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**Datasheet for the decision  
of 15 March 2021**

**Case Number:** T 0852/18 - 3.2.04

**Application Number:** 08741841.4

**Publication Number:** 2134161

**IPC:** A01K5/02

**Language of the proceedings:** EN

**Title of invention:**  
Feeding system and method

**Patent Proprietor:**  
DeLaval Holding AB

**Opponent:**  
Octrooibureau Van der Lely N.V.

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(3), 56  
RPBA Art. 12(4)

**Keyword:**

Amendments - broadening of claim (yes)  
Inventive step - (no)

**Decisions cited:**

G 0002/88, T 0177/08, T 1172/08, T 1896/11

**Catchword:**

Reasons 8.6, 8.7



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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**Case Number: T 0852/18 - 3.2.04**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 15 March 2021**

**Appellant:** DeLaval Holding AB  
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**Representative:** Gray, Helen Mary  
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**Appellant:** Octrooibureau Van der Lely N.V.  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
8 February 2018 concerning maintenance of the  
European Patent No. 2134161 in amended form.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** J. Wright  
C. Heath

## **Summary of Facts and Submissions**

- I. The appeals were filed by the proprietor and the opponent against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 2 (now auxiliary request 3), the patent in suit met the requirements of the EPC.

Amongst other things, the opposition division found that the subject-matter of the second auxiliary request involved an inventive step.

The opposition division also found that the subject-matter of the first auxiliary request extended the protection conferred.

- II. Oral proceedings before the Board were held by videoconference on 15 March 2021.
- III. The appellant (opponent) requests that the decision under appeal be set aside and that the patent be revoked.

The appellant (proprietor) requests that the decision under appeal be set aside and that the patent be upheld on the basis of one of auxiliary Requests 1, 2A, 3 to 5, whereby auxiliary request 1 was filed with the statement of grounds of appeal, auxiliary requests 2A, 4 and 5 were filed with letter of 30 October 2018, and auxiliary request 3 corresponds to the patent as upheld before the opposition division.

- IV. The independent claims that are relevant for this decision read as explained below (where applicable,

with additions and deletions emphasised by the Board using underline and strike-through):

The independent claims of the patent as granted read as follows:

"1. A system for feeding at least one animal with mixed feed according to a selected recipe comprising:

- a mixing device (1);
- a control device (2) operatively connected to said mixing device (1) and provided for controlling the mixing device (2) to mix a batch of feed according to the selected recipe;
- a feed area (3) provided for receiving said batch of mixed feed according to the selected recipe and for offering said batch to the at least one animal;
- a feed measurement arrangement (4) in connection with said feed area (3) provided for repeatedly measuring the amount of mixed feed according to the selected recipe that is left for consumption by the at least one animal, wherein
  - said control device (2) is (i) operatively connected to said feed measurement arrangement (4); (ii) provided for comparing values of said repeatedly measured amount of mixed feed according to the selected recipe that is left for consumption by the at least one animal with a threshold value; and (iii) provided for controlling said mixing device (1) to mix a further batch of feed according to the selected recipe when the values of said repeatedly measured amount of mixed feed according to the selected recipe that is left for consumption by the at least one animal fall below said threshold value,

characterized in that

the control device (2) is arranged to set said threshold value so that the further batch of mixed feed

will be supplied to the feed area before the at least one animal has consumed the entire amount of mixed feed according to the selected recipe that is left for consumption".

"12. A method for feeding at least one animal with mixed feed according to a selected recipe comprising:  
- mixing a batch of feed according to the selected recipe by a mixing device (1); and  
- offering said batch of mixed feed according to the selected recipe to the at least one animal at a feed area (3),  
- repeatedly measuring the amount of mixed feed according to the selected recipe that is left at the feed area (3) for consumption by the at least one animal;  
- comparing values of said repeatedly measured amount of mixed feed that is left for consumption with a threshold value; and  
- mixing a further batch of feed according to the selected recipe by the mixing device (1) when the values of said repeatedly measured amount of mixed feed that is left for consumption fall below said threshold value, wherein said method is characterized in that said threshold value is set so that the further batch of mixed feed will be supplied to the feed area before the at least one animal has consumed the entire amount of mixed feed according to the selected recipe that is left for consumption".

Independent claim 1 of auxiliary request 1 reads as claim 1 of the main request except that the words "characterised in that the control device (2) is arranged to set said threshold value..." are replaced by the words:

"characterised in that ~~the control device (2) is arranged to set~~ said threshold value is set..."

Independent claim 1 of auxiliary request 2a reads as granted claim 1 except that the wording of the first line of the claim reads: "A fully automated system for feeding at least one animal..." and the characterising feature reads: characterized in that ~~the control device (2) is arranged to set~~ said threshold value is set depending on an estimate of the speed of mixing, and supplying to the feed area (3) the further batch of feed according to the selected recipe so that the further batch of mixed feed will be automatically supplied to the feed area before the at least one animal has consumed the entire amount of mixed feed according to the selected recipe that is left for consumption.

Claim 1 according to auxiliary request 3 reads as granted claim 12.

Claim 1 according to auxiliary request 4 reads as granted claim 12 except that the first line reads: "A method for automatically feeding at least one animal"

Claim 1 according to auxiliary request 5 reads as claim 1 of the fourth auxiliary request except that the characterising feature is amended to read:  
"characterized in that said threshold value is set depending on an estimate of the speed of mixing, and supplying to the feed area (3) the further batch of feed according to the selected recipe so that the further batch of mixed feed will be supplied automatically to the feed area before the at least one animal has consumed the entire amount of mixed feed

according to the selected recipe that is left for consumption".

V. In the present decision, reference is made to the following documents:

D9 : NL 1030090

D9' : WO 2007/040388 A1

D9' is an English language family document of D9

D17 : D. Sanders: "Milk them... for all their worth!", Urbana, USA, Vaca Resources, 2000, index and pages 386 to 391.

D18 : M. Hutjens "Successful Feeding Systems for Dairy" Hoard's Dairyman, 2001, pages 2 and 30 to 34.

VI. The appellant-proprietor's arguments can be summarised as follows:

Auxiliary requests 1 and 2A do not extend the protection conferred by the claim, because setting the threshold in granted claim 1 means applying a threshold and the skilled person would understand this from the description.

The subject matter of auxiliary requests 3 and 4 involves an inventive step starting from D9. D9 does not disclose to mix feed on demand when a feed trough gets empty.

Auxiliary request 5 should be admitted into the proceedings.

VII. The appellant-opponent's arguments can be summarised as follows:



Auxiliary requests 1 and 2A extend the protection conferred by the claim by deleting the feature that the control device sets the threshold.

The subject matter of auxiliary requests 3 and 4 does not involve an inventive step starting from D9.

Auxiliary request 5 should not be admitted into the proceedings because it incorporates a feature that was completely absent from the granted patent.

### **Reasons for the Decision**

1. The appeals are admissible.
2. Background

The patent relates to a system and method for feeding at least one animal with mixed feed, according to a recipe (see published patent specification, paragraph [0001]. According to the patent (see paragraph [0002], last sentence) it is important for many feeding schemes that there is a constant feed available to optimise dry matter intake.

3. Auxiliary request 1, claim 1, extension of protection conferred
  - 3.1 [System] claim 1 of the patent as granted contained the feature: *the control device (2) is arranged to set said threshold value so that [...]*.
  - 3.2 In claim 1 of auxiliary request 1, the feature is amended to read: ~~*the control device (2) is arranged to*~~

~~set~~ *said threshold value is set [...]* (amendments emphasised by the Board).

- 3.3 The Board finds it useful to first consider what is meant by the claim feature of granted claim 1 that the control device is arranged to *set a threshold value*, so as to determine its contribution to the scope of protection.

The skilled person reads the claim giving terms their usual meanings and contextually. In the Board's view, giving the term *set* its usual meaning in this context, the skilled person would understand that the control device *assigns a value* to the threshold, whether by selecting a suitable value from different candidate values or by calculating the threshold value.

Therefore, the skilled person would not consider *set the threshold value* to mean to apply a threshold to a parameter, in the sense of comparing the parameter (here the amount of feed remaining) to the threshold, as the appellant-proprietor has argued. Not only does this interpretation run contrary to the skilled person's usual understanding of *setting a threshold*, but it would also make no sense as the first characterising feature because the preamble of the claim already defines (see feature ii) that the control device is provided for *comparing* measured amount of feed values to a threshold value.

- 3.4 Claim 1 as granted therefore requires that the control device is arranged in such a way that it sets the threshold value, in the sense of assigns the threshold a value, in order to fulfil certain criteria. In the Board's view, this feature limits the scope of protection to systems with a control device that must

be so arranged. In other words, it poses a technical limitation on the control device of the claimed system.

- 3.5 In contrast, claim 1 of the auxiliary request deletes any reference to the control device in relation to setting the threshold, rather using the passive voice to define that the threshold is set, whilst leaving open by what or by whom.
- 3.6 The consequence of this amendment is that the control device of present claim 1 does not have to be arranged in such a way as to set the threshold. Put another way, it no longer has this particular technical limitation of granted claim 1. Thus the scope of protection of the amended claim extends to systems with a control device that does not set the threshold value, for example because it is input as a preset value. Such systems were not covered by the scope of protection of the granted claim. Therefore, the scope of protection is extended by the amendment.
- 3.7 In this regard, the Board is not convinced by the appellant-proprietor's argument that, in determining the scope of protection conferred by the patent the description must be consulted and that this would lead the skilled person to conclude that, in the patent as granted the control device *does not* set the threshold and that therefore the scope of protection is not extended by deleting this feature.
- 3.8 Determination of the extent of protection is governed by Article 69(1) EPC. This reads: *The extent of the protection conferred by a European patent or a European patent application shall be determined by the claims. Nevertheless, the description and drawings shall be used to interpret the claims.*

- 3.9 In the present case, as has already been explained, claim 1 as granted defines that the control device is arranged to set the threshold (in the Board's view, in the sense of assigning a value to the threshold). In this regard the claim terms are perfectly clear. To ignore this and determine the extent of protection solely on the basis of the description, as the appellant-opponent argues should be done, would be to ignore, and therefore run contrary to, the first sentence of Article 69(1) EPC, cf. CLBA, 9th edition 2019, II.E.2.3.1, in particular decisions T0177/08, T1172/08 and T1896/11 cited therein.
- 3.10 Moreover, when interpreting the feature using the description and drawings (see published patent specification), the Board considers that the skilled person would likewise understand that the control device sets the threshold in the usual sense of assigning a value to the threshold. Paragraph [0015] mirrors the claim wording, stating that the control device is arranged to set the threshold.
- 3.11 There is no more information in the description on the matter. The context of paragraph [0015]'s statement is the preceding paragraphs [0013] and [0014]. These explain that the control device controls mixing, that it is connected to the feed measuring arrangement and that it compares the amount of feed measured with a threshold (cf. granted claim 1, features i and ii). These paragraphs do not explain how the threshold is set, let alone that it need not be or is not set by the control device. At most they merely explain what the threshold is used for. Similarly, paragraphs [0029] and [0030], to which the appellant-proprietor has also referred, confirm that the control device is connected

to the mixing device and the measuring arrangement and that it compares the [feed quantity] measurement to at least one threshold. Paragraph [0030] also indicates typical criteria for choosing threshold values, in the plural. Thus, aside from paragraph [0015], the description discloses what a threshold is used for and that there may be more than one threshold. However, it is not said in these paragraphs *what or who* sets a particular threshold (assigns it a value), be that by selecting a suitable value or by calculation.

- 3.12 In the Board's view, the skilled person would not interpret the silence of paragraphs [0013], [0014], [0029] and [0030] as to what sets the threshold(s) to imply that, in granted claim 1, it does not need to be the control device. All the more so, since such an interpretation would contradict the explicit statement they read in paragraph [0015], and indeed the claim itself, that the control device sets the threshold.
- 3.13 To sum up, when interpreting the extent of protection of granted claim 1 in accordance with Article 69 EPC, its clear terms require that the control device is arranged to set the threshold, in the sense of assigning it a value. This interpretation is not altered in the light of the description which uses the same formulation. Therefore, its deletion in present claim 1 extends the scope of protection.
- 3.14 In its grounds of appeal the appellant-proprietor also argued that that the broadest scope of protection conferred by the granted patent is defined by method claim 12 (which defines a threshold without saying what sets it) and therefore (considering the decision **G 2/88**, in particular point 3.2) it is admissible to

broaden claim 1 by deleting the feature of the control unit setting the threshold.

- 3.15 In its communication dated 22 October 2020 in preparation for the oral proceedings, the Board disagreed with this position (see point 2.2) and concluded that the amendment according to Auxiliary request 1 (and 2A) did not meet the requirements of Article 123(3) EPC.

The Board reasoned as follows (see communication points 2.3 to 2.6):

*2.3 G 2/88 answers questions (see point I) concerned with amendments which change a category of claim, in particular from a compound to the use of that compound. Since, in the present case, the amendments do not concern a change of category the specific answers provided to those questions appear not to be particularly relevant to the present case. However, it is useful to consider the background to these questions as set out in G2/88.*

*2.4 G 2/88 (see point 2.2) explains that there are basically two types (categories) of claim, a claim to a physical entity and a claim to a physical activity (such as a method). Moreover (see point 2.6), the subject matter of a claimed invention involves two aspects, first the type of claim (category) and secondly the technical features making up the technical subject matter.*

*The appellant-proprietor has pointed out (with reference to G2/88, point 3.2) that when examining whether an amendment results in the protection conferred being extended in the sense of Article 123(3)*

*EPC, the totality of the claims before amendment must be compared with the totality of the claims after the proposed amendment.*

*2.5 In the present case, the subject matter of granted claim 1 is a system for feeding animals and that of claim 12 a method for feeding at least one animal. Thus the subject matter of the totality of the claims before amendment falls into the two basic types (entity and activity). These two sets of subject matter determine the extent of protection (Article 69(1) EPC) of the claims as a whole.*

*In the auxiliary requests 1 and 2A, these basic types of subject matter is again reflected in claims 1 and 12 respectively. In other words, as with the granted patent, the extent of protection falls into parallel areas of an entity (system of claim 1) and an activity (method of claim 12). On this point (cf. impugned decision, point 4.3 and appellant-proprietor's grounds of appeal, page 4/5, second paragraph), the Board considers that since these areas of protection are inherently different, the question as to whether the one is broader in scope than the other, let alone their individual features, is irrelevant.*

*The appellant-opponent's [should have read appellant-proprietor's] argument that granted claim 12 already defines setting the threshold in accordance with amended claim 1, that is without reference to the control device, so (according to the argument) there is no extension of protection, ignores the fact that claim 12 protects an activity and not an entity.*

*The sole independent entity claim is system claim 1 and it is this which defines to what extent the patent protects a system.*

*2.6 In the Board's view, in the case of the entity (system claim 1), deletion of the feature that the control device is arranged to set the threshold results in a broadening of the extent of protection (of the entity) compared to granted claim 1, and thus this applies to the claim set as a whole.*

*Therefore, in the Board's opinion, the amendment does not meet the requirements of Article 123(3) EPC.*

- 3.16 Neither in writing nor at the oral proceedings did the appellant-proprietor comment on this part of the communication. Nor does the Board see any reason to deviate from its reasoning or conclusion in this part of its preliminary opinion.
- 3.17 From all of the above, the Board concludes that the opposition division correctly found (see impugned decision, reasons, section 4) that claim 1 of auxiliary request 1 extends the protection conferred by the claim and therefore does not meet the requirements of Article 123(3) EPC.
4. Auxiliary request 2A, claim 1, extension of protection conferred

Claim 1 of this request has the same amendment as auxiliary request 1 (deletion of the feature *the control device is arranged to set said threshold*) so does not meet the requirements of Article 123(3) EPC for the reasons explained for auxiliary request 1.



5. Auxiliary request 3, claim 1, inventive step starting from D9/D9'
- 5.1 It is not in dispute that the disclosure of D9' is the same as D9, the latter being prior art under Article 54(2) EPC. In the following, cited text passages refer to D9'.
- 5.2 D9 discloses a method of feeding an animal (see abstract). According to this method (see for example page 9, line 32 to page 10, line 10 with figure 5), a gripper 2 supplies feed material to a mixing device 24, thus feed is implicitly mixed according to a recipe. The mixed feed is then moved by the gripper to a feeding place, thus feed is offered to animals at feeding stations.
- 5.3 The amount of feed at a feeding station, including so called separate feeding places, such as a feed alley, is also repeatedly measured, for example by weighing (see page 9, lines 7 to to 23). When the feed troughs *get empty*, a control signal is sent to the gripper that the feeding places should be replenished. In the Board's view, this means that the measured amount of food still present is repeatedly compared to a threshold, the threshold being when the amount of feed gets to zero.
- 5.4 The appellant-proprietor has argued that D9 does not disclose that, for these separate feeding places, *mixing of feed* is triggered when the feed trough *gets empty*. The Board disagrees.
- 5.5 When the feed troughs of these separate feeding places get empty, a signal is sent to the gripper to replenish them (see page 9, lines 21 to 23). Thus they are

replenished *by the gripper* and not by other means, as is for example the case in the embodiment of figure 3, with its feeding column 11 that has feed troughs 12 that are replenished by loading augers 14 and chutes 15 (see page 8, lines 8 to 19 with figures 2 and 3).

5.6 How the gripper replenishes the separate feeding places described on page 9 is explained in the paragraph bridging pages 9 and 10 with figure 5. The first sentence of this paragraph says that, although the gripper can grip and displace "already mixed material" (where from it is not said), "material can be mixed as desired". In the Board's view, this sentence presents two alternative embodiments by which the gripper can be used to replenish the feeding places, the one using ready mixed feed, the other mixing as desired. In this respect, the wording *as desired* indicates to the Board that this mixing is on demand rather than mixing feed for later storage. In the context of the foregoing information (see page 9, lines 21 to 23) that when the feed troughs get empty (the empty trough threshold is reached) the gripper is dispatched to replenish them, the Board considers D9 to directly and unambiguously disclose that crossing the threshold triggers mixing as one of two alternative ways (ready mixing or mixing) to replenishing the feed troughs.

5.7 The rest of the paragraph is only concerned with this mixing *as desired* embodiment: The gripper is controlled to supply the mixer 24, mixed feed descends into the receptacle 27, from where the gripper brings the feed to the feeding places. Therefore, nothing suggests that the mixed feed is stored in the receptacle 27 or elsewhere for later distribution. Rather it is brought directly to the feeding places. Therefore, the Board

considers that both mixing and supplying to the feeding places is triggered when the empty trough threshold is reached. This embodiment therefore represents the closest prior art, as the appellant-opponent has argued.

- 5.8 In the light of this disclosure, the appellant-proprietor's speculative argument that it would take too long to start mixing feed when the trough gets empty, so the skilled person would only consider replenishing these with ready mixed feed, is moot.

The appellant-proprietor's further argument that it would be impossible to mix a single gripper load batch of mixed feed because several grippers full of individual ingredients would make more than a gripper full of mixed feed, so the mixed feed must first be stored, is also not convincing. This is because the gripper is not limited to always picking up a full gripper load of material but can be fitted with a weighing means for gripping just the amount it needs to (see page 8, lines 29 to 31).

- 5.9 However, in the Board's view, D9 does not disclose the characterising feature of claim 1 (the threshold is set so that the further batch of [freshly] mixed feed is delivered before the at least one animal has consumed all the feed. In D9, because the threshold is set at when the feed trough *gets empty*, whether passing this threshold triggers the gripper to get ready mixed feed or to mix a batch of feed for replenishing the feed trough, the animals will already have run out of feed, so there will inevitably be a period when there is no feed left for consumption.

- 5.10 Thus, as the last claim feature expresses, the effect of this difference is that the animal(s) always have feed available (see also, published patent specification, paragraphs [0002], [0008] and [0016]).
- 5.11 The Board agrees with the appellant-opponent that, without including elements of the solution, the objective technical problem can be expressed as how to modify D9's arrangement to provide feed in an optimal way.
- 5.12 In the Board's view, the skilled person will be well aware, from their general knowledge, of feeding regimes optimised by ensuring that animals always have mixed feed available. The patent itself (see paragraph [0002]) seems to acknowledge this, though the appellant-proprietor has disputed this. In any case, such regimes are disclosed, for example in D17 and D18, whether or not these documents disclose refreshing feed supplies at regular intervals rather than whenever feed becomes depleted. See D17, page 387, first paragraph of the section headed *Empty feed bunk syndrome: If absolutely no [total mixed ration] feed was left from the previous feeding it means the cows didn't get enough to eat. We call this "empty feed bunk syndrome,"* and D18, page 30, first and second paragraphs: *feed should be consistently available and feed should be available for 20 hours a day.*
6. Faced with the objective technical problem (optimising feeding regime), an obvious way to do so would therefore be to ensure that food is constantly available.

6.1 In the Board's view, starting from D9 and optimising in this way, whether using the embodiment that supplies ready mixed feed (cf. page 9, lines 32 to 33) or using the embodiment that mixes feed as desired, which represents the closest prior art (see the rest of the paragraph bridging pages 9 and 10), the skilled person would inevitably increase the threshold from the disclosed *empty* threshold to a higher feed quantity threshold that represents enough feed for the animals to still have some left by the time the feed is replenished. In other words the skilled person would set the threshold so that feed is replenished before the at least one animal has consumed the entire amount of mixed feed.

6.2 When starting from the embodiment that mixes on demand (*as desired* in D9's words), the skilled person would thus arrive at the subject matter of claim 1, as a matter of obviousness. Therefore, the appellant-proprietor's third auxiliary request (as maintained in the opposition proceedings) fails.

7. Auxiliary request 4, claim 1, inventive step starting from D9

7.1 Claim 1 adds to auxiliary request 3 that the method is for *automatically* feeding at least one animal (emphasis added by the Board).

In the Board's view, D9 also discloses automatic feeding. As already explained with reference to pages 9 and 10, feed is mixed and supplied to feed troughs when they get empty, under the control of the control means, thus without intervention from an operator. Therefore D9's system feeding animals is an automatic system.

Consequently, claim 1 of the present request does not add anything not known from D9. Therefore, claim 1 fails for the same reasons as apply to the third auxiliary request.

8. Auxiliary request 5, admission

8.1 This request is late-filed and its admission is therefore at the discretion of the Board in accordance with Art 12(4) RPBA 2007 with Article 25(2) RPBA 2020. In exercising its discretion, the Board took the following factors into account:

8.2 The appellant-opponent argued in its grounds of appeal that the subject matter of claim 1 as maintained (present auxiliary request 3) lacked inventive step starting from D9. In response thereto, the appellant-proprietor filed auxiliary request 5 with a letter dated 30 October 2018 setting out its response to the opponent's appeal grounds.

8.3 In this response, the appellant proprietor did not explain why it considered the subject matter of auxiliary request 5 to overcome the opponent's objections in this regard. It merely explained (in conjunction with auxiliary request 2A which has a corresponding additional feature - threshold value set depending on an estimate of speed of mixing and supplying) that none of the prior art suggested determining such an estimate, but without discussion of D9, nor why the added feature might not be obvious starting from D9. Therefore, in this regard, the Board holds that the appellant-proprietor's reply did not set out a complete case.

- 8.4 Examining the present request would therefore necessitate investigating whether the additional feature was rendered obvious from the prior art, when starting from D9.
- 8.5 It is recalled that Auxiliary Request 5 contains the following amended characterising portion in claim 1: "characterized in that said threshold value is set depending on an estimate of the speed of mixing, and supplying to the feed area (3) the further batch of feed according to the selected recipe so that the further batch of mixed feed will be supplied automatically to the feed area before the at least one animal has consumed the entire amount of mixed feed according to the selected recipe that is left for consumption".
- 8.6 This feature finds no basis in the description, but was contained in claim 7 of the originally filed application, which is its only basis therein. In the course of examination, that claim was deleted and in the patent as granted no reference of the now claimed subject matter can be found. In the Board's view, the added feature is not implied or hinted at in the granted patent either, merely because it adds to the threshold setting feature of granted claim 12.
- 8.7 The Board does not need to decide whether adding subject matter abandoned during examination creates an absolute bar to reclaiming such subject matter in opposition or appeal by way of a new request. However, it is certainly the case that its introduction for the first time at the appeal stage would take the discussion in a new direction that could not have been foreseen when the opposition notice was formulated, nor

indeed during the entire examination of the opposition, however much it might fall under the umbrella idea of mixing feed on demand of granted claim 1. For the Board, this is a factor to be taken into account when exercising its discretion whether to admit such request, and decidedly speaks against admission.

- 8.8 For these reasons, the Board decided to exercise its discretion under Article 12(4) and 12(2) RPBA 2007 with Article 114 EPC, by not admitting auxiliary request 5 into the proceedings.
9. The Board concludes that auxiliary requests 1, 2A, 3 and 4 fail and auxiliary request 5 has not been admitted into the proceedings. Since these are the appellant-proprietor's only requests, the Board must revoke the patent.



**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:



G. Magouliotis

A. de Vries

Decision electronically authenticated