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**D E C I S I O N**  
**of 21 June 2002**

**Case Number:** T 0481/99 - 3.2.6

**Application Number:** 92103552.3

**Publication Number:** 0715929

**IPC:** B23Q 7/14

**Language of the proceedings:** EN

**Title of invention:**

Pallet for workpieces with adjustable support members

**Patentee:**

AXIS S.p.A.

**Opponents:**

- (I) ATOP S.p.A.  
(II) ATS Wickel- und Montagetechnik AG

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 76(1), 123(2), 83, 87(1), 114(2), 56

**Keyword:**

"Amendments - basis in the divisional application as filed and  
in the earlier application (yes)"  
"Disclosure - enabling"  
"Priority - validity (yes)"  
"Late-filed material - admitted (no)"  
"Inventive step (yes)"

**Decisions cited:**

G 0009/91, G 0010/91, G 0002/98, T 0156/84, T 0534/89,  
T 1002/92, T 1019/92, T 1077/99



**Catchword:**

The principle that late filed facts, evidence and related arguments should only exceptionally be admitted into the proceedings by the opposition division (see e.g. G 0009/91, T 1002/92) does not imply that a late filed allegation of a prior use, which would be relevant if proven, is to be automatically disregarded on the ground that the new facts need first to be established by taking evidence. However, if the submissions and/or documents related to the late allegation of a prior use show inconsistencies or even contradictions, then the deciding body may disregard the alleged prior use pursuant to Article 114(2) EPC without further inquiries (see point 5.2 of the reasons).



Case Number: T 0481/99 - 3.2.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.6**  
**of 21 June 2002**

**Appellant I:** ATOP S.p.A.  
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**Appellant II:** ATS Wickel- und Montagetechnik AG  
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**Appellant III:** AXIS S.p.A.  
(Proprietor of the patent) I-50028 Tavarnelle Val di Pesa (Firenze) (IT)

**Representative:** Moir, Michael Christopher  
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**Decision under appeal:** Interlocutory decision of the Opposition Division  
of the European Patent Office posted 29 March  
1999 concerning maintenance of European patent  
No. 0 715 929 in amended form.

**Composition of the Board:**

**Chairman:** P. Alting van Geusau  
**Members:** G. Pricolo  
R. T. Menapace

## Summary of Facts and Submissions

- I. European patent No. 0 715 929 was granted in respect of European patent application No. 92 103 552.3, filed on 9 June 1989 as a divisional application on earlier European patent application No. 89 110 492.9 (publication number 0 348 715), and claiming a first priority of 27 June 1988 (US 212267) and a second priority of 20 March 1989 (US 326158).
- II. Patentee and opponents I and II each lodged an appeal, received at the EPO on 27 May 1999, 31 May 1999 and 30 April 1999, respectively, against the interlocutory decision of the Opposition Division posted on 29 March 1999 concerning maintenance of the European patent in amended form. The appeal fees were paid the same respective days. The statements setting out the grounds of appeal were received at the EPO on 29 July 1999, 5 August 1999 and 19 July 1999, respectively.
- III. In the decision under appeal the Opposition Division considered that the grounds for opposition did not prejudice maintenance of the patent in the form according to auxiliary request D filed at oral proceedings held on 15 March 1999.
- IV. The following documents which featured in the opposition procedure were considered as relevant in the appeal proceedings:
- D2: EP-A-267 324;
- D7: IT-A-1 167 951;
- D8: Brochures ATS 400 and ATS 430/S of Axis spa;

D10: B. Lotter: "Manufacturing assembly Handbook",  
Butterworths, 1989; pages with figures 4.42 and  
4.43;

D11: Brochure of Robert Bosch GmbH: "The Modular  
Transfer System TS2.", October 1985, pages 39, 40;

D12: US-A-4 787 505;

D13: FR-A-2 121 646;

D14: Drawings 2a-2e in support of alleged prior use of  
a pallet made by Miele Werk Euskirchen.

The following documents were filed during opposition  
proceedings, after expiry of the opposition period  
referred to in Article 99(1) EPC, in support of an  
alleged prior use made by Guitti Macchine s.r.l.:

D15: Declaration of Mr Guglielmo Guitti;

D16: Declaration of Mr Helmut Pabel;

D17: Declaration of Mr Claude Denis.

In respect of this alleged prior use by Guitti Macchine  
s.r.l., the following documents were filed during the  
appeal proceedings:

D18: Minutes of the hearing of the witnesses Mrs.  
Guitti, Pabel and Denis by the Civil Court of  
Florence (IT);

D22: Letter of Mr Guglielmo Guitti dated 15 January  
2001 to the attorneys Romano Pilli and Nicola De

Renzis;

D23: Judgment of the Italian Civil Court of Florence of  
2 July 2001.

During the appeal proceedings the following further  
documents were filed:

Affidavit of Professor Peter Foyer, dated 30 March  
2000;

Affidavit of Robert Ian Mills, dated 26 October 1999;

D19: Affidavit of Mr Massimo Lombardi dated 15 May  
2002, in support of an alleged prior use made by  
Axis spa;

D20: DE-A-37 38 447;

D21: JP-A-58-31 811 and corresponding patent abstract  
from esp@cenet database.

V. Oral proceedings before the Board of Appeal took place  
on 21 June 2001.

Appellant III (patentee) requested that the patent be  
maintained on the basis of the following documents :

**Claims:** 1 to 15 filed during oral proceedings;

**Description:** columns 1 and 2 filed during oral  
proceedings;  
columns 3 to 15 as maintained by the  
decision under appeal;

**Drawings:** figures 1 to 15 as maintained by the decision under appeal.

The appellants I and II (opponents I and II) requested that the patentee's appeal be dismissed and that the patent be revoked.

VI. Independent claims 1, 10 and 14 read as follows:

"1. A pallet conveyor production line comprising a conveyor (38) for transporting pallets, at least one pallet (10) for a workpiece comprising a base (9) having an aperture (40) therethrough, workpiece support means (13,15) for supporting a workpiece (17) over the aperture so that it can be raised from or lowered on to said support means by a lifting means passing through said aperture (40) from beneath the workpiece support means arranged to support the workpiece at locations on opposing sides of the aperture so that the lifting means is unimpeded by the workpiece support means, the workpiece support means (13,15) being adjustable to vary the distance between said locations to accommodate workpieces of different dimensions; automatic adjusting means (11) at a first station for adjusting the workpiece support means (13,15) so that the distance between the said locations is appropriate for a workpiece to be transferred, and at least one workpiece handling means at a second station comprising lifting means adapted to pass through the pallet aperture from beneath for raising or lowering the workpiece from or onto the support means."

"10. A pallet conveyor transfer apparatus for workpieces having a conveyor (38) for advancing pallets (10) carrying workpieces (17) and a device for



manipulating a workpiece on and off a said pallet, wherein the pallet comprises means (9,209) defining an aperture (40) through said pallet; and wherein the manipulating device comprises lifting means for raising and lowering a workpiece off or on to support members of the pallet, said lifting means passing through said aperture of the pallet to raise or lower the workpiece off or on to said support members characterised in that: said support members (13,15,213,215) for supporting a workpiece are releasably secured to said pallet and disposed so that a workpiece supported by said support members is disposed over said aperture; and

- the apparatus further comprises an automatic positioning device (300) for adjusting the position of said support members so that said support members can be positioned relative to said aperture to support workpieces of different dimensions."

"14. A method of automatically conveying workpieces (17) in a production line by means of a conveyor having pallets, each pallet (10) having an aperture (40) and support means (13,15) to support a workpiece at spaced locations above the aperture, the distance between the spaced locations being adjustable, the method comprising the steps of: a) sequentially moving empty pallets in turn into alignment with an automatic positioning unit (11) in the production line; b) bringing the positioning unit and the aligned pallet into engagement with each other; c) operating said positioning unit (11) to adjust the distance between the spaced locations of the pallet to suit a workpiece to be conveyed; d) disconnecting the pallet (10) and the positioning unit whilst maintaining the adjusted distance between the locations; e) at a workpiece

receiving station, disposing a workpiece (17) on the adjusted pallet; f) conveying the pallet with the workpiece thereon to a further workstation; g) at said further workstation removing the workpiece (17) from the pallet by moving a further lifting means through said aperture (40) to lift the workpiece from the support means."

VII. The arguments of appellant I can be summarized as follows:

The divisional application as filed, on which basis the patent in suit was granted, did not disclose that the production line comprised a second station having workpiece handling means. Neither did it disclose that the lifting means was unimpeded by the workpiece support means, this feature including an embodiment comprising support members that were pivoted away upon lifting up the lifting means, for which there was clearly no basis in the divisional application as filed. Furthermore, there was no basis for claiming "lifting means" and "support means" in general terms since only specific embodiments thereof were disclosed. Therefore, claim 1 of the patent in suit contained subject-matter extending beyond the content of the divisional application as filed, contrary to Article 123(2) EPC.

As regards the amendments of the independent claims 10 and 14, they were also contrary to the requirements of Article 123(2) EPC. With respect to claim 10, there was no disclosure in the divisional application as filed of a **transfer** apparatus, of a manipulating device **comprising** a lifting means, and of support members that could be positioned relative to the aperture. With

respect to claim 14, a method of automatically conveying workpieces was not disclosed originally. Neither were disclosed steps e and g of claim 14 which referred, respectively, to a receiving station and a further workstation having further lifting means.

Another infringement of Article 123(2) EPC was present in dependent claim 7 which referred to a "cantilever arm" although originally only an "arm" was disclosed.

Moreover, the originally filed divisional application itself contained subject-matter extending beyond the content of the earlier application as filed, contrary to Article 76(1) EPC: although the earlier application disclosed only the provision of support members that were secured to a plate and movable along a guide, the claims of the divisional application referred to "support means" in general and neither mentioned the plate nor the guide.

In any case, the patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, contrary to Article 83 EPC. Indeed, only the pallet and the positioning unit were described and the necessary information about the complete production line as claimed was missing.

As regards the first priority claim of the patent in suit, referring back to 27 June 1988, it was not valid because in the corresponding priority document the aperture in the pallet was neither associated with the technical problem to be solved nor were the aperture, or the lifting means, shown in the drawings. Moreover, the first priority document did not disclose the

feature that the lifting means was unimpeded by the workpiece support means.

Furthermore, the claimed subject-matter did not involve an inventive step. Starting from the closest prior art represented by document D2, the only feature still missing for arriving at the invention claimed in the patent in suit was the adjustment of the support members through an automatic adjustment means or automatic adjustment steps on the pallet. In order to solve the problem of providing a pallet conveyor production line that efficiently accommodated workpieces of different dimensions, the skilled person would obviously consider the provision of adjustable support members, this being *per se* a generally known measure. Alternatively, the skilled person would use the prior art pallets having manually adjustable support members acknowledged in the description of the divisional application as filed. Furthermore, conveyors having adjustable support members, such as the chain conveyors shown in D7, were generally known, and it was a normal trend in the art to pass from such conveyors to corresponding palletized production lines; in doing so, the skilled person would obviously maintain the advantageous feature relating to the adjustable support members. In any case, the further step of providing an automatic rather than a manual adjustment of the support members was trivial. Indeed, the mere automation of functions previously performed manually could not be considered inventive, unless the automation involved some special features which, however, were not defined in the claims of the patent in suit. Obviously, for such an automatic adjustment to be carried out, a corresponding automatic adjusting means was necessary. Clearly, the automatic adjusting

means was to be positioned somewhere, and the most immediate emplacement was in the production line. In doing this, the skilled person would arrive directly at the subject-matter of the independent claims without the exercise of inventive activity.

VIII. Appellant II concurred with the argumentation of appellant I and, in respect of inventive step, additionally submitted that the adjustment of the support members through an automatic adjustment means provided at a first station was the direct result of the automation of the steps performed by the human operator on the prior art pallet having manually adjustable support members, his hands corresponding to the adjustment means and his location, when performing the manual adjustment, corresponding to that of the first station.

IX. In support of its request appellant III (patentee) relied essentially on the following submissions:

As regards the amendments, they were fully supported by the divisional application as filed. Indeed, the skilled reader would regard the presence of a receiving station and of at least two further workstations, one comprising a lifting means and another comprising a workpiece handling means, as implicitly disclosed. It was clear from the description and drawings, in particular Figures 4 and 10, that the lifting means was unimpeded by the workpiece support means and that the latter could be positioned relative to the aperture. Original claim 1 referred to "lifting means" in general and to "support members", the latter expression being substantially equivalent to "support means". "Transfer apparatus" was a term of art designating production

lines having pallets. Although original claim 1 referred separately to a device for manipulating a workpiece and to a lifting means, it was clear that it was the manipulating device that comprised the lifting means. Finally, the method according to claim 14 only set out the inevitable way in which the disclosed apparatus worked.

Furthermore, the divisional application as filed was fully supported by the earlier application, in particular claims 35 to 38 thereof. Claims 36 to 38 did neither refer to a guide, nor did they require the support member to be secured to a plate.

Moreover, the claimed invention was sufficiently disclosed: production lines with pallets were generally known and the skilled person could reproduce a complete production line simply on the basis of the drawings of the patent in suit.

The first priority was validly claimed because the corresponding priority document explicitly disclosed, in the description and in the drawings, a pallet having an aperture. A reference to a lifting means passing through the aperture was also explicitly made in the description, whereby it was clear that the lifting means was unimpeded by the workpiece support members.

The claimed invention also involved an inventive step. D2 did not suggest the possibility of adjusting a common type of pallet to accommodate different size workpieces. It only disclosed that a common pallet basis could be used to accommodate different workpieces. When pallets were introduced in production lines, the known solution for accommodating different

size workpieces was to provide different families of pallets. Moreover, since the teaching of adjustable chain-conveyor systems was to change the entire conveyor structure to accommodate a different size workpiece, it would lead the skilled person to try to change the width of the pallet conveyor of D2, which was absurd.

## Reasons for the Decision

1. The appeals are admissible.
2. *Amendments*

In order to meet the requirements of Article 123(2) and (3) EPC, the patent as amended can neither contain subject-matter which extends beyond the content of the **divisional application as filed**, nor extend the protection conferred. Furthermore, the divisional application as filed, and consequently also the patent granted thereupon, must meet the requirement of Article 76(1) EPC in that its subject-matter cannot extend beyond the content of the **earlier application as filed**.

- 2.1 Article 123(2) and (3) EPC
  - 2.1.1 Claim 1 of the divisional application as filed explicitly refers to a pallet conveyor production line comprising a conveyor for transporting pallets, at least one pallet for a workpiece, the pallet comprising a base having an aperture therethrough, and a lifting means passing through said aperture from beneath.

Since original claim 1 broadly refers to "lifting means" in general, Article 123(2) EPC is not infringed by the presence of this term in the claims of the patent in suit.

Original claim 1 refers to "support members for supporting a workpiece", whilst claim 1 refers to "support means arranged to support the workpiece at locations". In the Board's view, these two expressions are of corresponding technical meaning. Indeed, the support means must comprise support members if the workpiece is to be supported at more than one location.

Furthermore, original claim 1 explicitly discloses that the workpiece support members (ie support means) support a workpiece over the aperture so that it can be raised from or lowered on to said support members by said lifting means and that the workpiece support means is adjustable to vary the distance between the support members to accommodate workpieces of different dimensions.

The explicit reference to automatic adjusting means for adjusting the workpiece support means is found in the first two lines of original claim 1.

Claim 1 of the patent in suit defines that the support means is arranged to support the workpiece at locations on opposing sides of the aperture so that the lifting means is unimpeded by the workpiece support means. That said locations are on opposite sides of the aperture is unambiguously derivable from the text of original claim 1, which defines that the workpiece is suspended over the aperture, taken in combination with the drawing of Figure 1, which shows that the workpiece is



supported at its extremities. Furthermore, original claim 1 states that the lifting means passes through the aperture of the pallet to raise or lower the workpiece off or on to said support members. In order to raise or lower the workpiece off or on to said support members, the lifting means, which passes through the aperture of the pallet from beneath, must forcibly be unimpeded by the workpiece support means, otherwise it could neither reach nor lower the workpiece because the support members would block its ascending or descending movement. In this respect, it is the Board's view that the definition of claim 1 of the patent in suit that the lifting means is unimpeded by the workpiece support means, only implies that the lifting means is unimpeded as regards the function of raising or lowering the workpiece from or onto the support means. Appellant I argued that this definition would comprise an embodiment where the lifting means, upon lifting up, is unimpeded only after the support members are pivoted away. This argument cannot be followed, because in such a case the workpiece cannot be raised from the support members by the lifting means, the latter being unable to reach a supported workpiece from beneath to lift it up because impeded by the support members, and at the same time the support members being unable to pivot because they support the workpiece. In addition, the claim language does not require that the lifting means pass beyond the support means.

The divisional application as filed explicitly discloses (see column 4, lines 17 to 20 of the original divisional application as published) that there is a positioning unit placed in-line with the production line which performs the adjustment of the workpiece

support means, that the lifting means lifts the workpiece to a workstation (see column 14, lines 47 to 53), and that workpieces are subjected to a sequence of operations, ie they are handled, at successive workstations (see column 1, lines 13, 14). The positioning unit placed in-line corresponds to adjusting means at a first station and the workstation corresponds to a second station having workpiece handling means. Therefore, contrary to appellant I's opinion, the Board comes to the conclusion that said second station having workpiece handling means is directly and unambiguously disclosed.

Claim 1 of the divisional application as filed refers both to a device for manipulating a workpiece on and off the pallet, and to a lifting means for raising and lowering a workpiece off or on the support members. Claim 1 of the patent in suit does not refer to the device for manipulating a workpiece, but only to the lifting means. However, the expressions "manipulating device" and "lifting means" designate the same device, since it immediately appears from the text of original claim 1 that both the manipulating device and the lifting means must provide the same function of raising and lowering a workpiece off or on to the support members and that both are functionally associated with the aperture in the pallet.

It follows that the combination of features of claim 1 of the patent in suit is fully supported by the disclosure of the divisional application as filed.

2.1.2 Similarly, the basis for the subject-matter of claim 10 of the patent in suit is found in original claim 1.

Appellant I submitted that the divisional application as filed did not disclose a **transfer** apparatus, a manipulating device **comprising** a lifting means, and support members that could be positioned relative to the aperture.

However, since the widely accepted meaning of the term "transfer apparatus" in the art is "apparatus in which a workpiece passes automatically through a number of stations", the Board takes the view that the expression "pallet conveyor transfer apparatus" designates a pallet conveyor production line of the kind referred to in the originally filed divisional application, where workpieces are subjected to a sequence of operations at successive workstations (see column 1, lines 12 to 14 of the divisional application as published).

As regards the expression "manipulating device **comprising** a lifting means", since "manipulating device" and "lifting means" refer substantially to the same device, as explained above (see above point 2.1.1), it also does not introduce any new subject-matter.

Furthermore, original claim 1 explicitly states that the support members, and consequently also the support means (see above point 2.1.1), can be positioned relative to the aperture.

2.1.3 Independent claim 14 relates to a method of automatically conveying workpieces in a production line. Although a method *per se* is not claimed in the divisional application as filed, the description thereof describes on several occasions how the apparatus operates (see e.g. column 9, line 28 to

column 10, line 4; column 14, lines 47 to 50, of the divisional application as published). Therefore, the introduction of a method claim defining how a pallet conveyor line having all the features of original claim 1 is operated does not give rise to objections under Article 123(2) EPC.

The claimed method refers, in addition to the apparatus features of original claim 1, to the features that the pallet conveyor line comprises, after the positioning unit, a receiving station followed by a further workstation having further lifting means. Both stations and their location in the production line are disclosed in the divisional application as filed. Indeed, the latter describes (see column 4, lines 17 to 22 of the divisional application as published) that the positioning unit is placed at a location prior to where the workpiece is first placed on the pallet, ie prior to the workpiece receiving station. After the positioning unit, the production cycle begins (see column 4, lines 40 to 43) and therefore the pallet is advanced to a workstation (see column 1, lines 12 to 14) which includes a lifting means (see column 14, lines 47 to 53).

Accordingly, also the combination of features of claim 14 of the patent in suit is fully supported by the disclosure of the divisional application as filed.

- 2.1.4 The subject-matter of the dependent claims is directly and unambiguously derivable from the divisional application as filed.

Appellant I argued, with reference to claim 7, that a "cantilever arm" was not disclosed originally, but only

an "arm". However, Figs. 10 and 11 of the originally filed divisional application unambiguously disclose an arm fixed at one extremity and free at the other, ie a cantilever arm.

2.1.5 The description of the patent in suit is adapted to be consistent with the claims as amended.

2.1.6 Hence, the amendments do not introduce subject-matter which extends beyond the content of the application as filed.

2.1.7 With respect to granted claims 10, 11 and 15, independent claims 1, 10 and 14 of the patent in suit are restricted to the presence of automatic adjustment means or automatic positioning means.

Therefore, the amendments do not result in an extension of the protection conferred.

2.1.8 It follows that none of the amendments give rise to objections under Article 123(2) and (3) EPC.

2.2 Article 76(1) EPC

2.2.1 The description and the drawings of the divisional application as filed are the same of those of the earlier application as filed. Support for the broad formulation of the independent claim 1 of the divisional application is found in claims 35, 36 and 38 of the earlier application as filed.

Therefore, the Board is satisfied that the divisional application meets the requirements of Article 76(1) EPC.

2.2.2 Appellant I argued that although the earlier application disclosed only the provision of support members that were secured to a plate and movable along a guide, the claims of the patent in suit referred to "support means" in general and neither mentioned the plate nor the guide.

However, claim 38, which refers back to independent claim 36 and defines the provision of automatic positioning means for adjusting the position of the support members, does not require the presence of the the guide and/or of the plate. Therefore, claim 38 forms a sufficient basis to conclude that the absence of the plate and the guide, in the independent claims of the patent in suit, does not constitute an infringement of Article 76(1) EPC.

With respect to the expression "support means", it has already been explained (see point 2.1.1 above) that, in the present context, it has a meaning identical to that of "support members", and therefore the amendment by way of introduction of this expression does not alter the claimed subject-matter.

### 3. *Sufficiency of disclosure*

3.1 The Board is satisfied that, having regard in particular to Figures 1 to 7 and column 1, line 11 to column 13, line 3 of the patent, the patent contains sufficient information enabling a skilled person to reproduce the claimed pallet conveyor production line, transfer apparatus, and method, and therefore, that the requirements of Article 83 EPC are met.

3.2 The Board already treated this question in its annex to

the summons to oral proceedings, and appellant I did not supply further arguments concerning this point, but only maintained its view that, since only the pallet and the positioning unit were described in the patent in suit, the information necessary for manufacturing the complete production line referred to in the claims was missing.

However, production lines comprising a pallet conveyor system, loading/unloading stations, and successive workstations are, undisputedly, generally known in the art. Therefore, the skilled person would simply use his general knowledge for manufacturing those elements of the production line which are not specifically described in the patent in suit, thereby arriving without difficulties at a complete production line including a pallet and a positioning unit as specifically described.

4. *Priority*

4.1 The Board, after comparing the subject-matter of the independent claims of the patent in suit and the disclosure of the first priority document (US 212267 of 27 June 1988, wherein figures 1 to 7 and the following passages thereof are of particular relevance: pages 4, lines 6 to 22; page 5, line 24 to page 6, line 25; page 12, lines 21 to 23), takes the view that the claimed subject-matter can be derived directly and unambiguously, using common general knowledge, from the first priority document as a whole, and therefore concludes that the first priority is valid for these claims, in accordance with Article 87(1) and G 2/98 (OJ 2001, 413).

4.2 Appellant I submitted that the priority claim was not valid because in the corresponding priority document the aperture in the pallet was neither associated with the technical problem to be solved nor were the aperture, or the lifting means, shown in the drawings. Additionally, the first priority document did not disclose the feature that the lifting means was unimpeded by the workpiece support means.

The aperture in the pallet and the lifting means are both directly and unambiguously disclosed in the description of the first priority document (see page 5, lines 24 to 27; page 12, lines 21 to 23; claim 13). Whether the aperture, or the lifting means, was associated with the statement of the technical problem in the priority document, or shown in the drawings thereof, is irrelevant for the question whether the requirement for claiming priority of "the same invention" referred to in Article 87(1) EPC is met. Indeed, the standard to apply for answering this question is, following G 2/98 (*supra*), whether the claimed subject-matter can be derived directly and unambiguously from the priority document as a whole. As explained above, the question can be answered in the affirmative.

As regards the feature that the lifting means is unimpeded by the workpiece support means, since it only implies that the lifting means is unimpeded as regards the function of raising or lowering the workpiece from or onto the support means, as explained above (point 2.1.1), it is also directly and unambiguously derivable from the first priority document, namely from the passage on page 12, lines 21 to 23, wherein it is stated that the pallet may include an aperture adapted



to permit a piston type lifting means for lifting the workpiece from the pallet, and from claim 13, stating that the support members are adapted to provide accessibility to the workpieces from below so that the workpieces can be lifted.

5. *The available prior art - late filed documents*

5.1 After considering the documents D20 and D21, and the allegation of a prior use by Axis spa (D19), filed one month before the date of oral proceedings, and the arguments based thereon, pursuant to Article 114(1) EPC, the Board concludes that even if it were to take these citations into account it would not come to a different decision on the appeal. Indeed, none of these citations relates to a conveyor line having pallets. Consequently, the Board decides to disregard them in accordance with Article 114(2) EPC.

Appellant I submitted that a pallet was merely a workpiece carrier and therefore also D19 to D21 related to conveyor lines having pallets.

However, the Board is convinced that the term "pallet" is used in the broad technical field of machine tools for indicating a particular kind of workpiece carrier, namely a discrete tray or platform on which a workpiece can be fixed, and which tray or platform is independent from the conveyor line in that it can be taken therefrom without other elements of the conveyor line being affected. This view of the Board corresponds to the opinion of the experts, Professor Peter Foyer and Robert Ian Mills, as set out in their affidavits. Hence, the chain conveyors shown in D19 to D21 cannot be considered to represent pallet conveyor lines.

5.2 As regards the alleged prior use by Guitti Macchine s.r.l., which was disregarded by the Opposition Division in accordance with Article 114(2) EPC (see the appealed decision, point 2 of the reasons), further evidence represented by documents D18, D22 and D23 was filed in the appeal proceedings in addition to the declarations D15 to D17 of Mrss Guitti, Pabel and Denis filed in opposition proceedings.

This prior use was cited more than a year after expiration of the opposition period and thus out of time. The relevant and quite extensive case law of the Boards of Appeal has developed several criteria for deciding on the admissibility of late-filed facts, evidence and related arguments, in particular the material's relevance (T 156/84 - OJ 1988, 372), whether the submission constituted a procedural abuse (eg T 1019/92 concerning prior art material originating from the opponent itself) or whether admitting the late-filed documents could lead to an excessive delay in the proceedings (see T 534/89 - OJ 1994, 464). Summing up these criteria against the background of the principles set out by the Enlarged Board of Appeal in G 9/91 and G 10/91 with regard to the admissibility of fresh grounds of opposition, it was held in decision T 1002/92 (OJ 95, 605) that in proceedings before the opposition divisions, late-filed facts, evidence and related arguments which go beyond the indication of facts, evidence and arguments presented in the notice of opposition should only exceptionally be admitted into the proceedings, if prima facie, there are clear reasons to suspect that such late-filed material would prejudice the maintenance of the patent in suit.

In the Board's opinion, such prima facie impact on the

patent is not per se excluded and new facts are not to be disregarded automatically, whenever the new facts first need to be established by taking evidence. The fact that the outcome of the taking of evidence cannot be predicted in advance - to the extent that it could, the taking of evidence would be a superfluous exercise - does not by itself entail the exclusion of late allegations of facts requiring a (distinct) taking of evidence which inevitably takes time, e.g. for the hearing of witnesses. On the other hand and in contrast to late-filed official documents, the mere relevance of an alleged prior use as to its substance cannot be decisive either, because it is, until proven, only hypothetical. Rather, the aforementioned prima facie approach means in the given circumstances that - similar to the concept of "Glaubhaftmachung" under e.g. German law - the deciding body, on the balance of probabilities in the light of all which has been submitted concerning the alleged facts (in particular evidence submitted and/or offered, arguments and counterarguments) in its context and against the background of general knowledge and experience, concludes that there are good reasons to expect a positive outcome from the taking of evidence. If such an expectation is not justified, e.g. because of inconsistencies or even contradictions in the relevant submissions, then the facts and evidence may be disregarded pursuant to Article 114(2) EPC without further inquiries.

The Opposition Division's decision to disregard the alleged prior use in question (D15 to D17) was based on a thorough evaluation along the lines set out above, and in particular on an apparent inconsistency in respect of the drawings submitted in support of the

prior use (point 2 of the reasons of the decision under appeal). Therefore, the Opposition Division has correctly exercised its discretionary power in this respect. The further evidence filed during the appeal proceedings does not suggest a different assessment, quite to the contrary: the Civil Court of Florence (IT), after having heard the witnesses Guitti, Pabel and Denis on the same alleged prior use in a case concerning the patent granted on the parent application of the patent underlying the present appeal, came to the conclusion that there was no reliable proof of the public availability before June 1988 of the Guitti device in accordance of the alleged prior use (see D23, page 12). This finding of an independent court, even if it is not binding on the instances of the EPO, demonstrates that the appraisal by the Opposition Division to disregard the alleged prior use by Guitti Macchine s.r.l. was proper and realistic, and the Board sees no reason to deviate from it.

5.3 As regards the alleged sale of an apparatus by Guitti Macchine s.r.l., there is no need for any consideration to be given in this respect since the apparatus was first delivered in December 1988, after the valid priority date of the patent in suit. It would not, therefore, form part of the prior art according to Article 54(2) EPC.

5.4 Document D12 also does not form part of the prior art according to Article 54(2) EPC since it was published on 29 November 1988, ie after the relevant priority date of the patent in suit.

5.5 The Board is satisfied that the subject-matter of the patent in suit is not disclosed in any of the available

pieces of prior art. Indeed, none of them discloses a production line, transfer apparatus and method wherein pallets have adjustable workpiece support means and automatic adjustment means are provided to adjust the support means to support workpieces at different locations. This was not in dispute between the parties during appeal proceedings.

Therefore, the subject-matter of claims 1, 10 and 14 is found to be novel.

6. *Inventive step*

6.1 The technical problem underlying the patent in suit consists in providing a pallet conveyor production line that efficiently accommodates workpieces of different dimensions (see column 3, lines 13 to 24 of the patent in suit).

6.2 Document D2 undisputedly represents the closest prior art. It discloses an apparatus which aims at the same objective (see D2, column 3, lines 33 to 36) as and has the most technical features in common with the claimed invention.

Using the wording of claim 1, D2 discloses (see Figure 1) a pallet conveyor production line comprising a conveyor for transporting pallets, at least one pallet (15, see Figure 2) for a workpiece (6) comprising a base having an aperture therethrough, workpiece support means (8) for supporting a workpiece over the aperture so that it can be raised from or lowered on to said support means by a lifting means (11) passing through said aperture from beneath, the workpiece support means being arranged to support the

workpiece at locations on opposing sides of the aperture so that the lifting means is unimpeded by the workpiece support means, at least one workpiece handling means at a station (1) comprising lifting means adapted to pass through the pallet aperture from beneath for raising or lowering the workpiece from or onto the support means.

6.3 The above mentioned technical problem is solved, in accordance with the definition of claim 1, by the provision of workpiece support means being adjustable to vary the distance between said locations to accommodate workpieces of different dimensions, and of automatic means provided at a first station for adjusting the workpiece support means so that the distance between said locations is appropriate for a workpiece to be transferred.

6.4 D2 teaches that different workpieces may be accommodated on pallets having preferably the same outer dimensions (column 3, lines 33 to 36). However, D2 only specifies that the pallets have preferably the same outer dimensions; it does not disclose or suggest to provide the pallet with support means adjustable for accommodating said different workpieces. The pallets having preferably the same outer dimensions might actually constitute different families of pallets, each adapted for a different workpiece, as generally known in the art.

Documents D10, D11 and D13 relate to pallet conveyor lines, but do not disclose any pallets having adjustable support means. These documents cannot, therefore, suggest the claimed solution to the technical problem.

Documents D7 and D8 relate to chain conveyors. D7 explicitly discloses (page 4, line 3 from the bottom to page 5, first paragraph) that the distance between the chains 3, and hence between support members 34, can be adjusted (see Figure 5). However, the skilled person would not transfer this arrangement to a pallet conveyor line when seeking to vary the distance between the support members of a pallet. Indeed, as explained above (see point 5.1 of this decision), a pallet is independent from the conveyor line, and therefore any variations of the distance between the chains of the conveyor as disclosed by D7 would not affect the support members which are on the pallet. Hence, neither D7 nor D8, which is silent about any adjustment of the support means, suggest the claimed solution to the technical problem.

A further piece of prior art, which was not disputed by appellant III, is acknowledged in the description of the divisional application as filed (see column 1, line 58 to column 2, line 4 of the published application), wherein it is stated that conventional pallets have mechanical connecting links or fasteners that must be manually loosened so that the support members can be moved, and then refastened to secure the workpiece support members to the pallet in the proper location. However, the mere presence of manually adjustable fasteners does not constitute an indication leading the skilled person towards the claimed solution. In particular, there is no suggestion of providing automatic adjusting means at a station of the production line allowing automatic control of the transport of differently sized workpieces. Moreover, such fasteners, although manually adjustable, are hardly suitable for automatic adjustment and thus would

even lead away from the idea of providing automatic adjustment means. Hence, also this further prior art would not suggest the claimed solution to the technical problem.

The other available documents do not disclose any pallets having adjustable support means, and likewise do not suggest the claimed solution to the technical problem.

6.5 Appellant I argued that the provision of a pallet having adjustable support means in the production line of D2 was obvious. Similarly, also the further step of providing an automatic adjustment of the support members by means of an automatic adjusting means positioned in the support line was obvious.

However, even if it were obvious to provide a pallet having adjustable support means in the production line of D2, there is no suggestion in the available prior art that improved efficiency and flexibility thereof could be achieved if the adjustment of the support means were carried out automatically **in the production line**, by means of an additional unit **specifically dedicated** to said adjustment.

In this respect, the Board considers the argument of appellant II, that the adjustment of the support members through an automatic adjustment means provided at a first station was the direct result of the automation of the steps performed by the human operator on the prior art pallet having manually adjustable support members, his hands corresponding to the adjustment means and his location when performing the manual adjustment corresponding to that of the first



station, to be based on hindsight. In this respect the Board observes that there is no disclosure of any manual adjustment being performed on a pallet when the latter is in the production line. In the Board's view, a manual adjustment would actually be carried out when the pallet is pulled off the line, for reasons of safety and convenience for the human operator.

6.6 As a result of the above, the Board concludes that the cited prior art does not suggest the claimed solution to the posed problem.

7. *The alleged prior use by Miele Werk Euskirchen(D14)*

In its decision, the Opposition Division stated that it was not necessary to decide whether the alleged prior use in accordance with the drawings D14 formed part of the state of the art because it was not relevant. Having regard to this conclusion, the Board considers it appropriate to first investigate the relevance of that alleged prior use.

The drawings D14 show a pallet having workpiece support means that can be manually adjusted. Therefore, even if it were assumed that D14 was a public prior use, it would not be more relevant than the prior art acknowledged in the description of the divisional application as filed (see column 1, line 58 to column 2, line 4 of the divisional application as published; see point 6.3 of this decision).

Consequently, it would not affect either the novelty or inventiveness of the subject-matter of claim 1.

Therefore, for the purposes of determining novelty and inventive step, it is not necessary to actually decide whether the alleged prior use by Miele Werk Euskirchen

was public.

8. It follows that the subject-matter of claim 1 is novel and not rendered obvious by the relevant prior art, including the alleged prior use.
9. Independent claims 10 and 14 require, similarly to claim 1 (see point 6.2 of this decision), the provision of adjustable workpiece support means and of automatic positioning means in the transfer apparatus or production line, respectively. Therefore, for the same reasons given in respect of claim 1, their subject-matter is also novel and involves an inventive step.
10. Therefore, the independent claims 1, 10 and 14, together with the dependent claims and the description as amended during the oral proceedings of 21 June 2002, and the remaining patent documents as maintained by the decision under appeal, form a suitable basis for maintenance of the patent in amended form.

## **Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent on the basis of the following documents:

**Claims:** 1 to 15 filed during oral proceedings;

**Description:** columns 1 and 2 filed during oral

proceedings;  
columns 3 to 15 as maintained by the  
decision under appeal;

**Drawings:** figures 1 to 15 as maintained by the  
decision under appeal.

The Registrar:

The Chairman:

D. Sauter

P. Alting van Geusau