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**Datasheet for the decision  
of 13 April 2018**

**Case Number:** T 0382/14 - 3.2.04

**Application Number:** 09164406.2

**Publication Number:** 2165607

**IPC:** A22C21/00

**Language of the proceedings:** EN

**Title of invention:**

Method and apparatus for processing poultry or a part thereof

**Patent Proprietor:**

Meyn Food Processing Technology B.V.

**Opponent:**

Nordischer Maschinenbau  
Rud. Baader GmbH + Co. KG

**Headword:**

**Relevant legal provisions:**

EPC Art. 56  
RPBA Art. 13(3)

**Keyword:**

Inventive step - obvious modification

Late-filed auxiliary requests - request clearly allowable  
(yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 0382/14 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 13 April 2018**

**Appellant:**  
(Opponent)

Nordischer Maschinenbau  
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**Respondent:**  
(Patent Proprietor)

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**Representative:**

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 20 December  
2013 rejecting the opposition filed against  
European patent No. 2165607 pursuant to Article  
101(2) EPC.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** S. Oechsner de Coninck  
C. Heath

## **Summary of Facts and Submissions**

I. The appellant (opponent) lodged an appeal, received on 18 February 2014 against the decision of the opposition division dated 20 December 2013 to reject the opposition against the patent EP2165607, and paid the appeal fee the same day. The statement setting out the grounds of appeal was filed on 23 April 2014.

II. Opposition was filed against the patent as a whole and based on Article 100a) together with 52(1), 54(2) and 56 EPC.

The opposition division held that the grounds for opposition mentioned in Article 100 (a) EPC did not prejudice the maintenance of the granted patent in unamended form having regard to the following documents in particular:

A1: US-B1-6283847

D1: WO-A1-97/21352

D2: EP-A1-0931459

D3: EP-A1-0429887

D4: EP-A1-1574133

D5: WO-A1-99/59417

D7: WO-A2-2007/067052

III. Oral proceedings were held on 13 April 2018.

IV. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed, in the auxiliary that the decision under appeal be set aside and that the patent be maintained on the basis of the Auxiliary Request filed during oral proceedings on 13 April 2018.

V. The independent claims as granted read as follows:

Claim 1:

"Method for processing poultry or a part thereof in a processing line, including the step of detaching and/or collecting a cartilage (18) of the poultry's keel bone (10), characterized in that during transport of the poultry's carcass (1) in the processing line, a cut is made in the cartilage (18) of the keel bone (10), which cut is made initially transverse to the transport direction (A) of the poultry and towards the poultry's backbone, and which cut develops from said transverse direction to eventually a direction opposed to the transport direction (A)."

Claim 5:

"Apparatus for processing poultry (1) or a part thereof, wherein a carrier is provided for the poultry's carcass (1) which carrier moves the carcass (1) in a transport direction (A) along a processing line (3) that is provided with detaching means (6) for a cartilage (18) of the poultry's keel bone (10), characterized in that the detaching means (6) for the cartilage (18) of the poultry's keel bone comprise a knife (19) that is movable towards and from a path that the carrier (2) follows in the processing line (3)."

VI. The appellant argues as follows:

The apparatus defined in claim 5 differs from the one disclosed in A1 in that it comprises a knife movable towards and from the carrier path. The problem to be

solved can be seen in improving the precision of the cutting means. For the skilled person it represents an obvious alternative to replace the fixed blades of A1 by a knife movable towards the carrier. D2, D7 and D6 all describe such a movable knife in the field of meat processing.

VII. The respondent argues as follows:

The skilled person would not find it obvious to move a knife towards a moving target and therefore to replace the stationary knife of A1. Especially the complexity of the arrangement shown in A1 renders the modification of its stationary blades counter intuitive. The other documents disclosing moving knives do not provide a suitable teaching. D2 does not disclose a moving knife acting on a cartilage. D7 is concerned with meat harvesting and D6 is concerned with pigs' ribs, not poultry cartilage.

### **Reasons for the Decision**

1. The appeal meets the requirements of Article 108 and Rule 99(2) EPC, and is therefore admissible.
  
2. Background of the invention  
The present patent is generally concerned with a method and apparatus for processing poultry or parts thereof, and more specifically for cutting and detaching the keel bone cartilage of poultry (see paragraph 6 first sentence). According to paragraph 3 it is sought to provide a method and an apparatus in which parts of the poultry may be harvested to a greater extent and with improved integrity. The solution as defined in the method claim 1 specifically requires a cut initially transverse to the transport direction that further develops from said transverse direction to a direction

opposed to the transport direction. The independent claim 5 defines a less specific solution that merely requires a knife to be movable towards and from a path that the carrier follows in the processing line, without any indication of features realising the cutting path of claim 1.

The board also observes that while it is required that the knife as detaching means for the cartilage is movable toward the path the carrier follows in the processing line, the claim remains unspecific as to the movement of the carrier at the same time. In particular, if the respondent correctly asserts that the preamble of claim 5 defines the carrier to move the carcass in a transport direction along a processing line, the claim does not give any specific indication regarding the carrier behaviour during knife movement, because the movement is defined in relation to the path, not the moving carrier.

### 3. Main request - Inventive step, Article 56 EPC

#### 3.1 *Nearest prior art - Differences*

As acknowledged in paragraph 4 of the patent, document A1 discloses a method and apparatus using a carrier for the poultry's carcass, which carrier moves the carcass along a processing line that is provided with detaching means for a cartilage of the poultry's keel bone. Because it discloses the same apparatus for the same purpose, A1 can be considered as a promising starting point for assessing inventive step. The poultry breast cartilage harvesting system of A1 as shown in figures 1 to 4 also includes a carrier in the form of support mandrels 20 that moves the poultry's carcass in a transport direction  $P_1$  along a processing line called

deboning line 11 that is provided with detaching means 50,51 for a cartilage CT of the poultry's keel bone. In A1, the detaching means is in the form of a lower positioning blade 50 and an upper separating blade assembly 51. It is common ground that the assembly of blades disclosed in A1 is stationary, and it is also undisputed that the subject-matter of claim 5 differs therefrom by the sole feature that the knife is movable toward the path the carrier follows in the processing line.

### 3.2 *Objective technical problem*

The above distinguishing feature allows the knife in use to move towards the path of the carrier, and to cut the keel bone of the poultry supported by said carrier exclusively at the cartilage of said keel bone (see paragraph 8, last sentence). This allows the active operating knife to target the keel bone cartilage in an accurate way. In relation to that effect, an objective problem as suggested by the Appellant can be formulated as how to provide an improved knife arrangement in view of its precision. This problem is also closely related and thus derivable from the subjective problem defined in paragraph 3 of the patent to harvest a greater extent of the keel bone cartilage. This problem had in fact been formulated on the basis of the same prior art A1, already acknowledged in the application as filed (compare paragraphs 3 and 4 in "A2" and "B" publications). The respondent did not object to the formulation of such a problem.



### 3.3 *Obviousness of the solution*

3.3.1 For a knife to operate a cut on a carcass located on carriers travelling along a transportation path, it is necessary for the knife to come into contact with the carcass at some point. This can be done in two main alternative ways of effecting a relative movement of the knife with respect to the carcass: moving the knife towards the carcass, or letting the carcass come into contact with the knife.

3.3.2 In A1, the operation is as follows: the lower positioning blade 50 serves to support the cartilage CT from the interior side thereof and also helps separate the membranes and meat MM connecting the cartilage CT to the rest of the skeletal portion of the poultry carcass. The upper separating blade assembly 51 serves to separate the cartilage CT from the breastbone BB along a separation plane SP through the cartilage CT adjacent the interface BCI between the breastbone and cartilage (see col. 7, lines 31-46). The keel bone cartilage of the carcass is thus progressively brought into contact with two elongated ramped blades to eventually be squeezed between them and removed. The skilled person therefore recognises this action to be based on the second alternative, that consists in bringing a carcass into contact with a stationary knife arrangement.

3.3.3 Tasked with modifying or improving the blade arrangement of A1, the skilled person will as a matter of obviousness inevitably consider the other alternative of bringing the knife into contact with the carcass. In relation to another alternative movement of the knife along or parallel to the path of the carrier, as submitted by the respondent, the board observes that

such a possible movement would not achieve any contact between the knife and carcass, and thus would not effect any cutting action. If the knife is to move. such movement must therefore have a component perpendicular to the processing path.

- 3.3.4 It is further undisputed that it belongs to the skilled person's knowledge in the field of poultry processing lines to use pivotable, rotatable or otherwise movable knives. This otherwise uncontested knowledge is indeed confirmed by various of the cited documents such as D7 (page 33, lines 21-28: pivotable blades 101), D2 (paragraphs 143,144, oblique cutters 63a,63b), D4 (cutter 27b, figure 7) or D6 (page 10, lines 20-30; "Tastmesser" 20). These citations illustrate the common use of movable knife arrangements in the field of poultry processing or in other closely related fields of meat processing.

A straightforward application of common knowledge concerning the use of movable cutting devices, as for example shown in any one of documents D2, D4, D6 or D7, to cartilage harvesting as shown in A1 leads in obvious manner to the claimed solution. This is in particular so because replacing the separating blade 51 by a movable one does not involve a complex redesign of the processing line disclosed in A1.

- 3.3.5 In this respect, the board does not share the respondent's view that the complexity of the arrangement shown in A1 with the blades 50, 51 set at particular angles would render a modification of the arrangement counter-intuitive and thus prevent the skilled person from departing from the concept of fixed blades when aiming to improve precision of the cut. In the Board's view, replacement of stationary knife 51

with its angled inside edge by a simpler, e.g. straight edged knife that is made to move inwardly and back again under the action of a reciprocating means towards the cartilage from the same outward location in the processing line, does not require modification of the other components of the production line shown in A1 that would go beyond simple workshop practice. For example, as the cutting edges of knives 50 and 51 are offset from each other, and their cutting action thus independent, replacing knife 51 will not affect the cutting by knife 50 which can in principle be left unchanged. Indeed, in equally obvious manner, the stationary knife 50 could itself also be replaced by an equivalent reciprocating knife. Otherwise, the Board can see no impediment to the simple adaptations of the A1 arrangement that would be necessary to accommodate the necessary reciprocating means.

3.4 From the above, the board concludes that the subject-matter of claim 5 according to the main request lacks an inventive step, starting from A1 and applying his common general knowledge, as illustrated for example in D2, D4, D6 or D7.

3.5 The board draws the same negative conclusion on inventive step when adapting the robotic arms disclosed in D1 (page 5, paragraph 1) to effect a cartilage removal. There, instead of boring through the triosseum canal of a carcass, as it is disclosed in the illustrative example of the apparatus for de-boning poultry (page 5, paragraph 6), the skilled person would simply have to define in the command software another suitable datum point or reference (page 6, paragraph 5 and 6) for the versatile 3D arms, equipped with the relevant severing means (page 5, paragraph 2). By such a straightforward adaptation of the same apparatus

aiming at the triosseum canal, the skilled person would arrive at the detaching means for the cartilage in the form of robotic arms carrying a knife that is movable towards the path of the carrier as defined in claim 5.

4. Auxiliary request

4.1 Admissibility under Art 13(1) and (3) RPBA

The auxiliary request was filed at the oral proceedings before the board, and amounts to an amendment to the Appellant-proprietor's case in the sense of Article 13 of the Rules of Procedure of the boards of Appeal (RPBA). Furthermore, under Article 13(3) RPBA any amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the board or the parties cannot reasonably be expected to deal with without an adjournment.

The approach consistently adopted by the boards when exercising their discretion in admitting an amendment filed at the very last stage during oral proceedings consists in identifying whether good reasons exist for filing the amendment so far into the proceedings - for example if it is occasioned by developments in the proceedings. Unless such a justification exists, amendment to a party's case will be admitted only if it does not extend the scope or framework of discussion as determined by the decision under appeal and the statement of the grounds of appeal, and is moreover clearly allowable, see Case Law of the boards of Appeal, 8th edition, 2016 (CLBA) IV.E.4.2.6 b) and the case law cited therein.

The auxiliary request deletes granted apparatus claims 5 to 15, and thus leaves only the remaining granted method claims 1 to 4, which had not been objected to by the Appellant in their appeal. The auxiliary request therefore by deletion removes all objections relating to claim 5, and retains only those claims found allowable during proceedings before the first instance, and that were not questioned by the Appellant in appeal proceedings. The auxiliary request thus appears clearly allowable in the sense that it is immediately apparent to the board, with little investigative effort on its part, that the amendments made successfully address the issue raised, without giving rise to new ones.

Apart from the questions raised in respect of the justification for the late filing, allowability of claims 1 to 4 of the auxiliary request has not been objected to by the opponent appellant, and no arguments have been presented in this regard.

Even if the auxiliary request could have been filed earlier, its focus on claims that were not objected to cannot reasonably take the appellant by surprise. For these reasons the board decided to use its discretion under Articles 13(1) and (3) RPBA with Article 114 (2) EPC to admit this request in the proceedings.

#### 4.2 Auxiliary request - Inventive step

The impugned decision found the subject-matter of claim 1 to imply an inventive step, in particular in view of A1 combined with the skilled person's knowledge. Since this finding has not been challenged at the appeal stage, the board does not see any reason to depart from this positive assessment. This is in particular so considering that the step of changing the cutting

direction from a transverse direction to a direction opposed to the transport direction does not appear to be disclosed or suggested by any of the available documents that instead describe simple tilting or reciprocating movements of cutting tools.

As to the adaptation of the description, the board notes that the description pages filed during the oral proceedings comply with the only subject-matter of claims 1 to 4 remaining in the auxiliary request.

- 4.3 From the above, the board concludes that the patent as amended according to the auxiliary request meets the requirements of the EPC and can therefore be maintained in amended form according to this auxiliary request in accordance with Art. 101(3) (a) EPC.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent in the following version:

#### Claims:

Claims 1 - 4 of the Auxiliary Request filed during the oral proceedings on 13 April 2018,

#### Description:

adapted description pages 2 and 3 as filed during the oral proceedings before the board on 13 April 2018, and page 4 as of the published specification,

#### Drawings:

Figures 1 - 12 as contained in the published specification.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated