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**Datasheet for the decision  
of 16 May 2022**

**Case Number:** T 1556/19 - 3.4.03

**Application Number:** 12758941.4

**Publication Number:** 2891392

**IPC:** H05K5/00, H05K5/02, G01F1/84,  
H05K7/14

**Language of the proceedings:** EN

**Title of invention:**  
FLAMEPROOF HOUSING WITH DISPLAY

**Applicant:**  
Micro Motion, Inc.

**Relevant legal provisions:**  
RPBA 2020 Art. 13(2)  
EPC Art. 84, 123(2)

**Keyword:**  
Amendments after summons - taken into account (no)

**Decisions cited:**  
T 1888/12, T 0783/05, T 1720/16



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Case Number: T 1556/19 - 3.4.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.03**  
**of 16 May 2022**

**Appellant:** Micro Motion, Inc.  
(Applicant) 7070 Winchester Circle  
Boulder, CO 80301 (US)

**Representative:** Ellis, Christopher Paul  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 7 January 2019  
refusing European patent application No.  
12758941.4 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** M. Papastefanou  
**Members:** M. Ley  
G. Decker

## **Summary of Facts and Submissions**

- I. The appeal is against the decision of the examining division to refuse European patent application No. 12 758 941.4 pursuant to Article 97(2) EPC.
- II. The following document is referred to in the following:  
  
D3 Extract of standard IS/IEC 60079-1:2007 (provided by the appellant with its letter dated 13 November 2018, pages 7 and 8).
- III. The examining division decided that the independent claims 1 and 9 of the sole request before it lacked clarity (Article 84 EPC).
- IV. In a communication pursuant to Article 15(1) RPBA 2020, the board informed the appellant about its preliminary opinion on the set of claims according to the main request and the auxiliary request filed with the statement setting out the grounds of appeal. Among others, the board raised questions of whether these requests could and should have been filed during the examination procedure and whether they should be admitted into the appeal proceedings.
- V. At the end of the oral proceedings before the board, the appellant requested that the decision under appeal be set aside and a European patent be granted on the basis of a main request, a first auxiliary request or a second auxiliary request, all filed with the letter dated 17 April 2022.
- VI. Claim 1 according to the main request has the following wording:

*A flameproof housing (202), comprising:  
a display aperture (212) formed in the flameproof housing (202);  
a shoulder (207) adjacent to the display aperture (212);  
a transparent panel (230) including an outer face (231) and a perimeter (232);  
and  
a fastener element (236) configured to engage an interior surface (203) of the flameproof housing (202) and hold the transparent panel (230) against the shoulder (207);  
wherein a perimeter interface region (264) between the perimeter (232) of the transparent panel (230) and the interior surface (203) of the flameproof housing (202) creates a perimeter gap that does not exceed a flameproof gap limit and wherein a face interface region (260) between the outer face (231) of the transparent panel (230) and the shoulder (207) creates a face gap, inclusive of a predetermined surface roughness tolerance, that does not exceed the flameproof gap limit; wherein the flameproof gap limit is determined by applying an applicable flameproof standard.*

Claim 1 according to the first auxiliary request has the following wording:

*A flameproof housing (202), comprising:  
a display aperture (212) formed in the flameproof housing (202);  
a shoulder (207) adjacent to the display aperture (212);  
a transparent panel (230) including an outer face (231) and a perimeter (232);  
and*

*a fastener element (236) configured to engage an interior surface (203) of the flameproof housing (202) and hold the transparent panel (230) against the shoulder (207);*  
*wherein a perimeter interface region (264) between the perimeter (232) of the transparent panel (230) and the interior surface (203) of the flameproof housing (202) creates a perimeter gap that does not exceed gap limit of 0.20 mm, inclusive of a predetermined surface roughness tolerance, and wherein a face interface region (260) between the outer face (231) of the transparent panel (230) and the shoulder (207) creates a face gap that does not exceed the gap limit.*

Claim 1 according to the second auxiliary request has the following wording:

*A flameproof housing (202), comprising:*  
*a display aperture (212) formed in the flameproof housing (202);*  
*a shoulder (207) adjacent to the display aperture (212);*  
*a transparent panel (230) including an outer face (231) and a perimeter (232);*  
*and*  
*a fastener element (236) configured to engage an interior surface (203) of the flameproof housing (202) and hold the transparent panel (230) against the shoulder (207);*  
*wherein a perimeter interface region (264) between the perimeter (232) of the transparent panel (230) and the interior surface (203) of the flameproof housing (202) creates a perimeter gap that does not exceed gap limit of 0.20 mm, inclusive of a predetermined surface roughness tolerance.*

VII. In summary, the appellant justified the late filing of its requests after the notification of the board's summons to oral proceedings by the fact that the examining division had issued only one communication before summoning to oral proceedings. The appellant further argued that the lack of clarity objection had not been explained in detail until the oral proceedings. Moreover, the amendments made to the main request, the first and second auxiliary requests overcame the objection under Article 84 EPC raised by the examining division in the contested decision and did not introduce any complex subject-matter. In particular, the amendments had a basis in page 14, line 5 to page 15, line 2 of the application as originally filed.

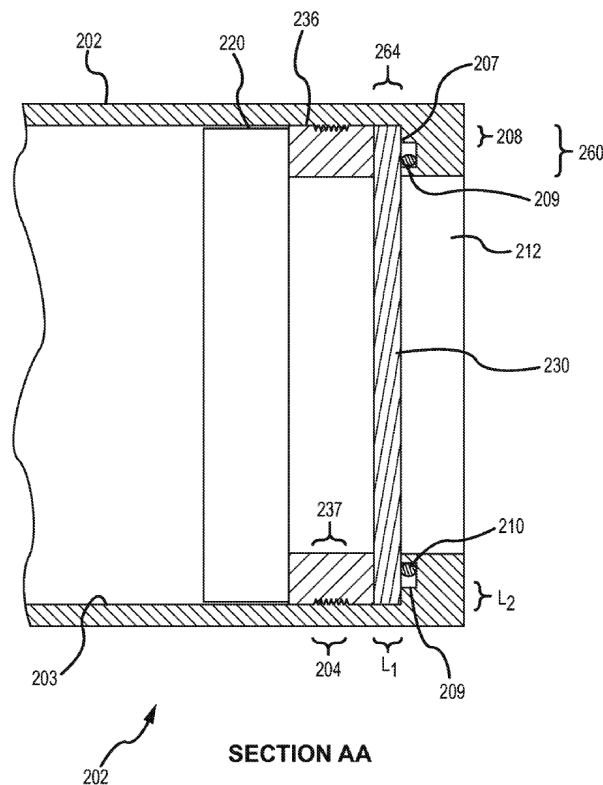
### **Reasons for the Decision**

1. The appeal is admissible.
2. The invention concerns a flameproof housing (202) for a display, which comprises a display aperture (212) formed in the flameproof housing (202), a shoulder (207) adjacent to the display aperture (212), a transparent panel (230) including an outer face (231) and a perimeter (232) and a fastener element (236) configured to engage an interior surface (203) of the flameproof housing (202) and hold the transparent panel (230) against the shoulder (207), see figure 4 of the application reproduced here below.

The perimeter interface region (264) between the perimeter (232) of the transparent panel (230) and the interior surface (203) of the flameproof housing (202) creates a perimeter gap that does not exceed a predetermined flameproof gap limit. The face interface

region (260) between the outer face (231) of the transparent panel (230) and the shoulder (207) creates a face gap that does not exceed the predetermined flameproof gap limit.

One possible application of the claimed device would be in a Coriolis mass flow meter, as explained in the application, page 1, line 10 to page 3, line 4 and page 6, line 17 to page 10, line 14 in combination with figures 1 to 3.



3. In the contested decision the examining division held that the term "predetermined flameproof gap limit" used in the independent claims of the sole request before it lacked clarity (Article 84 EPC). According to page 14, line 26 of the description, standard IEC 60079-1 of 2007 (i.e. document D3) might be used in the design. In figure 6 on page 7 of D3 a gap "i" was identified,

which seemed to correspond to the "perimeter gap" of claims 1 and 9. A "face gap" was however not defined in D3. Moreover, the term "predetermined flameproof gap limit" was not defined. The appellant's argument that different standards might be used to define the "flameproof gap limit" raised doubts as to what said limit should be.

4. Article 13(2) RPBA 2020 states that any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

In the present case, the sets of claims according to the main request, and to the first and the second auxiliary requests were all filed with the appellant's letter dated 17 April 2022 and thus after the notification of the board's summons to oral proceedings dated 13 January 2022.

In the board's view the appellant did not bring forward any cogent reasons to justify exceptional circumstances within the meaning of Article 13(2) RPBA 2020. Therefore, the board did not take into account any of the appellant's requests filed with the letter dated 17 April 2022, the reasons being the following.

5. Main request
  - 5.1 Claim 1 according to the main request differs from claim 1 of the request on which the contested decision was based *inter alia* in that "the flameproof gap limit is determined by applying an applicable flameproof standard".



5.2 The appellant explained that the filing of its requests was in response to the objection of added subject-matter raised for the first time in the board's preliminary opinion (see point 6.2). In response to that objection, the feature "inclusive of a predetermined surface roughness tolerance" was added in all requests. An objection raised for the first time in the board's preliminary opinion constituted exceptional circumstances.

As to the amendment regarding the predetermined gap limit (see previous point 5.1), the appellant argued that the examining division had issued only one communication under Article 94(3) EPC before issuing a summons to attend oral proceedings. In said communication, the examining division merely repeated the objection raised in the written opinion of the International Searching Authority without taking into account the appellant's arguments made in its letter dated 15 October 2015. This objection was not explained in detail in the division's communications and it was only during the oral proceedings that it was discussed in detail so that the appellant (then applicant) could understand it completely. There was, thus, no possibility to file any amendments addressing this objection during the examination procedure.

The feature "wherein the flameproof gap limit is determined by applying an applicable flameproof standard" was introduced in the claims filed with the statement setting out the grounds of appeal to overcome the reasons set out in the contested decision and did not introduce any complex subject-matter. According to the appellant, the claims defined that "a perimeter interface region between the perimeter of the

transparent panel and the interior surface of the flameproof housing creates a perimeter gap" and that "a face interface region between the outer face of the transparent panel and the shoulder creates a face gap", both the perimeter gap and the face gap not exceeding a flameproof gap limit determined by applying an applicable standard. As an example of an "applicable flameproof standard", IEC 60079-1 was mentioned on page 14 of the application, whereas other standards were envisaged (e.g. CEI EN, EN, IEC, ANSI, FLP, BS and MSHA). Reference was also made by the appellant to page 2, lines 9 and 10 and page 9, lines 22 to 23 of the description. A skilled person would look up a desired standard to determine a flameproof gap limit and then configure the housing accordingly. The appellant added that the gap "i" in D3 identified by the examining division corresponded to limits for both the perimeter and the face gaps.

- 5.3 In the board's view, an objection raised in the preliminary opinion for the first time may in general justify the filing of corresponding amendments as a response. In the present case, however, besides the addition of the feature regarding the predetermined surface tolerance which aimed at responding to the board's objection, the claims remained the same compared to the version filed with the statement of the grounds of appeal. The board had raised doubts about the admissibility of those claims in its preliminary opinion. The appellant did not address any of those doubts, either by amendments or by presenting arguments in its reply dated 17 April 2022. The board takes thus the view that the questions raised about the admissibility of the requests in its preliminary opinion have to be taken into account when determining whether there are exceptional circumstances that would

justify the admission of those requests now. For the board, there are no reasons why the appellant could not have filed the request presented for the first time in the appeal proceedings and introducing the term "determined by applying an applicable flameproof standard" already in the first-instance proceedings.

Indeed, the examining division's clarity objection reproduced in point 3. above had already been raised in the written opinion during the international phase and throughout the examination proceedings before the EPO. Had the appellant filed the main request already before the examining division, the board would have been in a position to review the examining division's decision on that matter in a judicial manner, which is the primary object of the appeal proceedings (see Article 12(2) RPBA 2020).

The fact that the examining division summoned for oral proceedings after only one communication under Article 94(3) EPC cannot justify not filing any amendments during the examination procedure. The examining division merely granted the appellant's own precautionary request for oral proceedings.

The board does not accept the argument, either, that it was only at the oral proceedings that the examining division explained its objection in detail. In the board's view it was clear from the beginning that the examining division regarded the term "predetermined gap limit" unclear because there was no way for the skilled person to determine this gap limit. And even if the objection had become clear to the appellant only at the oral proceedings before the examining division, the appellant (then applicant) could have at least

requested time to prepare an amended request. In the board's view, therefore, the appellant had several opportunities to address the examining division's objection by specifying that the flameproof gap limit was "determined by applying a flameproof standard" (or by making any other potentially clarifying amendments), e.g. with the entry into the regional phase before the EPO, after the examining division's communication under Article 94(3) EPC, after the summons to attend oral proceedings and during oral proceedings before the examining division. The appellant did not make use of any of those opportunities.

Under these considerations, the board cannot see why there were exceptional circumstances that could justify the filing of such amendments at this stage of the proceedings.

In addition, for the reasons already given in point 6.3.2 of the board's communication under Article 15(1) RPBA 2020, the feature "determined by applying a flameproof standard" does not render claim 1 clear within the meaning of Article 84 EPC, i.e. the amendment does not overcome the objections raised by the examining division and reiterated by the board in its preliminary opinion.

A skilled person confronted with a given flameproof housing having all structural features of claim 1 is able to measure the values of its "face gap" and its "perimeter gap". However, they would have no indications which "flameproof standard" they have to "apply" to determine a gap limit and to compare said measured values to the "predetermined gap limit". As also argued by the appellant, different standards exist

for different countries and/or for different applications of the flameproof housing and provide different values of "gap limits". The only standard explicitly mentioned on page 14 of the application discloses more than one possible value for a perimeter gap ("i") and is silent about any limit for a face gap, as also argued by the examining division.

Even indicating a specific standard in claim 1 would not provide any clarifications, because such standards were typically revised over time, and the possibility of substantial changes could not be ruled out, see also the Case Law of the Boards of Appeal, 9th Edition, 2019, II.A.3.6, last paragraph, T 1888/12, T 783/05 or T 1720/16.

Moreover, when reading the pages of the standard submitted by the appellant (D3), the values for "i" provided in Figure 6 do not refer to any "gap limits" in the sense of the claimed invention, but rather to the maximum dimension of gap (i) in order for the length "a" to be taken into account when calculating the distance "l", according to different applications (see the text above Figures 3 and 4 on page 7, and Figure 6). This reading of D3 is in accordance with the passage on page 14, lines 5 to page 15, line 2 of the application, which concerns a minimum flamepath length (see figure 4,  $L_1$ ,  $L_2$ ), and not a "flameproof gap limit" possibly determined by applying a "flameproof standard". Page 14, lines 5 to 24 discuss that a "minimum flamepath length" was "typically" defined by flameproof standards. Page 14, lines 25 to page 15, line 2, describe that the "flameproof housing 202" might be "designed to conform to the section 5.2.4.3 of IEC 60079-1:2007". The board has doubts whether the passage indicated by the appellant discloses at all a

"flameproof gap limit" which is "determined by applying an applicable flameproof standard" and which the "face gap" and the "perimeter gap" as defined in the claims should not exceed. In other words, the board is not convinced that D3 does give a definition of a "flameproof gap limit" according to claim 1. Hence, the skilled person would not be able to determine a "flameproof gap limit", even if they were to use the specific standard referred to in the application.

6. First auxiliary request

6.1 Claim 1 according to the first auxiliary request corresponds to the request on which the decision under appeal was based, wherein it has been specified *inter alia* that the "predetermined flameproof gap limit" is a "gap limit of 0.20 mm". In addition, the feature regarding the predetermined surface roughness tolerance has been added, as in claim 1 of the main request.

6.2 Regarding the presence of any exceptional circumstances, the appellant referred to its statements made for the main request. The specific thickness of 0.20 mm was introduced to overcome the examining division's objection under Article 84 EPC and had a basis in page 14, lines 25 to page 15, line 2 of the application and the standard IEC 60079-1 referred to. The skilled person would have understood that the value of 0.20 mm mentioned in D3 would apply to both the perimeter and the face gaps.

6.3 As for the main request, the board sees no exceptional circumstances that could justify the filing (and the admission) of the first auxiliary request at this stage of the appeal proceedings.

As for the main request, there are no reasons in the board's view why the appellant could not have filed the first auxiliary request already in the first-instance proceedings in order to address the examining division's objections.

Moreover, as explained in point 7.2.2 of the board's communication under Article 15(1) RPBA 2020, the value of 0.20 mm is not disclosed in the application as originally filed. The requirements of Article 123(2) EPC are thus not met for claim 1 according to the first auxiliary request.

A "face gap" and "a perimeter gap" both not exceeding a gap limit of 0.2 mm cannot be directly and unambiguously derived from page 14, line 25 to page 15, line 2 and the reference to section 5.2.4.3 of the standard IEC 60079-1:2007 (see D3). In said section of the standard several possible dimensions of gaps are mentioned for a spigot joint according to figure 6. For example, three possible values (0.20 mm, 0.15 mm, 0.10 mm) for "i" are mentioned without any clear indication as to which one is to be used for the claimed housing. Even if accepting that the gap limit "i" is to be applied to the "perimeter gap", there is no indication that the same "gap limit" is to be used for the "face gap".

In addition, the board's doubts about the interpretation of the gap (i) in Figure 6 of D3 as a "gap limit" in the sense of the present application expressed with regard to the main request apply also to the first auxiliary request. Thus, the values of gap (i) in Figure 6 of D3 cannot support corresponding values for the "gap limit" of the claims.

Hence, the first auxiliary request not only fails to address the outstanding objection of lack of clarity but also gives rise to a new objection of added subject-matter.

7. Second auxiliary request

7.1 Regarding the presence of any exceptional circumstances, the appellant referred to its statements made for the main request. It further argued that removing any limitation concerning the face gap would address the board's concern that a gap limit of 0.20 mm for a face gap was not disclosed in D3.

7.2 As for the higher-ranking requests, the board sees no exceptional circumstances that could justify the filing and the admission of the second auxiliary request at this stage of the appeal proceedings.

In particular, the board sees no reasons why the appellant could not have filed the second auxiliary request already in the first-instance proceedings in order to address the examining division's objection of lack of clarity. The examining division had also objected that D3 did not provide any gap value for a face gap, see point 3. above.

The board's doubts as to whether the value of (i) in Figure 6 of D3 can be seen as a "gap limit" in the sense of the present application, as raised against the main request, apply also to the second auxiliary request.

Furthermore, claim 1 according to the second auxiliary request is directed to a flameproof housing with a face gap that can take any possible value, whereas the



application as originally filed clearly requests that both the face gap and the perimeter gap as defined in claim 1 must not exceed an upper limit qualified as "flameproof gap limit", see e.g. original claim 1 or page 3, lines 9 to 20 as originally filed. The removal of any limitation of the value of the "face gap" introduces subject-matter that was absent in the application as filed, contrary to the requirements of Article 123(2) EPC.

Hence, like the first auxiliary request, the second auxiliary request not only fails to address the outstanding objection of lack of clarity but also gives rise to a new objection of added subject-matter.

8. As no allowable request is on file, the appeal must fail.

## Order

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

The appeal is dismissed.

The Registrar:

The Chair:



S. Sánchez Chiquero

M. Papastefanou

Decision electronically authenticated