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**D E C I S I O N**  
**of 25 August 2003**

**Case Number:** T 0353/03 - 3.4.2

**Application Number:** 98940729.1

**Publication Number:** 0934681

**IPC:** H05B 6/46

**Language of the proceedings:** EN

**Title of invention:**  
Apparatus for heating

**Applicant:**  
Antrad Systems AB

**Opponent:**  
-

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 111(1), 113(1), 123(2)  
EPC R. 67, 68(2), 86(4)  
PCT Art. 11(1)  
PCT R. 12, 48

**Keyword:**  
"Right to be heard - no (claims amended substantially)"  
"Justification reasoning of decision"  
"Errors in the translation of an international application may be corrected"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0353/03 - 3.4.2

**D E C I S I O N**  
of the Technical Board of Appeal 3.4.2  
of 25 August 2003

**Appellant:** Antrad Systems AB  
Björnnäsvägen 21  
S-113 47 Stockholm (SE)

**Representative:** -

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 20 November 2002  
refusing European application No. 98940729.1  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** A. G. Klein  
**Members:** M. P. Stock  
G. E. Weiss

## Summary of Facts and Submissions

- I. European patent application No. 98 940 729.1 was filed on 18 August 1998 as international application No. PCT/SE 98/01477 at the Swedish Patent Office, claiming a priority of 22 August 1997. The language of filing of the international application is Swedish.
- II. International publication took place on 18 March 1999 as WO 99/13688 in English together with the international search report (ISR). The international search had been conducted by the Swedish Patent Office as International Searching Authority (ISA) and was completed on 8 December 1998.
- III. Entry into the regional phase before the EPO as designated office was requested by means of EPO Form 1200 received on 12 May 1999. According to the pre-crossed box in item 6.1 of the form, the documents intended for proceedings before the EPO were the application documents published by the International Bureau.

Claim 1 as published reads as follows:

"1. Apparatus for the heating and/or measuring of dielectric materials with electromagnetic radiation within the frequency range 50 kHz - 299 MHz with one or more antennas placed in a cavity characterised in that the antenna/antennas in joint action with the cavity walls enclosing the load space generates an electric and/or magnetic field in the load, the longest side of the cavity is delimited in such way as the distance between two points in the cavity is less than half a

wavelength in vacuum of any wavelength in vacuum conditioned by applied frequency."

IV. In a first communication pursuant to Article 96(2) EPC, dated 1 October 2001, the examining division made reference to claims 1 to 15 as originally filed and stated that the application did not meet the requirements of Article 84 EPC because claim 1 was not clear. A further objection was raised under Article 83 EPC.

V. With his response dated 15 January 2002 the applicant filed a set of claims 1 to 15 amended in order to satisfy Articles 83 and 84 EPC. Amended claim 1 reads as follows:

"1. An apparatus for heating and/or measuring dielectric materials with electromagnetic radiation within the frequency range 50 kHz - 299 MHz with one or more antennas placed in a cavity characterised in that the antenna/antennas enclosed by the cavity in joint action with cavity walls that enclose a load space for heating a load, together generate pulsating electric and/or magnetic fields in a load."

VI. In a second communication dated 1 February 2002 the examining division stated that new claim 1 was not acceptable under Rule 86(4) EPC because it was related to unsearched subject-matter. The applicant should be aware of the likelihood of a refusal if an examinable claim was not filed with the next response.

VII. In his letter dated 21 May 2002 the applicant requested the correction of an obvious mistake which had occurred

as a result of a translation error from the Swedish PCT application. The formulation in the published documents (page 3, line 2, and claim 3) "The cavity space volume shall not exceed 25% of the cubic root of any wavelength..." should be replaced by "The cubic root of the cavity space volume shall not exceed 25% of any wavelength...". Enclosed with the letter were a copy of the corresponding description page of the original Swedish PCT application and a copy of the corresponding page of the English translation (page 3 of WO 99/13688). An amended set of claims 1 to 14 and an amended version of description page 3 were also enclosed. The new claim 1 contains the corrected wording and was further amended with respect to the frequency range (1 MHz - 299 MHz) disclosed on page 4. Comments with respect to the official communication dated 1 October 2001 were also given.

Claim 1 reads as follows:

"1. An apparatus for heating and/or measuring dielectric materials with electromagnetic radiation within the frequency range 1 MHz - 299 MHz with one or more antennas placed in a cavity in joint action with cavity walls enclosing the load space generates an electric and/or magnetic near field in a load, characterised in that the cubic root of the cavity space volume shall not exceed 25% of any wavelength in vacuum conditioned by applied frequency."

VIII. In its decision, dated 20 November 2002, refusing the application, the examining division stated that the subject-matter of claim 1 filed with the letter dated 21 May 2002 ("valid claim 1") had not been searched.

The feature "The cubic root of the cavity space volume shall not exceed 25% of any wavelength..." could not have been searched because it had not been included in the original English version. Neither the description nor claim 3 as filed had led the search examiner to look for this feature. For this reason the application was refused according to Article 97(1) in conjunction with Rule 86(4) EPC.

IX. With his letter dated 12 January 2003 the applicant (appellant) lodged an appeal against this decision.

Under "Grounds for Appeal" filed with the letter dated 10 March 2003 the appellant submitted that the difference between claim 1 filed with the letter dated 23 May 2002 and the example of a valid claim 1 included in the "Facts and Submissions" of the decision dated 20 November 2002 was very small. His invention had a high technological level and he had not been able to understand the requirements for a valid claim 1. New claim 1 was based on the English version of the PCT application PCT/SE 98/01477. An obvious mistake that had occurred in the translation of the Swedish PCT application into English was being corrected. This reformulation should be accepted. A new set of claims 1 to 14 was filed with a formulation of claim 1 which was in accordance with the valid claim 1 in the above decision.

## **Reasons for the Decision**

1. *Admissibility of the appeal*

The appeal complies with the provisions of Articles 106 to 108 and Rules 1(1) and 64(b) EPC and is therefore admissible.

2. *Article 113(1) EPC*

An objection under Rule 86(4) EPC was raised by the examining division in its second communication dated 1 February 2002 with respect to the subject-matter of claim 1 filed with the applicant's letter dated 15 January 2002.

Claim 1 filed with the applicant's letter dated 21 May 2002 as a reaction to the second official communication, and underlying the appealed decision, is related to subject-matter which differs from what was defined in claim 1 of 15 January 2002 in that

- (a) the feature specifying that the fields are pulsating has been cancelled;
- (b) the frequency range is more limited: 1 MHz - 299 MHz instead of 50 kHz - 299 MHz;
- (c) The feature "the cubic root of the cavity space volume shall not exceed 25% of any wavelength in vacuum conditioned by applied frequency" has been added.

Hence, it is evident that claim 1 has been substantially amended. In particular, the feature (a) to which the objection under Rule 86(4) EPC had been raised by the examining division is no longer present in claim 1.

Therefore the ground for refusal under Rule 86(4) EPC was raised in the appealed decision for the first time with respect to the subject-matter of claim 1 underlying the decision. The applicant thus had had no opportunity to present his comments before the decision was issued. This contravenes the applicant's rights as laid down in Article 113(1) EPC and amounts to a substantial procedural violation.

3. *Rule 68(2) EPC*

The examining division has stated in its decision of refusal, see last paragraph on page 2, that the new feature in claim 1 had not been searched and that, for this reason, the application was refused according to Article 97(1) in conjunction with Rule 86(4) EPC. This reasoning does not take into account that Rule 86(4) EPC mentions another condition which must also be fulfilled for amended claims to be rejected, namely that the unsearched subject-matter does not combine with the original claimed invention to form a single general inventive concept (lack of unity). There is no discussion in the appealed decision as to why the subject-matter of new claim 1 is not in unity with original claim 1. Therefore the appealed decision is not reasoned within the meaning of Rule 68(2) EPC.

4. *Requested correction*

The present European application was filed on 18 August 1998 at the Swedish Patent Office as international patent application PCT/SE 98/01477 in Swedish, as can be seen from a copy provided by the Swedish Patent



Office and as can also be gathered from the front page of the corresponding international publication WO 99/13688, see item "Published". Swedish is a prescribed language for an international application filed with the Swedish Patent Office as receiving Office within the meaning of Article 11(1)(ii) and Rule 12.1(a) PCT. Therefore it is evident that the documents as originally filed are represented by the original Swedish application documents. Consequently, errors in any translation filed later can be corrected, as is confirmed by the PCT Applicant's Guide, see Volume II - National Phase, 1 March 2001, point 57, under "Correction of Translation".

In the present case the correction requested by the applicant corresponds to a correct translation of what is indicated in the original international Swedish application, see second paragraph of the page submitted by the applicant. Therefore the wording "The cubic root of the cavity space volume shall not exceed 25% of any wavelength conditioned by applied frequency" proposed by the applicant for page 3, first paragraph, is acceptable and does not infringe Article 123(2) EPC.

5. *Rule 86(4) EPC*

In the present case the Swedish Patent Office acted not only as the receiving Office (RO) but also as the International Searching Authority (ISA), as can be seen from the international search report. Therefore, no translation of the application into English for the purpose of the search according to Rule 12.3(a) PCT was required. A translation was only needed for the publication, see Rules 12.4 and 48.3 PCT. Hence, it is

evident that the search was based on the original application documents filed in Swedish.

The corrected feature, which according to the latest amendment forms the characterising part of claim 1, was contained in claim 3 as originally filed. Therefore this feature was included in the claims on which the search was based, ie original claims 1 to 15 mentioned in the search report. It follows already from this that there is no infringement of Rule 86(4) EPC and the question of unity is irrelevant.

6. *Remittal to first instance*

The case is remitted to the first instance for further prosecution on the basis of the amended claims in accordance with Article 111(1) EPC.

It is noted that in claim 1 the original definition of the cavity "the longest side of the cavity is delimited in such way as the distance between two points in the cavity is less than half a wavelength in vacuum of any wavelength in vacuum conditioned by applied frequency" has been replaced by the corrected wording of original claim 3, namely that "the cubic root of the cavity space volume shall not exceed 25% of any wavelength in vacuum conditioned by applied frequency". It would have to be examined whether the second definition is more limited than the first definition. If this is true, then there is no problem with the original disclosure within the meaning of Article 123(2) EPC. However, if the second definition only overlaps with the first definition or even is wider, it would have to be examined whether there is support in the application

documents as originally filed for replacing the first definition by the second, or whether there is only support for both conditions being fulfilled simultaneously, both of which would then have to be recited in claim 1.

7. *Reimbursement of appeal fee*

The substantial procedural violation stated under point 2 above justifies reimbursement of the appeal fee in accordance with Rule 67 EPC.

**Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.
3. The appeal fee shall be reimbursed.

The Registry:

The Chairman:

P. Martorana

A. Klein