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**Datasheet for the interlocutory decision
of 23 February 2009**

Case Number: T 0871/08 - 3.3.05

Application Number: 00850170.2

Publication Number: 1101733

IPC: C01B 15/023

Language of the proceedings: EN

Title of invention:

Process and composition for the production of hydrogen peroxide

Patentee:

Akzo Nobel N.V., et al

Opponents:

I: ARKEMA FRANCE
II: Evonik Degussa GmbH
III: Kemira OYJ

Headword:

Hydrogen peroxide/AKZO

Relevant legal provisions:

EPC Art. 108
EPC R. 112(1)

Relevant legal provisions (EPC 1973):

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Keyword:

"Appeal of opponent II deemed not to have been filed"

Decisions cited:

T 0017/83

Catchword:

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Case Number: T 0871/08 - 3.3.05

INTERLOCUTORY DECISION
of the Technical Board of Appeal 3.3.05
of 23 February 2009

Appellant 01:
(Opponent I)

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Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted
26 March 2008 concerning maintenance of
European patent No. 1101733 in amended form.

Composition of the Board:

Chairman: G. Raths
Members: J.-M. Schwaller
H. Preglau

Summary of Facts and Submissions

- I. With the decision dated 26 March 2008 the opposition division maintained European patent No. 1 101 733 in amended form.
- II. The three opponents filed an appeal against this decision.

Opponent II (Evonik Degussa GmbH) filed in particular its notice of appeal with a letter dated 9 April 2008, received by the Office on 11 April 2008.

Concerning the appeal fee, opponent II stated that the appeal fee would be paid by online deduction from the current account. It further stated that if the fee would not be debited until one day before expiry of the time limit, the Office was requested to do so ("*Die erforderliche Beschwerdegebühr werden wir online von unserem laufenden Konto 280 002 15 abbuchen. Sollte bis einen Tag vor Ablauf der Frist nach Artikel 108 EPÜ keine Abbuchung erfolgt sein, beauftragen wir vorsorglich das Europäische Patentamt den Betrag fristgerecht abzubuchen*").

The statement of grounds of appeal was received by the Office on 19 June 2008. An appeal fee had not been paid.

- III. With EPO form 2936, the registrar of the board informed opponent II on 1 August 2008 that the appeal fee had not been paid and that pursuant to Article 108, second sentence, EPC, the appeal was deemed not to have been filed. Referring to the notice of appeal of 9 April

2008, the communication further stated that the payment of fees had to be done in one way or the other, but not under conditions.

IV. With letter dated 16 September 2008 and received by the Office on 18 September 2008, opponent II requested a decision according to Rule 112(2) EPC on the question as to whether the appeal fee had been paid in time.

V. The arguments of opponent II can be summarized as follows:

The request that the Office should deduct the appeal fee from the current account if the appeal fee had not been paid until one day before the expiry of the time limit for payment met all the requirements of Articles 5(2) and 7(1) of the Rules relating to Fees (RFees). Reference was made to decision T 71/83 (later corrected as T 17/83), where the mere information about a request for deduction of the appeal fee had been accepted as sufficient even if the request as such would have never been sent to the Office.

Reasons for the Decision

1. According to Article 108 EPC, notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid.

According to Article 5(1) RFees, the fees due to the Office shall be paid in euro:

(a) by payment or transfer to a bank account held by the Office,

(b) by payment or transfer to a Giro account held by the Office, **or** (emphasis added)

(c) by delivery or remittance of cheques made payable to the Office.

According to Article 5(2) RFees, The President of the Office may allow other methods of paying fees than those set out in paragraph 1.

The arrangements for deposit accounts (ADA) and their annexes (Supplement to the Official Journal 10/2007) - make available such a further method of paying fees, by opening a deposit account in the Office, with the payment being effected by debiting the deposit account on the basis of the payment data supplied by the user online (Annex B.1 to the ADA, point 3.2).

2. Concerning the method of payment, Opponent II indicated in its notice of appeal that it would pay online from its current deposit account. If until one day before the expiry of the time limit for payment, no such debit was effected, the Office was requested to debit the amount.

As opponent II did not pay the appeal fee within the time limit, the registrar could only send the respective form informing opponent II that a loss of rights had occurred (Rule 112(1) EPC).

3. Although the legal provisions relating to fees contain different options for the way of payment, it is up to a party to proceedings before the Office to decide which way it considers the most appropriate.

The party has however either to give a clear instruction to the Office to debit the fee from its current account or to indicate in a clear manner that it will make this debit by using the online facility.

4. Following the idea of opponent II, the Office should thus have monitored whether the appeal fee had been paid until the date indicated in its notice of appeal.

The board observes that the duty of the Office is to oversee time limits according to the provisions of the EPC and its corresponding Rules, it is not to oversee particular time limits arbitrarily set by a party. Therefore opponent II could not expect the Office to debit the appeal fee after having checked whether the fee had been paid until one day before the time limit set for the payment.

5. Decision T 0017/83 cannot help here because it deals with a completely different situation. In said decision the party announced that the instruction to deduct the appeal fee was sent to the Office on a specified day. In fact, the instruction never reached the Office or was at least not found in the Office. The question dealt with in this decision was whether the mere mentioning that an order to deduct a fee from a current account could replace the real order which was never found in the Office. This question had been answered positively.

6. In the present case the question to be dealt with concerns an instruction which effectively arrived at the Office but which was given conditionally.

The Board has thus to consider whether the instruction given by opponent II is in conformity with the provisions of the EPC, and whether the Office has to act according to the specific wish of opponent II to oversee a time limit set by the latter.

The board observes that following this idea would mean that the Office had to install monitoring tools in order to deal with the specific request to check the individual payment of a fee on the specific date arbitrarily fixed by opponent II. Obviously opponent II expected the Office to oversee a deadline which is not one of those indicated in the EPC, but one which would take into account its particular interests.

In this respect, it must however be underlined that the Office is only responsible of the surveillance of time limits set within the framework of the EPC, it is not in charge of the surveillance of time limits set by and in the own interest of a particular party.

7. The argumentation of opponent II that all indications to deduct the correct sum from the current account were given does not meet the point. That the Office had not deducted the appeal fee from the current account in time has nothing to do with a lack of information concerning the necessary details for deducting the due amount, but is a consequence of the conditional order given by Opponent II. Such a conditional order is however neither part of the provisions of the EPC, nor

foreseen by the ADA. As a matter of fact, the payment of the appeal fee lies exclusively within the responsibility of the appellant or its representative, who cannot discharge themselves by shifting the responsibility to the Office, let alone with a conditional order.

8. Taking these considerations into account, the board comes to the conclusion that the appeal fee to be paid by opponent II had not been paid in time, so that its notice of appeal is deemed not to have been filed (Article 108 EPC).

Order

For these reasons it is decided that:

The appeal of opponent II is deemed not to have been filed.

The Registrar:

The Chairman:

C.Vodz

G.Raths