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**Datasheet for the decision  
of 17 June 2014**

**Case Number:** T 0212/12 - 3.3.09

**Application Number:** 02770328.9

**Publication Number:** 1441595

**IPC:** A23B4/06

**Language of the proceedings:** EN

**Title of invention:**

METHOD OF PRESERVING MEAT OF SLAUGHTERED POULTRY

**Patent Proprietor:**

Marel Stork Poultry Processing B.V.

**Opponent:**

Meyn Food Processing Technology B.V.

**Headword:**

**Relevant legal provisions:**

EPC Art. 54, 56, 100(b)

**Keyword:**

Grounds for opposition - fresh ground for opposition (no)

Novelty - (yes)

Inventive step - (yes)

**Decisions cited:**

G 0010/91

**Catchword:**



**Beschwerdekammern  
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Case Number: T 0212/12 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 17 June 2014**

**Appellant:** Meyn Food Processing Technology B.V.  
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**Representative:** Mertens, Hans Victor  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 20 December  
2011 rejecting the opposition filed against  
European patent No. 1441595 pursuant to Article  
101(2) EPC.**

**Composition of the Board:**

**Chairman** W. Sieber  
**Members:** N. Perakis  
E. Kossonakou

## Summary of Facts and Submissions

- I. Mention of the grant of European patent No. 1 441 595 to Stork PMT B.V. (now Marel Stork Poultry Processing B.V.) was published on 2 April 2008 (Bulletin 2008/14). The granted claims contained two independent claims 1 and 18, which read as follows:

"1. Method of preserving slaughtered poultry (21) or parts thereof provided with skin, in which the poultry (21) or parts thereof are conveyed through a chilling room (32, 33) or at least through a part of said chilling room, and in the process is exposed to a stream of chilling air, during this exposure of the poultry (21) or parts thereof to the chilling air at least the skin of the poultry (21) or parts thereof being moistened by atomization of water (80), wherein during the moistening of the poultry (21) or parts thereof a water film is applied to the skin, the water film covering the entire skin of the poultry or parts thereof, the water film being maintained during the exposure to the chilling air, and wherein the moistening of the poultry (21) or parts thereof is carried out when the poultry (21) or parts thereof is/ are separated from the stream of chilling air, characterized in that the poultry (21) or parts thereof are conveyed by product carriers, each product carrier carrying only one bird or part thereof during the moistening thereof, wherein the poultry (21) or parts thereof are conveyed in said chilling room at different levels, viewed in the vertical direction."

"18. Device (1) for preserving slaughtered poultry (21) or parts thereof having skin, comprising:  
- a chilling room (32, 33) in which means are provided for generating a stream of chilling air;

- a conveyor (20) for conveying the slaughtered poultry (21) or parts thereof through the chilling room (32, 33), wherein the conveyor is constructed to convey the slaughtered poultry (21) or parts thereof by product carriers, wherein each carrier is configured for carrying only one bird (21) or part thereof during the moistening thereof, wherein the conveyor is configured for conveying the slaughtered poultry (21) or parts thereof in the chilling room at different levels, viewed in the vertical direction; and
- spray means (70, 71) for moistening at least the skin of the poultry (21) or parts thereof by atomization of water (80), wherein the spray means (70, 71) are situated in a spray area (101) separated from the stream of chilling air, wherein the spray means (70, 71) are configured for applying a water film that covers the entire skin, the spray means being configured for maintaining the water film during the exposure to the chilling air."

II. A notice of opposition was filed against the patent by Meyn Food Processing Technology B.V., requesting the revocation of the patent on the grounds of lack of novelty and lack of inventive step (Article 100(a) EPC).

The documents cited in the opposition proceedings included:

D1: US 4 810 515 A;  
D2: NL 9 301 244 A;  
D2': English translation of D2;  
D3: DE 33 11 437 A1;  
D4: US 3 729 773 A;

- D5: G.C. Mead *et al*, "Microbial cross-contamination during air chilling of poultry", *British Poultry Science*, 2000, 41, pp 158-162;
- D6: V.M. Allen *et al*, "Hygiene aspects of modern poultry chilling", *International Journal of Food Microbiology*, 2000, 58, pp 39-48; and
- D8: US 4 199 958 A.
- III. By a decision announced orally on 23 November 2011 and issued in writing on 20 December 2011, the opposition division rejected the opposition. According to this decision the method of claim 1 and the device of claim 18 were novel over D4 and D5. Furthermore, the novelty objection raised on the basis of D1, which was substantiated for the first time during the oral proceedings, was not admitted into the proceedings. Finally, regarding the issue of inventive step, the claimed subject-matter was considered non-obvious over D3 taken alone or in combination with D8, over the combination of D5 with D6 and over the combination of D2 with D4.
- IV. The opponent (in the following: the appellant) filed an appeal against the decision of the opposition division on 18 January 2012 and paid the appeal fee on the same day. In the statement setting out the grounds of appeal filed on 2 April 2012 the appellant requested that the decision of the opposition division be set aside and that the patent be revoked in its entirety.
- V. By letter of 13 August 2012 the patent proprietor (in the following: the respondent) filed observations on the appeal accompanied by auxiliary requests 1 to 4. The respondent requested maintenance of the patent as granted (main request) or according to one of the set of claims filed as auxiliary requests.

- VI. On 26 February 2014 the board issued an official communication expressing its preliminary non-binding view on the appeal and summoned the parties to oral proceedings.
- VII. By letter of 15 May 2014, the appellant commented on the preliminary opinion of the board and the auxiliary requests of the respondent.
- VIII. By letter of 2 May 2014, the respondent replaced the previously filed auxiliary requests 1-4 by the new auxiliary requests 1-8.
- IX. Oral proceedings were held before the board as arranged, on 17 June 2014.
- X. The relevant arguments put forward by the appellant in its written submissions and at the oral proceedings may be summarised as follows:
- The appeal concerned all claims and not only the claims relating to the device. This was derivable from the notice of appeal, in which the appellant requested revocation of the patent in its entirety. Although the arguments in the statement setting out the grounds of appeal concentrated on the device of claim 18 as granted, the appellant wrote that these arguments would likewise apply to the method of claim 1 as granted.
  - The fresh ground for opposition pursuant to Article 100(b) EPC should be admitted in the proceedings despite the fact that it was raised for the first time in the letter of 15 May 2014. The claimed invention was in fact not sufficiently

disclosed because the skilled person did not find in the patent in suit the required enablement in order to configure the product carriers so that each of them could carry only a single bird or a single part of a bird.

- In view of the very broad language used for the definition of the claimed subject-matter, documents D1, D2, D3, D4 and D8 disclosed the device of claim 18.
- The first allegedly distinguishing feature "a carrier configured to carry only one bird or part thereof" was disclosed in all documents. Reference was made to D2, D3, D4 and D8, which disclosed carriers capable of carrying only one entire bird, and to D1, which disclosed carriers carrying two parts of a carcass of a bird, which corresponded to an entire bird.
- The second distinguishing feature "a conveyor is configured for conveying the slaughtered poultry or parts thereof in the chilling room at different levels, viewed in the vertical direction" was also disclosed in D3, D4 and D8. The figures in these documents showed that entire bird carcasses were suspended on the conveyor at different levels viewed in the vertical direction. These documents, as well as D1 and D2, disclosed that each bird or part thereof was constituted of various carcass sections (head, legs, wings) which, when conveyed, were located at different levels viewed in the vertical direction.
- Finally, the feature "the spray means are situated in a spray area separated from the stream of



chilling air" was also disclosed in the above cited documents.

- The analysis of D1-D4 and D8 set out above applied likewise to the method claim 1 and led to the conclusion that its subject-matter lacked novelty.
  
- The device of claim 18 also lacked an inventive step in view of D1 and the common general knowledge of the skilled person or the combination of D1 with either D4 or D8. Following the problem-solution approach, D1 had to be considered to represent the closest prior art. Considering the claimed device to differ from that of D1 by the features of (i) a conveyor conveying the slaughtered poultry or parts thereof in the chilling room at different levels viewed in the vertical direction and (ii) the carrier configured for carrying only one bird or part thereof during the moistening thereof, the technical problem should be seen in the optimised use of the volume of the chilling room while cross-contamination between the conveyed birds or parts thereof is prevented. The skilled person starting from D1 and seeking to solve the technical problem would obviously consider the claimed solution in view of his common general knowledge (use of skyscrapers when limited floor space is available; insertion of intermediate floors in ancient buildings having high ceilings) or in view of the disclosure of either D4 or D8.
  
- The same problem-solution approach likewise applied to the method of claim 1, which also lacked an inventive step in view of D1 and the common general knowledge of the skilled person or

D1 and its obvious combination with either D4 or D8.

XI. The relevant arguments put forward by the respondent in its written submissions and at the oral proceedings may be summarised as follows:

- The appeal should be limited to the device claims 18-24 since the statement setting out the grounds of appeal contained substantiated objections only regarding this claim category. The appellant only stated that the arguments against claim 18 "likewise" applied to claim 1 without presenting any reason to support this statement. In general and in the present case, a device claim and a method claim should be analysed and discussed separately from each other.
- The fresh ground for opposition under Article 100(b) EPC should not be admitted into the appeal proceedings.
- The device of claim 18 was novel over the cited prior art. None of the cited documents disclosed:
  - (i) a conveyor for conveying the slaughtered poultry or parts thereof in the chilling room at different levels viewed in the vertical direction and
  - (ii) a carrier configured for carrying only one bird or part thereof during the moistening thereof.
- The method of claim 1 was likewise novel over D1 to D4 and D8.
- The device of claim 18 involved an inventive step over D1 considered alone or combined with either

D4 or D8. Following the problem-solution approach D1 could be considered to represent the closest prior art. The claimed device differed from D1 in that it comprised a conveyor conveying the slaughtered poultry in the chilling room at different levels viewed in the vertical direction and a product carrier which had such a configuration that allowed only one bird or part thereof to be carried. The technical problem was seen in the provision of a device which improved the space usage in the chilling room while avoiding cross-contamination of the slaughtered poultry. The features of the claim which provided the solution to the problem were neither obvious to the skilled person nor disclosed by D4 or D8. Moreover, the combination of D1 with either of these documents did not lead to the claimed device. Neither D4 nor D8 disclosed the appropriate water film formation on the entire skin of the poultry or the prevention of poultry cross-contamination.

- The method of claim 1 likewise involved an inventive step.

XII. The appellant requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

XIII. The respondent requested that the appeal be dismissed, i.e., that the patent be maintained as granted (main request). Alternatively, it requested that the patent be maintained on the basis of any one of auxiliary requests 1 to 8 filed with letter dated 2 May 2014.

## **Reasons for the Decision**

1. The appeal is admissible.
2. Extent of the appeal
  - 2.1 The respondent argued that the objections to the method claim 1 and the corresponding dependent claims had not been substantiated and therefore should not form part of the appeal proceedings.
  - 2.2 The board agrees with the respondent to the extent that the appellant did not thoroughly substantiate the lack of patentability with regard to method claim 1. However, the board cannot ignore the fact that in the notice of appeal the appellant requested the revocation of the patent in its entirety and that in the statement setting out the grounds of appeal (see point 5) it argued:

*"In the following the arguments against maintenance of the patent will concentrate on claim 18 as granted, it being understood however that the arguments presented will likewise apply to the features of method claim 1"*

Similarly, in the conclusions regarding novelty (see point 17) and inventive step (see point 27) it argued respectively:

*"Likewise the corresponding features of method claim 1 are also deprived of novelty",*

*"The foregoing analysis provides the conclusion that the independent claims 1 and 18 are deprived of inventive step in view of the combination of document*

*D1 with common general knowledge and/or the combination of document D1 with any other documents D4, D8 or D3."*

- 2.3 Moreover, claim 1 describes a specific chilling method for preserving slaughtered poultry which is carried out with the device of claim 18. The relevant features are present in both claims, namely chilling in a chilling room by a stream of air, during the chilling the poultry is moistened by atomisation of water, whereby the moistening (spray) area is separated from the stream of chilling air, and specific arrangements of the conveyor and the product carriers are used.

Consequently, the board has come to the conclusion that the appeal concerns both the device claim 18 and the method claim 1.

3. Fresh ground for opposition

The appellant raised the fresh ground for opposition under Article 100(b) EPC for the first time during the appeal proceedings (see letter dated 15 May 2014). It objected to the enablement of the product carrier configured for carrying only one bird or part thereof during the moistening thereof. At the oral proceedings before the board the respondent (patent proprietor) requested that this fresh ground for opposition should not be admitted into the proceedings.

Since G 0010/91 (OJ 1993, 420) requires that fresh grounds for opposition be considered in appeal proceedings only with the approval of the patentee (see Headnote 3), the board decided not to admit the fresh ground into the proceedings.

4. Interpretation of claim 18 and claim 1

4.1 Claim 18

Claim 18 concerns a device for preserving slaughtered poultry or parts thereof having skin. The device comprises the following structural features:

- a chilling room
  - equipped with means for the generating of a stream of chilling air;
  
- spray means
  - situated in a spray area separated from the stream of chilling air;
  - for moistening at least the skin of the poultry or parts thereof by atomisation of water;
  - configured for applying a water film that covers the entire skin; and
  - configured for maintaining the water film during the exposure to the chilling air;
  
- a conveyor
  - for conveying the slaughtered poultry or parts thereof through the chilling room;
  - configured for conveying the slaughtered poultry or parts thereof in the chilling room at different levels, viewed in the vertical direction;
  - constructed to convey the slaughtered poultry or parts thereof by product carriers
    - each carrier is configured for carrying only one bird or part thereof during the moistening thereof.

The board concurs with the respondent that the skilled reader would understand on the basis of his common general knowledge and the whole technical content of the patent in suit that:

- the means for generating a stream of chilling air is a structural feature of the chilling room since this means constitutes a physical entity which is part of this room;
- the spray means form an integral part of the cooling device and are situated within the perimeter of the chilling room; therefore spraying means outside the chilling room used to fully moisten the poultry skin prior to the chilling in the claimed device, such as disclosed in paragraph [0031] of the patent in suit, are merely an optional feature and do not correspond to the spray means mentioned in the claim;
- the spray means for the moistening of the skin of the poultry or parts thereof are so configured that they apply a mist of water to the skin of the poultry (see paragraphs [0046] to [0051] of the patent in suit) and are different from spraying means which liberally apply water to the poultry leading to dripping of water from the poultry;
- the configuration of the spray means so that the water film is maintained on the poultry during its exposure to the chilling air is understood to mean that a repetitive spraying takes place (see paragraphs [0025] to [0027] of the patent in suit);

- the conveyor is configured so that it contains product carriers each carrier carrying only one bird or part thereof when properly used;
  
- each bird or part thereof when conveyed through the chilling room passes from different levels of the chilling room viewed in the vertical direction, thus allowing the simultaneous presence of many birds at different levels viewed in the vertical direction. The interpretation of the appellant, that different sections of a bird carcass (head, legs, wings) are always at different levels viewed in the vertical direction is not considered plausible as it takes into consideration the level of different sections of one and the same bird carcass, which interpretation finds no basis in the wording of the claim or the patent specification.

#### 4.2 Claim 1

In view of the identity of the relevant features in claim 18 and claim 1 (see point 2.3 above), the skilled reader would interpret claim 1 in the same way. In fact, he would realise that claim 18 and claim 1 describe the same invention with respect to different claim categories.

### 5. Novelty

#### 5.1 Claim 18

In view of the above interpretation of claim 18, none of the cited documents is novelty-destroying.



5.1.1 D1 discloses a process for the treatment of meat during refrigeration. Although the process is described and illustrated in the figures for carcasses of pigs, it can be applied to various kinds of meat such as chicken (column 6, lines 44-48).

The process takes place in a refrigeration room with a suction system creating currents of air (figure 1; column 6, lines 1-4).

A series of cabins is situated inside the refrigeration room (column 3, lines 9-11) provided with a certain number of atomiser nozzles which are fed with sterilised water (column 3, lines 36-41).

The nozzles are oriented and adjusted inside the cabins in such a manner that the jets of mist correctly and completely envelop the half-carcasses as they pass through these cabins (column 4, lines 61-65).

The refrigeration room is intended for the "cold shock" refrigeration of the freshly slaughtered animal carcasses and for this purpose contains a conveying system of conventional type which moves the carcasses along a serpentine path inside the room. The conveying system (it corresponds to the conveyor of claim 18) comprises a rail which guides a series of gambrels (they correspond to the product carriers of claim 18) (figures 1, 2 and 5; column 2, lines 55-68). Each gambrel is composed of two generally horizontal branches disposed symmetrically in relation to the axis of the vertical suspension rod and each of these branches has two notches situated respectively at the free end of the branch and in the central portion of the latter (column 4, lines 26-31). The branches of the gambrel each enable a half-carcass of a pig to be suspended by a hamstring (column 4, lines 26-33). The conveying system of D1 conveys the carcasses at the same horizontal level and each gambrel (product

carrier) carries two parts of a pig (figures 2 and 5; column 4, lines 29-33).

The device of D1 differs from the device of claim 18 in that:

- The product carrier shown in the figures and described in the text of D1 is configured to carry two pig parts. Moreover, D1 is completely silent as to how a carrier should be configured when chicken are to be chilled.
- The pig parts (or other meat) are conveyed at one level.

Consequently, the subject-matter of claim 18 is novel over D1.

5.1.2 D2 discloses a method and a device for treating carcass parts by chilling. These are either a one-piece carcass or two halves of a carcass of an animal such as poultry (page 3, lines 12-25). The carcass or parts thereof are conveyed through a chilling room and during conveyance a liquid is dispersed on the carcass or parts thereof. D2 does not disclose means for generating a stream of chilling air. Figure 1 shows that the product carriers which are conveyed through the chilling room 2 are configured to carry two carcasses or parts thereof. Thus D2 does not disclose that the carriers are so configured that they carry, when properly used, only one carcass during the moistening thereof. Furthermore, in the chilling room 2, the carriers are conveyed at the same level. Thus D2 does not disclose that the poultry is conveyed in the chilling room at different levels, viewed in the vertical direction.

Consequently, the subject-matter of claim 18 is also novel over D2.

- 5.1.3 D3 discloses an installation for refrigerating slaughtered animals such as poultry which comprises a refrigerating room provided with means generating a stream of chilling air, a separate area for moistening the poultry with water and a conveyor conveying the poultry which has product carriers carrying the poultry (claims 9 and 11). However, the product carriers are not so configured as to carry only one bird during the moistening thereof. D3 (claims 17, 20 and 23) discloses that more than one bird is carried by a product carrier. In particular, figure 4 shows 4 birds carried by one product carrier. Furthermore, the carriers are conveyed at the same level. Thus D3 does not disclose that the poultry is conveyed in the chilling room at different levels, viewed in the vertical direction.

Consequently, the subject-matter of claim 18 is also novel over D3.

- 5.1.4 D4 discloses a method and a device for chilling eviscerated fowl (column 1, lines 5-7) in which the fowl suspended in multiples from a single suspension point, "shackle assembly", on the conveying system is simultaneously contacted with a spray of chilled liquid and a stream of cold gas (column 1, lines 63-67). In a preferred embodiment, each of the product carriers is capable of suspending eight chickens in a procession position (column 3, lines 1-3; figure 2). Hence, D4 does not disclose that the product carriers are so configured that they convey only one bird during the moistening thereof. D4 discloses that the fowl is conveyed at one level. Thus D4 does not disclose that

the poultry is conveyed in the chilling room at different levels, viewed in the vertical direction.

Consequently, the subject-matter of claim 18 is also novel over D4.

5.1.5 D8 discloses a chilling apparatus for chicken carcasses comprising a chilling room equipped with a fan for circulating chilled air for chilling the carcasses (claim 1; column 1, lines 17-21), a spray chamber separate from the air chilling room equipped with a device for spraying a mist water onto the carcasses (claim 1; column 3, lines 14-17; column 8, lines 33-41; figure 11), a conveyor for continuously conveying the carcasses at the same level through the chilling room and the spray chamber. Thus, D8 does not disclose that the conveyor conveys the slaughtered poultry or parts thereof in the chilling room at different levels, viewed in the vertical direction. Moreover, each product carrier, "shackle", carries three or six carcasses (figures 1 and 9; column 4, lines 46-50). Thus, D8 does not disclose that each product carrier is configured to carry only one bird or part thereof.

Consequently, the subject-matter of claim 18 is also novel over D8.

## 5.2 Claim 1

As pointed out above (see point 2.3), the relevant features of claim 18 are present in claim 1 as well. Therefore the board considers that the above analysis of the prior art documents with relation to the device claim 18 applies *mutatis mutandis* to the method claim 1. In fact, both parties agreed in this respect during

the oral proceedings. As a consequence the method of claim 1 too, is novel over the cited prior art.

6. Inventive step

6.1 Claim 18

6.1.1 Closest prior art

The patent in suit relates in general to the preservation of meat of slaughtered poultry by chilling the poultry or parts thereof during the processing and preservation in a slaughterhouse (paragraph [0001] of the patent in suit). D1, which deals with a process and an installation for the treatment of meat during refrigeration, is considered by the appellant to constitute the most promising springboard for the assessment of inventive step. The board agrees with the appellant, also in view of the number of common technical features of D1 with the claimed subject-matter (see point 5.1.1 above).

6.1.2 Technical problem

Both parties considered that the technical problem solved by the distinguishing features of claim 18 is the improved use of volume within the chilling room (the conveyor traverses the chilling room many times at different levels with the result that the poultry carcasses can be chilled one over the other) while avoiding cross-contamination of the conveyed poultry (from water dripping from the poultry conveyed above the lower poultry). The board has no reason to deviate from this definition, which also derives from the patent in suit (see paragraph [0018]). Moreover, the board is satisfied that the technical problem is solved

by the features of claim 18 since the conveyance of the birds at different levels within the chilling room evidently improves the volume use and since the spraying of mist instead of a large amount of water prevents dripping excess water from the upper birds onto the birds conveyed below, thereby avoiding cross-contamination of the birds.

### 6.1.3 Obviousness

The question which remains to be answered is whether the skilled person starting from the disclosure of D1 and seeking to improve the use of the space within the chilling room while avoiding cross-contamination of the conveyed birds would consider it obvious or would find a hint in the prior art (i) to configure the product carrier so that it carries only one bird or part thereof during the moistening thereof and (ii) to configure the conveyor so that it conveys the poultry or parts thereof in the chilling room at different levels viewed in the vertical direction.

Contrary to the assertions of the appellant, this is not obvious in view of the common general knowledge of the skilled person. The appellant referred to skyscrapers which are used when limited floor space is available and to old buildings with high ceilings, in which intermediate floors are applied to increase the available floor-space. The board does not contest the fact that improved use of the chilling space belongs to the common general knowledge of the skilled person. However, this is only one part of the problem to be solved since beside the improved use of space the skilled person would have to avoid cross-contamination of the birds. The board observes that the appellant did not provide any evidence that the common general

knowledge of the skilled person also included the claimed configuration of the conveyor and the product carriers in order to avoid cross-contamination. Therefore this line of argument was deficient and based merely on hindsight.

As regards the combination of D1 with D4 or D8, the board notes that neither D4 nor D8 provides the skilled person with the necessary motivation to modify the device of D1 so that he arrives at the claimed device. Both documents disclose a conveyor which conveys the birds or parts thereof in the chilling room at the same level, the conveyor being constructed so that each product carrier carries more than one bird or part thereof during the moistening thereof (see point 5.1.4 and 5.1.5 above). Therefore the combination of D1 with D4 or D8 would not lead to the device of claim 18. Moreover, the configuration of the conveyor and the product carriers in D4 and D8 did not protect the birds from cross-contamination since no measures were taken in that respect. In both D4 and D8 water apparently drips from the birds carried above onto the birds carried below. Incidentally, D4 (figure 2, outlet conduit 67; column 3, lines 51-55) discloses a water drain and D8 discloses use of specific partitions which facilitate the drainage of sprayed water (column 8, lines 33-41).

6.1.4 In view of the above considerations the device of claim 18 is not obvious in view of the cited prior art and claim 18 involves an inventive step.

6.2 Claim 1

As pointed out above (see point 2.3), the relevant features of claim 18 are present in claim 1 as well. In

fact, both parties agreed in this respect during the oral proceedings. Hence, the considerations expressed above concerning device claim 18 apply likewise to method claim 1. Consequently, this method is not considered obvious over D1 and the common general knowledge of the skilled person or the combination of D1 with either D4 or D8. Thus claim 1 too, involves an inventive step.

## Order

### For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated