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**D E C I S I O N**  
**of 23 November 1999**

**Case Number:** T 0788/97 - 3.2.4

**Application Number:** 90201272.3

**Publication Number:** 0399604

**IPC:** A01J 7/00

**Language of the proceedings:** EN

**Title of invention:**

Discharge system for milk and an automatic milking system  
provided with such a discharge system

**Patentee:**

Prolion B.V.

**Opponents:**

Alfa Laval Agri AB  
Maasland N.V.

**Headword:**

Discharge system/PROLION

**Relevant legal provisions:**

EPC Art. 100, 111(1), 123, 56

**Keyword:**

"New documents in appeal proceedings - remittal (no)"  
"Extension of subject-matter (undue generalisation)"  
"Inventive step"

**Decisions cited:**

T 0416/87

**Catchword:**

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Boards of Appeal

Chambres de recours

**Case Number:** T 0788/97 - 3.2.4

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.4**  
**of 23 November 1999**

**Appellant:** Maasland N.V.  
(Opponent) Weverskade 10  
3155 PD Maasland (NL)

**Representative:** Corten, Maurice Jean F.M.  
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**Respondent:** Prolion B.V.  
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**Representative:** Land, Addick Adrianus Gosling  
Arnold & Siedsma  
Advocaten en Octroogemachtigden  
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2517 GK Den Haag (NL)

**Other party:** Alfa Laval Agri AB  
(Opponent) PO Box 39  
14721 Tumba (SE)

**Decision under appeal:** Interlocutory decision of the Opposition Division  
of the European Patent Office posted 24 June 1997  
concerning maintenance of European patent  
No. 0 399 604 in amended form.

**Composition of the Board:**

**Chairman:** C. A. J. Andries

**Members:** P. Petti

C. Holtz

## Summary of Facts and Submissions

I. The European patent No. 399 604 resulted from the European patent application No. 90 201 272.3. Two oppositions were filed against this European patent. The first opposition was based upon Articles 100(a) and (b) EPC, the second only upon Article 100(a) EPC.

By an interlocutory decision dispatched on 24 June 1997, the opposition division maintained the patent in amended form according to the request submitted by the proprietor of the patent (hereinafter referred to as the respondent). This request was based upon the independent Claim 1 filed during the oral proceedings on 13 May 1997.

This claim reads as follows:

"1. A system for discharging milk from two or more milking sets (19, 19') of milking cups (18) to a storage tank (30) comprising

- an intermediate reservoir (6) arranged between the milking cups (18) and the storage tank (30) for storing milk during a predetermined time period and/or a number of milking sessions;
- a cleaning unit (36)
- two or more milking circuits each including
  - a milking set (19, 19') of milking cups (18)
  - a first conduit (14, 16, 17) leading from the

milking set (19, 19') via the intermediate reservoir (6) to the storage tank (30)

characterised in that the system includes a washing unit (9) with a tank (31), and for each milking set a washing circuit comprising

- switching means (24) between the milking set (19, 19') and the first conduit (16, 17)
- a second conduit (32) leading from said switching means (24) to the tank (31)
- washing elements (35) connectable to the teat cups (18)
- a third conduit (33) leading from the washing elements (35) via a switch (34) to the cleaning unit (36)

and in that the switching means (24) and switches (34) are switchable for separately washing of one of the milking sets by passing liquid through one of the washing circuits, which is fillable from the cleaning unit (36) with for instance cold or lukewarm water via the second conduit (32) the switching means (24), the milking set (19, 19') the washing elements (35), the switch (34) and the third conduit (33)."

In its decision the opposition division not only dealt with the grounds for opposition according to Article 100(a) and (b) EPC but also with the ground according to Article 100(c) EPC.

II. On 8 July 1997 the second opponent, Maasland N.V. (hereinafter referred to as the appellant), lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 20 October 1997.

With the statement setting out the grounds of appeal the appellant filed the following new documents:

D18: Original leaflet of the firm Westfalia Separator with the title "*Europa 1200 - Komfortabel voor de melker en de koeien*", 20 pages, 9997-6753-020/0187 holl. E.H.;

D19: Copy of the page 346 of the handbook L. van Wingerden, *Landbouwwerktuigen*, 1982.

III. The appeal lodged on 7 August 1997 by the first opponent, Alfa Laval Agri AB, was withdrawn in a letter dated 30 July 1998.

IV. Oral proceedings were held on 23 November 1999.

During the oral proceedings the respondent based its main request upon Claim 1 filed during the oral proceedings on 13 May 1997 (see above section I) and submitted two further amended independent claims upon which two auxiliary requests were based.

Claim 1 according to the first auxiliary request reads as follows:

"1. A system for discharging milk from two or more milking sets (19, 19') of milking cups (18) to a storage tank (30) comprising

- an intermediate reservoir (6) arranged between the milking cups (18) and the storage tank (30) for storing milk during a predetermined time period and/or a number of milking sessions;
- a cleaning unit (36)
- two or more milking circuits each including
  - a milking set (19, 19') of milking cups (18)
  - a first conduit (14, 16, 17) leading from the milking set (19, 19') via the intermediate reservoir (6) to the storage tank (30)

characterised in that the system includes a washing unit (9) with a tank (31), and for each milking set a washing circuit comprising

- switching means (24) between the milking set (19, 19') and the first conduit (16, 17)
- a second conduit (32) leading from said switching means (24) to the tank (31)
- washing elements (35) connectable to the teat cups (18)
- a third conduit (33) leading from the washing elements (35) via a switch (34) to the cleaning unit (36)

and in that the switching means (24) and switches (34) are switchable for separately washing of one of the



milking sets by passing liquid through one of the washing circuits, whereas said tank (31) is fillable from the cleaning unit (36) with for instance cold or lukewarm water via the second conduit (32) the switching means (24), the milking set (19, 19') the washing elements (35), the switch (34) and the third conduit (33)."

Claim 1 according to the second auxiliary request reads as follows:

"1. A system for discharging milk from two or more milking sets (19, 19') of milking cups (18) to a storage tank (30) comprising

- an intermediate reservoir (6) arranged between the milking cups (18) and the storage tank (30) for storing milk during a predetermined time period and/or a number of milking sessions;
- a cleaning unit (36)
- two or more milking circuits each including
  - a milking set (19, 19') of milking cups (18)
  - a first conduit (14, 16, 17) leading from the milking set (19, 19') via the intermediate reservoir (6) to the storage tank (30)

characterised in that the system includes a washing unit (9) with a tank (31), and for each milking set a washing circuit comprising

- switching means (24) between the milking set (19, 19') and the first conduit (16, 17)
- a second conduit (32) leading from said switching means (24) to the tank (31) which is coupled to a vacuum system (3) when washing
- washing elements (35) connectable to the teat cups (18)
- a third conduit (33) leading from the washing elements (35) via a switch (34) to the cleaning unit (36)

and in that the switching means (24) and switches (34) are switchable for separately washing of one of the milking sets by passing liquid through one of the washing circuits, wherein said tank (31) is fillable from the cleaning unit (36) with for instance cold or lukewarm water via the second conduit (32) the switching means (24), the milking set (19, 19') the washing elements (35), the switch (34) and the third conduit (33)."

V. The appellant requested that the decision under appeal be set aside and the case be remitted to the first instance for further prosecution, alternatively that the patent be revoked.

VI. The respondent requested that the appeal be dismissed (main request), alternatively that the decision under appeal be set aside and the patent be maintained on the basis of the first or the second auxiliary requests, as submitted in the oral proceedings on 23 November 1999.

The second auxiliary request of the respondent is based upon Claims 1 to 6 as submitted during the oral proceedings on 23 November 1999, on column 1 and 2 of the description, as submitted during the oral proceedings on 23 November 1999, on column 3 of the description as granted and on the sole drawing as granted.

VII. The arguments of the appellant can be summarized as follows:

(i) With regard to the request for remittal:

Although the description of the patent clearly relates to a "forward-flush system", i.e. to a system in which the flow direction of washing liquid is the same as the flow direction of the milk, the wording of the last characterising feature of the claim as granted allows the claim to be interpreted as relating to a "back-flush system". In the decision under appeal Claim 1 of the main request has been interpreted as defining a "forward-flush system", the new documents D18 and D19, relating to forward-flush systems, were filed for the first time in the course of the appeal proceedings in response to this interpretation. Thus, if the case were not to be remitted to the opposition division for further examination on the basis of the new documents, the losing party would be deprived of the opportunity to have the issues concerning the new documents examined at two instances.

(ii) On the subject of the admissibility of the

independent claim 1 of the main request and of the first auxiliary request with respect to Articles 100(c) and 123(2) EPC:

The feature "[the washing circuit] is fillable from the cleaning unit..." has no basis in the application as filed according to which the tank (31)- when coupled to vacuum system - is fillable from the cleaning unit.

- (iii) On the subject of the admissibility of the independent claim 1 of the second auxiliary request with respect to Article 123(3) EPC:

The amendment consisting in the replacement of terms "[the washing circuit] is fillable..." by the terms "said tank is fillable..." extends the protection conferred by the patent in so far as it defines a washing circuit which is not "fillable" by the washing liquid.

- (iv) With regard to inventive step:

- (iv.1) The system defined in Claim 1 relates to a system for discharging milk defining a "milking cycle" and a "washing cycle". Since there is no interaction between milking and washing cycles, the portion of the claim relating to the washing cycle can be considered - for the examination of whether the claimed subject-matter involves an inventive step - separately from the portion relating to the milking cycle which is well known, e.g. from the document US-A-4 095 920 (D12) referred to in the description of the

patent. The idea of separately washing one of the milking circuits of a milking system comprising two or more milking circuits is known either from document D19 or from the article of Carel de Vries "*De robot melkt*", in *Boerderij* 73, No. 15 (12 January 1988), pages 16 to 19 (document D15), for which an English translation (document D'15) has been submitted. Moreover, as far as the washing process of a milking circuit is concerned, it is clear for any skilled person that those parts of the milking circuit which come in contact with the milk have to be cleaned. The arrangement of the conduits and the switches of the washing circuit, as defined in the independent Claim 1 of each of the respondent's requests, would be arrived at by the skilled person without exercising any inventive skill. Thus, the subject-matter of the independent claims of each of the respondent's requests does not involve an inventive step.

- (iv.2) The subject-matter of Claim 1 according to the main request does not involve an inventive step having regard to the combination of the teaching of documents D18, D19 and of the Service Manual SNF-7458-S 5/85, SC3-185 to SC3-198 of the firm Alfa-Laval, INC., Agri-Group having the title "*Autoflush, individual stall backflush system*" (document D2).

VIII. The respondent contests the arguments of the appellant.

With regard to the appellant's request for remittal, the respondent sees no reasons to remit the case to the

first instance.

On the subject of the admissibility with respect to Articles 100(c) and 123(2) EPC of the independent claim 1 of the main request and of the first auxiliary request, the respondent argues that the feature that "[the washing circuit] is fillable from the cleaning unit..." could be derived from a passage on page 1, lines 13 to 17 of the application as filed which reads as follows:

"The discharge system according to the present invention is preferably used with an automatic milking system as described in EP-A-86.201.338.0 ... , the content of which should be deemed as interpolated herein".

### **Reasons for the Decision**

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

According to Article 111(1) EPC, the board may either decide on the appeal or remit the case to the instance which was responsible for the decision under appeal. Thus, it is at the discretion of the board whether it examines and decides the case or remit it to the opposition division to allow the new documents D18 and D19 to be examined at two levels of jurisdiction.

In the present case, which concerns a patent resulting

from a patent application filed in 1990, the appellant introduced documents D18 and D19 into the appeal proceedings. Since these documents were introduced with the statement setting out the grounds of appeal, the parties and the board had sufficient time to analyse them.

It has to be considered that the remittal of the case to the opposition division would not only prolong the proceedings against the interest of the public but also against the interest of the respondent, unless the new documents would put the maintenance of the patent at risk. In accordance with decision T 416/87, OJ EPO 1990, 415, section 9 the Board has considered documents D18 and 19 (see below, sections 6.3 and 6.4).

3. *The main request and the first auxiliary request*

3.1 Claim 1 according to the main request and Claim 1 according to the first auxiliary request of the respondent both contain the following feature which represents an amendment to Claim 1 as granted (the parts in bold characters indicate the extent of the amendment):

"...the switching means (24) and switches (34) are switchable for separately washing one of the **milking sets by passing liquid through one of the washing** circuits, which is fillable from the cleaning unit (36) with for instance cold or lukewarm water via the second conduit (32), the switching means (24), the milking set (19, 19'), the washing elements (35), the switch (34) and the third conduit (33)" and also refer in the pre-characterising portion to "a washing unit (9) with a

tank (31)".

- 3.2 The description of the application as filed on page 3, lines 8 to 13 contains the following statement:

"When washing using a washing unit 9 the vacuum system 3 is coupled to the tank 30, for instance with a capacity of 20 litres, and this is filled from a cleaning unit 36 with for instance cold or lukewarm water via conduit 32, switches 24, via washing elements 35, milking cups 18, switches 34 and conduit 33."

It can be unequivocally understood from the context of the description of the application as filed that this statement refers erroneously to the tank 30 but what is meant is the tank 31.

Thus, it is clear from this statement that the flow of the washing liquid through the washing circuit for washing the respective milking set is due to the fact that a washing tank, i.e. the tank 31, is connected to a vacuum source.

Moreover, the description of the application as filed does not refer to means for ensuring circulation of washing liquid through the washing circuit other than the vacuum.

Therefore, the above mentioned feature in the independent claims of the main and the first auxiliary requests represents a generalisation of this statement in the application as filed in so far as these claims do not refer to the vacuum system as a means for ensuring the flow of the washing liquid through the



milking cups. In other words, these claims also define washing circuits in which the flow of washing liquid is **not** due to the vacuum.

According to the respondent the passage on page 1, lines 13 to 17 of the application as filed (see section VIII above) provides a basis for this generalisation in so far as it refers to the European patent application No. 86 201 338 (published under the number EP-A-213 660) which discloses an apparatus for cleaning the milking cups provided with cleaning sprayers, which are normally not associated with a vacuum source but with a pressure source.

The board cannot find the mere reference to the European patent application No. 86 201 338 as providing a basis for this generalisation because the passage on page 1, line 13 to 17 does not in any way indicate that further details of the washing circuits can be found in the referred document. This passage could only provide support for the information that the claimed discharge system can be used with an automatic milking system (see for instance the content of Claim 6 of the patent in suit) but does not identify any features relating to the means for ensuring the flow of washing liquid in the washing circuit. Thus, the specific features relating to these means for ensuring the flow of the washing liquid in the washing circuit as disclosed in the document referred to in general terms in the passage on page 1, lines 13 to 17 of the application as filed cannot be considered as being within the content of the application as filed, as required by Article 123(2) EPC.

3.3 Therefore, the amendments concerning the above mentioned feature in Claim 1 of the main request as well as of the first auxiliary request are such that these claims contain subject-matter extending beyond the content of the application as filed (Article 123(2) EPC).

Thus, the main request and the first auxiliary request of the respondent are refused.

4. *The claimed subject-matter and the amendments (concerning the second auxiliary request of the respondent)*

4.1 Claim 1 according to the second auxiliary request as well as Claim 1 as granted are directed to a system for discharging milk comprising *inter alia* two or more milking sets (19, 19') of milking cups (18), a storage tank (30) and an intermediate reservoir (6). The claim makes it clear that each milking set is associated with a milking circuit and a washing circuit. It is also clear from the wording of the claim and from the description of the patent that the storage tank and the intermediate reservoir are common to all milking sets, that there is a switching means (24) associated with each milking circuit and that this switching means (24) is arranged between the milking set and the first conduit.

Claim 1 according to the second auxiliary request as well as Claim 1 as granted specify the features that the intermediate reservoir is suitable "for storing milk during a predetermined time period and/or a number of milking sessions" and that for each milking circuit

there is "a first conduit (14, 16, 17) leading from the milking set (19, 19') via the intermediate reservoir to the storage tank (30)". This latter feature, read in the light of the description and the drawings of the patent, means not only that the first conduit of each milking circuit includes a first conduit portion (16, 17) starting from the respective milking set (19, 19') and leading to a further conduit portion (14) but also that this further conduit portion (14) is common to all milking circuits and leads via the intermediate reservoir (6) to the storage tank (30).

Moreover, this feature read in conjunction with the feature that the switching means (24) is arranged between the milking set and the first conduit indicates that each switching means (24) is located between the first conduit portion and the milking set, i.e. so near as possible to the milking set. This finding is consistent with the drawing of the patent according to which the switching means 24 are located immediately downstream of the milking cups 18 and with a statement in description (column 1, lines 17 to 21) according to which an object of the invention is to avoid cleaning of the conduits of one circuit.

4.2 Claim 1 according to the second auxiliary request of the appellant differs from Claim 1 of the patent as granted in that

- (a) the term "**milking**" has been added before the term "circuits" in the preamble of the claim;

- (b) the terms "in that each circuit further comprises" have been replaced by the terms "**for each milking set a washing circuit comprising**";
- (c) the terms "**which is coupled to a vacuum system (3) when washing**" have been added after the term "tank (31)";
- (d) the terms "...the switching means (24) and switches (34) are switchable for separately washing of one of the circuits, which is fillable from the cleaning unit (36)..." have been replaced by the terms "...the switching means (24) and switches (34) are switchable for separately washing one of the **milking sets by passing liquid through one of the washing** circuits, **wherein said tank (31)** is fillable from the cleaning unit (36)..."

No objections under Article 123(2) EPC were raised in respect of these amendments.

The amendments according to items (a) and (b) only represent a clarification of the terms of Claim 1 as granted. The amendments according to items (c) and (d) can be derived from a passage on page 3, lines 8 to 13 of the description of the application as filed.

These amendments therefore do not contravene Article 123(2) EPC.

- 4.3 As far as the amendment according to item (d) is concerned, the following has to be noted:

The terms "... one of the circuits, which is **fillable** from the cleaning unit with for instance cold or lukewarm water" in the last characterising feature of Claim 1 as granted define a circuit, which comprises the switching means (24), the milking set (19, 19'), the washing elements (35), the switch (34) and the third conduit (33), through which the washing liquid coming from the cleaning unit (36) can flow in order to wash the milking set. In other word, the term "fillable" when relating to the term "circuit" does **not** means that the circuit is a close system which can be completely filled by the liquid but indicates that the circuit to be cleaned comes in contact with the washing liquid.

The amendment according to item (d) not only clarifies this circumstance in so far as it clearly states that washing of one of the milking sets occurs "by passing liquid through one of the washing circuits" but also - when considered with the amendment according to item (c) - adds the information that the liquid flows from the cleaning unit (36) through the washing circuit to the tank 31 due to the fact that this tank is coupled to the vacuum system.

Therefore, this amendment further limits the scope of protection without infringing the requirement of Article 123(3) EPC.

- 4.4 The further amendments to the patent concern the adaptation of Claim 4 and of the description to the amended Claim 1. These amendments do not contravene Article 123 EPC.

5. *Novelty (second auxiliary request)*

Novelty was not disputed. The Board also finds that the subject-matter of Claim 1 according to the second auxiliary request of the respondent is novel.

6. *Inventive step (second auxiliary request)*

6.1 According to the description of the patent, the problem to be solved relates to known systems for discharging milk which comprise two or more milking circuits, each including a milking set and conduits leading from the milking set to a storage tank through an intermediate reservoir and consists in "avoiding cleaning of the complete conduit system and valves, intermediate reservoir and/or conduits of one circuit" (see column 1, lines 17 to 21).

6.2 According to Claim 1 of the second auxiliary request, for each milking set there is a washing circuit, each washing circuit comprising switching means (24) arranged between the milking set and the first conduit of the respective milking circuit, and a switch (34) arranged in a third conduit (33) through which the washing liquid flows from a cleaning unit (36) to the washing elements associated with the milking cups of the milking set.

It can be understood from this Claim 1, when read in the light of the description of the patent (see section 4.1 above), that during the milking process the milk of a milking circuit flows from the respective milking set through the switching means (24), a first portion (16, 17) of the first conduit (14, 16, 17), a

further portion (14) of the first conduit (which is common to all milking circuits) to the intermediate reservoir (6), whereafter the milk can be transferred from this intermediate reservoir to the storage tank (30).

It is also to be understood from this Claim 1 that the washing liquid, due to the vacuum applied in the tank (31) of a washing unit (9), flows from the cleaning unit (38), in which the washing liquid can be prepared, through the third conduit (33), the switch (34), the washing elements (35), the milking set (i.e. the milking cups), the switching means (24) and a second conduit (32) to the tank (31).

Thus, it is clear that the system defined in Claim 1 avoids cleaning of all conduits and parts of a milking circuit through which the milk flow during the milking process. In particular, the system according to Claim 1 not only allows the separate washing of one of the milking circuits but also limits - due to the fact that the switching means (24) are arranged between the milking set and the first conduit, i.e. close to the milking set - the cleaning to the milking set, i.e. to those parts of the milking circuit which came into contact with the teats of the animal's udder.

- 6.2.1 In these respects, it has to be noted that the prior art referred by the appellant relates either to milk discharging systems in which all milking circuits are washed at the same time (see for instance document D18) or systems provided with more independent washing circuits (each associated to a milking set) which can be separately washed (see for instance document D15).

In any case, the available prior art does **not** suggest the idea upon which the claimed solution is based, i.e. the idea of arranging the conduits and valves of an independent washing circuit so as to limit the washing to the parts of the milking circuit which came into contact with the teats of the animal's udder.

6.3 With respect to the appellant's arguments referred to in section VII above, item (iv.1), the following has be noted:

- (i) The appellant based its arguments on the figure on the left-hand lower side on page 346 of document D19.

It has to be considered that page 346 of document D19 only shows diagrammatic figures concerning washing devices for milking machines. Because of the absence of a description let alone of a clarifying description of the devices shown in the figures, this document does not permit a clear and unequivocal teaching to be derived from the figures. Therefore, the skilled person would **not** consider this document as a source of information when trying to develop a washing system in which each milking set can be washed separately from each other.

Moreover, it has to considered that document D19 cannot suggest the idea upon which the claimed solution is based, i.e. the idea of arranging the conduits and valves of an independent washing circuit so as to limit the washing to the parts of the milking circuit which come into



contact with the teats of the animal's udder. In this context, the following has to be noted:

Some of the elements represented in the figure referred to by the appellant (on left-hand lower side of page 346) are provided with hand-written reference numbers (1 to 8) probably added by the appellant and with printed inscriptions in Dutch language (e.g. melkstel, melkfilter, vierweg kraan, onderdrukketel, etc.). This figure shows a milking set 4 ("melkstel") comprising teat cups inserted in a container 1 which according to the appellant is a cleaning unit containing a washing liquid. A milk conduit leads from the milking set 4 through a milk filter ("melkfilter") to an element 8 which according to the appellant is a milk meter. A second conduit 7 leads from the element 8 (on the right-hand side) to the element 3 ("onderdrukketel"), defined by the appellant as a tank. On the left-hand side of the figure, a line is connected via a first branch and a valve 6 ("vierwegkraan") to the element 8 and via a second branch to the milking set. Document D19 does not indicate how the milking set is cleaned. However, it can be assumed that the milking set could be washed by applying vacuum either in the element 3 or in the line represented on the left-hand side of the figure. If the teat cups of the milking set - after milking - were to be washed by applying vacuum in the element 3 ("onderdrukketel"), the washing liquid would flow from the container 1 through the teat cups via the milk filter, the milk

meter 8, the conduit 7 to the element 3. If the teat cups were to be washed by applying vacuum in the above mentioned line, the valve 6 ("vierwegkraan") should be opened and the washing liquid would flow from the container 1 through the teat cups via the milk filter to the milk meter 8. Thus, the washing liquid would in any case flow through the milk meter, i.e. through parts of the milking circuit which did not come in contact with the animal.

- (ii) The appellant also referred to document D15 as disclosing a system in which each milking set can be separately washed and referred particularly to the paragraph under the picture L on page 19.

A translation of this passage (see D'15, page 6, item L) reads as follows: "When a milk stand has not been used for ten minutes, the entire circuit until the air separator is cleaned automatically. For that purpose the milking cluster is automatically connected to a set of rinsing jet elements. Twice a day the entire system is cleaned thoroughly".

According to the appellant, the milk meter of the system described in document D15 can be positioned near the milking cluster and therefore the cleaning would only concern the parts of the milking circuit which are near the milking cluster. This argument cannot be accepted because document D15 does not clearly indicate where the air separator is positioned.

(iii) Therefore these arguments are not convincing.

6.4 With regard to the appellant's arguments referred to in section VII above, item (iv.2), it has to be noted that these arguments which were put forward during the written phase of the proceedings (see the letter dated 20 October 1997) were no longer referred to by the appellant during the oral proceedings.

The appellant essentially argued that the skilled person starting from a system as described in document D18 (i.e. a system in which all milking circuits are washed at the same time) would apply to this system the teaching of document D19 and arrive in an obvious way at a system which would still have differences with respect to the claimed subject-matter, that these differences were known from document D2 and that it would be obvious for the skilled person to apply the teaching of document D2 to the combination of documents D18 and D19.

It has to be noted that this way of arguing acknowledges that the skilled person needs two steps to arrive at the claimed subject-matter, the second step being possible only when the first step has been performed.

Moreover, document D2 concerns "back-flush systems" while documents D18 and D19 (as well as the claimed subject-matter) concern "forward-flush systems". This incompatibility between the documents renders unlikely their combination.

In any case, having regard to the observations

concerning document D19 in section 6.3 above (see item (i)), the combination of documents D18, D19 and D2 cannot lead to the claimed subject-matter.

Therefore, also these arguments do not convince the Board that D18 and/or D19 in any combination with D2 would lead the skilled person to the invention.

- 6.5 Having regard to the observations above, the Board finds that the solution according to Claim 1 of the second auxiliary request of the respondent involves an inventive step.
- 6.6 Given the above outcome of the examination of documents D18 and D19, the request of the appellant to have the case remitted to the first instance is refused (cf. section 2 above), the Board having exercised its powers under Article 111(1) EPC, to decide itself the relevance of these documents.
7. The patent can therefore be maintained on the basis of the second auxiliary request of the respondent.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The request of the appellant for remittal of the case to the first instance for further prosecution is refused.
3. The case is remitted to the first instance with the order to maintain the patent on the basis of claims 1 to 6 of the second auxiliary request submitted in the oral proceedings, as to the description: columns 1 and 2 as submitted in the oral proceedings and column 3 as granted, and the sole drawing as granted.

The Registrar:

The Chairman:

N. Magouliotis

C. Andries