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**Datasheet for the decision
of 5 June 2020**

Case Number: T 2444/17 - 3.4.02

Application Number: 09151052.9

Publication Number: 2085773

IPC: G01N27/16

Language of the proceedings: EN

Title of invention:

Temperature and humidity compensated single element pellistor

Applicant:

Life Safety Distribution GmbH

Headword:

Relevant legal provisions:

EPC Art. 84

Keyword:

Claims - clarity (no)

Decisions cited:

Catchword:



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Case Number: T 2444/17 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 5 June 2020

Appellant: Life Safety Distribution GmbH
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Representative: Haseltine Lake Kempner LLP
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 8 June 2017
refusing European patent application No.
09151052.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman R. Bekkering
Members: A. Hornung
B. Müller

Summary of Facts and Submissions

I. The applicant lodged an appeal against the decision of the examining division refusing European patent application No. 09151052.9 because the requirements of Articles 84 and 54(1) EPC (main and auxiliary request then on file) were not fulfilled. In addition, claim 1 of the auxiliary request was not compliant with the requirements of Article 123(2) EPC.

II. With the statement setting out the grounds of appeal, the applicant filed sets of claims according to a main request (identical to the main request underlying the appealed decision) and to new first to third auxiliary requests, and requested that the decision of the examining division be set aside and a patent be granted on the basis of one of these sets of claims.

As a precaution, the appellant requested oral proceedings.

III. In a communication annexed to a summons to oral proceedings, the board informed the applicant about its provisional and non-binding opinion according to which, *inter alia*, the subject-matter of claim 1 of all requests on file lacked clarity.

IV. Independent claim 1 of the applicant's main request and first auxiliary request reads as follows:

"A detector comprising:

a catalytic sensor responsive to a first explosive, ambient gas; and
control circuits coupled to the catalytic sensor,
wherein the control circuits include pre-stored correction factors,

wherein the control circuits produce corrected gas indicating indicia by combining the pre-stored correction factors with gas indicating indicia received from the catalytic sensor,
wherein the catalytic sensor includes only one pellistor to sense the first explosive, ambient gas, and
wherein the detector does not include a compensating pellistor."

- Independent claim 1 of the applicant's second auxiliary request reads as follows:

"A detector comprising:
a single pellistor that is a catalytic sensor responsive to a first explosive, ambient gas;
a non-catalytic temperature sensor that measures temperature;
a non-catalytic humidity sensor that measures humidity, wherein the non-catalytic temperature sensor and the non-catalytic humidity sensor are based on different technologies than a pellistor compensator; and
control circuits coupled to the catalytic sensor, wherein the control circuits include pre-stored correction factors,
wherein the control circuits produce corrected gas indicating indicia by combining the pre-stored correction factors with gas indicating indicia received from the catalytic sensor responsive to the outputs from the non-catalytic temperature sensor and the non-catalytic humidity sensor,
wherein the detector includes only the single pellistor to sense the first explosive, ambient gas; and
wherein the detector does not include a compensating pellistor."

- Independent claim 1 of the applicant's third auxiliary request reads as follows:

"A detector comprising:

a catalytic sensor responsive to a first explosive, ambient gas;

a non-catalytic sensor that measures temperature or humidity; and

control circuits coupled to the catalytic sensor, wherein the control circuits include pre-stored correction factors,

wherein the control circuits produce corrected gas indicating indicia by combining the pre-stored correction factors with gas indicating indicia received from the catalytic sensor,

wherein the catalytic sensor includes only one pellistor to sense the first explosive, ambient gas

wherein the non-catalytic temperature sensor of temperature or humidity is not a pellistor compensator, and

wherein the control circuits combine an output from the noncatalytic sensor with the pre-stored correction factors and the gas indicating indicia."

- V. The board's opinion concerning lack of clarity of claim 1 of the main request was worded as follows (see point 6.1 of the communication annexed to the summons):

"6. Main request

6.1 Clarity

Claim 1 appears to lack clarity (Article 84 EPC).

6.1.1 The exact technical features of a pellistor are not defined in claim 1. Therefore, the technical features of

the catalytic sensor of claim 1 including "only one pellistor" are not clear.

6.1.2 Claim 1 seems to be unclear because it attempts to define the claimed detector by using negative limiting features which are unclear as such, i.e. by using the disclaimer "wherein the detector does not include a compensating pellistor". Not only are the exact technical features of a pellistor unclear, as objected to in point 6.1.1 above, but it is also unclear what the eliminated "compensating pellistor" is compensating for. Since it is thus not clear what is excluded from the scope of protection, the disclaimer of claim 1 appears to be unclear.

6.1.3 It seems to be unclear what the "pre-stored correction factors" of claim 1 are correcting, how they are obtained and how they are used by the control circuits. Therefore, the technical features of the control circuits of claim 1 including these factors and using them are unclear.

6.1.4 It seems to be unclear how "corrected gas indicating indicia" are produced by the control circuits. The indication in claim 1 that this result is achieved by "combining the pre-stored correction factors with gas indicating indicia received from the catalytic sensor" appears to be too vague in order to define concrete means and/or process steps for obtaining "corrected gas indicating indicia".

6.1.5 It would appear from the application as a whole (see e.g. [0033]) that temperature and humidity sensors are required. Claim 1 appears to infringe Article 84 EPC since these essential features are missing.

6.1.6 It would appear from the application as originally filed (see paragraphs [0046] and [0047]) that certain assumptions need to be fulfilled in order to model and to provide a corrected output of a single pellistor-type sensor. Claim 1 is silent about these assumptions which appear to be essential.

Applicant's arguments in support of clarity of claim 1

6.1.7 The applicant referred to the Examination Guidelines GLX F-IV, 4.20 dealing with disclaimers.

The board notes that while Examination Guidelines are not binding on the boards of appeal, the board agrees with the applicant that disclaimers are not generally forbidden, even though their use is only exceptionally permitted. In the present case, the board doubts whether a definition of the claimed subject-matter with the help of negative limiting features, instead of a positive definition of the compensating element, is indispensable, as would be required.

6.1.8 According to the applicant, "[a]nything that is both a pellet and a resistor, with or without a catalyst, is considered a pellistor" (page 3, fourth paragraph, of the statement of grounds of appeal). In other words, a pellistor could be either catalytic or non-catalytic. A compensating pellistor, however, was non-catalytic.

These arguments do not appear to be relevant for clarifying the technical features of a pellistor. The applicant's definition of a pellistor is not part of the original disclosure of the patent application. Moreover, even if it were part of the original patent application, claims must be clear by themselves and may not rely unduly on the description for defining the scope of protection of

the claims. The board notes that, contrary to the applicant's statement, it would appear from the patent application, paragraphs [0003] and [0004], that a pellistor does include a catalyst."

VI. In the annex to the summons to oral proceedings, the board raised doubts about the admissibility of the first to third auxiliary request into the proceedings (Article 12(4) RPBA 2007). Irrespective of the question of admissibility, the board provided its preliminary view *inter alia* on the clarity of claim 1 of the auxiliary requests. The board's opinion concerning lack of clarity of claim 1 of the auxiliary requests 1 to 3 was worded as follows (see points **8.2.1**, **8.2.2** and **8.2.3** of the communication annexed to the summons, respectively):

"8.2.1 First auxiliary request

Claim 1 of the first auxiliary request is identical to claim 1 of the main request. Therefore, claim 1 lacks clarity for the same reasons as given in point 6.1 above.

8.2.2 Second auxiliary request

(a) It would appear that claim 1 lacks clarity for the same reasons as those given in point 6.1 above, except for the objection of point 6.1.5 which is overcome by adding temperature and humidity sensors to the detector of claim 1.

(b) In addition, it would appear that further clarity objections have to be raised:

- It is unclear what is meant by the "technology of a pellistor compensator". Hence, it is unclear which technical feature of the temperature and humidity

sensors of claim 1 is attempted to be defined by defining that these sensors "are based on different technologies than a pellistor compensator".

- The wording of claim 1 "... received from the catalytic sensor responsive to the outputs from the non-catalytic temperature sensor and the non-catalytic humidity sensor" is unclear (Article 84 EPC). In particular, it is unclear what actually is responsive to the outputs of the temperature and humidity sensors.

(...)

8.2.3 Third auxiliary request

- (a) It would appear that claim 1 lacks clarity for the same reasons as those given in point 6.1 above.

Indeed:

- It would appear that *both* temperature and humidity sensors are required in order to correct the output of a single pellistor-type sensor (see e.g. paragraph [0033]). Claim 1, however, requires the presence of only one of the sensors.
- Replacing the disclaimer "the detector does not include a compensating pellistor" by the wording "the non-catalytic temperature sensor of temperature or humidity [*sic*] is not a pellistor compensator" does not clarify the technical features of the temperature or humidity sensors of claim 1, since it is unclear what a "compensating pellistor" is and since the amendment, too, attempts to define the claimed subject-matter by using negative limiting features."

VII. In response to the summons to oral proceedings, the applicant informed the board with its letter dated 29 May 2020 that it did not intend to appear at the oral proceedings. The applicant did not file any comments concerning the board's preliminary opinion as annexed to the summons.

VIII. Following the applicant's letter of 29 May 2020, the oral proceedings scheduled for 1 July 2020 were cancelled.

Reasons for the Decision

1. In its letter dated 29 May 2020 the applicant stated: "*In reply to the Summons to Oral Proceedings communication dated 22 November 2019, please note that we do not intend to appear at the oral proceedings*". This statement is considered equivalent to a withdrawal of the request for oral proceedings (see Case Law of the Boards of Appeal, 9th edition 2019, section III.C.4.3.2 and the references cited there). Consequently, the oral proceedings were cancelled and a decision on the file as it stands is now given.
2. Pursuant to Article 12(4) RPBA 2007, the board takes into account the first to third auxiliary requests, which were filed for the first time together with the statement of grounds of appeal.
3. In the communication annexed to the summons (see points V. and V. above), the board expressed its preliminary opinion, along with the underlying reasons, that claim 1 of the main request and of auxiliary requests 1 to 3 lacked clarity and that the applicant's arguments in

favour of clarity, filed with the grounds of appeal, were not convincing. The applicant did not attempt to rebut the board's provisional opinion. The board sees no reason to deviate from its preliminary opinion, which therefore now becomes final.

4. It follows that claim 1 of the main request and the auxiliary requests 1 to 3 lacks clarity (Article 84 EPC).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Kiehl

R. Bekkering

Decision electronically authenticated