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**Datasheet for the decision  
of 5 October 2022**

**Case Number:** T 2795/19 - 3.4.02

**Application Number:** 12002842.8

**Publication Number:** 2487467

**IPC:** G01F1/74, G01F1/84, G01N9/00,  
G01N11/16

**Language of the proceedings:** EN

**Title of invention:**

Meter electronics and fluid quantification method for a fluid  
being transferred

**Applicant:**

Micro Motion, Inc.

**Headword:**

**Relevant legal provisions:**

RPBA 2020 Art. 13(1), 13(2)

**Keyword:**

Amendment to appeal case - amendment gives rise to new  
objections (yes)  
Amendment after summons - exceptional circumstances (no)

**Decisions cited:**

T 1707/17, T 0989/15, T 0954/17

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 2795/19 - 3.4.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.02**  
**of 5 October 2022**

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

**Representative:** Ellis, Christopher Paul  
Ollila Law Limited  
Unit 7 The Courtyard  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 22 May 2019  
refusing European patent application No.  
12002842.8 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** R. Bekkering  
**Members:** C. Kallinger  
G. Decker

## **Summary of Facts and Submissions**

- I. The applicant lodged an appeal against the decision of the examining division refusing European patent application No. 12002842.8.
- II. In its decision, the examining division found that the subject-matter of claim 1 (and the corresponding method claim 12) of the sole request then on file was not inventive over document D1 or D2, at least in view of document D3 or D4.
- III. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims on which the decision under appeal was based (main request).
- IV. Oral proceedings were appointed as requested. In a communication pursuant to Article 15(1) RPBA 2020 dated 17 December 2021, the board raised objections under Articles 84 and 83 EPC.
- V. In response to the board's communication, with the letter dated 31 August 2022 the appellant maintained its main request and filed two new sets of claims according to a first and a second auxiliary request.
- VI. On 5 October 2022 oral proceedings took place, during which the appellant filed amended claims according to a new main request ("MAIN REQUEST 5.10.22") and declared that this request should substitute all former requests on file.
- VII. The appellant's final request was that the decision under appeal be set aside and that a patent be granted

on the basis of the claims according to the new main (and sole) request filed during oral proceedings on 5 October 2022.

VIII. Claim 1 of the sole request reads as follows (amendments in comparison to the former main request are marked by the board):

*"1. Meter electronics (20) for quantifying a fluid being transferred, the meter electronics (20) comprising an interface (201) configured to communicate with a flowmeter assembly of a vibratory flowmeter and receive a vibrational response and a processing system (203) coupled to the interface (201) and configured to measure an average mass flow ~~rate~~ ( $\dot{m}_i$ ) for a predetermined time portion ( $t_i$ ) of the fluid transfer, with the processing system (203) being configured to obtain an average fluid viscosity ( $\mu_i$ ) for the predetermined time portion ( $t_i$ ); and determine if the fluid transfer is non-aerated during the predetermined time portion ( $t_i$ ); the meter electronics being characterized by the processing system (203) being configured to:*

*if the predetermined time portion ( $t_i$ ) is non-aerated, then add a mass-viscosity product ( $\dot{m}_i \mu_i$ ) to an accumulated mass-viscosity product ( $\dot{m}_i \mu_{accum}$ ) and add the mass flow ( $\dot{m}_i$ ) to an accumulated mass flow ( $\dot{m}_{accum}$ ); and*

*determine a non-aerated mass-weighted viscosity ( $\mu_{mass-weighted}$ ) for the fluid transfer by dividing the accumulated mass-viscosity product ( $\dot{m}_i \mu_{accum}$ ) by the accumulated mass flow ( $\dot{m}_{accum}$ )."*

## **Reasons for the Decision**

1. According to Article 13(2) RPBA 2020, "*[a]ny 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*".
2. It is settled case law that "exceptional circumstances" within the meaning of Article 13(2) RPBA 2020 may be acknowledged where, for instance, the filing of new requests constitutes a legitimate and timely response to a new objection raised by the board in its communication under Article 15(1) RPBA 2020 (see Case Law of the Boards of Appeal of the European Patent Office, 10th edition 2022, section V.A.4.5.4 a)).
3. However, the board emphasises that Article 13(2) RPBA 2020 requires the appellant not only to explain why the case involves exceptional circumstances but also to explain why its amendment, in terms of both content and timing, is a justified response to these circumstances. In particular, where an appellant seeks to amend its case at a very late stage in the proceedings, the cogent reasons referred to in Article 13(2) RPBA 2020 should include reasons why it has not been possible to file such an amendment earlier (see T 1707/17 Reasons 2.4).
4. In the present case, the board accepts that the amendments in claim 1 of the new main request aim at overcoming the objections under Article 84 EPC raised for the first time by the board in its preliminary opinion. However, the new main request was filed only during the oral proceedings before the board, hence at

the latest possible stage in the procedure. In view of the fact that the preliminary opinion had been issued already on 17 December 2021, the board is unable to see any reason why this request could not have been filed earlier. Nor did the appellant submit any such reason. Consequently, the board concludes that there are no exceptional circumstances within the meaning of Article 13(2) RPBA 2020.

5. Moreover, when exercising its discretion under Article 13(2) RPBA 2020, the board may also rely on criteria as set out in Article 13(1) RPBA 2020 (see Document CA/3/19, section VI, explanatory remarks on Article 13(2), fourth paragraph; see also decisions T 989/15, Reasons 16.2, and T 954/17, Reasons 3.10).
6. Under Article 13(1), fourth sentence, RPBA 2020, "*[t]he Board shall exercise its discretion in view of, inter alia, the current state of the proceedings, the suitability of the amendment to resolve the issues which were admissibly raised by another party in the appeal proceedings or which were raised by the Board, whether the amendment is detrimental to procedural economy, and, in the case of an amendment to a patent application or patent, whether the party has demonstrated that any such amendment, prima facie, overcomes the issues raised by another party in the appeal proceedings or by the Board and does not give rise to new objections*".
7. In amended claim 1 of the new main request, instead of "a mass flow rate" and "a fluid viscosity" now "an average mass flow" and "an average fluid viscosity" are measured.

8. The appellant argued that these amendments were disclosed in the application as originally filed (see page 16, lines 1 to 12 and lines 17 to 20 and page 18, lines 21 to 25).
9. The board is not convinced by the appellant's arguments. The first passage (lines 1 to 12) on page 16 of the originally filed description discloses that the mass flow can comprise an averaged mass flow rate. However, there is no direct and unambiguous disclosure that such an average measurement is also foreseen for the viscosity measurement described later on page 16 (lines 17 to 20). In addition, the passage on page 18 referred to by the appellant only discloses that the the mass-weighted viscosity, i.e. the end result of the iterative fluid quantification process, can be "similar to an average viscosity". Therefore, also this passage fails to directly and unambiguously disclose that the processing system obtains (at the beginning of this process) an average fluid viscosity as claimed.
10. The board is therefore of the opinion that the amendments in claim 1 of the new main request give rise to a new objection under Article 123(2) EPC.
11. Consequently, also for that reason the board decided not to admit the new main request into the proceedings, Article 13(2) and (1) RPBA 2020.
12. As no admitted requests are on file, the appeal must be dismissed.



**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



L. Gabor

R. Bekkering

Decision electronically authenticated