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**Datasheet for the decision  
of 15 April 2011**

**Case Number:** T 1265/10 - 3.2.04

**Application Number:** 99964785.2

**Publication Number:** 1139769

**IPC:** A22C 21/00

**Language of the proceedings:** EN

**Title of invention:**

Method and device for processing slaughter products

**Patentee:**

STORK PMT B.V.

**Opponent:**

Meyn Food Processing Technology B.V.

**Headword:**

Valid payment of opposition fee (yes)

**Relevant legal provisions:**

EPC Art. 99(1)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Payment of opposition fee (yes)"

"Authorisation to withdraw fee from deposit account (yes)"

**Decisions cited:**

J 0013/91, T 0152/82, T 0170/83, T 0152/85, T 0169/96,  
T 0806/99, T 0079/01

**Catchword:**

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Case Number: T 1265/10 - 3.1.01

**D E C I S I O N**  
of the Technical Board of Appeal 3.1.01  
of 15 April 2011

**Appellant:** STORK PMT B.V.  
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**Representative:** Mertens, Hans Victor  
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**Respondent:** Meyn Food Processing Technology B.V.  
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**Representative:** Van Breda, Jacobus  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 14 April 2010  
revoking European patent No. 1139769 pursuant  
to Article 101(2) EPC.

**Composition of the Board:**

**Chairman:** M. Ceyte  
**Members:** C. Scheibling  
C. Heath  
A. de Vries  
T. Bokor

## **Summary of Facts and Submissions**

- I. The patent proprietor appeals against the decision of the opposition decision dated 14 April 2010 revoking European patent No. 1 139 769.
  
- II. The notice of appeal was filed on 10 June 2010, the appeal fee paid on the same day, and the grounds of appeal were received on 12 August 2010. Both in the notice of appeal, and the grounds of appeal, the patent proprietor clarified that the appeal was limited to the issue of whether the opposition was validly filed, and consequently arguments against the decision under appeal were limited to this point. The appellant thus requests that the opposition be declared inadmissible, the decision under appeal be set aside and the patent be maintained as granted.
  
- III. The facts related to the filing of the opposition are the following: The notice of opposition was filed two days prior to the expiry of the opposition period, on 1 December 2004. The notice was accompanied by a number of documents, and on EPO Form 2300 (form for filing an opposition used by the opponent), section X ("payment of the opposition fee is made") was crossed to indicate that a voucher for payment of fees and costs (EPO Form 1010) was enclosed. However, no payment voucher was found to be enclosed with the notice of opposition. The notice of opposition made no further mention of the payment of the opposition fee. The opponent's representative who filed the opposition does, however, maintain a deposit account with the EPO, and has regularly used the same in order to settle fees due to the Office.

IV. With a communication dated 15 April 2005, the opponent was informed that the opposition fee had not been paid. As a response thereto, the opponent on 26 April 2005 sent a copy of EPO Form 1010 with the patent number at issue, indicating payment of the opposition fee, and bearing the date of 1 December 2004. As a consequence, in a "brief communication" of 29 May 2006, the formalities officer of the opposition division expressed the opinion that "for the reasons set out below it is considered that the opposition fee was duly paid and the opposition filed within the opposition period." The previous communication of 15 April 2005 was thereby set aside, and the patent proprietor's request for a decision under Rule 69(2) EPC 1973 was deemed inadmissible. The opposition division's position that the opposition fee had been duly paid and that the opposition was thereby admissible, was maintained in the summons to oral proceedings dated 3 September 2009, and in the decision under appeal.

V. The appellant (patent proprietor) has taken the view that an (appealable) decision on the issue of admissibility of the opposition was only rendered by the decision under appeal. Furthermore, the appellant in the grounds of appeal and in a letter of 8 March 2011 has argued that the opposition fee was not paid in time, and that therefore the opposition should be deemed inadmissible under the circumstances. The opponent could only have authorised the EPO to withdraw the opposition fee from the deposit account if such authorisation had been clear and beyond doubt. However, already the communication of 15 April 2005 was evidence that there had been serious doubts about the EPO being

properly authorised to withdraw the opposition fee. Legal certainty would require that the EPO be unambiguously authorised to withdraw money so that both the Office and the general public could be certain whether or not there was an authorisation, and, consequently payment of the opposition fee.

In view of the above facts, the appellant has further advanced a case of procedural violation based on two grounds. First, because an opposition procedure was conducted despite the fact that no opposition fee had been paid. And, second, because the opposition division should have taken a decision on the payment of the opposition fee prior to commencing the opposition procedure, but did not.

The appellant furthermore submitted that case law on the authorisation of the Office to withdraw money from deposit accounts was divergent and requested to refer this important point of law to the Enlarged Board of Appeal. The appellant in this respect referred to decisions **J 13/91** of 24 March 1992, **T 161/96** (OJ 1999, 331, **T 806/99** of 24 October 2000, and **T 152/82** of 5 September 1983.

- VI. Both in the opposition and appeal proceedings, the respondent (opponent), has taken the position that the "brief communication" of 29 May 2006 should be regarded as a decision on the question of the admissibility with the consequence that the opposition division in its decision on the merits of the opposition could no longer decide upon this point (as it had already done so), and, consequently, neither could the Boards of Appeal in the current case.

- VII. With the summons to oral proceedings, the Board sent an annex expressing the provisional view that in line with previous case law, the opposition fee should be regarded as having been duly paid.
- VIII. In its response thereto, the appellant in a letter of 8 March 2011 stated that it would not be represented at oral proceedings and filed further observations as to why the opposition should be regarded as inadmissible. The respondent with letter dated 18 March responded thereto. It maintained that the opposition fee had been duly paid, and that a referral to the Enlarged Board of Appeal was unnecessary.
- IX. Oral proceedings were duly held on 15 April 2011, at the end of which the following decision was announced.

### **Reasons for the Decision**

1. Admissibility of the appeal is contested by the respondent (opponent) who both in writing and in oral proceedings has advanced two reasons for this view.
2. First, the respondent argues that the decision to admit the opposition could not be contested by the patentee, because the latter would not be adversely affected thereby. In this respect, the respondent takes the view that the letter of the opposition division of 15 April 2005 noting a loss of rights allowed the *opponent* to request a decision on this matter (as it did), but not the *patentee*. The question of admissibility of the opposition was therefore purely a matter between the opponent and the opposition division. The grounds on

which the patent proprietor could file an appeal were exhaustively listed in Art. 100 EPC.

3. To start with the latter, Art. 100 EPC lists the grounds on which an opposition can be filed. The EPC lists no grounds for an appeal. Rather, it allows appeals "from decisions of the Receiving Section, Examining Divisions, Opposition Divisions and Legal Division", Art. 106(1) EPC. Unless the appeal exclusively concerns subject matter that cannot be appealed as such (Art. 106(3), Rule 97 EPC), all issues dealt with by the opposition division in its decision can be appealed, and this includes the question of whether the opposition fee has been paid in good time. The patentee's appeal thus does not lie from the letter of the opposition division of 15 April 2005, or from the communication issued on 29 May 2006, but from the final decision of the opposition division in which it held that the opposition fee was paid in good time.
4. Second, according to the respondent, the issue of timely payment of the opposition fee had already been finally decided by the Formalities Officer's communication of 29 May 2006 as a decision in accordance with Rule 112(2)EPC, and could thus no longer be appealed at this stage.
5. The Board holds that the text of Rule 112(2) EPC already contradicts this argument. Rule 112(2) EPC distinguishes between *decisions* that should be taken if the European Patent Office "does not share the opinion of the party requesting it", and *communications* ("inform that party"). Thus, in the present case the opposition division could only have rendered a decision

had it taken the view that the opposition fee had not been paid in good time. However, it agreed with the opponent's view that payment had been effected, and both parties were informed accordingly by way of a communication. Furthermore, neither form nor contents of the "brief communication" can be understood as a final decision on this issue. Not unlike the board's communications prior to the oral proceedings, the communication should rather be understood as a provisional view in order to assist the parties in further conducting and arguing their case. For this reason, the board is not barred from reviewing this point in the context of the current appeal.

6. The appeal meets all the admissibility requirements of the EPC and is therefore admissible.
7. According to Article 99(1) EPC, an opposition is only validly filed once the opposition fee has been paid. In other words, there is no opposition unless the corresponding fee has been paid within the time limit for filing an opposition.
8. One recognised way of paying the opposition fee is payment from a deposit account with the EPO, see the "Arrangements for deposit accounts (ADA)" in the version published in Supplement to Official Journal No. 2/2002, 3 - 37, subsequently referred to as "Arrangements". A deposit account set up for the purposes of fee payment to the EPO is an account the European Patent Office can withdraw funds from when properly instructed, or automatically. As the automatic debiting procedure is not available for the payment of opposition fees (Point 4. of the Arrangements for



automatic debiting procedure, Official Journal No. 2/2002, 11), the ordinary rules of the Arrangements apply.

- 8.1 The Arrangements require payment from a deposit account via a debit order. According to point 6.2, such a debit order must be made in writing, but is otherwise not subject to any formalities, in particular use of Debit Order Form 1010 is not required. For a valid debit order, point 6.3 of the Arrangements requires "the particulars necessary to identify the purpose of the payment and the number of the account which is to be debited." The Arrangements do not indicate what should happen in case one of the formal requirements is not complied with.
- 8.2 In the case at issue, section X ("Payment of the opposition fee is made") was crossed to indicate that a voucher for payment of fees and costs (EPO Form 1010) was enclosed. The notice of opposition itself did not mention any debit account number. The fact that box X of the opposition form was crossed is first of all a statement of fact, namely that the voucher for payment of fees and costs was enclosed. As such, this was incorrect - no such voucher has been found. But in addition to a statement of fact, it is also a declaration of intent, namely of the intention to pay the opposition fee. Declarations of intent, as is generally acknowledged, should be interpreted in order to ascertain the true intention of the declaring party rather than adhering to the literal meaning of the declaration. In this respect, both parties have pointed to a number of decisions by the Boards of Appeal that

relate to such intentions to pay fees in connection with the debit order system.

9. In agreement with the appellant, and in conformity with the jurisprudence of the Boards of Appeal, it is necessary for a debit order to be unambiguously recognisable and show a clear and unambiguous intention to make a particular payment, cases **T 170/83** (OJ EPO 1984, 605), **T 152/82** (OJ EPO 1984, 301) and **T 152/85** (OJ EPO 1987, 191).
  
10. The above-mentioned decision **T 170/83** (paragraph 6 of the Reasons) provides an appropriate starting point in this respect. In its English translation, this paragraph reads as follows:

"In the case of a debit account, the problem is not the existence or the timely deposit of money as such, but the timely authorisation of the EPO to dispose of such money for a specific purpose. By opening a deposit account, a special relationship between the EPO and the account holder is created. Accordingly, a necessary authorisation to dispose of such money can also be inferred from evaluating all the circumstances despite existing formal defects. Such an authorisation to be derived from the circumstances first of all requires that the authorising person (account holder) is known and clearly identifiable, and that certain fees that are due to the EPO for a known procedure are meant to be paid by the withdrawal from such account (and not in any other way). Both the account holder and his concrete intention must therefore be beyond doubt. In addition thereto, the circumstances must be such that

the EPO can and must regard itself as authorised to effect withdrawal without further clarifications."

In case **T 806/99**, which the board regards as of particular relevance, it was held sufficient for an unequivocal intention to pay the opposition fee by making use of the debit order system that in the Opposition Form 1200 box X had been crossed, even if no corresponding debit order was accompanied by the opposition brief that had been filed on the last day of the opposition period. The board in point 4 of the reasons (in English translation) held as follows:

"In the case at issue, the representative of the opponent in opposition form (EPO Form 2300) filed in due time, crossed the box in section X of the form that states "Payment of the opposition fee is made as indicated by the enclosed voucher for payment of fees and costs (EPO Form 1010)." This declaration satisfies at least the minimum formal requirements (written form, signature, indication as to the reasons for payment). The office also knows of the existence and the number of the deposit account of the representative. However, in view of the facts ascertained by the first instance, EPO Form 1010 was not filed together with the opposition and it is therefore necessary to examine whether the intention of the representative was clearly within the ambit of this declaration. In this respect, it is not sufficient to merely cling to the form of the declaration, but, on the contrary, according to the case law cited above, to equally consider the circumstances within which such declaration was made and in light of the circumstances known to the office at the time the declaration was received." (points 4

and 4.1 of the reasons). The board subsequently considered the fact that the representative regularly paid via the debit account, that other forms of payment such as payment per cheque could be excluded due to the fact that point IX of the opposition form did not list that a cheque had been enclosed, that by the rather detailed opposition statement it could be excluded that the opposition was not meant seriously, and that thereby it could be clearly established that the representative had intended to pay the opposition fee by the EPO debiting his account for the correct amount.

11. The Board in the case at issue is faced with facts that are almost identical to those on which the decision **T 806/99** was based, with the difference that the opposition was not filed on the last possible day of the opposition period, but two days prior to the expiry of such period. Nothing turns on this difference, however.
  
12. A number of decisions cited by the appellant concern issues of insufficient payment, or of the Office's obligation of notification in case of missing documents. In particular:
  - decision **T 79/01** of 25 March 2003 concerns a case where an appeal was deemed inadmissible due to the fact that less than half of the appeal fee had been paid. The case at issue, however, concerns the question whether or not there was a clear and unambiguous intention to pay the appeal fee.
  
  - decision **T 161/96** concerns the insufficient payment of an opposition fee. Here, the board held

that an insufficient payment was entirely within the responsibility of the opponent, and the Office had no obligation to inform the opponent of such insufficient payment where the opposition was filed just at the end of the opposition period. Neither insufficient payment of the opposition fee, nor the Office's obligations of notification are of any relevance in the case at issue.

- finally, decision **J 13/91** also deals with the Office's obligation of notification in cases of insufficient payment. Again, the case at issue does not give rise to any discussion on insufficient payment, but on the interpretation of the opponents intent to pay.

For the above reasons, the Board sees no discrepancy in case law on the issue of determining whether or not a fee has been paid in the context of making use of a deposit account, and consequently a referral to the Enlarged Board would not be justified.

13. The Board agrees with the appellant that legal certainty is of high relevance when it comes to filing an opposition. It is not least for this reason that case law has consistently required the clear and unambiguous intention of authorising the Office to withdraw money from a deposit account in order to effect payment. Determining such intention requires proper considerations of all circumstances of the specific case. The relevant question to be asked is: "Did the opponent give the Office proper authorisation to withdraw the opposition fee from his deposit account?" The appellant submits that the opponent did

not. A mere cross in section X of Form 2300 is a far cry from a full authorisation to withdraw money from a deposit account. After all, section X refers to Form 1010, and this form allows for three modes of payment: By cheque, by bank transfer, or by debit from a deposit account. Without Form 1010, how could the Office know which form of payment the opponent had chosen? How could it be certain that it was the third alternative, namely, debit from a deposit account? These are the same questions the Board was faced with in decision **T 806/99**, and the answers are the same. There was no cheque enclosed, for which reason intention to pay by cheque could be excluded, and the opponent's representative has regularly used payment via debit order, at least in appeal proceedings before this Board. The Board is aware that such interpretation favours representatives appearing regularly before the Office. But it appears legitimate to the Board to infer an intention, and thus an authorisation, from previous behaviour.

14. The appellant argued that a situation could be conceived where an opponent wanted to file an opposition but deliberately refrained from paying the opposition fee. This would mean that the opponent in such case could not turn around and ask the Office for the opposition fee to be reimbursed had the Office on the basis of the notice of opposition withdrawn the opposition fee from the deposit account. In light of the detailed notice of opposition, the existing deposit account and the intention to file the debit order Form 1010, the Board would find a refund of the opposition fee in such case highly inappropriate, and does not see, either, why an opponent who in performing

- the above acts only wanted to file a "mock" opposition should be protected by way of having the opposition fee reimbursed.
15. The Board would also like to highlight that the issue is not whether the opponent intended to pay. An intention to pay is certainly not enough in order to actually effect payment. For example, it would not have been enough to indicate in the notice of opposition that payment would be made by cheque, and no corresponding cheque had been enclosed. But the statement "we want to pay" is different in its legal significance from the statement "we want to authorise the EPO to withdraw the fees for a determined purpose from our account" in that the intention to authorise already allows the Office to act on such authorisation and carry out such intent where the EPO under the deposit account system already holds such money in trust.
16. In the case at issue, the Board therefore recognises the clear intention of the opponent to settle the opposition fee by authorising the Office to withdraw the opposition fee for a specific case from an identifiable deposit account. This is sufficient for payment of the opposition fee. The opposition has therefore been validly filed, and the appeal that is limited to the issue of whether a valid opposition has been filed, must fail accordingly. As the opposition division was correct in its conclusion that the opposition fee had been validly paid, no procedural violation has occurred by opening opposition procedures. Therefore, also the request for reimbursement of the appeal fee must be dismissed.

**Order**

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

1. The referral to the Enlarged Board is refused.
2. The request for reimbursement of the appeal fee is refused.
3. The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte