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**Datasheet for the decision  
of 19 January 2024**

**Case Number:** T 1886/21 - 3.2.04

**Application Number:** 16715358.4

**Publication Number:** 3250039

**IPC:** A22C21/00

**Language of the proceedings:** EN

**Title of invention:**

DEVICE FOR MAKING A PREPARATORY INCISION LONGITUDINALLY OF AN ANIMAL EXTREMITY PART WITH FIRST AND SECOND BONES ARTICULATED BY A JOINT

**Patent Proprietor:**

Foodmate B.V.

**Opponents:**

Meyn Food Processing Technology B.V.  
MAREL POULTRY B.V.

**Headword:**

**Relevant legal provisions:**

EPC Art. 54, 56, 83

**Keyword:**

Novelty - (yes)

Inventive step - (yes)

Sufficiency of disclosure - (yes)

**Decisions cited:**

G 0003/14

**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 1886/21 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 19 January 2024**

**Respondent:** Foodmate B.V.  
(Patent Proprietor) Einsteinstraat 26  
3281 NJ Numansdorp (NL)

**Representative:** V.O.  
P.O. Box 87930  
Carnegieplein 5  
2508 DH Den Haag (NL)

**Appellant:** Meyn Food Processing Technology B.V.  
(Opponent 1) Westeinde 6  
1511 MA Oostzaan (NL)

**Representative:** Van Breda, Jacobus  
Octrooibureau Los & Stigter B.V.  
Weteringschans 96  
1017 XS Amsterdam (NL)

**Party as of right:** MAREL POULTRY B.V.  
(Opponent 2) Handelstraat 3  
5831 AV Boxmeer (NL)

**Representative:** Calysta NV  
Lambroekstraat 5a  
1831 Diegem (BE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
28 September 2021 concerning maintenance of the  
European Patent No. 3250039 in amended form.**

**Composition of the Board:**

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

## **Summary of Facts and Submissions**

- I. Appeals were filed by the proprietor and appellant opponent 1 against the interlocutory decision of the opposition division finding that, on the basis of what was then auxiliary request 6 (auxiliary request 4 in appeal), the patent in suit met the requirements of the EPC.
- II. Oral proceedings before the Board were duly held on 19 January 2024. During the course of the oral proceedings, the proprietor withdrew its appeal and all its requests higher ranking than auxiliary request 5.
- III. The appellant (opponent 1) and party as of right (opponent 2) request that the decision under appeal be set aside and that the patent be revoked.

The now respondent (proprietor), requests that the decision under appeal be set aside and that the patent be maintained in amended form according to one of the auxiliary requests 5 or 5A, both refiled with its grounds of appeal.

- IV. The independent claim 1 of auxiliary request 5 reads as follows:

"Device for making a preparatory incision longitudinally of an animal extremity part having a first bone and a second bone articulated by a joint, and surrounded by meat, the device including: at least one elongate linear guide member (15, 115); at least one cutting unit (21, 121) associated with the at least one elongate linear guide member (15, 115) for translating movement lengthwise thereof;

a cutting knife (51, 151A, 151B) on the at least one cutting unit mounted for movement between a first position and a second position in a first plane, wherein the cutting knife is further mounted for having an adjustable cutting direction in a second plane perpendicular to the first plane, and further including a knife adjustment drive mechanism for adjusting the cutting direction of the cutting knife in the second plane;

a conveyor (5, 201) for transporting animal extremity parts through a path coincident with the at least one cutting unit;

a primary drive mechanism (19, 39, 119, 139) for moving the at least one cutting unit lengthwise of the at least one elongate linear guide member;

a secondary drive mechanism (23, 27, 123, 127) for moving the cutting knife between the first position for receiving an animal extremity part transported by the conveyor in the at least one cutting unit, and the second position for performing the preparatory incision longitudinally of an animal extremity part received in the at least one cutting unit, wherein the at least one elongate linear guide member, and the associated at least one cutting unit are part of a plurality of elongate linear guide members, and a plurality of associated cutting units forming a periphery of a rotatable carousel (9, 109), wherein the rotatable carousel (9, 109) surrounds a stationary primary guide track that engages with each of the cutting units to form the primary drive mechanism, and wherein the secondary drive mechanism is formed by a stationary secondary guide track (19, 119) associated with the periphery of the rotatable carousel, and a follower wheel (39, 139) being kept in a lifted position by the secondary guide track, and wherein the knife adjustment drive mechanism comprises a stationary knife adjustment

guide track (33, 133) surrounded by the rotatable carousel adapted to cooperate with a further follower wheel (35, 135) acting on the adjustable cutting knife via a knife adjuster lever."

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

D1: WO 00/59311

D3: EP 0 594 934 A2

D8: US 2012/0231715 A1

D38A: "Meyn precutter for whole leg deboner", Technical Data Sheet, pages 1 and 2, Meyn Food Processing Technology B.V., Amsterdam, dated 03-05-13.

VI. The appellant-opponent 1's arguments and those of the party as of right-opponent 2 can be summarised as follows:

Auxiliary request 5 should not be admitted. The subject matter of claim 1 of auxiliary request 5 lacks novelty with respect to D1 and inventive step starting from D1 in combination with D3, D8 or the skilled person's general knowledge.

Claim 1 of auxiliary request 5 lacks clarity and the invention according to claim 1 is insufficiently disclosed.

The respondent-proprietor's arguments can be summarised as follows:

Auxiliary request 5 should be admitted. The subject matter of claim 1 of auxiliary request 5 is new and involves an inventive step. Moreover, the invention is sufficiently disclosed.

## **Reasons for the Decision**

1. The appeal of the opponent 1 is admissible.
2. Background

Before removing meat from an animal extremity part with articulated first and second bones (such as a poultry leg), it is known to *manually* make a longitudinal preparatory incision (see published patent specification, paragraph [0003]). The invention relates to a device for *automatically* cutting such an incision as animal parts are being transported on a conveyor (see published patent specification, paragraph [0001] and claim 1).

According to the invention (see all versions of claim 1), this is achieved by a plurality of cutting units mounted on a carousel, such that the path of the conveyor coincides with the cutting units at a certain point. Each cutting unit is provided with a knife and can move lengthwise along an elongated guide member. For this lengthwise movement a first drive mechanism is provided. A secondary drive mechanism moves the knife from a position in which an animal part on the conveyor can be received in the cutting unit and a position for making the incision.

3. Auxiliary request 5
- 3.1 Admissibility



3.1.1 Auxiliary request 5 was filed with the proprietor's original statement of grounds and maintained in subsequent submissions and corresponds to the auxiliary request 7 filed already in opposition with letter of 9 April 2020. In its communication, section 3.2, the Board expressed the following provisional view on admission of auxiliary requests filed in appeal that corresponded to lower ranking requests than the auxiliary request 6 held allowable:

*"3.2 As to auxiliary requests 4A, 5 and 5A, these were not dealt with by the opposition division since it found a higher ranking request to meet the requirements of the EPC. Irrespective of whether they are divergent or not, they were admissibly raised and maintained in the opposition proceedings, therefore the Board does not see itself as having the discretion not to admit them into the appeal proceedings, Article 12(4)RPBA 2020.*

...

*With regard to divergence of requests, the respondent-opponent 2 has cited T1185/17, reasons 3.3, as setting a precedent on how to deal with divergent requests in appeal proceedings. However, that case was concerned with divergencies introduced by amendment to the appeal case after the filing of the grounds of appeal (cf. Article 13 RPBA 2007) and not to the admissibility of requests filed with the grounds of appeal as in the present case. Therefore, the argument is moot."*

3.1.2 At the oral proceedings neither appellant opponent 1 nor opponent 2 as party as of right wished to comment on the question of admission. Absent any further comment the Board saw no reason to depart from its

provisional opinion and therefore decided to admit these requests.

3.2 In their submissions the appellant-opponent 1 and opponent 2 as party as of right raised the grounds of lack of novelty vis-a-vis D1 and lack of inventive step starting from D1 in combination with the skilled person's general knowledge, D3 or D8. The grounds of insufficiency of disclosure and lack of clarity of amendments raised against claim 1 as maintained in its grounds of appeal were seen to also apply to the present request.

3.3 Novelty with respect to D1

In the following, the Board will refer to the embodiment discussed in D1 on pages 27 to 30 in conjunction with figures 21 to 26. This embodiment discloses a device for making a preparatory longitudinal incision in a chicken leg, thus in an animal extremity part as claimed (see figure 26).

As best seen in figure 25 and described on page 28, lines 6 to 11, and page 30, lines 33 to 37, the device includes elongate linear guide members (slot parts 318a, b and c) and a cutting unit (blades 320a and b with rods 370). The blades of the cutting unit can perform translating incision movements bound lengthwise by the slots, with which the cutting unit is thus associated. A primary drive mechanism moves the knives lengthwise along the slots 318a and 318c by means of follower wheels 350, 352 that are moved in the direction of arrows 351 and 353 as they run along a cam track (see page 30, lines 4 to 15 with figure 25).

The cutting knives can move between a first position (see figures 25 and 26b) where the knives 320a and b are retracted into the block 310 so that the cutting unit can receive an animal part as it is conveyed on the conveyor (figure 21 reference 304) through a path coincident with the cutting unit (see page 27, lines 34 to 36) and a second position within the meat (see figure 26c). From this second position, at which the knife has stabbed into the meat, the preparatory incision can be made.

As best seen in figure 26, both first and second positions can be considered to lie in a first plane, namely the vertical plane within which the knife stabs as it enters the meat. The cutting knife is mounted so as to have an adjustable cutting direction in a second plane perpendicular to the first plane, namely a horizontal plane within which the knives can perform a to and fro horizontal movement along the slot 318a (see page 28, lines 6 to 11 with figure 25). This controlled to and fro, thus direction changing movement, is brought about by a knife adjustment drive mechanism comprising adjuster lever 386 and a follower wheel 354, which runs on a stationary guide (cam) track, which can but be surrounded by the carrousel, as the last claim feature requires (see page 30, lines 15 to 20 with figure 25).

As best seen in figure 21 and explained on page 27, lines 16 to 24, there are a plurality of cutting blocks 310 so that there are pluralities of elongate linear guide members and associated cutting units. Moreover, these form the periphery of a rotatable carousel. Although not shown in the drawings, it is implicit that the cam track on which the wheels 350 and 352 run are stationary and surrounded by the carousel, and thus

constitute a primary guide track of the primary drive mechanism as claimed.

D1 (see page 30, lines 20 to 25 with figure 25) also discloses a secondary drive mechanism which moves the cutting knife between the first and second positions so that it can stab into the flesh of the animal part and indeed be retracted therefrom. This mechanism includes an actuating plate 356 which can move in the direction of arrow 357, and which in turn is moved by an actuating member. However, as this passage of D1 confirms, this actuating member is neither shown nor described in more detail, let alone is it said to comprise a secondary guide track or a follower wheel.

Therefore, D1 does not disclose at least the penultimate claim feature, namely that: *the secondary drive mechanism is formed by a stationary secondary guide track associated with the periphery of the rotatable carousel, and a follower wheel being kept in a lifted position by the secondary guide track.*

Nor is it implicit that the plate 356 is actuated by such a follower wheel running on a secondary guide track, as this would be the only possible, technically sensible way in which this could be realized. It could, as the respondent-proprietor has argued, be mechanically actuated by an arm pushing the plate 356 (see figure 25) as the carousel turned, in combination with some kind of locking and release mechanisms enabling the knife to perform its stabbing action and later be retracted into the cutting block. In the Board's view this is another technically realistic possibility. As there are thus realistic alternative ways of realizing D1's teaching, D1 cannot be said to implicitly disclose a particular one of those options

as a matter of direct and unambiguous disclosure. The Board concludes that the subject matter of claim 1 is novel with respect to D1, Article 54(1) EPC.

4. Auxiliary request 5, claim 1, inventive step starting from D1 in combination with D3, D8 or the skilled person's general knowledge

4.1 The patent itself does not disclose any particular technical effect associated with the differing feature of a secondary drive mechanism comprising a *follower wheel kept lifted by a secondary guide track*. Its functionality is merely described in paragraph [0016] to [0019] in conjunction with figures 6 to 11. Given also that D1 already has a secondary drive mechanism, but the description of its actuating member is incomplete, the Board holds that the objective technical problem can be formulated as *how to implement the actuating member of D1's secondary drive mechanism*, rather than that of finding an alternative secondary drive mechanism for D1 as the party as of right, opponent 2 proposed.

4.1.1 Regarding the combination documents D3 and D8, neither disclose an actuating member for implementing a tangential movement of a plate using a follower wheel, nor has this been argued by the parties. Indeed, the opponent 1 explained that these had originally been cited in a different context as rendering obvious another possible difference of claim 1 over D1, namely the use of a follower wheel and guide track as knife adjustment driving mechanism for adjusting the cutting direction of the cutting knife in a second plane perpendicular to the first plane, cf. point 1.3.4 and 1.3.5 of the opponent 2's reply of 19 May 2022. Nor do they appear relevant to the Board as they fail to shed

any light on how to realize the actuating member driving the actuating plate 356 to move the knives 320a and b to and fro in a direction tangential to the direction of rotation of the carousel and corresponding to the second drive mechanism of the claim. D3 seems to disclose a cutting arrangement that uses an air cylinder 6a to move a knife pneumatically up and down, (see column 8, line 26 to column 10, line 22 with figure 1) rather than offering a solution, much less a mechanical one using a follower wheel and guide track, for affecting the to and fro movement of the actuator plate 356. Similarly, D8 (see abstract and paragraph [0105] with figure 10) appears to disclose moving a clamped animal part along the knife, and does not provide any information on how plate 356 might be made to move to and fro in D1. Therefore, neither combination would lead to the subject matter of claim 1 as a matter of obviousness.

- 4.1.2 Regarding the skilled person's general knowledge, the Board is unconvinced without any evidence that it can be concluded that the skilled person knows that a follower wheel on a cam track can move an angled arm, pivoted at its apex, in order to convert a vertical movement into a tangential movement in the same plane as shown in figure 6 of the patent. That figure cannot itself serve as evidence of common general knowledge. The patent certainly does not acknowledge that it would represent common general knowledge.

Moreover, the Board agrees with the respondent-proprietor that this knowledge in any case is not directly applicable to D1. Firstly, any such pivoting movement would produce a rotational rather than a linear movement of the actuating member. Furthermore, any angled arm together with its follower wheel and

pivot would need to be located and designed so as not to interfere with the movement of the follower wheels 350, 352 and 354 and 352 in their respective guide tracks, while also ensuring that the arm can move plate 356 far enough for the to and fro movement of the knives, cf. figure 25 of D1. It could also not be placed at the side of the block 310, that is between adjacent blocks which must accommodate the poultry legs, see figure 21. All these constraints mean that designing such an arm would be far from straightforward. If at all possible it would require some complex arm design with appropriate location of its pivot point and follower wheel.

Neither the appellant-opponent 1 nor the party as of right opponent 2 have offered any evidence demonstrating that solutions to the problems posed by these additional complexities belong to the skilled person's general knowledge. Nor is this evident to the Board. It follows that providing an actuating member for tangentially moving the plate 356 of D1's secondary drive mechanism that used a follower wheel would require more than the routine skills of the skilled person.

- 4.2 From the above, the Board concludes that the subject matter of claim 1 involves an inventive step starting from D1 in combination with D3, D8 or the skilled person's general knowledge, Article 56 EPC.
- 4.3 Party as of right opponent 2 at the oral proceedings cited D38a. After acknowledging that this was the first time D38a was cited in this context they refrained from further comment. The Board therefore did not further consider this submission.

5. Auxiliary request 5, claim 1, clarity and sufficiency of disclosure
  - 5.1 Claim 1 is a combination of granted claims, including the associated reference signs. Therefore, any lack of clarity in the present claim attributable to inconsistent reference signs was present in the granted claim set. In such cases, as already noted in its communication and left uncommented by appellant opponent 1 and party as of right opponent 2, the Board does not have the power to consider the issue of clarity (see G3/14, point 85). Therefore, the argument of the appellant-opponent 1 that claim 1 lacks clarity is moot.
  - 5.2 Insufficiency of disclosure
    - 5.2.1 In accordance with established jurisprudence (see for example CLBA II.C.5.2) in order for an invention to be sufficiently disclosed, the patent must disclose at least one way of carrying out the invention. The Board considers that this requirement is fulfilled in the present case.
    - 5.2.2 It is not disputed that the embodiments of the invention disclose a device for making a preparatory incision in an animal extremity part with an elongate guide member, cutting knife a conveyor, a primary drive mechanism and and a knife adjustment drive mechanism as claimed. Nor is it disputed that embodiments disclose a secondary drive mechanism for moving the knife between first and second positions as such, for example when the knife stabs into the meat (see figures 1 to 15). However, the appellant-opponent 1 has argued that the patent does not disclose an embodiment of the invention that implements the secondary drive mechanism in the



way required by the penultimate claim feature, namely it being: *formed by a stationary secondary guide track associated with the periphery of the rotatable carousel, and a follower wheel being kept in a lifted position by the secondary guide track.*

5.2.3 Before looking in detail at the embodiments, the Board notes that the usual meaning of the word *form* (see *Oxford English dictionary on-line (OED)*) is: To construct, frame; to make, bring into existence, produce. Const. from, of, out of (the material or elements). Thus the word *form* and its cognate *formed* used in this claim feature define elements of which the secondary drive mechanism is made or constructed but implies no exclusivity to those elements. In other words, contrary to how the appellant-opponent 1 has argued, the claim does not exclude that the *secondary drive mechanism* comprises more elements than a *stationary secondary guide track* and a *follower wheel*.

5.2.4 Turning now to the description (see paragraph 16 with figure 6), it is disclosed that the knife arm 45 can hold the knife in a first position for receiving the animal part (dotted lines) because the follower wheel 27 is kept in a lifted position (by an amount H) on the secondary guide track 23 shown in figure 1. In a second position (full lines), the follower wheel 27 is no longer held high and the knife is stabbed into the meat until it reaches a second position from where a longitudinal incision can be made. As explained in more detail in paragraph [0019] with figure 11, when the wheel 27 leaves the secondary guide track, a torsion spring 49, shown in figure 6, biases the knife arm 45 so that the knife is urged from the first to the second position as it stabs into the meat.

- 5.2.5 Bearing in mind that the claim does not require the secondary drive mechanism to be exclusively comprised of a *secondary guide track* and a *follower wheel*, the fact that the embodiment also includes a torsion spring does not mean that the skilled person cannot carry out the invention as the appellant-opponent has suggested.
- 5.2.6 Moreover, the claim defines that the secondary drive mechanism is for moving the knife *between* the first and second positions, which implies no particular direction to the movement, rather than in the direction *from* the first to the second position as the appellant-opponent 1 reads it. Whether or not moving the knife *from* the first to the second position can be considered to be exclusively carried out by the action of the torsion spring, as best seen in figure 11, once the cutting unit 21 has passed around the back of the stationary drum 17, it meets a ramp at the front end of the stationary guide track 23, along which it then rises. As the wheel is raised the knife arm 45 is forced out of the second position - against the action of the torsion spring - until when the wheel has reached the end of the ramp where it is held high and the knife reaches the first position where it remains as long as the wheel 27 is held in its raised position (cf. figure 6). Thus moving the knife from the second back to the first position is achieved in the embodiment by the secondary guide track 23 raising the wheel 27 and not by the action of a spring. Therefore, contrary to how the appellant-opponent 1 has argued, the embodiment discloses how the follower wheel 27 being held high on the secondary stationary guide track 23 moves the knife *between* its first and second positions.

5.2.7 For these reasons, the Board considers that the invention according to claim 1 is sufficiently disclosed, Article 83 EPC.

6. As the respondent proprietor no longer pursues maintenance of the patent in the amended form upheld in the decision under appeal, that decision must be set aside. Furthermore, in view of the above, the Board finds the claims of auxiliary request 5 to meet the requirements of the EPC. Moreover, neither the Board nor the parties saw any need for the description to be adapted. Pursuant to Article 101(3)(a) EPC, the patent can therefore be maintained as amended according to auxiliary request 5.

## 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:

No. 1 to 8 according to the auxiliary request 5 refiled with the statement setting out the grounds of appeal of 8 February 2022

### Description:

Columns 1 to 10 of the patent specification

### Drawings:

Figures 1 to 25 of the patent specification.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated