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**Datasheet for the decision  
of 7 December 2021**

**Case Number:** T 2339/19 - 3.4.02

**Application Number:** 13198625.9

**Publication Number:** 2749872

**IPC:** G01N23/04, G01V5/00

**Language of the proceedings:** EN

**Title of invention:**  
Stationary CT apparatus

**Applicant:**  
Nuctech Company Limited

**Headword:**

**Relevant legal provisions:**

EPC Art. 84  
RPBA Art. 12(4)  
RPBA 2020 Art. 13(2)

**Keyword:**

Claims - clarity - main request (no)

Late-filed request - submitted with the statement of grounds  
of appeal - request not examined by the examining division -  
request could have been filed in first instance proceedings  
(yes) - admitted (no)

Amendment after summons - exceptional circumstances (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 2339/19 - 3.4.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.02**  
**of 7 December 2021**

**Appellant:**  
(Applicant)  
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**Representative:**  
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**Decision under appeal:** **Decision of the Examining Division of the European Patent Office posted on 6 March 2019 refusing European patent application No. 13198625.9 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** G. Decker  
**Members:** H. von Gronau  
A. Hornung

## **Summary of Facts and Submissions**

- I. The applicant's appeal is directed against the examining division's decision to refuse European patent application No. 13198625.9. The examining division refused the application on the basis of what was then the sole request because a correction in the figures was not considered allowable (Rule 139 EPC), the subject-matter of claim 1 extended beyond the content of the application as originally filed (Article 123(2) EPC), claim 1 was not clear (Article 84 EPC) and the subject-matter of claim 1 did not involve an inventive step (Article 56 EPC).
- II. With the statement setting out the grounds of appeal, the appellant requested that the contested decision be set aside and that a patent be granted according to a main request based on documents considered in the contested decision and filed again with the statement setting out the grounds of appeal, or on the basis of documents according to a first or second auxiliary request, both filed for the first time with the statement setting out the grounds of appeal. As an auxiliary measure it requested that oral proceedings be held.
- III. In a communication annexed to the summons to oral proceedings, the board expressed its preliminary opinion that *inter alia* claim 1 of the main request was not clear and the auxiliary requests should not be admitted into the appeal proceedings.
- IV. In a letter dated 5 November 2021, the appellant put forward arguments as to why claim 1 of the main request was considered clear and why the auxiliary requests

should be admitted into the appeal proceedings. The appellant also filed an amended main request in which an added subject-matter issue was addressed. The previous main request was maintained in case the amended main request was found not to be admissible. The appellant thus requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims according to an amended main request filed with the letter dated 5 November 2021, or, if the board did not consider this amended main request to be admissible, on the basis of the claims according to the main (and sole) request considered in the decision under appeal. Alternatively, it requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims according to a first or second auxiliary request filed with the statement setting out the grounds of appeal.

- V. With a letter dated 30 November 2021 the appellant's representative informed the board that neither the appellant nor the authorised representatives in this case intended to attend the oral proceedings scheduled to take place on 7 December 2021 by videoconference.
- VI. Oral proceedings took place on 7 December 2021. At the end of the oral proceedings the chair announced the board's decision.
- VII. Claim 1 of the main request filed with the statement setting out the grounds of appeal reads as follows:

"A stationary CT apparatus (10), comprising:  
a scanning passage (4);  
a stationary X-ray source arranged around the scanning passage; and

a plurality of stationary detector modules (12) arranged around the scanning passage and disposed opposite the X-ray source, characterized in that the X-ray source comprises a plurality of ray emission focal spots (71) arranged in a line or an array, wherein the ray emission focal spots are configured to emit sectorial ray beams directed towards the stationary detector modules, wherein elongation lines of external sides (91, 141) of sectorial ray beams emitted from two of the ray emission focal spots respectively arranged at an end and another end of the line or array of the plurality of ray emission focal spots intersect at a point of intersection (15), and a line formed by connecting the point of intersection to a central point of a ray receiving surface of each of the detector modules (121) is perpendicular to the ray receiving surface of the respective detector module, when viewed in a plane intersecting the scanning passage."

Claim 1 of the amended main request filed with the letter dated 5 November 2021 differs from claim 1 of the main request filed with the statement setting out the grounds of appeal in that the words "or an array" have been deleted from the definition "a plurality of ray emission focal spots (71) arranged in a line or an array" and in that the words "or array" have been deleted from the definition "the ray emission focal spots respectively arranged at an end and another end of the line or array".

Claim 1 of the first auxiliary request reads as follows (deletions compared with claim 1 of the main request are indicated in strikethrough, additions underlined):

"A stationary CT apparatus (10), comprising:  
a scanning passage (4);  
a stationary X-ray source arranged around the scanning passage; and  
a plurality of stationary detector modules (12) arranged around the scanning passage and disposed opposite the X-ray source,  
characterized in that  
the X-ray source comprises a plurality of ray emission focal spots (71) arranged in a ~~line or an array~~,  
wherein the plurality of ray emission focal spots and the plurality of detector modules are arranged in a same plane, and the plane is substantially perpendicular to the scanning passage;  
wherein the ray emission focal spots are configured to emit sectorial ray beams directed towards the stationary detector modules, wherein elongated lines ~~of external sides~~ (91, 141) that each connects the furthest extent of the plurality of detector modules and the furthest extent of the X ray-source on each respective same side ~~of sectorial ray beams emitted from two of the ray emission focal spots respectively arranged at an end and another end of the line or array of the plurality of ray emission focal spots intersect at a point of intersection (15), and a line formed by connecting the point of intersection to a central point of a ray receiving surface of each of the detector modules (121) is perpendicular to the ray receiving surface of the respective detector module, when viewed in a plane intersecting the scanning passage."~~

Claim 1 of the second auxiliary request reads as follows (deletions compared with claim 1 of the main request are indicated in strikethrough, additions underlined):

"A stationary CT apparatus (10), comprising:  
a scanning passage (4);  
a stationary X-ray source arranged around the scanning passage; and  
a plurality of stationary detector modules (12) arranged around the scanning passage and disposed opposite the X-ray source,  
characterized in that  
the X-ray source comprises a plurality of ray emission focal spots (71) arranged in a line ~~or an array~~,  
wherein the plurality of ray emission focal spots and the plurality of detector modules are arranged in a same plane, and the plane is substantially perpendicular to the scanning passage;  
wherein the ray emission focal spots are configured to emit sectorial ray beams directed towards the stationary detector modules, wherein elongation lines of external sides (91, 141) of sectorial ray beams emitted from two of the ray emission focal spots respectively arranged at an end and another end of the line ~~or array~~ of the plurality of ray emission focal spots intersect at a point of intersection (15), and a line formed by connecting the point of intersection to a central point of a ray receiving surface of each of the detector modules (121) is perpendicular to the ray receiving surface of the respective detector module, when viewed in a plane intersecting the scanning passage."

### **Reasons for the Decision**

1. The appeal is admissible.



2. *Amended main request filed with the letter dated 5 November 2021 - admittance (Article 13(2) RPBA 2020)*
- 2.1 Under Article 13(2) RPBA 2020 any amendment to a party's appeal case made after notification of a summons to oral proceedings is, in principle, not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
- 2.2 In the case in hand, the claims of the amended main request were filed for the first time with the letter dated 5 November 2021, i.e. after the notification of the summons to oral proceedings dated 3 December 2020. As justification for the late filing of the amended main request, the appellant argued that the amendments merely removed references to "or [an] array" from claim 1 (to overcome an objection under Article 123(2) EPC presented in point 4 of the summons and in the examining division's decision) and deleted dependent claims 2, 6 and 9 (to avoid any potential clarity issues). In the appellant's view, making these reasoned amendments at this stage improved procedural economy. The appellant requested that the amended main request be admitted under the board's discretion.
- 2.3 The board cannot discern any cogent reasons, as required by Article 13(2) RPBA 2020, in the appellant's justification. The basic principle of the third level of the convergent approach applicable to the amended main request is that, at this stage of the appeal proceedings, amendments to a party's appeal case are not to be taken into consideration. However, a limited exception is provided for if a party presents compelling reasons which justify clearly why the circumstances leading to the amendment are indeed

