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**Datasheet for the decision
of 15 December 2009**

Case Number: T 0704/08 - 3.2.07

Application Number: 97918428.0

Publication Number: 1009695

IPC: B65G 47/84

Language of the proceedings: EN

Title of invention:

Method and device for supplying, discharging and transferring of objects, like fruits

Patentee:

De Greef's Wagen- Carrosserie- en Machinebouw B.V.

Opponent:

FPS Food Processing Systems B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 123(2), (3)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Procedural violations and request for remittal (no - reasons point 1)"

"Admissibility (no - main request)"

"Added subject-matter (yes - main request and auxiliary requests I and II)"

"Scope of protection extended (yes - all other requests)"

Decisions cited:

-

Catchword:

-



Case Number: T 0704/08 - 3.2.07

DECISION
of the Technical Board of Appeal 3.2.07
of 15 December 2009

Appellant: De Greef's Wagen-
(Patent Proprietor) Carrosserie- en Machinebouw B.V.
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Respondent: FPS Food Processing Systems B.V.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 13 March 2008
revoking European patent No. 1009695 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
I. Beckedorf

Summary of Facts and Submissions

I. Opposition was filed against European patent No. 1 009 695 as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step) Article 100(b) EPC (insufficiency) and Article 100(c) EPC (added subject-matter).

The opposition division in its first decision of 3 August 2006 decided to maintain the patent in amended form in accordance with the second auxiliary request.

The proprietor and opponent each filed an appeal against that decision.

In a first appeal proceedings the present Board decided to remit the case to the department of first instance as it could not exclude that a substantial procedural violation had been committed (see T 1505/06 not published in OJ EPO).

At the end of the second opposition proceedings the opposition division decided with its second decision dated 13 March 2008 to revoke the patent.

- II. The appellant (patent proprietor) filed an appeal against this decision.
- III. The appellant requested that decision under appeal be set aside and
1. the case be remitted to the department of first instance in a different composition, or,

2. alternatively, the patent be maintained as granted or in amended form on the basis of one of the sets of claims filed as
- main request' with letter of 25 November 2009,
 - main request'' (claim 1) during the oral proceedings, and auxiliary request I, auxiliary request I', auxiliary request II, auxiliary request II', auxiliary request II'', auxiliary request II''', auxiliary request III, auxiliary request III', auxiliary request IV, auxiliary request IV', all filed with letter of 13 November 2009.

The respondent (opponent) requested that the appeal be dismissed.

IV. Claim 1 of the **main request** reads as follows:

"Apparatus (10) for transporting or transporting and classifying objects (F), such as fruits, comprising:
- a supply conveyor (11) for supplying the objects (F);
and
- a transferring device (12) for transferring the objects from the supply conveyor, said transferring device comprising gripper members (17; 47; 56; 62; 72; 82;) arranged in pairs for gripping the object (F), characterized by:
- a discharge conveyor (13) for instance for classifying, such as weighing and for discharging the objects (F) at a relatively large pitch (P), which is in any case no smaller, than the relatively small pitch (p) of the supply conveyor (11), said supply

conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are transported at substantially the same horizontal level, and in that

- the speed of the forward movement of the transferring device (12) is synchronized with the speed of the discharge conveyor (13) and of the supply conveyor (11), so that the objects (F) are transferred into the discharge conveyor (F)."

Main request'

Claim 1 of **main request'** differs from claim 1 of the **main request** with respect to the feature that is relevant to the decision as follows (amendments when compared to claim 1 of the **main request** are depicted in bold or struck through):

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) ~~to be transported are transported at substantially the same horizontal level~~ **are as it were transferred in a continuous horizontal path to the discharge conveyor (13), wherein the fruits are prevented from making a falling movement during the transfer between the supply conveyor (11) and discharge conveyor (13)**"

Main request''

Claim 1 of **main request''** differs from claim 1 of the **main request** with respect to the feature that is relevant to the decision as follows (amendments when

compared to claim 1 of the **main request** are depicted in bold or struck through):

