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**Datasheet for the decision  
of 27 September 2021**

**Case Number:** T 0368/17 - 3.2.04

**Application Number:** 05109024.9

**Publication Number:** 1658777

**IPC:** A21C9/04, A21C15/00, A23P20/13

**Language of the proceedings:** EN

**Title of invention:**  
Device for coating food products with a particulate material

**Patent Proprietor:**  
GEA Food Solutions Bakel B.V.

**Opponent:**  
Marel Townsend Further Processing B.V.

**Headword:**

**Relevant legal provisions:**  
EPC Art. 123(2), 111, 56  
RPBA 2020 Art. 13(2)  
EPC 1973 Art. 54(2)

**Keyword:**

Amendments - allowable (yes)

Appeal decision - remittal to the department of first instance  
(no)

Amendment after summons

Inventive step - (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

**Case Number: T 0368/17 - 3.2.04**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 27 September 2021**

**Appellant:** GEA Food Solutions Bakel B.V.  
(Patent Proprietor) Beekakker 11  
5761 EN Bakel (NL)

**Representative:** Wolff, Felix  
Kutzenberger Wolff & Partner  
Waidmarkt 11  
50676 Köln (DE)

**Respondent:** Marel Townsend Further Processing B.V.  
(Opponent) Handelstraat 3  
5831 AV Boxmeer (NL)

**Representative:** EP&C  
P.O. Box 3241  
2280 GE Rijswijk (NL)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
22 November 2016 concerning maintenance of the  
European Patent No. 1658777 in amended form.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** G. Martin Gonzalez  
K. Kerber-Zubrzycka

## **Summary of Facts and Submissions**

- I. The appeal was filed by the appellant-proprietor against the interlocutory decision of the Opposition Division maintaining the patent in amended form on the basis of the auxiliary request 2.
- II. The Opposition Division held that granted claim 1 contained subject-matter extending beyond the content of the application as filed, though claim 1 of the 2nd auxiliary request did not and was seen to be novel and involve an inventive step in the light of inter-alia the following evidence:
- D1 JP 02-57159
- III. In preparation for oral proceedings the Board issued a communication, dated 11 November 2019, setting out its provisional opinion on the relevant issues.
- Oral proceedings were held by videoconference before the Board on 27 September 2021.
- IV. The appellant-proprietor requests
1. to annul the decision of the opposition division dated November 22, 2016 and to maintain the European patent no. 1 658 777 B1 as granted (claims 1 to 12).
  2. Auxiliarily to grant a patent according to auxiliary request 1 as filed during the oral proceedings before the Opposition Division on 7 October 2016.
- The respondent-opponent requests
1. that the appeal be dismissed and that the decision of the Opposition Division be maintained.

2. Should the Board of Appeal come to the conclusion that the patent as granted or the auxiliary request 1 as filed during oral proceedings of the Opposition Division meets the requirements of Art. 123, to remit the case to the Opposition Division for discussion of the other grounds and related objections already raised by the respondent (opponent) during the Opposition Proceedings.

V. Independent claim 1 of the relevant requests reads as follows:

(a) Main request (as granted)

"Device for coating a food product (4) with a particulate coating material (9) comprising at least one essentially horizontal, rotary drum (3), at least one feed line (1,5) for feeding food products (4) to be coated to one end of the drum (3), at least one removal line (2,8) for removing coated food products (4) at the opposite end of the drum (3), as well as feed means (11) for feeding the coating material (9) to the food products (4), such that when the drum (3) rotates the food products (4) are tumbled and move from the end of the drum (3) that is oriented towards the feed line (1) to the opposite end, characterised in that;

- at least one further rotary drum (3) is provided, such that the food product (4) is subjected to the coating treatment in separate streams,
- the width of the feed line (1) and the removal line (2) is greater than the diameter of the drum (3) and
- that the width of said lines (1, 2) extend over at least two drums (3) in the transverse direction."

(b) First auxiliary request

Claim 1 as in the main request with the deletion of the terms "the width of" from its last feature as follows (emphasis added by the Board to indicate the deletion of the terms):

"...

- that ~~the width of~~ said lines (1, 2) extend over at least two drums (3) in the transverse direction."

VI. The appellant-proprietor argues as follows:

Granted claim 1 does not extend over the content of the originally filed application. The arguments of the respondent against novelty and inventive step of granted claim 1 and claim 1 of the first auxiliary request of letter of 23 July 2021 are late filed and should not be admitted by the Board. Without prejudice to the above, the subject-matter of claim 1 as granted (main request) and of the first auxiliary request involves an inventive step.

VII. The respondent-opponent argues as follows:

The Opposition Division was right to find that granted claim 1 contains added subject-matter. If the Board finds the main request or auxiliary request 1 to be compliant with Article 123 EPC, the case should be remitted for discussion of the grounds of novelty and inventive step. The arguments in letter of 23 July 2021 are not an amendment of the case in the sense of Article 13(2) RPBA 2020 and thus admissible. Claim 1 of the main request and of auxiliary request 1 is not inventive in the light of D1 in combination with common general knowledge.

## **Reasons for the Decision**

1. The appeal is admissible
2. Background

The invention is directed to a device for coating a food product using a rotary drum, see specification paragraph [0001]. A spread out distribution of the products on the feed line and on the removal line ensures that all products are evenly treated in the drum and also facilitates further processing after coating, such as baking or frying, than if they were transported in a relative narrow stream, packed close to one another, see paragraphs [0004]- [0006]. The invention aims at increasing treatment capacity of the device for coating, while also obtaining a spread out product distribution over the feed and removal lines. With this aim, the device according to the invention comprises at least two rotary drums, while the width of the feed and the removal lines is greater than the diameter of one drum and extends over at least two drums in the transverse direction, see specification paragraph [0008].

3. Added subject-matter - Main request.
  - 3.1 Original claim 1 recites that "said lines (1,2) extend over at least two drums (3) in the transverse direction", without explicitly specifying whether it is the length or the width of the line what is meant in this feature. Granted claim 1 was modified with respect to the originally filed claim by adding the terms "the width of" thus specifying "that *the width of* said lines

(1,2) extend over at least two drums (3) in the transverse direction". In the Board's view, this amendment does not add subject-matter, since it is already implicit from the wording of original claim 1 itself properly construed and in the light of the whole original disclosure that it is indeed the width of the feed and removal lines that extends over at least two drums.

3.2 The original claim defines feed and removal lines that feed products to one end of the drum and remove them from the other end. It further expressly mentions line width in relation to drum diameter, in particular that "the width of the feed line (1) and the removal line (2) is greater than the diameter of the drum(3)". In the context of these technical requirements of the claim in combination, the skilled person will unambiguously understand that the belts feed and remove the products to and from the drums along their transport direction, and will thus read the ensuing last feature of original claim 1 in the light of this understanding as implying that it is the width of the feed lines (and not e.g. the length) what extends over at least two drums.

3.3 The skilled person would not arrive at any other conclusion when reading the claim in the context of the whole original disclosure. Indeed, original paragraphs [0005]-[0008] describe how the stream and sub-streams of food products enter and leave the drums uniformly distributed over a wide removal belt and how the orientation of the drums and belts is aligned. This is presented consistently throughout description and figures, which all show such an alignment.



3.4 Thus the Board concludes that adding the term "width" only makes explicit what was already implicit in original claim 1. It concludes that the amendment in granted claim 1 does not introduce originally undisclosed subject-matter.

4. Remittal - Admission of appellant-opponent's arguments

4.1 The respondent-opponent requests remittal for the issues of novelty and inventive step should the Board come to the above conclusion for the main request. This request was revoked on the only ground of added subject-matter.

The Board notes that there is no absolute right to have an issue decided at two instances, see Case Law of the Boards of Appeal, 9th edition, July 2019 (CLBA), V.A. 7.2.1. In the present case, the issues of novelty and inventive step for other request, the second auxiliary request before the Opposition Division, have already been discussed in the impugned decision. In doing so the Opposition Division gave its opinion on the relevant features of the present main request so that it can be inferred how the Division would have decided for the present request. By way of example, its finding of novelty turns on the feature that the width of said lines extends over at least two drums, which is unchanged. Thus the lack of a specific discussion of these issues for the main request and the first auxiliary request does not per se justify remittal to the department of first instance. Moreover, the Board, in its preliminary written opinion already indicated that it may not remit the case. The parties can thus reasonably be expected to deal with the remaining issues at the oral proceedings, and indeed have made

detailed submissions on these issues in their replies to the Board's communication.

Moreover, considerations of procedural economy and the interest of legal certainty speak against remittal. Indeed, the filing date of the patent is 29 May 2005. After remittal and continuation of the opposition proceedings the patent will be close to expiry if not have already expired.

In view of the above the Board decided not to remit and exercise its power under Article 111(1) EPC for further examining the current appeal.

- 4.2 As regards the arguments of the respondent-opponent submitted with letter of 23 July 2021 in preparation for the oral proceedings regarding the main request and auxiliary request 1, the Board is not convinced that these represent an amendment to the respondent's case in the sense of Article 13(2) RPBA 2020. The respondent-opponent timely made their case of lack of novelty and inventive step based on D1 for both requests with the response to the appeal on 19 July 2017, see final remarks on page 7 of that response and sections 4 and 5 of its annex 1. The new submissions only further develop those arguments, particularly having regard to the Board's preliminary opinion of 11 November 2019. The respondent-opponent thus *inter alia* takes into consideration the Board's preliminary assessment of the final feature of claim 1.

The Board therefore sees no reason to disregard the respondent-opponent's submissions of 23 July 2021 on the basis of Article 13(2) RPBA 2020.

5. Main request - Novelty over D1

5.1 It is common ground that document D1 discloses a device for coating a food product, see figure 2, comprising three horizontal rotary drums 18, 18', 18'' in parallel, having parallel feed belts 6, 6', 6'' and sliding channels 19, 19', 19'' for removal.

Whether D1 anticipates the two last characterising features of claim 1 hinges on their interpretation, in particular whether *the width of the feed removal lines* can be read to refer also to the width of a set of parallel separate feed belts and removal lines. A further critical question is whether relative dimensions as claimed in granted claim 1 can be derived from figure 2 of D1.

5.2 As regards the term *feed and removal lines*, the Board considers that these can be read to also include embodiments of a set of parallel, separated elements as those disclosed by D1. As is clear from claim 8, the patent clearly considers that "the feed line (1) and the removal line (2) each comprise at least two endless conveyor belts, vibrating channels or the like". This is reflected in specification paragraph [0008] where it states that "products ... are supplied in a relatively broad stream on a supply line, such as one or more belts, vibrating systems and the like" (emphasis added) and "are accommodated ... in two or more drums depending on the width of the lines" (plural). Returning to the claim it initially speaks of "at least one feed line" and "at least one removal line" so that when the characterizing part refers to the "width of *the feed line and the removal line*" (emphasis added) it is not clear whether the width of one or more (feed or removal) lines is meant.

In this regard and contrary to the submissions of the appellant-proprietor, that a feed or removal line can be read to also include a set of parallel, separated elements is also technically meaningful when taking into account the teachings of the whole patent disclosure. A main object of the claimed invention is to provide broad and spread out feed and removal streams of food products, see paragraphs [0004]-[0008]. It stands to reason that a plurality of parallel transport elements contribute towards the achievement of this effect.

- 5.3 In such feed or removal lines, "the width" of the line is logically to be understood as the total width available on that line - for spreading out the food items. It thus corresponds to the summed up widths of the plurality of elements (belts or slide channels) making up the line.
- 5.4 With respect to the dimensions derivable from figure 2 of D1, it is readily apparent that this figure is not a mere schematic drawing - "an illustrative figure which gives an outline or general scheme of an object" (OED)- that is meant to give only general information of shape and relations of component parts. It is readily apparent from its level of detail and fidelity of representation of the shapes of the different elements that figure 2 is closer to a technical drawing - "a precise and detailed drawn representation or plan" (OED)- intended to illustrate the general shape, form and dimensions of components in relationship to each other in the known device or facility of D1 for coating food products. Therefore, though exact measurements may not be possible, it can certainly be used to infer relative dimensions of the different elements.

5.5 Thus, it can be readily inferred from figure 2 of D1 that the summed up width of the three parallel feed belts 6, 6', 6'', each of which has a width close to that of the drum, will be greater than the diameter of any of the rotary drums 18, 18', 18''. The same conclusion is derivable for the removal line made of the three sliding channels 19, 19', 19''. The Board therefore finds that D1 anticipates the feature that the width of the feed line and the removal line is greater than the diameter of the drum.

6. However, the Board cannot unambiguously conclude that the width of any of the lines (the feed or the removal line) extends over two drums in the transverse direction. As explained by the Opposition Division, see bridging paragraph of pages 4-5 of the impugned decision, this feature is understood as meaning that said width is at least twice the diameter of one of the used drums. It cannot be established with certainty that the summed up width of the feed line belts 6, 6', 6'', or of the removal line sliding channels 19, 19', 19'', is at least twice the diameter of one of the drums 18, 18', 18''. Thus this feature is not directly and unambiguously derivable from D1.

6.1 Granted claim 1 is therefore new over D1, Article 54(2) EPC.

7. Main request - Inventive step

7.1 D1 is regarded as suitable starting point for the assessment of inventive step by both parties.

It follows from the above novelty discussion that the subject-matter of claim 1 only differs from the

arrangement of figure 2 of D1 in that the width of any of the lines (the feed or the removal line) extends over at least two drums in the transverse direction, that is, it is larger than twice the diameter of a drum.

- 7.2 It is not in dispute that increasing the widths of the feed and the removal line provides increased capacity and that the corresponding objective technical problem of how to increase the limited capacity of the device of D1 can be formulated, see also specification paragraph [0003].
- 7.3 A straightforward and common sense approach for the skilled person when seeking to increase capacity of the known three drum device of D1, would be to simply increase the number of drums, repeating as a matter of routine the same arrangement or combination of feed belts and removal sliding channels for all drums. With ever more drums at some stage the summed width of associated feed belts and channels will eventually and inevitably exceed twice the diameter of a drum as a matter of obviousness.
- 7.4 The appellant-proprietor argues that increasing the number of drums would be the least obvious of the many possibilities available to the skilled person, such as increasing the speed of the transportation belts or increasing drum dimensions. In the Board's view, however, any of these options - whether increasing speed, dimensions or number - are part of the skilled person's playbook of strategies to increase capacity and thus obvious. Which one they choose depends on the particular circumstances. That choice does not render any of these options inventive.

7.5 The Board therefore concludes that granted claim 1 does not involve an inventive step, Article 56 EPC.

8. Auxiliary request 1 - Inventive step

The above conclusion of lack of inventive step, starting from D1 in combination with the common general knowledge of the skilled person, also applies to claim 1 of the first auxiliary request.

The new claim is amended to revert to the originally filed claim 1 by deleting the terms "the width of" from the last feature of the claim. As concluded for the issue of added subject-matter of the main request, this amendment only makes explicit what was already implicit in original claim 1, see section 3.4 above. It follows that both versions of the claim define the same subject-matter, which the Board finds to lack an inventive step, as explained above for the main request.

9. In conclusion, the Board confirms the conclusions of the decision under appeal that the main and first auxiliary request are not allowable, though for different reasons. Consequently, the appeal fails.

**Order**

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

**The appeal is dismissed.**

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated