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**Datasheet for the decision
of the Enlarged Board of Appeal
of 5 October 2011**

Case Number: R 0007/11
Appeal Number: T 0120/08 - 3.3.09
Application Number: 01934212.0
Publication Number: 1361804
IPC: A23L 1/314
Language of the proceedings: EN

Title of invention:

Method of production of a meat product containing olive oil

Patentee:

CRETA FARM SOCIETE ANONYME INDUSTRIAL AND COMMERCIAL trading
as CRETA FARM S.A.

Opponent:

EDESMA AktG
IFANTIS ABEE

Headword:

-

Relevant legal provisions:

EPC Art. 112a(2)(c)(d), 113
EPC R. 106

Keyword:

"Objection raised under Rule 106 (no) circumstance justifying
the exception authorised by Rule 106 (no)"
"Petition clearly inadmissible (yes)"

Decisions cited:

R 0002/08, R 0004/08, R 0008/08, R 0015/09, R 0006/10



Case Number: R 0007/11

D E C I S I O N
of the Enlarged Board of Appeal
of 5 October 2011

Petitioner:
(Patent Proprietor) Creta Farm Societe Anonyme Industrial and
Commercial trading as Creta Farm S.A.
15th km National Road Rethymnon-Heraklion
Latzimas of Arcadi
GR-741 00 Rethymnon (GR)

Representative: Hess, Peter K.G., et al
Bardehle . Pagenberg
Prinzregentenplatz 7
D-81675 München (DE)

Other party:
(Opponent 01) EDESMA AktG
BITTEO - Sindos A5
GR-Thessaloniki (GR)

Representative: Wachenfeld, Joachim
Vossius & Partner
Siebertstraße 4
D-81675 München (DE)

Other party:
(Opponent 02) IFANTIS ABEE
N. Kifissia - Seneka 4
GR-145 64 Athens (GR)

Representative: Beyer, Andreas
Wuesthoff & Wuesthoff
Patent- und Rechtsanwälte
Schweigerstraße 2
D-81541 München (DE)

Decision under review: **Decision of the Technical Board of Appeal**
3.3.09 of the European Patent Office of
14 October 2010.

Composition of the Board:

Chairman: J.-P. Seitz
Members: M.-B. Tardo-Dino
M. Ruggiu

Summary of Facts and Submissions

- I. The present petition for review concerns the decision T 120/08 of the Board of Appeal 3309 to revoke the European patent No. 1 361 804 announced at the end of oral proceedings. The parties were notified of the reasons in writing on 15 March 2011.
- II. The petitioner and patent proprietor CRETA FARM SOCIETE ANONYME INDUSTRIAL AND COMMERCIAL trading as CRETA FARM SA, the respondent in the appeal proceedings, filed the petition for review by letter dated and received on 29 March 2011. The fee for the petition was paid on the same day.
- III. The petition for review is based on Article 112a(2)c) and d) EPC and asserts that:
- a fundamental violation of the right to be heard occurred;
 - the Board of Appeal took the decision under review without deciding on a request relevant to that decision.
- IV. The facts which led to the decision under review, to the extent they are relevant for the present petition proceedings, can be summarised as follows.
- The patent was granted with three claims.

Claims 1 and 2 relate to a method of production of goods based on meat, which method includes four essential process steps (a) to (d). Claim 1 reads as follows:

"Method of production of goods based on meat which is distinguished by the embodiment of olive oil in substitution of animal fat, instead of the traditional use of animal fat of the use of emulsion which consist of vegetable fat, water and milk proteins prepared in temperatures over 100°C (in heat), said method including the followings stages:

(a) lean meat of a temperature of 0°C is mixed with H₂O of a temperature of -2°C, salt, polyphosphoric salts, preservatives, vegetable proteins, milk proteins and starch.

(b) said olive oil is inserted, the mixing is continued with simultaneous application of vacuum of 3 min. and the mixing stops when the temperature is 4°C.

(c) the mixture goes to filling machines where it is encased with simultaneous application of vacuum 1000mbar and later on it is pasteurized at a temperature of 71°C.

(d) after the pasteurization, the product freezes in freezing chambers at a temperature of up to 2°C."

V. Two oppositions were filed against the patent on the basis inter alia of Article 100(b) EPC.
Step (c) was the core of the discussion.

As to the insufficiency of disclosure the discussion before the opposition division focused on the definition in the patent of the vacuum, namely a "vacuum 1000mbar" to be applied in step (c) according to claim 1 and a "vacuum 1000mbar" applied at that step

(after previous "application of vacuum 960 mbar at the mixing step [b]) in the example set out in paragraph [0020] of the patent specification (paragraph III page 3 of the decision under review - page 6 of the opposition division decision).

Point 7 of the corrected minutes of the oral proceedings before the opposition division states:
"With respect to the vacuum used in the method according to the contested patent, Dr. Genigeorgis stated that the vacuum values have to be considered as pressure reduction by 1000 or 960 mbar. The argumentation presented by Dr. Genigeorgis was clarified by Dr. Tsoukalas and P [i.e. the patent proprietor], who both held that the vacuum according to the aforementioned patent is a weak vacuum of 1000 or 960 mbar compared to the standard atmospheric pressure of 1013 mbar".

The opposition division accepted the patent proprietor's argumentation about the definition of the vacuum 1000mbar and rejected the oppositions.

VI. Both opponents filed an appeal, Opponent II maintaining its objection under Article 100(b) EPC.

In a communication issued on 23 August 2010 prior to the oral proceedings, the Board of Appeal stated that *"They [i.e. the opponents] essentially argue that the Respondent's interpretation of the meaning of this feature, i.e. that the pressure during encasing of the mixture should be 13.25mbar below the surrounding atmospheric pressure, was very unusual and not known to a skilled person. The Board indeed considers this feature an important issue which has to be discussed in the oral proceedings under the provisions of*

Article 83 EPC... Sufficiency of disclosure of the claimed invention therefore depends on the Respondent's provision of convincing evidence that its interpretation of the feature "vacuum 1000mbar" is what also a person skilled in the art would immediately and unambiguously understand when reading the application as filed".

VII. In a letter in reply of 30 September 2010 the petitioner gave explanations regarding the understanding of the feature "vacuum 1000 mbar" and "vacuum 960 mbar". It provided a list of links to the internet and announced that it would be accompanied at oral proceedings by three technical experts who had already attended the oral proceedings before the opposition division. The request was worded as follows: *"the Board of Appeal's admission is requested for these technical experts to make oral submissions under the continuing responsibility and control of Patentee's professional representatives and in particular to all questions relating to the skilled person's knowledge..."* An auxiliary request was also filed, namely a set of claims 1 and 2 without the product claim 3.

According to paragraph IX of the decision under review, *"During the oral proceedings before the Board on 14 October 2010 a thorough discussion took place on the question of whether or not the claimed invention was sufficiently disclosed (Article 100(b) EPC) in respect of the feature "vacuum 1000mbar" according to step c) of Claims 1 of the main and auxiliary requests".* During this discussion the petitioner filed documents D, E, both Greek patents including a translation in English of the abstracts, and F (a document headed

Summary Declarations of Use of Vacuum during the Production o [sic] Processed Meat in Greek Patents by Mr C. Genigeorgis), to show what the skilled person would understand.

At the end of the oral proceedings the Board of Appeal revoked the patent for insufficiency of disclosure.

VIII. With letter of 4 November 2010, the petitioner requested that the minutes of oral proceedings before the Board of Appeal, which had been dispatched to the parties on 19 October 2010, be amended, so that they referred to the statements made by the appellants'/opponents' experts, Prof. Ambrosiadis and Dr Hammer.

In a very detailed manner the petitioner explained how the patent proprietor had repeatedly objected to the opponent's arguments.

IX. The Board rejected this request in a reasoned communication of 19 November 2010.

X. With letter dated 1 December 2010 the petitioner protested against this refusal on the ground inter alia that the refusal to incorporate the relevant statements of the technical experts into the minutes of the oral proceedings constituted de facto elimination of the *effet utile* of any petition for review by the Enlarged Board of Appeal.

XI. On 1 July 2011 the Enlarged Board sent a communication to the petitioner accompanying the summons to oral proceedings, conveying its provisional opinion that the petition may well prove to be clearly inadmissible because the reasons given to justify the fact that no

objection pursuant to Rule 106 EPC had been raised during oral proceedings before the Board of Appeal were unconvincing, and it indicated its doubt about the allowability of a petition which, under cover of an alleged violation of the right to be heard or a breach of the principle of equal treatment of the parties, was actually seeking a review of the merits of the decision and more particularly of the evaluation by the Board of Appeal of the evidence on file.

- XII. The arguments put forward by the petitioner in its petition and expanded upon during the oral proceedings were the following.

As to the admissibility issue, the petitioner reconstructed the course of the oral proceedings before the Board of Appeal. There was a first session from about 9.15 until 10am where the petitioner defended its patent and, to this end, it submitted the Greek patents. The Board interrupted the proceedings to consider these new documents. After half an hour the proceedings were resumed and the floor was given to the opponents, who discussed the test D44. The petitioner had only five minutes to respond and at the end of these five minutes the chairman put a question that the petitioner's representative had difficulties in answering. At this point in time there was, according to the petitioner a break in proceedings, during which the petitioner wanted to prepare counterarguments; but when oral proceedings were resumed, and coming as a complete surprise to the petitioner, the Board issued its final decision.

In fact, the petitioner argues, it cannot be concluded from the minutes of oral proceedings, which simply

state that the chairman closed the debate, that the petitioner had any reason to assume that a final decision would be imminent. The oral proceedings had previously been interrupted and the debate been declared terminated before this previous interruption; after this first interruption, however, oral proceedings had been resumed and the discussion continued. The petitioner expected that the same would be the case with the second interruption, all the more so since the opponents' experts had been heard and the petitioner had the impression that the Board was considering the opponents' experts' evidence before continuing with the hearing of the petitioner's experts. Once the decision of the Board had been issued, it was too late to issue an objection. Therefore the petitioner submits that this is a case where an objection pursuant to Rule 106 EPC could not have been raised.

As to the matter of allowability, the decisive question for the outcome of the decision was the interpretation of the "value vacuum 1000mbar". Whereas the opponents' technical experts had been heard by the Board the proprietor's technical experts were not been given the opportunity to comment on what the person skilled in the art would understand by the term "vacuum 1000mbar" in particular in view of the new evidence and the statements of the opponents' experts. According to the petitioner, it is not up to the Board of Appeal to select the means of evidence which it considers sufficient for establishing the truth. The decision is wrong because the Board applied the wrong criterion, namely that the skilled person would immediately and unambiguously understand how the invention is workable

since the skilled person had only to choose between two alternatives.

This course of conduct was in conflict with the principle of examination ex officio according to Article 114(1) EPC.

This amounted to a violation of the right to be heard under Article 113(1) EPC as well as a breach of the principle of equal treatment of parties enshrined in Article 6 of the European Convention on Human Rights (ECHR) as part of the right to a fair trial. According to this principle each party should have the opportunity to refute the other party's evidence with suitable evidence of its own.

The petitioner further alleged that the Board of Appeal disregarded its request to hear the experts, which request was correctly submitted and not withdrawn during the proceedings.

XIII. Oral proceedings before the Enlarged Board were held on 5 October 2011.

XIV. Apart from the request for oral proceedings, the requests in the petition were maintained at the end of the oral proceedings. They were the following:

1 -The decision under review be set aside, the proceedings be re-opened and the members of the Board of Appeal who participated in the decision under review be replaced.

2 -The fee for the petition for review be reimbursed.
The petitioner also requested:

"- to procure declarations by the members of Board 3309 who have taken part in the oral proceedings on the events in these oral proceedings or/and
- to hear them in the requested oral proceedings before the Enlarged Board."

Reasons for the Decision

Admissibility of the petition for review

1. The requirements under Article 112a EPC concerning the time limit and the payment of the petition fee are met and the petitioner is adversely affected by the decision for which review is sought.
2. Pursuant to Rule 106 EPC a petition for review based on a fundamental procedural violation under Article 112a paragraph 2(a) to (d) is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings.
 - 2.1 Raising an objection pursuant to Rule 106 EPC is a procedural act and a precondition for access to an extraordinary legal remedy against final decisions of the Boards of Appeal. Therefore such an objection must be expressed by a party in such a form that the deciding body is able to recognize immediately and without doubt that an objection pursuant to Rule 106 EPC is intended. For the same reason such an objection must be specific, that is the party must indicate unambiguously which particular defect amongst those

exhaustively listed in paragraph 2(a) to (c) of Article 112a and Rule 104 EPC it intends to rely on. (see R 4/08 of 20 March 2009, point 2.1 of the Reasons and R 8/08 of 19 May 2009, point 1.2.3 of the Reasons)

The alleged procedural violation resulting from the non hearing of the petitioner's experts by the Board of Appeal during the oral proceedings concerns an event which occurred during oral proceedings; it is related to the conduct of oral proceedings and it cannot be disputed that the absence of such a hearing was an event, or non-event, which was apparent to the petitioner at the time.

This defect should therefore have been objected to during the oral proceedings pursuant to Rule 106 EPC.

2.2 It is however the submission of the petitioner that the Board of Appeal did not make clear that the closure of the debate could lead directly to a final decision and the petitioner was not able, as a consequence, to raise an objection with respect to the absence of a hearing of its experts.

2.3 However, the minutes of the oral proceedings drafted under the responsibility of one of the members of the Board of Appeal and the chair pursuant to Rule 124(3) EPC (which unless duly corrected authenticate the facts they relate) indicate that the debate was closed but do not reflect any objection from the petitioner about a misunderstanding of what had been announced, or any protest that the debate had been prematurely closed or the Board had omitted to decide upon a request to hear experts.

Furthermore it indeed appears clearly from the documents on file and particularly from the petitioner's request for correction of the minutes of the oral proceedings before the Board of Appeal and also its letter after the refusal by the Board of Appeal to correct them that the absence of a hearing of the experts was not the relevant point and was not, at that time, considered by the petitioner as constitutive of a fundamental procedural violation of its right to be heard: the petitioner never raised an issue about the closure of the debate or an omitted request; nowhere is it stated that the debate had been closed only partially (see paragraphs VIII and X of the facts and submissions above); nor did the petitioner complain that one of its requests had been omitted or that it had not been able to object because of the unexpected closure of the debate.

In fact, the request concerned only the statements of the opponents' expert which should, according to the petitioner, have been transcribed in view of the written decision and a possible use before the national courts. The fact that the petitioner's experts had not been asked for their comments was incidentally mentioned twice in passing but the petitioner did not draw from this fact any consequence as a basis for a request or any submission.

- 2.4 At this stage the Enlarged Board can only repeat that it is hopeless to try to reconstruct what happened during the oral proceedings as already stated in R 15/09 of 5 July 2010. But even if the steps as described by the petitioner are taken to be correct relying on the principle of good faith, the Enlarged

Board notes that the debate was declared closed. The necessary meaning of the expression "the debate is closed", which corresponds to an important procedural step, is not open to multiple or relative interpretations; its announcement after a discussion of an issue with the parties must alert the parties to the fact that, unless otherwise announced by the Board of Appeal, the Board does not intend to come back to this discussion, except of course in exceptional cases where the Board decides to reopen the debate. At this precise point the parties and all the more professional representatives must bear in mind that a negative conclusion on the particular issue may be fatal for all the requests on file and as a consequence may result in a final decision, which is what happened in the current case following the decision about Article 83 EPC.

Accordingly, if the petitioner had had something to add, either a request or an objection because of a procedural defect or only a doubt, it should have mentioned it when the Board was about to pronounce the closure, namely at a point in time when the Board still had the possibility to reopen the debate or refuse to do so.

This analysis is in line with R 6/10 of 28 July 2010 paragraph 3.2, where the Enlarged Board considered that neither the minutes of the oral proceedings nor any other part of the file indicated that the appellant had objected to the closure of the debate without the witness having been heard.

This is also in line with what has already been indicated about the parties' roles and duties in R 2/08 of 11 September 2008, paragraphs 8.5 and 8.10, where

the Enlarged Board stated that it was not possible for a party to allege as an afterthought the violation of its right to be heard based on the fact that the Board of Appeal had accepted a procedural objection during the oral proceedings.

The Enlarged Board, in the present case, does not see that there was any obstacle to prevent the petitioner from complying with the requirement of Rule 106 EPC. All the facts point to the conclusion that this is an attempt to dress up a challenge of the decision on its merits as a petition for review, using the alleged violation of the right to be heard as clothing.

3. The outshot of this is that the petition is clearly inadmissible.

Order

For these reasons it is unanimously decided that:

The petition for review is rejected as clearly inadmissible.

The Registrar

The Chairman

P. Martorana

J.-P. Seitz