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**Datasheet for the decision
of 30 September 2015**

Case Number: T 0258/11 - 3.4.01
Application Number: 02751098.1
Publication Number: 1405261
IPC: G06K19/077, G06K17/00,
G06K7/00, B65G47/49
Language of the proceedings: EN

Title of invention:

METHOD AND SYSTEM OF SETTING AND/OR CONTROLLING OF A FOOD
PRODUCT DISPENSING MACHINE USING A TAG-TYPE COMMUNICATION
DEVICE

Patent Proprietor:

Nestec S.A.

Opponent:

DEMB Holding B.V.

Headword:

Relevant legal provisions:

EPC Art. 123(2)
EPC 1973 Art. 54, 56

Keyword:

Amendments - added subject-matter (no)
Novelty - (yes)
Inventive step - (yes)

Decisions cited:

Catchword:



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Case Number: T 0258/11 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 30 September 2015

Appellant: DEMB Holding B.V.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 November 2010 concerning maintenance of the
European Patent No. 1405261 in amended form.**

Composition of the Board:

Chairman G. Assi
Members: F. Neumann
D. Rogers

Summary of Facts and Submissions

I. The appeal lies from the interlocutory decision of the opposition division to maintain European patent No. 1 405 261 in amended form.

II. An opposition had been filed against the patent as a whole based on Article 100(c) EPC 1973 and Article 100(a) EPC 1973, objections of lack of novelty and inventive step being raised. During the opposition proceedings, reference was made, *inter alia*, to the following documents:

A2: EP-B-0 451 980;
A3: EP-A-0 449 533;
A5: EP-B-0 638 486;
A9: WO-A-01/017893;
A12: US-A-5 285 041.

III. In the notice of appeal, the appellant (opponent) requested that the decision of the opposition division be set aside and the patent be revoked in its entirety.

In the statement setting out the grounds of appeal, the appellant presented its arguments as to why, in its view, the amended claims of the patent as maintained did not meet the requirements of Article 123(2) EPC.

The appellant also indicated why, in its opinion, the subject-matter of claim 1 lacked novelty with respect to the disclosures of each of A2, A3 and A5, whereby reference was made throughout the appeal proceedings to the A-publication of document A2.

In addition thereto, the appellant presented a number of arguments in support of its view that the subject-

matter of the claims lacked inventive step, in particular starting from A9.

As an auxiliary measure, oral proceedings were requested.

- IV. In response thereto, the respondent (proprietor) requested that the appeal be dismissed and presented counter-arguments to the objections raised by the appellant.
- V. The Board issued a summons to oral proceedings. In a communication pursuant to Article 15(1) Rules of Procedure of the Boards of Appeal (RPBA), the Board set out its provisional opinion with regard to the requests then on file, commenting on the objections raised by the appellant in the statement setting out the grounds of appeal.
- VI. In response to the Board's communication, by letter of 28 August 2015, the appellant presented some additional arguments with regard to Article 123(2) EPC. Moreover, further arguments were presented with regard to the alleged lack of inventive step, including approaches starting from A2 and A12.
- VII. By letter of 31 August 2015 the respondent replied to the Board's communication and filed four amended sets of claims, forming the basis of a main request and first to third auxiliary requests.
The respondent requested maintenance of the patent based on the claims of the main request.

In a subsequent further letter of 18 September 2015, the respondent submitted additional arguments.

VIII. During the oral proceedings, the respondent deleted three dependent claims from each of the requests then on file. These amended claim sets were submitted as a main request and first to third auxiliary requests, replacing all previous requests on file.

IX. The final requests of the parties were therefore as follows:

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

The respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request, or alternatively on the basis of one of the first, second or third auxiliary requests, all filed at the oral proceedings before the Board on 30 September 2015.

X. Claim 1 of the respondent's main request reads as follows:

"A system for dispensing a product, comprising
- one or more receptacles having at least one wall member that defines an enclosure, and an electronic remotely sensed multi-bit communication tag (4) associated with the receptacle, wherein the tag includes machine-readable information regarding the product and including instructions in electronic form for the preparation of the product,
- a food or beverage dispenser (7) including a tag reader (8) for reading the tag, and a processor (9, 59) having a memory (61) operatively associated with the dispenser (7) and the tag reader (8), said processor being configured to:
signal the tag reader to read the tag;

receive information read from the tag by the tag reader;
store the information in the memory,
the dispenser being adapted for reading the tag associated with said one or more receptacles, wherein a food- or beverage-forming product is present within the enclosure of the receptacle,
characterized in that:
- the receptacle forms the package for the food- or beverage-forming product and is stored in the dispenser (7),
- the dispenser (7) is adapted for preparing and dispensing a food or beverage from the food-forming or beverage-forming product(s) of the package(s) including dilution with a diluent according to the product preparation instructions and the processor (9,59) being also configured to carry out the instructions to prepare and dispense the product,
- the tag is affixed to the package or left loose inside the package."

Claims 2 to 15 are dependent claims.

The wording of the claims of the respondent's auxiliary requests does not play a role for the present decision and so will not be reproduced here.

XI. The arguments of the parties, insofar as they are relevant to the decision, are derivable from the reasons for the decision.

Reasons for the Decision

1. The appeal is admissible.

Admissibility of the respondent's requests

2. The sets of claims forming the basis of the final requests of the respondent were submitted only during the oral proceedings before the Board.

The claims of each of the final requests are identical to the claims of the corresponding requests filed with the letter of 31 August 2015, with the exception that three dependent claims have been deleted from each request in order to meet an objection under Article 123(2) EPC.

It should be noted that, during the oral proceedings, the appellant raised objections against the admissibility of the previous requests filed with the letter of 31 August 2015. In particular, the appellant underlined the fact that the previous requests had only been filed on 31 August 2015, i.e. one day after the deadline set for reply by the Board in the communication under Article 15(1) RPBA. In addition thereto, the appellant considered that the amendments to the claims could - and should - have been made four years earlier in response to the statement setting out the grounds of appeal.

On the other hand, the respondent submitted that the Board's deadline for reply to their communication fell on a Sunday and that the requests were thus filed on the first working day after the deadline. Moreover, the amendments to the claims had been made in direct response to the Board's remarks contained in its communication. Until the position of the Board was known, there was no reason to amend the claims. Four years previously, the position of the opposition division, as set out in the contested decision, was

that the claims were allowable. Indeed, the statement setting out the grounds of appeal did not contain any new arguments vis-à-vis the arguments which the opposition division had not found convincing. It was only with the Board's communication that it became clear that the issue of an intermediate generalisation would have to be addressed. The amendments were aimed at overcoming this problem.

The Board notes that the deadline for filing any reply to the Board's communication simply has the aim of giving the Board and the other party to the procedure sufficient time for preparing the oral proceedings. Keeping this aim in mind, it is quite irrelevant whether the reply was filed on the deadline set on 30 August 2015 (a Sunday) or one day later. Therefore, with this understanding, a document received after such deadline should not necessarily be regarded as being late-filed. Rather, the Board's discretionary power laid down in Article 13(1) RPBA should be considered.

During the oral proceedings, having regard to the requests filed on 31 August 2015, the Board admitted these requests into the appeal procedure after due consideration of the amendments made in response to the Board's communication and the arguments submitted by both parties as to the admissibility of these requests. In this respect, the Board held that although the question of an intermediate generalisation had been raised by the appellant in the statement setting out the grounds of appeal, it was only with the Board's communication that this objection was confirmed as being pertinent.

Later on during the oral proceedings, after the respondent had filed the new requests underlying the present decision, the appellant raised no objections to their admissibility. In view of the fact that the appellant had no objections and that the amendments made consisted solely in the deletion of three dependent claims in each request and the consequential renumbering of the subsequent claims, the Board also admitted said new requests into the procedure.

In conclusion, the respondent's requests filed during the oral proceedings are admitted into the procedure.

Respondent's Main Request

3. Article 123(2) EPC

During the oral proceedings, the appellant raised objections under Article 123(2) EPC with regard to the respondent's previous main request of 31 August 2015. These objections also applied to the respondent's new main request as filed at the oral proceedings. In particular, three issues need to be considered.

3.1 The first point which the appellant objected to concerned the connection of the dispenser to an external communications network.

3.1.1 The appellant noted that claim 1 had been amended by combining, *inter alia*, claims 25 and 29 of the original application. However, the contents of original claim 29 had not been included in new claim 1 in their entirety. In particular, original claim 29 set out that the dispenser included a connection to an external communications network and that the processor was configured to place information read from the tag by

the tag reader on the external communications network. The appellant held that there was no basis for omitting these limiting features from the combination of features now found in claim 1.

The appellant also considered that the original application taught that a single system was provided to address multiple problems. The single system described in the original application included a connection to an external communications network. One of the problems to be solved by the originally disclosed system was that the dispenser needed reprogramming whenever a new product which required different preparation procedures was introduced into the product range of the dispenser. In the view of the appellant, reprogramming of the dispenser could not be performed without connection to an external communications network. Indeed, the description did not disclose how the processor could operate without such a connection. This feature of the connection to the external communications network was therefore indispensable for the functionality of the invention and had to be included in the independent claim.

- 3.1.2 The respondent explained that the application mentioned various problems. The main problem which the application addressed was the reprogramming mentioned above. This problem was solved by placing an electronic tag containing preparation instructions onto the product. The external communications network provided additional advantages but had nothing to do with the solution of this main problem. It was clear from the original application that the functionality associated with the external communications network was always presented as optional, the functions being consistently couched in "may" terms (page 20, line 21 to page 21,

line 4). The functionality of the external communications network was nowhere systematically linked to the main problem of reprogramming.

The respondent acknowledged that the reprogramming was not explicitly mentioned in claim 1 but considered that this was reflected in the ability of the processor to store information from the tag in its memory. The information required for the reprogramming could be provided to the processor via a connection to an external network or it could be provided via a tag. The external connection was not essential if the tag contained the necessary information.

- 3.1.3 In order to establish whether the omission of the features of original claims 29 results in the reader being presented with technical information which was not previously available, it has to be determined whether the connection to an external communications network is inextricably linked to the other features of the dispenser appearing in original claim 29 (i.e. the tag reader and the processor), in other words whether there is a close structural and functional relationship between the omitted features and the remaining features (Case Law of the Boards of the Appeal of the European Patent Office, 7th edition 2013, II.E.1.2).

The Board agrees with the respondent that the connection to the external communications network and the function provided by this connection are merely optional. From this, the Board concludes that there is neither a close structural relationship nor a close functional relationship between the connection to the external network and the dispenser, the tag reader and the processor. For this reason, the features relating

to the connection to the external communications network may be omitted from the new claim.

3.2 A second point which the appellant objected to was that the dispenser was defined in claim 1 as being adapted to perform the step of dilution.

3.2.1 The appellant held that this function had been isolated from the originally-disclosed context in which the step of dilution was combined with other product preparation steps, such as dosing, mixing, pumping, whipping and heating (page 21, lines 5-24). The appellant could find no basis in the original application for the breadth of the subject-matter resulting from the extraction of this feature from its original context. Specifically, there was no basis for a dispenser which prepared and dispensed a food or beverage using only the step of dilution, as was currently covered by claim 1.

Moreover, it was noted that page 10, lines 22-25 of the original application explained that, in carrying out the preparation instructions, the processor set **one** of an operating temperature, a dilution ratio, a mixing time or a dispensing time in accordance with the set of instructions in electronic form. In other words, the processor of the original application had four available options and selected **just one** of them. Claim 1 made no reference to the parameters to be set by the processor, the implication being that the processor might be configured to set all of these parameters. This was in conflict with the disclosure of page 10 mentioned above and found no basis in the original application documents.

The appellant further noted that claim 1 stated that the dilution was performed according to "*product*

preparation instructions". This terminology was much more general than that used in the original application which, on page 10, lines 22-25, referred to "*product preparation instructions in electronic form*".

3.2.2 The respondent argued that the term "*dilution*" simply meant mixing an ingredient with a liquid. The skilled reader was a person with knowledge of dispenser machines and would understand that the steps of heating, dosing, whipping, mixing and pumping were not mandatory steps. They could optionally be performed but were not necessary in every case. Since these steps were not essential, they could be omitted. The only essential step was that of dilution.

3.2.3 The Board observes that claim 1 sets out that the tag includes "*machine-readable information ... including instructions in electronic form for the preparation of the product*". It is therefore clear from claim 1 that the "*product preparation instructions*" according to which the dilution is performed, are "*instructions in electronic form*" and therefore have a basis in the original application.

Page 21 discusses the manner in which the processor orchestrates the preparation of the food product using the "*tag data*". The product is prepared by controlling the amount of diluent, heating the water tank, pumping the hot water into a mixing bowl and dosing the powdered food product into the mixing bowl. The water and powder are then mixed for a time specified by the tag information. This shows that the processor controls more than just one parameter when necessary. However, as argued by the respondent, the only essential step in this process is dilution, the execution of the other steps depending on the product to be dispensed (e.g.

hot and frothy) and the manner in which the concentrated food or beverage product is stored (e.g. in a powder hopper or a pre-measured capsule). The remaining steps are therefore optional and can be omitted from the claim.

3.3 The third objection under Article 123(2) EPC concerned the storage of the receptacle for the food- or beverage-forming product in the dispenser.

3.3.1 The appellant pointed to several passages of the original disclosure which taught that the food product container was not located in the dispenser. Page 22, lines 1-2 taught that the powder hopper could be the food product container. There was no disclosure that the powder hopper might be placed **in** the dispenser, the powder hopper being conventionally placed on top of the dispenser. On page 17, lines 17-19, the food packaging was a multi-serving flexible bag which was arranged in fluid communication with the tubes of the dispensing machine. Again, there was no disclosure that this flexible bag might be located **in** the dispenser. Various passages (e.g. page 32, lines 17-21; page 20, lines 15-17; page 19, lines 8-9) referred to the loading of the product container into the product dispenser. The appellant held that the action of loading the package into the dispenser could not be equated with storing the package in the dispenser, as was set out in claim 1. Figure 1 illustrated that the food packaging and the dispenser were two separate units. The appellant argued that whilst it might be unreasonable to store the food packaging outside the dispenser, this did not mean that the storage in the container was originally disclosed.

3.3.2 The respondent indicated that there were several embodiments in the original disclosure in which the receptacle was located **in** the dispenser. For example, page 19, lines 11-17 described an embodiment in which the powder hopper was located inside the dispenser. Page 20, lines 14-20 made clear that the food packaging was loaded into the dispenser and was left there until after the food was selected and dispensed.

3.3.3 The Board agrees with the respondent in this respect. Both of the cited embodiments provide sufficient basis for the amendment to claim 1 which defines that the package for the food- or beverage-forming product is stored in the dispenser.

3.4 No further objections were raised under Article 123(2) EPC, either by the appellant or by the Board.

The Board therefore concludes that the amendments do not infringe Article 123(2) EPC.

4. Novelty

4.1 During the oral proceedings, neither the appellant nor the respondent had any comments regarding novelty.

4.2 The disclosures of A2, A3 and A5 are very similar and are each considered to be equally relevant to the present case. Throughout the proceedings, A2 was taken as being representative of the disclosures of all of these documents. Consequently, in the following, A2 will be referred to, but the findings apply equally to the disclosures of A3 and A5.

A2 discloses a sealed package containing a powder, a paste or liquid ingredients for preparing beverages in

a dispensing machine. The package carries an identification marker in the form of mechanical pegs, a magnetic strip, an optical bar-code or electrically conductive areas. The identification marker is read by the dispensing machine so that the machine can identify which package has been inserted into the machine. On the basis of the package identification, a beverage preparation cycle is selected from a number of programmes stored in the processor of the beverage dispensing machine.

4.3 The respondent identified in writing by the letter of 26 August 2011 (point 2) the four features which, in its opinion, distinguished the subject-matter of claim 1 from the disclosure of A2. In particular, A2 did not disclose:

- i) the use of an electronic remotely sensed multi-bit communication tag;
- ii) that the tag contained information including instructions in electronic form for the preparation of the product;
- iii) that the processor had a memory operatively associated with the tag reader; and
- iv) that the processor was configured to store the information read from the tag by the tag reader in the memory.

4.4 During the written proceedings, the appellant submitted that the terms "*electrical*" and "*electronic*" had a similar meaning and that the tag of A2, which, in one embodiment, comprised electrically conductive areas, could be regarded as an electronic tag.

4.5 The Board observes that "*electronic*" implies the control of electric energy by means of electrical circuits comprising active electrical components and

associated passive electrical components and interconnection technologies. On the other hand, the term "*electrical*" merely implies the use of electricity. The tag of A2 therefore would not be considered by a skilled person to be an electronic tag.

For this reason alone, the subject-matter of claim 1 is new with respect to the disclosure of A2.

- 4.6 Neither the appellant nor the Board considered any of the remaining prior art documents to be novelty-destroying.

The subject-matter of claim 1 is therefore new.

- 4.7 Claim 11 is the method claim corresponding to claim 1 and defines "*A method of dispensing a food or beverage from the system according to any one of claims 1 to 10, which method comprises...*". By virtue of its interdependency with claim 1, the subject-matter of claim 11 is also new.

5. Closest prior art

- 5.1 On the basis of a feature-by-feature comparison, document A12 comes very close to the subject-matter defined in claim 1.

In particular, A12 discloses a sealed package in which a microwave ready-meal is enclosed. The package is provided with a tag comprising a machine-readable optical or mechanical code. On the basis of this code, the power, duration and sequence of each heating cycle can be controlled such that the ready-meal can be correctly prepared. The aim of A12 is to provide a system which enables the codes to be scanned

automatically without the need for human intervention. This is achieved by designing the oven such that a standardised package and its associated code may be consistently located in a predetermined position such that the code reader can automatically read the code when the package is inserted into the microwave oven.

However, in view of the fact that A2 concerns a beverage dispensing system whereas A12 is directed to a microwave oven for heating ready-meals, the appellant admitted during the oral proceedings that A2 would have to be seen as the closest prior art.

- 5.2 Similarly, document A9 has a number of features in common with the subject-matter defined in claim 1. However, A9 does not disclose a food and beverage dispenser, but instead is directed to a self-service cafeteria-type arrangement in which plates and cups are provided with tags coded with a customer's order.

The context of A9 is therefore very different to the context of the present invention and would not represent a realistic starting point.

6. Inventive step

Starting from the disclosure of A2 as the closest prior art, the appellant used three approaches to argue that the subject-matter of claim 1 did not involve an inventive step.

- 6.1 In a first approach, the appellant submitted that the subject-matter of claim 1 lacked an inventive step in view of A2 and common general knowledge.

Reference was made to the four distinguishing features i) to iv) identified by the respondent above.

6.1.1 Having regard to point i), the appellant firstly argued that column 5, lines 1-3 of A2 made clear that the mechanical, inductive, magnetic or optical means for coding information onto the pack were only examples of the coding means. The tag could therefore be implemented using other means. In view of the statement in the application that remotely sensed multi-bit electronic tags were well known (page 1, lines 8-9), it would have been obvious to employ an electronic tag instead of the mechanical, inductive, magnetic or optical tags used in A2.

The respondent submitted that the relevant skilled person worked in the field of beverage dispensing machines. The skilled person would therefore not have a detailed knowledge of remotely sensed communication/coding means. Just because RFID tags were known at the priority date of the application did not mean that their use in beverage dispensing machines was commonplace. Consequently, the use of electronic tags would not have been obvious to the relevant skilled person in the present case.

The Board considers that the widespread use of RFID tags at the priority date of the application means that such tags belong to the common general knowledge of the skilled person, irrespective of his specialist technical field. Indeed RFID tags would, depending on the circumstances, have been regarded as interchangeable with other conventional identification tags. To replace the coding means of A2 by an electronic tag would therefore have been obvious.

6.1.2 Having regard to point ii) above, the appellant was of the opinion that the code on the capsule of A2 included all of the information necessary for preparing the product. No additional information was needed by the dispenser. This was, in the opinion of the appellant, clear from the passage in column 4, lines 41-47 in which it was stated that the coding on the capsule was read and a signal was sent to the controller which then selected the appropriate preparation cycle. This meant that the electrical code on the tag could be regarded as including "*instructions in electronic form for the preparation of the product*".

Following the respondent's arguments, the Board disagrees with this analysis. In particular, as pointed out by the respondent, the indication in A2 that the controller "*selects*" the appropriate preparation instructions means that a list of preparation options for specific, known products must be available to the controller. The tag contains a code which enables the corresponding set of preparation instructions to be selected from the list. Thus, the information on the tag of A2 is merely a product identifier and does not itself include the preparation instructions.

6.1.3 Concerning points iii) and iv) above, the appellant indicated that the tag reader of A2 sent a signal to a processor and the processor selected a preparation cycle (column 4, lines 41-47). This meant that during operation of the dispenser, the memory of the processor was associated with the tag reader and information read from the tag by the tag reader was stored in this memory. The processor of D2 was therefore configured to store the information read from the tag in the memory.

Again, following the respondent's arguments, the Board disagrees with this assessment. As pointed out by the respondent, A2 does not disclose that the information read from the tag is stored in the memory. As argued above, it may be fairly assumed that the processor of A2 includes a memory in which various sets of preparation instructions are stored. The memory of the dispenser of A2 is accessed in order to select the correct preparation instruction but no new data is written to the memory.

- 6.1.4 In conclusion, there is nothing in A2 which would lead the skilled person to furnish the tag with product preparation instructions and to store information read from the tag in the memory of the dispenser. It cannot therefore be said that the subject-matter of claim 1 is obvious in the light of A2 and common general knowledge.

- 6.2 Following a second approach, the appellant submitted that even if the tag of A2 could not be understood to include product preparation instructions, it would be obvious to provide the tag with such instructions in the light of the disclosure of A9.

- 6.2.1 A9 discloses the use of an electronic communication tag which includes product preparation instructions in electronic form. Specifically, A9 discloses a self-service system in which food and beverages are ordered and paid for at a first location and the ordered goods are dispensed at a second location. When the order is placed, the customer is provided with containers (e.g. a plate, a cup or a tray) into/onto which the food and/or beverage are to be dispensed. These containers are provided with a transponder which is programmed in accordance with the customer's order. When the coded

container is presented at the dispensing outlet, the dispenser issues the food and/or beverage corresponding to the customer's order into the container. An example of a food product which is dispensed using this system is a sandwich which contains specific components. On the basis of the information carried by the tag, a custom-made sandwich may be prepared and dispensed.

- 6.2.2 The appellant submitted that from A9, the skilled person would be aware of the possibility to store product preparation instructions on an electronic transponder tag using radio frequency communication (page 3, line 37 to page 4, line 1). A9 also taught that such tags overcome problems associated with optical barcodes such as occlusion of the barcode (page 1, line 12 to page 2, line 5). It would therefore be obvious to employ an electronic tag in A2 to avoid any occlusion problems which may occur with an optical or mechanical recognition means.
- 6.2.3 The respondent pointed out that neither A2 nor A9 recognised the problem occurring with the dispenser of A2, namely that the dispenser would have to be reprogrammed every time a new product is introduced into the range. Moreover, neither A2 nor A9 contained any hint or incentive to modify the dispenser of A2 in any way.
- 6.2.4 The Board holds that, starting from A2, no reason can be seen for turning to A9 to solve the problem of reprogramming the dispenser when new products are introduced. Indeed, A9 does not offer a solution to this problem. Instead, A9 concerns an entirely different dispensing scenario in which a customer's order is assembled at a distribution outlet. Thus, although A9 shows that product preparation instructions

may be stored on an electronic tag, it does not suggest this arrangement as a solution to the re-programming problem encountered by the technician when filling the dispenser of A2 with new products. Starting from A2, no reason is apparent for why the skilled person would want to place the product preparation instructions on the tag when the whole concept of A2 is to provide these instructions in the memory of the dispenser.

6.2.5 It therefore cannot be said that the subject-matter of claim 1 is obvious in the light of the disclosures of A2 and A9.

6.3 Following a third approach, the appellant held that a combination of A2 and A12 would lead to the subject-matter of claim 1 in an obvious manner.

6.3.1 The appellant pointed out that A12 indicated that the provision of product preparation instructions on the tag in A12 permitted automatic cooking of vended food at different temperatures, cooking cycles or time periods without requiring any machine preprogramming or reprogramming (column 2, lines 35-40). In order to implement the instructions from the tag in A12, these instructions had to be at least temporarily stored in a memory in the controller of the microwave oven.

The problem of A2 would be solved if the requirement to preprogram the dispenser could be eliminated. Since A12 explained that the preprogramming of the machine could be avoided if the product preparation instructions were included on the tag, the skilled person would adopt the system of A12, in which the preparation instructions were included on the tag and the instructions were - at least temporarily - stored in a memory of the

controller, and would thereby arrive in an obvious manner at the subject-matter of claim 1.

- 6.3.2 The respondent pointed out that the system of A12 was actually developed to overcome the potential problem of erroneous scanning of the codes. A12 aimed to provide a system which enabled the codes to be scanned automatically without the need for human intervention. The problem solved by A12 was therefore not comparable to the problem faced by the inventor when starting from A2.

The respondent argued that, starting from the dispensing machine of A2, there was no prior art which recognised the problem that the introduction of new products would necessitate a reprogramming of the preparation instructions contained in the memory of the dispenser. In particular, the problem associated with A2 was not recognised in A12 so there was no reason why the skilled person would look to A12 to solve said problem. The dispenser of A2 was designed such that the preparation instructions were to be derived from the memory of the dispenser. In view of this, there was no obvious reason to provide product preparation instructions on the product itself.

- 6.3.3 The Board notes that, in accordance with established case law, a conscious choice of starting point not only determines the subject-matter serving as a starting point for the invention, but also defines the framework for further development (Case Law of the Boards of Appeal of the European patent Office, 7th edition, 2013, I.D.3.4.3).

The appellant has chosen A2 as the starting point in the present case. The system of A2 relies on the

storage of standard preparation programs in the memory of the dispenser. This is the context in which any further development of the system of A2 would be expected to take place. Given this framework, the Board considers that to suggest that the dispenser of A2 can be modified in such a way as to eliminate the preprogramming of preparation instructions - which is a fundamental feature of the system of A2 - would amount to hindsight.

The Board acknowledges that A12 does indeed indicate that the provision of a code containing preparation instructions on each individual ready-meal avoids the need to preprogram or reprogram the microwave oven controller (column 2, lines 35-40). However, the Board considers that this statement merely emphasises that A12 operates in a totally different framework to that of A2. Specifically, the microwave oven of A12 does not contain any preprogrammed heating cycles which would need to be updated when new products are introduced into the product range. Thus, A12 can be of no assistance when the skilled person is looking to overcome the problems associated with reprogramming the instructions of A2.

6.3.4 It therefore cannot be said that it would be obvious to combine the teachings of A2 and A12.

6.4 In conclusion, the Board believes that whilst it could be considered obvious to replace the optical/mechanical/magnetic recognition means of A2 with an electronic tag, it would not be obvious to modify the nature of the information on the tag in A2. The tag of A2 merely contains identification information enabling the appropriate preparation instructions to be selected from the memory. When further developing the dispenser

of A2 within its operational framework, it would not be necessary to include product preparation instructions on the tag, because these instructions are derived from the pre-programmed instructions in the memory of the dispenser. Thus, even if the tag of A2 were to be replaced by an electronic tag, there is no obvious reason to modify the dispenser of A2 in order to replace the product identification information on the tag by product preparation instructions.

6.5 As mentioned above, the appellant conceded during the oral proceedings that A2 had to be seen as the closest prior art, the contexts of A12 and A9 representing unrealistic starting points. Thus, although the appellant had initially argued a lack of inventive step starting from A12 or A9, it is not necessary to comment further on these approaches.

6.6 In view of the above findings, the subject-matter of claim 1 involves an inventive step.

6.7 As noted above, dependent claim 11 is the method claim corresponding to claim 1. Since claim 11 is interdependent with claim 1, it too must be considered inventive.

Conclusion

In view of the foregoing, the Board holds that the objections raised by the appellant do not prejudice the maintenance of the patent on the basis of the set of claims according to the respondent's main request. The description still has to be adapted to these claims.

Under these circumstances, the respondent's first to third auxiliary requests do not need to be considered.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the department of first instance with the order to maintain the patent with the following claims and a description to be adapted:

Claims:

Nos. 1 to 15 of the Respondent's Main Request received during the oral proceedings of 30 September 2015.

The Registrar:

The Chairman:



R. Schumacher

G. Assi

Decision electronically authenticated