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**Datasheet for the decision
of 15 October 2020**

Case Number: J 0009/18 - 3.1.01

Application Number: 15191492.6

Publication Number: 3017703

IPC: A23G9/08, A23G9/22, A23G9/28

Language of the proceedings: EN

Title of invention:
MACHINE FOR MAKING AND DISPENSING LIQUID AND/OR SEMI-LIQUID
FOOD PRODUCTS

Applicant:
ALI GROUP S.r.l. - CARPIGIANI

Headword:

Relevant legal provisions:

EPC Art. 113(1), 116(2)
RPBA 2020 Art. 11
EPC R. 103(1)(a), 111(2), 112, 113

Keyword:

Substantial procedural violation - violation of the right to be heard (yes)

Remittal to the department of first instance - fundamental deficiency in first instance proceedings (yes)

Reimbursement of appeal fee - (yes)

Decisions cited:

R 0002/14, R 0005/16, J 0016/02, J 0016/17

Catchword:



Juristische Beschwerdekammer
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Case Number: J 0009/18 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 15 October 2020

Appellant: ALI GROUP S.r.l. - CARPIGIANI
(Applicant) Via Gobetti 2/A
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Decision under appeal: **Decision of the Receiving Section of the
European Patent Office posted on 7 February 2018
rejecting the request for re-establishment of
rights into the period for requesting further
processing.**

Composition of the Board:

Chairman W. Sekretaruk
Members: W. Ungler
T. Karamanli

Summary of Facts and Submissions

I. The applicant (appellant) appealed against the decision of the Receiving Section posted on 7 February 2018. The tenor of the decision reads as follows:

1. The EPO's opinion as stated in our communication under Article 113(1) EPC dated 15 March 2017 (EPO Form 1103B) has become final since no timely reaction from the applicant/representative was received within the appropriate time limit and therefore the application is deemed to be withdrawn with legal effect as of 12 November 2016.

2. The request for re-establishment of rights dated 15 December 2017 cannot be dealt with since this is not an available means of redress in this situation.

All fees paid on 15 December 2017 will be refunded once this decision has become final.

II. By communication dated 17 May 2016, the applicant was informed of the publication date of the application (i.e. 11 May 2016) and the period of six months starting from the publication date for:

(a) paying the designation fee (Article 79(2) and Rule 39(1) EPC),

(b) requesting examination/paying the examination fee (Article 94(1) and Rule 70(1) EPC), and

(c) filing comments and/or amendments in relation to the search opinion (Rule 70a(1) EPC).

III. By communication ("Noting of loss of rights") under Rule 112(1) EPC dated 22 December 2016, the applicant was informed of the deemed withdrawal of the application due to non-payment of the designation fee,

non-filing of the request for examination (non-payment of the examination fee) and non-compliance with the invitation to comment on the European search opinion or to file amendments.

- IV. By letter dated 2 March 2017, received by the EPO on 3 March 2017, the applicant requested further processing; filed comments in relation to the European search opinion; and paid the designation fee, the examination fee and the fees for further processing for the late payment of the designation fee and the examination fee and the late filing of comments in relation to the European search opinion.

- V. By communication dated 15 March 2017, the Receiving Section informed the applicant of its intention to reject the request for further processing since the omitted acts had not been performed within the time limit for requesting further processing (Rule 135(1) EPC).

- VI. By several communications dated 21 June 2017, the applicant was informed of the planned refund of the fees paid without any legal ground (i.e. the further processing fees, the designation fee and the examination fee).

- VII. By letter dated 15 December 2017, the applicant requested re-establishment of rights into the period for requesting further processing. The respective fees (fees for re-establishment, fees for further processing, the examination fee and the designation fee) were paid, and a reply to the European search opinion was filed on the same day.

- VIII. Notice of appeal against the Receiving Section's decision was filed on 28 February 2018. In its statement setting out the grounds of appeal dated 7 June 2018, the appellant requested that the decision under appeal be set aside and that its request for re-establishment of rights under Article 122 EPC filed by letter dated 15 December 2017 be allowed.
- IX. On 19 December 2019, the Board issued a summons to oral proceedings. In a communication under Article 15(1) of the Rules of Procedure of the Boards of Appeal in the version of 2007 (RPBA, OJ EPO 2007, 536) annexed to the summons, the Board set out its provisional opinion that the request for re-establishment of rights had not been filed within the two-month period provided for in Rule 136(1) EPC and was therefore inadmissible.
- X. In its letter dated 15 September 2020, the appellant argued *inter alia*, and for the first time, that its right to be heard had not been respected in the first-instance proceedings. It further argued that its request for oral proceedings had been ignored and that it had not been given any opportunity to comment on the grounds on which the decision under appeal was based.
- XI. By letter dated 5 October 2020, the appellant presented two questions to be referred to the Enlarged Board of Appeal.
- XII. Oral proceedings were held before the Board on 15 October 2020. The appellant requested that the decision under appeal be set aside and that the case be remitted to the Receiving Section (main request). On an auxiliary basis, the appellant requested that the two questions filed by letter dated 5 October 2020 be referred to the Enlarged Board of Appeal. On a further

auxiliary basis, the appellant requested that the decision under appeal be set aside and that its request for re-establishment of rights under Article 122 EPC filed by letter dated 15 December 2017 be allowed.

Reasons for the Decision

1. The appeal complies with the requirements of Articles 106 to 108 and Rule 99 EPC and is therefore admissible.
2. Substantial procedural violations
 - 2.1 At the oral proceedings before the Board, the appellant argued in detail that two substantial procedural violations had occurred in the first-instance proceedings. Firstly, the appellant referred to decision J 16/02 and pointed out that its request for oral proceedings had not been properly dealt with by the Receiving Section. Secondly, the appellant argued that the impugned decision had been taken without the applicant having been given beforehand any opportunity to comment in writing on the grounds that this decision was based on. In addition, the appellant noted that the finding under point 2 of the tenor stating that the request for re-establishment "cannot be dealt with since this is not an available means of redress in this situation" was not at all supported by the reasons given in the decision (see point 4 of the Reasons of the impugned decision). The appellant concluded that its right to be heard had not been respected in the first-instance proceedings.
 - 2.2 As regards the appellant's first argument, reference is made to Article 116(2) EPC, which provides that oral

proceedings must be arranged before the Receiving Section at the request of the applicant only where the Receiving Section considers this to be expedient or where it intends to refuse the European patent application. Although according to this provision the Receiving Section is entitled not to grant a request for oral proceedings, the applicant has the right to a decision on this request (see J 16/02, point 3 of the Reasons). In its submission dated 15 December 2017 containing the request for *restitutio in integrum*, the applicant requested oral proceedings if the Receiving Section were to take an adverse decision (see page 16 of that letter). Thus, the applicant could rely on such proceedings being arranged before the issue of an adverse decision or, if they were not arranged, on being informed of the non-holding of oral proceedings and on having the opportunity to file further submissions in writing. In the file, there are no indications that the Receiving Section took the request for oral proceedings into consideration. In the impugned decision, this request is not even mentioned. Not deciding on a request put before the Receiving Section constitutes a substantial violation of the applicant's right to be heard (see also J 16/02, point 3 of the Reasons).

- 2.3 The appellant's second argument is interconnected with the first argument and is also related to the right to be heard. The right to be heard under Article 113(1) EPC is an important procedural right intended to ensure that no party is caught unaware by grounds and evidence in a decision turning down a request on which that party has not had the opportunity to comment (R 2/14, point 6 of the Reasons; R 5/16, point 6 of the Reasons).

- 2.4 In the present case, the request for re-establishment of rights under Article 122 EPC filed by letter dated 15 December 2017 was immediately rejected by the Receiving Section without it having issued any prior communication informing the applicant of the department's preliminary opinion. Consequently, contrary to Article 113(1) EPC, the impugned decision is based on grounds on which the applicant has not had any opportunity to present its comments. This handling of the case by the Receiving Section amounts to a (second) substantial procedural violation.
- 2.5 Furthermore, the Board accepts the appellant's argument that the Receiving Section's finding under point 2 of the tenor of the impugned decision was not sufficiently reasoned as required by Rule 111(2) EPC. Under point 4 of the Reasons of the impugned decision, there is only a repetition of the wording already contained in the tenor, stating that re-establishment of rights is not an available means of redress in such a situation. Hence, the decision does not contain any legal grounds for the rejection of the applicant's request for re-establishment. This deficient reasoning constitutes a further (third) violation of the right to be heard, which implies the right that a party's submissions be duly considered.
- 2.6 In addition, the decision under appeal does not state the name of the employee of the European Patent Office (EPO) responsible. As the exception in Rule 113(2) EPC does not apply, the decision does not meet the requirements of Rule 113(1) EPC, amounting to a further substantial procedural violation (see J 16/17).
3. For the sake of completeness, it is noted that point 1 of the tenor of the impugned decision is legally wrong

since the communication of 15 March 2017 was only a "communication" informing the applicant of the Receiving Section's intention to reject the request for further processing. It was neither a noting of the loss of rights under Rule 112(1) EPC nor a decision under Rule 112(2) EPC. A mere communication inviting the applicant to file comments within a time limit "before a final decision is taken" cannot replace the final decision. Thus, the communication as such could not have become "final" as stated in point 1 of the impugned decision.

4. Remittal - Article 11 RPBA 2020

The Board regards the violation of the right to be heard as a "special reason" within the meaning of Article 11 of the revised version of the Rules of Procedure of the Boards of Appeal (RPBA 2020, OJ EPO 2019, A63) justifying the remittal of the present case to the department of first instance for further prosecution. Since, in view of the above, several substantial procedural violations occurred in the first-instance proceedings, the Board takes the view that the case is to be remitted to the Receiving Section for further prosecution. Thus, the appellant's main request is allowed. Consequently, there is no need to deal with its auxiliary requests.

5. In view of the substantial procedural violations, the Board considers reimbursement of the appeal fee to be equitable under Rule 103(1) (a) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Receiving Section for further prosecution.
3. The appeal fee is to be reimbursed in full.

The Registrar:

The Chairman:



C. Eickhoff

W. Sekretaruk

Decision electronically authenticated