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**Datasheet for the decision  
of 16 May 2022**

**Case Number:** T 0352/19 - 3.2.04

**Application Number:** 10014291.8

**Publication Number:** 2449893

**IPC:** A22C7/00

**Language of the proceedings:** EN

**Title of invention:**

Mass distribution device and molding device

**Patent Proprietor:**

GEA Food Solutions Bakel B.V.

**Opponent:**

Marel Further Processing B.V.

**Headword:**

**Relevant legal provisions:**

EPC Art. 56, 123(2)

**Keyword:**

Inventive step - (no)

Amendments - allowable (no)

requests of respondent going beyond upheld requests

requests presumed not to be maintained after withdrawal of appeal

appellant opponent - application of the principle of the prohibition of reformatio in peius

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

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**Case Number: T 0352/19 - 3.2.04**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 16 May 2022**

**Appellant:** GEA Food Solutions Bakel B.V.  
(Patent Proprietor) Beekakker 11  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
10 December 2018 concerning maintenance of the  
European Patent No. 2449893 in amended form.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** G. Martin Gonzalez  
T. Bokor

## Summary of Facts and Submissions

- I. The appeal was filed by the Appellant-Opponent against the interlocutory decision of the Opposition Division finding that, on the basis of the auxiliary request 8, the patent in suit met the requirements of the EPC.

An appeal was also filed but later withdrawn by the Respondent-Proprietor.

- II. The Opposition Division held *inter-alia* that claim 1 as upheld involved an inventive step over the cited prior art.

- III. In preparation for oral proceedings the Board issued a communication setting out its provisional opinion on the relevant issues.

Oral proceedings before the Board were held on 16 May 2022 in the absence of the Proprietor who announced by letter dated 6 April 2022 that they would not attend the scheduled oral proceedings.

- IV. The Appellant-Opponent requests that the decision under appeal be set aside and the European patent No. 2449893 be revoked.

With their appeal, now withdrawn, the Proprietor requested cancellation of the decision under appeal and maintenance of the patent in amended form according to one of auxiliary requests 5 and 6 filed before the Opposition Division on 31 October 2018. They also maintained auxiliary request 8, corresponding to that upheld in the decision under appeal, or the maintenance

of the patent according to one of auxiliary requests IX and X filed with letter of 6 September 2019.

V. The wording of claim 1 of the requests is as follows:

(a) Auxiliary request 5

"Mass distribution device (14) for supplying a mass of foodstuff starting material to one or more cavities (15) of a mould drum (9) for molding products (10) from the mass, comprising a base member (2) which extends partially around the outer cylindrical circumference of the drum (9) and which has an introduction area (26) through which the mass is fed to the cavities (15), wherein the base member (2) comprises in the introduction area (26) a multitude of holes (12) through which the mass is pressed into the cavities, characterized in, that a pressure member (5) is located at the inside of the base member (2)".

(b) Auxiliary request 6

Claim 1 as in auxiliary request 5 with the following features added at the end of the claim:

"...wherein the holes (12) differ in length

or

wherein in the introduction area (26) a slidable cutting member (6) is located which cooperates with the base member (2) to cut fibers, wherein the cutting member is a curved plate".

(c) Auxiliary request 8 (as upheld)

Claim 1 as in auxiliary request 5, with only the first or-feature option added at the end of the claim, that is:

"...wherein the holes (12) differ in length".

(d) Auxiliary request IX

Claim 1 as in auxiliary request 8 with the following amendments (emphasis by the Board to indicate amendment):

"...introduction area (26) a multitude of holes (12) arranged as an array of holes through which the mass is pressed...

...wherein the holes (12) differ in length and wherein in the center of the array, the holes are shorter than at the rim of the array

or

wherein in the introduction area (26) a slidable cutting member (6) is located which cooperates with the base member (2) too cut fibers, wherein the cutting member is a curved plate".

(e) Auxiliary request X

Claim 1 as in auxiliary request IX where the following last features have been deleted:

"...or

wherein in the introduction area (26) a slidable cutting member (6) is located which cooperates with the base member (2) too cut fibers, wherein the cutting member is a curved plate".

VI. In the present decision, reference is made to the following documents:

(D1) WO 2010/110655 A1  
(O1) US 4,821,376

VII. The Appellant's arguments can be summarised as follows:

The subject-matter of upheld claim 1 (auxiliary request 8) lacks an inventive step over the combination of teachings of D1 and O1. O1 addresses the same problem as the patent, namely that of uniform product shrinkage during cooking, albeit for a flat type moulding machine. The obvious application of its teachings to the drum type machine of D1 would inevitably result in holes of differing length. Claim 1 of auxiliary request X contains added subject-matter.

VIII. The Respondent's arguments can be summarised as follows:

The application of the teachings of O1 for a flat type machine to a drum type machine, as that of D1, is not straightforward and involves an inventive step. The original disclosure for the amendments to claim 1 of auxiliary request X is column 6, lines 7-15 of the application as published.

### **Reasons for the Decision**

1. The appeal is admissible.
2. Background

The invention relates to a device for supplying a mass of foodstuff to mold cavities in a mold drum, see

specification paragraph [0001]. Known devices have the deficiency that products with fibers such as beef or turkey tend to orient themselves in the direction of the product flow, i.e. for a drum in the turning direction of the drum. During cooking the fibers shrink in their length direction and the product thus deforms more in the direction of alignment for example from a round into an oval shape, which is undesirable, see specification paragraph [0002]. In order to avoid this effect the mass is fed into the mold cavities through an introduction area that comprises a multitude of holes through which the mass is pressed into the cavities. Due to these holes alignment of the mass fibers is avoided and the product shrinks uniformly during cooking, see paragraphs [0005]-[0006].

3. Respondent's requests

The Respondent-Proprietor originally requested the cancellation of the decision under appeal and maintenance of the patent in amended form according to one of auxiliary requests 5,6,8, filed before the Opposition Division on 31 October 2018, auxiliary request 8 corresponding to that upheld in the decision under appeal, or according to one of auxiliary requests IX and X filed with letter of 6 September 2019.

The Proprietor then withdrew their appeal but did not expressly amend their original requests. By withdrawing their appeal the patent Proprietor became respondent and the Opponent the sole appellant. Under well established case law a sole appellant is protected by the principle of prohibition of reformatio in peius , see Case Law of the Boards of Appeal, 9th Edition, 2019 (CLBA) V.A.3.1 and 3.1.6. Thus, in an appeal by the opponent against an interlocutory decision the non-

appealing patentee is primarily restricted to defending the patent as maintained in amended form. In the present case, auxiliary requests 5, 6 and IX go beyond the scope of the maintained claims, and would thus not be allowable under the principle of the prohibition of reformatio in peius. Therefore, following the withdrawal of the Proprietor's appeal the Board proceeds on the assumption that the requests of the Proprietor as Respondent are directed to the maintenance of the patent as upheld (auxiliary request 8) and thus dismissal of the Opponent's appeal, or alternatively, cancellation of the appeal and maintenance of the patent according to auxiliary request X filed with letter of 6 September 2019. Given that the Proprietor's appeal was withdrawn following the Board's preliminary opinion, and the Proprietor chose not attend the oral proceedings, the Proprietor's right to be heard concerning the Board's assessment of its requests in the wake of the withdrawal of the appeal has been respected by the Board.

4. Auxiliary request 8 - Inventive step
  - 4.1 The Appellant contests the Opposition Division's findings that claim 1 involves an inventive step when starting from D1 in combination with O1. In the Board's view, claim 1 of auxiliary requests 8 lacks an inventive step, contrary to the Division's conclusions.
  - 4.2 It is common ground that D1 is a suitable starting point for assessing inventive step. D1 describes a mass distribution device 18 for supplying a mass of foodstuff to cavities 44 of a mould drum 16. The distribution device has an introduction area 34, 42 for feeding the mass to the cavities 44 and a pressure

member 40 located at the inside of the distribution device 18.

4.3 It is thus not in dispute that the introduction area of the known drum type mass distribution device described in D1 does not have a multitude of holes through which the mass is pressed into the mould cavities. Consequently, D1 also does not disclose holes that differ in length.

4.4 Due to the multitude of holes, alignment of the mass fibers within the cavity is avoided and the product shrinks uniformly during cooking, see paragraphs [0005]-[0007] of the patent specification.

However, it is not apparent what technical effect is achieved by the feature of the holes having different lengths. The patent discusses it as one of two equivalent options (same or different length) but does not appear to associate any particular advantage or benefit with either option, see paragraph [0012]. Nor does the Division or the Respondent appear to have identified an associated effect, see impugned decision, sections 6.5.1 or 8.5; and Respondent's reply of 6 September 2019, section III.2.1.2.

4.5 The Board thus formulates the technical problem solely on the basis of the first feature of the multitude of holes, namely as how to obtain a product that shrinks uniformly during cooking.

4.6 It is not in dispute that the combination document O1 addresses the above problem, see O1, column 1, lines 25-31 and 40-44. The Respondent-Proprietor also does not contest that O1 teaches the relevant solution, albeit for a flat type reciprocating machine. In

particular, the multitude of fill orifices 313 in the mass introduction area of O1 correspond to the multitude of holes of claim 1, see O1 column 6, line 53 to line 7, line 2. In its decision, page 20, the Opposition Division had already held that applying a multitude of holes known from O1 to the D1 drum would be obvious.

- 4.6.1 The Respondent submits that it involves an inventive step to realize that the plate solution of O1 can be adapted to a drum type or cylindrical geometry as that of D1. In particular, the provision of a plurality of holes would cause an increased pressure of the base member onto the drum, which would require complex redesigning of the pressure bearing elements of the known drum machine. Also the use of a curved geometry for the cutting or stripper plate would raise design problems due to the increased stiffness of the curved form and also to the deformations of the curved member at different working temperatures of the machine. It is argued that a complex and non-obvious redesign of the involved machine parts would be necessary.
- 4.6.2 These arguments do not convince the Board. In the Board's view, the modifications needed for applying the teaching of O1 to D1 are within the customary design practice of the skilled person. It is not in dispute that the skilled person is an engineer involved in the design and development of meat patty production machines with the relevant mechanical and thermal design knowledge. The Board considers that redesigning machine parts to adapt them to modified mechanical or thermal loads or constraints when developing new machine models is within the routine work and abilities of such a skilled person. The Board does not therefore consider that adapting the plate of O1 to the

cylindrical geometry of a drum, when applying their teachings to the known drum type machine of D1, involves an inventive step. The Board thus confirms the finding of obviousness by the Division for the feature of the multitude of holes.

- 4.7 Turning to the remaining difference of holes of different length, the Respondent further submits, as also argued by the Opposition Division, that the obvious combination of D1 and O1 would not lead to this feature. The only obvious adaptation of O1 to a drum type machine would be by bending the relatively thin flat plate 312, which would result in holes of equal length.

However, in the Board's view, bending is not the only manufacturing technique available to the skilled person to adapt the flat plate of O1 to the drum of D1. Other well known techniques that the skilled person would consider as a matter of obviousness include, for example, machining. With machining only the side of the plate facing the drum needs to be adapted to a cylindrical surface, which would inevitably result in holes of unequal length. Thus, whether the holes are of equal or unequal length is the result of the technique chosen to adapt the plate of O1 to the drum of D1. As in the Board's view the skilled person would consider either of those techniques as a matter of obviousness, either result, holes of equal or unequal length, is perforce also obvious.

Alternatively, as put forward by the Appellant at the oral proceedings, the obvious combination of D1 and O1 necessarily leads to holes of different length. O1 teaches a flat sliding stripper plate 331 adjacent the side opposite of the orifice plate 312 to mould plate

32 and which has fill openings 332 that align with the fill orifices 313 of the plate 312 see column 6, lines 15-30. The orifice outlets are naturally immediately adjacent the mould cavity, see column 6, lines 52-64. Adapting this configuration as a matter of obviousness to a curved drum surface as in D1 would result in an orifice plate with a *curved* side facing the cavities on the drum and an opposing *flat* side for the sliding stripper plate, with their respective orifices and openings aligning. The orifices of this plate can then but be of unequal length.

4.8 The Board thus concludes that claim 1 of auxiliary request 8 lacks an inventive step, Article 56 EPC.

5. Auxiliary request X - Amendments

5.1 As noted by the Board in section 9.2 of its preliminary opinion regarding auxiliary requests IX and X:

*"Claim 1 of auxiliary requests IX and X add the feature that the holes are arranged as an array of holes wherein in the center of the array, the holes are shorter than at the rim of the array, taken from the original description column 6, lines 7-15, see (EP 2 449 893 A1 publication). The new claim (both requests) omits the geometrical limitation that in that specific embodiment one surface of the base member is flat and one is round. This structural limitations appear to be inextricably linked to the added feature that the holes have different length, as also explained in original column 6, lines 12-15. There appears to be no basis for the omission of this feature. Consequently, claim 1 of auxiliary requests IX and X appears to add subject-matter vis-a-vis the original disclosure, Article 123(2) EPC."*

5.2 The Respondent Proprietor refrained from comment after issuance of the communication. Absent any further submissions the Board sees no reason to change its point of view. It thus holds that claim 1 of auxiliary request X is deficient under Article 123(2) EPC.

6. For the above reasons the Board finds that the decision was wrong in concluding inventive step for the upheld claims (auxiliary request 8) and that therefore it must be set aside. It also finds for the remaining request that, taking into consideration the amendments made by the Respondent-Proprietor, the patent and the invention to which it relates do not meet the requirement of the Convention. The Board must thus revoke the patent pursuant to Article 101(3)(b) EPC.

**Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated