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**Datasheet for the decision  
of 13 April 2026**

**Case Number:** T 0941/24 - 3.2.02

**Application Number:** 17207180.5

**Publication Number:** 3332729

**IPC:** A61B34/00

**Language of the proceedings:** EN

**Title of invention:**

MEDICAL TRACKING SYSTEM COMPRISING TWO OR MORE COMMUNICATING  
SENSOR DEVICES

**Applicant:**

Brainlab SE

**Headword:**

Determining a relative position/BRAINLAB

**Relevant legal provisions:**

EPC Art. 53(c), 84  
EPC R. 43(3), 43(4)

**Keyword:**

Exceptions to patentability - method for treatment by surgery  
(no)  
Claims - clarity (yes) - essential features missing (no)

**Decisions cited:**

G 0001/07, G 0003/95, G 0001/15, G 0001/19, G 0001/24,  
T 1526/17, T 1075/06, T 1631/17, T 0318/21, T 1005/98,  
T 0923/08, T 0836/08

**Catchword:**

Use of the term "encompass" in G 1/07 (Points 3.1.4 to 3.1.6  
of the Reasons).



**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

Case Number: T 0941/24 - 3.2.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 13 April 2026**

**Appellant:** Brainlab SE  
(Applicant) Olof-Palme-Straße 9  
81829 München (DE)

**Representative:** SSM Sandmair  
Patentanwälte Rechtsanwalt  
Partnerschaft mbB  
Joseph-Wild-Straße 20  
81829 München (DE)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 9 February 2024  
refusing European patent application No.  
17207180.5 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** M. Alvazzi Delfrate  
**Members:** A. Martinez Möller  
W. Ungler

## **Summary of Facts and Submissions**

- I. The appeal was filed by the applicant against the examining division's decision refusing European patent application No. 17207180.5. The examining division found that method claim 7 of the main and only request defined a method for treatment of the human or animal body by surgery within the meaning of Article 53(c) EPC.
- II. In the statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request or, in the alternative, on the basis of one of auxiliary requests 1 to 7, all filed with the statement of grounds of appeal.
- III. In the communication pursuant to Article 15(1) RPBA, the board expressed its preliminary opinion that method claim 7 of the main request did not define a method for treatment of the human or animal body by surgery within the meaning of Article 53(c) EPC, but that dependent method claim 8 did.
- IV. With its submission dated 24 February 2026, the appellant filed a new main request. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the new main request filed on 24 February 2026 or, in the alternative, on the basis of one of auxiliary requests 1 to 7 filed with the statement of grounds of appeal, or on the basis of auxiliary request 8, which corresponded to the main request filed with the statement of grounds of appeal.

The claims of the new main request correspond to the claims of the previous main request except for the deletion of method claim 8 and the renumbering of the subsequent claims with the dependencies adapted.

In the same submission, the appellant specified that all the requests included the description and drawings as indicated in the examining division's intention to grant dated 22 December 2023.

V. Claim 7 of the main request reads as follows.

"A method of determining a relative position between two sensor devices (1, 2) of a medical tracking system, wherein the sensor devices (1, 2) are independently maneuverable and can be positioned in a fixed position relative to targets (10, 13, 15), comprising the steps of

- determining, with the two sensor devices (1, 2), respective sensor data comprising the position of a marker device (9) of another sensor device (1, 2) and
- transferring the sensor data to a control unit (3), characterized by
- determining the relative position between the two sensor devices (1, 2) by the control unit (3) by combining the sensor data."

VI. The appellant's arguments, where relevant to the present decision, can be summarised as follows.

The invention as defined in claim 7 aimed at providing a method of determining a relative position between two sensor devices. This could be achieved without a surgical step because it was not necessary to attach a sensor device to the patient. None of the claimed steps defined or encompassed a physical activity or action

that constituted a method step for treatment of a human or animal body by surgery. The fact that the claimed method could be performed during a surgical intervention was irrelevant as there was no functional link between the claimed method and any effects of a surgical nature that would occur during the intervention. Therefore, the method did not count as a method for treatment of the human or animal body within the meaning of Article 53(c) EPC.

Since the step of attaching a sensor device to an anatomical structure was not essential, there was no violation of Article 84 EPC either.

### **Reasons for the Decision**

1. Patent application
- 1.1 The patent application relates to medical tracking. Typically, a medical tracking device is used to detect the position of markers which are attached to targets, such as objects or anatomical points to be tracked.
- 1.2 The application proposes making use of two sensor devices, with each sensor device being able to determine sensor data representing the position of a marker device located on the other sensor device. A control unit can then combine the sensor data of both sensor devices to determine the relative position between them.
- 1.3 With such a configuration, even if the data from one sensor device were insufficient or of low quality, the combination of the data from both devices would allow the relative position between the two sensor devices to be adequately determined. Thus, simpler sensor and

marker devices can be used. Moreover, it is less likely that an object to be tracked by the user is obstructed.

- 1.4 The application provides details of possible uses of the method. In particular, the second paragraph on page 5 indicates that a sensor device can be rigidly attached to a target and that a target can be an anatomical structure such as a bone, a medical instrument or a part of the infrastructure in an operating room such as an operating table.
  - 1.5 The application describes workflows that relate to knee surgery, for example using a cutting block that is rigidly attached to the (exposed) bone (see for example the first full paragraph on page 6). In one of the workflows described in the application, a sensor device is attached to a cutting block that is in turn attached to the tibia, and the other sensor device is attached to another cutting block that is attached to the femur. The tibia is moved relative to the femur using the knee joint while the relative positions between the two bones are determined using the sensor devices. These relative positions can then be used to determine parameters of the knee joint relevant for the subsequent steps of the surgical intervention (see the first full paragraph on each of pages 20 and 22 as well as Figure 12).
2. The decision under appeal
    - 2.1 According to points 20.1 and 21.1.1 of the Reasons of the contested decision, method claim 7 encompassed an embodiment in which a sensor device was attached to a bone, with a step of attachment to a bone even being implicit in claim 7. The examining division considered this to be emphasised by claim 8 of the then main

request (which *inter alia* defined an additional step: "each sensor device is attached to a target"). The examining division regarded the case as being similar to T 923/08 and explained that, in view of headnote 2a of G 1/07, claim 7 could not be left to encompass that embodiment.

2.2 The board deems it useful to consider some aspects of decision G 1/07, in particular its use of the term "encompass".

3. G 1/07 - "comprises" and "encompasses"

3.1.1 The boards of appeal have often referred to what is "encompassed" or "embraced" by a claim or feature to describe the subject-matter that is included within its scope (see e.g. point 7 of the Reasons of G 3/95, Order of G 1/15 or point 116 of the Reasons of G 1/19).

3.1.2 With this meaning, a generic feature encompasses all conceivable implementations that fall within its scope. Similarly, the subject-matter of a dependent claim within the meaning of Rule 43(4) EPC is necessarily encompassed by the claim on which it depends.

3.1.3 G 1/07 uses the verb "encompass" on several occasions, most prominently in points 1 and 2a of the Order reproduced below.

*1. A claimed imaging method ... which comprises or encompasses an invasive step ...*

*2a. A claim which comprises a step encompassing an embodiment which is a 'method for treatment of the human or animal body by surgery' within the meaning of*

*Article 53(c) EPC cannot be left to encompass that embodiment.*

- 3.1.4 For almost any method claim, it is possible to conceive of a more specific claim (i.e. a dependent claim) comprising an additional step that is surgical. This more specific claim would fall under the scope of the initial method claim which did not recite this additional surgical step. Therefore, if "encompass" were used with the above meaning, virtually all method claims would encompass a surgical step and not be allowable under Article 53(c) EPC. It is therefore clear that "encompass" in G 1/07 is not used with the same meaning as discussed above.
- 3.1.5 In the case on which referral G 1/07 was based, a method claim comprised a step of "delivering polarized  $^{129}\text{Xe}$  gas" to a subject, in that it explicitly recited that step. This step was considered to encompass the specific embodiment described in the patent application whereby the delivery was performed via injection into the heart.
- 3.1.6 Consequently, G 1/07 uses the term "comprise" in relation to a step that is explicitly recited in a method claim. By contrast, G 1/07 uses the term "encompass" with regard to an embodiment or step that the patent application mentions as a specific implementation of a more generic claimed method step (see the second and third paragraphs of point 3.2 of the Reasons of G 1/07, as well as the remark in point 4.3.1 of the Reasons on "whether or not a step being or encompassing a surgical step excluded from patentability can be omitted ... by simply leaving it out from the claim").

3.1.7 With the meaning of "encompass" as used in G 1/07, a claimed method encompasses steps of its dependent claims in so far as they define specific embodiments of one or more steps comprised in the claimed method. However, in this board's view, additional steps that are defined only in the dependent claims are not necessarily encompassed by the independent claim.

3.1.8 The principles of G 1/07 can be extended to steps which are claimed implicitly rather than explicitly (see for example T 1526/17, Reasons 2.1; T 1075/06, Reasons 2.1.1; T 1631/17, Reasons 2; T 318/21, Reasons 2.2.1 to 2.3; or T 1005/98, Reasons 2.3, prior to G 1/07). In this context, implicit steps are those that a person skilled in the art would consider to be necessarily implied as an integral part of the claimed method. Consequently, they are comprised in the claimed method.

4. Main request - claim 7 - Article 53(c) EPC

4.1 Attachment to a bone

4.1.1 The board accepts that a step of (directly) attaching a sensor device to a bone is to be regarded as a surgical step. However, claim 7 does not explicitly comprise any step of attaching a sensor device to a target, nor any other step encompassing - within the meaning of G 1/07 - attachment of a sensor device to a bone. In addition to all the considerations above, the description, which always has to be consulted to interpret the claims when assessing the patentability of an invention under Articles 52 to 57 EPC (G 1/24, Order), does not suggest that the step of attaching the sensor device to a bone is part of the claimed method. Rather, the last paragraph states that the invention "solely relates to

the step of navigating, tracking and verifying by acquiring and analyzing data" (see also the second paragraph of each of pages 9 and 10 of the description, which indicate methods that do not form part of the invention).

4.2 The examining division referred to the fact that claim 8 of the then main request specified that "each sensor device is attached to a target". It is questionable whether the fact that a dependent claim defines an additional step allows any conclusions to be drawn about which embodiments are encompassed by the steps of the independent claim (see point 3.1.7 above). In any event, the question is moot since former dependent claim 8 has been deleted in the current main request.

4.2.1 The method defined in claim 7 can be carried out and the relative position between the two sensor devices determined regardless of whether or not each sensor device is attached to a target. For example, the claimed method could be used to determine the relative position of two freely movable sensor devices that are not attached anywhere (e.g. carried by a user) or that are attached to medical hardware such as movable imaging scanners. Accordingly, the claimed method does not require one or both sensor devices to be attached to a target. At least for this reason, attachment of the sensor devices to a target, such as a bone, is not implied as an integral part of the claimed method, i.e. it is not an implicit feature of the method. This distinguishes the case in hand from the case on which T 923/08 was based.

4.2.2 It follows from the above that the method of claim 7 does not comprise attaching the sensor devices to a

target, either implicitly or explicitly. Consequently, the claimed method does not comprise or encompass attachment to a bone.

#### 4.3 Movement of an exposed bone

4.3.1 As mentioned in point 1.5 above, the application describes a workflow involving moving the exposed tibia relative to the exposed femur using the knee joint while calculating the relative position of the sensor devices. Pivoting the exposed bone constitutes a surgical step (see T 1526/17, point 2.1 of the Reasons). Therefore, it must be determined whether or not the method of claim 7 comprises or encompasses moving an exposed bone, even though the contested decision did not address this question.

4.3.2 Claim 7 concerns a method of determining a relative position between two sensor devices. In contrast to the situation in T 1526/17 or T 318/21, the sensor devices need not be moved in order for their relative positions to be determined. Instead, the method concerns a passive, one-time determination which does not rely on any motion or acceleration by the sensor devices or the targets. It is thus a situation comparable, in respect of the movement of a bone, with determining the position of the distal end of a bone guide wire in the case on which T 836/08 was based.

4.3.3 It follows that the method of claim 7 does not comprise a step of moving the sensor devices, either implicitly or explicitly. Therefore, the claimed method does not comprise or encompass movement of an exposed bone.

4.4 In conclusion, the method of claim 7 does not comprise or encompass any surgical steps. Consequently, it does

not constitute a method for treatment by surgery within the meaning of Article 53(c) EPC.

5. Main request - claim 7 - Article 84 EPC

5.1 The contested decision refers to a lack of compliance with Article 84 EPC (see points 20.1 and 21.3.1 of the Reasons). In particular, the examining division held that, for the embodiment in which a sensor device is attached to a bone, attachment to the bone was an essential feature that was missing (Rule 43(3) EPC).

5.2 As set out above, the relative position between the two sensor devices can be determined regardless of whether or not each sensor device is attached to a target. Therefore, a sensor device need not be attached to a target, such as a bone, in order to carry out the invention defined by the claimed method. At least for this reason, attachment to a bone does not constitute an essential feature of the method defined by claim 7. Consequently, the board agrees with the appellant that there is no lack of essential features in claim 7.

6. Conclusion

6.1 For the reasons set out above, the objections in the contested decision relating to claim 7 are unconvincing. The contested decision does not include any other objections, nor is there anything to suggest that the main request does not meet the requirements of the EPC for any other reason (see also the examining division's communication under Rule 71(3) EPC dated 22 December 2023). The board does not see any reason to raise other objections *ex officio* either.

## Order

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

The decision under appeal is set aside. The case is remitted to the examining division with the order to grant a patent in the following version:

#### Description:

Pages 1 to 23 as indicated in the examining division's intention to grant dated 22 December 2023

#### Claims:

1 to 11 of the main request filed with the letter of 24 February 2026

#### Drawings:

Sheets 1/15 to 15/15 as indicated in the examining division's intention to grant dated 22 December 2023

The Registrar:

The Chairman:



A. Chavinier-Tomsic

M. Alvazzi Delfrate

Decision electronically authenticated