

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 30 November 2023**

**Case Number:** T 1809/22 - 3.2.07

**Application Number:** 10006876.6

**Publication Number:** 2251159

**IPC:** B26D1/36, B26D1/02, B26D1/157,  
B26D5/42, B26D7/06, B26D7/08,  
B26D7/18, B26D7/22, B26D7/24,  
B26D7/32, B26D7/30, B26D7/01,  
B26D5/00, A22C17/00, B26D1/143,  
B26D5/08

**Language of the proceedings:** EN

**Title of invention:**  
Conveyor drive for food slicing machine

**Patent Proprietor:**  
Formax, Inc.

**Opponents:**  
Weber Maschinenbau GmbH Breidenbach  
JERMI Käsewerk GmbH

**Headword:**

**Relevant legal provisions:**

EPC Art. 54, 56, 100(a), 105, 112(1)(a)

EPC R. 89(1), 106

RPBA 2020 Art. 10(4), 12(2), 12(6), 21

**Keyword:**

Intervention of the assumed infringer - intervention during  
appeal proceedings - admissible (yes)

Late-filed request - circumstances of appeal case justify  
admittance (no)

Novelty - main request (no) - auxiliary request (yes)

Inventive step - auxiliary request (yes)

**Decisions cited:**

G 0004/91, G 0001/94, G 0003/04, T 0296/93, T 0018/98,

T 0452/05, T 1713/11, T 0741/13, T 1665/16, T 0304/17,

T 1404/20, T 1891/20

**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 1809/22 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 30 November 2023**

**Appellant:** Formax, Inc.  
(Patent Proprietor) 9150 191st Street  
Mokena, Illinois 60448 (US)

**Representative:** v. Bezold & Partner Patentanwälte - PartG mbB  
Ridlerstraße 57  
80339 München (DE)

**Appellant:** Weber Maschinenbau GmbH Breidenbach  
(Opponent ) Günther-Weber-Strasse 3  
35236 Breidenbach (DE)

**Representative:** Grünecker Patent- und Rechtsanwälte  
PartG mbB  
Leopoldstraße 4  
80802 München (DE)

**Party as of right:** JERMI Käsewerk GmbH  
Intervenor ) Ritter-Heinrich-Strasse 2-4  
88471 Laupheim-Baustetten (DE)

**Representative:** Grünecker Patent- und Rechtsanwälte  
PartG mbB  
Leopoldstraße 4  
80802 München (DE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
18 July 2022 concerning maintenance of the  
European Patent No. 2251159 in amended form.**

**Composition of the Board:**

**Chairman**            G. Patton  
**Members:**            S. Watson  
                             Y. Podbielski

## **Summary of Facts and Submissions**

- I. Appeals were filed by both the patent proprietor and the opponent against the decision of the opposition division maintaining European patent No. 2 251 159 in amended form according to auxiliary request 0.

The appellants will continue to be referred to as the "patent proprietor" and the "opponent".

- II. On 7 March 2023 a notice of intervention according to Article 105 EPC was filed by an assumed infringer ("intervener"):

JERMI Käsewerk GmbH  
Ritter-Heinrich-Straße 2-4  
88471 Laupheim-Baustetten (DE).

- III. With letter of 6 June 2023 the Higher Regional Court of Karlsruhe requested that the appeal proceedings be accelerated pursuant to Article 10(4) RPBA.

With its communication of 22 June 2023 the board informed the Higher Regional Court of Karlsruhe and the parties that the appeal proceedings would be accelerated and that oral proceedings would be held on 30 November 2023.

- IV. In preparation for oral proceedings, the board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA, which took into account both appellants' statements of grounds of appeal and their respective replies; the notice of intervention of 7 March 2023; as well as the the opponent's submissions of 22 May 2023 and the patent proprietor's three submissions of 6 July 2023.

- V. All parties responded to the board's communication. The patent proprietor with submissions of 2 October 2023 and 21 November 2023 and the opponent and intervener with joint submissions of 16 November 2023.
- VI. Oral proceedings before the board took place on 30 November 2023.
- VII. At the conclusion of the proceedings the decision was announced. Further details of the oral proceedings can be found in the minutes.
- VIII. The final requests of the parties are as follows:

The patent proprietor requests

- that the intervention by the intervener be found inadmissible;  
and that, before a positive finding on admissibility be made, two questions identified on page 12 of the patent proprietor's submissions of 6 July 2023 in response to the notice of intervention be referred to the Enlarged Board if the Board deviates from the interpretation of Article 105(1) (a) EPC provided in G 4/91;  
whereby should the board deviate from G 4/91 without referring the first question, a precautionary Rule 106 EPC objection was also raised in writing on page 13 of the patent proprietor's submissions of 6 July 2023 in response to the notice of intervention;
- that the decision under appeal be set aside; and
- that the opposition be rejected so that the patent is maintained as granted (main request),
- or that the patent be maintained in amended form on the basis of one of the sets of claims according to

auxiliary requests 1, 2, 0, 1.1, 2.1, 11, 11.1, 12, 12.1, 9, 9.1, 5, 5.1, 6, 6.1, 8, 8.1, 10, 10.1, 7, 3 or 4, whereby

- auxiliary requests 1 to 12 were filed on 18 January 2021;
- auxiliary requests 0, 1.1, 2.1, 5.1, 6.1, 8.1 to 12.1 were filed on 18 March 2022, and
- auxiliary request 0 was found by the opposition division to meet the requirements of the EPC,
- additionally, that the case be remitted to the opposition division should the alleged public prior use "GigaSlicer" become relevant for auxiliary request 0.

