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**Datasheet for the decision
of 22 January 2021**

Case Number: J 0010/20 - 3.1.01

Application Number: 16874169.2

Publication Number:

IPC: A23J7/00, C07F9/10

Language of the proceedings: EN

Title of invention:

INDUSTRIAL METHOD FOR RECOVERING PHOSPHOLIPIDS AND PRODUCING
LECITHIN FROM A RESIDUE FROM THE PRODUCTION OF SOY PROTEIN
CONCENTRATE (SPC)

Applicant:

Fernandes De Siqueira Machado, Paula

Headword:

Relevant legal provisions:

EPC Art. 108, 122(1)
EPC R. 134(2), 134(4), 136(1), 136(3)
RFees Art. 7(3)

Keyword:

Extension of periods - COVID-19 pandemic - Notice from the EPO
Protection of legitimate expectations (yes)
Statement of grounds of appeal filed within time limit (yes)
Date on which payment is made - payment through bank outside
of a Contracting State
Request for further processing within time limit (no)
Request for re-establishment of rights within time limit (no)

Decisions cited:

G 0005/88, G 0002/97, J 0011/88, J 0027/90, J 0013/94,
J 0018/03, T 0923/95, T 0401/97, T 0812/04, T 0595/11,
T 1037/11, T 2251/12, T 0777/15, T 1588/15, T 1678/17,
T 1503/18, T 3221/19, T 1304/19, T 0126/20

Catchword:

If the European Patent Office issues a promise or statement on how to act in a given area, the principle of legitimate expectations requires that promise or statement to be honoured unless there is good reason not to do so. Users and representatives cannot be expected to question, without any apparent reason, statements on the extension of time limits which are made in publications under Rule 134(4) EPC. Even in the absence of a general dislocation in the delivery or transmission of mail, they can rely on such publications without suffering any disadvantages (points 1.12.-1.20 of the Reasons).



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Case Number: J 0010/20 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 22 January 2021

Appellant: Fernandes De Siqueira Machado, Paula
(Applicant) Rua Eduardo Sprada
630 CS B Mossungue
81220-000 Curitiba (BR)

Representative: De Tullio, Michele Elio
Viale Liegi, 48/b
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Decision under appeal: **Decision of the Receiving Section of the European Patent Office posted on 5 December 2019 deeming the request for re-establishment of rights into the period for filing a request for further processing not to be filed and the European patent application No. 16874169.2 to be withdrawn.**

Composition of the Board:

Chairman W. Sekretaruk
Members: N. Obrovski
P. Schmitz

Summary of Facts and Submissions

- I. The appeal of the applicant (appellant) lies against the decision of the Receiving Section of 5 December 2019 on European patent application No. 16874169.2. In this decision, the appellant's request for re-establishment of rights into the period for filing a request for further processing was deemed not to have been filed and the European patent application was deemed to be withdrawn with effect of 17 July 2018.
- II. On 16 July 2018, the appellant filed Form 1200 for entry into the European phase of the international application No. PCT/BR2016/050317.
- III. By communication dated 30 August 2018, the Receiving Section informed the appellant about a loss of rights under Rule 112(1) EPC, due to the non-payment of the relevant fees within the prescribed period. The Receiving Section also informed the appellant that it had the possibility to file a request for further processing within a non-extendable period of two months after notification of this communication.
- IV. By submission dated and received on 9 November 2018, the appellant requested further processing under Article 121 EPC and stated that the prescribed fees had been paid via bank transfer to the EPO's bank account. A copy of the transfer details from BANCO BRADESCO S/A in Sao Paulo, Brazil, dated 9 November 2018, was attached. The fees were received by the EPO on 12 November 2018.

- V. By communication dated 22 January 2019, the Receiving Section informed the appellant that no request for further processing had been filed because the fee for further processing and the fees for entry into the European phase had only been paid on 12 November 2018, i.e. after the expiry of the two-month period on 9 November 2018. The Receiving Section also informed the appellant about the possibility of filing a request for re-establishment of rights and about the requirement to pay the prescribed fees therefor.
- VI. By submission dated and received on 31 March 2019, the appellant requested re-establishment of rights under Article 122 EPC into the time limit for requesting further processing. The prescribed fees were not paid.
- VII. By communication dated 21 June 2019, the Receiving Section informed the appellant that the prescribed fees for the request for re-establishment of rights had not been paid, and that the request was therefore deemed to not have been filed. The Receiving Section set a time limit of two months for comments. The appellant did not react. On 5 December 2019 the Receiving Section issued the decision under appeal.
- VIII. The appellant filed the notice of appeal on 17 February 2020. On the same day, the appeal fee and the fees for re-establishment of rights were paid. The statement of grounds of appeal was filed on 2 June 2020.
- IX. By affidavit dated 21 January 2021, the appellant explained why the fee for further processing had only been received in the Office's bank account on 12 November 2018. She also stated that she had exercised all due care to maintain the European patent application.

- X. On 22 January 2021 oral proceedings were held before the Board. In preparation thereof, the Board had provided its preliminary opinion in a communication under Article 15(1) RPBA 2020.
- XI. The appellant requests that the decision under appeal be set aside and that the payment of the fee for further processing be deemed to have been made in time or, alternatively, that she be re-established in her rights regarding the non-observance of the time limit for further processing.
- XII. The appellant's representative submitted that he suffered heavy restrictions and difficulties due to the disruptions caused by the COVID-19 outbreak in Italy. He further submitted that this was also true with regard to Brazil, where both the appellant and her Brazilian attorney were located.
- XIII. With regard to the missed time limit for filing a request for further processing, the appellant submitted that the bank transaction had been carried out by a Brazilian bank which had a subsidiary in London and therefore in one of the contracting states to the EPC, the United Kingdom. Thus, the fee had to be considered to have been paid in due time under Article 7(3) of the Rules relating to Fees.

At the oral proceedings, the representative stated that the Brazilian bank had told the appellant that the transaction could be carried out more quickly because it had a subsidiary in London. The subsidiary's involvement in the bank transaction could, however, not be confirmed.

XIV. With regard to the request for re-establishment of rights, the appellant's representative submitted that it could be considered that he had been aware of the missed time limit for further processing as of 1 February 2019. It was, however, the appellant herself who had to be aware of the missed time limit, in particular because the prescribed fees had been paid directly by her. Since the appellant's Brazilian attorney had been in charge of the communication with the appellant, it had to be considered at what point in time that attorney had informed the appellant about the missed time limit.

The appellant's representative further submitted that he only received on 11 March 2019 the confirmation from the Brazilian attorney that the appellant had received the information on the missed time limit. The cause of non-compliance had thus only been removed on 11 March 2019.

XV. With regard to the fees for re-establishment of rights, the appellant's representative confirmed that these fees had not been paid together with the filing of the request for re-establishment on 31 March 2019, but only together with the filing of the notice of appeal on 17 February 2020.

At the oral proceedings, the representative stressed that they had not been responsible for the payment of the fees for the re-establishment of rights. Moreover, it had been difficult for the appellant to raise the money for the prescribed fees.

XVI. The appellant's representative confirmed not to have replied to the Receiving Section's communication dated 21 June 2019, by which the appellant had been informed

about not having paid the fees for re-establishment of rights in time. According to the representative, the failure to reply was the result of a single isolated mistake related to the migration to a new docketing system between July 2019 and October 2019. Due to this migration, the data concerning the present European patent application had been corrupted. The representative had only learned of this data corruption - and of the Receiving Section's communication dated 21 June 2019 - upon receipt of the Receiving Section's decision dated 5 December 2019.

Reasons for the Decision

1. Admissibility of the appeal

- 1.1 Under Article 108 EPC, the notice of appeal must be filed within two months of notification of the decision, and the statement setting out the grounds of appeal within four months of that notification.
- 1.2 Under Rules 126(2), 131(4) and 134(1) EPC, the period of two months of notification of the Receiving Section's decision ended on 17 February 2020. The notice of appeal was filed on that day, and thus within the prescribed period.
- 1.3 The period of four months of notification of the decision ended on 15 April 2020. The statement of grounds of appeal was filed afterwards, namely on 2 June 2020.

Extension of periods under Rule 134(2) EPC

- 1.4 Under Rule 134(2) EPC, if a period expires on a day on which there is a general dislocation in the delivery or transmission of mail in the state in which the European Patent Office is located, the period is, for all parties and their representatives, extended to the first day following the end of the interval of dislocation.
- 1.5 Rule 134(2) EPC does not distinguish between statutory periods and periods specified by a department of first instance or a Board of Appeal. Its scope of application is therefore not limited to the one or the other. The time limit for filing the statement of grounds of appeal may also be extended under this provision (with regard to Rule 85 EPC 1973, see J 13/94, point 1 of the Reasons).
- 1.6 If the requirements of Rule 134(2) EPC are fulfilled, any time limit which expires within the period of interruption or dislocation is extended by operation of law (with regard to Rule 85 EPC 1973, see J 11/88, point 5 of the Reasons).
- 1.7 According to the Notice from the European Patent Office dated 1 May 2020 concerning the disruptions due to the COVID-19 outbreak (OJ EPO 2020, A60) all periods expiring on or after 15 March 2020 were extended to 2 June 2020. The Notice from the European Patent Office dated 1 May 2020 replaced the Office's previous Notice dated 16 April 2020 (OJ EPO 2020, A43), which in turn replaced the Office's Notice dated 15 March 2020 (OJ EPO 2020, A29). All of these Notices refer to Rule 134(2) EPC.

- 1.8 In the related Notice from the European Patent Office dated 30 March 2020 concerning the extension of periods for the payment of fees (OJ EPO 2020, A38), it is stated that the extension of time limits under Rule 134(2) EPC applies to all periods provided for under the EPC and the PCT, including those specified by the Office under Rule 132 EPC.
- 1.9 The Notices of the European Patent Office dated 15 March 2020, 16 April 2020, and 1 May 2020 refer to "the problems caused by the disruptions due to the COVID-19 outbreak". In particular, the Notices refer to "restrictions on the movement and circulation of persons, as well as on certain services, exchanges and public life in general, which can be qualified as a general dislocation within the meaning of Rule 134(2) EPC" in the Federal Republic of Germany, the State in which the European Patent Office is located.
- 1.10 Rule 134(2) EPC, however, does not refer to a "general dislocation" as such, but to a "general dislocation in the delivery or transmission of mail". The European Patent Office's Notices are silent on whether there was a general dislocation in the delivery or transmission of mail in the Federal Republic of Germany.
- 1.11 It thus seems likely that these Notices are based on an application of Rule 134(2) EPC by analogy (in the Notice of the President of the European Patent Office dated 3 July 2015, Rule 134(5) EPC was applied by analogy to problems caused by the closure of banks in Greece; see OJ EPO 2015, A61). Ultimately, however, this question can be left open.

Publications under Rule 134(4) EPC and the principle of legitimate expectations

- 1.12 Under Rule 134(4) EPC, the date of commencement and the end of any dislocation under Rule 134(2) EPC must be published by the European Patent Office. The rationale underlying this provision is to provide users and representatives with legal certainty as to the extension of time limits under special circumstances, by providing them with an official publication on which they can rely.
- 1.13 The Notices of the European Patent Office dated 15 March 2020, 30 March 2020, 16 April 2020, and 1 May 2020 refer to Rule 134 EPC and have been published on the EPO's website and in the Official Journal. They are thus a source of legitimate expectations (see Case Law of the Boards of Appeal, 9th edition 2019, III.A.1.1).
- 1.14 The appellant refers in a general manner to the disruptions caused by the COVID-19 outbreak, without making a link to these Notices or the period for filing the statement of grounds of appeal. The date of filing of the statement of grounds of appeal, however, corresponds to the date to which all periods expiring on or after 15 March 2020 were extended by virtue of these Notices, namely to 2 June 2020. It can thus be assumed that the appellant relied on these Notices when filing its statement of grounds of appeal.
- 1.15 The principle of legitimate expectations is well established in the jurisprudence of the Boards of Appeal (G 5/88, point 3.2 of the Reasons; G 2/97, point 1 of the Reasons). If a public authority such as the European Patent Office issues a promise or statement on how to act in a given area, the principle of legitimate expectations requires that promise or statement to be honoured unless there is good reason

not to do so. No such reason is forthcoming. It would, to the contrary, constitute a disproportionate and unjustifiable burden to the users of the European patent system if they could not rely on the publications by the European Patent Office under Rule 134(4) EPC, and if they could lose rights irreversibly when doing so.

1.16 The travaux préparatoires also indicate that it is the Office's - and not the users' or representatives' - task to obtain the necessary information on a dislocation in the contracting states (with regard to Rule 85 EPC 1973, see CA/144/01, point 3). Also against this background, users and representatives cannot be expected to question, without any apparent reason, the statements made in publications by the European Patent Office under Rule 134(4) EPC. Nor can they be expected to engage in individual investigations whether and during which exact period a dislocation occurred in one of the contracting states, which may not even be their own.

1.17 The principle of legitimate expectations is applicable to both ex parte and inter partes proceedings (T 1037/11, point 1.14 of the Reasons, referring to the inter partes proceedings underlying G 5/88 and G 2/97; T 923/95, point 2 of the Reasons). As the Office's Notices under Rule 134(4) EPC address all parties and representatives in all proceedings at the same time and in the same way, there does not appear to be a need to weigh the different parties' interests. If one did so nevertheless, it seems that the immediate loss of rights for one party, due to the unexpected expiry of a time limit, would weigh heavier than the mere possibility for the other party not to prevail on the merits (see T 595/11, point 1.13 of the Reasons).

- 1.18 Users must not suffer a disadvantage as a result of having relied on erroneous information received from the EPO (G 2/97, point 4.1 of the Reasons). Therefore, even if there was no general dislocation in the delivery or transmission of mail in the Federal Republic of Germany during the relevant period, and even if it were not possible to apply Rule 134(2) EPC by analogy under the given circumstances, users could still rely on the information on the extension of time limits provided in the Notices of the European Patent Office without suffering any disadvantages.
- 1.19 Technical Boards of Appeal have also acknowledged the time extensions in view of the Notice from the European Patent Office dated 1 May 2020 (T 777/15, point 3.2 of the Reasons; T 1503/18, point 10.2 of the Reasons; T 1678/17, point 6.2 of the Reasons; T 126/20, point IV. of the Facts and Submissions; T 3221/19, point IV. of the Facts and Submissions; T 1304/19, point VII. of the Facts and Submissions).
- 1.20 In conclusion, in view of the European Patent Office's Notices, the statement of grounds of appeal was filed in due time. The appeal is therefore admissible.

2. Missed time limit for further processing

- 2.1 Under Rule 135(1) EPC, further processing is requested by payment of the prescribed fee within two months of the communication concerning either the failure to observe a time limit or a loss of rights. Under Article 7(1) of the Rules relating to Fees, the date on which any payment is considered to have been made to the Office is the date on which the amount of the

payment or of the transfer is actually entered in a bank account held by the Office.

2.2 According to Rules 126(2) and 131(4) EPC, the period of two months of notification of the Receiving Section's communication dated 30 August 2018, by which the appellant was informed of a loss of rights under Rule 112(1) EPC, expired on 9 November 2018. The payment of the fees prescribed for further processing entered in a bank account held by the Office on 12 November 2018, i.e. after the expiry of the time limit for requesting further processing under Rule 135(1) EPC.

2.3 Under Article 7(3) of the Rules relating to Fees, where payment of a fee is not considered to have been made until after the expiry of the period in which it should have been made, it is considered that this period has been observed if evidence is provided to the Office that the person who made the payment fulfilled one of the following conditions in a contracting state within the period within which the payment should have been made:

(i) he effected the payment through a banking establishment;

(ii) he duly gave an order to a banking establishment to transfer the amount of the payment.

2.4 The appellant submitted that the bank transaction was carried out on 9 November 2018 by a Brazilian bank which has a subsidiary in one of the contracting states to the EPC, namely the United Kingdom. Therefore, the fee should be considered to have been paid in due time under Article 7(3) of the Rules relating to Fees.

However, under Article 7(3) of the Rules relating to Fees it is of no relevance whether the banking establishment through which payment is made has a subsidiary in one of the contracting states or not. What matters is whether the payment, through a banking establishment, was made in a contracting state (see T 401/97, points 4 and 5 of the Reasons). In the present case, the order to transfer the amount of the payment was given in Sao Paulo, Brazil, and therefore not in a contracting state. Article 7(3) of the Rules relating to Fees is thus not applicable.

2.5 In conclusion, the appellant did not pay the fees for further processing within the prescribed time limit, and no request for further processing was filed.

3. **Missed time limit for re-establishment of rights**

3.1 According to Article 122(1) EPC the appellant is, upon request, to be re-established in her right to file a request for further processing if she was unable to observe the time limit in spite of having taken all due care required by the circumstances. Under Rule 136(1) EPC, the request for re-establishment of rights must be filed in writing within two months of the removal of the cause of non-compliance with the period. The request is deemed to not have been filed until the prescribed fee has been paid.

3.2 The appellant's representative concedes that he was aware of having missed the time limit for further processing as of 1 February 2019. He further states that the knowledge of having missed this time limit was passed on from himself to the appellant's Brazilian attorney, and from the Brazilian attorney to the appellant. Afterwards, the Brazilian attorney informed

him that the appellant had been informed thereof. The appellant alleges that this last step - the knowledge of the appellant's representative in Europe that the appellant received the information about the missed time limit from her Brazilian attorney - matters for determining when the cause of non-compliance was removed. According to the appellant, this last step in the communication chain was completed on 11 March 2019.

3.3 The Board does not share the appellant's view. If a professional representative is appointed, the removal of the cause of non-compliance usually occurs on the date on which the professional representative becomes aware of the fact that a time limit has not been observed (see J 27/90, point 1. of the Headnote). The notification of the communication on the loss of rights to the professional representative must be considered as the removal of the cause of non-compliance, unless there are special circumstances. A person other than the professional representative being responsible for the payment of fees does not constitute special circumstances (see T 1588/15, points 5, 9 and 10.2 of the Reasons). Moreover, the removal of the cause of non-compliance is normally the actual receipt - and not the deemed notification - of the communication by the professional representative (T 2251/12, point 10 of the Reasons; see also T 812/04, point 2.1.1 of the Reasons).

3.4 Even if the cause of non-compliance had, as alleged by the appellant, only been removed on 11 March 2019, the prescribed fees for re-establishment of rights were still only paid on 17 February 2020. This would in any case be long after the expiry of the two-month time limit under Rule 136(1) EPC.

- 3.5 The appellant's arguments on the migration to a new docketing system do not concern the missed time limit for paying the fees for re-establishment of rights, but rather the subsequent failure to reply to the Receiving Section's communication (by which the appellant was informed about having missed this time limit).
- 3.6 In any case, re-establishment of rights is ruled out in respect of the period for requesting re-establishment of rights under Rule 136(3) EPC. This includes the period for paying the prescribed fees for such a request (with regard to Article 122(5) EPC 1973, see J 18/03, point 4 of the Reasons).
- 3.7 As the fees for the appellant's request for re-establishment of rights were not paid in time, the request for re-establishment is deemed to not have been filed. In the absence of such a request, the question whether the applicant and her representatives acted with all due care required by the circumstances does not need to be addressed.
- 3.8 In conclusion, the Receiving Section was correct in stating that the request for re-establishment of rights was deemed not to have been filed and that the European patent application was deemed to be withdrawn.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Eickhoff

W. Sekretaruk

Decision electronically authenticated