

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 25 November 2022**

**Case Number:** T 2111/19 - 3.4.02

**Application Number:** 05731989.9

**Publication Number:** 1869416

**IPC:** G01F1/84, G01N9/00

**Language of the proceedings:** EN

**Title of invention:**

COMPACT VIBRATORY FLOWMETER FOR MEASURING FLOW CHARACTERISTICS  
OF A MULTI-PHASE FLOW MATERIAL

**Applicant:**

MICRO MOTION INCORPORATED

**Headword:**

**Relevant legal provisions:**

EPC Art. 113(1), 111(1) sentence 2

EPC R. 111(2)

RPBA Art. 12(4)

RPBA 2020 Art. 13(2)

**Keyword:**

Late-filed amendment to appeal case - submitted during oral proceedings - taken into account (yes)  
Right to be heard - substantial procedural violation (no)  
Appealed decision - reasoned (yes)  
Appeal decision - remittal to the department of first instance (no)  
Late-filed request - submitted with the statement of grounds of appeal - submitted shortly before oral proceedings - admitted (no)

**Decisions cited:**

T 0713/14, T 1294/16, T 0545/18, T 0661/18, T 1598/18

**Catchword:**



## Beschwerdekkammern

## 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 2111/19 - 3.4.02

### D E C I S I O N of Technical Board of Appeal 3.4.02 of 25 November 2022

**Appellant:** MICRO MOTION INCORPORATED  
(Applicant)  
7070 Winchester Circle  
Boulder  
Colorado 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 18 February  
2019 refusing European patent application No.  
05731989.9 pursuant to Article 97(2) EPC.

#### Composition of the Board:

**Chairman** R. Bekkering  
**Members:** H. von Gronau  
T. Karamanli

## **Summary of Facts and Submissions**

I. The applicant's appeal is directed against the decision of the examining division to refuse European patent application No. 05731989.9. The examining division refused the application because the amendment to the claims of the sole request filed by letter dated 18 August 2016 introduced subject-matter which extended beyond the content of the application as filed, contrary to Article 123(2) EPC. In addition, claims 1 and 9 lacked clarity (Article 84 EPC) and the subject-matter of independent claims 1 and 9 was not novel in view of document

D3: EP-A-1 429 119.

II. With the statement setting out the grounds of appeal dated 20 June 2019, the appellant filed amended claims according to a main request and a first auxiliary request and requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims according to the main request or first auxiliary request. As a further auxiliary measure the appellant requested that oral proceedings be held.

III. In a communication under Article 15(1) RPBA 2020 annexed to the summons to oral proceedings dated 8 October 2021, the board expressed its provisional opinion that the main request and the first auxiliary request, both filed for the first time with the statement setting out the grounds of appeal, should not be admitted into the appeal proceedings pursuant to Article 12(4) RPBA 2007.

IV. By letter dated 21 October 2022, the appellant filed claims according to a second auxiliary request which corresponded to the claims of the sole request filed on 18 August 2016 and upon which the decision under appeal was based. The appellant further argued that the main request and the first auxiliary request should be admitted into the appeal proceedings pursuant to Article 12(4) RPBA 2007, that the claims of both requests clearly defined the invention, that the claimed subject-matter of both requests did not extend beyond the content of the application as filed and that it was new in view of document D3. Furthermore, the appellant requested that the case be remitted to the department of first instance because of a fundamental deficiency in the first-instance proceedings, if the board was of the opinion that the examining division had not given an indication on novelty and inventive step.

V. Oral proceedings took place on 25 November 2022. At the oral proceedings the appellant did not maintain the objection of an alleged fundamental deficiency by the examining division due to the lack of an assessment of novelty and inventive step but requested that the case be remitted to the department of first instance for the examination of novelty and inventive step should the board find that the claims of one of the appellant's requests met the requirements of Articles 84 and 123(2) EPC. In addition, it raised objections of a substantial procedural deficiency with respect to a clarity objection raised by the examining division to the definition of "end bend angles  $\theta$ " in claim 1 of the then sole request and requested that the case be remitted to the department of first instance.

The appellant's final requests were as follows:

The appellant requested that the decision under appeal be set aside and that the case be remitted to the department of first instance for further prosecution because of a fundamental deficiency.