exceptional in the particular appeal ("cogent reasons"). For example, if a party submits that the board raised an objection for the first time in a communication, it must explain precisely why this objection is new and does not fall under objections previously raised by the board or a party (see Supplementary publication 2, EPO OJ 2020, explanatory remarks to Article 13(2) RPBA 2020).

In the case in hand, the board did not raise a new issue in its communication under Article 15(1) RPBA 2020. The examining division had already raised the added subject-matter objection in the result of the telephone consultation sent on 4 December 2018 (see separate sheet, page 1, fourth paragraph) and in the grounds for the examining division's decision (see section 15). The explanations given by the appellant in its letter dated 5 November 2021 regarding a simple amendment improving procedural economy are not considered to include cogent reasons justifying admittance of the amended main request.

- 2.4 Therefore, the board, exercising its discretion under Article 13(2) RPBA 2020, decided not to take the claims of the amended main request into account.
  
- 3. *Main request as filed with the statement setting out the grounds of appeal - claim 1 - clarity (Article 84 EPC)*
  - 3.1 The examining division was of the opinion that the definition of the point of intersection in claim 1 was not clear (see reasons for the decision, section 16).
  - 3.2 The appellant disagreed with the examining division's objections and was of the opinion that claim 1 did not

suffer from a lack of clarity (see grounds of appeal, sections 1.16-1.25). The appellant further argued that the person skilled in the art would take note of the teaching regarding the arrangement (distribution and orientation) of ray emission focal spots from the description. There was no natural reason for the skilled person to doubt that the extent of the sectorial ray beams would go beyond the scanning area 13, i.e. beyond the receiving surfaces 121 of detector modules at either end of the plurality of detector modules 12. The wording in claim 1 was clear since the skilled person would understand its scope and know how to re-create the recited arrangement in practice and thus implement the invention. The fact that the meaning of the claimed "elongation lines of external sides (91, 141)" corresponded exactly to the line marked 141 and the line marked 91 in Figures 2 and 4 would be unambiguous for the skilled person (see letter dated 5 November 2021, section "Clarity").

- 3.3 The board agrees with the examining division that claim 1 is not clear. Claim 1 specifies that *"elongation lines of external sides (91, 141) of sectorial ray beams emitted from two of the ray emission focal spots respectively arranged at an end and another end of the line or array of the plurality of ray emission focal spots intersect at a point of intersection (15)"*. The meaning of the expressions "sectorial ray beams" and "external sides" is not clear. Moreover, the above wording of claim 1 does not clearly define the external sides of the sectorial ray beams emitted from the two ray emission focal spots, so it does not clearly define the point of intersection 15 either. According to the appellant, the extent of the sectorial ray beams was clear from the specification on page 6, line 13 to page 7, line 6 and Figures 2 and 4, which taught that the

sectorial ray beams did not go beyond the ray receiving surfaces of the detector modules. However, claim 1 does not define any such extent of the sectorial ray beams emitted from the ray emission focal spots, so the elongation lines and the point of intersection are not clearly defined. According to Article 84 EPC, the claims must define the invention for which protection is sought. The clarity stipulation under Article 84 EPC concerns only the claims, and therefore - according to the established case law of the boards of appeal - requires that they be clear in themselves, without there being any need for the skilled person to refer to the description (see Case Law of the Boards of Appeal, 9th edition, July 2019 ("Case Law"), II.A.6.3.5). In the case in hand, therefore, it is not justified to give the features of the claim a meaning that can only be deduced from the description or figures, as the appellant suggests.

3.4 The board thus concludes that claim 1 does not meet the clarity requirements of Article 84 EPC.

4. *First and second auxiliary requests - admittance (Article 12(4) RPBA 2007)*

4.1 In this case, the statement of grounds of appeal was filed before 1 January 2020, i.e. before the entry into force of the revised version of the Rules of Procedure of the Boards of Appeal (RPBA 2020, OJ EPO 2019, A63). Under Article 25(2) RPBA 2020, therefore, Article 12(4) to (6) RPBA 2020 is not to be applied, but Article 12(4) as amended in 2007 continues to apply instead.

4.2 Article 12(4) RPBA 2007 gives the boards of appeal the power to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in

the first-instance proceedings. The boards of appeal, whose primary function is to review the decisions of the department of first instance, thus have the discretion not to admit sets of claims according to requests which could and should have been submitted during the first-instance proceedings but were not (see Case Law, V.A.4.11).

- 4.3 In the case in hand, the examining division had raised the clarity objection throughout the examination proceedings. In not filing the auxiliary requests, in particular in response to the communication annexed to the summons to oral proceedings before the examining division or in response to the result of the telephone consultation of 4 December 2018, and in withdrawing its request for oral proceedings and requesting a decision according to the state of the file, the appellant consciously waived its right to have the examining division assess and decide on the auxiliary requests. The appellant argued that in the first-instance proceedings a telephone meeting with the first examiner took place only one week before the scheduled oral proceedings and that the first examiner had indicated a number of objections that were articulated and argued differently from how they had previously been presented. A brief communication summarising the telephone call was not issued until 6 December 2018, i.e. less than five working days before the scheduled oral proceedings. The appellant considered this to be a very short time period for absorbing, analysing and addressing the newly presented issues; doing so would have involved discussions with the applicant, which was based in China (even less time was available due to the associated time differences). The appellant had taken the view that an appeal could be filed against a future negative decision of the examining division, using

tailored requests including claim amendments to address and resolve the issues communicated by the examiner more efficiently.

However, the appellant has not given any reasons why the course of the proceedings might have prevented it from filing the auxiliary requests in the first-instance proceedings. The time between the telephone conversation with the examiner and the scheduled oral proceedings was sufficient to file auxiliary requests that could have been discussed during oral proceedings before the examining division. Moreover, instead of withdrawing its request for oral proceedings, the appellant could have attended them and filed the auxiliary requests during the oral proceedings. A potential hindrance that would have made it challenging for the appellant to file auxiliary requests during the first-instance proceedings is not a reason to postpone new requests and to wait until appeal proceedings to file them.

- 4.4 The board therefore has the discretion not to admit the first and second auxiliary requests filed with the grounds of appeal in accordance with Article 12(4) RPBA 2007.
- 4.5 When exercising its discretion, the board considered in particular the following aspects. Independent claim 1 of each of the two auxiliary requests had not been filed during the first-instance proceedings, so the examining division could not decide on their subject-matter. They concern technical problems which are different from those in the current main (and former sole) request. In particular, compared with the subject-matter of claim 1 of the main request, the claimed subject-matter of the first auxiliary request

includes additional features deduced from the drawings. In addition, the board cannot see *prima facie* that these claims and their subject-matter are clearly allowable. The board has doubts that the wording introduced in claim 1 of the first auxiliary request can be directly and unambiguously derived from the originally filed application, in particular from Figures 2 and 4, as suggested by the appellant. Claim 1 of the second auxiliary request also contains the same unclear definition of the point of intersection as in claim 1 of the main request.

- 4.6 In view of the above aspects the board exercised its discretion under Article 12(4) RPBA 2007 to not admit the first and second auxiliary requests into the appeal proceedings.
5. As the main request is not allowable and the amended main request and the first and second auxiliary requests were not admitted into the proceedings, the appeal must fail.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



L. Gabor

G. Decker

Decision electronically authenticated