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Datasheet for the decision of 9 October 2017

Case Number: T 1987/11 - 3.4.02

Application Number: 04101218.8

Publication Number: 1450154

IPC: G01N23/10, G01N33/02

Language of the proceedings: EN

Title of invention:
Non destructive x-ray inspection apparatus for food industry

Patent Proprietor:
Dylog Italia S.p.A.

Opponents:
Mettler-Toledo Safeline X-Ray Limited
Cheyney Design & Development Limited

Headword:

Relevant legal provisions:
EPC 1973 Art. 100(c), 76(1)
EPC Art. 123(2)

Keyword:
Grounds for opposition - patent as granted extends beyond content of earlier application (yes) - patent as granted extends beyond content of application as filed (yes)
Amendments - amended claims extend beyond the content of the earlier application (yes) - amended claims extend beyond the content of the application as filed (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
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Case Number: T 1987/11 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 9 October 2017

Appellant I: (Patent Proprietor)	Dylog Italia S.p.A. Corso Bramante, 53 10126 Turin (IT)
Representative:	Robba, Pierpaolo Interpatent S.R.L. Via Caboto, 35 10129 Torino (IT)
Appellant II: (Opponent 1)	Mettler-Toledo Safeline X-Ray Limited Greenfield Royston Business Park Royston, Herts SG8 5HN (GB)
Representative:	Gerbino, Angelo Jacobacci & Partners S.p.A. Corso Emilia 8 10152 Torino (IT)
Party as of right: (Opponent 2)	Cheyney Design & Development Limited New Cambridge House Litlington Royston Hertfordshire SG8 0SS GB (GB)
Representative:	Chambers, Neil Edward Burrows Chambers Associates Busines Centre West Avenue One Business Park Letchworth Garden City, Herts SG6 2HB (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on**

18 July 2011 concerning maintenance of the European Patent No. 1450154 in amended form.

Composition of the Board:

Chairman	R. Bekkering
Members:	H. von Gronau
	T. Karamanli

Summary of Facts and Submissions

I. The appeals of the appellant patent proprietor and of appellant opponent O1 are directed against the decision of the opposition division concerning maintenance of the European Patent No. 1450154 in amended form. The opposition division held claim 1 as granted and claim 1 of the first auxiliary request not to be allowable under Articles 100(c) and 123(2) EPC and maintained the patent on the basis of the second auxiliary request.

The present patent is based on a divisional application of earlier application No. 97102770.1.

II. The appellant patent proprietor requested that the decision under appeal be set aside and that the opposition be rejected (main request), or, in the alternative, that the patent be maintained in amended form on the basis of the claims according to the first auxiliary request, filed with its statement of grounds of appeal. As second auxiliary request, it requested that the appeal of appellant opponent O1 be dismissed. In the alternative, it requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the claims according to one of the third to ninth auxiliary requests filed with its statement of grounds of appeal.

III. Appellant opponent O1 requested that the decision under appeal be set aside and that the patent be revoked.

IV. The party as of right (opponent O2) has filed no request.

V. The appellant patent proprietor and appellant opponent O1 both requested as an auxiliary measure oral proceedings.

VI. In a communication accompanying the summons to oral proceedings the board expressed its provisional opinion, that inter alia claim 1 of the main request and of the auxiliary requests extended beyond the content of the application as filed and/or the content of the earlier application as filed contrary to Article 123(2) EPC and/or Article 76(1) EPC 1973.

VII. With a letter dated 2 August 2017 the appellant patent proprietor informed the board that it would not be attending the oral proceedings. The appellant patent proprietor did not reply in substance to the observations of the board.

VIII. With a letter dated 8 September 2017 appellant opponent O1 informed the board that it would not be attending the oral proceedings with the proviso that the patent proprietor did not change its decision of not attending the oral proceedings.

IX. Opponent O2 did not file any reply in the appeal proceedings.

X. Oral proceedings were held by the board on 9 October 2017 in the absences of the duly summoned parties. At the end of the oral proceedings the board announced its decision.

XI. Claim 1 as granted (main request) reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising

a feeding line for transporting said vessels and/or cans (3) through said apparatus, a pair of emitter means (5) and a pair of sensor means (7), characterised by
- a static structure (11) comprising two modular units (13), mutually placed at 90° and placed at 45° in relation to said feeding line wherein a first one of said emitter means (5) and a first one of said sensor means (7) are incorporated in a first modular unit (13) and a second one of said emitter means (5) and a second one of said sensor means (7) are incorporated in a second modular unit (13), said two modular units (13) being arranged so as to provide for said emitter means (5) on one side of said feeding line for emission of an X-ray beam and said sensor means (7) on the other side of said feeding line and facing said emitter means, so that X-rays collected by said sensor means (7) in said first modular unit (13) and X-rays collected by said sensor means (7) in said second modular unit (13) intersect said feeding line at an angle of 45° in a common crossing area, whereby said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

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

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus, a pair of emitter means (5) and a pair of sensor means (7), characterised by
- a static structure (11) comprising two modular units (13), each bridging the feeding line and being placed at 90° one to the other and crossing each other, the

overlapping parts of the modular units (13) defining a common crossing area, said modular units being placed at 45° in relation to said feeding line wherein a first one of said emitter means (5) and a first one of said sensor means (7) are incorporated in a first modular unit (13) and a second one of said emitter means (5) and a second one of said sensor means (7) are incorporated in a second modular unit (13), said two modular units (13) being arranged so as to provide for said emitter means (5) on one side of said feeding line for emission of an X-ray beam and said sensor means (7) on the other side of said feeding line and facing said emitter means, so that X-rays collected by said sensor means (7) in said first modular unit (13) and X-rays collected by said sensor means (7) in said second modular unit (13) intersect said feeding line at an angle of 45° in said common crossing area, whereby said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

Claim 1 of the patent as maintained in amended form by the opposition division (second auxiliary request) reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus, a pair of emitter means (5) and a pair of sensor means (7), characterised by
- a static structure (11) comprising two modular units (13), each bridging the feeding line and being placed at 90° one to the other and crossing each other, the overlapping parts of the modular units (13) defining a common crossing area, said modular units being placed

at 45° in relation to said feeding line wherein a first one of said emitter means (5) and a first one of said sensor means (7) are incorporated in a first modular unit (13) and a second one of said emitter means (5) and a second one of said sensor means (7) are incorporated in a second modular unit (13), said two modular units (13) being arranged so as to provide for said emitter means (5) on one side of said feeding line for emission of an X-ray beam and said sensor means (7) on the other side of said feeding line and facing said emitter means, so that X-rays collected by said sensor means (7) in said first modular unit (13) and X-rays collected by said sensor means (7) in said second modular unit (13) intersect said feeding line at an angle of 45° in said common crossing area, and wherein said emitter means (5) and said feeding line are arranged such that the x-ray beams emitted by said emitter means (5) cross each other before intersecting the feeding line, whereby said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

Claim 1 of the third auxiliary request reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus, a pair of emitter means (5) and a pair of sensor means (7), said feeding line having a longitudinal axis, characterised by
- a static structure (11) comprising two modular units (13), each bridging the feeding line and being placed at 90° one to the other and crossing each other, the overlapping parts of the modular units (13) defining a common crossing area, said modular units being placed

at 45° in relation to said feeding line wherein a first one of said emitter means (5) and a first one of said sensor means (7) are incorporated in a first modular unit (13) and a second one of said emitter means (5) and a second one of said sensor means (7) are incorporated in a second modular unit (13), said two modular units (13) being arranged so as to provide for said emitter means (5) on one side of said feeding line for emission of an X-ray beam and said sensor means (7) on the other side of said feeding line and facing said emitter means, so that X-rays collected by said sensor means (7) in said first modular unit (13) and X-rays collected by said sensor means (7) in said second modular unit (13) intersect the feeding line axis at an angle of 45° in said common crossing area, and wherein said emitter means (5) and said feeding line are arranged such that the x-ray beams emitted by said emitter means (5) cross each other before intersecting the feeding line, whereby said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

Claim 1 of the fourth auxiliary request reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus along a longitudinal axis of said feeding line, a pair of emitter means (5) and a pair of sensor means (7), characterised by
- a static structure (11) comprising two modular units (13), each bridging the feeding line and being placed at 90° one to the other and crossing each other, the overlapping parts of the modular units (13) defining a common crossing area, said modular units being placed

at 45° in relation to said feeding line wherein a first one of said emitter means (5) and a first one of said sensor means (7) are incorporated in a first modular unit (13) and a second one of said emitter means (5) and a second one of said sensor means (7) are incorporated in a second modular unit (13), said two modular units (13) being arranged so as to provide for said emitter means (5) on one side of said feeding line for emission of an X-ray beam and said sensor means (7) on the other side of said feeding line and facing said emitter means, so that X-rays collected by said sensor means (7) in said first modular unit (13) and X-rays collected by said sensor means (7) in said second modular unit (13) intersect the feeding line axis at an angle of 45° in said common crossing area, and wherein said emitter means (5) and said feeding line are arranged such that the x-ray beams emitted by said emitter means (5) cross each other before intersecting the feeding line, whereby said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

Claim 1 of the fifth auxiliary request reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus, a pair of emitter means (5) and a pair of sensor means (7), characterised by
- a static structure (11) comprising two modular units (13), each bridging the feeding line and being placed at 90° one to the other and crossing each other, the overlapping parts of the modular units (13) defining a common crossing area, said modular units being placed

at 45° in relation to said feeding line wherein a first one of said emitter means (5) and a first one of said sensor means (7) are incorporated in a first modular unit (13) and a second one of said emitter means (5) and a second one of said sensor means (7) are incorporated in a second modular unit (13), said two modular units (13) being arranged so as to provide for said emitter means (5) on one side of said feeding line for emission of an X-ray beam and said sensor means (7) on the other side of said feeding line and facing said emitter means, so that X-rays collected by said sensor means (7) in said first modular unit (13) and X-rays collected by said sensor means (7) in said second modular unit (13) start to intersect said feeding line at an angle of 45° in said common crossing area, and wherein said emitter means (5) and said feeding line are arranged such that the x-ray beams emitted by said emitter means (5) cross each other before intersecting the feeding line, whereby said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

Claim 1 of the sixth auxiliary request reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus, a pair of emitter means (5) and a pair of sensor means (7), characterised by
- a static structure (11) comprising two modular units (13), each bridging the feeding line and being placed at 90° one to the other and crossing each other, the overlapping parts of the modular units (13) defining a common crossing area, said modular units being placed

at 45° in relation to said feeding line wherein a first one of said emitter means (5) and a first one of said sensor means (7) are incorporated in a first modular unit (13) and a second one of said emitter means (5) and a second one of said sensor means (7) are incorporated in a second modular unit (13), said two modular units (13) being arranged so as to provide for said emitter means (5) on one side of said feeding line for emission of an X-ray beam and said sensor means (7) on the other side of said feeding line and facing said emitter means, so that X-rays collected by said sensor means (7) in said first modular unit (13) and X-rays collected by said sensor means (7) in said second modular unit (13) intersect said feeding line at an angle of 45° inside and outside said common crossing area, and wherein said emitter means (5) and said feeding line are arranged such that the x-ray beams emitted by said emitter means (5) cross each other before intersecting the feeding line, whereby said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions inside and outside said common crossing area."

Claim 1 of the seventh auxiliary request reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus, a pair of emitter means (5) and a pair of sensor means (7), said feeding line having a longitudinal axis, characterised by
- a static structure (11) comprising two modular units (13), mutually placed at 90°, crossing each other and placed at 45° in relation to said feeding line wherein a first one of said emitter means (5) and a first one

of said sensor means (7) are incorporated in a first modular unit (13) and a second one of said emitter means (5) and a second one of said sensor means (7) are incorporated in a second modular unit (13), said two modular units (13) being arranged so as to provide for said emitter means (5) on one side of said feeding line for emission of an X-ray beam and said sensor means (7) on the other side of said feeding line and facing said emitter means, said first modular unit and said second modular unit being arranged so as to shape with their overlapping parts a common crossing area crossed by said feeding line and said X rays, so that X-rays collected by said sensor means (7) in said first modular unit (13) and X rays collected by said sensor means (7) in said second modular unit (13) intersect the feeding line axis at an angle of 45° in said common crossing area, and wherein emitter means (5) and said feeding line are arranged such that the x-ray beams emitted by said emitter means (5) cross each other before intersecting the feeding line, whereby said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

Claim 1 of the eighth auxiliary request reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus, characterised in that it is composed of
— a static structure (11) composed of two modular units (13), mutually placed at 90° crossing each other and placed at 45° in relation to said feeding line;

-- a first one of said two modular units (13) being equipped with first emitter means (5) and first sensor means (7); and
-- a second one of said two modular units (13) being equipped with second emitter means (5) and second sensor means (7), wherein
- said first and second emitter means (5) are provided on one side of said feeding line;
- said first and second sensor means (7) are provided on the other side of said feeding line and facing said first and second emitter means (5), respectively;
- said static structure (11) is arranged so as to shape with the overlapping parts of the modular units (13) a common crossing area, and
- said emitter means (5) and said feeding line are arranged such that the x-ray beams emitted by said emitter means (5) cross each other before intersecting the feeding line,

so that X-rays collected by said first sensor means (7) in said first modular unit (13) and X rays collected by said second sensor means (7) in said second modular unit (13) intersect said feeding line at an angle of 45° in said common crossing area and said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

Claim 1 of the ninth auxiliary request reads as follows:

"Non-destructive X-ray inspection apparatus for glass vessels and/or metal cans for food industry, comprising a feeding line for transporting said vessels and/or cans (3) through said apparatus, said feeding line

having a longitudinal axis, characterised in that it is composed of

— a static structure (11) composed of two modular units (13), mutually placed at 90° and placed at 45° with respect to said feeding line;

-- a first one of said two modular units (13) being equipped with first emitter means (5) and first sensor means (7); and

-- a second one of said two modular units (13) being equipped with second emitter means (5) and second sensor means (7), wherein

- said first and second emitter means (5) are provided on one side of said feeding line;
- said first and second sensor means (7) are provided on the other side of said feeding line and facing said first and second emitter means (5), respectively;
- said static structure (11) is arranged so as to shape with the overlapping parts of the modular units (13) a common crossing area crossed by the feeding line axis and said X-rays, and
- said emitter means (5) and said feeding line axis are arranged such that the x-ray beams emitted by said emitter means (5) cross each other before intersecting the feeding line axis,

so that X-rays collected by said first sensor means (7) in said first modular unit (13) and X rays collected by said second sensor means (7) in said second modular unit (13) intersect said feeding line axis at an angle of 45° in said common crossing area and said vessels and/or cans passing on said feeding line are inspected along two perpendicular directions in said common crossing area."

Reasons for the Decision

1. Main request - claim 1 of the patent as granted - Article 100(c) EPC 1973 - extension beyond the content of the application as filed and/or the content of the earlier application as filed

According to claim 1 the X-rays collected by the sensor means in the first modular unit and the X-rays collected by the sensor means in the second modular unit intersect a feeding line at an angle of 45° in a common crossing area. The board agrees with the view of the opposition division and appellant opponent O1 that, contrary to the assertion of the appellant patent proprietor (cf. its statement of grounds of appeal dated 25 November 2011, page 2, fifth paragraph), the claim defines the two modular units and the common crossing area in such a way that it leaves no room for interpretation concerning the common crossing area. According to claim 1 the first modular unit comprises a first one of the emitter means and a first one of the sensor means, and the second modular unit comprises a second one of the emitter means and second one of the sensor means. The X-rays collected by the sensor means in the first modular unit and the X-rays collected by the sensor means in the second modular unit intersect the feeding line at an angle of 45° in a common crossing area. The claim does not define any other parts of the modular units that could define a crossing area. The earlier application as originally filed does however not disclose that the crossing area defined by the collected X-rays intersects the feeding line. According to figure 5 of the earlier application as filed (corresponding to figure 4 of the application as filed) the crossing area of the X-rays to be collected

by the sensors lies in front of the feeding line. The application as filed does not disclose another arrangement of emitters and sensors that results in the X-rays crossing at the feeding line.

Therefore, the subject-matter of claim 1 is neither disclosed in the earlier application as filed nor in the application as filed. Thus the ground for opposition under Article 100(c) EPC 1973 prejudices the maintenance of the patent as granted (Article 101(2), first sentence, EPC).

2. First auxiliary request - claim 1

2.1 The claim additionally defines that the two modular units "each bridging the feeding line and being placed at 90° one to the other and crossing each other, the overlapping parts of the modular units defining a common crossing area", and that X-rays collected by said sensor means in said first modular unit and X-rays collected by said sensor means in said second modular unit intersect said feeding line at an angle of 45° in "said" common crossing area.

2.2 Article 123(2) EPC and Article 76(1) EPC 1973 - extension beyond the content of the application as filed and/or the content of the earlier application as filed

2.2.1 In its decision the opposition division came to the conclusion that the further restriction was not sufficient for claim 1 to conform to the disclosure of the original application. An embodiment where the X-rays cross each other at the intersection with the feeding line was still covered by claim 1.

2.2.2 According to the patent proprietor the amendments in the claim referred to a common crossing area that was clearly derivable "from figure 4 and the originally filed documents". A specific propagation of the X-rays was not essential so that it was not necessary to include additional features into independent claim 1 to fulfil the requirements of Article 123(2) EPC (cf. statement of grounds of appeal dated 25 November 2011, page 3, fifth and sixth paragraphs).

2.2.3 Appellant opponent O1 emphasised that the arrangement illustrated by figure 4 of the opposed patent provided for two different inspection zones. The fact that there were two zones was proved by the fact that the inspection took place in two spaced locations which were artificially tied together by the patentee just by the allegation that they would belong to an area of common crossing of the feeding line by the two modular units. This area was just pictorially represented in figure 4, but it was not hinted at in the description of the opposed patent (cf. reply to the grounds of appeal dated 29 March 2012, third page, third paragraph).

2.2.4 The board agrees with the opposition division. The same added subject-matter deficiency as for claim 1 of the patent as granted still applies tothe subject-matter of present claim 1. The X-rays collected by both sensor means may still intersect each other at the feeding line in said common crossing area. It is not specified how large or how small the common crossing area is. When the square in figure 4 of the patent represents the crossing area, the X-rays intersecting the feeding line within said crossing area may still cross each other at the feeding line.

Furthermore, as asserted by opponent O1 it is not disclosed in the application as originally filed that there are bridging parts and overlapping parts of the modular units which define a common crossing area. Figure 4 just shows a square area. From the description it can be understood that the apparatus provides a static structure 11 composed of two modular units placed at 90° one to the other and at 45° with respect to the feeding line of the vessels. Both units are each equipped just with a standard emitter 5 and a sensor 7 (cf. figure 5 in combination with page 5, penultimate line, to page 6, line 10, of the earlier application as filed and figure 4 in combination with page 6, lines 3 - 9, of the application as filed). This structure 11 is bridging the feeding line. The structure 1 in prior-art examples shown in figures 1 - 3 of the patent is bridging the feeding line. Therefore it is plausible that the corresponding structure 11 of figure 4 also bridges the feeding line (cf. figure 5, in combination with page 5, lines 11 - 14, of the earlier application as filed; figure 4, in combination with page 5, lines 19 - 21, of the application as filed). However, the feature that the two modular units have overlapping parts is not derivable from figure 5 of the earlier application as filed together with the related portions of the description or from the application as filed. The square area in figure 4 could be just one component that links the emitter means and sensor means of the modular units.

2.2.5 For the above reasons the subject-matter of claim 1 does not meet the requirements of Article 123(2) EPC and Article 76(1) EPC 1973

3. Second auxiliary request - claim 1

3.1 The claim comprises all features of claim 1 of the first auxiliary request. In addition it defines that "said emitter means and said feeding line are arranged such that the x-ray beams emitted by said emitter means cross each other before intersecting the feeding line".

3.2 Article 123(2) EPC and Article 76(1) EPC 1973 - extension beyond the content of the application as filed and/or the content of the earlier application as filed

3.2.1 The opposition division in its decision was of the opinion that with this amendment the claim fulfilled the requirements of the EPC. All essential features were now defined in claim 1 which was limited to the embodiment of figure 4.

3.2.2 Appellant opponent O1 expressed the opinion in its grounds of appeal that the feature concerning overlapping parts of the two modular units was still unclear. Opponent O1 also saw added subject-matter because the piecemeal picking of the additional feature did not meet the requirements of Articles 123(2) and 76(1) EPC.

3.2.3 The board is of the opinion that the additional feature does not overcome the objection of added subject-matter in claim 1 of the first auxiliary request. The common crossing area as defined in the claim is not originally disclosed. In particular, overlapping parts of the modular units that could define a common crossing area are not disclosed in the earlier application or the application as filed (cf. point 2.2.4 above). Consequently, the objection of added subject-matter with regard to the bridging parts and the overlapping parts of the modular units is also justified for the

subject-matter of claim 1 of the second auxiliary request.

3.2.4 Therefore, the subject-matter of claim 1 does not meet the requirements of Article 123(2) EPC and Article 76(1) EPC 1973.

4. Third to ninth auxiliary requests

4.1 Claim 1 of all these requests comprises overlapping parts of the modular units that define a common crossing area.

4.2 As explained above under point 2.2.4, the board is of the opinion that the bridging parts and the overlapping parts of the modular units are neither disclosed in the original application documents nor in the earlier application as filed (Article 123(2) EPC and Article 76(1) EPC 1973). Therefore, regarding claim 1 of the third to ninth auxiliary requests, the objection of added subject-matter with regard to the bridging parts and the overlapping parts of the modular units is also justified.

5. In summary, all requests of the appellant patent proprietor are not allowable. Therefore, as requested by the appellant opponent O1, the decision under appeal must be set aside and the patent must be revoked in accordance with Article 101(2),first sentence, EPC and 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:

S. Sánchez Chiquero R. Bekkering

Decision electronically authenticated