UPC CFI, Local Division Paris, 11 December 2024, Dexcom v Abbott

remote monitoring of analyte measurements

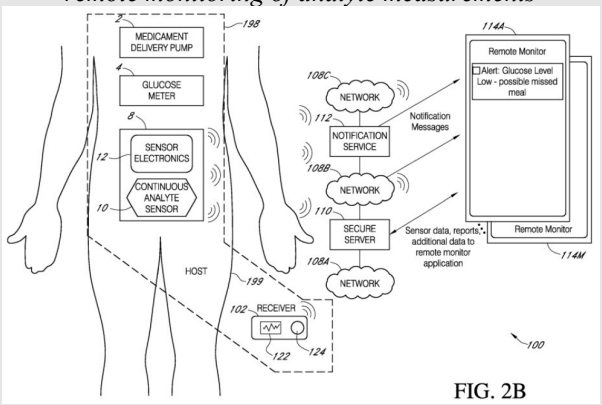

FIG. 2B

PATENT LAW – PROCEDURAL LAW

EP'282 is not valid, neither as granted (lack of inventive step) nor as amended by auxiliary requests 1,2 and 3 (added matter) and it must be entirely revoked (Article 138(1) EPC, Article 65(2) UPCA).

New added matter ground for revocation raised in Rejoinder to the reply to the Statement of Defence inadmissible (R. 9.2 RoP)

- **Order by the judge-rapporteur allowing further written pleadings (R. 36 RoP) relates to adding some arguments to the debate related to some specific terms regarding claim interpretation, but it did not authorise ABBOTT to raise a new ground for revocation.**

The UPC procedure is a front-loaded system and the Court finds no legitimate reason to allow a new ground for revocation to be raised at a later stage of the proceedings concerning the validity of the patent as granted, even if such an order would have allowed the other party to respond to the new grounds.

Claim interpretation (Article 69 EPC)

The skilled person (Article 56 EPC) is a group of persons,

- **comprising persons skilled in the field of (physiological) analyte monitoring systems (such as Continuous Glucose Monitoring (CGM)) and persons skilled in the art of designing portable electronic systems, who are also familiar with the communication and data processing techniques involved in such systems.**

Strict literal interpretation of claim features relating to "the rules and the setting" in the present case (Article 1, Interpretation Protocol)

- **Deviating from the wording of the claim would in the present case to the detriment of third parties not combine adequate protection for the patent proprietor with sufficient legal certainty for third parties.**

Lack of inventive step claim 1 as granted (article 56 EPC):

- **the invention set out in claim 1 as granted does not involve an inventive step when considered in view of Valdes combined with Goodnow.**
- **Two aspects of the solution - the presence of a server between the host and the remote devices, and an invitation scheme – are rendered obvious by Goodnow**

Added matter auxiliary requests (Article 138(1)(c) EPC)

- **claim 1 according to the auxiliary requests extends the subject-matter of the European patent beyond the content of the earlier application as filed**
- **"Whole-content approach" must be adopted in the present case to determine added matter. Question to be addressed is whether the skilled person considering claim 1 would be confronted with new technical information based on what was derivable, directly and unambiguously, from the whole contents of the description, claims and figures of WO 631.**

Source: Unified Patent Court

UPC Court of First Instance, Local Division Paris, 11 December 2024
(Lignières, Lopes, Gillet, Dumont)
UPC_CFI_395/2023
Decision on the merits
of the Court of First Instance of the Unified Patent Court delivered on 11/12/2024
in an action for infringement with counterclaim for revocation
concerning **EP3831282**
HEADNOTE
1. The order pursuant to **Rule 36 RoP** issued by the judge-rapporteur relates to adding some arguments to the debate related to some specific terms regarding claim interpretation, but it did not authorise the defendant to raise a new ground for revocation. The UPC procedure is a front-loaded system and the Court finds no legitimate reason for the defendant, which had already stated its own claim interpretation in its Statement of Defence and counterclaim, to raise a new ground for revocation at a later stage of the proceedings concerning the validity of the patent as granted. The additional ground concerning the patent as granted raised in the Rejoinder to the reply to the Statement of Defence is inadmissible pursuant to **Rule 9.2 RoP**.
2. As regards the claim interpretation, the Court adopted a "whole-content approach". In the present case, a question to be addressed is whether the skilled person considering a claim would be confronted with new technical information based on what was derivable, directly and unambiguously, from the whole contents of

the description, claims and figures of the earlier application.

KEYWORDS

Admissibility, Added-matter, Inventive step, Auxiliary request, Validity, R. 9.2 RoP, R. 36 RoP, Article 56 EPC, Article 138 (1)(c) EPC.

ORDER

CLAIMANT

1) DexCom, Inc.
6340 Sequence Drive
92121 San Diego, CA – US
Represented by
Anne-Charlotte Le Bihan, Bird & Bird AARPI
Laurent Labatte, Bird & Bird AARPI
David Sproston, Hoffmann Eitle
Mark Jones, Hoffmann Eitle

DEFENDANTS

1) Abbott Logistics B.V.
Postbus 365
8000AJ Zwolle – NL
Represented by
Christian Dekoninck
Taylor Wessing N.V.
2) Abbott Diagnostics GmbH
Max-Planck-Ring 2
65205 Wiesbaden – DE
Represented by
Christian Dekoninck
Taylor Wessing N.V.
3) Abbott France
40/48 Rue d'Arceuil
94593 Rungis CP 10457 - FR
Represented by
François Pochart August Debouzy
4) Abbott Oy
Karvaamokuja 2 A
00380 Helsinki - FI
Represented by
Christian Dekoninck
Taylor Wessing N.V.
5) Abbott Diabetes Care Inc.
1360 South Loop Road
94502 Alameda, CA - US
Represented by
Christian Dekoninck
Taylor Wessing N.V.
6) Newyu,Inc.
100 Abbott Park Road,
D367 AP6D Sales Tax
60064 - Abbott Park, Illinois - US
Represented by
Christian Dekoninck
Taylor Wessing N.V.
7) Abbott Laboratories
100 Abbott Park Road
60064 - Abbott Park, IL - US
Represented by
Charlotte Garnitsch
Taylor Wessing N.L.
8) Abbott Laboratories A/S
Emdrupvej 28C
2100 Copenhagen - DK
Represented by
Christian Dekoninck
Taylor Wessing N.V.
9) Abbott Scandinavia Aktiebolag
Hemvärnsgatan 9
171 54 Solna - SE
Represented by
Christian Dekoninck
Taylor Wessing N.V.
10) Abbott
Avenue Einstein 14
1300 Wavre - BE
Represented by
Christian Dekoninck
Taylor Wessing N.V.
11) Abbott GmbH
Max-Planck-Ring 2
65205 Wiesbaden - DE
Represented
Christian Dekoninck
Taylor Wessing N.V.
12) Abbott Gesellschaft m.b.H.
Perfektastrasse 84A
1230 Wien - AT
Represented by
Christian Dekoninck
Taylor Wessing N.V.
13) Abbott S.r.l.
Viale Giorgio Ribotta 9
00144 - Rome - IT
Represented by
Christian Dekoninck
Taylor Wessing N.V.
14) Abbott B.V.
Wegalaan 9
2132JD Hoofddorp - NL
Represented by
Christian Dekoninck
Taylor Wessing N.V.

PATENT AT ISSUE

Patent no.	Proprietor
EP3831282	DexCom, Inc.

DECIDING JUDGES

COMPOSITION OF PANEL

Presiding judge and Judge-rapporteur Camille Lignières
Legally qualified judge Rute Lopes
Legally qualified judge Carine Gillet
Technically qualified judge Alain Dumont

LANGUAGE OF PROCEEDINGS:

English

SUBJECT-MATTER OF THE PROCEEDINGS:

Infringement action and Counterclaim for revocation

DATE OF THE ORAL HEARING: 30/10/2024

THE PARTIES

1. DEXCOM Inc. (hereinafter: DEXCOM) is a US company founded in 1999 and headquartered in San Diego, California, which positions itself as a world leader in the development, manufacture and marketing of innovative Continuous Glucose Monitoring (hereinafter "CGM") systems for persons with diabetes.

2. All the defendants (hereinafter: ABBOTT entities or ABBOTT) are part of a global healthcare group headquartered in Chicago, USA.
3. The ABBOTT entities develop and distribute diagnostic, medical and nutritional products and software, notably the products sold under the "FreeStyle Libre" trademarks (including "Freestyle Libre 3"), which constitute a glucose monitoring system and are the subject of the present infringement action and counterclaim for revocation (hereinafter "CC").
4. Defendant 1, ABBOTT Laboratories, is the US parent company of the ABBOTT group.
5. Defendant 2 is ABBOTT Diabetes Care Inc, a US subsidiary of the First Defendant which develops the "FreeStyle Libre 3 system".
6. The third to thirteenth defendants distribute the FreeStyle Libre 3 products at their respective locations in the EU: France, Belgium, the Netherlands, Italy, Sweden, Finland, Austria, Denmark and Germany.
7. The fourteenth defendant, Newyu, is a U.S subsidiary company that develops the "LibreLinkUp application" with the second Defendant.

FACTS AND PROCEEDINGS

Summary of facts:

8. DEXCOM Inc. is the owner of a European patent n° EP 3 831 282 B1 (hereinafter: "EP'282").
9. The Patent at issue entitled "Remote monitoring of analyte measurements" was filed with the European Patent Office on 19 December 2013, claiming US priorities, and was granted on 23 March 2022.
10. EP'282 derives from a divisional application filed on the basis of a parent patent application, published as EP 2 939 158 A2 (EP'158).
11. The present action covers all the territories of the countries where EP'282 is in force, notably Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, and Sweden.
12. The patent at issue relates to remote monitoring, in particular monitoring of glucose levels in people suffering from diabetes. Remote monitoring means that the user of a continuous analyte monitor can share his glucose information with other people (family, friends, etc.) in order to allow these people to support the host in his glucose management.
13. This dispute is part of an ongoing global litigation series between DEXCOM and the ABBOTT group's companies.

Summary of proceedings:

14. An infringement action was lodged by DEXCOM on 30/10/2023 before the UPC Paris Local Division against ABBOTT's companies related to the patent EP'282.
15. No preliminary objection pursuant to **R. 19** of the Rules of procedure (hereinafter "RoP") was raised: Jurisdiction, competence and language were not challenged.
16. A counterclaim for revocation with the Statement of Defence (hereinafter "SoD") was filed by ABBOTTs' entities.
17. A procedural order establishing a confidentiality club protecting trade secrets or other confidential information was issued on 5 April 2024.
18. In its reply to the defence and the counterclaim, DEXCOM rejected the arguments for the revocation of its patent and filed auxiliary requests to amend the patent in question.

THE REQUESTS

19. DEXCOM lodged written pleadings, on 15 May 2024 (to amend the patent) and 16 August 2024.
20. ABBOTT lodged written pleadings on 15 March 2024 (counterclaim for revocation), 15 July 2024 and 16 September 2024.
21. DEXCOM requests that the Court:

In the main action for patent infringement:

1. DECLARE that:
- The subject matter of claim 1, 5, 6, 7, 9, 10,11, 12 and 13 of patent EP 3 831 282 is infringed by the Defendants' LibreLinkUp remote analyte monitoring system (including the LibreLinkUp application connected to the LibreView server, the FreeStyle Libre 3 sensor unit, and the FreeStyle Libre 3 application), (here after LibreLinkUp);
- The subject matter of claim 14 of patent EP 3 831 282 is infringed by the defendants' LibreLinkUp;

2. DECLARE that:
- The Defendants have committed acts of direct infringement within the territory of the Agreement on the Unified Patent Court or in the alternative, within the territory comprising Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Italy, and Sweden, designated "Relevant Territory";

3. DECLARE that:
- The defendants have committed acts of indirect infringement regarding the LibreLinkUp application and/or the FreeStyle Libre 3 sensor units, and/or the FreeStyle Libre 3 application.

4. ORDER the Defendants to cease and desist, under a penalty of EUR 1,000.00 for each act of infringement;
5. ORDER the Defendants to recall, within a period of 60 days from the date of service of the judgement and subject to a penalty of EUR 50,000.00 for each day of delay, the infringing products from all distribution channels, while at the same time informing the third parties and asking them to return the products, also to remove and destroy said products and to report on these actions;
6. ORDER the Defendants to destroy, within a period of 60 days from the date of service of the judgment and subject to a penalty of EUR 50,000.00 for each day of delay, the infringing products, at their expense;
7. ORDER the Defendants to inform the Claimant, within a period of 30 days from the date of service of the judgment and subject to a penalty of EUR 50,000.00 for each day of delay, (origin and distribution channels, quantities, price obtained, identity of any third person involved).
8. DECLARE the Defendants liable jointly and severally for all damages resulting from the acts.
9. ORDER the Defendants to pay to the Claimant the sum of EUR 500,000 as an interim award of damages;

10. ORDER the Defendants to bear the legal costs and expenses of the proceedings, including those incurred by the Claimant.
11. AUTHORIZE the Claimant to announce and publish the Court's decision in full or in part, on its website www.dexcom.com and in five public media of the Claimant's choice and at the Defendant's costs;
12. AUTHORIZE, in the event that a security is ordered, the Claimant to provide it by bank security and determine the amount of the security separately for each claim granted.
In the defence to the counterclaim for revocation:
-Dismiss all of the defendants' requests against EP 282 as granted or alternatively, against EP 282 as limited under Auxiliary request 1, against EP 282 as limited under Auxiliary request 2, against EP 282 as limited under Auxiliary Request 3.
In any event
-Order the defendants to bear the legal costs and expenses incurred by DEXCOM.

22. ABBOTT entities request that the Court:

- REVOKE EP 282 in its entirety, due to added matter and lack of inventive step over **US 2011/0320130** (hereinafter "Valdes) by itself or over Valdes in combination with Goodnow (**US 2011/0178717**);
- DISMISSE the infringement action in its entirety;
- ORDER DEXCOM to bear legal costs and other expenses incurred by ABBOTT's entities, and to pay for interim award an amount of 100.000 euros, within 14 days after service of the judgment;
- SEND a copy of the decision to the European Patent Office and to the national patent office of any Contracting Member States;
- DECLARE the judgment immediately enforceable.
In the alternative, in case the Court should order correctives measures as claimed by DEXCOM,
- GRANT a grace period of 18 months after the announcement of the decision, before an injunction, recall and removal and/or destruction are enforced;
- ORDER DEXCOM to provide a financial security in the amount of 100 million;
- ISSUE any order to provide information conditional upon a confidentiality order.

THE PATENT AT ISSUE

23. DEXCOM is the registered proprietor of the European patent EP'282.
24. The Patent at issue, titled "Remote monitoring of analyte measurements", was filed with the European Patent Office on 19/12/2013, claiming US priorities dated 31/12/2012 and 15/03/2013. Mention of the grant of the patent at issue was published on 23/03/2022. (Exhibit C14 DEXCOM)
25. The patent is in force notably in the following EU Member States: Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands and Sweden.
26. EP'282 relates generally to remote monitoring, in particular remote monitoring of glucose levels in people suffering from diabetes.
27. A variety of non-invasive, transdermal and/or implantable electrochemical sensors are being developed for continuously detecting and/or quantifying blood glucose values. These devices generally transmit raw or minimally processed data for subsequent analysis at a remote device which can include a display, to allow presentation of information to a user hosting the sensor. (patent at issue, [0004])
28. According to DEXCOM, the known processes (prior art documents cited in the description are **US 2012/220266** and **US 2011/ 199214** [005] and [006]) do not provide teaching allowing the skilled person to implement an improved remote analyte monitoring process. (§ 45 Statement of claim (hereinafter "SoC"))
29. EP'282 presents an invention providing a remote monitoring process of analyte values measured by a transcutaneous sensor, as set out in claim 1.
30. EP'282 comprises 15 claims, notably Claim 1, an independent claim protecting a method, and Claims 14 and 15, independent claims protecting an apparatus and a storage medium, respectively.
31. Claim 1 reads as follows (the "feature breakdown" presentation by DEXCOM (§46, SoC) is not contested by the Defendants and adopted by the Court):

A method comprising:
1.1 receiving, at a mobile remote computing device (114)
1.1.1 via a server (110),
1.1.2 an invitation to receive one or more notification messages containing information indicative of an analyte concentration state of a host based on analyte sensor data obtained from a transcutaneous analyte sensor (10) monitoring an analyte concentration state of the host,
1.1.3 wherein the one or more notification messages are generated based on a set of rules initially set by the host at a host monitoring application installed on a mobile host communication device (105) operably coupled to the transcutaneous analyte sensor (10);
1.2 presenting, at the mobile remote computing device (114), the invitation to install a remote monitoring application on the mobile remote computing device (114) to receive the one or more notification messages for user acceptance;
1.3 installing the remote monitoring application, by the mobile remote computing device (114), in response to user acceptance of the invitation;
1.4 configuring, using the remote monitoring application, the mobile remote computing device (114) to receive via the server, the one or more notification messages according to the set of rules,
1.4.1 wherein the configuration includes settings on the mobile remote computing device (114) generated based on the set of rules initially set by the host at the host monitoring application;

1.5 configuring the remote monitoring application to receive modifications to at least one of the settings at the remote monitoring application; and

1.6 receiving at least one notification message at the mobile remote computing device (114) in accordance with the set of rules and providing the at least one notification message for display in accordance with the settings including any modifications to the settings.

32. Independent claim 14 reads as follows:

"An apparatus comprising at least one processor and at least one memory including programmable instructions, which when executed by the at least one processor causes implementation of the method of any preceding claim."

33. Independent claim 15 reads as follows:

"Computer-readable storage medium includes code which when executed by at least one processor causes implementation of the method of any of claims 1 to 13."

34. Figure 1 of the patent at issue depicts a high-level system architecture of a remote monitoring system in accordance with some exemplary implementations and Figures 2A-2C of the patent at issue illustrate different system architectures of the remote monitoring system of Fig.1 in accordance with some exemplary implementations. Fig. 3 depicts an exemplary process for notifying a remote monitor of an event in accordance with some example implementations. (patent at issue, [0008])

35. Figure 2B of the patent at issue illustrates an example of a continuous analyte monitoring system implementing a method according to claim 1.

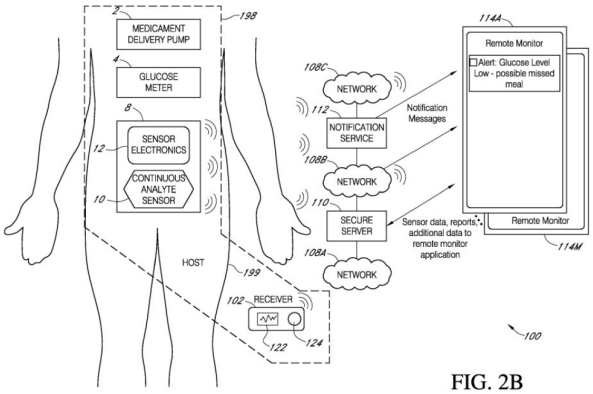

FIG. 2B

GROUNDS FOR THE DECISION

CLAIM INTERPRETATION

The skilled person

36. In the present case, the invention relates to wearable health-monitoring systems including mobile devices such as smartphones linked through a network. The Court considers that the skilled person is a group of persons, comprising persons skilled in the field of (physiological) analyte monitoring systems (such as Continuous Glucose Monitoring (CGM)) and persons skilled in the art of designing portable electronic systems, who are also familiar with the communication and data processing techniques involved in such systems.

Principles for claim interpretation

37. In accordance with **Art. 69 of the Convention on the Grant of European Patents** (EPC) and the Protocol on its Interpretation, the present panel adopts the standard for the interpretation of patents set by the UPC Court of Appeal in two recent orders (**UPC CoA 335/2023** and **UPC CoA 1/2024**), as follows:

1) The patent claim is not only the starting point, but the decisive basis for determining the protective scope of the European patent.

2) The interpretation of a patent claim does not depend solely on the strict, literal meaning of the wording used. Rather, the description and the drawings must always be used as explanatory aids for the interpretation of the patent claim and not only to resolve any ambiguities in the patent claim.

3) However, this does not mean that the patent claim serves only as a guideline and that its subject-matter may extend to what, from a consideration of the description and drawings, the patent proprietor has contemplated.

4) The patent claim is to be interpreted from the point of view of a person skilled in the art.

5) In applying these principles, the aim is to combine adequate protection for the patent proprietor with sufficient legal certainty for third parties.

38. These principles for the interpretation of a patent claim apply equally to the assessment of the infringement and the validity of a European patent. This follows from the function of patent claims, which under the European Patent Convention serve to define the scope of protection of the patent under **Art. 69 EPC** and thus the rights of the patent proprietor in the designated Contracting States under **Art. 64 EPC**, while considering the conditions for patentability under **Art. 52** to **57 EPC**.

The subject-matter and the scope of protection

39. The invention relates to a method according to claim 1. When a host (a patient) monitors their glucose values on an application on their device (e.g. a smartphone), they may wish to share the information regarding their diabetes with one or more remote monitors, such as a friend, family member and/or caregiver. Each remote monitor may find it advantageous to modify the settings provided by the host on the remote monitoring application installed on their smartphone. This allows the friend, family member and/or caregiver to tailor their own alarm settings (e.g. what types of episodes they get notified about, and what alarm criteria triggers each type of episode alarms) based on the role they serve for the host and the current condition of the host.

40. DEXCOM and ABBOTT partly disagree on the interpretation of some terms in the features of claim 1.

The server (in features 1.1.1 and 1.4)

41. EP'282 mentions that the network can include one or more servers to process the health-related data and to transmit notifications and data to one or more remote monitors (see [0021]). It is also implicit that a server

within the meaning of claim 1 may be distributed at different geographical locations, or fulfil more than one single function, such as transmitting invitations (containing personal data) or notification messages (containing medical data). The presence of a single server in claim 1 does not entail any particular limitation as to its concrete implementation, nor does it exclude the use of multiple servers in practice.

42. Therefore, the Court agrees with DEXCOM that this feature in claim 1 is of a rather generic nature and can cover a concrete implementation with several apparatuses for more than one processing function.

The rules and the settings

43. According to claim 1, the rules and settings are related to the notification messages sent from the host monitoring application to the remote device.

44. In the view of the Court, an interpretation is made difficult by the fact that the patent specification does not always consistently distinguish between "alerts" (or "alarms") on the one hand and "notification messages" on the other hand, which could all be triggered by "events" but possibly according to different rules. Notification messages and alerts might obey different rules (see e.g. [0010] and [0042] ("*The alerts may be triggered based on events which are the same or different as the rules used to trigger events for notification messages to the remote monitor 114*")).

45. It is common ground that a remote user may change the set of rules used on the server, such as threshold glucose levels that trigger notification messages (see e.g. [0019], [0038]). However, the question arises as to whether this functionality is reflected in the features of claim 1, in particular with regard to the remote user.

46. According to the patent specification, "rules" are associated with a host and can be stored on the server (see [0149]). They can be used to select the addressee of notification messages, e.g. depending on the time of the day or their geographic proximity with the host (see [0117] or [0204]: "*the secure server 110 may vary the rules used to trigger an alert or notification based on the host's location. Location may be used in combination with time as well*"). They could be different for the host and for a remote monitor / user (see e.g. [0040]). They could also establish schedules / times of day for different remote monitors (see [0035], [0039]). Thus, such rules can be much more extensive and allow more flexibility than settings originating from a remote monitor, especially those shown in Figure 17 which could be modified by a user (see [0200]), so that the mere mention of "settings" in a claim does not necessarily imply identical "rules" on the server.

47. DEXCOM submits that features 1.4 to 1.6 do not mean that the remote user would configure only the mobile remote computing device in order to define the settings, or that the settings are necessarily stored only locally on the mobile remote computing device.

48. DEXCOM argues that features 1.4 to 1.6 should be interpreted as implicitly meaning that the server must be configured to trigger notification messages according to the set of rules, but modified based on the modifications to the "settings", which would be the only way to achieve the claimed result, i.e. the remote device receiving only these messages. That interpretation would correspond to the teaching in the description.

49. Based solely on the description, the Court agrees with DEXCOM that the skilled person would understand that a user of the described monitoring system can modify the rules that serve as a basis for generating notification messages on the server. However, the Court disagrees that this justifies the claim interpretation put forward by DEXCOM. The Court considers that Claim 1 does not support that interpretation for the following reasons:

- Claim 1 expressly sets out that the notification messages are generated based on the set of rules (in feature 1.1.3: "*notification messages are generated based on a set of rules*"). The messages are expressly received by the host device in accordance with this same set of rules ("*receive… according to the set of rules*" in feature 1.4; "*receiving... in accordance with the set of rules*" in feature 1.6).
- Feature 1.6. associates the settings with the modifications to the settings. No feature of claim 1 associates the set of rules with the modifications to the settings.
- As mentioned above, rules triggering notification messages and settings may constitute different sets, so that a message may be generated and received at the remote device without any use of the settings (and the modifications of the settings) on the remote device.
- Thus, the remote device of claim 1 may receive for instance more notification messages than those which would be based solely on the settings.
- Feature 1.6 expressly sets out two distinct steps ("*receiving*" and "*providing... for display*") so that messages are received in accordance with the set of rules, whereas they are provided for display in accordance with the settings (including any modifications). This distinction makes sense only if the set of rules is different from the settings (including any modifications). Otherwise, feature 1.6 would mean that all the messages received would be displayed without any processing in the remote device. This is indeed DEXCOM's interpretation, arguing that "this requires no analysis at the mobile remote computing device". The Court cannot follow this argument because it is incompatible with the wording of features 1.4 and 1.6.

50. DEXCOM further submits that the rules are stored on the server and that they are set based on the settings chosen by the remote user at the remote monitor.

51. The Court considers that DEXCOM's argument is not convincing because feature 1.4.1 of claim 1 expressly sets out that "the configuration includes settings on the mobile remote computing device", which is in line with the description, especially [0171]. Thus, the settings are stored and modified on the remote device

in the first place. No feature of claim 1 hints at a transmission to the server.
52. DEXCOM finally argues that use of the same word "initially" in features 1.1.3 and 1.4.1 implies that any modifications to the settings by the remote device will automatically modify the rules, on the server.
53. In the Court's view, this is not convincing either. Basing the rules on the one hand and the settings on the other hand on the same initial set merely reflects the fact that the initial values should be consistent for all users of the system. There is no objective reason for the skilled person to deduct from the fact that rules are initially set on one device (the host device) and that settings can be modified on a different device (the remote device), that the rules would be modified in accordance with the modifications to the settings, prior to being used on a third device (the server).

Conclusion

54. The Court considers that DEXCOM's interpretation is not justified because, referring to the principle adopted by the UPC Court of Appeal (see § 37 and 38 of the present decision):

- The patent claim is the decisive basis for determining the protective scope and the validity of the European patent. As explained above, the wording of claim 1 does not contain any ambiguities to be resolved and it permits a technically reasonable interpretation that differs from DEXCOM's interpretation.
- The patent claim cannot serve only as a guideline and its subject-matter may not extend to what, after examination of the description and drawings, appears to be the subject-matter for which the patent proprietor seeks protection. The Proprietor's interpretation is consistent with the description. However, adopting it for the purposes of claim interpretation would lead to an incompatibility with the wording of several claim features, namely features 1.1.3, 1.4 and 1.6, thus going beyond using the description and the drawings as explanatory aids for the interpretation of the patent claim.
- Such an interpretation deviating from the wording of the claim would not combine adequate protection for the patent proprietor with sufficient legal certainty for third parties, to the detriment of third parties in the present case.

55. In conclusion, the Court interprets the features relating to the rules and settings as follows:

- notification messages are generated based on the set of rules initially set by the host (in feature 1.1.3);
- the mobile remote computing device receives via the server the notification messages generated in accordance with the set of rules (in features 1.4 and 1.6);
- the remote monitoring application provides notification messages for display in accordance with the settings including any modifications to the settings (in feature 1.6), thus distinct from the set of rules.

VALIDITY OF THE PATENT AT ISSUE

I. The patent as granted:

56. ABBOTT seeks the revocation of the patent at issue on various grounds: added subject-matter and lack of inventive step.

Inadmissibility of added-subject matter

57. **Art.138(1)(c) EPC** provides that a European patent may be revoked with effect for a Contracting State on the grounds that "*the subject-matter of the European patent extends beyond the content of the application as filed or, if the patent was granted on a divisional application or on a new application filed under **Article 61**, beyond the content of the earlier application as filed*".

-Parties' arguments

58. ABBOTT raised this ground for revocation for the first time in its Rejoinder of 15 July 2024 and has argued that it would be made in reply to DEXCOM's interpretation of features 1.4, 1.4.1 and 1.6 of 15 May 2024.
59. ABBOTT submits that Claim 1 as granted contains inadmissible added subject-matter in the light of the auxiliary requests, which comprise features contradicting those of claim 1 according to the main request, in particular the interpretation of the "set of rules" and the "settings" in features 1.4 to 1.6 of claim 1.
60. According to claim 1, notification messages are sent via the server and received at the remote device in accordance with the set of rules. On the other hand, the remote device analyses the received notification messages with respect to its local settings set by the user and displays them if the information contained in the notification message is in accordance with the settings. ABBOTT submits that those features have no basis in the parent application **WO 2014/105631 A2** (hereafter "WO 631"). Claim 20 of WO 631 and Figure 3 would disclose that the set of rules and the settings must be, and are, stored and used on the secure server 110.
61. DEXCOM argues that the new added-matter objections are not a reply to its Defence to the Counterclaim for Revocation but that they are stand-alone objections that are not provoked by the filing of the auxiliary requests, but are simply objections that could, and should, have been brought by ABBOTT in their Counterclaim for Revocation. They would appear to have been purposefully withheld for tactical reasons. Accordingly, they should be disregarded, pursuant to **Rule 9.2 RoP**, as decided in the Bitzer v. Carrier case (**UPC Paris CD, 29 July 2024, ACT_555899/2023**). –

Legal framework

62. **Rule 9.2 RoP** provides that "[t]he Court may disregard any step, fact, evidence or argument which a party has not taken or submitted in accordance with a time limit set by the Court or these Rules."

- Grounds on admissibility of the added-matter ground:

63. ABBOTT initially raised as sole ground for revocation lack of inventive step for the claims as granted. ABBOTT raised a fresh ground for revocation, namely added subject-matter, with its submissions of 15/07/2024 (Reply to the Defence to the Counterclaim for Revocation) and concluded that the patent as granted was invalid in view of the following grounds:

(a) lack of inventive step; and
(b) added matter.

64. Following a request from DEXCOM dated 19/07/2024, which argued that it had to respond to ABBOTT's new arguments concerning the interpretation of the claims in relation to the terms "coupling", "settings" and "set of rules", the judge-rapporteur, by Order under R.36 RoP dated 27/07/2024 (ORD_44813/2024), allowed further exchanges on these specific issues.

65. DEXCOM submitted in its statement of 16/08/2024 that ABBOTT's argument on added matter should be disregarded because it was raised too late in the proceedings. According to DEXCOM, this ground of invalidity should have been raised in the Statement of Defence and Counterclaim for revocation.

66. In its final statement dated 16/09/2024 (§§3.2 and 3.3), ABBOTT argued that, on the claim interpretation discussion between the parties, DEXCOM responded with new proposed definition in its Reply to the Statement of Defence so that ABBOTT "needed to address the added-subject matter that became apparent in DEXCOM's Reply to the SoD".

67. At the oral hearing, DEXCOM maintained its inadmissibility argument and ABBOTT submitted that the exchange of further written pleadings under Rule 36 RoP gave DEXCOM an opportunity to respond also to the arguments on added matter. Consequently, the objection of added subject-matter should be admitted.

68. The Rule-36 order issued by the judge-rapporteur relates to adding some arguments to the debate related to some specific terms regarding claim interpretation, but it did not authorise ABBOTT to raise a new ground for revocation. As DEXCOM rightly pointed out, the UPC procedure is a front-loaded system and the Court finds no legitimate reason for ABBOTT, which had already stated its own claim interpretation in its SoD and CC, to raise a new ground for revocation at a later stage of the proceedings concerning the validity of the patent as granted.

69. The additional ground concerning the patent as granted raised in the statement of 15/07/2024 is inadmissible.

70. Against this background, the Court disregards that ground.

Lack of inventive step

71. Art. 56 EPC states that "*[a]n invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art.*"

72. In order to assess inventiveness, it is necessary to determine whether, given the state of the art, a person skilled in the art would have arrived at the technical solution claimed by the patent using their technical knowledge and carrying out simple operations. Inventive step is defined in terms of the specific problem encountered by the person skilled in the art.

- Concerning Claim 1:

73. For assessing inventive step, ABBOTT refers to the following documents:

- US 2011/0320130 A1 (hereafter "Valdes"), as a starting point;
- US 2011/0178717 A1 (hereafter "Goodnow") as another host-client architecture and data management system.

74. Both documents constitute prior art according to Art.54(2) EPC.

75. ABBOTT submits that granted claim 1 is not inventive over Valdes taken by itself. The only difference between the express disclosure in Valdes and granted claim 1 is the invitation feature. Valdes explicitly discloses that the downloadable software can be transmitted from another device. This possibility inherently implies that users can invite other users, in this case their caregivers, to receive notification messages. Alternatively, claim 1 lacks an inventive step over Valdes in combination with Goodnow, which relates to the same technical field of diabetes care data management.

76. DEXCOM responds that the combination of features of claim 1 enhances safety, in particular the invitation scheme for the notification messages necessitating express acceptance by the remote user, which is not rendered obvious in the prior art.

Inventive step over Valdes taken alone

77. Valdes relates to a method for communicating sensor data between communication devices in a continuous glucose monitoring system

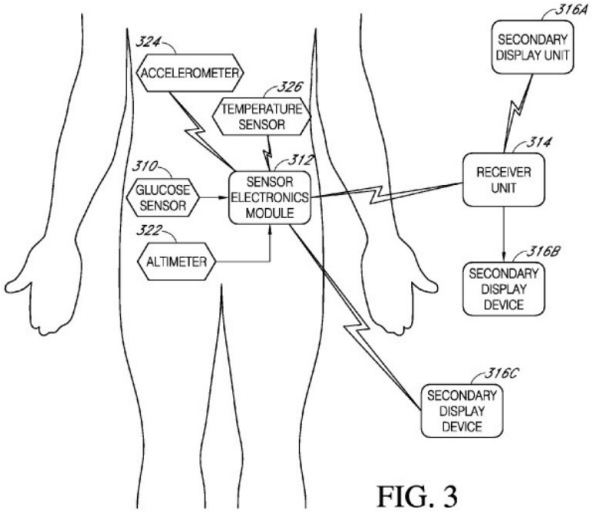

FIG. 3

78. As depicted in Figure 3, the host, i.e. the person whose analyte sensor data is being monitored, wears a display device (316) linked with a receiver unit (314) transmitting sensor data to the display device (see [0157]).

79. The various display devices may be mobile phones. A monitoring application can be installed on all mobile phones, for instance an application downloadable via the internet, such as an iTunes App via Apple's online iTunes store (see [0109]). The host's mobile phone further comprises an alarm configured to warn the host in response to an alert being received. Thus, the notification message is generated based on a set of rules, typically relating to glucose levels.

80. Thus, Valdes discloses feature 1.1.3 of claim 1.

81. The host display device may relay the data to a further, remote, display device. The further remote display device may belong for example to a person associated with the host, such as the host's parent, spouse or care provider (see [0105], [0128]). The remote device can thus remotely monitor a child's glucose levels and has user-configurable alerts to alert a parent of a child's glucose level (see [0157]), or to alert a care provider (see [0106]: "*when an alert triggers that indicates severe hypoglycemia, the receiver unit can perform multiple actions, such as… transmitting a data package to a remote display device indicating activation of an alarm on the display, and transmitting a data package as a text message to a care provider.*").
82. The application has an interface for a user to view sensor-related data (see [0192]). The user interface can include a settings screen that allows a user to select and modify settings of the glucose monitoring system (see Figure 7B; [0198]: "modifying settings relating to sending SMS alerts; modifying high and low blood glucose threshold alerts").
83. DEXCOM insists on the importance of the settings being generated based on the set of rules initially set by the host for an improved reliability of the monitoring. The Court assumes that the initial rules, as "set by the host", are medically reasonable rules, for instance either realistic appropriate default values or values individual to the host. This must be assumed to be the case both in the patent at issue and in Valdes. Consequently, feature 1.4.1 is not a feature technically distinguishing claim 1 from the method known from Valdes.
84. Thus, **Valdes** also discloses features 1.4 (except for the server), 1.4.1, 1.5 and 1.6 of claim 1.
85. **Valdes** is silent as to:

- the presence of a server between the host and the remote devices ("via a/the server" in features 1.1.1 and 1.4 of claim 1);
- the invitation scheme for installing the monitoring application in features 1.1.2, 1.2, and 1.3 in claim 1.

86. The Court agrees with ABBOTT that the application must be both downloaded and subsequently installed as part of an effective download process. However, it considers that, without documentary evidence for the particular invitation scheme set out in claim 1, the subject-matter of claim 1 involves an inventive step in view of **Valdes** taken alone.

Inventive step over Valdes combined with Goodnow

87. DEXCOM formulates the technical problem to be solved as: how to improve the reliability of the host's glucose monitoring. The Court considers this formulation too unspecific. ABBOTT defines the objective technical problem as that of adding to the **Valdes** system the invitation feature, namely the feature of inviting the caregiver to install the application on the secondary display device. The Court considers this definition as containing pointers to the solution, which is impermissible.
88. **Valdes** expressly proposes to relay, or share, data with remote users but provides no concrete way of doing this. Starting from Valdes, the skilled person is thus confronted with the problem of finding a way to establish a connection between the host and a remote user using smartphones as display devices in order to share notification messages, i.e. sensitive medical data.
89. As mentioned above, the solution according to the invention comprises two aspects:

- the presence of a server between the host and the remote devices, and
- an invitation scheme.

90. According to features 1.1.1, 1.1.2 and 1.4 of claim 1, the server is located between the host and the remote devices and used as an intermediary for the remote device to receive the invitation and the notification messages.
91. Contrary to DEXCOM, the Court does not see that claim 1 would set out that the server necessarily generates the invitation and the messages. No feature of claim 1 implies that the server would carry out any of the method steps in claim 1, besides enabling the remote device to receive the invitation and notification messages. However, the wording of claim 1 does not define which of the host device or the server would generate the invitation and the notification messages. Consequently, inventive step can be assessed independently for the two aspects listed above.

The server – server-based architecture

92. When implementing the method known from **Valdes**, the skilled person will seek a solution for the general problem of passing on data and alerts between two devices (316 in Figure 3 of Valdes), one belonging to the host, one belonging to a remote user.
93. It was well known in the field of healthcare applications to resort to an architecture with servers for relaying health-related data between mobile phones. This is evidenced for instance in the article by **V. Custodio, "A Review on Architectures and Communications Technologies for Wearable Health-Monitoring Systems"**, December 2012 issue (published 16 October 2012), in Sensors 2012, 12; pages 13907 to 13946 (Annex B6 to ABBOTT's Rejoinder to the Reply to the Defence of 15/07/2024; hereafter "Custodio").
94. Figure 1 of **Custodio** shows an architecture with a wide-area network using back-end servers when data are to be processed remotely, in the "cloud". This centralised processing has the advantage of saving battery in the smart device(s) (see page 13910. last paragraph).
95. On the other hand, **Goodnow** relates to the same technical field as **Valdes** and the patent at issue, namely the field of Continuous Glucose Monitoring (CGM) systems and methods. It adopts the typical architecture shown in **Custodio**. The system provides a host-client datasharing system for managing diabetes care data, with a database, preferably web or Internet based on a host server. The database uses servers for handling client interactions with the system and including a synchronization architecture by which a diabetic client (the host within the meaning of claim 1) may share data useful in managing the diabetic condition with selected healthcare professionals (HCPs). This architecture may be implemented through an Internetbased synchronising host server (see [0003], [0008], [0009], [0330]).

96. Thus, Goodnow renders the server feature of claim 1 obvious.

The invitation scheme

97. The invitation as set out in claim 1 comprises two parts:

- an "invitation" to receive one or more notification messages: see also "500" in figure 12, "1610" in figure 16;
- an "invitation" to install a remote monitoring application: see also "502" in figure 12, "1620" in figure 16.

98. The invitation scheme contributes to improving security (see [0110] in EP'282). It can be seen as an aspect of the very general problem of "reliability", which EP'282 proposes to improve according to DEXCOM. A similar scheme is disclosed in Goodnow for the same purpose (see [0008]: "A security process assures that data is shared only as authorized by the original user and is accepted by the sharing health care professional.")

99. Goodnow discloses an invitation scheme where the patient (the host of claim 1) invites a remote user (a HCP) to accept to share data (see [0330], [0341], Figure 160) via the server (the "Host" in Goodnow). This is done for instance with an email invitation when the HCP is not yet registered (see [0351]). The email invites the HCP to download and install the necessary application (see [0353], [0354]). The typical email is shown in Figure 163. It is described as an "E-mail Invitation to Register and Share Data" (see [0176]).

100. The HCP must further expressly accept data sharing, as is shown in Figure 158 (see [0350]). At that point in time, the system is made aware that the HCP has accepted the invitation and that data may be shared. As mentioned above, when combined with Valdes (see e.g. [0106]), such data may be notification messages of an alert.

101. Thus, according to Goodnow, the two actions to be carried out by the HCP in order to permit data sharing are installing the application and expressly accepting data sharing. In the Court's view, the order in the sequence for those actions is not important for achieving security. Presenting them to the HCP in one or two messages is also an obvious matter of design choice.

102. Thus, Goodnow renders feature 1.1.2, 1.2 and 1.3 of claim 1 obvious.

Conclusion

103. For the reasons above, the invention set out in claim 1 as granted does not involve an inventive step when considered in view of Valdes combined with Goodnow.

- Concerning the other claims:

104. Neither the method claims 2 to 13, which are dependent on method claim 1, nor claims 14 and 15, protecting an apparatus / a storage medium implementing the method of claim 1, are valid for the same reasons of lack of inventive step mentioned above. The Court notes that DEXCOM has not provided any specific arguments in support of the validity of these other claims.

II. Auxiliary requests

105. Pursuant to Rule 30 RoP, DEXCOM has filed three auxiliary requests (DEXCOM Exhibits C 191 to C 193) to amend claim 1 in the patent at issue.

106. ABBOTT contends that the three proposed amendments are not allowable, arguing that the three auxiliary requests lack clarity, add matter and are not inventive.

107. In the following, the Court addresses the ground of added subject-matter.

Auxiliary Request 1

108. DEXCOM has amended the set of claims as follows:

- Claim 7 was deleted and
- The following feature was added to claim 1, with features 1 to 1.6 remaining unchanged:
  "wherein: the set of rules resides on the server and the server generates each notification message based on the set of rules by processing analyte sensor data received from the mobile host computing device to detect an event satisfying a rule in the set of rules, the mobile host communication device triggers alerts to the host, wherein a different set of rules defines when an alert is triggered by the mobile host communication device when compared to the set of rules used to generate the notification messages to the mobile remote computing device as modified by modifications to the settings"

109. The Court adopts the following breakdown for the added features:

1.7 wherein: the set of rules resides on the server and
1.7.1 the server generates each notification message based on the set of rules by processing analyte sensor data received from the mobile host computing device to detect an event satisfying a rule in the set of rules
1.8 the mobile host communication device triggers alerts to the host,
1.8.1 wherein a different set of rules defines when an alert is triggered by the mobile host communication device when compared to the set of rules used to generate the notification messages to the mobile remote computing device as modified by modifications to the settings

- Added subject-matter

110. Art.138(1)(c) EPC provides that a European patent may be revoked with effect for a Contracting State on the grounds that "*the subject-matter of the European patent extends beyond the content of the application as filed or, if the patent was granted on a divisional application or on a new application filed under Article 61, beyond the content of the earlier application as filed*".

111. The patent at issue was granted on European application EP 21151332.0, published as EP 3 831 282 A1 and filed in accordance with Article 76 EPC as a divisional application to "parent" European patent application EP 13821308.7.

112. It follows that, when examining added matter, the Court will examine whether the subjectmatter does not extend beyond the content of the earlier application as filed. In the present case, the earlier application within

the meaning of Article 138(1)(c) EPC was published as WO 2014/105631 (hereafter: WO 631, Annex 3 ABBOTT's Exhibits).

113. For features 1 to 1.6, ABBOTT submits that they contain inadmissible added subject-matter in the light of the auxiliary requests, which comprise features contradicting those of claim 1 as granted, in particular the interpretation of the "set of rules" and the "settings" in features 1.4 to 1.6 of claim 1. According to claim 1, notification messages are sent via the server and received at the remote device in accordance with the set of rules. On the other hand, the remote device analyses the received notification messages with respect to its local settings set by the user and displays them if the information contained in the messages is in accordance with the settings. ABBOTT submits that those features have no basis in WO 631. Claim 20 of WO 631 and Figure 3 would disclose that the set of rules and the settings must be, and are, stored and used on the secure server 110.

114. ABBOTT submits that the first auxiliary request adds matter and lacks clarity in that it adds features which contradict the remainder of claim 1, and that it cannot properly function. In particular, they object that DEXCOM would isolate single sentences from entire paragraphs and generalise them out of their context.

115. DEXCOM submits that the content of the earlier parent application WO 631 is to be interpreted as being the whole technical content of the earlier application. More specifically, the subject-matter of the divisional is directly and unambiguously derivable by the skilled person from the disclosure of the earlier application as filed, as determined by the totality of its claims, description and figures when read in context. ABBOTT's objections are based on reading a small handful of paragraphs in isolation, without giving consideration to their proper context. DEXCOM further submits that ABBOTT's claim interpretation is incorrect.

116. DEXCOM further submits that features 1.7 and 1.7.1 find a basis in paragraphs [0006], [0007], [0035], [0054], [0122], [0134] of the application as filed, i.e. EP 3 831 282 A1. DEXCOM further submits that features 1.8 and 1.8.1 find a basis in paragraphs [049], [057] of the parent application as filed, i.e. WO 631.

117. The Court agrees with DEXCOM that a "whole-content approach" must be adopted. In the present case, a question to be addressed is whether the skilled person considering claim 1 would be confronted with new technical information based on what was derivable, directly and unambiguously, from the whole contents of the description, claims and figures of WO 631.

The system architecture

118. DEXCOM identifies the passages providing a basis for the system architecture defined by the components of granted claim 1. The Court agrees. These paragraphs do not specifically address the "rules", "settings" and "modifications" to the latter according to claim 1.

119. WO 631, paragraphs [036], [038], [042] and [048] refer to Figure 1 depicting a high-level system architecture of an implementation of the remote monitoring system, mainly comprising host monitoring systems (host devices according to claim 1) for several patients, linked to remote monitors (remote devices according to claim 1) and a secure server through a network, with host and remote applications downloaded on a plurality of devices, e.g. smartphones, for cooperating with the secure server. The secure server is expressly disclosed as processing the health-related data and transmitting notification messages to remote devices, as set out in [038]. Paragraph [036], lines 7-9, further sets out that "[t]he remote monitoring system can receive notifications from the server when a threshold is exceeded, notifying the caretaker using the remote monitoring system of the condition of the host". Therefore, the skilled person would understand that processing takes place on the secure server 110. Paragraph [0146] discloses various alternative ways for the secure server to deliver notification messages.

The set of rules

120. The Court agrees that notification messages are generated based on rules.

121. WO 631, [046] exemplifies that an "event" can be detected by the secure server and/or by the receiver 102 (which can be considered the host device in Figure 2B). It causes the display of a notification message on the remote device. Paragraph [054], lines 3-9 discloses the role of the secure server as paramount in the context of Figure 3: "*The secure server 110 may determine whether to send a notification message to a remote monitor 114 based on received sensor data (as well as any other data available at the secure server), which triggers an event (or satisfies a rule) at the secure server.*" Paragraphs [0121] and [0122] further disclose the use of rules in the context of the secure server. Paragraph [0130], first sentence, equates "triggers" for the generation of a notification message with rules, criteria, and filters.

122. In summary, WO 631 consistently discloses the invention as comprising a server for processing sensor data in order to generate notification messages, possibly based on different rules for different host/remote devices. Paragraph [0035] in EP 3 831 282 A1 also provides a basis for a set of rules as in features 1.7 and 1.7.1 residing on the server. This set of rules may be the set defined in feature 1.1.3, namely a set "*initially set by the host*" (see [0037]: "*during the configuration process by a user, such as host 199*").

123. Features 1.8 and 1.8.1 introduce "*a different set of rules*" for local alerts for the host, i.e. alerts which are not triggered by the server. According to DEXCOM, the features are based on two sentences of WO 631, in paragraphs [049] ("*the receiver 102 may trigger alerts on its own*") and [057] ("*the rules used to trigger alerts to host 199 at receiver 102 may be different from the rules used to send notification messages to remote monitor 114*"). A further passage in [049] discloses that "*the receiver 102 may trigger an alert based on rules residing within the receiver*".

124. In all those passages, the different set of rules is associated with, and stored in, the receiver 102. In the embodiment of Fig. 2B, the receiver 102 is a mobile host communication device within the meaning of claim 1

because the receiver 102 has stored thereon a host monitoring application (see paragraph [0157], *"[t]he host monitoring application can be... downloaded onto receiver 102 in the implementation of FIG. 2B.*").

125. Consequently, the Court has no issue with feature 1.8 and the first part of feature 1.8.1 ("*wherein a different set of rules defines when an alert is triggered by the mobile host communication device*").

The modifiable settings

126. The last part of feature 1.8.1 ("*when compared to the set of rules used to generate the notification messages to the mobile remote computing device as modified by modifications to the settings*") suggests that the set of rules as modified by modifications to the settings could be used to trigger the notification messages to the remote device. This amendment is consistent with DEXCOM's interpretation of the rules and settings.

127. Paragraph [0217] of **WO 631** relates to Figure 17. It is titled "Remote Monitor Settings Page" and discloses that settings may be reconfigured in the remote monitor, for the purpose of generating alerts.

128. DEXCOM identifies [0188] as the passage providing a basis for the modifiable settings of claim 1. Paragraph [0188] relates to Figure 16 and discloses that settings may be modified by the remote monitor to trigger an alert tailored to a particular remote device. Paragraph [0188] reads as follows:

> "*At block 1630, the user manages alert settings using the remote monitoring application downloaded on the computing device (now considered a remote monitor 114). The alert settings can initially be set at recommended alert settings set by the person that sent the invitation at step 1012 in process 1000 (or default settings in the case the person sending the invitation did not enter any recommended settings) in some implementations. The user of the remote monitor 114 can then modify any of the recommended or default settings. The settings can include setting threshold values for when to trigger an alert to the remote monitor, delays, reminders and no data alert settings, discussed in more detail elsewhere herein. The remote monitor 114 may then transmit the settings of the remote monitor to the secure store for storage and use when triggering alerts associated with the remote monitor.*[1] " [emphasis added]

129. The skilled person would understand from **WO 631** as a whole and paragraph [0188], last sentence in particular, that the settings, modified using the remote application, must be transmitted back to the secure server ("*secure store*" in [0188]) to be used as a basis for generating / triggering alerts in the server.

130. However, as explained above, the Court interprets differently the rules and modifiable settings of claim 1, with notification messages generated in accordance with the set of rules and processed locally (filtered) on the remote device for display in accordance with the settings, as set out in features 1.1.3, 1.4 and 1.6. The Court could find no clear basis for triggering notification messages based on the set of rules for generating notification messages combined with the modifications used to display alerts on the remote device. This technical teaching therefore differs from the teaching in [0217] and/or [0188] of **WO 631**.

131. If DEXCOM's interpretation were followed, the "*set of rules as modified by modifications to the settings*" of feature 1.8.1 would be identical to the "*settings including any modifications to the settings*" of feature 1.6, thus depriving the distinction between the two steps of "*receiving*" and "*providing... for display*" in feature 1.6 of any meaning. ABBOTT has pointed to that contradiction and the Court agrees.

132. In conclusion, claim 1 according to the first auxiliary request extends the subject-matter of the European patent beyond the content of the earlier application as filed (**Art. 138(1)(c) EPC**).

Auxiliary request 2

133. DEXCOM has amended the set of claims according to the first auxiliary request by:

- deleting claim 3;
- adding the following feature in claim 1:
  "*following receipt of a said notification message and activation of the remote monitoring application from an idle mode or inactive mode, either programmatically or under the control of a user of the mobile remote computing device, the mobile remote computing device establishes a connection to the server and receives therefrom analyte sensor data of the host*"

134. Claim 1 includes the same features as claim 1 according to the first auxiliary request, with additional features. Therefore, claim 1 according to the second auxiliary request extends the subject-matter of the European patent beyond the content of the earlier application as filed (**Art. 138(1)(c) EPC**) for the same reasons as the claims according to the first auxiliary request.

Auxiliary request 3

135. DEXCOM has conditionally amended claim 1 of EP 282 as granted to add the following features:

> "*wherein the mobile remote computing device is a first mobile remote computing device and there is a second mobile remote computing device;*
> *the server stores rules defining when each mobile remote computing device should be sent a notification message and determines when one or more of the mobile remote computing devices should be sent a notification message by processing analyte sensor data received from the mobile host computing device to detect an event satisfying one or more of the rules, wherein the rules comprise high and low threshold values that trigger a notification message to the first mobile remote computing device that are different from high and low threshold values that trigger a notification message to the second mobile remote computing device.*"

[1] For the sake of clarity, certain terms have been highlighted by the Court using bold font.

136. The dependent claims have been adapted for consistency with the amendment to claim 1.
137. The Court adopts the following breakdown for the added features:

1.7' wherein the mobile remote computing device is a first mobile remote computing device and there is a second mobile remote computing device;

1.8' the server stores rules defining when each mobile remote computing device should be sent a notification message and determines when one or more of the mobile remote computing devices should be sent a notification message by processing analyte sensor data received from the mobile host computing device to detect an event satisfying one or more of the rules,

1.9' wherein the rules comprise high and low threshold values that trigger a notification message to the first mobile remote computing device that are different from high and low threshold values that trigger a notification message to the second mobile remote computing device.

138. DEXCOM submits that the added features are disclosed in paragraphs [041], [0134], [0122] and [0134] in the application as filed.
139. ABBOTT submits that the third auxiliary request comprises contradictory features in that it suggests that the settings on the remote device somehow modify the rules which are stored in the server, which is inconsistent with the modifiable settings stored in the remote devices, as in feature 1.6.
140. The Court agrees that features 1.8' and 1.9' set out rules that are stored on the server and that are different for the first and second remote devices. In the Court's view, this implies that they must differ from the initial set of rules of features 1.1.3 and 1.4.1, i.e. that they have been modified. The Court's reasoning with respect to features 1.8 and 1.8.1 according to the first auxiliary request therefore applies to features 1.8' and 1.9' according to the third auxiliary request.
141. Consequently, claim 1 according to the third auxiliary request extends the subject-matter of the European patent beyond the content of the earlier application as filed (Art. 138(1)(c) EPC) for the same reasons as the claims according to the first auxiliary request.

CONCLUSION

142. Given the above, the European patent EP'282 is not valid, neither as granted, nor as amended by auxiliary requests 1,2 and 3, and it must be entirely revoked in accordance with Art. 138(1) EPC and Art. 65(2) UPCA.
143. Consequently, the infringement action brought by DEXCOM has no legal basis and all related requests must be dismissed.
144. With regard to costs, as mentioned in the Interim conference Order, both parties have requested separate proceedings.
145. Pursuant to Rule 118.5 RoP, the Court decides in principle that DEXCOM, as the unsuccessful party, is required to bear legal costs in accordance with Art. 69 of the Agreement.
146. ABBOTT requests in its statements an interim award of costs of 100.000 Euros, without however submitting any further argument as to this requested amount. The Court considers that the interim award request is not sufficiently justified. Consequently, the amount covering the costs of the successful party shall be determined by the Court in separate proceedings, upon request by a party for cost decision pursuant to Rule 151 RoP. Therefore, the request made by ABBOTT for an interim award of costs of 100.000 Euros must be dismissed.

DECISION

The Court orders that:

1. The European patent EP 3 831 282 is revoked in its entirety, with effect in the territories of the Contracting Member States for which the European patent had effect at the date of the counterclaim for revocation and as specified by ABBOTT's requests (any Contracting Member States concerned where the patent at issue is in force), namely: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia and Sweden.
2. The Registry shall send a copy of this decision to the European Patent Office and to the national patent office of any Contracting Member States concerned, in accordance with Article 65(5) UPCA, after the deadline for appeal has passed.
3. All of DEXCOM's infringement claims based on the patent at issue are dismissed.
4. DEXCOM is required to bear the costs of the proceedings in the action CFI_395/2023 and ABBOTT's request for an interim award of costs of 100.000 Euros is dismissed.

Issued in Paris, 11 December 2024.

NAMES AND SIGNATURES

Camille Lignières, Presiding judge and Judge-rapporteur
Carine Gillet, Legally qualified judge
Rute Lopes, Legally qualified judge
Alain Dumont, Technically qualified judge
Charlotte Ferhat, Clerk

Information about appeal

An appeal against the present Decision may be lodged at the Court of Appeal, by any party which has been unsuccessful, in whole or in part, in its submissions, within two months of the date of its notification (Art. 73(1) UPCA, R. 220.1(a), 224.1(a) RoP).

Information about enforcement

(Art. 82 UPCA, Art. Art. 37(2) UPCS, R. 118.8, 158.2, 354, 355.4 RoP) An authentic copy of the enforceable decision or order will be issued by the Deputy-Registrar upon request of the enforcing party, R. 69 RegR.

DECISION DETAILS

Decision no. ORD_63909/2024 in ACTION NUMBER: ACT_583778/2023
UPC number: UPC_CFI_395/2023

Action type: Infringement Action and Counterclaim for Revocation

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