BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

Internal distribution code:
(A) [ ] Publication in OJ
(B) [ ] To Chairmen and Members
(C) [X] To Chairmen
(D) [ ] No distribution

Datasheet for the decision of 14 October 2010

Case 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. 83

Relevant legal provisions (EPC 1973):
-

Keyword:
"Sufficiency of disclosure (no)"

Decisions cited:
T 0206/83, T 0772/89, T 0629/05, T 0815/07

Catchword:
"Vacuum 1000 mbar" insufficiently disclosed.

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0120/08 **-** 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 14 October 2010

Appellant I: (Opponent)
EDESMA AktG
BITTEO - Sindos A5
GR-Thessaloniki (GR)

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

Appellant II: (Opponent)
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)

Respondent: (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:
Sieckmann, Dirk Christoph
Betten & Resch
Patentanwälte
Postfach 10 02 51
D-80076 München (DE)

As from 25 February 2011

Hess, Peter K.G., et al
Bardehle . Pagenberg
Galileiplatz 1
D-81679 München (DE)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 29 October 2007 rejecting the oppositions filed against European patent No. 1361804 pursuant to Article 102(2) EPC 1973.**

Composition of the Board:

Chairman: W. Sieber
Members: W. Ehrenreich
R. Menapace

Summary of Facts and Submissions

I. The mention of the grant of European patent No. 1 361 804 in respect of European patent application No. 01 934 212.0, which had been filed on 29 May 2001 as International Application PCT/GR01/00025 in the name of "*Creta Farm Anonimos Viomichaniki & Emporiki Etaireia",* was published pursuant to Article 97(3) EPC on 29 September 2004.

II. The patent was granted with three claims, Claims 1 and 3 reading as follows:

"1. 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 or 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 following stages:

(a) lean meat of a temperature of 0°C is mixed with H_2O 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."

"3. The products based on meat, with embodiment of olive oil, which are obtainable according to the methods of claims (1) and (2)."

Claim 2 is dependent on Claim 1.

The wording of step (c) in Claim 1 is identical to that of step (c) in Claim 1 as originally filed, with the exception that "Then" at the beginning of the text has been deleted and 1000 mBAR" has been replaced by "1000mbar" - hereinafter referred to as "1000 mbar".

III. Notices of opposition against the patent were filed by

- EDESMA AktG ("Opponent I") on 24 February 2005
- IFANTIS ABEE ("Opponent II") on 29 June 2005.

The oppositions were based on the grounds according to Article 100(a) EPC (Opponents I and II) and on the ground according to Article 100(b) EPC (Opponent II).

With respect to the objections under Article 100(a) EPC the opponents cited several documents and, in the course of the opposition proceedings, comparative tests were submitted by the patent proprietor (D31, D33-D36, D41) and by Opponent II (D32).

In the oral proceedings before the opposition division on 18 September 2007, the objections under Articles 100(a) and 100(b) EPC were discussed. As to the latter, the discussion focussed on the question whether or not the patent in suit disclosed the invention in a manner sufficiently clear and complete in view of the vacuum defined in the patent, namely a "vacuum 1000 mbar" to be applied in step (c) according to Claim 1 and a "vacuum 1000 mbar" 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.

In item 7 of the minutes of the oral proceedings (sent to the parties in a corrected version on 13 December 2007) the following is reported on statements made regarding this question by two technical experts of the patent proprietor who were present at the oral proceedings:
"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 [= the patent proprietor] who both held that the vacuum according to the aforementioned patent is a weak vacuum of 1000 and 960 mbar compared to the standard atmospheric pressure of 1013 mbar".

IV. With decision announced at the end of the oral proceedings on 18 September 2007 and issued in writing on 29 October 2007 the opposition division rejected the oppositions.

As to the meaning of the terms "vacuum 1000 mbar" and a "vacuum 960 mbar" - the latter value for step (b) being indicated in the description (only) - the reasons of the decision under appeal, point 4.2, state at page 6, second paragraph:

"…. *when the patent defined a vacuum of 1000 mbar or 960 mbar, this should be regarded as a vacuum with respect to the standard atmospheric pressure which was 1013.25 mbar. Accordingly, the values foreseen in the patent referred to a weak vacuum of 13.25 and 53.25 mbar below the surrounding atmospheric pressure. This interpretation has also been confirmed by the proprietor during the oral proceedings*."

The claimed invention was also found to be novel and inventive over the prior art.

V. Notices of appeal against that decision were filed by Opponent I ("Appellant I") on 8 January 2008 and by Opponent II ("Appellant II") on 7 January 2008, each with simultaneous payment of the prescribed fee.

Both appellants filed their respective statement setting out the grounds of appeal on 10 March 2008, in which the objections as to novelty and inventive step were maintained, as well as - by Appellant II - those in respect of the opposition ground according to Article 100(b) EPC. In addition a comparative test D44 carried out by one Dr. Hammer ("D44") was filed.

VI. In its letter of response dated 6 October 2008 the patent proprietor (hereinafter: "the respondent")

defended the maintenance of the patent as granted and, in the course of the written proceedings, made further submissions to support its position.

VII. In a communication issued 23 August 2010, the board, in preparation of the oral proceedings, made preliminary and non-binding observations on the issues of novelty, inventive step and the opposition ground pursuant to Article 100(b) EPC.

Concerning the latter issue, the board (in point III of the communication) pointed out to the parties that sufficiency of disclosure of the claimed invention depended on the provision of convincing evidence that the respondent's interpretation of the feature "vacuum 1000 mbar" in Claim 1, namely that this term related to a pressure of 13.25 mbar below surrounding air pressure, is what also the person skilled in the art would immediately and unambiguously understand when reading the application as filed.

VIII. In response to the board's communication the respondent filed, with its letter dated 30 September 2010 and received on the same day, a set of Claims 1 and 2 as a basis for an auxiliary request. This set of claims differed from the claims as granted by the deletion of product Claim 3.

As regards the understanding of the feature "vacuum 1000 mbar" and "vacuum 960 mbar", printouts of the following internet pages were submitted with the same letter:

A http://www.vacom.de/2/3files/vakuummesstechnik grundlagen.pdf;

B http://www.apt-huerth.de/APT_WebSite_DE/druckbe-zeichnungen.html;

C http://www.calsky.com/lexikon/de/txt/v/va/vakuum.php.

With its letter dated and received on 30 September 2010 Appellant I inter alia confirmed its position that the skilled person would not have immediately and unambiguously applied the respondent's interpretation of the term "vacuum 1000 mbar" and submitted, in support of its argumentation, a definition of the term "vacuum" from the "freie Encyclopädie Wikipedia" (D57).

IX. 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 1000 mbar" according to step (c) of Claims 1 of the main and auxiliary request. In the course of that discussion the respondent presented the following further documents:

D GR 20060100066 A, a Greek (national) patent application of Appellant I;

E GR 20050100136 B, the specification of a Greek national) patent granted to Appellant I;

F Document dated 21 September 2010 and headed "SUMMARY DECLARATIONS OF USE OF VACUUM DURING THE PRODUCTION O [*sic*] PROCESSED MEATS IN GREEK

PATENTS by Mr C. Genigeorgis (who was also present at the oral proceedings as expert accompanying the respondent's representatives).

Documents D and E, both drafted in the Greek language, included an English translation of the abstract. Over some passages in the claim section of document D a translation into English was written by hand which comprised the wording "vacuum 980 mbar" and "vacuum 940-980 mbar" over "980 mBAR" and "940-980 mBAR", respectively in the Greek text.

Document F in its paragraph 1 cites from the specification of the patent in suit the title and those sentences on page 3, in which "application of vacuum 960 mbar" (column 3, lines 46-48) and "application of vacuum 1000 mbar[s]" (column 3, lines 30-32) is mentioned, followed by the English translation of the titles and of sentences in the following patent documents, namely

- document E above: page 4, lines 11-14; claims page 1, lines 13-15, lines 20-22;

- document D above: page 5, lines 11-13, 14-16 and 18-18; claims page 1, lines 25-27; claims page 2, lines 1-5; claims page 2, lines 20-28; claims page 2, lines 33-34;

- Greek patent application GR 20050100084 of Appellant I: page 4, lines 18-20;

- "Approved" Greek patent number 100590 29-11-2006 page 5, lines 14-17; claims page 1, item 1c,

all of those sentences containing (in the English translation) the term "vacuum 950 / 980 / 940-980 / (950 mBAR".

X. The parties' arguments concerning sufficiency of disclosure (Article 100(b) EPC) in respect of "vacuum 1000mbar" to be applied in step (c) according to Claim 1 and a "vacuum 960 mbar" applied at step (b) in the example set out in paragraph [0020] of the patent specification can be summarised as follows:

(i) The respondent argued that the term "vacuum" meant that the pressure of a gas in a space is lower than the surrounding atmospheric pressure (see document A), which pressure is commonly defined either in terms of an absolute pressure, i.e. relative to absolute vacuum, or in terms of gauge pressure, i.e. relative to standard atmospheric pressure (= 1013.25 mbar), the value of the latter being marked with a negative sign ("-") in document A, paragraphs "Absolutdruck" and "Relativdruck" and document (B) paragraph "Relativdruck"). A skilled person reading the feature "vacuum 1000 mbar" in Claim 1, which was not marked with a negative (-) sign, would therefore immediately interpret this term as an absolute vacuum and would automatically choose the standard atmospheric pressure of 1013.25 mbar as reference pressure. Thus a skilled person reading the specification and the claims of the patent in suit would unambiguously interpret the terms "vacuum 1000 mbar" and "vacuum 960 mbar" as vacuums having an absolute pressure of 1000 and

960 mbar, respectively, that is to say low vacuums having a gauge pressure of -13.25 mbar and -53.25 mbar below the standard atmospheric pressure. Accordingly, the values appearing in the specification and the claims of the contested patent refer to a weak vacuum of 13.25 mbar and 53.25 mbar below the surrounding atmospheric pressure.

In this context it should be noted that the plant of the respondent in which the claimed process was carried out was situated about 50 m above sea level, where 1000 mbar represented a low vacuum. This was also in line with the test report D44 provided by Appellant I and showing in Table 2 that either no or a weak vacuum of -0.05 bar (-50 mbar) was applied during the cuttering step.

Furthermore, there is, as is well known to the skilled person, a lower limit of approximately 200 mbar to the vacuum in mixing and filling machines, because otherwise an extraordinary technical complexity of these machines would be required. Moreover, a vacuum of a gauge pressure of -1000 mbar, that is an absolute pressure of 13.25 mbar, is not feasible, since at this pressure the boiling temperature of the water in the mixture is so low that it would boil away, with the effect that the vacuum would break down.

The appellants' argumentation that a "vacuum 1000 mbar" could not be performed by a skilled person was not credible also for the reason that in documents (D) and (E), both patent documents

stemming from Appellant I itself, the vacuum applied during stuffing the meat was defined in the claims and the description by analogous terms, namely "vacuum 980 mbar", "vacuum 950 mbar" or "vacuum 940-980 mbar". Furthermore, it follows from the comparative tests D44 presented by Appellant I that its technical experts were able to carry out the invention underlying the patent in suit, since that document reports on the comparison of a product made according to the patent in suit with a product according to the state of the art (*"Vergleich eines patentgemäß hergestellten Produktes (charge 1) mit einem Produkt gemäß dem Stand der Technik (Charge 11)"* - page 1, paragraph 3, point 1.

After all, step (c) of Claim 1 relates to a conventional encasing of mixed meat components at a low vacuum which could be performed by a skilled person without any problems.

(ii) The arguments of the appellants were essentially the following:

There is no disclosure in the patent further defining "vacuum 960 mbar" or "vacuum 1000 mbar", let alone instructing the person skilled in the art that the required "vacuum x mbar" (x = 1000 and 960, respectively) is tantamount to the result of the equation:

"Vacuum x mbar" = "actual pressure [of the surrounding atmosphere at the location where the plant is operated] minus (1013 mbar - x)"

as is the patentee's position. As, again according to the patentee, the application of vacuum is one of the decisive features of the method claimed in the opposed patent, it is quite astonishing that for reproducing the method according to Claim 1 different local pressures (e.g. of 1000 mbar at sea level, about 945 mbar in Munich and about 915 mbar in Granada, Spain) had to be applied. Such a site-specific interpretation of an expression is not in line with the requirement of an enabling disclosure.

Also in view of the following a skilled person reading feature (c) of Claim 1 would not interpret the vacuum values according to the respondent's position:

As can be seen from D 57, "vacuum" means an (almost) empty space. Where the pressure in a container is only slightly lower than the atmospheric pressure, normally the expression "lowered pressure" or "reduced pressure" is used. So, in the patent in suit an expression like "reduction of the pressure to 1000 mbar" should have been used for clearly defining the pressure to be applied according to the patentee.

In the given context, the use of "vacuum 1000 mbar" is rather an indication that an almost complete removal of the air was meant, because, as set out in paragraph 20 of the specification of the patent in suit, the vacuum serves to reduce the quantity of enclosed oxygen in order to avoid

an undesired oxidation of the meat products. The application of a vacuum of usually between 50% and 80% for this purpose being already state of the art, the skilled person would understand that a significant reduction of the pressure - namely by 1000 mbar, and not only by 13.25 mbar - is required.

However, such a pressure reduction as well as one to 1000 mbar absolute (representing 13.25 mbar below standard pressure) can be qualified as a "vacuum" only at locations where the surrounding (atmospheric) pressure is above 1000 mbar, i.e. at or near sea level - for instance at the site of the respondent's plant - but not at locations with a lower surrounding pressure, such as Munich (945 mbar) or Granada (915 mbar), where 1000 mbar constitute an overpressure.

Under these circumstances a skilled person intending to encase the meat product at a "vacuum 1000 mbar" was not able to determine which vacuum actually had to be applied in order to carry out the invention properly.

As regards the respondent's defence that Appellant I in its own patent documents D and E characterised the vacuum by analogous terms like "vacuum 950 mbar" or "vacuum 940-980 mbar", Professor Ambrosiadis had stated that the experiments relating to the above documents were carried out under his supervision and that the vacuum actually applied was -950 mbar and -940 to -980 mbar gauge pressure, respectively, i.e. a

vacuum which was conventionally applied in meat stuffing devices. This was also corroborated by Dr. Hammer who stated that the vacuum encasing step in the experiments D44 was carried out at -1 bar.

Rather, the patentee's technical experts, who have jointly signed and are therefore jointly responsible for the comparative test D35, which, inter alia, investigated the effect of the applied vacuum on the obtained meat product, made mutually contradictory statements on the meaning of the expressions in question. Dr. Genigeorgis had repeatedly stated during the oral proceedings before the opposition division that "vacuum 960 mbar" means 960 mbar below standard pressure, or 53 mbar absolute (see page 2, paragraph 7 of the amended version of the minutes) and that "vacuum 1000 mbar" means a reduction by 1000 mbar and not to 1000 mbar. If even the patentee's own technical experts were unable to determine what vacuum had to be applied in order to obtain the purportedly improved properties of the meat product, that could not be expected of the person skilled in the art.

For these reasons, the disclosure was insufficient and the patent did not enable the person skilled in the art to reproduce the method claimed.

XI. The appellants requested that the decision under appeal be set aside and that the patent be revoked.

XII. The respondent requested that the appeals be dismissed or, alternatively, that the patent be maintained on the basis of Claims 1 and 2 of the auxiliary request filed with letter dated 30 September 2010.

XIII. By a letter dated 4 November 2010 the respondent requested amendment of the minutes of the oral proceedings which had been dispatched to the parties on 19 October 2010.

By its communication dated 19 November 2010 the board informed the parties of its decision to reject the request and of the reasons for that decision.

In a letter dated 1 December 2010 the respondent stated that it "insists on the request to amend the minutes", because, *inter alia,* it was necessary to have the statements of the Appellants' experts in the minutes "[i]n order for the respondent to exercise effectively its right to apply for review of the case before the Enlarged Board of Appeal" and the refusal to incorporate into the minutes the relevant statements of the parties "constitutes a de facto elimination of the *effet utile* of any petition for review by the Enlarged Board of Appeal".

Reasons for the Decision

Procedural matters

1. The appeals are admissible.

2. As regards the respondent's request for amendment of the minutes, i.e. actually for a more detailed version of the minutes of the oral proceedings, the board is bound by the decision to reject this request communicated to the parties on 19 November 2010 and can no longer change it itself. Thus, this board is no longer empowered to assess whether the minutes as they stand and/or the refusal to amend them according to the respondent's suggestions constituted a violation of any of the parties' rights. The possibility to correct a decision under Rule 140 EPC is limited to linguistic errors, errors of transcription and obvious mistakes. The respondent did not rely on any such error or mistake and the board too is not aware of any such deficiency of the decision to reject the requested amendment.

Sufficiency of disclosure of the invention - Article 83 EPC

3. Pursuant to Article 83 EPC the "European patent application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art". According to the jurisprudence of the boards of appeal the standard of disclosure for this requirement is that it must be possible to reproduce the invention on the basis of the original application documents without any inventive effort and undue burden, whereby the skilled person may use his common general knowledge to supplement the information contained in the application, textbooks and general technical literature forming part of the common general knowledge (see e.g. decisions T 629/05, T 206/83, T 772/89).

4. The subject-matter of Claim 1 as granted discloses the invention as consisting in a process for the production of goods based on meat, which process is characterised by four essential process steps (a) to (d). Process step (c) provides that the mixture produced in steps (a) and (b) *"goes to filling machines where it is encased with simultaneous application of vacuum 1000 mbar..."*. The equivalent wording can be found in original Claim 1.

No further information on the value of the vacuum to be applied in step (c) is found in the application as filed or in the patent specification.

Hence, in the present case it has to be examined first whether a skilled person having read the application as filed would be able, on the basis of his general knowledge and without undue burden, to reliably define "vacuum 1000 mBAR" or "vacuum 1000 mbar", as it was granted, because keeping to that parameter during the vacuum encasing step (c) is a prerequisite for carrying out the solution to the technical problem for which protection is sought in Claim 1.

5. "Vacuum 1000 mbar"

5.1 For technical purposes, a vacuum is commonly defined as being present where inside a container/apparatus the (absolute) gas pressure is lower than the gas pressure outside the container/surrounding the apparatus (see e.g. D57, page 1 "Begriffserklärung", document A, page 1 "Vakuum").

5.2 A commonly used unit for indicating the gas pressure is "bar" or "millibar" ("mbar"), the latter unit being used in the patent in suit.

5.3 A gas pressure is normally measured as an absolute pressure relative to the absolute vacuum (pressure of zero). In contrast, where the pressure is measured relative to the given surrounding pressure ("barometric pressure") - i.e. so-called "gauge pressure" - one speaks either of an overpressure or, if the pressure is lower than the surrounding pressure, of a reduced/lower pressure or vacuum. The latter is made clear by putting "(rel)" or "-" before the value of the vacuum, e.g. "-50 kPA" (see document B and document A, "Vakuum").

6. It is against this background that in order to be able to carry out the claimed process the person skilled in the art must and therefore would try to establish the meaning of "vacuum 1000 mbar" in Claim 1, because the patent (and the underlying application as originally filed) is silent on the meaning of that value (as well as of "vacuum 960 mbar" mentioned in the description of step (b) of the claimed process).

6.1 Giving "vacuum 1000 mbar" its literal meaning, i.e. that of an absolute pressure, immediately leads to difficulties, even contradictions, which would prevent the skilled person from such an understanding:

An absolute pressure of 1000 mbar would be so close to that prevailing at sea level (around 1013 mbar) that it would not constitute an reduced/lower pressure (and thus a vacuum) in the larger part of the inhabited regions of the world, with the consequence that either

it would be a feature of the claimed process that it had to be carried out at or close to sea level, or the performing of the invention would be geographically restricted. There is no technical reason indicated in the application or otherwise evident to the skilled person which in the given technical context could support such an understanding. Even the respondent (proprietor) did not adopt such an interpretation.

6.2 As regards the second possible understanding of "vacuum 1000mbar", namely as a gauge pressure, here of -1000 mbar, that is a "significant" reduction of the pressure (not to, but by 1000 mbar), as Appellant I argued and the respondent's technical expert Dr. Genigeorgis stated before the opposition division (point II, above), the same difficulties arise. Again, such a gauge pressure (= a reduced/lower pressure, see point 5.3 above), by its very definition, can only be present at places with an atmospheric/barometric pressure higher than 1000 mbar (absolute), i.e. close to sea level, and there is nothing pointing to such an understanding by the person skilled in the art.

That being so, it is immaterial whether or not Appellant I was actually able to carry out the vacuum encasing step at a pressure of -1 bar (as Dr. Hammer affirmed in regard to the experiments D 44 - point XVIII, ii), above). Equally, it is irrelevant whether the encasing step is indeed not feasible at an absolute pressure of 13.25 mbar since the vacuum would break down because of the low boiling temperature of the water in the mixture (as the proprietor (respondent) also argued, see point VIII, (ii) above), or for other

technical and/or cost reasons. Therefore, these issues need not be pursued further.

6.3 According to the respondent's (proprietor's) position the true meaning of the term "vacuum 1000 mbar" as understood by the skilled person is, however, yet another one, namely the standard atmospheric pressure of 1013.25 mbar minus 1000 mbar = 13.25 mbar below the surrounding atmospheric pressure at a given place, i.e. a weak vacuum of 13,25 mbar gauge pressure.

6.3.1 This interpretation was accepted by the opposition division, but without any substantiated reasoning, in fact nothing more than because "[t]his interpretation had been confirmed by the patent proprietor" (point 4.2 of the reasons reproduced under point IV, above, cf. also item 7 of the minutes of the oral proceedings before the opposition division, reproduced under point III above). In respect of this crucial issue the decision under appeal thus suffers from a deficiency under Rule 111(2) EPC, first requirement.

6.3.2 Documents A and B filed in response to the communication which the board had issued in preparation of the oral proceedings and in which it gave also a preliminary view on that issue (Article 100 (b) EPC) do not support the respondent's position (see point X. (i) above). This is also true for document C according to which the term "Vacuum" describes the state of a fluid in a volume at a pressure below the atmospheric pressure at normal conditions, and the range between 1000 and 1 hPa (= mbar) is called "Grobvakuum" (weak vacuum). It is clear from the values indicated for the further ranges (strong, high, ultrahigh, … vacuum),

that all these values are absolute values unrelated to the surrounding pressure, not gauge pressures related to the surrounding atmospheric pressure. Therefore, also from this document it cannot be derived that a "vacuum 1000 mbar" means an reduced/lower pressure ("mild vacuum" as the respondent put it) of (exactly) 13.25 mbar in relation to any surrounding pressure.

6.3.3 Beyond this, the respondent has not put forward any technical argumentation for his contention that the skilled person reading the specification and the claims of the patent in suit would unambiguously interpret the term "vacuum 1000 mbar" as referring to a weak vacuum of 13.25 mbar below the surrounding atmospheric pressure, a view which was not even shared by all of the respondent's own experts (see item 7 of the minutes of the oral proceedings before the opposition division - point III, supra). In particular, the respondent has not shown anything in the patent documents or in the common general knowledge from which the skilled person would conclude that the solution of the problem underlying the invention is conditional upon such a weak/"mild" vacuum.

6.3.4 Rather, this is questionable in view of the resulting wide range of the absolute pressure at the encasing step of the claimed process, depending on the geographical location/altitude of the meat processing plant. It is furthermore questionable whether a skilled person intending to remove oxygen in order to avoid oxidation according to paragraph [0020] of the patent in suit would consider it appropriate to reduce the air pressure only marginally by 13.25 mbar.

6.3.5 The respondent furthermore relied on the fact that Appellant I in its own patent documents D and E used the analogous terms "vacuum 940 mbar" and "vacuum 940 to 980 mbar". However, apart from the assertions by one of the opponents' experts that the experiments relating to these documents had been carried out at gauge pressures in the range of 940 to 980 mbar, i.e. in a strong vacuum, an undefined term used in a patent document does not become meaningful to the person skilled in the art simply by the use in patent documents of a competitor (here opponent/appellant I), in particular where, as in the present case, it is strongly disputed that the terms in question have the same meaning in the document(s) of each side.

6.3.6 The respondent's eventual contention that a "vacuum 1000 mbar" at the encasing step is not essential for carrying of the claimed process is not convincing, quite the contrary. It is because of a deliberate choice by the respondent as the then applicant that the term in question appears in the application as originally filed and the specification of the patent in suit. In general, as pointed out in decision T 815/07, the purpose of a parameter contained in a claim is to define an essential feature of the invention. Its significance is that the presence of this technical feature contributes to the solution of the technical problem underlying the invention. So, if this contention was true, the use of the critical term in the patent in suit would in addition be misleading.

7. From the above it follows that a skilled person is at a loss when trying to perform the "application of vacuum 1000 mbar" at the encasing step of the process claimed

in either of the respondent's main and auxiliary request. Therefore, neither of these requests is allowable due to non-compliance with Article 83 EPC, a provision whose purpose is to ensure a fair and complete disclosure of the subject-matter for which protection is sought.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar The Chairman

C. Rodríguez Rodríguez W. Sieber