- IX. Both opponent and intervener request that
- the decision under appeal be set aside, and
  - the patent be revoked in its entirety.
- X. The arguments of the parties relevant for the decision are dealt with in detail in the reasons for the decision.
- XI. The following documents are referred to in this decision:
- B1: Statement of claim made by the patent proprietor against JERMI Käsewerk GmbH
  - B2: Summons from Regional Court of Mannheim dated 1 December 2022
  - D4: JP 2003335407 A
  - D10: DE 100 18 568 A1
  - D104: Hand-drawn sketch of drive arrangement for alleged public prior use "GigaSlicer".
- XII. Independent claim 1 of the main request reads as follows:

"A food article feed apparatus (120) for conveying food articles in a slicing machine comprising:  
a first conveyor (992) for moving a first food article toward a cutting plane (2081);  
a second conveyor (994) for moving a second food article toward the cutting plane (2081);  
characterized in that said first conveyor (992) is driven by a hollow shaft (1064);  
said second conveyor (994) is driven by a second shaft (1060); said second shaft independently operating within said hollow shaft."

XIII. Independent claim 1 of auxiliary request 0 reads as follows (feature labelling as used by the parties):

- 1.1 "A food article feed apparatus (120) for conveying food articles in a slicing machine comprising:
- 1.2 a first conveyor (992) for moving a first food article toward a cutting plane (2081);
- 1.3 a second conveyor (994) for moving a second food article toward the cutting plane (2081);  
characterized in that
- 1.4 said first conveyor (992) is driven by
- 1.6 a hollow shaft (1064);
- 1.5 said second conveyor (994) is driven by a second shaft (1060);
- 1.7 said second shaft independently operating within said hollow shaft;
- 1.8 a third conveyor (996) for moving a third food article;
- 1.9 a fourth conveyor (998) for moving a fourth food article;
- 1.10 said fourth conveyor driven by a second hollow shaft;
- 1.11 said third conveyor (996) driven by a second



shaft;

1.12 said second shaft operating within said second hollow shaft;

1.13 said first conveyor (992) is adjacent to said second conveyor (994);

1.14 said third conveyor (996) is adjacent to said fourth conveyor (998);

1.15 said second conveyor (994) is adjacent to said third conveyor (996);

1.16 said hollow shaft (1064) and said second shaft (1060) extend from a non-adjacent side of said first conveyor (992) to independent drive sources;

1.17 said second hollow shaft and said second shaft extend from a non-adjacent side of said fourth conveyor (998) to independent drive sources."

XIV. As the wording of the claims of the further auxiliary requests is not relevant to the decision, the claims have not been reproduced here.

## **Reasons for the Decision**

### 1. Admissibility of the intervention

1.1 The intervener filed a notice of intervention on 7 March 2023 in response to a statement of claim from the patent proprietor (document B1) and a summons from the Regional court of Mannheim (document B2) which were received by the intervener on 7 December 2022.

1.2 The patent proprietor contested the admissibility of the intervention for the following reasons:

(a) the withdrawal of the infringement action referred to in the notice of intervention had retroactive

effect in German law (ex tunc) so that the infringement action never existed and was, in any case, no longer pending when the notice of intervention was filed;

- (b) the three month intervention period set out in Rule 89(1) EPC had already expired as the time limit had started when the intervener had become aware of earlier preliminary injunction proceedings;
- (c) an appeal fee was not paid;
- (d) the intervention was by a straw man and therefore inadmissible.

2. (a) pendency of the infringement action

2.1 It is not decisive for the admissibility of the intervention that the infringement action had been withdrawn when the notice of intervention was filed.

2.1.1 The condition under Article 105(1)(a) EPC is a factual one which was fulfilled when the infringement action was instituted.

The patent proprietor argued at the oral proceedings that it was purely a question of law whether the infringement action, once withdrawn, was considered to have never existed. However, Article 105 EPC requires only that infringement proceedings have been instituted against a third party, but makes no mention that such proceedings must still be pending. It therefore has to be considered whether the proceedings had, in fact, been instituted, regardless of any later course such proceedings might take.

In the present case the patent proprietor did not contest that the action had been brought and the

statement of claim and summons had been received by the intervener on 7 December 2022.

2.1.2 The institution of such proceedings created a substantial legitimate interest for the assumed infringer to enter the opposition proceedings (see T 1713/11, Reasons 2.2). This interest pertains even after the withdrawal of the infringement action as there is no bar on the proprietor instigating another such action at a later date (Sec. 269 German Code of Civil Procedure, (6)).

2.2 The patent proprietor argued that according to the Enlarged Board of Appeal's interpretation of the EPC, given in decision G 4/91 (Reasons 2), both the opposition (or appeal) proceedings and the infringement proceedings must be contemporaneous.

The relevant paragraph in G 4/91 reads as follows:

*"Thus intervention is provided for when both opposition proceedings before the EPO and infringement proceedings before a national court are in existence at the same time, in respect of the same European patent. Intervention must be initiated by the assumed infringer by filing the notice of intervention at the EPO within three months of the date on which the infringement proceedings were instituted."*

The patent proprietor interpreted the reasoning given by the Enlarged Board of Appeal as meaning that intervention is only provided for when both opposition proceedings and infringement proceedings are in existence at the same time.

2.3 The board, however, does not agree with the patent proprietor's interpretation of the Enlarged Board of Appeal's decision in this respect and instead concurs with the interpretation in decision T 1713/11, Reasons 2.7, that there is no requirement that infringement proceedings are still pending when an intervention is filed. All that is required under Article 105(1)(a) EPC is that proceedings for infringement (covering injunctions as well) have been instituted against the intervening party.

This interpretation is not in contradiction to G 4/91, Reasons 2. In that case, the Enlarged Board was concerned *inter alia* with the question whether opposition proceedings had to be in existence when a notice of intervention was filed. It answered this question in the affirmative. In doing so it also gave an explanation as to one of the reasons why the legislator introduced the possibility of interventions, namely to avoid unnecessary duplication of work in proceedings before the EPO and national courts (Reasons 2 and 3). However, there is no indication that the parallel existence of national and opposition proceedings at the date of filing an intervention is a precondition for the admissibility of the intervention. It is only the pendency of opposition proceedings which is required (see G 4/91 headnote and Reasons 7).

2.4 Request for referral of questions to the Enlarged Board of Appeal and objection under Rule 106 EPC

2.4.1 The patent proprietor requested that the following questions be referred to the Enlarged Board of Appeal:

- (i) *"Is the pendency of the infringement action at the time of filing the declaration of*

*intervention a requirement for an admissible intervention according to Article 105(1) (a) EPC?"*

- (ii) *"if not, is an intervention inadmissible if the withdrawal of an infringement action under national law has a retroactive effect, i.e., the infringement action is considered as never pending?"*

2.4.2 The patent proprietor argued that if the board deviated from the interpretation of Article 105(1) (a) EPC given in decision G 4/91 (Reasons 2), then the board must refer the questions. According to the patent proprietor, the board had no discretion not to refer the questions as Article 21 RPBA sets out that if a board considers it necessary to deviate from an interpretation of the Convention in a decision of the Enlarged Board of Appeal then the question must be referred to the Enlarged Board of Appeal.

2.4.3 The patent proprietor also raised a precautionary objection under Rule 106 EPC should the board deviate from the interpretation given by the Enlarged Board of Appeal in G 4/91 without referring the questions put forward by the patent proprietor.

2.4.4 Under Article 112(1) (a) EPC a party to an appeal may request that questions be referred to the Enlarged Board of Appeal in order to ensure uniform application of the law, or if a point of law of fundamental importance arises.

It is established case law that the questions must be relevant for deciding the case under appeal, they cannot only be of theoretical significance for the

decision (see Case Law of the Boards of Appeal ("CLB"), 10th edition 2022, V.B.2.3.3).

2.4.5 However, as set out in point 2.3 above, the board does not deviate from the Enlarged Board of Appeal's interpretation of the Convention, but rather does not agree with the patent proprietor's understanding of the Enlarged Board of Appeal's interpretation.

2.4.6 There is therefore no need to refer the questions to the Enlarged Board of Appeal as the board has not deviated from an interpretation of the EPC given by the Enlarged Board of Appeal.

2.4.7 Similarly, since the objection according to Rule 106 EPC raised by the patent proprietor is a precautionary measure in case the board intended to deviate from G 4/91 without referring the afore-mentioned first question to the Enlarged Board of Appeal, the board dismisses the objection.

2.5 (b) earlier preliminary injunction proceedings

The earlier preliminary injunction proceedings, to which the proprietor refers did not lead to the service of a request for a preliminary injunction on the assumed infringer and are therefore not relevant (see T 452/05, Reasons 1.2).

The proprietor's suggestion that the mere instigation of these proceedings, without the knowledge of the assumed infringer, should trigger the time limit of three months under Rule 89(1) EPC cannot be followed.

The three month time limit is necessary for the assumed infringer to prepare the notice of intervention,

including any supporting evidence, and thus cannot start without the assumed infringer's knowledge of such proceedings.

The patent proprietor further suggests that in the absence of any official service of relevant documents, the assumed infringer's knowledge of such proceedings, however it has been obtained, should be taken as a starting point for the calculation of the three month time period under Rule 89(1) EPC. There is no legal basis for this suggestion.

Article 105(1) EPC refers to proceedings which have been instituted, which in civil proceedings usually means the service of the relevant documents on the other party. For reasons of legal certainty it is required that the time period under Rule 89(1) EPC can be unambiguously established (see T 304/17, Reasons 10). This is not the case if the relevant starting point is taken as the infringer's knowledge of possible proceedings, obtained regardless of the serving of official documents.

The patent proprietor argued that the three month time limit for filing the notice of intervention from the first infringement proceedings was intended to provide legal certainty only for the patent proprietor. Therefore, the argument that legal certainty required official service of relevant documents relating to infringement proceedings instituted by the patent proprietor was without merit.

However, the decisions cited by the patent proprietor and discussed hereafter are not relevant to the present case as they both refer to cases where the issue

related to proceedings instituted by the alleged infringer and not by the patent proprietor.

In T 296/93 the board held that the two alternative means of intervention in Article 105 EPC are mutually exclusive, so that if proceedings have been instituted under the first sentence of Article 105(1) EPC 1973 (now Article 105(1)(a) EPC), an alleged infringer cannot trigger a further three month time limit by instituting proceedings itself under the second sentence of Article 105(1) EPC 1973 (now Article 105(1)(b) EPC) (see T 296/93, Reasons 2.4 to 2.7).

In T 18/98 the intervener III had not been sued by the patent proprietor itself, so that the board found that no infringement proceedings under Article 105(1), first sentence, EPC 1973 had taken place (Reasons 2.2). The only admissible intervention was that filed by the intervener II, but that intervener had instituted the proceedings under Article 105(1), second sentence, EPC, which is now Article 105(1)(b) EPC (Reasons 2.1).

None of the above cases lends support to the conclusion that, once a patent proprietor has instituted infringement proceedings against the intervener, the intervener's knowledge of such proceedings without formal service suffices to trigger the three month time period under Rule 89(1) EPC.

2.5.1 Therefore, as the preliminary injunction proceedings were withdrawn before official service, the three month period set out in Rule 89(1) EPC was not triggered by these proceedings.

2.6 (c) no appeal fee paid



- 2.6.1 It was established in G 3/04 that there is no legal basis for the payment of an appeal fee by an intervener in appeal proceedings (G 3/04, Reasons 11, final paragraph).
- 2.6.2 The patent proprietor argued that the facts in G 3/04 were different as the intervener in that case did not seek appellant status in its own right. In the present case, according to the patent proprietor, the intervention should be found inadmissible as no appeal fee was paid although the intervener seeks appellant status as it requests revocation of the patent in its entirety and attacks the patent in its maintained form.
- 2.6.3 However, following G 3/04, it is clear that an intervener who intervenes during appeal proceedings has no possibility of paying an appeal fee, therefore non-payment of the appeal fee cannot make the intervention inadmissible.
- 2.7 (d) intervener as a straw man
  - 2.7.1 The patent proprietor's final argument that the intervention is inadmissible because it was filed by a straw man without any legitimate interest in the intervention and in an attempt to circumvent the Rules of Procedure of the Boards of Appeal regarding late-filing of evidence, is also not convincing.
  - 2.7.2 The patent proprietor argued that as the intervener and opponent have the same representative and the infringement action against the intervener has been withdrawn that the intervener had no legitimate interest in the intervention.

- 2.7.3 It is established case law that "any third party" referred to in Article 105(1) EPC requires that the intervener must be a separate legal entity from the parties to the proceedings. In the present case, the intervener (JERMI Käsewerk GmbH) is a separate independent legal entity to the opponent (Weber Maschinenbau GmbH Breidenbach) and therefore is a third party who may intervene in opposition proceedings if it can prove that proceedings for infringement of the same patent have been instituted against it (Article 105(1) (a) EPC).
- 2.7.4 An opponent and an intervener may appoint a common representative (T 1891/20 of 15 November 2021, Reasons 1.3.9).
- 2.7.5 The board also cannot see that the intervention is in any way an "abuse of due process" by the opponent and/or the intervener. It would not have been possible for an intervention to be filed without the initial action of the patent proprietor instituting infringement proceedings.
- 2.8 Therefore, as the notice of intervention was filed within the three-month time limit set out in Rule 89(1) EPC, no appeal fee could be paid and the intervener is a third party to the proceedings, the intervention is admissible.
3. *Main request - claim 1 as granted - novelty (Article 54 EPC)*
- 3.1 The opposition division found that the subject-matter of claim 1 of the patent as granted was not novel with respect to the disclosure of document D10.

3.2 In its statement of grounds of appeal, the patent proprietor contested the opposition division's findings, arguing that document D10 did not show a food article feed apparatus and a slicing machine in combination as required by claim 1 as granted. Further, the conveyors of the apparatus of D10 were not suitable for moving food articles into the slicing plane.

3.3 The board does not find the patent proprietor's arguments convincing.

3.3.1 Claim 1 of the patent as granted does not comprise both a food article feed apparatus and a slicing machine but is directed to a food article feed apparatus which is suitable for conveying food articles in a slicing machine.

3.3.2 The patent proprietor argued, referring to the Guidelines for Examination F-IV.4.15 (March 2023) and decision T 741/13, that due to use of the phrase "in a slicing machine", the feature of a "food article feed apparatus (120) for conveying food articles in a slicing machine" was ambiguous and could refer either to a slicing machine together with a food article feed apparatus or to a food article feed apparatus alone.

Therefore, according to the patent proprietor, as claim 1 was ambiguous, the description and drawings should be used to interpret the claim. All embodiments in the description refer to the combination of a slicing machine and food article feed apparatus, so that the claim should be construed as including both the slicing machine and the food article feed apparatus.

3.3.3 However, the board does not see any ambiguity in the claim as it is addressed to "a food article feed

apparatus for conveying food articles in a slicing machine". This is construed as meaning a food article feed apparatus *suitable for* conveying food articles in a slicing machine (see Guidelines for Examination, F-IV.4.13.1 (March 2023)).

- 3.3.4 In any case, even if the description were used to interpret the claims, it is established case law that limitations should not be read into a claim that are not suggested by the explicit wording of the claim (CLB, *supra*, II.A.6.3.4). Claim 1 does not comprise a slicing machine. It is directed to a food article feed apparatus that must be suitable for conveying food articles in a slicing machine.

The board notes that in T 741/13, cited by the patent proprietor, the claim was directed to a "vertical conveyor in a picking system" (translation by the present board). The claim was construed broadly by the competent board in that case as a vertical conveyor suitable to be placed in a picking system and was not limited to the combination of a vertical conveyor and a picking system (see Reasons 1.1).

- 3.3.5 The board also does not find the patent proprietor's further arguments convincing.

The patent proprietor argued that the conveyors of D10 were not suitable for moving food articles toward a cutting plane because the "Rangiereinheit 4" of D10 did not show the downstream end of the food article feed apparatus being located shortly before the slicing plane. The patent proprietor also argued that "moving a first/second food article toward the cutting plane" implied that the food article feed apparatus was part of a food article feed system which allowed an

adjustment of the thickness of the slices by adjusting the feed rate.

However, as reasoned by the opposition division and argued by the opponent, the "Rangiereinheit 4" of D10 is *suitable* for conveying food articles toward a cutting plane as this only implies that the conveyors are capable of moving unspecified food articles towards an unspecified cutting plane. The further features seen as implicit by the patent proprietor, such as the feed apparatus being located shortly before the slicing machine or the requirement of thickness adjustment through feed rate adjustment, do not form part of claim 1 of the main request and cannot be used to distinguish the subject-matter of the claim from the apparatus of document D10.

3.4 The patent proprietor has therefore not convincingly shown that the opposition division was incorrect in finding that the subject-matter of claim 1 of the patent as granted lacked novelty over the disclosure of D10.

4. *Consideration of auxiliary requests 1 and 2 before auxiliary request 0*

4.1 Auxiliary requests 1 and 2 were filed on 18 January 2021 with the patent proprietor's response to the notice of opposition.

4.2 The opponent objected to these requests being ranked above auxiliary request 0 in appeal proceedings. Auxiliary request 0 was found by the opposition division to meet the requirements of the EPC.

The opponent argued that these requests could and should have been presented as higher ranking before the opposition division, so that the opposition division could decide on them. They should therefore not be admitted into the appeal proceedings under Article 12(6) RPBA.

- 4.3 The patent proprietor decided the order in which its auxiliary requests were to be considered by the opposition division. By placing the set of claims according to auxiliary request 0 above auxiliary requests 1 and 2 during opposition proceedings, the patent proprietor effectively replaced the first auxiliary request with auxiliary request 0. Although auxiliary requests 1 and 2 as such (i.e. the sets of claims labelled auxiliary request 1 and 2) were not withdrawn, they were never procedurally active as there was no need for the opposition division to decide on them once a higher ranking request had been found allowable. They became effectively the second and fourth auxiliary requests according to the order of requests given by the patent proprietor during the oral proceedings before the opposition division (see minutes, page 1, third paragraph). With this course of action, the patent proprietor prevented the opposition division from taking a decision on auxiliary requests 1 and 2, and it consequently prevented the board from reviewing that decision on appeal (Article 12(2) RPBA).

According to Article 12(6), second sentence, RPBA, a board should not admit requests which should have been submitted in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justified their admittance.

Therefore, although the status of auxiliary requests 1 and 2 below auxiliary request 0 is not in question, they cannot be made higher ranking than auxiliary request 0 unless the circumstances of the appeal case justify this (see T 1404/20, Reasons 1.1 to 1.5).

4.3.1 The patent proprietor argued that special circumstances justifying the reordering of the claims were present due to the filing of an intervention and because the opposition division admitted a new novelty attack based on D10 at the oral proceedings.

4.3.2 The board notes that the patent proprietor re-ordered its auxiliary requests 1 and 2 with its statement of grounds of appeal of 23 November 2022, prior to the notice of intervention of 7 March 2022.

Further, the board cannot see why the intervention in the present case would require previously lower ranking auxiliary requests with broader claims to be filed above the version found to meet the requirements of the EPC by the opposition division. The main request is not allowable for the reasons given in the appealed decision, i.e. irrespective of any arguments or evidence brought forward by the intervener.

4.3.3 The patent proprietor's second argument that due to the introduction of a novelty attack based on D10 for the first time at the oral proceedings it was "forced to insert auxiliary request 0 between the main request and auxiliary request 1 to make sure that auxiliary request 0 was admitted by the opposition division" also cannot be followed (see patent proprietor's rejoinder of 6 July 2023 to the opponent's reply to the appeal, page 2, third paragraph).

Auxiliary request 0 was filed on 18 March 2022. According to the minutes of the oral proceedings before the opposition division, at the beginning of the oral proceedings and before the opponent had raised the novelty attack based on D10, the patent proprietor stated that the auxiliary requests were to be considered in the order: "0, 1, 1.1, 2, 2.1..." (see minutes, page 1, third paragraph). Therefore, according to the minutes of the oral proceedings, the patent proprietor had already chosen this order before being made aware of a new objection to the main request and therefore the board cannot see any connection between the re-ordering and the new objection.

- 4.4 The board therefore decided that auxiliary requests 1 and 2 were not to be considered in the appeal proceedings before auxiliary request 0 (Article 12(6) RPBA).
5. Therefore, the appeal of the patent proprietor should be dismissed.

#### Appeal of the opponent

6. *Scope of the intervention*
  - 6.1 The patent proprietor argued that as the intervention was filed during appeal proceedings, the intervener could only take on the status of a non-appealing opponent, i.e. party as of right (G 3/04, Reasons 10) and was therefore unable to object to the patent in its maintained form.
  - 6.2 The context in which G 3/04 was written must, however, be taken into account. The question being considered by the Enlarged Board was whether, after withdrawal of the



sole appeal, appeal proceedings could be continued by a third party who had intervened during the appeal proceedings. The Enlarged Board decided that appeal proceedings could not be continued as an intervener was unable to take on the procedural status of an appellant and therefore had to be regarded as a non-appealing opponent (party as of right), but with the critical distinction that the intervener had the right to raise new grounds of opposition (G 3/04, Reasons 10; G 1/94, Reasons 13). This may include new evidence which a board has no discretion not to admit (CLB, *supra*, III.P.3.1, referring to T 1665/16, Reasons 2.2 to 2.3 and 2.5).

Therefore, the board takes the view that, in the present case, although the intervener could not continue appeal proceedings should both the opponent and patent proprietor withdraw their appeals, the intervener may raise objections to the patent in the form maintained by the opposition division. An intervener is allowed to raise new grounds for opposition, and an appeal in the present case has been filed by the first opponent (in addition to the patent proprietor's appeal).

This is in line with the general purpose of an intervention, to allow the assumed infringer to defend itself against a patent proprietor's action (G 1/94, Reasons 13). It would be contrary to this purpose if the intervener could not raise objections, possibly new, to the patent in maintained form.

There would then be no purpose to an intervention in cases where a patent is maintained in amended form and only opponent(s) have appealed. According to the patent

proprietor's understanding of G 3/04, the intervener would then not be able to raise any objections at all.

In T 1891/20 of 15.11.2021 an intervention was found admissible during appeal proceedings in a case where the patent was maintained in amended form and no appeal was filed by the patent proprietor. The intervener raised objections against the patent in modified form (see T 1891/20, Reasons 3.1.4).

7. *Novelty - claim 1 -auxiliary request 0*

- 7.1 The opponent and the intervener both raised three novelty objections against claim 1 of auxiliary request 0, with respect to the disclosure of:
- (a) the alleged public prior use "GigaSlicer";
  - (b) the lower conveyor of D4; and
  - (c) the upper conveyor of D4.

None of these objections have been dealt with in the decision under appeal.

- 7.2 The patent proprietor argued that the new objections should not be admitted into the appeal proceedings as they were late-filed and could and should have been raised during the opposition proceedings (Article 12(6) RPBA).

- 7.3 However, although their admittance as new objections of the opponent alone would have been at the board's discretion, as the intervener may raise new grounds for opposition, it follows that it can also raise new objections under existing grounds for opposition when filing its intervention (see point 6. above). Therefore, these objections form part of the appeal

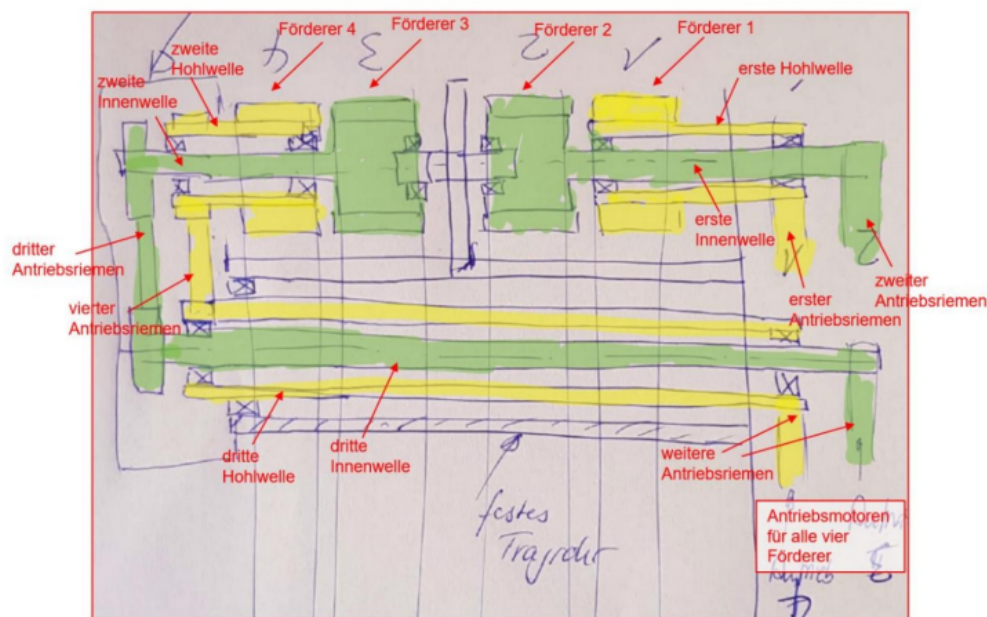
proceedings and it is not necessary to consider their admittance under the RPBA.

8. *Novelty - "GigaSlicer" alleged public prior use*

8.1 The opponent and the intervener argued that the "GigaSlicer" apparatus disclosed all the features of claim 1 of auxiliary request 0 and, as the priority for claim 1 was not validly claimed, the exhibiting of the "GigaSlicer" at the InterPack trade fair in Düsseldorf, Germany in April 2008 made the "Gigaslicer" publicly available.

8.2 The patent proprietor contested the public availability of the alleged public prior use and argued that the priority had been validly claimed and the "GigaSlicer" apparatus did not disclose all the features of claim 1 of auxiliary request 0.

8.3 The alleged drive arrangement for the alleged public prior use is represented by sketch D104. The first to fourth conveyors are shown from right to left in the sketch.



(D104 with annotations (taken from the opponent's statement of grounds of appeal, page 11))

8.4 The patent proprietor argued that D104 showed all four drive sources for the two pairs of hollow and inner (second) shafts on the non-adjacent side of the first conveyor, so that at least feature 1.17 was not disclosed by this drive shaft arrangement.

According to the patent proprietor, claim 1 requires that the drive sources for the first and second conveyors are on the opposite side of the apparatus to the drive sources for the third and fourth conveyors.

8.5 The opponent and the intervener argue that the "GigaSlicer" shows feature 1.17. The second hollow shaft arrangement or the third hollow shaft arrangement in D104 can be regarded as disclosing features 1.10 and 1.11. With either arrangement, feature 1.17 is disclosed.

The opponent and the intervener understand the term in features 1.16 and 1.17, that the shafts "extend from a non-adjacent side...to independent drive sources" to mean that the shafts may extend in any direction from the non-adjacent side and to any transmission element which is directly or indirectly connected to a motor.

8.6 The board, however, agrees with the patent proprietor that features 1.16 and 1.17 have to be interpreted such that the independent drive sources, which correspond to the origin of movement of the shafts, i.e. the motors, must be placed in two pairs, one pair on the non-adjacent side of the first conveyor, the other pair on the non-adjacent side of the fourth conveyor, for the following reasons.

8.6.1 Features 1.16 and 1.17 do not explicitly define that the drive sources for the shafts driving the first and second conveyors must be on the opposite side of the four conveyors to the drive sources for the shafts driving the third and fourth conveyors.

8.6.2 However, the two features must be read in combination with each other and also with features 1.13 to 1.15 which define the conveyor arrangement. The skilled person recognises that if the hollow and second (inner) shafts for the first and second conveyors "extend from a non-adjacent side of said first conveyor to independent drive sources" and the hollow and second (inner) shafts for the third and fourth conveyors "extend from a non-adjacent side of said fourth conveyor to independent drive sources" (emphasis added by the board), that the two shaft pairs extend outwardly *from* the opposite outsides of the four conveyors and cannot all extend from the same side of only one conveyor to the drive sources.

In addition, the skilled person understands that the shafts must extend to the independent drive sources, i.e. the shafts must extend to the motors themselves, it is not sufficient that they extend to transmission elements, such as drive belts, which are driven by the drive sources.

8.7 If, as argued by the opponent and the intervener, the second hollow/inner shaft arrangement in D104 is regarded as driving the third and fourth conveyors (second hollow shaft, second inner shaft, shown at the top left of D104), feature 1.17 is not disclosed. This is because the second shaft arrangement does not extend to independent drive sources from the non-adjacent side of the fourth conveyor, but only to transmission elements, namely the third and fourth drive belts (left-hand side of D104). These transmission elements are connected to the drive sources via the third hollow/inner shaft arrangement (shown across the bottom of the sketch of D104).

8.7.1 Alternatively, if the third hollow/inner shaft arrangement in D104 is regarded as driving the third and fourth conveyors, feature 1.17 is also not disclosed because the shafts of the third hollow/inner shaft arrangement extend only to transmission elements, namely the further drive belts shown at the bottom right of sketch D104, and not to the drive sources.

8.8 Therefore at least feature 1.17 is not disclosed by the alleged public prior use "GigaSlicer" and the subject-matter of claim 1 of auxiliary request 0 is novel with respect to the "GigaSlicer".

8.9 As the "GigaSlicer" forms no part of the opponent's or the intervener's inventive step objections, it is unnecessary to consider whether the priority of contested patent has validly been claimed or whether the drive shaft arrangement of the "GigaSlicer" was made available to the public.

9. *Novelty - document D4, lower conveyor*

9.1 The lower conveyor of D4 does not disclose all features of claim 1 of auxiliary request 0.

At least feature 1.16 is not present in the disclosure of the lower conveyor in document D4.

9.2 Feature 1.16

9.2.1 In the lower conveyor of D4, the second shaft (D4, figure 3, drive shaft 16) does not extend from a non-adjacent side of the first conveyor 17 (D4, left-hand side in figure 3) to an independent drive source as required by feature 1.16. Instead the shaft 16 extends from the non-adjacent side of the fourth conveyor 44 (D4, right-hand side of figure 3) to independent drive source M1 (D4, figure 3). In the lower conveyor of D4 the drive source M1 driving the second conveyor 28 via the second shaft 16 and the drive source M2 driving the first conveyor 17 via hollow shaft 15 are located on opposite sides of the lower conveyor so that said shafts cannot both "extend from a non-adjacent side of said first conveyor" 17, contrary to the requirements of feature 1.16.

9.2.2 The opponent and the intervener argued that shaft 16 extended from the outer side of the left-most conveyor 17 (first conveyor) across the whole width of the

apparatus to the drive source M1 (on the right-hand side of the apparatus) and therefore D4 showed feature 1.16.

- 9.2.3 However, as set out above in point 8.6.2, the skilled person understands feature 1.16, in the context of the claim as a whole, as requiring the shafts to extend from the non-adjacent side of the first conveyor to the drive source. In D4 the second shaft 16 does not extend from the conveyor's non-adjacent side to a drive source, instead the shaft extends to its drive source (M1) from the non-adjacent side of the fourth conveyor (see D4, right-hand side of figure 3).

10. *Novelty - document D4, upper conveyor*

The opponent and the intervener argued that the upper conveyor of document D4, as shown in figures 2 and 3, disclosed all the features of claim 1 of auxiliary request 0.

However, the inner drive shaft 60, which drives the second conveyor 390 in the apparatus of D4, extends from the non-adjacent side of the fourth conveyor 58 to the independent drive source M3, so that at least feature 1.16 is not present in the upper conveyor of the apparatus of document D4.

In the upper conveyor of D4 (figure 2) the drive source M3 driving the second conveyor 390 via the second shaft 60 and the drive source M4 driving the first conveyor 88 via hollow shaft 86 are located at opposite sides of the upper conveyor so that said shafts cannot both "extend from a non-adjacent side of said first conveyor" 88, contrary to the requirements of feature 1.16.



11. The subject-matter of claim 1 of auxiliary request 0 is therefore novel with respect to the alleged public prior use "GigaSlicer" and both the upper and lower conveyor of document D4.

12. *Inventive step - claim 1 - auxiliary request 0*

The opponent and the intervener raised three inventive step objections with respect to

- (a) the teaching of D10 alone;
- (b) the teaching of D10 together with the common general knowledge of the skilled person; and
- (c) the combination of the teaching of D10 and D4.

The combination of document D10 with the common general knowledge of the skilled person was considered by the opposition division. None of the other objections were dealt with in the decision under appeal.

12.2 The patent proprietor argued that the new objections should not be admitted into the appeal proceedings as they were late-filed and could and should have been raised during the opposition proceedings (Article 12(6) RPBA).

12.3 However, for the same reasons as set out above for the novelty objections (see point 7.3 of this decision), the board does not have discretion not to admit the objections relating to a lack of inventive step raised by the intervener.

Therefore these objections are to be considered in the appeal proceedings and it is not necessary to consider their admittance under the RPBA.

13. *Inventive step - D10 alone*

13.1 The opponent and the intervener argued that the subject-matter of claim 1 was anticipated by placing, side-by-side, two of the units from D10. The skilled person would place the units side-by-side in order to double the processing capacity of the apparatus. According to the opponent and the intervener, the skilled person would place the conveyors together such that the motors are on both outer sides of the units, to save space and to improve maintenance access.

13.2 The board agrees with the patent proprietor that as the apparatus of figure 5 of D10 already discloses four independent conveyors, it would be unnecessary for the skilled person to double the system to arrive at the claimed four parallel conveyors.

In addition, the board also agrees with the patent proprietor and the opposition division, that D10 expressly teaches in paragraph [0019] and figures 4 and 5 that all drive shafts extend from the non-adjacent side of one conveyor to the independent drive sources.

There is no motivation, without knowledge of the claimed invention, for the skilled person to alter the apparatus, contrary to the explicit teaching of D10, such that one set of drive shafts extends from the non-adjacent side of one outer conveyor, but the other set extends from the non-adjacent side of the opposite outer conveyor.

13.3 Therefore, the subject-matter of claim 1 of auxiliary request 0 is inventive over D10 alone.

14. *Inventive step - D10 with common general knowledge*

14.1 The opponent and the intervener argued that the only distinguishing feature in claim 1 of auxiliary request 0 with respect to the disclosure of figure 5 of D10 was that the third conveyor was driven by a second (inner) shaft and the fourth conveyor was driven by a hollow shaft (features 1.10 and 1.11). In the apparatus of document D10 the third conveyor was driven by a hollow shaft and the fourth conveyor by an inner shaft.

14.2 The board however agrees with the opposition division that feature 1.17 is also not disclosed in document D10.

As set out above in relation to the "GigaSlicer" and document D4, the board cannot follow the opponent's and the intervener's interpretation of features 1.16 and 1.17. These features require one set of shafts to extend from the non-adjacent side of the first conveyor to independent drive sources, and the other set to extend from the non-adjacent side of the fourth conveyor to independent drive sources. They cannot all extend from one side as is the case in D10.

Therefore, for the same reasons as given above in point 13, the skilled person has no motivation to change the driveshafts so that one set extends from the opposite side of the conveyors to the independent drive sources.

It is therefore not necessary to consider the opponent's and the intervener's arguments relating to the choice of which conveyor is driven by which shaft.

14.3 The opponent and the intervener have therefore not convincingly shown that the opposition division was incorrect on this point.

15. *Inventive step - D10 and D4*

For the same reasons given above in point 13.2, the board does not find the subject-matter of claim 1 obvious over a combination of documents D10 and D4 as it sees feature 1.17 as a further distinguishing feature in addition to features 1.10 and 1.11.

Therefore it is not necessary to consider the arguments relating to whether the skilled person would combine D10 and D4 as even if they were combined, feature 1.17 would not be present. As set out in points 13.2 and 14.2 above, there is no motivation for the skilled person to ignore the clear teaching of D10 to place all four drive sources on one side of the four conveyors and instead move two of the conveyors to the opposite side of the conveyors.

16. The intervener mentioned that the same arguments also applied to D3 and D5 but without further substantiating its position. In the absence of any substantiation, the objections cannot be convincing.

17. As the objections raised by the opponent and the intervener do not prejudice the maintenance of the patent in the form found by the opposition division to meet the requirements of the EPC, the appeal of the opponent is also to be dismissed.

**Order**

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

The appeals are dismissed.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated