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**Datasheet for the decision
of 23 November 2022**

Case Number: T 0334/19 - 3.2.04

Application Number: 11178825.3

Publication Number: 2389812

IPC: A22C21/00

Language of the proceedings: EN

Title of invention:

Device and method for bringing into position and arranging a carcass part of slaughtered poultry on or in a product carrier

Patent Proprietor:

Marel Poultry B.V.

Opponent:

BAADER Food Systems Denmark A/S

Headword:

Relevant legal provisions:

EPC Art. 54, 84, 111(1), 123(2)

EPC R. 103(1)(a)

RPBA Art. 12(4)

Keyword:

Novelty - main request (no) - auxiliary request (no)
Claims - clarity - auxiliary request (no) - functional
features (no)
Late-filed request - admitted (yes) - submitted with the
statement of grounds of appeal
Amendments - added subject-matter (no)
Reimbursement of appeal fee - (no) - substantial procedural
violation (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0334/19 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 23 November 2022

Appellant: Marel Poultry B.V.
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Respondent: BAADER Food Systems Denmark A/S
(Opponent) Vestermøllevej 9M
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Representative: Stork Bamberger Patentanwälte PartmbB
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 30 November
2018 revoking European patent No. 2389812
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: C. Kujat
C. Heath
G. Martin Gonzalez
T. Bokor

Summary of Facts and Submissions

- I. The proprietor's appeal lies from the decision of the opposition division of the European Patent Office concerning revocation of the European Patent No. 2 389 812 pursuant to Article 101 (3) (b) EPC.
- II. The opposition division held *inter alia* that claim 1 of Auxiliary Request 3 lacked novelty and that claim 1 of Auxiliary Requests 4, 5 and 6 lacked clarity. It did not admit Auxiliary Request 7 and revoked the patent.

In its decision, the opposition division cited *inter alia* the following document:

D15 WO 00/41568 A3

- III. In preparation for oral proceedings, the board issued a communication pursuant to Article 15(1) RPBA dated 7 October 2021 setting out its provisional opinion on the relevant issues. Oral proceedings were duly held as a videoconference on 23 November 2022.
- IV. The appellant requests that the decision under appeal be set aside and that the patent be maintained as granted, or on the basis of one of Auxiliary Requests 1-9 filed with the grounds of appeal. They also request the reimbursement of the appeal fee.
- V. The opponent as respondent requests dismissal of the appeal and the request for reimbursement of the appeal fee, and remittal in case one of Auxiliary Requests 8 or 9 should be discussed or admitted.

VI. The relevant independent claims of the requests read as follows:

Main Request (patent as granted)

"1. Device for bringing into position and arranging a carcass part of slaughtered poultry on or in a product carrier(150; 550; 650; 950), which device comprises:
- at least one assembly of a base part and an associated movable holder (221; 421; 521; 621; 921) for the carcass part of slaughtered poultry with positioning means associated with the holder (221; 421 ; 521; 621; 921) for the carcass part, which holder (221; 421; 521; 621; 921) is adapted for receiving a carcass part to be arranged on or in a product carrier (150; 550; 650; 950),
- drive means for moving the holder (221; 421; 521; 621; 921) relative to the base part associated with the respective holder (221 ; 421 ; 521 ; 621; 921) between a receiving position in which the carcass part can be received and a transfer position in which the carcass part is brought into a position relative to the product carrier (150; 550; 650; 950) that is suitable for transfer to the product carrier (150; 550; 650; 950), characterized in that the holder (221; 421; 521; 621; 921) is adapted to receive at least one of the following: a back half, a leg, or a leg part, and wherein in the transfer position the holder (221; 421; 521; 621; 921) positions a leg or leg part of the carcass part such that the hip side of the leg or leg part is below the knee side of the leg or leg part."

Auxiliary Request 1

Claim 2 is as claim 1 for the Main Request but with the following feature added at the end of the claim:

"wherein the holder (221; 421; 521; 621; 921) is movable between a substantially horizontal receiving position and a substantially vertical transfer position."

Auxiliary Request 2

Claim 12 is as claim 2 for Auxiliary Request 1.

Auxiliary Requests 3 and 4

Claim 1 is as claim 2 for Auxiliary Request 1.

Auxiliary Request 5

Claim 1 is as claim 2 for Auxiliary Request 1 with the following amendment (addition underlined by the board):

"... the hip side of the leg or leg part is below the knee side of the leg or leg part, and wherein the device is adapted to arrange back halves, legs or drumsticks in separating line carriers or cooling line carriers, or to arrange legs, drumsticks or thigh pieces in a product carrier which passes these carcass parts through a system for coating and/or marinating, and wherein the holder (221; 421; 521; 621; 921) is movable between a substantially horizontal receiving position..."

Auxiliary Request 6

"1. System for bringing into position and arranging a carcass part of slaughtered poultry on or in a product carrier (150; 550; 650; 950), wherein the system comprises at least one device for bringing into position and arranging a carcass part of slaughtered poultry on or in a product carrier (150; 550; 650; 950), which device comprises:

- at least one assembly of a base part and an associated movable holder (221; 421; 521; 621; 921) for the carcass part of slaughtered poultry with positioning means associated with the holder (221; 421; 521; 621; 921) for the carcass part, which holder (221; 421; 521; 621; 921) is adapted for receiving a carcass part to be arranged on or in a product carrier (150; 550; 650; 950),
- drive means for moving the holder (221; 421; 521; 621; 921) relative to the base part associated with the respective holder (221; 421; 521; 621; 921) between a receiving position in which the carcass part can be received and a transfer position in which the carcass part is brought into a position relative to the product carrier (150; 550; 650; 950) that is suitable for transfer to the product carrier (150; 550; 650; 950), characterized in that the holder (221; 421; 521; 621; 921) is adapted to receive at least one of the following: a back half, a leg, or a leg part, and wherein, in the transfer position, the holder (221; 421; 521; 621; 921) positions a leg or leg part of the carcass part such that the hip side of the leg or leg part is below the knee side of the leg or leg part, and wherein the device is adapted to arrange back halves, legs or drumsticks in separating line carriers or cooling line carriers, or to arrange legs, drumsticks

or thigh pieces in a product carrier which passes these carcass parts through a system for coating and/or marinating, and wherein the holder (221; 421; 521; 621; 921) is movable between a substantially horizontal receiving position and a substantially vertical transfer position, at least the assembly of the base part and holder (221; 421; 521; 621; 921) of the device being moveable along a track by associated drive means, in such a way that, in a supply station (810) along the track, a carcass part can be received in the holder (221; 421; 521; 621; 921) and, at an application location downstream of the supply station (810), the holder (221; 421; 521; 621; 921) is in the transfer position, wherein at the application location - with the holder (221; 421; 521; 621; 921) having the carcass part in the transfer position - the carcass part can be arranged on the product carrier (150; 550; 650; 950)."

Auxiliary Request 7

Claim 1 is as for Auxiliary Request 6 but with the following amendment (addition underlined by the board):
"...and a substantially vertical transfer position, and wherein the system comprises multiple devices and the mutual distance between the devices is variable, at least the assembly of the base part..."

Auxiliary Request 8

Claim 1 is as for Auxiliary Request 7 but with the following amendment (deletion marked by the board):
"... the hip side of the leg or leg part is below the knee side of the leg or leg part, ~~and wherein the device is adapted to arrange back halves, legs or drumsticks in separating line carriers or cooling line~~

~~carriers, or to arrange legs, drumsticks or thigh pieces in a product carrier which passes these carcass parts through a system for coating and/or marinating, and wherein the holder (221; 421; 521; 621; 921) is movable between a substantially horizontal receiving position...~~"

"6. Method for arranging a carcass part of slaughtered poultry on a product carrier, which carcass part is at least one of the following: a back half, a leg, or a leg part, use being made of a system according to claim 1."

"7. Method for arranging a carcass part of slaughtered poultry on a product carrier (150; 550; 650; 950), which method includes:

- arranging a carcass part of slaughtered poultry in a holder (221; 421; 521; 621; 921) of a device of a system according to claim 1, the holder (221; 421; 521; 621; 921) being in the receiving position,
- positioning the carcass part in the holder (221; 421; 521; 621; 921) by means of positioning means associated with the holder (221; 421; 521; 621; 921),
- moving the holder (221; 421; 521; 621; 921) from the receiving position to the transfer position, and
- transferring the carcass part from the holder (221; 421; 521; 621; 921) to the product carrier (150; 550; 650; 950), in such a way that the carcass part is arranged on or in the product carrier (150; 550; 650; 950), wherein the carcass part is at least one of the following: a back half, a leg, or a leg part."

VII. The appellant proprietor essentially argued as follows: The subject-matter of claim 1 of Auxiliary Request 3 was novel over document D15. Claim 1 of Auxiliary Requests 5 to 7 was clear. Auxiliary Request 8 should

be admitted to the appeal proceedings and the amendments in its independent claims were allowable. The appeal fee should be reimbursed.

VIII. The respondent opponent essentially argued as follows: The subject-matter of claim 1 of Auxiliary Request 3 lacked novelty over document D15. This also applied to claim 1 of the Main Request, claim 2 of Auxiliary Request 1, claim 12 of Auxiliary Request 2 and claim 1 of Auxiliary Request 4. Claim 1 of Auxiliary Requests 5 to 7 lacked clarity. Auxiliary Request 8 should not be admitted to the appeal proceedings because its independent claims contained unallowable amendments. The appeal fee should not be reimbursed.

Reasons for the Decision

1. The appeal is admissible.
2. *Background*

For use in poultry slaughterhouses, transportation devices usually have a plurality of product carriers for carcass parts of slaughtered poultry. The invention concerns devices and methods for bringing into position and transferring a carcass part in the form of a back half, a leg or a leg part of slaughtered poultry on or in such a product carrier. The device contains a movable holder (221; 421; 521; 621; 921) for receiving the carcass part and drive means for moving the holder between a substantially horizontal receiving position for the carcass part and a substantially vertical transfer position where it is transferred to the product carrier (150; 550; 650; 950), see figures 16, 18-21 of the patent, where the C-versions show the transfer position. In the transfer position, the holder

positions a leg or leg part of the carcass part such that its hip side is below its knee side.

3. *Main Request, Auxiliary Requests 1-4 - Novelty*

Claim 1 of the present Auxiliary Request 3 is identical with claim 1 of Auxiliary Request 3 underlying the impugned decision, which the decision held to lack novelty over document D15. The proprietor as appellant disputes this finding.

- 3.1 Document D15 is directed to a slaughtering line which opens a blood vessel such as the carotid artery of a fowl and allows the blood to run out, see the embodiment discussed on pages 16 and 17 and shown in figures 7a-7d. In that line, a fowl is hung by its head from a hook 10 on an endless conveyor 12 and its blood vessels are opened by blade 44, see figures 4a and 4b. Thereafter, the body is moved to a higher location than the location of the opening in order to allow the blood to run out. To do so, the slaughtering line contains a leg gripper unit 122 which takes out the fowl from hook 10 and hangs it by its feet in hook 144 of another endless conveyor. The leg gripper unit 122 comprises a set of arms 124 and a gripper 130 which can rotate about a pin 126 by means of a drive unit 128, see figure 7a. Gripper 130 comprises a fixed plate 132 and two gripper fingers 136 on its sides for gripping a drumstick of the legs of the fowl between the plate 132 and each finger, see figure 7b. Once the legs are gripped, the head of the fowl is released from hook 10 and the fowl falls forward between the arms 124. At the same time, the gripper is rotated through about 270° in the direction of arrow 140 by the drive unit 128 such that the fowl hangs by its legs and the drumsticks extend in the horizontal direction, see figure 7c.

Then, the leg gripper unit 122 is moved in the direction of arrow 142 until the legs project through the opening of hook 144, page 16, lines 33 to 35. A continuing movement of the leg gripper unit in the direction of arrow 142 under the hook 144, while the legs are at the same time released from the clamping of the fingers 136 leads to the fowl being hung by its feet from hook 144. During this movement, the gripper is rotated through about 90° counter the direction of arrow 140, see figure 7d.

3.2 Although figures 7a-7d of D15 show an entire chicken carcass, it is common ground that leg gripper unit 122 is suitable for receiving a back half, a leg or a leg part of the fowl. The board also concurs with the appellant that leg gripper unit 122 may be considered to be an assembly of a base part, i.e. arms 124, and an associated movable holder, i.e. gripper 130, while drive unit 128 may be regarded as drive means for moving the holder relative to the base part. The parties further agree that figures 7a and 7b show a substantially horizontal receiving position, since fixed plate 132 and gripper fingers 136 extend horizontally when the fingers are moved towards the fixed plate for gripping the drum sticks in figure 7b.

3.3 The points of contention in respect of novelty are whether D15 discloses the following features:

- a substantially vertical transfer position,
- drive means for moving the holder relative to the base part between a receiving position ... and a transfer position, and
- in the transfer position, the holder positions the carcass part such that the hip side of the leg or leg part is below the knee side of the leg or leg part.

- 3.4 The impugned decision, as also maintained by the respondent opponent, considered that the horizontal movement "in the direction of arrow 142 until the legs project through the opening which is delimited by the hook 144" according to page 16, lines 33-35 of D15 result in at least one position of the part in which the legs are arranged in a product carrier, thus forming a transfer position in which the holder 130 is in a substantially vertical position shown in figure 7c, see paragraph 2.25 of the reasons.
- 3.5 The claim requires that the transfer position is one in which the carcass part is brought into a position relative to the product carrier that is suitable for transfer to the product carrier. With regard to this feature, the parties agree, and this view is shared by the Board, that a position that is suitable for transfer may be so immediately before or upon release, and therefore does not necessarily refer to the position of the carcass part in the actual moment of release. Thus a holder transfer position that brings the carcass part into position immediately before or upon release so that it is then ready for transfer is a transfer position in the sense of claim 1.

Such a position also exists in D15. In that document, the arms 124 together with gripper 130 are moved from a starting position on the left side of hook 144 to an intermediate position further to the right, see horizontal arrow 142 in figure 7c and page 16, lines 33 to 35. In the intermediate position the fowl's feet which now protrude horizontally through the hook are brought into alignment with the U-shaped lower ends of hook 144 immediately prior to release from the gripper. The release occurs during a second continued rightward

movement with simultaneous counter rotation of gripper 130 relative to arms 124 by 90° which results in the horizontal position of fixed plate 132 and gripper fingers 136 shown to the right of the hook in figure 7d showing completed transfer with the vertically oriented feet retained in the lower hooks, see page 16, line 35 to page 17, line 3. From the term "a continuing movement ... in the direction of the arrow 142" ascribed to that second movement, the board gleans that the first horizontal movement along arrow 142 for bringing the fowl's feet beyond hook 144 occurs prior to the gripper's counter rotation during the second movement. Thus, fixed plate 132 and gripper fingers 136 still have their vertical orientation according to figure 7c during that first movement. In the board's view, in this intermediate position during that first movement in which the feet have been moved to the right of hook 144 and project through its central opening, the carcass is positioned ready for transfer, i.e. is in a position suitable for transfer, as indeed was also acknowledged by the appellant. Because the counter rotation takes place subsequently during the second movement, the holder is still in a substantially vertical transfer position, i.e. where fixed plate 132 and gripper fingers 136 still have the orientation shown in figure 7c. It is immaterial that the fowl's feet in that transfer position are still retained by the fingers 136. The fowl is in a suitable position for its transfer to hook 144 (which would occur upon release of the clamping produced by fingers 136).

- 3.6 With regard to the drive means for moving the holder relative to the base part, the board concurs with the appellant that drive unit 128 for relative movement between gripper 130 and arms 124 is not involved in attaining the actual transfer position during the

horizontal translation of the fowl from from the position of figure 7c to the intermediate position. Indeed, as can be inferred from arrow 142 in figure 7c, gripper 130 (with its fixed plate 132 and gripper fingers 136) moves in unison with arms 124 during that transfer. However, in the absence of any feature in claim 1 directed to relative movement between holder and base part during the entire transition from the receiving position to the transfer position, the board construes the feature "drive means for moving the holder relative to the base part ... between a receiving position ... and a transfer position" in a broad sense, i.e. that there must be relative movement at least during some stage of that transition. It is common ground that such relative movement between arms 124 and gripper 130 occurs between the horizontal receiving position of gripper 130 shown in figure 7b and its vertical orientation in figure 7c.

- 3.7 With regard to the relative orientation of the hip side and the knee side, the board concurs with the appellant that the fowl's drumsticks are pinched between the holder, i.e. fixed plate 132 and gripper fingers 136, such that the hip side is below the knee side in figures 7c and 7d regardless of the position of gripper 130. However, the receiving position is shown in figure 7b of document D15, where the hip side is located above the knee side before the fowl's drumsticks are pinched, see the arrows which indicate inward rotation of gripper fingers 136. As the holder is rotated about pin 126 by 270 degrees in order to bring the fowl into the position shown in figure 7c, see page 16, lines 28-30, the holder actually positions the carcass part such that the hip side is below the knee side during that rotation. D15 explicitly mentions rotation by the drive unit 128 during that transition, see page 16, line 30.

Therefore, the Board disagrees with the appellant who attributes the rotation solely to gravity (grounds of appeal, page 6, fourth paragraph from the bottom).

3.8 Hence, the board considers the subject-matter of claim 1 of the Auxiliary Request 3 to lack novelty over the disclosure of document D15, Article 54 EPC.

3.9 The above conclusion of lack of novelty over D15 applies also to claim 1 of the main request, which is broader due to the absence of a feature directed to the holder being movable between a substantially horizontal receiving position and a substantially vertical transfer position, and to the identical claim 2 of Auxiliary Request 1, claim 12 of Auxiliary Request 2 and claim 1 of Auxiliary Request 4. This was not contested by the appellant. None of these requests is therefore allowable.

4. *Auxiliary Requests 5-7 - Clarity*

Claim 1 of the present Auxiliary Request 5 is identical with claim 1 of Auxiliary Request 4 underlying the impugned decision, which the decision held to lack clarity. The proprietor as appellant disputes this finding.

4.1 It is common ground that none of the granted claims contains the additional feature "*wherein the device is adapted to arrange back halves, legs or drumsticks in separating line carriers or cooling line carriers, or to arrange legs, drumsticks or thigh pieces in a product carrier which passes these carcass parts through a system for coating and/or marinating*" in claim 1 of Auxiliary Request 5. In fact, this feature was only present in paragraph 17 of the patent and has

been combined with granted claims 1 and 2 into claim 1 of Auxiliary Request 5. Consequently, and following the decision **G 3/14** of the Enlarged Board of Appeal, that claim may be examined for compliance with the requirements of Article 84 EPC if the above feature introduces the non-compliance.

- 4.2 It is undisputed that the contested feature defines the transfer of back halves or leg parts of slaughtered poultry carried out by the device in terms of a result to be achieved or intended use ("device is adapted to arrange ... in carrier(s)") as it refers to an arrangement of the parts in elements (carriers of a separating or a cooling line, or that pass part through a coating/marinating system) that are not part of the device. According to the established case law of the Boards of Appeal, functional features defining a technical result may be permissible in a claim, see CLBA, 10th edition 2022, II.A.3.4 ("Functional features"). This also encompasses features defined by a result to be achieved. Such features are allowable as long as the person skilled in the art knows, without exceeding their normal skills and knowledge, what they have to do in order to obtain said result.

In the present case, this requirement is not met:

- 4.3 With reference to figures 16 and 18 to 21 of the patent in suit, the appellant argued that the contested feature is to be understood in the sense that a carcass part is presented to the claimed types of carriers by the holder part of the device in a vertical transfer position, with the whole legs being in a vertical position. The Board understands the appellant's reference to a vertical position of the legs in the above figures in the sense that the contested feature

shall be directed to a vertical arrangement of the tibia, with its heelside above its kneeside, see the C-versions of figures 16 and 18-21. However, neither a vertical position of the whole legs, nor of the tibia is spelled out in the claim. While the feature "hip side of the leg or leg part is below the knee side of the leg or leg part" is implicitly directed to a substantially vertical arrangement of the femur (which extends between hip and knee), it does not restrict the spatial arrangement of the tibia (which extends between knee and heel). The contested feature is therefore the only feature potentially directed to the position of the tibia.

- 4.4 As the contested feature does not explicitly state the position of the tibia, the claim would only be clear if the structural adaptation(s) of the holder, and/or additional adaptation(s) of other elements of the device for arranging the tibia in a vertical position can be inferred by the skilled person, and if they can then reduce the device to practice without undue burden. Assuming, *arguendo*, that separating line carriers, cooling line carriers and product carriers for coating/marinating are different from product carriers used in other areas of the poultry processing plant, i.e. the slaughtering line of D15 - as put forward by the appellant on page 22 of their grounds - and also assuming that poultry legs are transported through these lines in a vertical arrangement - as argued by the appellant during the oral proceedings before the Board - it is still not clear which structural adaptations of the device itself are required to bring a leg into that position. Does the configuration of a known holder have to be adapted? Or does it suffice if the drive means are adapted such that a known holder can bring a carcass part into a

different transfer position? As the claim is silent about the required adaptation(s), and these are not immediately apparent to the skilled person from common general knowledge, claim 1 of Auxiliary Request 5 lacks clarity.

- 4.5 This conclusion also applies to claim 1 of Auxiliary Requests 6 and 7, which also contain the feature *"wherein the device is adapted to arrange back halves, legs or drumsticks in separating line carriers or cooling line carriers, or to arrange legs, drumsticks or thigh pieces in a product carrier which passes these carcass parts through a system for coating and/or marinating"*. This was not contested by the appellant.

5. *Auxiliary Request 8 - Admissibility, Amendments*

The present Auxiliary Request 8 was filed with the statement of grounds of appeal. It is identical with Auxiliary Request 7 not admitted by the opposition division. The opponent as respondent requests its non-admission in appeal.

- 5.1 The statement of grounds of appeal was filed on 8 April 2019, which is before the date of the entry into force of the revised version of the Rules of Procedure of the Boards of Appeal (RPBA 2020). Therefore, pursuant to Article 25(2) RPBA 2020, Article 12(4) RPBA 2007 applies for the admission issues of this request. In this manner, Auxiliary Request 8 is subject to the discretion afforded by Article 114(2) EPC with Article 12(4) RPBA 2007. In exercising their discretion in a case where the opposition division did not admit a request, the Boards consider in particular, whether the opposition division had exercised its discretion improperly, see CLBA, V.A.5.11.3.h).

5.2 In the present case, the opposition division found that claim 7 of Auxiliary Request 7 contained amendments based on subject-matter not previously covered by the claims, and decided with reference to Guidelines, E-VI, 2.2 not to admit the request into the proceedings for reasons of procedural efficiency.

The Board does not find these reasons convincing.

5.3 The division referred to the correct passage of the Guidelines, which indeed mentions procedural efficiency as a reason for not admitting late-filed requests based on subject-matter not previously covered by the claims, see the explicit statement to that effect in the last paragraph of E-VI, 2.2 (reference is made to the 2018 version, which was in force on the day of the decision). Further, the proprietor indeed seems to have referred to clause 149 of the application as a basis for the amendment, see item 13.5 of the minutes of the oral proceedings. However, claim 7 of Auxiliary Request 7 (Auxiliary Request 8 in appeal) differed from original claim 14 only in that it was restricted to the second alternative "carcass part", and in that the term "device" was replaced with "system" in the back-reference to claim 1. According to well-established practice of the European Patent Office, claims to a device or to a system both relate to a product, and thus, to the same subject-matter. This was already stated in the 2018 version of Guidelines, see chapter F-IV,3.8 ("*However, ... a clear distinction must be maintained between product claims (for a device, apparatus or system) and process claims...*", emphasis added by the Board), of which the opposition division should have been aware. Their finding was thus clearly wrong. For the same reasons, the statement "*claim 7 of*

auxiliary request 7 cannot be based on clause 149 of the description of the application as filed, as said clause only refers back to a device and never to a system as defined in claim 7" (paragraph 2.93 of the impugned decision, emphasis added by the Board) is also evidently wrong.

- 5.4 In the present case, for a proper exercise of discretion, the division at least would have needed to argue why original claim 14 in their view could not provide a basis for claim 7. In the absence of such argumentation in the impugned decision, the Board decided to exercise their own discretion under Article 114 (2) EPC by refraining from the non-admission of Auxiliary Request 8.

- 5.5 The Board is also satisfied that the independent claims of Auxiliary Request 8 meet the requirements of Article 123(2) EPC for the following reasons:
 - 5.5.1 Independent claim 1 is a straightforward combination of original claims 1, 2, 3, 7 and 10 restricted to the second alternative "carcass part" of claim 7. The Board is not convinced by the respondent's objection that only original claim 8 contains a basis for the feature "multiple devices". Instead, the feature "*the system comprises at least one device*" of original claim 7 can be spelled out as "one or more devices" and therefore also relates to multiple devices. In addition to that, the feature "*mutual distance between the devices*" in original claim 10 only makes sense if the system comprises multiple devices.

- 5.5.2 Independent method claim 6 is based on original claim 13, restricted to the second alternative "carcass part". Its back-reference to "one or more of the preceding claims" directly extends to the combination of original claims 1-3, 7 and 10, i.e. the subject-matter of claim 1 of Auxiliary Request 8 referred to by the back-reference in claim 6.
- 5.5.3 Independent method claim 7 is not based on the second alternative "carcass part" in original claim 14, since the back-reference in claim 14 only referred to original claim 1, but not to original claims 2, 3, 7 or 10, now incorporated into claim 1 of Auxiliary Request 7. However, in the Board's view, claim 7 of Auxiliary Request is directed to a method of using the device according to claim 1 with its features as claimed, and thus, the amendments in claim 7 do not extend beyond the application as filed for the same reasons as claim 1 did not do so.

6. *Remittal*

In the present case, the opposition division did not admit Auxiliary Request 7 (Auxiliary Request 8 in appeal) because it did not fulfil the requirements of prima facie relevance according to the criterion of "clear allowability". In particular, the division did not consider patentability, namely novelty (Article 54 EPC), and inventive step (Article 56 EPC). To allow a full two instance examination of these issues remittal of the case for further prosecution appears appropriate in accordance with established jurisprudence. This is in accordance with the stated preference of the respondent. The appellant also supported this request.

7. *Reimbursement of the appeal fee*

7.1 The appellant proprietor requests reimbursement of the appeal fee in view of two alleged substantial procedural violations. In their view, their right to be heard was violated when the opposition division disregarded the feature "the carcass part is at least one of the following: a back half, a leg or a leg part" for the discussion of novelty of claim 12 of Auxiliary Request 3. Further, they argue that their right to a fair trial was violated by hearing the witnesses for the alleged prior use by sales of Linco 530 machines by the respondent opponent to the companies ETS Secoue, LDC Aquitaine and Coren, since it could not have been ruled out that the witnesses were influenced by the opponent's representative or the accompanying persons.

7.2 As noted by the Board in its communication in preparation for the oral proceedings in section 6:

"Pursuant to Rule 103(1)(a) EPC, the appeal fee is reimbursed (where the Board of Appeal deems an appeal to be allowable, and) if such reimbursement is equitable by reason of a substantial procedural violation. According to established case law, in order to render the reimbursement of the appeal fee equitable, a causal link must exist between the alleged procedural violation and the decision of the department of first instance that necessitated the filing of an appeal (CLBA, 9th edition 2019, V.A.9.7.1).

In the present case, the board is unable to see such a causal link, since Auxiliary Request 3 was also rejected for lack of novelty of claim 1 over document D15. That alone would have necessitated the filing of

an appeal, irrespective of the "additional" lack of novelty of claim 12 over D15 and also irrespective of the outcome of the hearing of the witnesses for the alleged prior use of Linco 530-machines ..."

- 7.3 As the appellant did not submit further arguments with regard to the existence of a causal link in the present case, the Board confirms its provisional view and thus decided not to order reimbursement of the appeal fee under Rule 103(1)(a) EPC. The issue whether the witnesses may have been biased can be left undecided.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated