have been brought forward already during the opposition proceedings and that its admission is subject to the board's discretion under Article 12(6) RPBA.

In any case, feature (f) does not exclude that the shortest distance from an inner wall surface of the

corresponding opening of the container body to an outer circumferential surface of the piercing section is very small or close to zero, as it is the case for friction fitted elements. It is also noted that a friction fit ("reibschlüssiger Sitz") is merely a preferred option in D3 (see paragraph [0008], "Vorzugsweise ...").

Insofar, the board concurs with the finding of the opposition division and the respondent's view that the subject-matter of claim 1 is anticipated by the disclosure of D3 and thus lacks novelty (Article 100(a) EPC in combination with Articles 52(1) and 54(3) EPC).

4. Auxiliary request 1 - admittance

4.1 The appellant argued that the amendments made to claim 1 were supported by Figures 1A to 1C and were intended to define the difference between claim 1 and the disclosure of D3. The amended wording made it clear that sealed opening cross-sections of the openings corresponded to the opening area ("Öffnungsfläche 40") of D3. The appellant justified its submission with the unexpected change of mind of the opposition division.

4.2 Auxiliary request 1 is an amendment within the meaning of Article 12(4) RPBA. Any such amendment may be admitted at the discretion of the board.

According to Article 12(6) RPBA, second sentence, the board shall not admit requests which should have been submitted in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.

Auxiliary request 1 addresses the finding of the opposition division with respect to granted claim 1 and

the issue of lack of novelty over D3. This issue was already brought forward in the notice of opposition and also addressed in the appellant's reply to said notice. The opposition division made it clear on page 1 of their letter dated 9 March 2022 that they provided a "preliminary non-binding opinion" and even explicitly stated that they might change their mind as a result of the discussion during the oral proceedings.

The appellant therefore had to expect that the opposition division could agree with the respondent with respect to the disclosure of D3. The change of mind of the opposition division was apparently not unexpected.

The appellant thus should have submitted the auxiliary request 1 as a reply to the preliminary opinion or, at the latest, during oral proceedings before the opposition division.

Hence, auxiliary request 1 is not admitted into the appeal proceedings (Article 12(6) RPBA, second sentence).

The questions raised by the respondent whether the requirements of Articles 84 and 123(2) EPC are met or whether the claimed subject-matter is known from D3 can be left unanswered.

5. Auxiliary request 2

5.1 The opposition held that the requirements of Article 123(2) EPC were not met as no basis for the amendments could be found in the figures and paragraph [0050] of the published patent application. The lengths of the piercing sections shown in the figures had to fulfil

several requirements not included into claim 1, namely "the shortest length must have a length that is in relation to the punching diameter and the greatest length must not reach liquid levels after piercing". Claim 1 included therefore "unduly generalised subject-matter that has no basis in the application as originally filed" (point 1.2 of the Reasons of the decision).

5.2 The appellant argued in the statement setting out the grounds of appeal that a basis for the amendments was to be found in Figures 1 and 3 of the patent application as originally filed.

5.3 The board shares the opposition division's conclusion. It cannot be directly and unambiguously derived from Figures 1 and 3 that in relation to the first and second lengths shown these cross-sectional views are the shortest and greatest lengths. Moreover, as pointed out by the opposition division, other features not included into claim 1 are disclosed in the context of these figures, which amount to an inadmissible intermediate generalisation. The requirements of Article 123(2) EPC are therefore not fulfilled.

Even if it were accepted that the first and second lengths were derivable from the figures as the shortest and greatest lengths, then the same teaching had to be derivable from Figures 4a, 4b, 5a, 5b of D3, as pointed out by the respondent, so that the objection of lack of novelty would not be overcome.

6. Auxiliary request 2A - admittance

The appellant did not provide any specific arguments in view of the admissibility and allowability of auxiliary

request 2A.

Auxiliary request 2A is not be admitted into the appeal proceedings for the reasons given for auxiliary requests 1 (Article 12(6) RPBA). In any case, it is not allowable for the reasons given for auxiliary request 2.

7. Auxiliary requests 3, 3A - admittance

7.1 According to the appellant, the basis for the amendment was found in paragraph [0050] of the published patent application. The amendments should overcome the objections under Article 123(2) EPC raised by the opposition division against the then main request (now: auxiliary request 2).

The technical effect to be solved was described in paragraph [0049] of the published patent application. The feature was not known from the prior art and not derivable from any of the cited documents.

7.2 The board notes that the present second auxiliary request was filed for the first time as main request prior to the oral proceedings before the opposition division. The issue of Article 123(2) EPC was discussed during oral proceedings. The board is at present not aware of any reason that prevented the appellant from filing a set of claims according to the auxiliary request 3 and auxiliary request 3A after the opposition division's conclusion that the then main request did not comply with Article 123(2) EPC or to overcome the objections raised against the granted claims.

As pointed out by the respondent, auxiliary requests 3 and 3A should have been filed during the opposition

proceedings.

Hence, auxiliary requests 3 and 3A are not admitted into the appeal proceedings under Article 12(6) RPBA, second sentence.

Again, the questions raised by the respondent whether the requirements of Articles 84 and 123(2) EPC are met or whether the claimed subject-matter is known from D3 can be left unanswered.

8. As no allowable and admissible set of claims is on file, there is no reason to overturn the opposition division's decision. The appeal is thus to be dismissed (Articles 101(3)(b) and 111(1) EPC).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



S. Sánchez Chiquero

T. Häusser

Decision electronically authenticated