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**Datasheet for the decision
of 3 November 2015**

Case Number: T 1640/11 - 3.4.03

Application Number: 04731954.6

Publication Number: 1620836

IPC: G09F3/02

Language of the proceedings: EN

Title of invention:
AUTHENTICATION SYSTEM

Applicant:
AEGATE SALUS AG

Headword:

Relevant legal provisions:
EPC 1973 Art. 56, 84
EPC 1973 R. 71(2), 29(1)
RPBA Art. 15(1), 15(3), 15(5), 15(6)
EPC R. 43(1)

Keyword:
Claims - clarity (no)

Decisions cited:
T 0337/95, T 0560/09

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1640/11 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 3 November 2015

Appellant: AEGATE SALUS AG
(Applicant) c/o DGE Avocats
Rue Bartholoni 6
1204 Geneva (CH)

Representative: Smith, Samuel Leonard
J A Kemp
14 South Square
Gray's Inn
London WC1R 5JJ (GB)

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 25 February 2011 refusing European patent application No. 04731954.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Eliasson
Members: S. Ward
C. Schmidt

Summary of Facts and Submissions

- I. The appeal is against the decision of the Examining Division refusing European patent application No. 04 731 954 as the application did not meet the requirements of the EPC for the reasons given in the communication dated 15 July 2010. In that communication it was stated that the subject-matter of claim 1 was not clear within the meaning of Article 84 EPC and did not involve an inventive step within the meaning of Article 56 EPC.
- II. The appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of the claims filed with the letter of 8 February 2008.
- III. Oral proceedings before the Board were held in the absence of the appellant, the appellant having previously stated in writing that "neither the Applicant, nor any Representative will be attending the Oral Proceedings of 3 November 2015."
- IV. Claim 1 of the sole request reads as follows:

*"An authentication system for authenticating products at point-of-release, the products being housed in respective containers, the system including:
a container (8) for housing a product for distribution and release and including at least one unique product identifier (10) indicating a unique product identity code and no other information about the product and providing said data for reading by an external device;*

at least one terminal (6) located at a point-of-release of the product and for reading the product identifier (10);
an authentication database (2) for storing data relating to the product identifier (10) and the respective products; and
a communication channel (4) by which data read by the at least one terminal (6) can be compared with data stored in the authentication database (2) so as to authenticate the corresponding product; wherein:
the terminal (6) includes: a reader for reading data from the product identifier (10); a communication port for communicating at least some of said data to the said data to the [sic] authentication database (2) and for receiving data from the authentication database (2); and a controller for providing authentication of a product on the basis of the data received from the authentication database (2); and
the authentication database (2) includes: a communication port for receiving from the terminal (6) data relating to the product identifier (10) of a corresponding product and for communicating to the terminal (6) data for authenticating the product; and a memory for storing for each product data relating to the respective product identifier, the product identifier having no value without access to the authentication database (2)."

- V. The findings of the Examining Division, insofar as they are relevant to the present decision, may be summarised as follows:

The feature "the product identifier having no value without access to the authentication database" was vague and unclear. It was not apparent which value was meant: a financial value, a value to an individual or a

sentimental value. The definition of the subject-matter of claim 1 was therefore unclear (Article 84 EPC).

The subject-matter of claim 1 also did not involve an inventive step within the meaning of Article 56 EPC.

VI. The appellant's arguments, insofar as they are relevant to the present decision, may be summarised as follows:

The term "value" had a clear and well-known meaning as defined, for example, on the website "dictionary.reference.com" or in many other dictionary sources.

In general, "value" could be considered to be a measure of "worth", whether this was something abstract or monetary. Clearly, it was the intention that the product identifier would be worthless without access to the authentication database, in the sense that it would be of no use, and therefore it would have no monetary worth either.

VII. With the summons to oral proceedings, the Board sent the appellant a communication under Article 15(1) RPBA expressing *inter alia* its provisional view that the subject-matter of claim 1 did not appear to be clear within the meaning of Article 84 EPC 1973.

Reasons for the Decision

1. The appeal is admissible.
2. As announced in advance, the duly summoned appellant did not attend the oral proceedings. According to Rule

71(2) EPC 1973, the proceedings could however continue without the appellant. In accordance with Article 15(3) RPBA, the board relied for its decision only on the appellant's written submissions. The board was in a position to decide at the conclusion of the oral proceedings, since the case was ready for decision (Article 15(5) and (6) RPBA), and the voluntary absence of the appellant was not a reason for delaying a decision (Article 15(3) RPBA).

3. *Clarity (Article 84 EPC 1973)*

3.1 The requirement under the EPC that the claims be clear was set out in T 560/09 as follows:

- *"Article 84 EPC in combination with Rule 43(1) EPC [Rule 29(1) EPC 1973] stipulates the requirements that the claims shall be clear and define the matter for which protection is sought in terms of the technical features of the invention. Those requirements serve the purpose of ensuring that the public is not left in any doubt as to which subject-matter is covered by a particular claim and which is not. From this principle of legal certainty, in the Board's judgement, it follows that a claim cannot be considered clear in the sense of Article 84 EPC if it does not unambiguously allow this distinction to be made". (T 560/09, Reasons, Point 2; see also T 337/95, Reasons, Points 2.2 - 2.5).*

3.2 In the present case, claim 1 seeks protection for an authentication system which includes a number of interacting features (container, unique product identifier, terminal, authentication database, communication channel etc.), and the claim cannot

therefore be considered clear in the sense of Article 84 EPC 1973 if it does not allow a skilled person to determine unambiguously which subject-matter is covered and which is not, both by each feature individually and by the system as a whole.

3.3 The authentication system of claim 1 includes *inter alia* the following features:

- *"a container (8) for housing a product for distribution and release and including at least one unique product identifier (10) indicating a unique product identity code and no other information about the product and providing said data for reading by an external device"; and*
- *"an authentication database (2) for storing data relating to the product identifier (10) and the respective products";*

and also includes as the final feature of the claim:

- *"the product identifier having no value without access to the authentication database (2)."*

3.4 A condition for the claimed subject-matter to be clear is therefore that a skilled person would be able draw an unambiguous distinction between those product identifiers which are covered by the cited final feature of the claim, and those which are not.

The Examining Division argued essentially that this was not the case. The appellant argued that "the term 'value' has a clear meaning that is well-known to any skilled reader" and which can be found in dictionaries.

3.5 In the opinion of the Board, the appellant's argument misses the point. It is certainly true that in some cases a lack of clarity may arise as a result of the use of unfamiliar or obscure terminology, but that does not mean that clarity is guaranteed simply by constructing a claim using only words which would be familiar to the skilled reader; the requirements of Article 84 EPC are not necessarily met merely because the words used in a claim have corresponding entries in a dictionary.

3.6 In the present case, the problem is not that the reader would be unaware of the normal meaning of the word "value", but that its meaning is inherently subjective: what has value for one person may have no value for another, and what has a value in attaining a particular goal may have no value if a different goal is to be achieved. In claim 1, however, no person or goal is defined.

The same can be said for the alternatives "worth" or "use" suggested by the appellant. What has no worth to one person may have worth to another, and what has no use for one purpose may be useful for another.

3.7 Determining whether a product identifier is covered by the claimed definition would therefore involve not a comparison of physical structures or functional capabilities, but speculative conjecture about persons to whom, or purposes for which, the product identifier might have "value".

3.8 The ambiguity to which this would lead may be illustrated by considering a container having a product identifier designed not to convey any information about the product without access to the authentication

database (so that, for example, no information about the product could be inferred from the product identity code itself, as explained in the description under point 1 on page 15, third paragraph).

3.9 To a person whose aim is to gain access to data relating to the product, such a product identifier would have no value unless that person had access to the authentication database. Hence, seen from the point of view of such a person, the product identifier would fall within the ambit of the final feature of claim 1.

3.10 However, the assessment for exactly the same product identifier would be not necessarily be the same for others having different purposes in mind.

If the genuine product were known to be supplied in a package bearing a product identifier, then its absence would clearly indicate a counterfeit product, whereas the presence of a product identifier, even without access to the authentication database, would at least indicate a potentially authentic product.

Hence, for a person interested in, say, re-selling the product over the internet, the product identifier would have some value even without access to the authentication database. Seen from the point of view of such a person, the product identifier would not fall within the ambit of the final feature of claim 1.

3.11 As a result of such ambiguities, the Board does not believe that a product identifier defined in the manner of claim 1 represents a clear technical feature as required by Article 84 and Rule 29(1) EPC 1973.

3.12 It might have been possible, in the light of the description, for the appellant to have clarified the final feature of claim 1 by avoiding the subjective term "value" in favour of a formulation defining the actual function of the product identifier. This appears to be to make product data available to a person having access to the authentication database, while not conveying any information about the product to those who do not have access to the authentication database (see point 1, page 15, third paragraph of the description).

However, despite the fact that the Board expressed in the communication under Article 15(1) RPBA its provisional view that the feature under discussion lacked clarity for reasons essentially as set out above, the appellant chose not to file either amendments or counter-arguments.

Consequently, the Board sees no reason to depart from its provisional opinion that claim 1 does not meet the requirements of Article 84 EPC 1973.

4. In the light of this conclusion it is unnecessary to discuss the finding of the Examining Division that the subject-matter of claim 1 did not involve an inventive step within the meaning of Article 56 EPC 1973.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated