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**Datasheet for the decision  
of 11 May 2022**

**Case Number:** T 3045/19 - 3.2.07

**Application Number:** 13718603.7

**Publication Number:** 2831088

**IPC:** B02C23/08, C08H7/00, C07G1/00,  
C10L5/44, D21H11/00, C08L97/00

**Language of the proceedings:** EN

**Title of invention:**

LIGNIN AND METHOD AND SYSTEM FOR PROCESSING LIGNIN

**Patent Proprietor:**

UPM-Kymmene Corporation

**Opponents:**

Stora Enso Oyj  
Metsä Fibre Oy

**Headword:**

**Relevant legal provisions:**

EPC Art. 111(1), 113(1)  
EPC R. 103(1)(a), 115(2)  
RPBA 2020 Art. 11, 15(1), 15(3)

**Keyword:**

Right to be heard - substantial procedural violation (yes)

Appeal decision - remittal to the department of first instance  
(yes)

Reimbursement of appeal fee - (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

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Case Number: T 3045/19 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 11 May 2022**

**Appellant:**  
(Patent Proprietor)

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**Representative:**

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**Respondent:**  
(Opponent 1)

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**Respondent:**  
(Opponent 2)

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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
11 September 2019 concerning maintenance of the  
European Patent No. 2831088 in amended form.**

**Composition of the Board:**

<b>Chairman</b>	I. Beckedorf
<b>Members:</b>	S. Watson
	A. Cano Palmero

## Summary of Facts and Submissions

- I. An appeal was filed by the patent proprietor (appellant) in the prescribed form and within the prescribed time limit against the decision of the opposition division maintaining European patent No. 2 831 088 in amended form according to the then third auxiliary request.
- II. In the present decision reference is made to the following documents:
- D1: Frosterud, D. et al, *Selected drying technology and particle engineering for the future biorefinery*, Third Nordic Wood Biorefinery Conference, 22 March 2011, pages 172-179;
- D2: Tomani, P., *The LignoBoost process*, Cellulose Chemistry and Technology, 44 (1-3), 2010, pages 53-58.
- III. The opposition division held that the subject-matter of independent claims 1 and 10 of the patent as granted was not inventive over the teaching of document D1 alone or in combination with the teaching of document D2 and that the subject-matter of independent claims 11 and 12 of the patent as granted was not inventive over a combination of the teachings of documents D2 and D1 (Articles 100(a) and 56 EPC).
- IV. In its statement setting out the grounds of appeal, the appellant *inter alia* alleged that its right to be heard had been infringed by the opposition division as it had not been given an opportunity to comment on the opposition division's finding relating to the content

of the common general knowledge of the skilled person before a decision on the patent as granted was taken during oral proceedings before the opposition division (Article 113(1) EPC).

- V. In preparation for oral proceedings, arranged at the request of all parties, the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020. The Board indicated its preliminary opinion that the patent proprietor's right to be heard had been infringed, as the written decision had not taken account of the patent proprietor's objections.
- VI. All parties responded to the Board's communication, the appellant with letter dated 3 March 2022; opponent 1 (respondent 1) with letter dated 28 February 2022 and opponent 2 (respondent 2) with letter dated 11 March 2022.
- VII. Oral proceedings before the Board took place on 11 May 2022. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes.
- VIII. The final requests of the parties are as follows:

for the appellant:

that the decision under appeal be set aside  
and  
that the case be remitted to the opposition  
division for further prosecution and that the  
appeal fee be reimbursed,  
or, in the alternative,  
that the patent be maintained as granted,

or, in the alternative,  
when setting aside the decision,  
that the patent be maintained on the basis of the  
set of claims according to the auxiliary request  
filed with the statement setting out the grounds  
of appeal, which corresponds to auxiliary request  
2 on which the decision under appeal is based.

for respondents 1 and 2:

that the appeal be dismissed  
or, in the alternative,  
that the case be remitted to the opposition  
division for further prosecution.

- IX. As the present decision solely concerns an alleged substantial procedural violation, it is not necessary to reproduce the independent claims of the main or auxiliary request here.
- X. The lines of argument of the parties are dealt with in detail in the reasons for the decision.

### **Reasons for the Decision**

1. *Oral proceedings in the absence of respondent 2*

Although respondent 2 did not attend the oral proceedings before the Board, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that provision only affords the opportunity to be heard and, by absenting itself from oral proceedings, a party gives up that opportunity

(see Case Law of the Boards of Appeal (CLB), 9th edition, 2019, V.A.4.5.3.).

In accordance with Rule 115(2) EPC and Article 15(3) RPBA 2020, the written submissions of respondent 2 have been taken into account by the Board and are discussed in the following reasons.

2. *Substantial procedural violation*

- 2.1 Two allegations were made by the appellant relating to its right to be heard pursuant to Article 113(1) EPC:
- that the appellant was not given the opportunity at oral proceedings before the opposition division, before a decision was taken on the patent as granted, to dispute the common general knowledge used by the opposition division, namely that the properties of a binder can be improved by reducing its particle size (statement of grounds of appeal, point 18); and
  - that the opposition division, in its reasoned decision, did not consider the appellant's arguments disputing this common general knowledge (appellant's submissions of 3 March 2022 in agreement with the Board's preliminary opinion set out in the communication pursuant to Article 15(1) RPBA 2020, points 8.7 to 8.9).
- 2.2 Respondent 1 contested the allegation that the appellant's right to be heard had been infringed during oral proceedings before the opposition division (see reply of respondent 1 to the statement of grounds of appeal, page 8, fourth paragraph). No substantive submissions were made by respondent 1 regarding the second allegation, *i.e.* a lack of consideration in the written decision under appeal of the appellant's

arguments made during oral proceedings before the opposition division disputing the common general knowledge used by the opposition division.

2.3 Respondent 2 did not attend the oral proceedings before the opposition division and did not take position on the extent to which the matter was discussed at the oral proceedings (see reply of respondent 2 to the statement of grounds of appeal, paragraph bridging pages 1 and 2). Further, respondent 2 made no substantive submissions regarding a lack of consideration of the appellant's arguments in the written decision.

2.4 In light of the following conclusion with respect to the second allegation, it is not necessary for the Board to decide whether the first alleged infringement of the appellant's right to be heard occurred.

2.4.1 It is established case law of the Boards of Appeal that the requirements of Article 113(1) EPC relate not only to the right to present comments but also to have those comments duly considered. The deciding department must demonstrably show that arguments, which are central to a party's case, were heard and considered (see CLB, *supra*, III.B.2.4.2).

In the decision under appeal, the opposition division states in relation to the common general knowledge in question, that "it is commonly known that when a particulate material, such as lignin powder, is used in low amounts as a binder a homogenous distribution of the material is crucial and that such a homogenous distribution is best achieved, when the particles are fine enough. This is immediately evident to the skilled person and as such does not need any pointer at

all" (see decision under appeal, page 10, lines 20 to 24).

A similar statement is made in relation to claims 11 and 12 (decision under appeal, page 11, final paragraph), "[a]s already argued with respect to claims 1 and 10 it is clear for the skilled person faced with the problem of providing an improved lignin binder for an improved product that the binder, and even more if there is a low amount of binder present, has to be homogeneously distributed which can be best realised when the particles are small."

No mention is made in the decision under appeal that this common general knowledge was disputed by the appellant.

- 2.4.2 The question to be considered is not whether the opposition division was incorrect in finding that this knowledge belongs to the common general knowledge of the skilled person, nor whether the disputed common general knowledge requires substantiation or not, but only whether the opposition division took account of the arguments put forward by the appellant.

As the opposition division made no reference at all to the appellant's comments made during the oral proceedings and disputing this common general knowledge (see the minutes of the oral proceedings, page 7, final two paragraphs and page 9, third paragraph), it is not apparent that the appellant's arguments on this point were in fact considered.

- 2.4.3 In its findings of lack of inventive step, the opposition division used the disputed common general knowledge as a link between the combinations of teachings (within or between documents). The objections

of the appellant are central to its case as it argued that the common general knowledge relied on by the opposition division in order to find the subject-matter of claims 1, 10, 11 and 12 obvious, is disputed and unsubstantiated.

Therefore, as the disputed common general knowledge appears to be crucial for the decision taken, the opposition division should have considered the appellant's comments in its written decision and the appellant's right to be heard was infringed, leading to a substantial procedural violation.

As the opposition division found that the further objections raised by the respondents did not prejudice the maintenance of the patent as granted (see the reasons for the decision under appeal, points 2.1, 2.2 and 2.3.1), the necessity of filing an appeal was causally linked to the substantial procedural violation.

2.5 Thus the lack of consideration of the appellant's comments amounts to a substantial procedural violation of the appellant's right to be heard pursuant to Article 113(1) EPC.

### 3. *Remittal*

According to Article 111(1) EPC, a Board may either exercise any power within the competence of the department which was responsible for the decision under appeal or remit the case for further prosecution.

Pursuant to Article 11 RPBA 2020 cases should however only be remitted when special reasons present

themselves. Article 11, second sentence, RPBA 2020, states that, as a rule, fundamental deficiencies, such as a substantial procedural violation, which are apparent in the proceedings constitute special reasons.

Therefore, in the absence of any arguments against remittal and in accordance with the requests of all parties to remit the case if the Board were to find that a substantial procedural violation had occurred, the case should be remitted to the opposition division for further prosecution, pursuant to Article 11, second sentence, RPBA 2020.

4. *Reimbursement of the appeal fee*

In light of the substantial procedural violation identified above, which is causally linked to the necessity of filing an appeal, and in the absence of any contrary arguments, the Board finds it equitable that the appeal fee paid by the patent proprietor should be reimbursed in full in accordance with 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 opposition division for further prosecution.
3. The appeal fee paid by the patent proprietor is reimbursed in full.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated