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Datasheet for the decision of 7 December 2022

Case Number: T 2950/19 - 3.4.02

Application Number: 09739629.5

Publication Number: 2286187

IPC: G01F1/84

Language of the proceedings: EN

Title of invention:
VERY HIGH FREQUENCY VIBRATORY FLOW METER

Applicant:
Micro Motion, Inc.

Headword:

Relevant legal provisions:
RPBA Art. 12(4)
RPBA 2020 Art. 13(2)

Keyword:
Amendment after summons - exceptional circumstances (no)
Late-filed request - submitted with the statement of grounds of appeal - admitted (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 2950/19 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 7 December 2022

Appellant: (Applicant)	Micro Motion, Inc. 7070 Winchester Circle Boulder, CO 80301 (US)
Representative:	Ellis, Christopher Paul Ollila Law Limited Unit 7 The Courtyard Timothys Bridge Road Stratford upon Avon CV37 9NP (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 16 May 2019 refusing European patent application No. 09739629.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairwoman	T. Karamanli
Members:	C. Kallinger
	H. von Gronau

Summary of Facts and Submissions

I. The appellant lodged an appeal against the decision of the examining division refusing European patent application No. 09 739 629.5.

II. With the notice of appeal dated 10 July 2019, the appellant requested that the decision of the examining division be set aside and that a patent be granted "*on the basis of the claims annexed to the Decision*".

III. With the statement setting out the grounds of appeal dated 24 September 2019, the appellant filed amended claims 1 to 14 with claim pages 27-29 attached thereto. The appellant stated that "*these claim pages now form the only request*" and, as a precaution, requested oral proceedings.

IV. In a communication pursuant to Article 15(1) of the revised Rules of Procedure of the Boards of Appeal (RPBA 2020, OJ EPO 2019, A63), attached to the summons to oral proceedings dated 17 January 2022, the board indicated that, in its preliminary opinion, it intended not to admit the request filed with the statement of grounds of appeal into the appeal proceedings in view of Article 12(4) RPBA 2007. The board took the preliminary view that it had discretionary power under Article 12(4) RPBA 2007 and that in exercising this discretion it would consider in particular the following aspects:

- *"Although the appellant amended its requests several times during the course of the first-instance examination proceedings, the claims of the current request were not filed during the*

first-instance proceedings so that the examining division could not decide on their subject-matter, in particular with respect to Articles 123(2), 84 and 54 EPC.

- *The subject-matter of claim 1 of the current request has been amended by introducing features from the description, in particular that the "predetermined maximum decoupling frequency" is stored in the meter electronics. However, the relevant part of the description referred to by the appellant discloses that the "very high frequency can be based on pre-stored [...] values" (see page 20, lines 17-18). Therefore, the current request prima facie presents new issues with respect to the requirements of Article 123(2) EPC and relates to possibly unsearched subject-matter.*
- *Claim 1 still comprises the features "a very high frequency vibrational response"* and *"predetermined maximum decoupling frequency [...] that is independent of a foreign material size or a foreign material composition within the fluid flow" objected to in the decision under appeal under Article 84 EPC (see Grounds for the Decision, points 2.1.2 and 2.1.4). Amended claim 1 therefore seems prima facie not suitable to overcome the objections under Article 84 EPC.*
- *Claims 1 and 9 now define that the "predetermined maximum decoupling frequency [...] that is independent of a foreign material size or a foreign material composition within the fluid flow" is stored in the meter electronics. However, the feature is still so vague that clear apparatus features for defining the flow meter assembly cannot be derived therefrom. For the same reasons as set out in the appealed decision (see Grounds for the Decision, points 3.1.1 and 3.1.2) the*

subject-matter of claims 1 and 9 therefore seems prima facie not allowable under Article 54 EPC."

V. By a letter dated 20 April 2022, the appellant filed amended claims of a new main request and a new first auxiliary request, explained the amendments in the claims of these requests and provided arguments in support of clarity, novelty and inventive step in respect of these requests.

VI. By a further communication of the board dated 2 May 2022, which was sent to the appellant in advance by email on 27 April 2022, the appellant was informed that the board was of the preliminary view that the appellant had not justified with cogent reasons that the circumstances leading to the filing of the amended claims of the main request and the first auxiliary request in reply to the board's communication annexed to the summons to oral proceedings would be exceptional within the meaning of Article 13(2) RPBA 2020 in the present case.

VII. On 7 December 2022 oral proceedings took place. At the oral proceedings the appellant clarified that the sole request filed with the statement of grounds of appeal was maintained as second auxiliary request. During the oral proceedings the appellant withdrew its first auxiliary request filed by letter 20 April 2022 and stated that its former second auxiliary request became its first auxiliary request.

At the end of the oral proceedings the chairwoman announced the board's decision.

VIII. The appellant's final requests are that the decision under appeal be set aside and that a European patent be

granted on the basis of the claims of the main request filed by letter dated 20 April 2022 or, alternatively, of the first auxiliary request filed as sole request with the statement setting out the grounds of appeal.

IX. Independent claims 1 and 9 of the appellant's main request read as follows:

1. A very high frequency vibratory flow meter (100), comprising:
a flow meter assembly (10) including one or more flow conduits (103A, 103B) having a fluid flow therein, with the flow meter assembly (10) being configured to generate a very high frequency vibrational response that is above a predetermined maximum decoupling frequency for the flow fluid that is independent of a foreign material size or a foreign material composition within the fluid flow; and
meter electronics (20) coupled to the flow meter assembly (10) and configured to vibrate the flow meter assembly (10) at a very high frequency that generates the very high frequency vibrational response such that a decoupling ratio A_p/A_f of a particle amplitude A_p to a fluid amplitude A_f is about 3:1 for entrained gas at the very high frequency or such that the decoupling ratio A_p/A_f is about equal to the quantity $3/(1+(2*\rho_p/\rho_f))$ for entrained solids at the very high frequency, where ρ_p is a foreign material particle density and where ρ_f is a fluid density, receive the vibrational response, and generate one or more flow measurements from the very high frequency vibrational response.

9. A method of operating a very high frequency vibratory flow meter, the method comprising:

vibrating one or more flow conduits of the very high frequency vibratory flow meter at a very high frequency and generating a very high frequency vibrational response, wherein the very high frequency vibrational response is above a predetermined maximum decoupling frequency for the flow fluid independent of a bubble size and a flow fluid viscosity of material therein; receiving the very high frequency vibrational response, with the very high frequency vibrational response resulting in a decoupling ratio A_p/A_f of a particle amplitude A_p to a fluid amplitude A_f of about 3:1 for entrained gas or about equal to $3/(1+(2*\rho_p/\rho_f))$ for entrained solids, where ρ_p is a foreign material particle density and where ρ_f is a fluid density; and generating one or more flow measurements from the very high frequency vibrational response.

X. Independent claims 1 and 9 of the appellant's first auxiliary request (filed as sole request with the statement of grounds of appeal) read as follows:

1. A very high frequency vibratory flow meter (100), comprising:
a flow meter assembly (10) including one or more flow conduits (103A, 103B) configured to have a fluid flow therein, with the flow meter assembly (10) being configured to generate a very high frequency vibrational response that is above a predetermined maximum decoupling frequency for a flow fluid of the fluid flow that is independent of a foreign material size or a foreign material composition within the fluid flow; and
meter electronics (20) coupled to the flow meter assembly (10) and configured to vibrate the flow meter assembly (10) at a very high frequency that generates the very high frequency vibrational response such that

a decoupling ratio A_p/A_f of a particle amplitude A_p to a fluid amplitude A_f is about 3:1 for entrained gas at the very high frequency or such that the decoupling ratio Ap/Af is about equal to the quantity $3/(1+(2*\rho_p/\rho_f))$ for entrained solids at the very high frequency, where ρ_p is a foreign material particle density and where ρ_f is a fluid density, receive the vibrational response, and generate one or more flow measurements from the very high frequency vibrational response,
wherein the meter electronics (20) is configured to store the predetermined maximum decoupling frequency for the flow fluid of the fluid flow that is independent of a foreign material size or a foreign material composition within the fluid flow.

9. A method of operating a very high frequency vibratory flow meter, the method comprising:
vibrating one or more flow conduits of the very high frequency vibratory flow meter at a very high frequency and generating a very high frequency vibrational response, wherein the very high frequency vibrational response is above a predetermined maximum decoupling frequency for a flow fluid that flows through the one or more flow conduits, resulting in a decoupling ratio A_p/A_f of a particle amplitude A_p to a fluid amplitude A_f of about 3:1 for entrained gas or about equal to $3/(1+(2*\rho_p/\rho_f))$ for entrained solids, where ρ_p is a foreign material particle density and where ρ_f is a fluid density;
receiving the very high frequency vibrational response; and
generating one or more flow measurements from the very high frequency vibrational response, wherein the one or more flow measurements are used to determine a density error, wherein the predetermined maximum decoupling

frequency is sufficiently high to make the density error determination independent of a bubble size and a flow fluid viscosity of material therein.

Reasons for the Decision

1. Main request - admittance - Article 13(2) RPBA 2020

1.1 The claims according to the main request were filed after the notification of the summons to oral proceedings dated 17 January 2022. Therefore, in accordance with Article 25(1) and (3) RPBA 2020, Article 13(2) RPBA 2020 applies to the question of the admittance of the current main request.

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*".

1.2 The appellant argued that it had been of the opinion that the sole request as filed with the statement of grounds of appeal was admissible, because the amendments to the claims addressed the objections raised by the examining division. The appellant considered the board's intention not to admit this request into the appeal proceedings as indicated in the board's communication under Article 15(1) RPBA 2020 as a new objection which amounted to exceptional circumstances. The appellant therefore filed the current main request which reverted back to the claims of the sole request which formed the basis of the

decision under appeal with only minor amendments so that no new issues arose.

1.3 The board is not convinced by the appellant's arguments for the following reasons.

In the case at hand, the appellant chose not to pursue with its appeal the sole request which formed the basis of the decision under appeal, but to file with its statement of grounds of appeal amended claims of a new sole request. This prevented the board from reviewing the decision under appeal.

In its communication under Article 15(1) RPBA 2020, the board informed the appellant that it intended not to admit the sole request filed with the statement of grounds of appeal. Informing the appellant about the board's intention not to admit the newly filed request does however not constitute an exceptional circumstance within the meaning of Article 13(2) RPBA 2020, because the examination of the admittance of a request which is filed for the first time with the statement of grounds of appeal is a normal course of events in appeal proceedings. The appellant should therefore have expected that its request, filed for the first time with the statement of grounds of appeal, would possibly not be admitted into the appeal proceedings.

In its communication under Article 15(1) RPBA 2020, the board listed a number of aspects that might be taken into account when exercising its discretionary power under Article 12(4) RPBA 2007 (see point IV. above). Amongst these aspects, the board stated with respect to amended independent claims 1 and 9 that the amended feature referring to the *"predetermined maximum decoupling frequency"* was still so vague that clear

apparatus features for defining the flow meter assembly could not be derived therefrom and that therefore, for the same reasons as set out in points 3.1.1 and 3.1.2 in the appealed decision, the subject-matter of claims 1 and 9 seemed prima facie not allowable under Article 54 EPC.

The board is of the opinion that, in the case at hand, this information relates only to one of several aspects which could have been taken into account by the board in the exercise of its discretionary power under Article 12(4) RPBA 2007. Furthermore, the board's remark referring to the reasoning in the contested decision applied equally to the two amended independent claims 1 and 9 of the sole request filed with the statement of grounds of appeal. In the decision under appeal, it was found in points 3.1.1 and 3.1.2 that the subject-matter of apparatus claim 1 of the sole request then on file was not novel. For understandable reasons, the question of novelty was not further examined with regard to the subject-matter of corresponding independent method claim 9. However, this does not mean the examining division considered the subject-matter of independent claim 9 to be novel. The board was of the preliminary opinion that claim 1 as filed with the statement of grounds of appeal prima facie lacked novelty for the same reasons as indicated for claim 1 underlying the contested decision. In the case at hand, it is apparent that this prima facie assessment of novelty applies analogously to the method claim 9 of the sole request filed with the statement of grounds of appeal, because independent claim 9 defines an operating method for a flow meter corresponding to the flow meter of independent apparatus claim 1. Consequently, the board's remark on independent claims 1 and 9 of the sole request filed with the

statement of grounds of appeal does not contain any new or surprising objections which could constitute an exceptional circumstance within the meaning of Article 13(2) RPBA 2020.

The board notes that, even if the board were to accept that exceptional circumstances were present, the appellant failed to provide an explanation why the amendments made to claim 9 of the current main request are a justified response to the exceptional circumstances as alleged by the appellant.

Consequently, the board exercised its discretion under Article 13(2) RPBA 2020 and decided that the main request was not to be taken into account in the appeal proceedings.

2. First auxiliary request - Admittance - Article 12(4) RPBA 2007

2.1 During the first-instance examination proceedings, the applicant filed several sets of amended claims. The claims of the sole request on which the appealed decision is based were filed in response to a communication, in which the examining division presented inter alia its objections with respect to Articles 123(2), 84 and 54 EPC. During the oral proceedings before the examining division, it was found that these objections were still valid (see minutes, page 1, first paragraph) and, as a consequence, the examining division issued the decision under appeal.

The current auxiliary request has been filed for the first time as sole request with the statement of grounds of appeal.

2.2 In the case at hand, the statement of grounds of appeal was filed before the date on which the revised version of the Rules of Procedure of the Boards of Appeal (RPBA 2020) entered into force. Thus, in accordance with Article 25(2) RPBA 2020, Article 12(4) to (6) RPBA 2020 does not apply. Instead, Article 12(4) of the Rules of Procedure of the Boards of Appeal in the version of 2007 (RPBA 2007 (OJ EPO 2007, 536)) applies.

According to Article 12(4) RPBA 2007, everything presented by the parties under Article 12(1) RPBA 2007 has to be taken into account by the board if and to the extent it relates to the case under appeal and meets the requirements in Article 12(2) RPBA 2007. However, Article 12(4) RPBA 2007 also empowers the board to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first-instance proceedings. Thus the board of appeal has discretion not to admit sets of claims according to requests which could and should have been submitted during the first-instance proceedings but were not (see Case Law of the Boards of Appeal of the EPO, 10th edition 2022, V.A.5.11.4 a)).

The appellant argued that, although the claims according to the current auxiliary request could have been filed earlier and although the amendments had to be discussed under Article 123(2) EPC, the claims had been amended to address the examining division's objection under Article 84 EPC and the statement of grounds of appeal contained arguments demonstrating that the claims met the requirements of the EPC and that the objections of the examining division were not justified. Therefore, the claims would be clearly

allowable and should be admitted into the appeal proceedings.

The board is not convinced by the appellant's arguments for the following reasons.

The subject-matter of claim 1 of the current first auxiliary request has been amended by introducing features from the description, in particular that the *"predetermined maximum decoupling frequency"* is stored in the meter electronics. However, the relevant part of the description as filed, referred to by the appellant, discloses that the *"very high frequency can be based on pre-stored [...] values"* (see page 20, lines 17-18). Therefore, the current first auxiliary request prima facie presents new issues with respect to the requirements of Article 123(2) EPC.

In addition, claim 1 still comprises the unclear features *"a very high frequency vibrational response"* and *"predetermined maximum decoupling frequency [...] that is independent of a foreign material size or a foreign material composition within the fluid flow"* objected to in the contested decision under Article 84 EPC. Amended claim 1 therefore seems prima facie not suitable to overcome the objections under Article 84 EPC.

In conclusion, the board is of the opinion that the first auxiliary request could and should have been filed already during the first-instance examination proceedings and that the amended claims give rise to new objections under Article 123(2) EPC and are prima facie not suitable to overcome the previously raised objections under Article 84 EPC.

The board therefore decided, in exercising its discretion under Article 12(4) RPBA 2007, not to admit the first auxiliary request into the appeal proceedings.

3. As none of the appellant's requests is allowable, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairwoman:

L. Gabor T. Karamanli

Decision electronically authenticated