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**Datasheet for the decision
of 25 April 2023**

Case Number: T 0984/21 - 3.4.02

Application Number: 11715319.7

Publication Number: 2678644

IPC: G01F1/84

Language of the proceedings: EN

Title of invention:

VIBRATING FLOW METER AND METHOD FOR MEASURING TEMPERATURE

Applicant:

Micro Motion, Inc.

Relevant legal provisions:

RPBA 2020 Art. 12(6), 13(2)

Keyword:

Admission of amended requests (no)

Decisions cited:

T 2599/19



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 0984/21 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 25 April 2023

Appellant: Micro Motion, Inc.
(Applicant) 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 21 January 2021
refusing European patent application No.
11715319.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair R. Bekkering
Members: F. J. Narganes-Quijano
C. Almberg

Summary of Facts and Submissions

- I. The appellant (applicant) lodged an appeal against the decision of the examining division refusing European patent application No. 11715319.7.
- II. Among the documents considered during the first-instance proceedings, the following documents were cited in the present appeal proceedings:
- D2: US 2007/0151371 A1
D4: WO 01/02816 A2.
- III. In the decision under appeal the examining division concluded in respect of the requests then on file *inter alia* as follows:
- main request: independent claims 1 and 9 were not clear (Article 84 EPC);
 - first auxiliary request: independent claims 1 and 9 were not clear (Article 84); and
 - second auxiliary request: dependent claim 5 did not comply with the requirements of Article 123(2) EPC, and independent claims 1 and 8 were not clear (Article 84 EPC).
- The examining division also held that the subject-matter of the independent claims of the main and the first and second auxiliary requests was not new and/or did not involve an inventive step in view documents D2 and D4 (Articles 54(1) and 56 EPC).
- IV. With the statement setting out the grounds of appeal dated 13 May 2021 the appellant submitted claims according to a main request and an auxiliary request.

- V. In reply to the preliminary opinion expressed by the board in a communication pursuant to Article 15(1) RPBA 2020 annexed to the summons to oral proceedings the appellant filed by letter dated 27 March 2023 claims according to a second to a fifth auxiliary request.
- VI. Oral proceedings before the board were held on 25 April 2023.

The appellant requested that the appealed decision be set aside and that a patent be granted based on the claims of one of

- the main request and the first auxiliary request (then labelled "auxiliary request") filed with the statement of grounds of appeal of 13 May 2021, and
- the second to fifth auxiliary requests filed with the letter of 27 March 2023.

At the end of the oral proceedings the chair announced the decision of the board.

- VII. Claim 1 of the main request reads as follows:

"A vibrating flow meter (205), comprising:
a single curved flow conduit (210);
a single conduit temperature sensor T_1 (291) affixed to the single curved flow conduit (210);
a balance structure (208) affixed to and opposing the single curved flow conduit (210); and
a single balance temperature sensor T_2 (292) affixed to the balance structure (208), wherein a conduit temperature sensor resistance of the conduit temperature sensor T_1 (291) and a balance structure temperature sensor resistance of the balance temperature sensor T_2 (292) are selected to form a

predetermined resistance ratio corresponding to a temperature importance ratio."

Claim 1 of the first auxiliary request differs from claim 1 of the main request in that the claim further reads as follows:

"between the flow conduit (210) and the balance structure (208), wherein the temperature importance ratio comprises a relative importance of local temperatures of the flow conduit (210) and the balance structure (208) on the output data."

Claim 1 of the second auxiliary request differs from claim 1 of the first auxiliary request in that the expression "the balance structure (208) on the output data" at the end of the claim is replaced by the expression "the balance structure (208) on flowmeter output data."

Claim 1 of the third auxiliary request differs from claim 1 of the second auxiliary request in that the two occurrences of each of the expressions "sensor T₁ (291)" and "sensor T₂ (292)" have respectively been replaced by the expressions "resistor T₁ (291) and "resistor T₂ (292)".

Claim 1 of the fourth and the fifth auxiliary requests differs from claim 1 of the third auxiliary request in that the last feature of the claim reading "are selected to form a predetermined resistance ratio corresponding to a temperature importance ratio between the flow conduit (210) and the balance structure (208), wherein the temperature importance ratio comprises a relative importance of local temperatures of the flow conduit (210) and the balance structure (208) on

flowmeter output data" is respectively replaced by the following feature:

"are selected to provide electrical resistances in proportion to the thermal importance of the conduit (210) and the balance structure (208 [sic]".

and by the following feature:

"are selected to quantify how a change in temperature will affect the elastic modulus of the balance structure or conduit, or how a change in flow fluid temperature or environmental temperature will transfer into the balance structure or conduit."

Reasons for the Decision

1. The appeal is admissible.
2. *Main request - Admittance - Article 12(6), second sentence, RPBA 2020*
 - 2.1 The present main request was filed with the statement of grounds of appeal, and the claims of this request have no counterpart in the claims of the requests considered during the first-instance proceedings and they differ, in particular, from the claims of the requests underlying the decision under appeal. More particularly, claim 1 of the main request differs from claim 1 of the main request underlying the decision under appeal in that the expressions "a conduit temperature sensor" and "a balance temperature sensor" have respectively been replaced by "a single conduit

temperature sensor" and "a single balance temperature sensor".

- 2.2 According to Article 12(6), second sentence, RPBA 2020 "[t]he Board shall not admit requests [...] which should have been submitted [...] in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance".
- 2.3 With its letter dated 27 March 2023 and during the oral proceedings the appellant submitted that the term "single" in the features "single conduit temperature sensor" and "single balance temperature sensor" of claim 1 of the present main request was already present in the corresponding features of claim 1 of auxiliary requests 1 and 2 underlying the decision under appeal, and that the examining division had already assessed in its decision the impact of the two occurrences of the term "single" on the issues of novelty and inventive step over documents D2 and D4. The appellant submitted that, for these reasons, the board was not being presented with new subject-matter not addressed by the examining division.
- 2.4 The board notes, however, that the term "single" was present in claim 1 of the then first and second auxiliary requests in combination with other features absent in claim 1 of the present main request, so that already for this reason this claim is directed to subject-matter on which no decision was taken by the examining division.

In addition, the examining division's view on the patentability of claim 1 of the then first and second auxiliary requests over documents D2 and D4 does not

constitute a justification for dissociating - as done by the appellant with claim 1 of the present main request - the term "single" from the remaining features of claim 1 of either one of the then first and second auxiliary requests and presenting the board with subject-matter containing the amendment relating to the term "single", without the mentioned remaining features.

In other words, present claim 1 was not "submitted [...] in the proceedings leading to the decision under appeal". The question is whether it should have been.

- 2.5 In the present case, the term "single" appears to have been inserted twice in independent claim 1 of the main request for the purpose of overcoming objections of lack of novelty and of inventive step raised by the examining division in respect of the independent claims of the main request underlying the decision under appeal, but the claims of the present main request could, and as a matter of fact should, have been submitted during the first-instance proceedings, and in particular during the first-instance oral proceedings, in reaction to the mentioned objections.

The board is also unable to identify in the present case any specific circumstance of the appeal case that would justify the admission of the main request into the appeal proceedings, against the negative presumption under Article 12(6), second sentence, RPBA 2020. On the contrary, by filing the claims of the main request for the first time with the statement of grounds of appeal the appellant presented the board with subject-matter on which no decision was taken by the department of first instance, so that the admission of this request into the proceedings would compel the

board either to give a first ruling on several issues (in particular, under Articles 123(2), 84 and 52(1) EPC) - a task incompatible with its primary role, namely to review the decision under appeal in a judicial manner (*cf.* Article 12(2) RPBA 2020) -, or to remit the case to the department of first instance, which in the present case would be contrary to procedural economy.

2.6 In view of these considerations, the board decided not to admit the main request into the appeal proceedings (Article 12(6), second sentence, RPBA 2020).

3. *First auxiliary request - Admittance - Article 12(6), second sentence, RPBA 2020*

3.1 The first auxiliary request was filed with the statement of grounds of appeal and the claims of this request have no counterpart in the claims of the requests considered during the first-instance proceedings, and they differ, in particular, from the claims of the requests underlying the decision under appeal. More particularly, claim 1 of the auxiliary request differs from claim 1 of the main request underlying the decision under appeal in that

a) the expressions "a conduit temperature sensor" and "a balance temperature sensor" have respectively been replaced by "a single conduit temperature sensor" and "a single balance temperature sensor",

b) the temperature importance ratio referred to in the claim is the temperature importance ratio "between the flow conduit (210) and the balance structure (208)", and

c) the temperature importance ratio "comprises a relative importance of local temperatures of the flow

conduit (210) and the balance structure (208) on the output data".

3.2 As regards feature a), the same considerations brought forward in points 2.2 to 2.5 above also apply to this amended feature. In addition, features b) and c) are directed - as submitted by the appellant during the oral proceedings - to overcome objections addressed by the examining division in the decision under appeal. However, the corresponding amendments could also have been submitted during the first-instance proceedings in reaction to the mentioned objections. Therefore, claim 1 of auxiliary request could, and as a matter of fact should, have been submitted during the first-instance proceedings.

3.3 In view of these considerations, the board decided not to admit the first auxiliary request into the appeal proceedings (Article 12(6), second sentence, RPBA 2020).

4. *Second to fifth auxiliary requests - Admittance - Article 13(2) RPBA 2020*

4.1 The second to fifth auxiliary requests were filed after the notification of the summons to oral proceedings and claim 1 of each of these requests contain amendments when compared with claim 1 of the main and the first auxiliary requests (see point VII above). Therefore, the claims of the second to fifth auxiliary requests constitute an amendment of the appellant's appeal case within the meaning of Article 13(2) RPBA 2020 and according to this article these requests "shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons" by the appellant.

4.2 The appellant submitted that the amended claims according to the second to fifth auxiliary requests were filed in reaction to the objections of lack of clarity raised by the board in the communication annexed to the summons to oral proceedings.

The board first notes that in the communication annexed to the summons the board expressed the preliminary opinion that the main request was not to be admitted into the appeal proceedings under Article 12(4) and (6) RPBA 2020 (point 1.1 of the communication). The board also expressed the view that the claims of the main request were not clear (Article 84 EPC) (see point 1.2 of the communication), but with the reservation that this view was expressed *"in the event that the main request would, contrary to the preliminary opinion expressed [in point 1.1 of the communication], be admitted into the appeal proceedings"* (point 1.2 of the communication, first paragraph) and *"if at all admitted"* (point 1.2.4). An analogous opinion was expressed in respect of the first auxiliary request (points 2.1 and 2.2 of the communication). Since neither the main request nor the first auxiliary request are admitted into the appeal proceedings (*cf.* points 2 and 3 above), the mere fact that the board in preparation for the oral proceedings raised objections of lack of clarity conditional on the main request and/or the first auxiliary request being, contrary to its preliminary opinion, admitted by the board during the oral proceedings does, in the board's view, not constitute exceptional circumstances within the meaning of Article 13(2) RPBA 2020 that would justify amending the appellant's appeal case (see in this respect decision T 2599/19, catchword and points 1.1.3 and 1.1.5 of the reasons).

In addition, the objections of lack of clarity addressed by the board in its communication essentially correspond - as mentioned in point 1.2, first paragraph, of the communication annexed to the summons, and as also acknowledged by the appellant during the oral proceedings - to the objections of lack of clarity already raised by the examining division in its decision. Therefore, they do not constitute new objections amounting to exceptional circumstances within the meaning of Article 13(2) EPC, but only a further elaboration of the arguments given by the examining division in support of the mentioned objections under consideration of the counter-arguments submitted by the appellant with the statement of grounds of appeal.

- 4.3 In the absence of exceptional circumstances let alone cogent reasons that would justify the amendments according to the second to fifth auxiliary requests, the board decided not to take into account the second to fifth auxiliary requests pursuant to Article 13(2) RPBA 2020.
5. In view of the above considerations and conclusions, and in particular in the absence of an admitted request, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



H. Jenney

R. Bekkering

Decision electronically authenticated