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**Datasheet for the decision  
of 22 March 2023**

**Case Number:** T 1788/21 - 3.2.07

**Application Number:** 17162182.4

**Publication Number:** 3222532

**IPC:** B65B19/22, B65B35/56

**Language of the proceedings:** EN

**Title of invention:**

ORIENTATION UNIT AND METHOD FOR CAUSING A CHANGE IN  
ORIENTATION OF A PARALLELEPIPED-SHAPED ARTICLE IN A PACKING  
MACHINE

**Patent Proprietor:**

G.D SOCIETA' PER AZIONI

**Opponent:**

Focke & Co. (GmbH & Co. KG)

**Headword:**

**Relevant legal provisions:**

EPC Art. 56

RPBA 2020 Art. 12(2), 12(3), 12(4), 12(5), 12(6), 15(1)

**Keyword:**

Auxiliary request 2 - prohibition of reformatio in peius (no)  
- admitted (yes) - inventive step (yes)

**Decisions cited:**

G 0009/92, G 0004/93

**Catchword:**



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Case Number: T 1788/21 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 22 March 2023**

**Appellant:** Focke & Co. (GmbH & Co. KG)  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
30 July 2021 concerning maintenance of the  
European Patent No. 3222532 in amended form.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** A. Cano Palmero  
S. Watson

## **Summary of Facts and Submissions**

- I. The opponent (appellant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division to maintain European patent No. 3 222 532 in amended form on the basis of the then auxiliary request 1.
- II. The opposition was directed against the patent in its entirety and based on the grounds for opposition pursuant to Article 100(a) EPC (novelty and inventive step).
- III. In preparation for oral proceedings, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA 2020, to which the patent proprietor (respondent) responded on the merits with letter dated 26 August 2022.
- IV. Oral proceedings before the Board took place on 22 March 2023.

At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

- V. The final requests of the parties are as follows,  
  
for the appellant

that the decision be set aside and  
that the patent be revoked in its entirety;

for the respondent

when setting aside the decision under appeal,  
that the patent be maintained in the amended form  
according the set of claims according to auxiliary  
request 2, filed as second auxiliary request during  
opposition proceedings with letter of  
14 February 2020 and re-filed with the reply to the  
statement of grounds of appeal.

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

**D1:** EP 1 394 082 A2;  
**D2:** EP 1 889 784 A1;  
**D3:** DE 1556624 A1;  
**D4:** EP 2 460 747 A1;  
**D5:** US 2,195,625 A;  
**D6:** EP 2 726 376 B1;  
**D10:** DE 10 2008 041 109 A1;  
**D12:** EP 2 716 555 A1;  
**D15:** EP 0 900 731 A2.

VII. The lines of argument of the parties relevant for the  
present decision, which address the issues of  
admittance and inventive step of the subject-matter of  
claims 1 and 6 of auxiliary request 2, are dealt with  
in detail in the reasons for the decision.

VIII. Claim 1 of auxiliary request 2 reads as follows:

"A packing machine (12) for the production of a packet  
(1) of tobacco articles comprising an inner wrapping  
(3) containing a group (4) of tobacco articles and an  
outer container (2), which houses the inner wrapping  
(3); the packing machine (12) comprises:

a first wrapping unit (14). which wraps the inner wrapping (3) around the group (4) of tobacco articles by folding a wrap (7; 9);

a second wrapping unit (15), which creates the outer container (2) around the inner wrapping (3) by folding a blank (10; 33);

an orientation unit (16), which receives the inner wrapping (3) from the first wrapping unit (14) in an input station (S1), where the article (3) is oriented according to an input plane (A), releases the inner wrapping (3) to the second wrapping unit (15) in an output station (S2), where the article (3) is oriented according to an output plane (B), and comprises an orientation drum (17), which can rotate around a first rotation axis (18) and supports a first parallelepiped-shaped pocket (19), which is fed along an orientation path (P1) between the input station (S1) and the output station (S2); and wherein the second wrapping unit (15) further comprising a wrapping drum (25), which can rotate around a second rotation axis (26) and supports at least one second pocket (27), which is fed along a wrapping path (P3), receives the inner wrapping (3) from the first pocket (19) of the orientation drum (17) in the output station (S2), and releases the inner wrapping (3) in a transfer station (S5); and a first feeding station (S3), which is arranged along the periphery of the wrapping drum (25) and feeds a first wrapping element to the second pocket (27),

the packing machine (12) is **characterised in that:**

the output plane (B) is oriented differently from the input plane (A); and

the first rotation axis (18) of the orientation drum (17) is oblique, i.e. neither parallel nor perpendicular, relative to the input plane (A) and to the outlet plane (B) and/or the first rotation axis (18) of the orientation drum (17) is oblique, i.e.

neither parallel nor perpendicular, relative to the walls of the first pocket (19)."

IX. Claim 6 of auxiliary request 2 reads as follows:

" A wrapping method for the production of a packet (1) of tobacco articles comprising an inner wrapping (3) containing a group (4) of tobacco articles and an outer container (2), which houses the inner wrapping (3); the wrapping method comprises the steps of:  
wrapping the inner wrapping (3) around the group (4) of tobacco articles in a first wrapping unit (14) by folding a wrap (7; 9);  
creating the outer container (2) around the inner wrapping (3) in a second wrapping unit (15) by folding a blank (10; 33);  
feeding the inner wrapping (3) from the first wrapping unit (14) to the second wrapping unit (15) by means of an orientation unit (16), which receives the inner wrapping (3) from the first wrapping unit (14) in an input station (S1), where the article (3) is oriented according to an input plane (A), releases the inner wrapping (3) to the second wrapping unit (15) in an output station (S2), where the article (3) is oriented according to an output plane (B), and comprises an orientation drum (17), which can rotate around a rotation axis (18) and supports a first parallelepiped-shaped pocket (19), which is fed along an orientation path (P1) between the input station (S1) and the output station (S2); and  
wherein the second wrapping unit (15) further comprising a wrapping drum (25), which can rotate around a second rotation axis (26) and supports at least one second pocket (27), which is fed along a wrapping path (P3), receives the inner wrapping (3) from the first pocket (19) of the orientation drum (17)

in the output station (S2), and releases the inner wrapping (3) in a transfer station (S5); and a first feeding station (S3), which is arranged along the periphery of the wrapping drum (25) and feeds a first wrapping element to the second pocket (27), the wrapping method is **characterised in that:**  
the output plane (B) is oriented differently from the input plane (A); and  
the rotation axis (18) of the orientation drum (17) is oblique, i.e. neither parallel nor perpendicular, relative to the input plane (A) and to the outlet plane (B) and/or the rotation axis (18) of the orientation drum (17) is oblique, i.e. neither parallel nor perpendicular, relative to the walls of the pocket (19)."

### **Reasons for the Decision**

1. *Auxiliary request 2 - Admittance, Article 12(4) RPBA 2020 and prohibition of reformatio in peius*
- 1.1 During the oral proceedings before the opposition division, the respondent submitted a new auxiliary request 1, according to which the patent in suit was maintained. In this respect, the appellant argued in point V of the statement of grounds of appeal that the original auxiliary requests 1 to 8, and therefore also auxiliary request 2, were apparently not further pursued.
- 1.1.1 The Board disagrees. Contrary to the argument of the appellant, the Board fails to identify anything in the decision under appeal or in the minutes of the oral proceedings before the opposition division that could suggest that auxiliary requests 2 to 8, in particular



auxiliary request 2, were not further pursued or not maintained in opposition proceedings.

- 1.1.2 Consequently, the re-filing of auxiliary request 2 in appeal is not considered an amendment in the sense of Article 12(4) RPBA 2020 and, therefore, is part of the appeal proceedings (see document CA/3/19, explanatory remarks on Article 12(4) RPBA 2020).
  
- 1.2 During the oral proceedings before the Board, the appellant argued that the subject-matter of claim 1 according to auxiliary request 2 was an *aliud* to the subject-matter of claim 2 of the patent as maintained by the opposition division. This would result in an improvement of the patent proprietor's position putting the opponent and sole appellant in a worse situation than if it had not appealed, contrary to the principle of prohibition of *reformatio in peius* (see G 9/92 and G 4/93).
  - 1.2.1 In particular, the appellant indicated that by replacing the feature relating to the orientation unit of the apparatus of claim 2 of the maintained version  
  
"... , where the **inner wrapping (3)** is oriented according to an input plane (A), releases the inner wrapping (3) to the second wrapping unit (15) in an output station (S2), where the **inner wrapping (3)** is oriented ..."
  
  - by the feature in claim 1 of auxiliary request 2  
  
"... , where the **article (3)** is oriented according to an input plane (A), releases the inner wrapping (3) to the second wrapping unit (15) in an output station (S2), where the **article (3)** is oriented ..."

the orientation unit of auxiliary request 2 was not encompassed by the orientation unit as claimed in the maintained version. As a result, the subject-matter of auxiliary request 2 was now distinct from the subject-matter of the maintained version, and the respondent's position was improved without its having appealed the decision of the opposition division.

- 1.2.2 The Board is not persuaded by the appellant's arguments for the following reasons.

It cannot be agreed with the appellant that the subject-matter of claim 1 of auxiliary request 2 is *aliud* to the subject-matter of claim 2 of the maintained version. Indeed, both claims are directed to the same physical entity, namely a packing machine comprising a first and second wrapping unit and an orientation unit.

Furthermore, the Board is not convinced that, taking into consideration the claims as a whole, the combination of the replaced features and the newly-added features (such as the features relating to the second wrapping unit) in claim 1 of auxiliary request 2 clearly represents at least no worsening in the respondent's position with respect to the maintained version.

In this light, the Board concludes that the consideration of auxiliary request 2 is not contrary to the prohibition of *reformatio in peius*.

- 1.3 In view of the above, auxiliary request 2 is admitted into the appeal proceedings.

2. *Auxiliary request 2 - Inventive step, Article 56 EPC*

2.1 The following findings on inventive step of the subject-matter of claims 1 and 6 of auxiliary request 2 correspond substantially to the view of the Board which was communicated to the parties with the communication pursuant to Article 15(1) RPBA 2020 (see point 9 thereof). The parties neither reacted nor objected, orally or in writing, to the opinion expressed in that communication. After having reconsidered all relevant legal and factual aspects of the case, the Board does not see any reason to deviate from its preliminary opinion and confirms it as definitive for the present decision.

2.2 It is common ground that in auxiliary request 2 features from claim 8 according to the patent as granted have been added to independent claims 1 and 6 (see point V.2 of the statement of grounds of appeal and point 4.1 of the reply to the statement of grounds of appeal).

2.3 The appellant argued in point V.2 of the statement of grounds of appeal that since the added features of claim 8 as granted were already anticipated by any of documents **D2**, **D3**, **D6** or **D12**, the subject-matter of claims 1 and 6 according to auxiliary request 2 did not involve an inventive step.

2.4 The Board identifies the following attacks against claims 1 and 6 according to auxiliary request 2 from the appellant's statement of grounds of appeal:

- **D6** as closest prior art in combination with the teachings of any of **D3**, **D4** or **D5** (point IV.2.1. of the statement of grounds of appeal) in further combination

with the teachings of any of **D2, D3, D6** or **D12** (point V.2 of the statement of grounds of appeal);

- **D15** as closest prior art in combination with the teachings of any of **D1, D3, D4, D5** or **D10** (point IV.2.2 of the statement of grounds of appeal) in further combination with the teachings of any of **D2, D3, D6** or **D12** (point V.2 of the statement of grounds of appeal); and

- a general reference to earlier submissions in opposition proceedings (point IV.3. of the statement of grounds of appeal).

2.5 With regard to the lines of attack based on the **teaching of D5**, the Board notes that these objections were not raised and/or maintained against claims 2 and 9 as maintained by the opposition division which could have applied to claims 1 and 6 according to auxiliary request 2. Therefore, the opposition division could not decide on this matter.

2.5.1 Considering that the primary object of the appeal proceedings is that of reviewing the decisions of the administrative departments of the EPO (cf. Article 12(2) RPBA 2020), and that in accordance with Article 12(6), second sentence, RPBA 2020 the Board shall not admit objections which should have been submitted, or which were no longer maintained in opposition proceedings, the lines of attack based at least partly on the combinations of **D6** with **D5** and **D15** with **D5** **are not admitted into appeal proceedings under Article 12(6), second sentence, RPBA 2020.**

2.6 It is uncontested that the subject-matter of claims 1 and 6 according to auxiliary request 2 differs from the known packing machines and wrapping methods of either document **D6** or **D15** at least in that the rotation axis

of the orientation drum is oblique *i.e.* neither parallel nor perpendicular, relative to the input plane and to the outlet plane and/or the rotation axis of the orientation drum is oblique, *i.e.* neither parallel nor perpendicular, relative to the walls of the pocket supported by the drum.

- 2.6.1 According to the appellant, starting from either document **D6 or D15** as closest prior art, the skilled person is faced with the task of simplifying or replacing the complex orienting wheel 57 of **D6** or simplifying the complex rotating mechanism 10 of **D15**. For this purpose, the skilled person would take from documents **D3 or D4** (and also from D5) the technical teaching that the reorientation of articles, also of cigarette packs or of cigarette packaging, can be greatly simplified by means of a rotary turret-like rotating unit whose axis of rotation is inclined with respect to the input and output planes. In addition, it is clear for the skilled person from figure 2 of **D10** that revolving turret-type reorientation units with an inclined axis of rotation can be used for cuboid packaging, so that the skilled person would be motivated to incorporate the teaching of **D10** in the known packing machine and wrapping method of **D15**.
- 2.6.2 The Board is not persuaded by the arguments of the appellant and concurs with the findings of the opposition division in points 5.1.2 and 5.1.4 of the reasons for the decision under appeal, that the skilled person would be discouraged from combining the teachings of any of documents **D1, D3, D4 or D10** with the known packing machines of either **D6 or D15**, since this would involve a complete redesign and major structural changes to those machines. Contrary to the allegation of the appellant (see page 15, second

paragraph of the statement of grounds of appeal), the Board is convinced that such a reorientation of the drum axis has implications that extend beyond the customary measures that a skilled person could take without exercising an inventive skill. In sum, the introduction of the teachings of any of **D1, D3, D4** or **D10** (and even of **D5** if this teaching could be taken into account) in the known apparatus of either **D6** or **D15** can only be the result of an *ex post facto* analysis.

2.6.3 It follows that even if the features introduced from claim 8 as granted were considered to be rendered obvious by the teachings of any of **D2, D3, D6** or **D12**, the skilled person would still not arrive at the subject-matter of claims 1 and 6 of auxiliary request 2 in an obvious manner starting from either of **D6** or **D15** as closest prior art.

2.7 As for the general reference to earlier submissions in opposition proceedings made by the appellant in point IV.3. of the statement of grounds of appeal, the Board considers such a reference to submissions before the opposition division unsubstantiated in the sense of Article 12(3) RPBA 2020. Hence, the Board decided **not to admit these into the appeal proceedings pursuant to Article 12(5) RPBA 2020.**

2.8 It follows that the appellant has not submitted admissible and convincing objections under Article 56 EPC that could prejudice the maintenance of the patent based on the claims of auxiliary request 2.

3. *Amended description*

The respondent submitted during the oral proceedings before the Board an amended description adapted to the claims of auxiliary request 2, to which the appellant did not raise further objections.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent as amended in the following version:

Claims:

nos. 1 to 6                      filed as auxiliary request 2 with  
the reply to the appeal of  
19 April 2022

Description:

page 2                              received during oral proceedings  
of 22 March 2023

pages 3 to 8                      of the patent specification

Drawings:

figures 1 to 31                      of the patent specification.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated