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**Datasheet for the decision
of 12 June 2015**

Case Number: T 2120/10 - 3.4.01
Application Number: 07108535.1
Publication Number: 1860456
IPC: G01S7/40, G01S13/86, G01S13/94,
G01C21/00
Language of the proceedings: EN

Title of invention:

Methods and systems for radar aided aircraft positioning for approaches and landings

Applicant:

Honeywell International Inc.

Headword:

Relevant legal provisions:

EPC 1973 Art. 113(1)
EPC R. 111(2)
RPBA Art. 11

Keyword:

Substantial procedural violation - violation of the right to be heard (yes)
Appealed decision - sufficiently reasoned (no)

Decisions cited:

T 0070/02, T 0763/04, J 0007/82, T 0246/08

Catchword:



**Beschwerdekammern
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Chambres de recours**

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Case Number: T 2120/10 - 3.4.01

**D E C I S I O N
of Technical Board of Appeal 3.4.01
of 12 June 2015**

Appellant: Honeywell International Inc.
(Applicant) 101 Columbia Road
Morristown, NJ 07960 (US)

Representative: Houghton, Mark Phillip
Patent Outsourcing Limited
1 King Street
Bakewell, Derbyshire DE45 1DZ (GB)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 15 April 2010
refusing European patent application No.
07108535.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Assi
Members: F. Neumann
D. Rogers

Summary of Facts and Submissions

- I. The appeal lies from the decision of the examining division refusing European patent application number 07 108 535.1.
- II. The contested decision was a decision according to the state of the file. As to the grounds for the decision, the examining division referred to its communication dated 9 December 2009.
- III. With the statement setting out the grounds of appeal the appellant requested that the decision under appeal be set aside and a patent be granted on the basis of the documents on file on 9 December 2009.

As a precautionary measure, oral proceedings were requested.

- IV. The Board issued a communication in which the appellant was informed that the Board considered that a procedural violation had occurred during the examination proceedings and that, in the absence of any apparent reasons for doing otherwise, it intended to remit the case to the examining division for further prosecution.
- V. With letter of 15 May 2015 the appellant withdrew the request for oral proceedings *"on the basis that in the absence of those proceedings the Board of Appeal will remit the case to the examining division for further prosecution and reimburse the appeal fee."*

Reasons for the Decision

1. The appeal is admissible.
2. The decision under appeal was issued as a "*decision according to the state of the file*". The standard form used for the decision stated that the European patent application was refused and referred to the communication of 9 December 2009 for the grounds for the decision. In that communication the examining division had raised the objection that the subject-matter of claim 1, filed with the letter of 19 June 2009, lacked an inventive step (Article 56 EPC) in the light of the disclosure of document D5 (US-A-5 361 212) taken in combination with the teaching of document D1 (US-B1-6 512 976).
3. Moreover, the decision stated that "*The applicant filed no comments or amendments in reply to the latest communication but requested a decision according to the state of the file by a letter received in due time on 8 April 2010*". This statement is factually incorrect because the applicant had indeed replied to the latest communication (that of 9 December 2009) with letter dated 15 March 2010, submitting detailed arguments as to why, in the applicant's opinion, the objection of lack of inventive step was unjustified.
4. According to Rule 111(2) EPC decisions of the European Patent Office which are open to appeal shall be reasoned. This fundamental requirement also applies to decisions according to the state of the file. Indeed, it is established jurisprudence that a request for a decision on the state of the file cannot be construed as a waiver of the right to a fully reasoned first instance decision (see Case Law of the Boards of Appeal of the EPO, 7th edition 2013, III.K.4.3.3).

5. For a decision to be reasoned it must contain, in addition to the logical chain of facts and legal provisions on which the decision is based, a discussion of the crucial points of dispute, in order to give the party concerned a fair idea of why its submissions were not considered convincing (T 70/02, not published, Reasons, point 7).

This requirement is reflected in the Guidelines for Examination. Chapter E-X, 5 of the April 2010 version (valid at the time the decision was issued), instructs examiners that *"It is particularly important that special attention should be paid to important facts and arguments which may speak against the decision made. If not, the impression might be given that such points have been overlooked"*. The Guidelines emphasise that *"The need for complete and detailed reasoning is especially great when dealing with contentious points which are important for the decision."*

6. In the statement setting out the grounds of appeal (see page 1), the appellant protested about the apparent failure to take the submissions of the appellant into account when deciding the case: *"We are not sure the extent to which the Examining Division considered our written submissions of our letter dated 15 March 2010, and these written submissions are particularly significant"*.

In fact, although the appellant had responded by letter of 15 March 2010 to the communication of 9 December 2009 by submitting detailed arguments against the objection raised by the examining division, these arguments were completely ignored in the contested decision. Indeed, there is no indication that the

examining division took these arguments into consideration.

The decision is therefore not sufficiently reasoned, as required by Rule 111(2) EPC.

7. Consistent case law of the boards of appeal shows that a failure to address in the contested decision the disputed points amounts to an infringement of the right to be heard (Article 113(1) EPC 1973) and constitutes a substantial procedural violation.

8. In particular, attention is drawn to the Case Law of the Boards of Appeal of the EPO, 7th edition 2013. In point III.B.1.3.9 it is stated that *"In T 763/04 the board held that Art. 113(1) EPC 1973 is contravened if facts and arguments which according to the appellant are clearly central to his case and could present a challenge to the decision in question were completely disregarded in that decision. The right to be heard is contravened if the decision of the department of first instance fails to mention or take into consideration important facts and arguments which could present a challenge to that decision."*

It has consistently been held that the right to be heard under Art. 113(1) EPC is not just a right to present comments but also a right to have those comments duly considered. Chapter III.K.4.4 of the Case Law book emphasises that *"The comments presented must be considered in the ensuing decision (J 7/82, OJ 1982, 391 and T 246/08). A decision must show that all potentially refutative arguments adduced by a party are actually refutable. Failure to take into due account a potentially refutative argument of the applicant when deciding the case deprived the applicant of its right*

to be heard in contravention of Art. 113(1) EPC and amounted to a substantial procedural violation (T 246/08)".

9. With regard to the present case, the Board has no reason to depart from the jurisprudence mentioned above. When deciding the case, the potentially refutative arguments contained in the letter of 15 March 2010 should have demonstrably been taken into account. The failure to do so amounts to an infringement of the right to be heard (Article 113(1) EPC 1973) and constitutes a substantial procedural violation.
10. The Board notes that the applicant's submission dated 8 April 2010 mentions a telephone conversation with the examiner. No minutes of this telephone conversation appear on the file. It is conceivable (but, in the absence of minutes, this is pure speculation) that the examiner may have explained during this conversation why the pending objections would be upheld. However, even if this were the case, in order to be sufficiently reasoned as required by Rule 111(2) EPC, the decision should nevertheless have addressed the appellant's arguments and explained why they were not persuasive.
11. According to Article 11 RPBA *"A Board shall remit a case to the department of first instance if fundamental deficiencies are apparent in the first instance proceedings, unless special reasons present themselves for doing otherwise"*.

As no such reasons are apparent, the Board remits the case to the examining division for further prosecution.

12. In view of the aforementioned substantial procedural violation, reimbursement of the appeal fee is equitable in accordance with Rule 103(1) (a) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



R. Schumacher

G. Assi

Decision electronically authenticated