If this request for remittal was not granted, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims according to the main request filed with the statement setting out the grounds of appeal dated 20 June 2019 or, alternatively, according to one of the first auxiliary request filed with the statement setting out the grounds of appeal dated 20 June 2019, or the second auxiliary request filed by letter dated 21 October 2022. The appellant further requested that the case be remitted to the department of first instance for the examination of novelty and inventive step should the board find that the claims of one of the appellant's requests met the requirements of Articles 84 and 123(2) EPC.

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

VI. Claim 1 of the main request as filed with the statement of grounds of appeal reads as follows:

"A compact vibratory flowmeter (200) for measuring flow characteristics of a multiphase flow material at a flow material pressure of greater than about 68974.4 N/m<sup>2</sup>, the compact vibratory flowmeter (200) comprising one or more flow conduits (301), inlet and outlet manifolds (104) having a bore (B) that is the same as an internal diameter of the one or more flow conduits (301), at least two pickoff sensors (308) affixed to the one or

more flow conduits (301), and a driver (309) configured to vibrate the one or more flow conduits (301), the flowmeter having [sic!] a length (L) substantially the distance between the inlet and outlet manifolds (104) and a height (H) substantially a distance between a centerline of the inlet and outlet manifolds (104) and the furthest away centerline, the compact vibratory flowmeter (200) being characterized by:  
a maximum drive frequency on a fluid including water in the one or more flow conduits (301) that is less than about 200 Hertz (Hz);  
an aspect ratio (L/H) of the flowmeter that is greater than about 2.5;  
a height-to-bore ratio (H/B) of the one or more flow conduits (301) that is less than about 10; and  
a bowed flow conduit geometry in the one or more flow conduits (301) that includes end bend angles  $\theta$  of between about 120 degrees and about 170 degrees."

Claim 1 of the first auxiliary request differs from claim 1 of the main request in that the expression "fluid including water" is replaced by the expression "multi-phase flow material".

Claim 1 of the second auxiliary request differs from claim 1 of the main request in that:

- the expression "68974.4 N/m<sup>2</sup>" is replaced by the expression "10 pounds-per-square-inch (psi)",
- the expression "the flowmeter having" [sic] is replaced by the expression "the one or more flow conduits (301) having"
- the indication "about 200 Hertz" is replaced by the indication "about 250 Hertz", and
- the definition "an aspect ratio (L/H) of the flowmeter that is greater than about 2.5;" is replaced by the definition "an aspect ratio (L/H) of the one or

more flow conduits (301) that is greater than about 2.5;".

### **Reasons for the Decision**

1. The appeal is admissible.
2. Fundamental deficiency and remittal (Article 111(1), second sentence EPC and Article 11 RPBA 2020)
  - 2.1 At the oral proceedings before the board the appellant raised two objections of fundamental deficiencies with respect to a clarity objection raised by the examining division concerning the definition of the "end bend angles  $\theta$ " in claim 1 of the then sole request. This clarity objection had first been raised in the communication of the examining division of 17 March 2014 but had not been repeated again until the oral proceedings before the examining division, although the examining division had issued several further communications. The applicant had been taken by surprise when this clarity objection had been raised again at the oral proceedings before the examining division and referred to in the contested decision so that its right to be heard under Article 113(1) EPC had been violated. The appellant was furthermore of the opinion that the decision was not sufficiently reasoned with regard to the three objections of lack of clarity under Article 84 EPC (point 4 of the decision under appeal). The contested decision stated in particular under point 4 of its reasons only that "Additionally, the definition of the end bend angles  $\theta$  in claim 1 (line 21) and claim 9 (line 6) is not clear to a person skilled in the art" without giving an explanation as to

why this definition was not clear. Because of these fundamental deficiencies the appellant requested that the case be remitted to the department of first instance.

2.2 The appellant raised the objections of fundamental deficiencies for the first time at the oral proceedings before the board.

The summons to oral proceedings was notified after the date on which the Rules of Procedure of the Boards of Appeal 2020 (RPBA 2020, OJ EPO 2021, A35) entered into force, i.e. 1 January 2020 (Article 24(1) RPBA 2020). Thus, in accordance with Article 25(1) and (3) RPBA 2020, Article 13(2) RPBA 2020 applies to the question of whether to admit the present objections of fundamental deficiencies, which were raised by the appellant after notification of the summons to oral proceedings and are therefore amendments within the meaning of Article 13(2) RPBA 2020. Where an amendment is made to a party's appeal case at this advanced stage of the proceedings, Article 13(2) RPBA 2020 stipulates that it will, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

2.3 The board does not consider that exceptional circumstances within the meaning of Article 13(2) RPBA 2020 are only new or unforeseen developments in the appeal proceedings themselves. The term "exceptional circumstances" can also be interpreted more broadly (see also e.g. decisions T 713/14, point 4 of the Reasons; T 1294/16, points 18.2 to 18.4 of the Reasons; T 545/18, point 2 of the Reasons; T 661/18, point 1 of the Reasons; and T 1598/18, point 25 of the Reasons).

The right to be heard under Article 113(1) EPC is given great importance in the EPC and the established case law. In the case at hand, no other party was affected by the late raising of these objections and the board was in a position to take a decision on this issue without postponing the oral proceedings. In the present case, the board therefore sees the exceptional circumstances within the meaning of Article 13(2) RPBA 2020 in the fact that the appellant has submitted that its right to be heard under Article 113(1) EPC had been violated in the first-instance proceedings.

In view of the above, the board, exercising its discretion under Article 13(2) RPBA 2020, takes into account the appellant's objections of fundamental deficiencies under Article 13(2) RPBA 2020.

2.4 In assessing the objections of fundamental deficiencies raised by the appellant the board notes that the present application was refused on several grounds, namely under Articles 123(2), 84 and 54 EPC.

The examining division *inter alia* came to the conclusion that the subject-matter of then claim 1 extended beyond the content of the application as filed because of the definition "*the one or more flow conduits (301) having a length (L) substantially the distance between the inlet and outlet manifolds (104) and a height (H) substantially a distance between a centerline of the inlet and outlet manifolds (104) and the furthest away centerline*". On page 8, lines 23-24, it was the meter overall length (L) (and not that of the conduits) that was defined as having a length, which was substantially the distance between manifolds (104) of the flowmeter. The examining division also

considered the overall teaching of the application and stated additionally that the flow conduits (301) were of an arcuate shape and thus had a length  $L_T$ , which was larger than the distance between manifolds (104), as could be seen from Figure 3 (see reasons of the decision under appeal, section 3).

The board further notes that this objection of the examining division was already raised in the communication dated 25 September 2018 annexed to the summons for oral proceedings, section 4.1 and at the oral proceedings before the examining division (see minutes, section 3). The board is therefore of the opinion that regarding the objection under Article 123(2) EPC, the examining division respected the appellant's right to be heard under Article 113(1) EPC. The examining division also gave sufficient reasons in the decision under appeal why the defined length of the one or more flow conduits was not explicitly disclosed as the distance between the inlet and outlet manifolds in the application as originally filed and why this feature also could not be derived from the application as filed (see reasons of the decision under appeal, point 3). The objection under Article 123(2) EPC is therefore sufficiently reasoned as required by Rule 111(2) EPC. The additional clarity objections raised, in particular the one regarding the bend angles, are therefore not essential for the refusal of the application and therefore any alleged insufficient reasoning with respect to the clarity objections in the decision under appeal cannot constitute a fundamental procedural deficiency.

2.5 The board therefore concludes that for at least one ground for refusal the appellant's right to be heard under Article 113(1) EPC was respected and the ground

for refusal was sufficiently reasoned according to Rule 111(2) EPC. A fundamental deficiency that justifies to set aside the decision under appeal and to directly remit the case to the department of first instance under Article 111(1), second sentence, EPC and Article 11 RPBA 2020 (which applies in accordance with Article 25(1) RPBA 2020) can, therefore, not be established.

3. Main request and first auxiliary request - admittance  
(Article 12(4) RPBA 2007)

3.1 Both, the main request and the first auxiliary request were filed for the first time with the statement setting out the grounds of appeal.

The statement of grounds of appeal was filed before the date on which the RPBA 2020 entered into force, i.e. 1 January 2020 (see Article 24(1) RPBA 2020). Thus, pursuant to 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 - see OJ EPO 2007, 536) continues to apply.

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, the board has the power to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first-instance proceedings.

3.2 In support for the admittance of the main request and the first auxiliary request the appellant argued as follows:

*"Case Law of the Boards of Appeal of the EPO, 9th edition 2019, 4 V-A. 4.11 is cited in the instant Summons to support an argument that the Main and First Requests may be inadmissible as being within "the power of the Board to hold inadmissible... requests which could have been presented... in the first instance proceedings." According to V-A, 4.11.1 (beginning at page 1227), the Board explains that there is a lenient standard when considering whether to admit requests:*

*Since, in fact, almost every claim request could have been presented before the department of first instance, the question within that context is whether the situation was such that the filing of this request should already have taken place at that stage (T 273/11, see also T 1162/11). Also in T 1848/12 the board applied the more lenient "should have been presented" with regard to the admission of documents.*

*The Board also suggests that even if a request should have been made in a proceeding of the first instance, it is still within the discretion of the Board to admit the request submitted with the grounds of appeal. Id. ("Art. 12(4) RPBA 2007 instructs us that consideration is unlikely to be given to new submissions that should have been presented in the first-instance proceedings."). The Board also explains in 4.11.1 that, according to Art. 12(4) RPBA 2007, admission of auxiliary requests into proceedings hinged on the question whether a party to appeal proceedings was in a position to make its submission earlier, and whether it*

*could have been expected to do so under the circumstances.*

*Although discussed in the context of inter partes appeals, the Board explains that amendments, including amended requests, are usually admitted into appeal proceedings if they are justified by the normal development of the proceedings or can under the circumstances be considered a normal reaction of a losing party. 4.11.3 (g). An example of a "legitimate and normal reaction" was a "main request including an "addition of a feature of a dependent claim which further limited the subject-matter." Id. The Board's rationale was that "it did not appear that the patent proprietor made a "considered and deliberate choice" not to file the request" and "plausibly the formulation of a suitable new request [that could have been filed earlier] overcoming the objection was not immediately evident." Id.*

*In the context of ex parte appeals where a request had not been filed in the first instance but was filed with the grounds of appeal:*

*The board was aware that amended claims filed together with the statement of grounds of appeal have in many cases been admitted into appeal proceedings if they constituted a legitimate reaction to the reasoning underlying the appealed decision. Indeed, such amended claims filed with the statement of grounds of appeal may achieve the goal of "a more defined and controlled initial phase of proceedings" (see T 1007/05), in particular if they serve to avoid later amendments. But this does not mean that the board is obliged to admit amended claims solely because they were filed*

*with the statement of grounds of appeal. In the case in hand, the applicant had been given several opportunities to file amended claims in the first-instance proceedings. No auxiliary requests were filed. By presenting its sole and amended request only in appeal proceedings the applicant was making it impossible for the board to examine the contested decision.*

*4.11.4 (b) [The appellant probably meant 4.11.4 (c)]. The Board has admitted a request that was made in the first instance, withdrawn in favor of more restricted claims in response to a novelty rejection, and then resubmitted with the Grounds of Appeal. The Board explains the admission as follows:*

*In T 435/11 claim 1 of the request essentially corresponded to a claim on which the examining division had expressed a negative opinion with respect to novelty and which had subsequently been withdrawn in favour of more restricted claims. The board took into account the special circumstances of the case. In the first-instance proceedings, the appellant had introduced limitations against which the examining division had raised objections under Art. 123(2) EPC, and the appellant had not been able to overcome those objections by further amendment. The appellant had thereby manoeuvred itself into a difficult position. If the appellant in these appeal proceedings was to be afforded a way out at all, it had to be allowed to revert to a claim with the offending features removed. The board therefore admitted the main request into the proceedings." (see letter dated 21 October 2022, pages 2 to 5).*

With respect to the communication under Article 15(1) RPBA 2020 the appellant noted "*that it is not dispositive if a request had not been filed during the first instance proceedings and concerned technical aspects that are different from that of the former sole request. The admission of a request hinges on whether the request should have been made. By way of illustration, a request may first be made with a grounds of appeal if it is a "normal development of the proceedings" rather than an attempt to obtain an advantage through "considered and deliberate choice" to abuse EPO procedure. A request first filed with the grounds of appeal may also be admitted where a legitimate reaction to the reasoning underlying the appealed decision and further may achieve the goal of "a more defined and controlled initial phase of proceedings" in particular where they serve to avoid later amendments.*

*The Applicant respectfully asserts that both the Main and First Auxiliary Requests were a natural response to the Reasons of the Decision to refuse." (see letter dated 21 October 2022, page 5).*

The appellant furthermore noted that the examining division had surprisingly not considered its arguments at the first-instance oral proceedings: "*Despite the Applicant providing a reasoned basis that a mere difference in wording between the as-filed description and the objected to claim language is well within the "directly and unambiguously derivable" standard, in the Article 123(2) EPC reasoning, the Reasons of the Decision to refuse never even mentions the "directly and unambiguously" standard and only relies on the explicit text of the description and the claims. Accordingly, including additional amendments with the Grounds of Appeal at the very least "constituted a*

*legitimate reaction to the reasoning underlying the appealed decision." For example, where the Decision seemingly requires literal support (i.e., no textual difference between the claims and description) to meet the Article 123(2) EPC standard where the "directly and unambiguously" standard was argued during oral proceedings, it is a legitimate response to file requests with the Grounds of Appeal that meet the Decision's incorrect standard (EPO Case Law, V-A, 4.11.4 (e) (a request can be admitted "if the main request included amendments which clearly met the objections on which the refusal of the application has been based."). Applicant further submits that the Decision maintaining the Article 123(2) EPC rejection without relying on the "directly and unambiguously" standard, shows that the Applicant has been inadvertently "manoeuvred itself into a difficult position" for reasons not based on any "considered and deliberate choice" by the Applicant." (see letter dated 21 October 2022, paragraph bridging pages 5 and 6).*

At the oral proceedings before the board the appellant emphasised that filing the main request and the first auxiliary request with the grounds of appeal was a response to the reasons in the decision under appeal concerning the objection under Article 123(2) EPC. The appellant could not have expected that the examining division would not accept the arguments provided in the oral proceeding before the examining division. Therefore there was no need to amend the claims at the first-instance proceedings. For the assessment of Article 123(2) EPC, one could rely on the "directly and unambiguously" standard, which the examining division surprisingly did not apply. Consequently, the appellant was maneuvered in a difficult situation which justified admittance of requests filed in reaction to the reasons

of the decision under appeal not taking into account this standard.

3.3 For the admittance of the main request and the first auxiliary request filed with the grounds of appeal the board considers first whether the appellant could have filed the amended claims in the first-instance proceedings.

The board notes that the examining division in its communication of 25 September 2018 annexed to the summons for oral proceedings raised several objections under Articles 84, 123(2), 54 and 56 EPC. In particular the objection under Article 123(2) EPC with respect to the lengths of the flow conduits was raised in this communication in section 4. These objections were also discussed at the oral proceedings before the examining division (see minutes, sections 3 and 4). The examining division apparently offered an opportunity to amend the claims at the oral proceedings, but the representative stated that he was not allowed by the applicant to amend the claims (see minutes, section 7). The reasons of the decision under appeal do not comprise any additional aspects, in particular with respect to the objection under Article 123(2) EPC, which have not been addressed previously. The board concludes from the course of the first-instance proceedings that the appellant should have been aware of the examining division's opinion and could therefore have been expected to file the amended claims of the present main request and first auxiliary request, in particular with the amendment to overcome the objection under Article 123(2) EPC, at least as an auxiliary measure before or at the first-instance oral proceedings. Although the appellant was expressly given the opportunity by the examining division at the oral proceedings to file

amended claims, it did not do so. The motivation of the appellant's representative, based on internal agreements, not to make use of this possibility is irrelevant in this respect. Thus the appellant was also in a position to file amended claims in the first-instance proceedings.

3.4 The board has therefore discretion under Article 12(4) RPBA 2007 not to admit the main request and first auxiliary request into the appeal proceedings.

In the circumstances of the present case, the board sees no reason to admit the present main request and first auxiliary request into the appeal proceedings. On the contrary, by filing the claims of these requests for the first time with the statement of grounds of appeal the appellant has presented the board with subject-matter on which no decision was taken by the department of first instance. In addition, the admission of this request into the proceedings would compel the board either to give a first ruling on several issues (in particular, with respect to Articles 123(2), 84, 54 and 56 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.

3.5 The appellant's arguments above with regard to the case law of the Boards of Appeal are not convincing.

As concluded above, the appellant could have filed the amended claims, at least as an auxiliary measure, already during the first-instance proceedings. Contrary to the appellant's submissions, a normal course of the

proceedings would have required the appellant to file the amended claims as soon as possible, i.e. at or before the first-instance oral proceedings.

The board cannot see either that the appellant had manoeuvred itself into a difficult position by introducing deficiencies that the appellant could not overcome by further amendments in the first-instance proceedings because the examining division did not apply the "directly and unambiguously derivable" standard and only relied on the explicit text of the description and the claims. The argument that the reasoning in the decision under appeal to refuse the application nowhere mentioned the "directly and unambiguously" standard is not convincing, because the examining division clearly applied this standard. The examining division did not only refer to the text on page 8, lines 23 to 24, of the application as filed but also considered whether the feature defining the length of the one or more flow conduits as being the distance between the inlet and outlet manifolds could be clearly and unambiguously derived from the application as filed. It considered in particular Figures 2 and 3 and came to the conclusion that the claimed feature could not be derived from the application as filed (see reasons of the decision under appeal, sections 3. and 7.a')). The examining division had provided this analysis already in its communication of 25 September 2018 (see section 4.1) and it was discussed at the oral proceedings before the examining division (see minutes, section 3), so that it cannot have come as a surprise to the appellant.

As the decision under appeal does not contain any surprising reasoning, the amended claims of the main request and the first auxiliary request are also not a

legitimate reaction to the reasoning of the decision under appeal.

3.6 In view of these considerations, the board exercising its discretion under Article 12(4) RPBA 2007 did not admit the main request and the first auxiliary request into the appeal proceedings.

4. Second auxiliary request - admittance (Article 13(2) RPBA 2020)

4.1 The claims of the second auxiliary request were filed only with letter dated 21 October 2022, i.e. after notification of the summons to oral proceedings. The claims of the second auxiliary request correspond to those of the sole request underlying the decision under appeal that the appellant no longer pursued when filing the statement setting out the grounds of appeal. Hence, the second auxiliary request is an amendment within the meaning of Article 13(2) RPBA 2020. The board has therefore to assess whether there are exceptional circumstances which have been justified with cogent reasons.

4.2 At the oral proceedings before the board the appellant argued that the claims of the second auxiliary request corresponded to those underlying the contested decision. The provisional opinion of the board in its communication under Article 15(1) RPBA 2020 that the main request and the first auxiliary request should not be admitted into the appeal proceedings constituted exceptional circumstances. These requests were filed to overcome the objections raised by the examining division so that the appellant assumed that they were more likely be admitted by the board. Surprisingly the board did not admit the main request and the first

auxiliary request, and the appellant had therefore to return to the claims of the sole request forming the basis for the decision under appeal.

4.3 The board is not persuaded by the appellant's arguments. When filing new requests with the statement setting out the grounds of appeal, the appellant always runs the risk that these requests will not be admitted. If the appellant had intended to maintain the claims of the sole request underlying the decision under appeal in the present case, it would have been, contrary to the appellant's submissions, a normal course of the proceedings and therefore necessary to maintain that request with the statement setting out the grounds of appeal as a main or auxiliary request. The notification of the summons to oral proceedings triggers the third stage of the convergent approach. The basic principle of the third level of the convergent approach is that, at this stage of the appeal proceedings, amendments to a party's appeal case are not taken into consideration. A limited exception is provided for, requiring a party to present compelling reasons which justify clearly why the circumstances leading to the amendment are indeed exceptional in the particular appeal case. The board considers that the non-admission of the main request and the first auxiliary request does not constitute such exceptional circumstances.

4.4 Therefore, the board exercised its discretion under Article 13(2) RPBA 2020 and decided that the second auxiliary request was not taken into account.

5. Remittal to the department of first instance for the examination of novelty and inventive step (Article 111(1), second sentence, EPC and Rule 11 RPBA 2020)

As set out above the board decided not to admit any of the requests on file. The board has therefore not to decide on the question whether the claims of one of the appellant's requests meet the requirements of Articles 84 and 123(2) EPC and whether the case should be remitted to the department of first instance for further prosecution under Article 111(1), second sentence, EPC and Rule 11 RPBA 2020.

6. As none of the appellant's requests were allowed by the board, the appeal has to be dismissed.

### **Order**

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

The appeal is dismissed.

The Registrar:

L. Gabor

The Chairman:

R. Bekkering



Decision electronically authenticated