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**Datasheet for the decision  
of 12 March 2021**

**Case Number:** T 1957/18 - 3.2.07

**Application Number:** 07763583.7

**Publication Number:** 2001748

**IPC:** B65B51/04, A22C11/12

**Language of the proceedings:** EN

**Title of invention:**  
CLIP CONTROL SYSTEM

**Patent Proprietor:**  
POLY-CLIP SYSTEM CORP.

**Opponent:**  
Tipper Tie technopack GmbH

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(c), 122(2), 111(1)  
RPBA 2020 Art. 11, 15(1)

**Keyword:**

Grounds for opposition - subject-matter extends beyond content of earlier application (yes)

Amendments of application

Amendments - allowable (no) auxiliary request 1 - allowable (yes) auxiliary request 2

Remittal to the department of first instance - (yes) special reasons for remitting

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

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Case Number: T 1957/18 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 12 March 2021**

**Appellant:** POLY-CLIP SYSTEM CORP.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 28 May 2018  
revoking European patent No. 2001748 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** S. Watson  
B. Paul

## **Summary of Facts and Submissions**

- I. An appeal was filed by the patent proprietor (appellant) against the decision of the opposition division revoking European patent number 2 001 748.
- II. The opposition had been filed against the patent as a whole based on Article 100(a) [inventive step], (b) and (c) EPC.

The opposition division found that the content of the patent as granted extended beyond the content of the application as filed (Article 100(c) EPC); that the amendments made to the claims in auxiliary request 1 extended the protection conferred (Article 123(3) EPC); and that the subject-matter of claim 1 of auxiliary requests 2 to 6 did not meet the requirements of Article 123(2) EPC.

- III. With a communication pursuant to Article 15(1) RPBA 2020 of 1 December 2020 the Board indicated its preliminary opinion that the appeal could be allowed in part, as auxiliary request 2 appeared to fulfil the requirements of Article 123(2) EPC.
- IV. Both parties made written submissions in response to this communication, the respondent with letter of 6 January 2021 and the appellant with letter of 12 February 2021.
- V. Oral proceedings before the Board took place on 12 March 2021 at the end of which the decision was announced. For further details of the oral proceedings reference is made to the minutes thereof.

VI. The final requests of the parties are as follows,  
for the patent proprietor:

that the decision under appeal be set aside  
and  
that the subject-matter of the claims of the patent  
as granted or, alternatively, of the claims of one  
of auxiliary requests 1 to 4, be found to meet the  
requirements of Article 123(2) EPC  
and  
that the case be remitted to the opposition  
division for further prosecution regarding the  
further grounds for opposition raised by the  
opponent.

for the opponent:

that the appeal be dismissed  
or, in the event that the decision under appeal is  
set aside in respect of the ground underlying said  
decision, that the case be remitted to the  
opposition division for further prosecution  
regarding the further grounds for opposition.

VII. The lines of argument of the parties are dealt with in  
detail in the reasons for the decision.

VIII. Claim 1 of the main and first auxiliary requests reads  
as follows (amendments with respect to claim 1 as  
originally filed are shown underlined (additions) or  
~~struck through~~ (deletions)):

"A clip control system comprising:  
a stuffer/clipper (30) for processing a food  
product, said stuffer/clipper comprising a reader

(32) and a processing unit (34) and having an product specific operating parameter, said operating parameter comprising at least one of a clip type, a portion per casing, a label, a speed control, and a casing brake setting;  
a clip package mountable to said stuffer/clipper (30) and holding a plurality of clips (40); and information encoded in said clip package and readable by said reader (32);  
said processing unit (34) configured to receive said information and to set said operating parameter based thereon."

Claim 1 of the second auxiliary request reads as follows (amendments with respect to granted claim 1 are shown in **bold**):

"A clip control system comprising:  
a stuffer/clipper (30) for processing a food product, said stuffer/clipper comprising a reader (32) and a processing unit (34) and having a product specific operating parameter, said operating parameter comprising at least one of a clip type, a portion per casing, a label, a speed control, and a casing brake setting;  
a clip package mountable to said stuffer/clipper (30) and holding a plurality of clips (40); and information **being specific to a product made by said stuffer/clipper (30) and** encoded in said clip package and readable by said reader (32);  
said processing unit (34) configured to receive said information and to set said operating parameter based thereon."

IX. As auxiliary requests 3 and 4 do not form part of this decision, it is not necessary to reproduce them here.

## **Reasons for the Decision**

1. *Main request - Article 100(c) EPC*

1.1 In the contested decision, the opposition division considered two objections under Article 100(c) EPC:

- (i) the addition of the term "product specific" in claim 1 as granted;
- (ii) the non-inclusion of the feature of claim 6 as originally filed in claim 1 as granted.

The opposition division found that the addition of the term "product specific" before "operating parameter" in granted claim 1 led to the subject-matter extending beyond the content of the application as filed (see Grounds for the Decision, II.1.3.2 to II.1.3.4). With respect to the second objection, the opposition division found that the omission of the feature of claim 6 did not extend the subject-matter of claim 1 as granted (see section II.1.3.1).

1.2 *Non-inclusion of original claim 6 in granted claim 1*

Claim 1 of the patent as granted is based on a combination of claims 1 and 7 as originally filed. In the originally filed application documents, claim 7 was dependent on claim 6.

Claims 6 and 7, as originally filed, read as follows:

"6. The clip control system of claim 1, wherein said information is specific to a product made by said stuffer/clipper."

"7. The clip control system of claim 6, wherein said operating parameter comprises at least one of a clip size, a clip type, a portion per casing, a label, a speed control, and a casing brake setting."

- 1.2.1 The opposition division found (see the contested decision, II.1.3.1) that the dependency of original claim 7 on original claim 6 was "merely formal" and that the feature of original claim 6 was "not considered to be essential for the subject-matter of original claim 7". Thus, the opposition division found that the non-inclusion of the feature of claim 6 in claim 1 as granted did not lead to an extension of the subject-matter of the claim beyond the content of the application as originally filed.
- 1.2.2 The respondent maintained its objection to the non-inclusion of the feature of claim 6 in the appeal proceedings. In its reply to the statement of grounds of appeal, point III.2, the respondent argued that the subject-matter of claim 7 as originally filed, which was introduced into granted claim 1, was only disclosed in combination with the feature of claim 6 as originally filed, *i.e.* that the information was "specific to a product made by said stuffer/clipper".
- 1.2.3 The appellant argued that the dependency of claim 7 on claim 6 was a formal dependency and that "product specification information" and "product specific operating parameters" were regarded as synonyms, so



that the subject-matter of claim 6 as originally filed was included in granted claim 1 through the use of the term "product specific operating parameter" (see appellant's submissions of 12 February 2021, point 1.3).

- 1.2.4 The Board, however, agrees with the respondent, that there is no disclosure in the application as filed of an embodiment in which information that is not product specific, is used to set a product specific operating parameter. All the embodiments shown in the description relate to product specific operating parameters being set based on information specific to a product made by the stuffer/clipper. That the information used has been encoded in a clip package, does not lead to the conclusion that such information must inherently be specific to a product made by the stuffer/clipper, it may be any information.
- 1.2.5 The Board also cannot agree with the appellant, that the terms "product specific information" and "product specific operating parameter" are synonymous. "Information" is not the same as an "operating parameter". Information can be any type of data, whereas an operating parameter must in some way be linked to the operation of the stuffer/clipper and have some values, whether simply "on/off" or a range of values.
- 1.2.6 The Board also cannot follow the argument of the appellant, that the dependency was only "formal". The original set of claims comprised independent claim 1, which was directed to a clip control system for a stuffer/clipper, together with dependent claims 2 to 9. Of these claims, claims 2 to 6 and 9 were dependent on claim 1, claims 7 and 8 were dependent on claim 6.

In particular, as only two of the system claims have a further dependency (*i.e.* are not directly dependent on claim 1), the skilled person would understand the dependency of claim 7 on claim 6 as intentional.

1.2.7 The original application discloses a general teaching of setting operating parameters based on information encoded in a clip package. However, the setting of product specific operating parameters has only been disclosed in combination with the information encoded in the clip package being specific to a product made by said stuffer/clipper.

1.3 Therefore, for the reasons given under point 1.2 above, the subject-matter of the patent extends beyond the content of the application as filed (Article 100(c) EPC) and the main request is not allowable.

2. *Auxiliary request 1 - Article 100(c) EPC*

In auxiliary request 1, dependent claim 6 has been deleted. Independent claim 1 remains identical to claim 1 of the main request.

Auxiliary request 1 is therefore also not allowable for the same reasoning as given above in relation to the main request.

3. *Auxiliary request 2 - Article 100(c) EPC -  
Article 123(2) EPC*

Claim 1 of auxiliary request 2 includes the feature of granted claim 6. The inclusion of this feature overcomes the objection raised above against claim 1 of both the main request and auxiliary request 1.

It must, however, be considered whether or not the introduction of the term "product specific" before "operating parameter" in claim 1, extends the subject-matter beyond the content of the application as filed, as was found to be the case in the contested decision (see II.1.3.2 to II.1.3.4).

3.1 The opposition division found that

- (a) the parameters clip type, portion per casing, label, speed control and casing brake setting were not implicitly operating parameters that are specific to the product made, they could be general to the machine and applicable to all products produced by the stuffer/clipper;
- (b) the use of product specific information to set an operating parameter did not inevitably lead to a product specific operating parameter as the parameters listed in claim 1 could be set the same for all the products produced.

3.2 With its statement of grounds of appeal (section II.2), the appellant argued that the decision of the opposition division was incorrect as every operating parameter which is set according to information specific to a product inherently had to be understood as a product specific operating parameter, regardless

of whether such a parameter has the same value for a number of different products.

3.3 In its reply to the statement of grounds of appeal (III.1), the respondent agreed with the findings of the opposition division set out under point 3.1 above. The respondent further developed the findings of the opposition division in its submissions of 6 January 2021 and during oral proceedings, arguing essentially that a product specific operating parameter must have a unique value for every product, whereby the value is independent of machine or operational considerations.

3.4 The Board notes that the combined term "product specific operating parameter" is not literally disclosed anywhere in the application as filed.

However, it is established jurisprudence that literal support for an amendment is not required. An amendment cannot however present the skilled person with new technical information, *i.e.* the amendment must not give rise to a disclosure which is not clearly and unambiguously derivable, using common general knowledge, from the application as filed (see Case law of the Boards of Appeal [CLB], 9th edition, 2019, II.E.1.3.2, fourth paragraph).

3.5 a) *Product or machine specific parameters*

3.5.1 The respondent argued, in its reply to the statement of grounds of appeal (see page 5, final paragraph), that the passage on page 5, lines 24 and 25, and page 6, lines 8 and 9 and 15 to 17, of the published application, indicates that the operating parameters are not product specific, but rather that product

specific information is used to set machine specific parameters:

"Processing unit 34 uses that data, which is preferably product specific information, to set the various parameters of stuffer/clipper 30."

With its submissions of 6 January 2021 (see I.5, third and fourth paragraphs) the respondent further illustrated this argument with the example that the operating parameter "speed control" of the stuffer/clipper could be set the same for many different products; or the same product could be stuffed/clipped at different speeds depending on non-product specific information, such as how the stuffer/clipper will be unloaded, or the availability of personnel to perform the unloading.

- 3.5.2 The Board, however, follows the argumentation set out by the appellant in its submissions of 12 February 2021 (point 1.2, third paragraph), that a product specific operating parameter may also be further influenced by machine and operational factors. The operating parameter is, however, still product specific as the value will remain within set limits for the specific product.

The Board notes that the passage cited by the respondent discloses, in general, the teaching that various operating parameters of the machine can be set based on information from the clip package. However, the application as originally filed also discloses that at least one operating parameter of a stuffer/clipper is set based on product specific information encoded in a clip package, as disclosed in original claims 1, 6 and 7. Operating parameters which are set based on information specific to a product to be made on the

stuffer/clipper are regarded as being product specific operating parameters, regardless of whether the final value of the operating parameter used is further constrained by machine or operational considerations.

3.6 *b) Unique value of the operating parameter for each product*

The opposition division found that setting an operating parameter based on product specific information did not inevitably lead to a product specific operating parameter as the operating parameters listed in claim 1 could be set the same for all products produced.

3.6.1 The respondent (reply to the statement of grounds of appeal, page 4, lines 19 to 38) agrees with the findings of the opposition division that the use of product specific information to set an operating parameter does not lead to a product specific operating parameter.

The respondent illustrates this argument with reference to page 8, lines 5 to 9 of the published application. The cited passage describes how if the wrong type of clip is supplied for the product being made, the reel will be rejected and the stuffer/clipper will not proceed further until the correct clips have been mounted and recognised. The opponent argues that this example shows that all products will have the speed of the machine set to zero if the wrong type of clip has been mounted and that therefore speed control is not product specific as it is set the same for all products.

3.6.2 The appellant however, interprets "product specific" operating parameter as a parameter which has values which correspond to particular products, independently

of whether the values may be the same for other products. According to the appellant, the setting of an operating parameter based on product specific information must lead to a product specific operating parameter (see statement of grounds of appeal, II.2.).

- 3.6.3 The Board agrees with the appellant and finds that the skilled person would understand an operating parameter, which is set based on information specific to a product made, to be a "product specific operating parameter".

The skilled person would not understand "product specific operating parameter" as a parameter which requires each product to have a unique value for that parameter.

In the application documents as originally filed, the term "product specific" is used in combination with the information which is used to set the operating parameters (see page 4, lines 18 to 21; page 5, lines 4 to 9 of the published application). Examples of the types of information that are "product specific" are given as "clip size, clip type, film type, portions per casing, label, speed control, and casing brake settings". It is clear to the skilled person, that many of these types of information will not be unique for every possible product. The skilled person understands that the term "product specific" means specific, but not necessarily exclusive, to a particular product made by the stuffer/clipper.

In the example given by the respondent, in the event that the clip is the correct clip for the product to be made, the speed control would not be set to zero, therefore it can be seen that the operating parameter is specific to the product, even if the value of the parameter may be the same for a number of products.

- 3.6.4 In its submissions of 6 January 2021 the respondent argued further that the application as filed (see page 5, line 16 of the published application) discloses that the product-specific information on the RFID tag 60 on the clip package is a "unique electronic code for the food product". According to the respondent, this disclosure indicates that "product specific" cannot be understood as "product dependent" but must be understood as unique for every product.
- 3.6.5 The Board cannot see how the disclosure that a product has a unique electronic code, leads to the interpretation of the term "product specific operating parameter" as requiring a unique value of an operating parameter for every product. Even if the electronic code may be unique to each product, it is then read by the reader of the clipper/stuffer and processed in the processing unit which then sets at least one of the operating parameters listed in claim 1 based on this information.
- 3.7 The respondent also argued in the oral proceedings, that there is no disclosure in the application as originally filed of using only one of the seven types of product-specific information shown on page 5, lines 4 to 6, of the published application. The application only discloses using at least all seven types. The Board cannot agree. The cited passage reads, "Product-specific information, including by way of example and not by limitation, clip size, clip type, film type portions per casing, label, speed control, and casing brake setting,...". This cannot be understood as an unambiguous disclosure that all seven categories of information must be present in the clip



package and be required to set at least one of the product specific operating parameters.

The use of the term "including by way of example and not limitation" indicates that the examples given are neither mandatory nor exhaustive.

- 3.8 In conclusion, the Board follows the argumentation of the appellant that the skilled person unambiguously derives from the application as originally filed, that operating parameters are product specific, when they are set based on information specific to a product.

Further, the Board cannot see in the present case, that any new technical information has been presented by naming an operating parameter which has been set based on information specific to a product, a "product specific operating parameter".

Therefore the Board finds that the appellant has convincingly shown that the decision of the opposition division was incorrect in relation to auxiliary request 2 and the introduction of the term "product specific" before the term "operating parameter" does not extend the content of the patent beyond the original filing.

4. *Remittal*

Both the appellant and the respondent requested, should a request be found to fulfil the requirements of Article 123(2) EPC, that the case be remitted to the opposition division for further prosecution of the remaining grounds of opposition

- 4.1 According to Article 111(1) EPC the Board may either exercise any power within the competence of the

department which was responsible for the decision appealed or remit the case to that department for further prosecution. Under Article 11 RPBA 2020, a Board shall not remit a case unless special reasons present themselves for doing so.

- 4.2 According to established jurisprudence, parties do not have an absolute right to two instances (see CLB, *supra*, V.A.7.2.1), however under Article 111(1) EPC and Rule 11 RPBA 2020 the Board does have the discretion to decide upon or to remit a case, based on the individual circumstances of the particular appeal.

In the appealed decision in the present case, the opposition division did not decide on any of the further grounds for opposition which had been raised by the opponent.

The annex to the summons to attend oral proceedings before the opposition division briefly gives the opposition division's opinion, at that time, on the objections raised regarding sufficiency of disclosure and inventive step (see point 2.2, third paragraph and point 4., final paragraph) but, particularly in the case of inventive step, without full reasoning.

The respondent brought forward some substantive arguments in its reply to the statement of grounds of appeal (see sections IV and V), however it has not presented a complete case.

The appellant has made no substantive arguments in the appeal proceedings in relation to objections under inventive step and sufficiency of disclosure.

Against this background, and taking into account the circumstances of this particular case, the Board is of the opinion that the further grounds for opposition raised by the respondent cannot be decided upon without

undue burden (cf. explanatory notes to Article 11 RPBA 2020, Supplementary publication 2 - OJ EPO 2020, 54).

4.3 Therefore it appears that special reasons within the meaning of Article 11, first sentence, RPBA 2020 apply, and that it would be appropriate to remit the present case to the opposition division for further prosecution, in accordance with Article 111 (1) EPC, as requested by both parties.

## Order

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

- 1. The decision is set aside.**
- 2. The case is remitted to the opposition division for further prosecution.**

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated