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**Datasheet for the decision
of 4 February 2022**

Case Number: T 0905/19 - 3.2.04

Application Number: 13718050.1

Publication Number: 2838369

IPC: A22C21/00, B07C5/16, B07C5/342

Language of the proceedings: EN

Title of invention:
METHOD AND APPARATUS FOR USE IN A FOOD PACKAGING SYSTEM

Patent Proprietor:
Ishida Europe Limited

Opponent:
Marel Stork Poultry Processing B.V.

Headword:

Relevant legal provisions:
EPC Art. 54, 123(2), 83, 56

Keyword:

Novelty - Main request (no) - auxiliary request (yes)
Amendments - added subject-matter (no)
Sufficiency of disclosure - (yes)
Inventive step - auxiliary request (yes)

Decisions cited:

G 0010/91

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0905/19 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 4 February 2022

Appellant: Ishida Europe Limited
(Patent Proprietor) 11 Kettles Wood Drive
Woodgate Business Park
Birmingham, West Midlands B32 3DB (GB)

Representative: Gill Jennings & Every LLP
The Broadgate Tower
20 Primrose Street
London EC2A 2ES (GB)

Appellant: Marel Stork Poultry Processing B.V.
(Opponent) Handelstraat 3
5831 AV Boxmeer (NL)

Representative: Algemeen Octrooi- en Merkenbureau B.V.
P.O. Box 645
5600 AP Eindhoven (NL)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
24 January 2019 concerning maintenance of the
European Patent No. 2838369 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
K. Kerber-Zubrzycka

Summary of Facts and Submissions

- I. The appeals were filed by the appellant (proprietor) and appellant (opponent) against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 1, the patent in suit met the requirements of the EPC.
- II. The opposition division decided that, for the main request (patent as granted), the subject-matter of claim 1 lacked novelty but that the first auxiliary request met all the requirements of the EPC.
- III. The Board issued a communication in preparation for oral proceedings. The oral proceedings were duly held on 4 February 2022.
- IV. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted, or in the alternative, maintained according to auxiliary request 1 (as upheld by the opposition division) or alternatively in accordance with one of auxiliary requests 2 to 12, all filed (or refiled) with the proprietor's grounds of appeal.

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

- V. The independent claim 1 of the main request (as granted) reads as follows:

"Apparatus for controlling a poultry packaging system, comprising:

a first receiving unit operable to receive a plurality of orders for poultry product, wherein said poultry product is either a whole or a portion of a poultry bird, and wherein characteristics of each received order include the weight of the received order and the number of individual poultry bird portions making up the weight of the received order;

a second receiving unit operable to receive at least one measurable parameter of at least one poultry bird from a measurement unit;

a recommendation unit operable to determine which of the plurality of received orders best corresponds to the received at least one measurable parameter based on the characteristics of each received order and the at least one measurable parameter of the at least one poultry bird, and;

a control unit operable to transmit a signal to a poultry processing system such that said poultry processing system processes the at least one poultry bird in accordance with the determined order."

The independent claims of the first auxiliary request (as upheld in opposition proceedings) read as follows, where, for claim 1, added features with respect to the main request are highlighted in underline by the Board:

"1. Apparatus for controlling a poultry packaging system, comprising:

a first receiving unit operable to receive a plurality of orders for poultry product, wherein said poultry product is either a whole or a portion of a poultry bird and wherein, for at least one of said plurality of orders, said poultry product is a portion of a poultry bird, and wherein characteristics of each received order include the weight of the received order and the

number of individual poultry bird portions making up the weight of the received order; a second receiving unit operable to receive at least one measurable parameter of at least one poultry bird from a measurement unit, wherein the at least one measurable parameter comprises the weight of the at least one poultry bird;

a recommendation unit operable to determine which of the plurality of received orders best corresponds to the received at least one measurable parameter based on the characteristics of each received order and the at least one measurable parameter of the at least one poultry bird, and;

a control unit operable to transmit a signal to a poultry processing system such that said poultry processing system processes the at least one poultry bird in accordance with the determined order".

10. "A computer-implemented method for controlling a poultry packaging system, comprising:

(a) receiving a plurality of orders for poultry product, wherein said poultry product is either a whole or a portion of a poultry bird and wherein, for at least one of said plurality of orders, said poultry product is a portion of a poultry bird, and wherein characteristics of each received order include the weight of the received order and the number of individual poultry bird portions making up the weight of the received order;

(b) receiving at least one measurable parameter of at least one poultry bird from a measurement unit, wherein the at least one measurable parameter comprises the weight of the at least one poultry bird;

(c) determining which of the plurality of received orders best corresponds to the received at least one measurable parameter based on the characteristics of

each received order and the at least one measurable parameter of the at least one poultry bird; and
(d) transmitting a signal to a poultry processing system such that said poultry processing system processes the poultry birds in accordance with the order determined in step (c)".

15. "A computer program product comprising instructions which when executed by data processing apparatus causes the apparatus to be configured to be operable in accordance with the method of any of claims 10 to 14".

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

D1: US 2010/0179684 A1
E1: US 2011/0105001 A1
E2: US 2003/0065414 A1
E3: US 4372099
E4: WO 00/23771 A1
E5: US 2010/0051513 A1
E6: US 6712221
E7: WO 00/23772 A1
E8: WO 2005/095904 A1
E9: US 4627007
H1: S. Barbut : "Poultry Products Processing, an Industry Guide", CRC Press, 2002, pages 152 to 179.

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

The subject matter of claim 1 of the main request is new with respect to E1 because E1 does not disclose a recommendation unit as claimed. New attacks against novelty should not be admitted. The opposition division

correctly found that the first auxiliary request meets all the requirements of the EPC.

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

E1 takes away novelty of claim 1 of the main request. With regard to the first auxiliary request, claim 1 adds subject matter extending beyond the application as filed and has been amended so that it extends the protection conferred. Moreover, the invention is insufficiently disclosed. New attacks against novelty *inter alia* based on E3 should be admitted. The subject matter of the independent claims lacks novelty over E1, E2 and E5 and lacks inventive step starting from E1, E2 and E5 in the light of H1.

Reasons for the Decision

1. The appeals are admissible.
2. Background

The invention (see published patent specification, paragraph [0001]) relates to a food packaging apparatus [for poultry] that reduces *giveaway*. In other words, it is a batching system where orders for batches of products of a certain total weight are fulfilled as close as possible to that weight. In this way, any over-weight which would be *given away* to the customer for free is minimised.

In a poultry factory (see specification, paragraph [0002]) delivered whole birds are prepared by being slaughtered, de-feathered, de-boned and eviscerated. These prepared birds, which the patent refers to as

grillers, are then cut into desired portions (breast fillets etc.) and packaged.

3. Main request claim 1, novelty with respect to E1
- 3.1 Interpretation of the terms *whole poultry bird* and *portion of a poultry bird*
- 3.2 The claim defines that a poultry product can be a whole or a portion of a poultry bird. The appellant-opponent has argued that the term *whole poultry bird* is ambiguous and that a prepared bird (*griller*) is to be considered as a *portion of a poultry bird*, since, having had parts such as the head and the intestines removed, it is not a complete bird but only a portion thereof. The Board disagrees.
- 3.3 It is true that the description uses the terms *whole bird* and *poultry bird* (cf. published patent specification, paragraphs [0012] and [0086]) to refer to a bird prior to processing or to a processed bird (typically plucked, eviscerated and decapitated). Such a processed bird is also referred to as a *griller* in the patent (see for example published patent specification, paragraph [0002]). Therefore, read in isolation, the term *whole bird* might be ambiguous. However, in the claim which is directed at a poultry packaging system the terms *whole poultry bird* and *portion of a poultry bird* are used in the particular context of distinguishing different orders for poultry products which are to be packaged, i.e. poultry items that are the product of some form of processing. The skilled person understands that a consumer would not order an unprocessed bird and that an unprocessed bird would not be packaged. Thus, in the claim context, the skilled person understands a *whole poultry bird* to mean

one that has been processed, in other words a *griller* (cf. published patent specification, paragraph [0015]). The skilled person will likewise understand a *portion of a poultry bird* to be a part of a processed bird that has been separated from the main carcass, such as a breast fillet. Therefore, contrary to how the appellant-opponent has argued (see its grounds of appeal, top of page 8), what the patent calls a *griller* is not a portion of a poultry bird. This interpretation is confirmed by the description. In particular (see published patent specification, paragraph [0002]), although the whole birds are delivered to a preparation system, the paragraph goes on to explain that they must first be processed to produce grillers or portions thereof before being packaged.

- 3.4 The opposition division found (see impugned decision, reasons, point 3.2.1.2) that the subject matter of claim 1 lacked novelty with respect to an embodiment of E1 explained in paragraph [0111] in which whole birds were packaged to order. The Board agrees with this finding.
- 3.5 E1 discloses an apparatus for controlling a poultry packaging system that produces batches of products packed for consumers (see for example E1, paragraph [0046]). Since these packages are produced to fulfil orders it is implicit that the system has a [first] receiving unit for receiving a plurality of poultry product orders. The claim specifies that a poultry product is either a whole or a portion of a poultry bird. E1 discloses an embodiment for packaging whole poultry birds - *a batch to consist just of a single bird* (see paragraphs [0111] to [0109] with figure 5). In this embodiment, candidate birds are weighed by a weighing device 20, thus E1 discloses a [second]

receiving unit for receiving a measurable parameter of a poultry bird from a measurement unit. As explained in paragraph [0111], whole poultry birds that are found to have the *desired weight* (and appearance) are batched in a special batching area 40. In the Board's view, the *desired weight* can but correspond to what has been ordered, Therefore, E1 discloses a control unit operable to transmit a signal to a poultry processing system such that it processes a poultry bird in accordance with the determined order.

3.6 Therefore, novelty of claim 1 hinges on whether E1 discloses *a recommendation unit operable to determine which of the plurality of received orders best corresponds to the received measurable parameter (weight for example) based on the characteristics (e.g. the desired weight) of each received order.*

3.6.1 In this regard, the appellant-proprietor has argued that because this wording requires a *best* match of a plurality of orders this implies that the apparatus compares against *all* of the orders which moreover must *differ* from each other. This would therefore result in the very best match in absolute terms for all orders. It would then not be enough, if, as in E1, only a single order is considered.

The Board is unable to read either limitation in the wording of granted claim 1. That the recommendation unit determines a best match of orders with poultry bird measurement parameter(s) does not mean that there might not also be other best matches for other orders, for example because they are identical. Moreover, the claim is drafted in terms of a single matching "event" of orders and a bird's parameters. Whether the unit repeats this process until each and every order is

ideally filled, or only performs the matching for a single order until that order is ideally filled is simply not stated in the claim. Thus, it cannot be inferred from the claim wording that the orders are all different or that each must be ideally filled. Consequently, the Board reads the claim broader than the limited reading given by the appellant proprietor.

3.7 With this broad understanding of the recommendation unit of claim 1, E1 is seen to also anticipate the above feature: As explained in paragraph [0111], a batch can consist just of single birds having the *desired external appearance and weight*. This desired weight is the one ordered. Moreover, *the batching algorithm [...designates] the suitable specimens in the buffer section to be unloaded in the batching device 40*. Thus, those *suitable* specimens are the best matches of a plurality of orders to pre-weighed candidate birds in terms of the measurable parameter of weight. In so doing the system of E1 has considered all the orders it is processing and established that among them the order for whole birds best matches the bird with suitable appearance and weight. This is repeated until a single order is ideally filled. What happens to those birds not found to be suitable and how these are processed to make up the other orders is not relevant, because, as stated above, claim 1 is not seen to lay down any requirements for all the orders.

3.8 From the above, the Board concludes that E1, in particular the embodiment that batches whole prepared birds, discloses all the features of claim 1. Therefore, the appellant-proprietor's main request must fail.

4. First auxiliary request, Articles 123(2) and (3) EPC

The appellant-opponent has argued that the amended feature of claim 1 setting out that *for at least one of said plurality of orders said poultry product is a portion of a poultry bird* adds subject matter extending beyond the application as filed because the claim now covers the possibility that the apparatus packages whole poultry birds *and* portions of poultry bird, whereas originally only an apparatus was claimed which packaged exclusively orders for the one or the other but not a mixture of both. Moreover, the description did not disclose the subject matter that had been added to the claim. At oral proceedings before the Board, the appellant-opponent furthermore argued that this alleged unallowable extension of subject matter broadened the claim beyond what was granted and therefore extended the protection conferred by the claim (Article 123(3) EPC).

The opposition division (cf. impugned decision, reasons, point 4.1) considered that the amendment did not add subject matter extending beyond the application as filed because it merely excluded the possibility of all orders being for whole poultry birds. The Board agrees with this.

Original claim 1 defines a first receiving unit operable to receive *a plurality of orders for poultry product, wherein said poultry product is either a whole or a portion of a poultry bird*.

The feature defines, with its *either/or* (rather than *and/or*) clause that *products*, not *orders*, are exclusively whole birds or exclusively portions of birds. It stands to reason that a whole bird product cannot also be a portion of a bird and vice versa. So a

product is exclusively one of these and never both. However, this exclusivity does not extend to the *orders* for these products received by the first receiving unit. This the original claim leaves open: It does no more than define a plurality of orders for poultry product without specifying anything about whether they are for just one type of product or a mixture of types of product. Put another way, original claim 1 covered the possibility for orders to be exclusively whole birds, exclusively portions of birds or a mixture of the two. The disputed amendment merely excludes one of these possibilities (orders are exclusively for whole birds). Therefore, the amendment finds a basis in original claim 1. Whether or not the description also offers a basis for this feature can therefore be left undecided.

The only other amendment to claim 1 (measurable parameter comprises the weight of the poultry bird) is indisputably disclosed in original claim 2. Therefore, the Board concludes that claim 1 does not add subject matter extending beyond the application as filed.

Since the amendment to the *order* feature of claim 1 merely restricts the claim beyond what was originally filed and since granted claim 1 has the same feature, the appellant-opponent's objection under Article 123(3) EPC is moot.

5. First auxiliary request, claim 1, sufficiency of disclosure
- 5.1 Article 83 EPC requires that the European patent application (in this case the patent) shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled

in the art. According to established jurisprudence, an invention is sufficiently disclosed if it can be performed by a person skilled in the art in the whole area claimed, using common general knowledge and taking into account further information given in the description of the patent or patent application, see Case Law of the Boards of Appeal, 9th edition, 2019 (CLBA) II.C. 1.

- 5.2 The appellant-opponent has pointed out that the first claim feature defines that orders can be for a product that is a whole poultry bird or a poultry portion, but that the claim also defines that the characteristics of *each* received order includes the number of poultry bird portions. According to the appellant-opponent, if orders are exclusively for whole birds the requirement that the order should include the number of poultry portions is an unresolvable contradiction that renders the invention impossible to carry out. The Board disagrees.

The argument boils down to the presence of a contradiction which, at most, calls into question the clarity of the claim, rather than its sufficiency of disclosure. Furthermore, the skilled person who is intent on making technical sense of the claims will immediately realise that orders exclusively for whole birds will not define a number of poultry portions, therefore they will dismiss this aspect of the claim (number of portions) as not being applicable where whole birds are concerned. In the Board's view there is also sufficient information in the rest of the patent to carry out the invention where whole birds are batched. For example, paragraphs [0005] and [0074] explain that orders can be for whole chickens and these can be batched according to weight. Therefore, the

skilled person would be able to produce batches of whole poultry birds, merely by knowing the weight of the order and that it was for a whole bird.

- 5.3 The appellant-opponent has also argued that the invention according to claim 1 cannot be carried out because the skilled person would not know how to assess whether an order *best* corresponded to the at least one measured parameter. In particular, this would be at odds with paragraph [0020] which explains that the recommendation unit ranks the orders to minimize giveaway, but that this ranking can be overridden by an operator (see the last sentence). As the appellant-opponent argues, this means that the suggested top of the rank need not be the *best* after all.

The Board is unconvinced. What is best is always relative to what is required. If the user overrides the system ranking because a different ranking better suits their requirements, then the new ranking necessarily best matches those changed requirements. The fact that an operator might have a different idea or has changed their idea as to what *best* might mean and so override the proposed ranking only means that their concept of what constituted *ideal* has changed. In this light paragraph [0020] merely indicates that the system is adaptable to the user's needs. Thus, the Board is unable to see any contradiction.

- 5.4 For all these reasons, the Board considers that the opposition division were correct in finding the first auxiliary request to be sufficiently disclosed.
6. First auxiliary request, claim 1, novelty with respect to E1

- 6.1 The first auxiliary request adds that at least one received order is for a portion of a poultry bird. The appellant-opponent has argued that the claimed apparatus cannot be distinguished by the order received. The Board disagrees. Because the apparatus is now defined as arranged to process at least one order for a *portion* of a poultry bird, its recommendation unit must be capable of determining a best correspondence for the portion order from the weight of a [whole] poultry bird. This is therefore different from an apparatus that is merely capable of processing entire birds (grillers) based on their weight. Where E1 describes packaging poultry portions in detail, matching orders to available products for portions is not based on the weight of the *whole poultry bird*, but on the weight of the individual portions (see E1, paragraphs [0016] to [0019]). Therefore, this part of E1 does not disclose the subject matter of claim 1.
- 6.2 Nor does the Board come to a different conclusion considering that E1 (see paragraph [0024]) considers an entire carcass of an eviscerated chicken to be an *animal part*. In this regard, the appellant-opponent has argued that E1 discloses that the weight of a whole bird is used to batch an entire eviscerated chicken which is an animal part and thus a portion. As has already been explained, the skilled person reads a *portion of a poultry bird* to be different from a *whole poultry bird* in claim 1. The fact that E1 might call such a whole poultry bird an *animal part* does not change the way the claim is to be read. This means that the entire carcass referred to in paragraph [0024] is not a poultry portion as claimed. Therefore the argument is moot.

6.3 The appellant-opponent has also pointed out that in the embodiment of E1 which packages whole poultry birds (see paragraph [0111] with figure 5), those birds which are not selected for unloading in the batching device 40 are processed downstream and will often be divided into parts, which means portions. The appellant-opponent has argued that this non-selection is based on the weight of the poultry bird (cf. paragraph [0109], weighing device 20) and can equally well be seen as a positive selection of something to be packaged as portions. So, according to the argument, E1 discloses a recommendation unit batching orders for portions based on the weight of the entire bird. The Board disagrees.

E1 is entirely silent as to how these *non-selected* birds are processed downstream of the batching device 40. Although they presumably go on to fulfil orders, their non selection for a whole poultry bird order does not mean that they are being selected for fulfilling specific orders of poultry portions according to their weight. Whether to fulfil such orders for portions a recommendation unit as claimed might be used (batching portions using the weight of whole birds), or whether portion weight might be used as a batching parameter, as in E1's first embodiment, is left entirely unsaid. Therefore, the Board does not see a direct and unambiguous disclosure of a recommendation unit as claimed in the description of this embodiment.

6.4 For these reasons, the Board considers that the subject matter of claim 1 is new with respect to E1.

7. First auxiliary request, claim 1, novelty with respect to E2

E2 (see abstract) concerns the processing of primary slaughtered products into secondary products. It is mainly concerned with improving this process by collecting data about these products. To this end a data processing system 12 is used which receives data such as the weight of a carcass (see for example paragraph [0081]). Although E2 mentions packaging (see paragraph [0025]) nothing is said as to how this is achieved. In particular, the Board is not convinced by the appellant-opponent's argument that the buffering of slaughtered products (see E2, paragraph [0038]), or E2's disclosure that the control system selects a specific routing for products (see E2, paragraph [0081]) is a direct and unambiguous disclosure of a recommendation unit, let alone one as claimed. Whilst E2's arrangement must somehow route products to make up suitable orders, it does not disclose that this is done by determining which received order best corresponds to a measured parameter, let alone the weight of a poultry bird, as claimed. Put another way, although the apparatus of E2 might have the claimed inputs to make such a determination, whether its control unit 12 is operable to do so is left unsaid. Therefore, E2 does not take away novelty of claim 1.

8. First auxiliary request, claim 1, novelty with respect to E5

The Board agrees with the appellant-opponent (see appeal grounds, starting last line of page 18) that E5 discloses a system for processing and packaging poultry (see E5, paragraphs [0001] and [0002]), including complete poultry products (see paragraph [0090], last sentence on page 5). Items are brought together as a batch according to weight and number of items (see paragraph [0092]) These are then packaged (see

paragraph [0094]). Therefore, the disclosure implies a recommendation unit that determines which items best meet an order.

However, in the Board's view, E5 does not disclose a recommendation unit that makes a recommendation for poultry portions using the parameter of weight of a poultry bird. Rather in E5, items such as poultry portions to be packaged are individually weighed by weighing unit 4 (see paragraph [0090] with figures 1 and 2). Therefore, E5 does not take away novelty of claim 1.

9. Admission of novelty objections based on E3, D1, E4, E6, E7, E8 and E9 for the first auxiliary request

9.1 In its communication in preparation for the oral proceedings (see point 9.5), the Board gave a preliminary opinion regarding these issues and concluded that it did not intend to admit these objections into the proceedings. In particular, the Board stated the following:

"With its grounds of appeal (see pages 28 to 31), the appellant-opponent for the first time objects a lack of novelty with respect to E3, D1, E4, E6, E7, E8 and E9 and lack of inventive step starting from E1. They are therefore subject to the discretion afforded by Article 114(2) EPC with Article 12(4) RPBA. The main purpose of the appeal proceedings is to give the losing party a possibility to challenge the decision of the opposition division on its merits (see G0010/91, point 18). Consistent with this purpose, in exercising their discretion, the boards consider, among other factors, whether or not late filing is justified by developments in the procedure, cf. Case Law of the Boards of Appeal,

9th edition, 2019 (CLBA), V.A.11.3, and the decisions cited therein. In the present case, there have been no developments that would justify filing these additional objections first in appeal, nor has the appellant-opponent argued otherwise. Auxiliary request 1 was on file over a year prior to the opposition oral proceedings. During that time, all the evidence was available (it was cited in the opposition notice, see page 1). Thus these objections could and, in the Board's view, should have been raised in the opposition proceedings. Therefore, the Board does not intend to admit them (novelty with respect to E3, D1, E4, E6, E7, E8 and E9) into the appeal proceedings, Article 12(4) RPBA".

- 9.2 At the oral proceedings before the Board the appellant-opponent did not explain why this preliminary opinion might have been wrong. Rather, it merely stated that E3 was not more relevant than E1. In the light of this, the Board saw no reason to deviate from its preliminary intention. Therefore it decided not to admit these novelty objections into the proceedings.
10. First auxiliary request, claim 1, inventive step starting from E1, E2 or E5 with H1
- 10.1 Without prejudice to the question of admittance of the inventive step objection starting from E1 raised for the first time in appeal, the Board is of the opinion that none of these combinations would lead the skilled person to the claimed invention as a matter of obviousness.
- 10.2 None of the proposed starting documents discloses a recommendation unit which determines which of a plurality of orders, including an order for poultry

portions, best corresponds to the measured weight of a [whole] poultry bird. In other words, none of them batches portions using the weight of a whole bird as a batching parameter.

- 10.3 At most, these documents disclose a recommendation unit that batches poultry portions using the weight of the individual portions to be packaged as a batching parameter, see for example, E1, paragraphs [0016] to [0019]. Similarly E5 (see the abstract) discloses an apparatus that weighs individual items and uses this weight as a batching parameter for those items. Nor is anything more disclosed in paragraph [0045]. Whilst this paragraph suggests estimating the weight of an item rather than measuring it directly, it does not hint that this item might be a poultry portion let alone that its weight could be estimated from the weight of an entire bird. E2 appears to be less relevant since it does not disclose a recommendation unit (see above point 7).
- 10.4 Starting from the most promising documents for arriving at the invention, E1 or E5, the differing feature would boil down to a recommendation unit that uses the weight of a whole poultry bird for batching poultry portions to fulfil specific orders.
- 10.5 It is common ground (see published patent specification, paragraph [0041]) that the skilled person knows that each portion of a whole poultry bird (such as breast, thigh, wing etc.) comprises a certain percentage of the overall weight of the bird, and that there is little variance in these percentages from bird to bird. This is confirmed by document H1 (see tables 6.4 and 6.5 on pages 170 and 171) which disclose

weights of poultry portions as a percentage of the total weight of birds.

10.6 Irrespective of whether the differing feature (whole poultry weight parameter for batching poultry portions) is seen to solve the problem of improving the accuracy of the apparatus or of merely simplifying it, the appellant-opponent has argued that the skilled person would use this knowledge (portion weight as % of total weight) and modify the starting apparatus to arrive at the subject matter of claim 1. This, the appellant-opponent argued, is obvious because it is a matter of common sense. The Board disagrees.

10.7 The context of H1's Tables 6.4 and 6.5 is a chapter on *yield*. As H1 explains on page 171 under the sub-heading *yield*, expected yields are important to the industry. In the Board's view it might well be common sense for the farmer to use such tables to estimate how they could optimise their yield when selling birds for slaughter. By the same token, it is plausible that a slaughterhouse might use such tables when planning how many and what weight of birds would yield enough meat to meet its overall production goals. However, in the Board's view, it is not plausible that the slaughterhouse would present the farmer with a list of individual orders, including poultry portions (for example a certain number of four chicken legs weighing 500g, cf. published patent specification, paragraph [0008]) and expect the farmer to assign individual live birds to these orders, or that the farmer would weigh and select birds for slaughter on the farm in order to fulfil specific on-farm orders, as a matter of common sense.

- 10.8 In the Board's view, even though the skilled person knows how the weight of poultry portions relates to the bird's total weight, having the idea to use the weight of a whole bird as a batching parameter for packaging portions of birds requires a special insight on the part of the skilled person that this knowledge can be applied in a new way. In the Board's view this insight goes beyond their normal skills and abilities. Nor does the Board consider this new application a matter of mere common sense. The Board does not see why or how the skilled person, who knows that each portion of a bird comprises a certain percentage of their overall weight, would have an instinctive understanding that that knowledge can be used to advantage when batching items.
- 10.9 For this reason, the Board has not been convinced by the appellant-opponent's arguments that the opposition division (cf. impugned decision, point II 4.4) erred in deciding that the subject matter of claim 1 involved an inventive step.
11. The Board's positive conclusions on novelty and inventive step for claim 1 of the first auxiliary request equally apply to the independent claims 10 (computer-implemented method) and 15 (computer programme product) of this request, for the same reasons.
12. From the above, the Board concludes that it agrees with the opposition division's finding that the main request fails but that the first auxiliary request meets the requirements of the EPC. Therefore, both appeals must be dismissed.

Order

For these reasons it is decided that:

Both appeals are dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated