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**Datasheet for the decision
of 2 March 2023**

Case Number: T 1151/20 - 3.4.02

Application Number: 14724995.7

Publication Number: 2994724

IPC: G01F15/075, F24D19/10, G01D4/00

Language of the proceedings: EN

Title of invention:

CONSUMPTION METER WITH SELECTABLE LEGAL REGISTERS

Patent Proprietor:

Kamstrup A/S

Opponents:

ista International GmbH
Apator Miitors ApS

Headword:

Relevant legal provisions:

EPC Art. 54(1), 111(1)
RPBA 2020 Art. 11

Keyword:

Novelty - main request (no)

Remittal to the department of first instance - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 1151/20 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 2 March 2023

Appellant:
(Opponent 1)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
16 March 2020 concerning maintenance of the
European Patent No. 2994724 in amended form.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. Opponent 1 (ista International GmbH) appealed against the interlocutory decision of the opposition division maintaining European patent No. 2994724 in amended form.

The opposition division had found that the patent as amended according to the main request then on file and the invention to which it related met the requirements of the EPC.

- II. Oral proceedings before the board were held on 2 March 2023.

- III. Opponent 1 requested that the decision under appeal be set aside and the patent be revoked.

Opponent 2 (Apator Miitors ApS) was not represented at the oral proceedings and had filed no requests.

The patentee is a party to the appeal proceedings as of right and the respondent in the present case. It requested that the appeal be dismissed (main request) or, in the alternative, that the decision under appeal be set aside and

- the case be remitted to the department of first instance for further prosecution or, should the case not be remitted,

- the patent be maintained in amended form on the basis of the claims of the first to third auxiliary requests all filed with a letter dated 3 December 2020.

- IV. The following document, which was relied on in the first-instance opposition proceedings, is referred to in the present decision:

E1: EP 2 000 788 A1.

Opponent 1's written submissions are labelled as follows:

S: statement of grounds of appeal.

The patentee's written submissions are labelled L1 and L2 as follows:

L1: letter dated 3 December 2020,

L2: letter dated 1 February 2023.

V. Independent claim 1 according to the patentee's main request reads as follows (the features of claim 1 are preceded by the numbering **A1**, **B**, **B1**, **B2**, **C1**, **C2**, **D**, **D1**, **D2**, **D1.1**, **D2.1**, **A2** and **A3** as used in the appealed decision, point 11.1):

"A1 A consumption meter (1) arranged for fixed installation at a consumer site (2) for measuring consumption data of either a hot or a cold supplied liquid to the consumer site, the meter comprises:

B - a flow meter unit (5) arranged for
B1 mount at either an inlet side (3) or an outlet side (4) of the consumer site, and arranged for
B2 measuring a flow quantity of the supplied liquid;

C1 - an inlet temperature sensor (6) for measuring an inlet temperature of the supplied liquid, and
C2 an outlet temperature sensor (7) for measuring an outlet temperature of the supplied liquid;

D - a calculator unit (8) configured to determine consumption values based on the flow quantity, the inlet temperature and the outlet temperature, characterised in that the calculator unit comprises

D1 at least a first (R_1) and

D2 a second (R_2) legally verified consumption registers for storing consumption values verified for billing,

D1.1 the first legally verified consumption register being associated with a first operational state of the consumption meter being mounted at the inlet side of the consumer site and

D2.1 the second legally verified consumption register being associated with a second operational state of the consumption meter being mounted at the outlet side of the consumer site,

A2 so that the consumption meter is capable of measuring legally verified consumption data for each of the at least first and second operational states;

A3 wherein the consumption meter is arranged for receiving an input and to set the operational state of the consumption meter based on the input in accordance with the arrangement of the flow meter unit at the consumer site, so as to store consumption values in the legally verified register associated with the set operational state of the consumption meter".

Reasons for the Decision

1. Novelty

The subject-matter of claim 1 is not novel over the disclosure of E1 (Article 54(1) EPC).

1.1 Construction of the term "register"

According to features **D1** and **D2** of claim 1, a register is defined on the basis of its function of storing consumption values, wherein a specific register is

associated with a specific state of mounting of the consumption meter (features **D1.1**, **D2.1** and **A3**). This broad functional definition of the term "register" does not define any clear technical characteristics of the term "register". In particular, the two registers referred to in claim 1 are not limited to two memory spaces being physically separated but cover any memory means suitable for storing data according to the functional definition given in claim 1; see, for instance, statement of grounds of appeal S, page 6, fourth paragraph. The board shares the view of opponent 1 expressed therein according to which the two registers of claim 1, i.e. the memory means for storing the two consumption values associated with the two operational states of the consumption meter, can be provided at the same physical memory space for both consumption values (see S, page 9, third paragraph). The two registers are distinguished one from the other only by the fact that they are related to two distinct operational states of the consumption meter via a certain "test criterion" (S, page 6) or, as submitted by opponent 1 during the oral proceedings before the board, a certain "rule" defining the meaning of the register. As explained by opponent 1, the term "register" in claim 1 is so broad as to cover the situation where the claimed consumption meter comprises a single physical memory space which functions alternatively as two different registers by switching between the two rules defining the meaning of each register.

1.2 Construction of the term "legally verified"

The board concurs with the view of opponent 2 according to which the "feature ['legally verified'] has no technical effect so that thee *[sic]* is no difference between a 'legal register' and a 'register' " (see minutes of the oral proceedings before the opposition division, page 1, point

5.1). In particular, there is no discernible technical feature of a register in a device claim that would be attributable to the register being "verified", let alone that such a test would have a "legal" character.

1.3 It is undisputed by the patentee that the features of the preamble of claim 1, i.e. features **A1**, **B**, **B1**, **B2**, **C1**, **C2** and **D**, are anticipated by E1.

1.4 The remaining features **D1**, **D2**, **D1.1**, **D2.1**, **A2** and **A3** of claim 1 are also anticipated by the consumption meter of E1 for the following reasons:

E1, [0020], discloses a calculator unit arranged for calculating the amount of consumed energy. It is implicit that at some point in time this calculated value is stored in the device of E1 in a memory or a register associated with a first operational state of the consumption meter. This operational state of the meter is set, for instance, on the basis of the measurement of the temperature at the position of the flow meter F and provided to the calculator via a separate data input FD_in (see E1, [0031]; figure 1), which plays the role of the input mentioned in feature **A3**. As further disclosed in E1, [0020], "if it is detected that the temperature sensors are reversed, this is easily taken into account by also reversing data in the consumed energy calculation formula". This means that a first consumption value was initially stored in a first register defined as being associated with a first operational state of the consumption meter. In case of detecting an installation error of the consumption meter at the consumer site, the rule defining the meaning of the two registers switches the meaning of the first register such that the stored consumption value is considered being associated with the second operational state of the consumption meter. As

submitted by opponent 1, this means that the calculator of E1 comprises two registers in the sense that consumption values can be stored for both operational states of the consumption meter being mounted at the inlet side or at the outlet side, as defined in features **D1**, **D2**, **D1.1** and **D2.1**. (see e.g. S, paragraph bridging pages 8 and 9; submission repeated during oral proceedings). By setting the operational state of the consumption meter in accordance with the arrangement of the flow meter at the consumer site, the correct consumption values are stored in the legally verified register associated with the actual operational state of the consumption meter set by the input F_{in} of E1, as defined in feature **A3**. On the basis of these stored consumption values, the consumption meter of E1 is adapted to measure the consumption data for each of the two operational states of the consumption meter, as defined in feature **A2**.

Accordingly, the storage of two different consumption values associated with two different mounting states of the consumption meter corresponds to the two registers defined in features **D1**, **D2**, **D1.1**, **D2.1**, **A2** and **A3** of claim 1, irrespective of whether the physical memory space is the same for both consumption values.

1.5 Patentee's counter-arguments

- 1.5.1 Concerning features **D1**, **D2**, **D1.1**, **D2.1** and **A3**, the patentee counter-argued that "the two legally verified consumption registers of maintained claim 1 each comprise an allocated storage means, i.e. a memory, for storing the data associated with the register. They are not merely sets of rules or formulas as asserted by the Appellant" (see L1, page 7, third paragraph; emphasis in the original). Moreover, the patentee submitted that "E1 does not explicitly disclose any memory or data storage" and "even

if such a memory for the data that is calculated with the formulas is read into E1, there is no disclosure in E1 that the data would be stored in different memories dependent on the operational state of the meter" (see L1, page 7, sixth paragraph; emphasis in the original)

The board shares the patentee's view that the formulas referred to by opponent 1 are not registers or storage locations, because formulas are mathematical functions which cannot be looked at as being storage means for storing data therein. The board further concurs with the patentee that no memory is explicitly disclosed in E1. However, in view of the meter of E1 "calculating the amount of consumed energy" (see E1, column 5, lines 1 and 2) and potentially recalculating a corrected value, the board is of the opinion that E1 implicitly discloses a memory for storing consumption data. Moreover, the board, in view of the broad functional definition of the term "register" in claim 1, is of the opinion that it does not matter whether E1 discloses different (physical) memories since claim 1 does not define different (physical) memories either. Anyway, as explained in point 1.1 above, the two registers of claim 1 are constructed such as to cover an embodiment in which the two registers correspond to a single physical memory space in combination with rules defining the meaning of that memory space, e.g. a memory flag. Depending on that memory flag, a unique physical memory space functions as a first register or a second register.

- 1.5.2 The patentee disagreed with the board that the term "legally verified" had no further technical effect on the registers. In the patentee's view, "legal verification of the consumption registers comprises at least a testing of said registers that is carried out prior to the installation of the consumption meter and that is based on

data stored in the respective registers. The testing ensures that the full data chain (...) is not only unbroken and correct but also tamper proof. The testing follows test procedures described in the European Standard EN 1434 and in the WELMEC guidelines for legal metrology. This testing and the calibration of the registers are clearly technical features" (L2, page 3, fourth paragraph).

The board cannot follow the patentee's argument. First, claim 1 is a device claim directed to a consumption meter. Whether and, if so, how a register of claim 1 has been verified or tested amounts to a particular method step which does not translate into a clear technical feature of the register. Secondly, claim 1 does not define any specific way in which the register is to be verified or even legally verified. None of the information mentioned in the patentee's argument above, e.g. testing prior to installation, ensuring an unbroken, correct and tamper-proof data chain, using a European standard or guidelines for legal metrology, is actually specified in claim 1.

- 1.5.3 Concerning feature **A2**, the patentee put forward that "E1, further, does not disclose a consumption meter that would be capable of measuring 'legally verified' consumption data" (L1, page 7, last paragraph).

The board is unable to see which technical limitation of the meter is defined by the expression "legally verified" (see points 1.2 and 1.5.2 above). Whether a register is "legally verified" or whether a "consumption meter is capable of measuring legally verified consumption data" depends *inter alia* on legal rules which are not defined in claim 1.

- 1.5.4 The patentee put forward that "E1 does not disclose the possibility to switch between two distinct mounting scenarios respectively operational states" (L2, page 5, third paragraph). "If there is only one physical memory location then data from one operational state would be mixed with data from another operational state, hereby contaminating the result and making it problematic to use for billing purposes. But the gist of the invention is exactly the opposite: if the consumption meter has been in operation for a period of time, and if it is determined that the meter is set up for the wrong operational state, then an input is given to the meter and the data stored in the other physical memory location (the second register) is now used for billing in the correct operational state" (L2, page 4, second paragraph).

The patentee's argument is irrelevant because it relates to features which are not present in claim 1. In particular, claim 1 does not define memory means in which two consumption values are stored *simultaneously*, so that it is possible to switch from a first value to a second value. While feature **A2** specifies that consumption data for *each* of the first and the second operational state is measured, it does not imply that that data is available at *the same time* for both operational states. Claim 1 covers the embodiment of E1 in which a first consumption value associated with a first operational state is stored in a first register and, by changing the rule defining the meaning of the register, a second value associated with a second operational state can be stored in a second register, the first and second registers corresponding to the same physical memory.

2. Lack of novelty of the subject-matter of claim 1, found for the above reasons, precludes maintenance of the patent according to the interlocutory decision of the opposition

division. The decision under appeal, therefore, must be set aside.

3. Remittal of the case

As requested by the patentee, the board decides to make use of its discretion under Article 111(1) EPC and Article 11 RPBA 2020 in remitting the case to the opposition division for further prosecution.

3.1 The board notes that the patentee had filed three auxiliary requests during the appeal proceedings and that it maintained all these requests. According to the patentee, these requests are identical to the requests filed by the patentee during the first-instance opposition proceedings ("apart from the removal of granted claims 4 to 6"). However, the opposition division neither had to decide on their admittance to the opposition proceedings nor did a debate take place on the patentability of the claimed subject-matter of the then second to fourth auxiliary requests. Rather, the opposition division decided to maintain the patent on the basis of a higher-ranking request. If the board were to decide on the patentability of the claimed subject-matter of the auxiliary requests, it would not be in a position to review an earlier first-instance decision, but would have to carry out a first examination of a new set of claims. This would run counter to the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020).

3.2 The board, following opponent 1's submissions, interprets the term "register" in claim 1 in a fundamentally different and broader sense than the opposition division and the patentee (see point 1.1 above). The facts of the case are fundamentally changed by this new interpretation

of the claim wording. The consequence thereof is that the board comes to the conclusion that the subject-matter of claim 1 of the main request lacks novelty with respect to E1, whereas the appealed decision concluded that neither E1, nor any other available prior art document anticipated the subject-matter of claim 1. The patentability of the subject-matter of claim 1 of the auxiliary requests has to be assessed on the basis of this new interpretation of the claim wording. This amounts to a fresh case which alone justifies the case to be remitted to the department of first instance for further prosecution.

3.3 Opponent 1 did not submit any arguments for not remitting the case to the first instance.

3.4 In view of the above, there are special reasons within the meaning of Article 11 RPBA 2020 in the case in hand which justify remitting the case to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:



L. Gabor

R. Bekkering

Decision electronically authenticated