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**Datasheet for the decision
of 4 December 2009**

Case Number: T 1709/07 - 3.4.01

Application Number: 04077808.6

Publication Number: 1504791

IPC: A61N 5/04

Language of the proceedings: EN

Title of invention:

Applicator for microwave radiation treatment

Applicant:

Emcision Limited

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)

Relevant legal provisions (EPC 1973):

EPC Art. 76(1)

Keyword:

-

Decisions cited:

T 0415/91

Catchword:

-



Case Number: T 1709/07 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 4 December 2009

Appellant: Emcision Limited
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Representative: Miller, James Lionel Woolverton
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 10 July 2007
refusing European patent application
No. 04077808.6 pursuant to Article 97(1) EPC
1973.

Composition of the Board:

Chairman: B. Schachenmann
Members: G. Assi
H. Wolfrum

Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal, received on 20 September 2007, against the decision of the examining division, dispatched on 10 July 2007 refusing the present European patent application No. 04077808.6 (publication number 1 504 791) which is a divisional application of the earlier application No. 99936873.1 (publication number 1 100 585). The appeal fee was paid on 19 September 2007. The statement setting out the grounds of appeal was received on 20 September 2007.

In the contested decision, the examining division held that the present application did not meet the requirements of Articles 76(1) and 123(2) EPC 1973.

II. With a communication of 2 September 2009 the appellant was summoned to oral proceedings before the Board scheduled to take place on 4 December 2009. The Board gave a provisional opinion on the case with a further communication of 15 September 2009.

With a reply of 4 November 2009 the appellant filed sets of claims according to a main request and auxiliary requests 1 to 16. Moreover, with a letter of 16 November 2009 the appellant informed the Board that its representative would not attend the oral proceedings.

The oral proceedings took place as scheduled in the absence of the appellant's representative.

- III. The appellant requested in writing that the decision under appeal be set aside and a patent be granted on the basis of the following application documents:
- Sets of claims according to the main request and auxiliary requests 1 to 16 filed with the letter of 4 November 2009;
 - Description pages 1, 3-5 as filed and 2 received with a letter of 7 December 2006;
 - Drawing sheets 1/2 and 2/2 as filed.

Moreover, the appellant's representative made the following statement with the letter of 16 November 2009: *"I look forward to receiving a written decision in due course taking into account the requests that I filed with the letter of 4th November"*.

- IV. The wording of claim 1 of the main request reads as follows:
- "A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:*
- (i) an applicator body (3); and*
 - (ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end,*
- characterised by the second ends having points adapted to be piercingly advanced into tissue in said selected region of body tissue; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating energy to said tissue in said selected region of body tissue for controlling excessive bleeding."*

The wording of claim 1 of auxiliary request 1 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

(i) an applicator body (3); and
(ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end and being insertable into and retractable from tissue to be irradiated, characterised by the second ends having points adapted to be piercingly advanced into tissue in said selected region of body tissue; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating energy to said tissue in said selected region of body tissue for controlling excessive bleeding."

The wording of claim 1 of auxiliary request 2 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

(i) an applicator body (3); and
(ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end, characterised by the second ends having points adapted to be piercingly advanced into tissue in said selected

region of body tissue; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating dielectric heating energy to said tissue in said selected region of body tissue for controlling excessive bleeding."

The wording of claim 1 of auxiliary request 3 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

(i) an applicator body (3); and
(ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end and being insertable into and retractable from tissue to be irradiated,
characterised by the second ends having points adapted to be piercingly advanced into tissue in said selected region of body tissue; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating dielectric heating energy to said tissue in said selected region of body tissue for controlling excessive bleeding."

The wording of claim 1 of auxiliary request 4 reads as follows:

"A device for the surgical treatment of the human or animal body and for controlling excessive bleeding during surgery, the device comprising means for inserting an array of needles (5) into the tissue or organ being treated; and means for applying irradiating energy to the region undergoing treatment for a time

sufficient to raise the temperature of said tissue or organ by 20-30 degrees C."

The wording of claim 1 of auxiliary request 5 reads as follows:

"A device for the surgical treatment of the human or animal body and for controlling excessive bleeding during surgery, the device comprising means for inserting an array of needles (5) into the tissue or organ being treated and for retracting said needles therefrom; and means for applying irradiating energy to the region undergoing treatment for a time sufficient to raise the temperature of said tissue or organ by 20-30 degrees C."

The wording of claim 1 of auxiliary request 6 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

- (i) an applicator body (3); and*
- (ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end, the needles extending from one face of the applicator body and being for enclosing a volume of tissue to be heated and being insertable into and retractable from tissue to be irradiated, characterised by the second ends having points adapted to be piercingly advanced into tissue in said selected region of body tissue; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating energy to said tissue in*

said selected region of body tissue for controlling excessive bleeding."

The wording of claim 1 of auxiliary request 7 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

(i) an applicator body (3); and
(ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end; the needles extending from one face of the applicator body, the needles being for enclosing a volume of tissue to be heated, the needles being insertable into and retractable from tissue to be irradiated, the needles serving to confine irradiated energy emanating from the applicator body, characterised by the second ends having points adapted to be piercingly advanced into said tissue along said selected incision line; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating dielectric heating energy to said tissue in said selected region of body tissue for controlling excessive bleeding."

The wording of claim 1 of auxiliary request 8 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

(i) an applicator body (3); and
(ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end; the needles extending from one face of the applicator body, the needles being for enclosing a volume of tissue to be heated, characterised by the second ends having points adapted to be piercingly advanced into the volume of tissue to be heated; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating energy to said tissue for heating said volume of tissue for controlling excessive bleeding."

The wording of claim 1 of auxiliary request 9 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

(i) an applicator body (3); and
(ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end; the needles extending from one face of the applicator body and being for enclosing a volume of tissue to be heated, the needles being insertable into and retractable from tissue to be irradiated, the needles serving to confine irradiated energy emanating from the applicator body, characterised by the second ends having points adapted to be piercingly advanced into volume of tissue to be heated; and a power and control unit (1) which is configured to energise said plurality of needles to

deliver irradiating dielectric heating energy to said tissue in said selected region of body tissue for controlling excessive bleeding."

The wording of claim 1 of auxiliary requests 10 and 11 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

(i) an applicator body (3); and

(ii) a plurality of needles (5) connected to said applicator body, each needle including a first end and a second end,

characterised by the second ends having points adapted to be piercingly advanced into tissue in said selected region of body tissue; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating microwave energy to said tissue in said selected region of body tissue for controlling excessive bleeding."

The wording of claim 1 of auxiliary request 12 reads as follows:

"A device for the surgical treatment of the human or animal body and for controlling excessive bleeding during surgery, the device comprising means for inserting an array of needles (5) into the tissue or organ being treated; and means for applying microwave energy to the region undergoing treatment for a time sufficient to raise the temperature of said tissue or organ by 20-30 degrees C."

The wording of claim 1 of auxiliary request 13 reads as follows:

"A device for the surgical treatment of the human or animal body and for controlling excessive bleeding during surgery, the device comprising means for inserting an array of needles (5) into the tissue or organ being treated and for retracting said array of needles therefrom; and means for applying microwave energy to the region undergoing treatment for a time sufficient to raise the temperature of said tissue or organ by 20-30 degrees C."

The wording of claim 1 of auxiliary request 14 reads as follows:

"A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:

- (i) an applicator body (3);*
- (ii) a source of microwave radiation in the form of a waveguide; and*
- (iii) an array of retractable needles (5) connected to said applicator body, each needle including a first end and a second end, characterised by the second ends having points adapted to be piercingly advanced into tissue in said selected region of body tissue; and a power and control unit (1) which is configured to energise said plurality of needles to deliver irradiating microwave energy to said tissue in said selected region of body tissue for controlling excessive bleeding."*

The wording of claims 1 and 2 of auxiliary request 15 reads as follows:

- "1. A device for generating localised heating in a selected body tissue, which device comprises an applicator including a source of microwave radiation and an array of retractable needles (5) arranged so as to extend from one face of the applicator and, in operation, to confine the irradiated microwave energy field emanating from the applicator.
2. A device as claimed in claim 1 in which the array of needles (5) is rectangular."

The wording of claims 1 and 2 of auxiliary request 16 reads as follows:

- "1. A device for controlling excessive bleeding from severed tissue during a surgical procedure by providing localised heating of a selected region of body tissue prior to a severing surgical incision into said tissue, the device comprising:
- (i) an applicator body (3);
 - (ii) a source of microwave radiation in the form of a waveguide; and
 - (iii) an array of retractable needles (5) connected to said applicator body, each needle including a first end and a second end, the needles extending from one face of the applicator body, the needles being for enclosing a volume of tissue to be heated, the needles being insertable into and retractable from tissue to be irradiated, the needles serving to confine irradiated energy emanating from the applicator body, characterised by the second ends having points adapted to be piercingly advanced into tissue in said selected region of body tissue; and a power and control unit (1) which is configured to energise said plurality of

needles to deliver irradiating microwave energy to said tissue in said selected region of body tissue for controlling excessive bleeding.

2. A device as claimed in claim 1 in which the array of needles (5) is rectangular."

- V. The revised version of the European Patent Convention or EPC 2000 entered into force on 13 December 2007. In the present decision, reference will be made to "EPC 1973" or "EPC" for EPC 2000 (EPC, Citation practice, pages 4-6) depending on the version to be applied according to Article 7(1) of the Revision Act dated 29 November 2000 (Special Edition No. 1 OJ EPO 2007, 196) and the decisions of the Administrative Council dated 28 June 2001 (Special Edition No. 1 OJ EPO 2007, 197) and 7 December 2006 (Special Edition No. 1 OJ EPO 2007, 89).

Reasons for the Decision

1. The appeal is admissible.
2. Pages 1-5 of the description of the present divisional application as filed are identical to pages 1-5 of the description of the earlier application as filed.
3. Main request
 - 3.1 The limitation of claim 1 of the earlier application as filed requiring that the device delivers "*microwave radiation*" has been omitted from claim 1 of the present divisional application as filed, which recites a source of "*radiation*", and also from claim 1 of the main

request, according to which "*irradiating energy*" is delivered to body tissue.

Thus, the question arises as to whether the omission of the term "*microwave*" meets the requirement of Article 76(1) EPC 1973 that a divisional application may be filed only in respect of subject-matter which does not extend beyond the content of the earlier application as filed.

3.2 The disclosure of the earlier application as filed may be summarized as follows.

According to one aspect of the invention, a device is provided, which comprises an applicator including inter alia a "*source of microwave radiation*" (page 2, lines 1-8). The invention also provides the use of "*the device as defined above*", i.e. with a source of microwave radiation, for restricting the loss of blood during a surgical procedure on the human or animal body (page 2, lines 10-13). According to another aspect of the invention, a method of controlling excessive bleeding during surgery is provided, the method comprising inter alia the step of applying "*microwave energy*" to the region undergoing treatment (page 2, lines 15-22).

It thus results from this disclosure that the invention according to the earlier application concerns a device, the use of the device and a method, all consistently relying on the application of microwave radiation. This finding is confirmed by further paragraphs concerning the source of microwave radiation (page 2, lines 24-29), the operation of the device (paragraph bridging pages 2

and 3), theoretical calculations (page 3, lines 13-23), the description of Figure 1 (page 4, lines 3-12) and, again, the operation of the device (page 5, lines 13-30). Indeed, all these paragraphs mention expressions like "microwave radiation", "microwave energy", "microwave power" and "microwave source".

3.3 The following further disclosure on page 4, lines 14-30 deserves particular attention:

"As shown in Figures 2 and 3, the applicator head (3) includes a rectangular waveguide (6) around the periphery of which the needles of array (5) are located. The waveguide is a TM_{11} mode waveguide and is filled with a suitable dielectric. For irradiation of a region 5cm long by 2cm wide, the rectangular waveguide should have corresponding dimensions and may be filled with a medium whose dielectric constant (ϵ_r) is about 50. These parameters dictate that the microwave operating frequency should be of the order of 1 GHz. The specific values given here are by [way] of example only; it will be appreciated that a range of applicators designed to irradiate different volumes of tissue may be developed and these, of necessity, will have different dimensions and may require a different dielectric medium and a different operating frequency from that given above."

The crucial issue to be considered concerns whether this disclosure should be understood as giving a hint at operating frequencies outside the microwave range, as the appellant submitted (grounds of appeal, page 2, second paragraph), or rather as giving a hint at microwave frequencies other than that "of the order of 1 GHz" explicitly mentioned by way of example, as the

examining division held (decision under appeal, page 4, first full paragraph). In this regard, the appellant's attempt to corroborate its view by referring to general expressions like "irradiation" and "to energise" on page 4, lines 8 and 11, is not convincing because these expressions are in a paragraph referring to the drawings, in particular Figure 1 which shows a power and control unit supplying up to 500 W of "microwave power" via a coaxial cable to a rectangular applicator (page 4, lines 3-6). Moreover, the term "energise" may be understood as referring to the system for releasing the needles.

- 3.4 The above cited disclosure on page 4, lines 14-30 should be understood as a skilled person in the relevant technical field (heating of body tissue by means of radiation before surgery) would do when reading the whole application, whereby implicit information that the skilled person can directly and unambiguously derive from the application would also form part of the disclosure.

The mentioned frequency of 1 GHz, which is at the lower end of the microwave range as conventionally defined, is disclosed in the context of an example concerning a particular applicator with a rectangular waveguide which is 5 cm long by 2 cm wide by 8 cm deep (Figure 2), which is filled with a medium with a dielectric constant $\epsilon_r \approx 50$, and which supports a TM_{11} mode. Moreover, the device of the present invention is not intended to be used in liver surgery only (page 1, lines 3-8; see expression like "In particular" and "especially"). Thus, the radiation frequency may depend on many factors like the applicator with its dimensions, dielectric medium

and modes, the kind of surgery, the dimensions of the surgical incision, the volume of the tissue to be heated, the temperature rise to be obtained, the penetration coefficient of radiation into the tissue, and so on.

In this respect, the appellant submitted that the skilled person knew that the use of microwave frequencies was not strictly required (letter of 4 November 2009, page 3, first full paragraph). Indeed, at the priority date of the earlier application as filed, other techniques for heating body tissue were known, which relied on the application of radiation not only in the microwave range but also in that of radiofrequencies. Reference was made, for example, to documents cited in the European Search Report of the present divisional application, in particular US-A-4,974,587 (column 1, lines 16-28 mentioning an applicator for achieving hyperthermia, operating at frequencies ranging from 100 KHz to 2450 MHz, in combination with other treatments such as surgery) and EP-A-0 073 709 (page 4, lines 10-22 regarding an applicator for obtaining hyperthermia, operating at frequencies lower than 1 GHz).

These submission, however, are not conclusive. The essential issue is, rather, what information can be derived from the earlier application as filed. Although the skilled person may consider implicit features, which can be directly and unambiguously derived from the application, as being disclosed, other features which do not have a clear basis in the application cannot be used to enrich the disclosure, even if they are known in the art. In this respect, the Board does

not substantially depart from T 0415/91 (unpublished; Reasons, paragraph 2.3).

The disclosure on pages 1-5 of the earlier application as filed consistently teaches the use of microwave radiation with the exception of the sentence on page 4, line 24-30. The most immediate interpretation of this sentence in the context of the whole application would then be that microwave frequencies other than the mentioned value of 1 GHz are contemplated. Conceivable alternatives like radiofrequencies, which are not mentioned but may be considered to fall under the wording of this sentence, cannot support the deletion of the term "*microwave*".

- 3.5 In conclusion, claim 1 of the main request has been amended by omission of the term "*microwave*" in such a way that it covers subject-matter, in particular the delivery of irradiating energy at frequencies other than in the microwave range, which extends beyond the content of the earlier application as filed. This contravenes Article 76(1) EPC 1973. Therefore, the main request is not allowable.

4. Auxiliary requests 2-9

The wording of claim 1 according to each of auxiliary requests 2-9 does not mention the term "*microwave*" either. Therefore, these auxiliary requests are not allowable for the same reasons as given above for refusing the main request.

5. Auxiliary request 10

5.1 The limitation of claim 1 of both the earlier application as filed and the present divisional application as filed, requiring that the device comprises an array of "*retractable*" needles, has been omitted from claim 1 of auxiliary request 10, which recites the feature of a "*plurality of needles*".

Thus, the question arises as to whether the omission of the term "*retractable*" meets the requirements of Article 76(1) EPC 1973 with regard to the earlier application as filed and of the corresponding Article 123(2) EPC with regard to the present divisional application as filed.

5.2 According to the appellant (grounds of appeal, page 2, third paragraph), the feature that the needles were retractable was not related to the aim of providing localised heating of a selected region of body tissue prior to surgical incision of that tissue, as disclosed on page 1, lines 33-35 of both the earlier application as filed and the present divisional application as filed.

This view appears to be correct in the sense that the aim mentioned above could be achieved by both a device with retractable needles and a similar device with needles permanently advanced from the body of the applicator. Therefore, the feature does not appear to be necessary for achieving the aim of the invention referred to above.

The examining division, however, held that the essentiality test should not be stretched so far that the scope of the invention could be extended to all possible solutions that solved an underlying technical problem (decision under appeal, paragraph bridging pages 5 and 6). The examining division's consideration leads to the question as to whether the amendment indeed has a basis in the earlier application as filed and the present divisional application as filed.

- 5.3 The disclosures of the earlier application as filed and of the present divisional application as filed may be summarized as follows with regard to the description and the drawings.

According to one aspect of the invention, a device is provided, which comprises inter alia an *"array of retractable needles"* (page 2, lines 1-8). According to page 2, lines 31-34, the device *"may include a needle advance mechanism including a collar to which the needles are secured"*. The invention also provides the use of *"the device as defined above"*, i.e. with retractable needles, for restricting the loss of blood during surgery (page 2, lines 10-13). According to another aspect of the invention, a method of controlling excessive bleeding in a surgical treatment is provided, the method comprising inter alia the step of inserting an array of *"needles"* into the tissue or organ being treated (page 2, lines 15-22). In operation of the device, the needles are *"advanced from the body of the applicator into the tissue"* and are then *"retracted back into the body of the applicator"* when the heating process is completed (paragraph bridging pages 2 and 3). The drawings show an applicator

according to the invention comprising an "array (5) of retractable needles" (page 4, lines 3-12; Figures 1 and 2). Figure 2, in particular, shows a "solenoid mechanism (10) for controlling the advance and retraction of the array of needles" (page 5, lines 4-11). In operation (page 5, lines 13-30), at the end of the treatment period, the microwave source is switched off and the "needle array (9) is retracted" (page 5, lines 26-28).

As far as the claims are concerned, claims 1 of both the earlier application as filed and the present divisional application as filed concern a device comprising inter alia an array of "retractable needles". Claim 8 of the earlier application as filed concerns a method comprising the step of inserting an "array of needles" into the tissue or organ being treated.

- 5.4 Therefore, the device is consistently presented as comprising an array of retractable needles with the only exceptions represented by the paragraph on page 2, lines 15-22 and by claim 8 of the earlier application, which refer to an array of needles in general without explicitly excluding the possibility that these be retractable. Both exceptions, however, concern a method of controlling excessive bleeding during surgery. In the context of the whole application, this method can be understood as implicitly referring to retractable needles because it is carried out by using the device which is disclosed as comprising retractable needles. This view is consistent with the paragraph on page 2, lines 10-13 and, moreover, with the fact that the paragraphs describing the operation of the device (paragraph bridging pages 2 and 3; page 5, lines 13-30)

clearly mention the step of retracting the needles back into the body of the applicator, when the heating process is completed.

- 5.5 In conclusion, claim 1 of auxiliary request 10 has been amended by omission of the term "*retractable*" in such a way that it covers subject-matter, in particular a device with needles that are not retractable, which extends beyond the content of both the earlier application as filed and the present divisional application as filed. This contravenes Article 76(1) EPC 1973 and 123(2) EPC. Therefore, auxiliary request 10 is not allowable.

6. Auxiliary requests 11 and 12

The wording of claims 1 according to auxiliary requests 11 and 12 does not mention the term "*retractable*" either. Therefore, these auxiliary requests are not allowable for the same reasons as given above for refusing auxiliary request 10.

7. Auxiliary request 13

- 7.1 The limitation of claim 1 of both the earlier application as filed and the present divisional application as filed, requiring that the device comprises an array of needles "*arranged so as to extend from one face of the applicator*", has been omitted in claim 1 of auxiliary request 13.

Thus, the question arises as to whether the omission of the expression at issue violates the requirements of Article 76(1) EPC 1973 with regard to the earlier

application as filed and of the corresponding Article 123(2) EPC with regard to the present divisional application as filed.

- 7.2 The disclosures of the earlier application as filed and the present divisional application as filed may be summarized as follows with regard to the description and the drawings.

According to one aspect of the invention, a device is provided, which comprises inter alia an *"array of retractable needles arranged so as to extend from one face of the applicator"* (page 2, lines 1-8). The invention also provides the use of *"the device as defined above"*, i.e. with the mentioned arrangement of the needles, for restricting the loss of blood during surgery (page 2, lines 10-13). According to another aspect of the invention, a method of controlling excessive bleeding in a surgical treatment is provided, the method comprising inter alia the step of inserting an *"array of needles"* into the tissue or organ being treated (page 2, lines 15-22). In operation of the device, the needles are advanced from the body of the applicator into the tissue which is to be heated so that *"the needles function as an extension of the waveguide"* (paragraph bridging pages 2 and 3; page 4, lines 32-34), whereby this feature clearly implies that the needles extend from one face of the waveguide. The drawings show an applicator according to the invention comprising an array of retractable needles which clearly extend from one face of the applicator.

As far as the claims are concerned, claim 1 of the earlier application as filed concerns a device

comprising inter alia an "*array of retractable needles arranged so as to extend from one face of the applicator*". Claim 8 of the earlier application as filed concerns a method comprising the step of inserting an "*array of needles*" into the tissue or organ being treated.

- 7.3 Therefore, the device is consistently presented as comprising an array of retractable needles arranged so as to extend from one face of the applicator. The only exceptions are represented by the paragraph on page 2, lines 15-22 and by claim 8 of the earlier application as filed.

Under these circumstances, arguments corresponding to those mentioned in the paragraph 5.4 above apply.

- 7.4 In conclusion, claim 1 of auxiliary request 13 has been amended by omission of the feature that the needles are "*arranged so as to extend from one face of the applicator*" in such a way that it covers subject-matter that extends beyond the content of both the earlier application as filed and the present divisional application as filed. This contravenes Article 76(1) EPC 1973 and 123(2) EPC. Therefore, auxiliary request 13 is not allowable.

8. Auxiliary request 14

The wording of claim 1 according to auxiliary request 14 does not mention the feature that the needles are "*arranged so as to extend from one face of the applicator*". Therefore, auxiliary request 14 is not

allowable for the same reasons as given above for refusing auxiliary request 13.

9. Auxiliary request 15

9.1 Claim 2 of auxiliary request 15 recites the feature that the array of the needles is rectangular.

In the earlier application as filed and the present divisional application as filed the term "*rectangular*" is consistently used only for characterising the shape of the applicator head and the waveguide shown in the drawings (page 2, lines 24-29; page 4, lines 3-6 and 14-22).

According to this disclosure, the array of the needles is not defined per se as being rectangular but is characterised by the fact that the needles are positioned around the periphery of the rectangular waveguide. The waveguide and the arrangement of the needles together constitute a structural unity. Neither the earlier application as filed nor the present divisional application as filed provide a basis for the mention of a feature separated from the other. This is confirmed by claims 2 and 3 of the earlier application as filed and claim 2 of the present divisional application as filed.

9.2 In conclusion, claim 2 of auxiliary request 15 recites a feature which results from a generalisation that cannot be directly and unambiguously derived from the original disclosure. The feature thus extends beyond the content of both the earlier application as filed and the present divisional application as filed. This

contravenes Article 76(1) EPC 1973 and 123(2) EPC.
Therefore, auxiliary request 15 is not allowable.

10. Auxiliary request 16

Claim 2 of auxiliary request 16 corresponds to claim 2 of auxiliary request 15. Therefore, auxiliary request 16 is not allowable for the same reasons as given above for refusing auxiliary request 15.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar

The Chairman:

R. Schumacher

B. Schachenmann