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**Datasheet for the decision
of 25 January 2024**

Case Number: T 2124/21 - 3.4.02

Application Number: 08745942.6

Publication Number: 2307860

IPC: G01F1/84

Language of the proceedings: EN

Title of invention:
DUAL-DRIVER VIBRATORY FLOWMETER

Applicant:
Micro Motion, Inc.

Relevant legal provisions:
RPBA 2020 Art. 12(1), 12(2), 12(4), 13(2)

Keyword:
Amendment to the appeal case within the meaning of Article
13(2) RPBA - (yes)
Exceptional circumstances justified by cogent reasons - (no)
Amendment taken into account - (no)

Catchword:

On appeal, the sole request subject of the appealed decision was abandoned, and amended requests were filed instead. When later the sole request was submitted in reply to the board's communication, it constituted an "amendment" to the appeal case within the meaning of Article 13(2) RPBA.

The appellant's choice, on appeal, not to seek a review of the appealed decision prevented the board from pursuing the primary object of the appeal proceedings (cf. Article 12(1)(a) and (b) and (2) RPBA). Instead, the late submission of the sole request left its consideration to the board's discretion under Article 13(2) RPBA.



Beschwerdekammern

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Case Number: T 2124/21 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 25 January 2024

Appellant:
(Applicant)

Micro Motion, Inc.
7070 Winchester Circle
Boulder, CO 80301 (US)

Representative:

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Decision under appeal:

**Decision of the Examining Division of the
European Patent Office posted on 28 June 2021
refusing European patent application No.
08745942.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman

C. Almberg

Members:

C. Kallinger

F. Giesen

Summary of Facts and Submissions

- I. The applicant filed an appeal against the decision of the examining division refusing European patent application No. 08 745 942.6.
- II. With the statement of grounds of appeal, filed in 2021, the appellant submitted claims according to a Main Request and a First Auxiliary Request that superseded the sole request subject of the appealed decision.
- III. In a communication issued pursuant to Article 15(1) RPBA, the board informed the appellant of its preliminary intention not to admit the Main Request and First Auxiliary Request, inter alia because no reason had been given why these amendments were filed only on appeal, and because prima facie they contained added subject-matter (Articles 12(4) RPBA and 123(2) EPC).
- IV. In a written reply to the board's communication, the appellant withdrew the Main Request and First Auxiliary Request and requested, by reference, the grant of a patent based on the claims of the sole request filed on 13 April 2021 and subject of the appealed decision.
- V. At oral proceedings held on 25 January 2024, the appellant's final request was that the appealed decision be set aside and that a patent be granted based on the claims of the sole request filed on 13 April 2021 and subject of the appealed decision.

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

Reasons for the Decision

Sole request - admittance

1. The sole request at issue was submitted by reference after notification of the board's communication issued under Article 15(1) RPBA (cf. OJ EPO 2023, A103), i.e. at a stage of the appeal proceedings when Article 13(2) RPBA is applicable.
2. According to Article 13(2) RPBA, *"[a]ny amendment to a party's appeal case made [...] after notification of a communication under Article 15, paragraph 1, shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned"*.
3. In favour of taking into account the sole request, the appellant argued as follows.

The submission of the sole request with the reply to the board's communication was nothing else than a return to the sole request subject of the appealed decision. Taking this request into account, and assessing it on its merits, would be in line with the purpose of appeal proceedings to review the appealed decision. Moreover, the features distinguishing the sole request from the Main Request and First Auxiliary Request implied no substantial technical change. In particular, going from the Main Request and First Auxiliary Request back to the sole request did not give rise to any new issues regarding technical matters. The board should thus be in a position to readily assess the sole request as to inventive step. Lastly, the board's preliminary objection under Article 123(2) EPC

against the Main Request and First Auxiliary Request was unexpected.

4. The two questions for the board to answer in this respect, in view of Article 13(2) RPBA, are whether the sole request, when submitted with the reply to the board's communication, constituted an "amendment" to the appeal case, and, if so, whether there are exceptional circumstances justified with cogent reasons by the appellant.
5. When the sole request was submitted with the reply to the board's communication, it replaced every request then on file, i.e. the Main Request and First Auxiliary Request. Therefore, it is with the latter two requests that the sole request must be compared when establishing whether it is an "amendment" to the appeal case. Since the sole request subject of the appealed decision was abandoned by the statement of grounds of appeal, i.e. was not pending when resubmitted with the reply to the board's communication, it cannot be the object of comparison for the purposes of Article 13(2) RPBA. The appellant has not argued otherwise.
6. Claim 1 of each of the Main Request and First Auxiliary Request has an additional feature compared with claim 1 of the sole request. The sole request is therefore not identical to any of them. Notably, the terms of Article 13(2) RPBA offer neither an exemption for requests shown to have been admissibly raised and maintained in the first instance proceedings (unlike Article 12(4), first sentence, RPBA, applicable at the outset of appeal proceedings) nor any other restrictions.
7. Therefore, the sole request submitted with the reply to the board's communication constitutes an "amendment" to

the appeal case within the meaning of Article 13(2) RPBA.

8. It is true, as suggested by the appellant, that the primary object of the appeal proceedings is to review the appealed decision. But it is equally true that a party's appeal case shall be directed to the requests on which said decision was based. Moreover, a party's statement of grounds of appeal shall contain their complete appeal case (Article 12(2) and (3) RPBA).
9. By the statement of grounds of appeal, however, the appellant abandoned the request subject of that decision and, instead, directed its appeal case to two amended requests. Thus, the appellant made a choice, at the outset of appeal proceedings, not to seek a review of the appealed decision and thereby prevented the board from pursuing the primary object of the appeal proceedings (cf. Article 12(1)(a) and (b) and (2) RPBA). The board cannot be expected to begin the judicial review of the appealed decision only at the last stage of the appeal proceedings (a.k.a. the third level of the convergent approach, see OJ, Suppl. 2/2020), at which the sole request appeared as an amendment, and at which its admittance was subject to two increasingly stringent sets of admittance conditions under Article 13(1) and (2) RPBA.
10. The fact that the present amendment does not imply a substantial technical change of the claimed subject-matter, is also not a circumstance that justifies admittance of the sole request. Rather, the only exceptional aspect of the present case is the appellant's own choice to avoid the board's review of the appealed decision until the last stage of the appeal proceedings. As not contested by the appellant

at oral proceedings, the preliminary objection raised under Article 123(2) EPC against the then freshly filed Main Request and First Auxiliary Request is not an exceptional circumstance.

11. Therefore, there are no exceptional circumstances. Let alone has the appellant presented any cogent reasons.
12. As a result, the board decided not to take the sole request submitted with the reply to the board's communication under Article 15(1) RPBA into account (Article 13(2) RPBA).
13. Since there is no admitted request on file, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



L. Gabor

C. Almberg

Decision electronically authenticated