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**Datasheet for the decision  
of 14 November 2022**

**Case Number:** T 2599/19 - 3.4.02

**Application Number:** 07871714.7

**Publication Number:** 2242999

**IPC:** G01F1/84

**Language of the proceedings:** EN

**Title of invention:**

A VIBRATING FLOW DEVICE AND METHOD FOR FABRICATING A VIBRATING  
FLOW DEVICE

**Applicant:**

Micro Motion, Inc.

**Headword:**

**Relevant legal provisions:**

RPBA Art. 12(4)

RPBA 2020 Art. 13(2)

**Keyword:**

Admittance of main and sole request (no) - exceptional  
circumstances (no)

**Decisions cited:**

**Catchword:**

Since the initial main request, filed for the first time with the statement of grounds of appeal, would not have been admitted under Article 12(4) RPBA 2007, the objections raised by the board in the communication annexed to the summons to oral proceedings against this initial main request are of a hypothetical nature and do not establish exceptional circumstances referred to in Article 13(2) RPBA 2020 which could justify amending the applicant's appeal case.



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Case Number: T 2599/19 - 3.4.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.02**  
**of 14 November 2022**

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

**Representative:** Ellis, Christopher Paul  
Ollila Law Limited  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 12 March 2019  
refusing European patent application No.  
07871714.7 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** R. Bekkering  
**Members:** A. Hornung  
G. Decker

## Summary of Facts and Submissions

I.

II. The applicant appealed against the decision of the examining division refusing European patent application No. 07871714.7 on the basis of Article 97(2) EPC finding that the main and sole request then on file did not meet the requirements of Articles 123(2) and 54(1) EPC.

III. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims in accordance with the main and sole request filed with a letter dated 2 February 2022.

IV. Oral proceedings before the board were held on 14 November 2022.

V. The present decision refers to the following documents:  
D1: WO 01/51898 A1,  
D6: WO 2005/038411 A1,  
D7: JP H07-248241 A.

VI. Claim 1 in accordance with the main request reads as follows:

"A vibrating flow device (5), comprising:

at least one conduit (103A, 103B), at least one drive (104), and at least one pick-off (105, 105'), wherein the at least one drive (104) vibrates the at least one conduit (103A, 103B) at one or more drive frequencies in an out of phase bending mode of vibration such that the conduits (103A, 103B) are driven in opposite directions about their respective bending axes X and X', and the at least one

pick-off (105, 105') measures the motion of the at least one conduit; and

at least one housing (200) that encompasses the at least one drive (104), the at least one pick-off (105, 105'), and at least a portion of the at least one conduit (103A, 103B), wherein an oblong annular cross-sectional shape of the at least one housing (200) is configured with a cross-sectional length (L) that extends in a direction that is generally parallel to the direction of motion of vibration of the at least one drive (104) and a cross-sectional width (W) that extends in a direction that is generally orthogonal to the direction of motion of the bending mode, wherein the dimension of the cross-sectional length (L) exceeds the dimension of the cross-sectional width (W) to affect a vibrational response of the at least one housing (200) by increasing a moment of inertia of the at least one housing (200) so that frequencies that induce the out of phase bending mode of the at least one housing is [sic] greater than the one or more drive frequencies".

## **Reasons for the Decision**

1. Main request - admittance
  - 1.1 The board decides that the main and sole request is not taken into account under Article 13(2) RPBA 2020.
    - 1.1.1 The present main request was filed on 2 February 2022 in response to the summons to oral proceedings before the board. Claim 1 has been modified with respect to the previous claim 1 filed with the statement of grounds of appeal by extensively rewording the claim. According to the applicant, these amendments to claim 1 were intended to overcome the objections under Articles 123(2), 84 and

56 EPC raised in the board's communication pursuant to Article 15(1) RPBA 2020, annexed to the summons to oral proceedings.

1.1.2 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". The board is unable to see any such exceptional circumstances justifying filing the new main request in response to the board's summons to oral proceedings.

1.1.3 Indeed, the objections raised by the board in the communication annexed to the summons to oral proceedings related to a set of claims in accordance with a main request whose admission into the proceedings had not yet been decided. This main request had been filed by the applicant for the first time with the statement setting out the grounds of appeal on 10 July 2019. In the communication annexed to the summons to oral proceedings, point 6, the board informed the applicant that it was considering not admitting the main request, filed on 10 July 2019, under Article 12(4) RPBA 2007.

Only once the set of claims had been admitted would the objections become effective, in the sense that the objections would then prevent a patent from being granted on the basis of the admitted set of claims. Until the time that a decision is taken on the effective admission of the request, the objections raised in the board's summons are only of a hypothetical nature, in the sense that they are conditional on the admittance of the request. As stated in the board's communication annexed to the summons, point 7, "[i]n case that the main request was still to be admitted

into the proceedings, objections under Articles 84, 123(2) and 56 EPC would have to be raised". In other words, if the main request were not admitted, no objections would have to be raised against it. In no case can hypothetical objections serve as a valid justification for submitting remedial amendments.

1.1.4 The main request, filed on 10 July 2019, would indeed not have been admitted under Article 12(4) RPBA 2007 for the following reasons, already set forth in the communication annexed to the summons to oral proceedings, point 6:

Independent claims 1 to 3 have been extensively reworded. In particular, claim 1 has been amended with respect to claim 1 underlying the appealed decision in that:

- (i) the conduit is vibrated "in an out of phase bending mode of vibration";
- (ii) the housing has an "oval" cross-sectional shape;
- (iii) the housing's cross-sectional length exceeds its width to affect the housing's vibrational response "so that a range of frequencies that induce the out of phase bending mode of the at least one housing is greater than the one or more drive frequencies" rather than affecting the vibrational response "by increasing a moment of inertia of the at least one housing (200), and wherein the at least one housing's (200) modes of vibration occur at frequencies that exceed the one or more drive frequencies".

The main request, filed on 10 July 2019, could and should have been submitted during first-instance proceedings.

Indeed, since the beginning of the examination proceedings, novelty and inventive-step objections had been raised by the examining division in view of document D1. The applicant initially responded with arguments without attempting to overcome the objection by substantively amending claim 1. In the subsequent communication annexed to the summons to oral proceedings, the novelty and inventive-step objections in view of D1 were reiterated. In addition, the examining division introduced new prior-art documents D6 and D7 and raised novelty and inventive-step objections based on them. The applicant responded by submitting an amended set of claims. In spite of the discussion during the oral proceedings dealing with the patentability issues, the applicant refrained from submitting amendments, which could have been in the form of auxiliary requests, to overcome these objections.

As a result of the applicant's approach, there could be no in-depth and concluding exchange of views on novelty and inventive step of the now-claimed subject-matter between the applicant and the examining division, thereby shifting the discussion on patentability to the appeal proceedings without any good reason. Moving the inchoate debate on novelty and inventive step to the appeal proceedings runs counter to procedural efficiency as well as to the primary object of the appeal proceedings, to review the decision under appeal in a judicial manner (see Article 12(2) RPBA 2020).

- 1.1.5 In conclusion, since the initial main request, filed for the first time with the statement of grounds of appeal, would not have been admitted under Article 12(4) RPBA



2007, the objections raised against this initial main request by the board in the communication annexed to the summons to oral proceedings are of a hypothetical nature and do not establish exceptional circumstances referred to in Article 13(2) RPBA 2020. Therefore the board's objections cannot serve as a valid justification for submitting amendments under Article 13(2) RPBA 2020.

1.1.6 The applicant did not submit further arguments in favour of the existence of exceptional circumstances which would justify filing amendments to its appeal case. The board does not see any further circumstances which would qualify as exceptional circumstances justifying amendments of the applicant's appeal case either.

1.2 Applicant's counter-arguments

1.2.1 The applicant argued that the reason for filing an amended set of claims was to overcome the objections raised by the board in the communication annexed to the summons to oral proceedings.

The board does not find this argument convincing, since the objections referred to by the applicant relate to a set of claims which had not yet been admitted into the proceedings under Article 12(4) RPBA 2007. As explained in point 1.1 above, these objections are of a hypothetical nature, and cannot serve as a valid justification for submitting amendments under Article 13(2) RPBA 2020.

1.2.2 Concerning the admittance of the initial main request filed with the statement of grounds of appeal, the applicant argued that during first-instance proceedings it "considered it unnecessary to have to limit the claims further. More generally, the Applicant does not consider it reasonable to narrow the scope of protection more than

necessary if the Examiner at first instance maintains, in the Applicant's assertion, an incorrect interpretation of what is disclosed in, and/or considered an obvious modification of, a prior art document" (letter of reply dated 2 February 2022, page 2, penultimate paragraph).

The board cannot agree with the applicant. If the applicant was convinced during first-instance proceedings that it was correct in its assertions, there is no comprehensible reason why, upon filing the appeal, the applicant amended the set of claims underlying the appealed decision instead of maintaining it unchanged. Since the examining division's objections were known to the applicant at the latest during the oral proceedings held before the examining division, the applicant had had the opportunity to make any desired amendment to its case during first-instance proceedings.

- 1.2.3 During oral proceedings before the board, the applicant submitted that the examining division had issued a summons to oral proceedings after just a single communication pursuant to Article 94(3) EPC, regularly changed its mind concerning the objections to be raised, and introduced documents D6 and D7 at a late stage, namely when summoning the applicant to oral proceedings. This course of action of the examining division had prevented the applicant from properly defending its case and filing adequate amendments on time during the first-instance proceedings.

The board cannot accept the applicant's arguments. According to the Guidelines for Examination, applicants may be summoned to oral proceedings by examining divisions after just a single communication pursuant to Article 94(3) EPC. The board is unable to identify unjustified changes of mind of the examining division during the examination proceedings. Changes of the

objections raised by the examining division were essentially due to amendments of the claims. Documents D6 and D7 were annexed to the summons to oral proceedings. Therefore the applicant had had sufficient time to consider the relevance of these documents and to file adequate amendments of the claims during first-instance proceedings.

2. In view of the above, the appellant's main and sole request is not taken into account, and therefore there is no basis for setting aside the contested decision. Consequently, the appeal must be dismissed.

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



H. Jenney

R. Bekkering

Decision electronically authenticated