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Datasheet for the decision of 21 March 2013

Case Number: T 1682/09 - 3.4.02

Application Number: 97306375.3

Publication Number: 825424

IPC: G01G19/393

Language of the proceedings: EN

Title of invention:
Weighing and packing system

Patent Proprietor:
YAMATO SCALE CO., LTD.

Opponent:
Multipond Wägetechnik GmbH

Relevant legal provisions:
EPC Art. 54(1), 56

Keyword:
Novelty over public prior use (yes)
Inventive step (no)

Decisions cited:
T 1210/05, T 1449/05, T 1006/08

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Case Number: T 1682/09 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 21 March 2013

Appellant: (Opponent)	Multipond Wägetechnik GmbH Traunreuter Straße 2 84478 Waldkraiburg (DE)
Representative:	Hofer, Dorothea Prüfer & Partner GbR Patentanwälte Sohnckestraße 12 81479 München (DE)
Respondent: (Patent Proprietor)	YAMATO SCALE CO., LTD. 5-22, Saenba-cho Akashi-shi, Hyogo 673-0849 (JP)
Representative:	Brinck, David John Borchardt R.G.C. Jenkins & Co 26 Caxton Street London SW1H 0RJ (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 27 May 2009 concerning maintenance of the European Patent No. 825424 in amended form.**

Composition of the Board:

Chairman: A. G. Klein
Members: F. J. Narganes-Quijano
B. Müller
F. Maaswinkel
D. Rogers

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the interlocutory decision of the opposition division finding European patent No. 0825424 (based on European patent application No. 97306375.3) as amended by the respondent (patent proprietor) according to the auxiliary request to meet the requirements of the EPC.

II. The opposition filed by the appellant against the patent as a whole was based on the grounds for opposition listed in Articles 100(a), (b) and (c) EPC 1973, and in particular on the grounds of lack of novelty and lack of inventive step.

In support of its case the appellant filed during the first-instance proceedings, among other pieces of evidence, the following documents:

V1: documents S1 to S34 in support of the prior use of the assembly of the weighing system MP 1401, Nr. 695 and the packing system VBMS 250, Nr. 4908

D4: EP-A-0319202

D7: "Computernetzwerke" A. S. Tanenbaum; 4th ed., Pearson Studium, Pearson Education, 2003; pages 31 to 33

D8: extract from de.wikipedia.org, entry "VMEbus" (printing date: 20 July 2006).

III. In its decision the opposition division held that the grounds for opposition under Articles 100(b) and (c) EPC 1973 were not convincing, that the subject-matter of claim 1 of the patent as granted did not involve an inventive step, and that the subject-matter of the set

of claims amended according to the auxiliary request was novel and involved an inventive step over the prior art considered during the proceedings.

The wording of claim 1 amended according to the auxiliary request, and as maintained by the opposition division, reads as follows:

"A weighing and packing system comprising:

a weighing system (121, 131) including a plurality of weighing units (11) forming a combination scale, a weighing driving section (12) for causing a weighing operation to be performed, and weighing control means (26) for controlling the weighing driving section (12);

a packing system (122, 132) including a packer for packing an article to be weighed, a packing driving section (81) for causing the packer to perform a packing operation, and packing control means (62) for controlling the packing driving section (81); and

an operation indicating section (26b, 62b) for setting operating conditions of the weighing and packing system and for displaying an operation state;

characterised in that the weighing driving section (12) and the weighing control means (26) are mutually connected through a LAN (23, 63, 91) and in that the weighing and packing system further comprises:

a first interconnection formed by a signal transmission means (32, 32a, 32b) for communicating between the operation indicating section (26b, 62b), which forms part of one of the weighing system (121, 131) and the packing system (122, 132) and the control means (26, 62) of the other of the weighing system and the packing system; and

a second interconnection formed by a parallel (86, 126) or serial signal (156, 166) line between the weighing system and the packing system."

The claims of this request are the only claims before the Board.

IV. With the statement setting out the grounds of appeal the appellant submitted, among other pieces of evidence, the following documents:

D10: DE-A-4404892

D12: "Bussysteme: Feldbus ja, aber welcher ?" C. Eilmes; MessTec, No. 3/96 (1996); pages 1 to 6.

With its reply to the statement of grounds of appeal the respondent submitted the following document:

D15: "Functional requirements", Version 6.10, IEEE Project 802, Local and Metropolitan Area Networks Standards Committee; Institute of Electrical and Electronics Engineers, Inc., draft 6.10 (1991), pages 1 to 18.

V. Oral proceedings took place before the Board on 21 March 2013.

The appellant requested that the decision under appeal be set aside and the patent be revoked in its entirety.

The respondent requested that the appeal be dismissed.

At the end of the oral proceedings the Board gave its decision as recorded in the Order below.

VI. The arguments of the appellant in support of its requests are essentially the following:

Public prior use V1 is based on information given in a series of documents. This information has been confirmed by the declarations of the witnesses. The witnesses made notes of the facts of the delivery and the installation of the assembly as evidenced by the logs and installation reports shown during the first-instance oral proceedings and these reports helped the witnesses to recall the relevant facts. In view of the available evidence, there is no need to provide further evidence originating directly from the customers. There is no difference, as regards disclosure, between selling and leasing an assembly such as the assembly that is the subject of prior use V1; in particular, both selling and leasing involve the same start-up, training and maintenance procedures of the assembly. The declarations also show that there was no confidentiality agreement. The original of the instruction manual of the assembly was presumably lost when the company Sonnentau went bankrupt.

The opposition division's view that a VME bus does not constitute a LAN is not based on the appropriate criteria. In particular, a LAN does not exclude its operation in a master/slave modus, the length of a VME bus can be about 3 m and therefore falls within the lower length range of a LAN of about 1 to 10 m, a VME bus and a LAN both involve the use of a common data transmission line, and a LAN does not properly allow the simultaneous access of multiple users to a server and the simultaneous access of the server to multiple users. A LAN is rather characterized by its size, its data transmission technology and its topology, and a VME bus satisfies all the requirements of a LAN. Document D15 shows only the characteristics of a LAN in a very specific field (internet or computer network).

The VME bus of prior use V1 is therefore a LAN and the claimed system is not novel.

In any case, the use of a LAN was already common in the field of weighing systems and the interchangeability of the weighing units was already a feature of the assembly of prior use V1 (V1, document S16). In particular, document D10 discloses a combination scale comprising all the features of the weighing system of the claimed apparatus, the control unit 60 and the two weighing units 14 and 16 being interconnected by means of a bus 64. In addition, the document teaches the provision of the bus in the form of a field bus, and more particularly in the form of a CAN bus. As already found in decision T 1006/08, the CAN bus disclosed in document D10 is a LAN. Document D10 does not specify the transmission protocol of the CAN bus, but neither does the patent in suit. According to document D10 the weighing units can be connected in a rapid and simple way and the document teaches in addition that the CAN bus improves the modularity of the scale. It is therefore obvious to replace the VME bus of the assembly of prior use V1 by a CAN bus. This replacement improves the data transfer speed and solves the problem of the interchangeability of the hardware.

VII. The arguments of the respondent in support of its request can be summarized as follows:

The new evidence filed by the appellant on appeal is not *prima facie* relevant and for procedural economy this evidence should not be admitted into the proceedings. The appellant has given no explanation as to why this evidence was not filed within the opposition period. This is particularly the case for document D10, a publication originating from the

appellant itself. The case should be remitted to the opposition division in the event that the late filed evidence were to be admitted and considered potentially prejudicial to the maintenance of the patent.

All the key evidence relating to the alleged prior uses originates from the opponent and the opponent must prove the allegations up to the hilt. When, as in the present case, key evidence as to what has been used is provided purely in the form of oral testimony from a witness recollecting events which occurred over ten years previously, there can be expected to be some imperfection in recall (T 1210/05, points 2.5.5, 2.5.8 and 2.6). Meeting the required standard of proof is difficult, if not impossible, in the absence of some sort of corroborating evidence. There is, however, no independent corroboration of any of the key details. According to the hearing of the witness M. Hormann (paragraph bridging pages 9 and 10 of the minutes of the hearing), a copy of the instruction manual was supplied with the assembly of prior use V1. This is the type of corroboratory evidence which may or may not confirm a witness's recollection of events. However, no copy of the instruction manual has been filed and no evidence has been provided that an independent person received the instruction manual.

In addition, a leasing arrangement was apparently involved, so it does not appear to be a simple sale. Leasing may imply some confidentiality agreement. The alleged system was set up at the customers' premises, but the customers did not own the assembly and the assembly was not accessible to the public.

According to document D15 a LAN allows independent devices to communicate with each other and involves the

use of packet mode communications and of a common Data Link Layer interface. A VME bus is however used to interconnect separate circuit boards in a single device, such as a rack assembly; these are not independent devices, but separate parts of a single device. Furthermore, there is no defined communication protocol, for example defining the content of a packet and a common Data Link Layer. Therefore, a VME bus has some similarities with a LAN but is not a LAN and claim 1 is novel over the alleged public use V1.

It is not obvious to replace a VME bus by a LAN in order to improve modularity and to render easier any operation of reprogramming or of reconfiguration of the interconnections between different elements. A combination scale is a single apparatus and a LAN is used to interconnect a plurality of apparatuses. In document D10 a control unit and individual scales are interconnected using a bus consisting of a plurality of parallel electrical lines (column 2, lines 41 to 19). The interfaces are preferably in the form of serial interfaces, although the use of a field bus system such as the CAN of the company Bosch is also possible (column 3, lines 7 to 17). It is however impossible to assemble a combination weighing and packing system using such a CAN; the bus 64 represented in Figure 1 of document D10 has the shape of a belt, in the same manner as commonly used for a bus in a computer circuit such as an integrated circuit with relation to a control bus, an address bus or control lines. These control lines simply transmit on/off or 1/0 signals. On the other hand, a CAN or a LAN require more complicated connections and utilise transmission protocols for the transmission of data. Document D10 gives no suggestion as to how this may be done. In addition, even assuming that the assembly of prior use V1 contained a CAN in

the packing system, the weighing system comprised a plurality of weighing units and it was not obvious to extend the CAN to the weighing system. In any case, there is no evidence that a CAN is a LAN.

Reasons for the Decision

1. The appeal is admissible.

2. *Documents D10, D12 and D15 - Admissibility*

2.1 Document D10 was submitted by the appellant together with the statement of grounds of appeal in reaction to the assessment of inventive step in the contested decision. The opposition division held that the subject-matter of claim 1 of the patent as granted - the main request before the opposition division - did not involve an inventive step because the claimed alternative relating to the packing driving section and the packing control means being mutually connected through a LAN was rendered obvious by the alleged public prior use V1 and the prior art on file. The subject-matter of claim 1 of the auxiliary, and now sole claim request before the Board, was restricted, by deletion in claim 1 as granted of the aforementioned alternative, to the remaining alternative, i.e. to the weighing driving section and the weighing control means being mutually connected through a LAN. The opposition division held that the amended claimed subject-matter involved an inventive step. However, apart from dismissing from consideration the combination of the alleged prior use V1 with other prior uses alleged by the appellant on the grounds that the latter allegations had not been sufficiently proven, the opposition division did not give in its decision any

detailed reasoning as to why in its opinion the use of a LAN for interconnecting the weighing driving section and the weighing control means involved an inventive step over the available prior art.

It is incumbent upon the party adversely affected by the decision and appealing against it to challenge the decision on its merits. The appellant filed document D10 in support of the submission that the provision of a LAN for interconnecting the driving and the control sections of a weighing apparatus was already known in the prior art. The Board is of the view that this constituted, in the circumstances of the present case, a normal and legitimate reaction to the (not fully reasoned) view of the opposition division that the use of a LAN for interconnecting the weighing driving section and the weighing control means of the system allegedly used according to the prior use V1 involved an inventive step. In addition, the content of document D10, and in particular the disclosure of the document relating to the use of an interconnection bus, was already extensively considered by both parties in the parallel case relating to European patent No. 0825425 and involving the same parties (see decision T 1006/08, points 2 to 14 of the reasons, the document labelled D16 corresponding to present document D10).

In view of the above considerations, the Board considered it appropriate in the circumstances of the case to admit document D10 into the proceedings and to reject the respondent's request not to admit the document for being late filed.

During the proceedings the respondent requested the remittal of the case to the opposition division in the event that evidence submitted by the appellant during

the appeal proceedings, and in particular document D10, were to be admitted into the proceedings. However, as noted above, document D10 complements the case already presented by the appellant during the first-instance proceedings and relating to the issue of inventive step over prior use V1. Admission of the document into the proceedings does not therefore create a completely fresh case or raise new issues that would justify the remittal of the case. Furthermore, document D10 was already filed with the statement of grounds of appeal and, as noted in the previous paragraph, the pertinent content of the document was already known by the parties, and in these circumstances the respondent had had due opportunity to deal - as he actually did in detail in its letter of reply to the statement of grounds of appeal - with the content of the document and the corresponding appellant's submissions. A remittal of the case would therefore have resulted in a delay of the procedure that would not have been justified in the circumstances of the present case. For these reasons, the Board did not allow the respondent's request for remittal of the case to the opposition division.

2.2 Document D12 was filed by the appellant with the statement of grounds of appeal as documentary evidence in support of its submission that, as already found by the opposition division in its decision, a CAN constitutes a LAN. In view of the circumstances surrounding this submission (see point 5.3 below), in view of the fact that document D12 was submitted by the appellant only in support of an allegation of common general knowledge, and in view of the fact that this document had also been considered by the parties in the parallel case mentioned above (decision T 1006/08, point 4 of the reasons, the document labelled D11

corresponding to present document D12), the Board decided during the oral proceedings to admit document D12 into the proceedings.

In the circumstances indicated above the admission of document D12 would not in the Board's view have justified the remittal of the case for reasons similar to those already given in point 2.1 above with regard to document D10.

2.3 Document D15 was filed by the respondent during the appeal proceedings in response to the submissions of the appellant that a VME bus constitutes a LAN. In view of the fact that the issue of novelty of the claimed subject-matter during the proceedings turned mainly on the question of whether or not a VME bus constitutes a LAN as claimed (see point 4.2 below), that the patent itself does not contain any precise definition of a LAN, and that document D15 issued by the IEEE specifies the functional requirements of a LAN as established by the Local and Metropolitan Area Networks Standards Committee, the Board decided during the oral proceedings to admit the document into the proceedings.

2.4 The remaining documents and documentary evidence submitted by the appellant during the appeal proceedings are not pertinent to the present decision.

3. *Alleged public prior use V1*

3.1 The appellant's allegation of public prior use V1 relates to an assembly of the weighing system Multipond Wägeautomat MP 1401-B, Nr. M 695 of the associated companies Multipond and Atoma and of the packing system SBM VBMS 250, Nr. 4908 of the company Aquarius (V1, documents S9 and S14 to S17). The assembly was

allegedly delivered on 30 May 1994 (V1, document S7) and mounted on 9 August 1994 (V1, document S8) at the premises of the company Sonnentau Gebr. Winkelmann KG (Visselhövede, Niedersachsen, Germany).

In its decision the opposition division found that the pieces of evidence V1 (documents S1 to S34) submitted by the appellant in support of its allegation of prior use and the results of the hearing of the witnesses F. Hofer and M. Hormann (*cf.* annex to the minutes of the first-instance oral proceedings) were sufficient to prove the relevant facts of the alleged public prior use and that the mentioned assembly comprised all but one of the features of the weighing and packing system defined in claim 1 of the then auxiliary request (and now the only claim request before the Board). The only missing claimed feature related to the weighing driving section and the weighing control means being mutually connected through a LAN, the corresponding connection in the assembly of prior use V1 being implemented by means of a VME bus (V1, document S16).

3.2 The respondent has contested the opposition division's conclusion that the alleged prior use V1 has been sufficiently proven. In particular, the respondent has submitted that there is no independent evidence corroborating the alleged facts, that the appellant has failed to submit a copy of the original of the instruction manual of the assembly, and that the prior use was based on a leasing agreement and not on the selling of the system.

3.2.1 In the present case all the written evidence relating to prior use V1, i.e. documents S1 to S34, originates from the appellant (Multipond Wägetechnik GmbH), i.e. one of the companies involved in the alleged prior use,

and the witnesses that were heard by the opposition division were also employees of the appellant. The evidence relied upon by the opposition division is therefore based exclusively on evidence originating from the appellant itself and, as submitted by the respondent, there is no independent corroborating evidence on file of the pertinent facts of the alleged prior use. However, while corroborating evidence from an independent source can certainly constitute strong evidence in support of an allegation of prior use, the mere absence of such independent evidence does not constitute a sufficient reason for dismissing an allegation of prior use.

The respondent referred in this respect to the case considered in decision T 1210/05 in which the evidence submitted in support of an alleged prior disclosure was considered, in the absence of independent evidence, not sufficient to conclude that the disclosure constituted prior art (points 2.5.4, 2.5.5, 2.6 and 2.8 of the reasons). In the circumstances of the case underlying the mentioned decision, however, the allegation relating to the relevant technical content of the prior disclosure was based on a copy of a poster allegedly displayed in a congress (point 2.2 of the reasons) and, for the rest, exclusively on the testimony of the person who allegedly displayed the poster (points 2.5.3 to 2.5.5 of the reasons). In contrast, in the present case the alleged prior use is based on a series of pieces of documentary evidence S1 to S34 including copies of invoices and confirmation orders, delivery records, assembly reports, documents countersigned by the customers, constructional drawings, etc. which already substantiate the alleged facts, and the declarations of the witnesses merely confirm or corroborate in the opposition division's view the

relevant facts shown in the documentary evidence. In addition, the respondent has failed to identify, among the allegations accepted by the opposition division as having been proven, any specific relevant fact that would only have found support on the witnesses' declarations. The circumstances of the case in decision T 1210/05 are therefore different from, and not comparable with those of the present case.

The respondent has also made reference to the comments in point 2.5.8 of decision T 1210/05 relating to the capacity of a witness to recollect past events. It is, however, noted that these comments were made in the context of an assessment which, unlike in the present case, depended critically on the probative value of the witness' declaration (points 2.2, 2.5.1 and 2.5.5 of the reasons). They are therefore not readily applicable to the present case, at least not to the extent of justifying disregarding the witnesses' declarations which, as submitted by the appellant, were not only based on their own recollection of the events, but also on personal logs and installation notes made at that time and shown to the opposition division during the hearing of the witnesses.

3.2.2 As regards the respondent's submissions that no copy of the instruction manual of the assembly has been filed as evidence by the appellant, the Board notes that the documentary evidence V1 contains, in addition to constructional drawings (documents S9, S10, S16 to S21, S23, and S30 to S33), also copies of brochures and excerpts specifying the technical characteristics of the delivered system (documents S14, S15 and S24 to S26) and that the mere absence of a copy of the instruction manual, or the like, originally handed over to the company Sonnentau - which went bankrupt in the

meantime - is not detrimental to the probative value of the evidence on file.

3.2.3 The respondent has also pointed out that the public character of the alleged prior use V1 has not been proven because the assembly was not sold, but only leased to the company Sonnentau (V1, document S25). Nonetheless, according to the established case law the selling of an apparatus is, in the absence of any special circumstance, sufficient to render the apparatus sold available to the public. The Board does not see in what respect the mere fact that the assembly under consideration was leased and not sold may affect, in the circumstances of the present case, the public availability of the assembly. In particular, as the assembly was only leased, it was not owned by the company Sonnentau, but this circumstance did not appear to impose restrictions to the public availability of the features of the assembly; more particularly, the prior use involved the mounting of the assembly at the premises of the company Sonnentau and also - as submitted by the appellant - the subsequent conventional start-up, training and maintenance procedures of the assembly at the same premises. Thus, the features of the assembly were rendered available to the company Sonnentau which, in the absence of any special reason for concluding otherwise, constituted at that time a member of the public.

In addition, in view of the documentary evidence and the witnesses' declarations, no secrecy agreement was to be expected in the circumstances of the case, and the respondent has failed to identify any special circumstance surrounding the prior use that would indicate that the assembly could have been leased under some form of express or implied confidentiality.

3.3 The respondent has also submitted that the alleged prior use originates from the appellant itself and that for this reason the burden of proof to be applied in the assessment of the alleged prior use is beyond any reasonable doubt or "up-to-the-hilt". However, apart from the specific submissions already addressed in the previous paragraphs and considered not persuasive by the Board, the respondent has failed to identify any particular deficiency in the reasoning of the opposition division - such as gaps in the line of argument developed by the opposition division, or inconsistencies in the available evidence, or contradictions between the written evidence and the witnesses' declarations - that would be at variance with the standard of proof referred to above.

In addition, in the Board's opinion there is no manifest ground for challenging the reasoning and the conclusion of the opposition division in respect of prior use V1.

3.4 Having regard to the above, the Board sees no reason for overturning the opposition division's finding that the relevant facts of the alleged public prior use V1 have been sufficiently proven.

4. *Novelty*

4.1 Apart from the formal aspects relating to the alleged prior use V1 and addressed in point 3 above, during the appeal proceedings the respondent has not disputed the view expressed by the opposition division in its decision that the assembly used according to prior use V1 comprised all but one of the technical features of the weighing and the packing system defined in claim 1

of the then auxiliary request (and now only claim request before the Board). The only exception is the feature of the interconnection between the weighing driving section and the weighing control means which was implemented in prior use V1 in the form of a VME bus and not in the form of a LAN as required by the claimed subject-matter.

The appellant for its part has submitted that, contrary to the opposition division's finding, the VME bus of prior use V1 constituted a LAN (Local Area Network) and that, consequently, the claimed subject-matter is not novel.

4.2 Document D15 is a report of the Institute of Electrical and Electronics Engineers (IEEE) on the functional requirements of Local Area Networks (LAN) established by the Local and Metropolitan Area Networks Standards Committee and was published in 1991, i.e. some years before the relevant date of the patent (be it the first of the two priority dates (23 August 1996) or, if the appellant's submissions that the claimed invention was not sufficiently disclosed in the first priority document were to be followed, the second priority date (30 January 1997)). According to document D15 a LAN is characterized, among other structural and functional features, by the use of packet mode communications and a common Data Link Layer interface (page 4, second paragraph). Although the concept of LAN has evolved with time, the presence of this specific communications networking structure or - if the argument of the appellant that document D15 is restricted to the internet and/or to computer networks were to be followed - of a communications networking structure operating in a way comparable to it has remained, at

least at the relevant date of the patent, an essential requirement of a LAN.

There is, however, no clear evidence on file that would allow the conclusion that a VME bus, and in particular the VME bus of the assembly of prior use V1, included a communications networking structure as that mentioned above.

The numerous submissions of the appellant in support of its view that a VME bus constitutes a LAN are insufficient to rebut this conclusion. Indeed, the Board cannot exclude that, as submitted by the appellant,

- a LAN and a VME bus may have in common several functional and structural features, such as the use of a data transmission line having a predetermined network topology, a predetermined data transmission protocol and a predetermined data transmission rate (document D7, page 31, last paragraphs, and page 32, first and second paragraphs and Figure 1.7, and document D8, section "Arbeitsweise"), or that
- other specific features of a VME bus, such as the relatively small length of a VME bus (document D7, Table on page 31) or the operation of a VME bus in a master/slave mode (document D4, page 3, lines 49 to 52, document D7, page 32, second paragraph, and page 33, second paragraph, and document D10, paragraph bridging columns 3 and 4), do not in principle exclude considering a VME bus as a LAN, or that
- other features relied upon by the opposition division as essential features of a LAN might well not constitute essential requirements of a LAN, such as the simultaneous access of multiple users

to a server and the simultaneous access of the server to multiple users (document D7, page 33, second paragraph).

However, all these submissions would indicate, at the most, that each of a VME bus and a LAN exhibit features that are either common to, or equivalent to, or not excluded by the features of the other one. Thus, in the absence of any clear evidence that the VME bus of the system of prior use V1 included a communications networking structure proper to a LAN, such as a packet mode communications and a common Data Link Layer interface, the appellant's submissions are insufficient to conclude that the VME bus under consideration included all the structural and functional features characterizing a LAN.

4.3 In view of the above considerations, the Board comes to the conclusion that the evidence and the arguments submitted by the appellant are insufficient to discharge itself of the onus of proof that the assembly of prior use V1 anticipated all the features of the claimed system, and in particular the use of a LAN as claimed. Accordingly, the subject-matter of claim 1 of the auxiliary request (and sole claim request before the Board) is novel over prior use V1.

Since, as shown in point 5 below, the issue of inventive step over the prior use V1 is crucial for the outcome of the appeal, there is no need to address the appellant's submissions of lack of novelty over other prior uses alleged during the proceedings.

5. *Inventive step*

5.1 The assessment of inventive step has focused on the question of whether it was obvious at the relevant date

of the patent in suit to replace the VME bus of the system of prior use V1 by a LAN.

According to the patent disclosure (paragraphs [0013] and [0059]) and the respondent's submissions, the use of a LAN instead of a VME bus for interconnecting the weighing driving section and the weighing control means improves the weighing and packing system in that hardware, and in particular the weighing units, can rapidly be added and changed.

5.2 The Board first notes that the weighing and packing system of prior use V1 resulted from the assembly of two different systems, namely a weighing and a packing system originating from different companies (point 3.1 above) and each having a different data transmission and interconnection structure. Thus, while the weighing system comprised a VME bus for interconnecting the weighing driving section and the weighing control means, the packing system comprised different interconnecting means. In addition, as noted during the oral proceedings, according to the documentary evidence on file, the assembly also included a CAN interconnecting the weighing and the packing systems (see V1, documents S18 to S20; see also the results of the hearing of the witness F. Hofer (paragraphs bridging pages 2 and 3, paragraphs bridging pages 5 and 6, and page 10, last paragraphs) relating to the use of a CAN already operating within the packing system for interconnecting the weighing and the packing systems).

In view of the different data transmission and interconnection structures present in the assembly of the two systems, it would have been - as remarked by the Board during the oral proceedings - straightforward for the skilled person competent in this field to

contemplate the integration of these structures in order to simplify and to improve the management of the data transmission and interconnection architecture of the whole assembly. The skilled person confronted with the problem of fulfilling this task would in principle have been faced with different possible alternatives. In view of the presence of a CAN already operating in the assembly, however, the skilled person would have considered extending the operation of the CAN to include the interconnection between the weighing driving section and the weighing control means of the weighing system as a straightforward way of integrating the structures of the two systems, and in the Board's view the skilled person would have seriously contemplated the implementation of this possibility, especially in view of the potential improvements that the use of the CAN in the weighing system would bring about.

In particular, the skilled person would have been prompted by the prior art before the relevant date of the patent to follow this possibility in view of the teaching of document D10. This document discloses a scale comprising a control unit 60 connected with a bus 64 by means of an interface 62, the bus being connected to two weighing units 14 and 16 each having a microcontroller (abstract and Figure 1 together with the corresponding disclosure, in particular column 3, lines 51 to 59). The scale is therefore of the same type as the weighing system of prior use V1, i.e. of the type including a plurality of weighing units forming a combination scale, a weighing driving section and a weighing control means. In addition, one of the essential aspects addressed in the document is endowing the weighing system with a modular architecture (column 2, line 50 *et seq.*, and column 4, lines 26 to 29) that

allows a different number of weighing units to be connected to the bus (column 3, lines 1 to 5), and the document teaches implementing the bus in the form of a field bus, and more particularly in the form of a CAN bus (column 2, lines 41 to 49, and column 3, lines 7 to 17).

This obvious approach in the integration of the two systems constituting the assembly would have resulted in the replacement of the VME bus connecting the weighing driving section and the weighing control means by an interconnection in the form of a CAN bus. Furthermore, this replacement would have improved the modularity of the resulting assembly as taught in document D10 and consequently, in view of the communications networking characteristics of the CAN, would also have improved the flexibility of the assembly when adding and/or replacing components of the weighing system such as the weighing units (*cf.* point 5.1 above, second paragraph).

5.3 In addition, as submitted by the appellant with reference to document D12 (title and page 3, last paragraph), a CAN (Controller Area Network) is a particular example of a field bus and a field bus constitutes a LAN, so that as already found by the opposition division in its decision - and as also concluded by the Board in a different composition in decision T 1006/08, *supra* (point 4 of the reasons) referred to in point 2.1 above and involving the same parties - a CAN constitutes a LAN.

This finding was consistently relied upon by the parties during the proceedings and was not contested, either expressly or implicitly, by the respondent during the first-instance proceedings and during the

written phase of the appeal proceedings - and neither in the parallel proceedings relating to decision T 1006/08 referred to above, see point 4 of the reasons. During the written appeal proceedings the respondent itself submitted arguments in support of inventive step of the claimed invention with respect to prior art disclosures - in particular document D10 - teaching the use of a CAN, and all of these submissions were implicitly based on the assumption that a CAN constituted a LAN.

The respondent, however, resiled from its position for the first time at the end of the oral proceedings before the Board as its representative expressed doubts that all buses disclosed in document D12 as falling within the category of field buses, and in particular the CAN bus referred to in the document, constituted a LAN. This change in the respondent's position at such a very late stage of the appeal procedure may not be admissible under Articles 13(1) and (3) RPBA (Rules of Procedure of the Boards of Appeal) as a late amendment to its case on appeal, see in this respect decision T 1449/05, points 2.5 to 2.9. In any case, the simple calling into doubt of the above finding that a CAN constitutes a LAN, without however submitting technical arguments and/or evidence to counter the finding, is insufficient in the circumstances of the case to put into question the finding of the opposition division in this respect or, in view of the evidence relied upon by the appellant, to shift the burden of proof back again on the appellant.

5.4 During the proceedings the respondent submitted in support of inventive step of the claimed subject-matter that, while a LAN is used to interconnect a plurality of devices, a combination scale is a single device.

However, this argument is at variance with the fact that a combination scale comprises a plurality of weighing units each requiring individual control. In addition, as already noted in point 5.2 above, document D10 explicitly addresses the modular architecture of a combination scale comprising a plurality of weighing units each including its own microprocessor (column 3, lines 51 *et seq*.) and, in addition, the document expressly teaches connecting each of the plurality of weighing units of the scale to a common CAN (column 3, lines 3 to 17).

The respondent has also submitted that it would be impossible to assemble a combination weighing and packing system using a bus as disclosed in document D10 (point VII above, last paragraph). However, the use of a bus in the form of a CAN as proposed in document D10 goes beyond the mere use of control lines transmitting on/off signals as suggested by the respondent. On the contrary, although not explicitly disclosed in document D10, the use of a CAN presupposes - as admitted by the respondent - a predetermined networking structure and a predetermined data transmission protocol, and these are the features that the person skilled in this field would understand as being implicitly disclosed in document D10 and that would enable him to extend the CAN used in the assembly of prior use V1 to cover the weighing system as specified above. It is also noted that, as stressed by the appellant during the proceedings, also the patent specification fails to explicitly provide any information on the structural and functional features, and more particularly on the data transmission protocol, of the LAN of the claimed system.

5.5 It follows from the above considerations that it would have been obvious for the skilled person to integrate the weighing and the packing systems of the assembly of prior use V1 so as to result in a weighing and packing system as defined in claim 1 of the then auxiliary request and now only claim request before the Board (Article 56 EPC).

6. In view of the Board's conclusion that the subject-matter of claim 1 amended according to the only claim request before the Board does not involve an inventive step, the Board concluded during the oral proceedings that the patent was to be revoked in accordance with the appellant's request (Article 101 (3) (b) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

M. Kiehl A. G. Klein

Decision electronically authenticated