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are transported at substantially the same horizontal level" has been replaced by "said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are transported at ~~substantially the same horizontal level~~ **in a continuous horizontal path to the discharge conveyor (13), wherein the fruits are prevented from making a falling movement during the transfer between the supply conveyor (11) and discharge conveyor (13)**"

Auxiliary request I

The feature of claim 1 of **auxiliary request I** that is relevant to the decision is the following and it has the same wording as the corresponding feature of claim 1 of the **main request**:

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are transported at substantially the same horizontal level,"

Auxiliary request I'

The feature of claim 1 of **auxiliary request I'** that is relevant to the decision is the following and it has the same wording as the corresponding feature of claim 1 of the **main request'** (see above):

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) are as it were transferred in a continuous horizontal path to the discharge conveyor (13), wherein the fruits are prevented from making a falling movement during the transfer between the supply conveyor (11) and discharge conveyor (13)"

Auxiliary request II

The feature of claim 1 of **auxiliary request II** that is relevant to the decision is the following and it has similar wording to the corresponding feature of claim 1 of the **main request** with, however, the changes indicated (amendments when compared to claim 1 of the **main request** are depicted in bold or struck through):

"said ~~supply conveyor (11), transferring device (12)~~ and ~~discharge conveyor (13)~~ **discharge conveyor (13), supply conveyor (11), and transferring device (12)** being arranged such that the ~~objects~~ **fruits** (F) to be transported are transported at substantially the same horizontal level,"

Auxiliary request II'

The feature of claim 1 of **auxiliary request II'** that is relevant to the decision has the following wording (amendments when compared to claim 1 of the **main request** are depicted in bold or struck through):

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that

the objects (F) to be transported are ~~transported~~
transferred at ~~substantially the same horizontal level~~
in a continuous horizontal path"

Auxiliary request II''

The feature of claim 1 of **auxiliary request II''** that is relevant to the decision is the following and it has similar wording to the corresponding feature in claim 1 of **main request'** (amendments when compared to claim 1 of **main request'** are depicted in bold or struck through):

"said ~~supply conveyor (11), transferring device (12)~~
~~and discharge conveyor (13)~~ **discharge conveyor (13),**
supply conveyor (11), and transferring device (12)
being arranged such that the ~~objects~~ **fruits** (F) are as it were transferred in a continuous horizontal path to the discharge conveyor (13), wherein the fruits are prevented from making a falling movement during the transfer between the supply conveyor (11) and discharge conveyor (13)"

Auxiliary request II'''

The feature of claim 1 of **auxiliary request II'''** that is relevant to the decision is the following and it has the same wording as the corresponding feature of claim 1 of **main request'** (see above) namely:

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) are as it were transferred in a continuous horizontal path to the discharge conveyor

(13), wherein the fruits are prevented from making a falling movement during the transfer between the supply conveyor (11) and discharge conveyor (13)"

Auxiliary request III

The feature of claim 1 of **auxiliary request III** that is relevant to the decision is the following (amendments when compared to claim 1 of the **main request** are depicted in bold or struck through):

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are ~~transported~~ **transferred** at substantially the same horizontal level"

Auxiliary request III'

The feature of claim 1 of **auxiliary request III'** that is relevant to the decision is the same as the corresponding feature of claim 1 of **auxiliary request III**:

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are transferred at substantially the same horizontal level"

Auxiliary request IV

The feature of claim 1 of **auxiliary request IV** that is relevant to the decision is the same as the corresponding feature of claim 1 of **auxiliary requests III and III'**:

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are transferred at substantially the same horizontal level"

Auxiliary request IV'

The feature of claim 1 of **auxiliary request IV'** that is relevant to the decision is the same as that of the corresponding feature of claim 1 of **auxiliary request II'** and has the following wording (amendments when compared to claim 1 of the **main request** are depicted in bold or struck through):

"said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are ~~transported~~ **transferred** at ~~substantially the same horizontal level~~ **in a continuous horizontal path**"

V. The arguments of the appellant may be summarised as follows:

(i) The opposition division committed a number of procedural violations so that the case should be remitted to the opposition division in a different composition.

When the opponent requested a postponement of the second oral proceedings the opposition division should have agreed to this. Although the right to be heard of the appellant has not been infringed it considers that the Board should indicate that oral proceedings should

be postponed when the representative in question has a pre-booked holiday, even if there are other representatives in this practice who are capable of taking the case over, and the other party agrees to the postponement. That is a substantial procedural violation.

The documents D11 to D14 were admitted into the opposition proceedings by the opposition division. In its decision the opposition division did not, however, give any reasons for admitting them. That is also a substantial procedural violation.

The first decision of the opposition division was to maintain the patent in amended form. The second decision of the opposition division was very different in that it revoked the patent. This at least gives the appellant the feeling that the members of the opposition division were not impartial towards the parties. For this reason also the remittal should be to an opposition division in a composition different to the one which took the appealed decision.

(ii) Amendments made to claim 1 of the main request during the grant proceedings do not offend against Article 123(2) EPC.

A basis for the amendments can be found on page 3, lines 29 to 38. It is indicated therein that the path is "continuous horizontal" which is the same as "substantially the same horizontal level" so that there is no addition of subject-matter in this respect.

The claim must be understood to mean that the path from the supply conveyor to the discharge conveyor is horizontal. The claim does not mean that the whole of the transport along the supply conveyor, transferring device and discharge conveyor is horizontal. The supply conveyor is not horizontal because it is a singulator which by definition is not horizontal. In the above mentioned passage of the description it is indicated that the transfer to the discharge conveyor is horizontal which corresponds to the wording of the claim when correctly understood.

The same applies to claim 1 of each of auxiliary requests I and II.

(iii) Claim 1 of main request' has not been amended contravening Article 123(3) EPC.

The term "transport" as used in claim 1 as granted is inherently limited to the transfer between the conveyors so that there has been no extension of the scope of protection by the use of the term "transfer" in claim 1 of this request.

(iv) Main request'' should be admitted into the proceedings even though it is filed during the oral proceedings before the Board.

Since the request no longer includes the term "transfer" it overcomes the objection to this term that was made with respect to main request'.

(v) Claim 1 of each of auxiliary requests I', II'' and II''' has not been amended contravening Article 123(3) EPC.

The term "transport" as used in claim 1 as granted is inherently limited to the transfer between the conveyors so that there has been no extension of the scope of protection by the use of the term "transferred" in claim 1 of these requests.

(vi) Claim 1 of each of auxiliary requests II' and IV' has not been amended contravening Article 123(3) EPC.

The term "transport" as used in claim 1 as granted is inherently limited to the transfer between the conveyors so that there has been no extension of the scope of protection by the use of the term "transferred" in claim 1 of these requests.

(vii) Claim 1 of each of auxiliary requests III, III' and IV has not been amended contravening Article 123(3) EPC.

The term "transport" as used in claim 1 as granted is inherently limited to the transfer between the conveyors so that there has been no extension of the scope of protection by the use of the term "transferred" in claim 1 of these requests.

VI. The arguments of the respondent may be summarised as follows:

(i) The allegations of the appellant regarding possible procedural violations are disagreed with, as is the request for remittal.

The respondent does not consider that its right to be heard as opponent was infringed, since it was suitably represented at the oral proceedings before the opposition division.

It is correct that D11 to D14 were late filed. However, the relevance of the documents is clear from the decision of the opposition division.

There is no evidence of any partiality on the side of the opposition division.

The case should not be remitted because there have been no procedural violations and it is important that a final decision is reached as quickly as possible.

(ii) Amendments made to claim 1 of the main request during the grant proceedings offend against Article 123(2) EPC.

Claim 1 has been amended to specify that transport is "at substantially the same horizontal level", whereas the application as originally filed only referred to "in a continuous horizontal path" which is not the same.

Furthermore, the claim specifies that the transport along all three conveyors is at this horizontal level.

This means that not just the transfer between conveyors is horizontal, but also that the whole transport path is horizontal. There is no support for this feature in the application as originally filed. In figure 1 it is clear that the supply conveyor is not horizontal. On the contrary it is inclined and this is to be expected since it would serve to pick up fruit out of a water bath. None of the other figures show the entire arrangement or allow the orientation of the conveyors to be discerned. Also, the description refers to transfer between conveyors and not transport on conveyors.

This objection applies also to claim 1 of each of auxiliary requests I and II.

(iii) Claim 1 of main request' has been amended such that the scope of protection has been extended contravening Article 123(3) EPC.

The claim as amended specifies a horizontal transfer between the supply conveyor and the discharge conveyor whereas the claim as granted specified a horizontal transport on the supply conveyor and the discharge conveyor. This means that the limitation in the claim as granted to horizontal transport on these conveyors no longer applies, which extends the scope of protection so as to now include non-horizontal transport on the conveyors.

(iv) Main request'' should not be admitted into the proceedings. This request is late filed since it is filed during the oral proceedings. Moreover it is clearly not allowable under Article 123(2) EPC since it

contains the same feature which led to the finding that claim 1 of the main request does not comply with this article.

(v) Claim 1 of each of auxiliary requests I', II'' and II''' has been amended such that the scope of protection has been extended contravening Article 123(3) EPC.

The claims as amended each specify a horizontal transfer between the supply conveyor and the discharge conveyor whereas claim 1 as granted specified a horizontal transport on the supply conveyor and the discharge conveyor. This means that the limitation in claim 1 as granted to horizontal transport on these conveyors no longer applies, which extends the scope of protection to now include non-horizontal transport on the conveyors.

(vi) Claim 1 of each of auxiliary requests II' and IV' has been amended such that the scope of protection has been extended contravening Article 123(3) EPC.

The claims as amended each specify a transfer in a continuous horizontal path, whereas claim 1 as granted specified a horizontal transport on the supply conveyor and the discharge conveyor. Since the claims specify merely that the transfer is in a continuous horizontal path the limitation in claim 1 as granted to horizontal transport on these conveyors no longer applies, which extends the scope of protection to now include non-horizontal transport on the conveyors.

(vii) Claim 1 of each of auxiliary requests III, III' and IV has been amended such that the scope of protection has been extended contravening Article 123(3) EPC.

The claims as amended each specify that the objects to be transported are transferred at substantially the same horizontal level, whereas claim 1 as granted specified a horizontal transport on the supply conveyor and the discharge conveyor. Since the claims specify merely that the transfer is at substantially the same horizontal level the limitation in claim 1 as granted to horizontal transport on these conveyors no longer applies, which extends the scope of protection to include non-horizontal transport on the conveyors.

Reasons for the Decision

Request by the appellant for remittal to the department of first instance

1.1 *Refusal of the opposition division to cancel the oral proceedings*

1.1.1 In response to the summons by the opposition division to the second oral proceedings the representative of the opponent indicated that he had already booked a holiday on that date and requested that another date be set. The representative of the proprietor with letter of 4 January 2008 supported the request of the opponent, but expressed surprise that the representative of the opponent could not be replaced by another representative from the same practice. The opposition

division did not change the date of the oral proceedings. The representative of the opponent was replaced by another from the same practice and this representative stated at the oral proceeding that he did not want a postponement of the oral proceedings.

- 1.1.2 The appellant has argued that the opposition division committed a substantial procedural violation in not postponing the oral proceedings at the request of the opponent when this request was supported by the proprietor.

The arguments of the **appellant** concern the right to be heard of the **respondent**. The respondent, however, does not consider that its right to be heard was infringed by the opposition division.

The question arises as to whether a request by a party based on an alleged infringement of the rights of another party is an admissible request. In the present case the Board does not find it necessary to consider this question further since the request is manifestly without foundation.

- 1.1.3 The opponent was represented in the second oral proceedings before the opposition division by a representative who considered that he did not need a postponement of the oral proceedings. It follows therefore that the right to be heard of the opponent was respected and that there was no procedural violation.

- 1.1.4 The appellant further argued that the availability of another representative from the same practice should

not play a role since it concerns the internal relationship between the representative and his client. The Board notes that it was the appellant as proprietor who initially indicated (see letter of 4 January 2008) that it was surprised that the representative of the opponent could not be replaced by another representative from the same practice. The Board considers that in any case this somewhat inconsistent argumentation does not apply in the present case since the opponent chose to change its representative and does not consider that its right to be heard was infringed as a result of this change.

1.1.5 The appellant indicated during the oral proceedings before the Board that it desired a general statement from the Board concerning the circumstances under which an oral proceedings should be postponed. The Board does not consider that it is a purpose of appeal proceedings to issue such general statements in circumstances where they are irrelevant for the case to be decided, irrespective of whether a Board should issue general statements at all. The Board therefore declined to consider this point further.

1.1.6 The Board concludes that no procedural violation was committed in this respect, let alone a substantial one.

1.2 *Admittance into the proceedings of late-filed documents*

1.2.1 The appellant considered that the decision of the opposition division did not give any reasoning why D11 to D14 were more relevant than those already in the proceedings.

The appellant is correct in so far as the opposition division in its decision merely stated with respect to their admittance that they were *prima facie* relevant to the question of novelty and/or inventive step (see point 3 of the reasons). However, the opposition division came to the conclusion that the subject-matter of independent claims 1 and 7 of the main request lacked novelty over D14 (see point 7); that the subject-matter of independent claim 1 of the second auxiliary request lacked an inventive step over the combination of D12 and D14 (see point 12.2); and that the subject-matter of independent claim 7 of the second auxiliary request lacked novelty over D13 (see point 12.4).

The reasons why the opposition division admitted D12 to D14 into the proceedings are thus absolutely clear from this further reasoning in the decision. The Board would furthermore note that a document does not have to be more relevant than documents already in the proceedings in order for it to be admitted into the proceedings. It is sufficient that it could influence the outcome of the proceedings, for example in combination with a document already in the proceedings.

With regard to D11 the decision neither explicitly nor implicitly explained its relevance. It may be noted, however, that a document may be admitted into proceedings if it **could** affect the decision at the time of its admittance. The fact that it turned out that the document did not affect the decision does not mean that the opposition division committed a procedural violation in not providing supporting reasons for its

admittance since there could arise other reasons, as in the present case, for revoking the patent.

1.2.2 The Board concludes that no procedural violation was committed in this respect, let alone a substantial one.

1.3 *Alleged partiality of the members of the opposition division*

1.3.1 The appellant based its written arguments (see page 2, lines 18 to 21 of the letter of 13 November 2009) on the fact that the second decision of the opposition division (revocation of the patent) was in its opinion so different to its first decision (maintenance of the patent in amended form). In the oral proceedings before the Board the appellant admitted that it could not point to a particular act of partiality, but it had a "feeling" that the members may have been partial.

1.3.2 As pointed out by the Board in its communication dated 17 September 2009 (see point 2 thereof), it considers such an allegation to be a very serious matter and that such allegations should not be made lightly.

1.3.3 The first and second decisions of the opposition division were indeed different from each other. However, the circumstances of the two decisions were also different. For the second decision D11 to D14 were available to the opposition division which was not the case during the first opposition proceedings. Also, at the two oral proceedings before the opposition division the representatives of both parties were different which could have resulted in a different ways of

presenting the arguments and hence to a different result.

The Board can thus see no reason for even suspecting the partiality of any of the members of the opposition division. In fact the change of the decision of the opposition division when faced with new documents seems to show a clear lack of partiality.

The argument of the appellant that it had a "feeling" regarding partiality is clearly an argument that cannot be considered further since it does not stem from any action of the opposition division, but from the personal feelings of the representative of the appellant.

1.3.4 The Board concludes therefore that there is no reason at all to suspect any of the members of the opposition division of partiality.

1.4 Since there has been no procedural violation there is no reason to remit the case to the department of first instance.

Main request

2. *Article 100(c) EPC*

2.1 The respondent argued that a number of the amendments that had been made to claim 1 during the grant proceedings added subject-matter.

It is only necessary in the present decision to consider one of these amendments which, as will become

apparent below, has been found to result in added subject-matter. In the auxiliary requests this feature is either still present or the amendments made to overcome the objection have themselves lead to further objections resulting in the corresponding request not being allowable.

- 2.2 The feature of claim 1 of this request that "said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are transported at substantially the same horizontal level" was not contained in any of claims in the application as originally filed.

The appellant considered that a basis for this feature was to be found in the description as originally filed on page 3, lines 29 to 38, wherein it is stated that: "Close to reversing wheel of the supply conveyor 11 the fruits F are gripped one at a time by gripper elements 17 of the transferring device 12, wherein the fruits are as it were transferred in a continuous horizontal path to the discharge conveyor 13, wherein the fruits are prevented from making a falling movement during the transfer between supply conveyor 11 and discharge conveyor 13."

- 2.3 There are two differences between this wording and the wording that was introduced into claim 1 during the grant proceedings.
- 2.4 The first difference is that claim 1 specifies "at substantially the same horizontal level" whereas the description as originally filed refers to "in a

continuous horizontal path". The Board understands the term "continuous" to refer to the adjective "horizontal" since the subsequent wording indicates that the "fruits are prevented from making a falling movement" which would imply that they are prevented from leaving the path that is continuous and horizontal. Such a path is necessarily at the same horizontal level. Furthermore, the Board interprets the term "substantially" in the context as meaning 'horizontal and that which can be seen to be horizontal within normal tolerances' so that there is no broader technical meaning to be attributed to the term.

- 2.5 The second difference is that the claim specifies that "the **supply conveyor (11), transferring device (12) and discharge conveyor 13** being **arranged** such that the objects (F) to be transported are **transported** at substantially the same horizontal level" (emphasis added by the Board), whereas in the description as originally filed it is disclosed that "the fruits are as it were **transferred** in a continuous horizontal path **to the discharge conveyor**" (emphasis added by the Board).

The fact that it specifies that the transport is carried out by the supply conveyor, transferring device and discharge conveyor means that a horizontal transport is effected **on each of these devices**. The cited part of the description does not, however, provide a basis for this amendment since it is concerned solely with the transfer from the supply conveyor to the discharge conveyor, i.e. it gives no information regarding the transport on the supply and discharge conveyors.

The appellant referred to the drawings as also providing support for the amendment. However, figure 1 clearly shows a supply conveyor that is inclined. This inclination is not present by chance since such conveyors commonly pick up fruits from a water bath and need to be inclined for this purpose as well as for singulating them. None of the other figures allow an orientation other than that shown in figure 1 to be reliably deduced. Therefore the drawings do not provide any support for the amendment and indeed figure 1 speaks against it.

The appellant argued that in claim 1 the horizontal transport concerned only the transport between the supply conveyor and the discharge conveyor and did not concern the transport on these conveyors themselves. The Board cannot agree with the appellant. In this respect the claim is quite unequivocal in specifying that it is "said supply conveyor (11), transferring device (12) and discharge conveyor (13)" which are "arranged such that the objects (F) to be transported are transported at substantially the same horizontal level". It is clearly thus specified that the horizontal transport applies to all three parts of the apparatus or at least the transferring device and the discharge conveyor if one would assume, as the appellant did, that no supply conveyor operates entirely horizontally and that this reference in claim 1 as granted had to be seen as incorrect. There is no indication that the specified horizontal transport is limited to the transfer between the supply conveyor and the discharge conveyor.

2.6 Therefore, claim 1 as granted does not comply with Article 123(2) EPC so that the ground under Article 100(c) EPC succeeds.

Main request'

3. *Article 123(2) EPC*

3.1 In accordance with claim 1 of this request instead of "to be transported at substantially the same horizontal level" (main request) it is specified that "said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) are as it were transferred in a continuous horizontal path to the discharge conveyor (13)".

3.2 The new wording of the claim corresponds to the wording in the application as originally filed on page 3, lines 33 to 38, so that a basis may be found for the amendment. The amendment therefore complies with Article 123(2) EPC.

4. *Article 123(3)*

4.1 Since part of the wording of claim 1 of this request has been replaced by other wording it must be considered whether the scope of protection has been extended as a result of this replacement.

The term "transfer" as used in the claim 1 of this request has a different meaning to "transport" as used in claim 1 as granted. The term "transport" includes the motion of the objects on the supply and discharge conveyors in addition to the motion between these

conveyors, whereas the term "transfer" is restricted to the motion commencing at the end of the supply conveyor and finishing at the start of the discharge conveyor and including the motion on the transferring device. This is also the meaning which the appellant attributed to the term.

Taking this meaning of the term "transfer" the claim as amended requires that there is horizontal motion only from the end of the supply conveyor to the start of the discharge conveyor. The claim is thus silent as to whether or not the motion **on** the conveyors is horizontal. Claim 1 as granted required that also the motion **on** the conveyors should be horizontal so that this limitation is no longer present in the patent as amended in accordance with this request. This means that the scope of protection has been extended.

- 4.2 The amendment to claim 1 of this request therefore does not comply with Article 123(3) EPC.

Main request''

5. *Admissibility of the request*

- 5.1 This request was filed during the oral proceedings before the Board so that it was late filed. Given such late filing the likeliness that the request could succeed becomes a relevant factor for its admittance. The wording of claim 1 of the request, however, includes the feature that the transport on the transferring device and the conveyors is horizontal. This feature is the one which led to the main request being refused. Since this request includes the same

defect as the main request it clearly is not allowable so that there is no reason to admit the request into the proceedings.

- 5.2 Therefore this request is not admitted into the proceedings.

Auxiliary requests I and II

6. *Article 100(c) EPC*

- 6.1 Claim 1 of each of these requests contains similar wording to that which led to the conclusion that claim 1 of the main request did not comply with Article 123(2) EPC.

The fact that claim 1 of auxiliary request II specifies "fruits" instead of "objects" as specified in claim 1 of the main request does not alter this conclusion.

Also, the fact that the "supply conveyor (11), transferring device (12) and discharge conveyor (13)" are specified in a different order in claim 1 of auxiliary request II compared to claim 1 of the main request, i.e. "said discharge conveyor (13), said supply conveyor (11), and said transferring device (12)", has no effect on the meaning of the claim and hence on applying the conclusion reached with respect to claim 1 of the main request to claim 1 of this request.

- 6.2 Therefore, claim 1 of each of these requests does not comply with Article 123(2) EPC for the same reasons as already explained with respect to claim 1 of the main

request so that the ground under Article 100(c) EPC also succeeds in these cases.

Auxiliary requests I', II'' and II'''

7. *Article 123(3) EPC*

7.1 Claim 1 of each of these requests contains an amendment which is the same as or similar to that of claim 1 of main request'. The only relevant differences being that in auxiliary request II'' the term "objects" has been replaced by "fruits" and the order of specifying the supply conveyor, transferring device and discharge conveyor (13) has been changed in the same manner as already explained with respect to auxiliary requests I and II (see point 6.1 above). These differences in the wording have no effect regarding the allowability of such amendments which has already been indicated in point 4.1 above.

7.2 The amendments to claim 1 of each of these requests therefore do not comply with Article 123(3) EPC for the same reasons as explained with respect to main request'.

Auxiliary requests II' and IV'

8. *Article 123(3) EPC*

8.1 Claim 1 of each of these requests contains the wording that: "said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are **transferred in a continuous horizontal path**" (emphasis added by the Board).

As already explained above with respect to main request' (see point 4.1) the Board considers that the meaning of the term "transfer" is broader than the term "transport" which means that also in these requests the amendments are such that the scope of protection has been extended.

- 8.2 The amendments to claim 1 of each of these requests therefore do not comply with Article 123(3) EPC for the same reasons as explained with respect to main request'.

Auxiliary requests III, III' and IV

9. *Article 123(3) EPC*

- 9.1 Claim 1 of each of these requests contains the wording that: "said supply conveyor (11), transferring device (12) and discharge conveyor (13) being arranged such that the objects (F) to be transported are **transferred** at substantially the same horizontal level" (emphasis added by the Board).

As already explained above with respect to main request' (see point 4.1) the Board considers that the meaning of the term "transfer" is broader than the term "transport" which means that also in these requests the patent has been amended such that the scope of protection has been extended.

- 9.2 The amendments to claim 1 of each of these requests therefore do not comply with Article 123(3) EPC for the same reasons as explained with respect to main request'.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders