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**Datasheet for the decision
of 20 January 2017**

Case Number: T 2508/13 - 3.3.05

Application Number: 05105684.4

Publication Number: 1736461

IPC: C05F17/02, C05F17/00

Language of the proceedings: EN

Title of invention:

System and method for treatment of organic waste

Applicant:

BIOE S.R.L.

Headword:

Organic waste treatment/BIOE

Relevant legal provisions:

EPC Art. 56

RPBA Art. 12(4), 15(3)

Keyword:

Inventive step - (no)

Requests filed with statement of grounds not admitted

Decisions cited:

T 1067/08, T 1231/09

Catchword:



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Case Number: T 2508/13 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 20 January 2017

Appellant: BIOE S.R.L.
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 1 July 2013 refusing European patent application No. 05105684.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman H. Engl
Members: G. Glod
P. Guntz

Summary of Facts and Submissions

I. The appeal lies from the decision of the examining division to refuse European patent application EP 05 105 684.4 because it did not fulfil the requirements of Articles 123(2), 84 and 56 EPC.

In the decision under appeal, the following documents relevant to the present decision were cited:

D1: EP-A-1 146 027

D2: DE-U1-202 08 885

II. With the statement of grounds of appeal of 21 October 2013, the appellant submitted a main and two auxiliary requests.

III. In a communication pursuant to Rule 100(2) EPC of 7 June 2016, the board raised the question of the admissibility of these requests under Article 12(4) of the Rules of Procedure of the Boards of Appeal (RPBA). *Inter alia* it raised objections under Article 56 EPC.

IV. By letter of 7 September 2016, the appellant submitted a new set of claims designated as "amended claims". Since the appellant did not explicitly withdraw the two auxiliary requests, the board understands the said "amended claims" to replace only the previously filed main request.

V. The two independent claims 1 and 14 of the main request read as follows:

"1. System for the bio-stabilisation process of the organic fraction of a static waste pile, comprising the following components:

- impermeable base (1) for supporting the pile (2)

- aeration system for controlled blow-in of air
- breathable impermeable cover (3) of the pile (2)
- sensors (11, 12, 13, 14) for controlling the process conditions **characterized in that** the system is provided with containment walls (20) for the pile (2), wherein the breathable impermeable cover (3) is fixed on said walls (20) so that during the bio-stabilization process a space is formed between the top of the pile and the cover (3)."

"14. Process for biostabilisation of the organic component of a static waste pile, comprising the following phases:

- arrangement of the pile (2) on a impermeable base (1) inside containment walls (20)
- covering of the pile (2) with a breathable impermeable sheet (3) and fixing of the sheet on said containment walls (20) so that a space is formed between the roof of the pile and the cover (3)
- controlled blow-in of external ambient air by means of an aeration system
- adjustment of the internal temperature of the pile to a value of between 60 and 80°C"

- VI. The appellant was summoned to oral proceedings scheduled to take place on 20 January 2017.
- VII. By letter of 15 December 2016, the appellant announced that it would neither attend nor be represented at the oral proceedings.
- VIII. Oral proceedings took place on 20 January 2017 in the absence of the duly summoned appellant. At the end of the oral proceedings the chairman announced the decision to dismiss the appeal.

IX. The appellant's arguments may be summarised as follows:

The invention dealt with the treatment of organic waste and avoided the use of biofilters and the dispersion of unpleasant smells into the air but, at the same time, involved the classic technique of composting or biostabilisation of the organic waste in a static pile.

D1 dated from 2001, and it was strange that in the four years between the filing of the application and the publication of D1 nobody had thought about the simple solution offered by the present invention.

The examining division had not correctly understood the inventiveness of the claimed subject-matter, and its decision was based on an "ex post facto" analysis.

X. The appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of the set of claims designated as "amended claims" and submitted by letter of 7 September 2016 (main request) or, in the alternative, on the basis of the first or second auxiliary request as filed with the statement of grounds of appeal.

Reasons for the Decision

1. Absence from oral proceedings

In accordance with Rule 115(2) EPC and Article 15(3) RPBA, a board is not obliged to delay its decision by reason only of the absence at the oral proceedings of a party duly summoned.

It is established case law that appellants who submit amended claims before the oral proceedings and

subsequently do not attend those proceedings must expect a decision based on objections which might arise against such claims in their absence (see Case Law of the Boards of Appeal, 8th edition, July 2016, IV.E.4.2.6 d)).

In the present case, the appellant was summoned to the oral proceedings after having submitted a new main request with the letter of 7 September 2016. Therefore, it had to expect that said request could be held not to be allowable. Thus the appellant cannot be taken by surprise by the present decision.

In addition, the appellant had the opportunity to be heard, which it waived by deciding not to be present at the oral proceedings.

Main request

2. Article 56

2.1 The invention

The invention concerns a system and a method for the treatment of the organic fraction of solid waste.

2.2 Closest prior art

D1 is considered the closest prior art, since it relates to a biostabilisation process of the organic fraction of waste for the production of compost (claim 1 and paragraph 50). In figure 1 it discloses waste arranged in a trapezoidal heap onto a waterproof concrete bed (1), under whose surface ducts (10) have been embedded to release the air required for the oxidation of the heap biomass (paragraphs [0009] and

[0010]). The material to be treated is separated from the outside environment through a waterproof transpiring cover (3), whose function is assured by its foam PTFE membrane (Goretex) (paragraph [0017]). Sensors (11, 12, 13 and 14) monitor and control temperature, humidity, oxygen and pH value, which allows a first quality compost to be produced within 21 days from the process start-up (paragraphs 31, 33, 40, 41, 46, 47 and 49). The set-up allows the control of bad smells generated inside by the presence of substances. Only minimum traces of smelling compounds come out from the heap, while high quantities of odourless CO₂ are pushed upward by the insufflation of new fresh air from the bottom (paragraphs [0024] and [0027]).

2.3 Problem

According to the application, the problem to be solved is to provide a simple, economically advantageous system and process for the biostabilisation of waste (paragraph [0009]).

The appellant's argument that the claimed system avoided the dispersion of unpleasant smells into the air can be accepted, but this particular effect does not constitute a difference with respect to D1.

2.4 Solution

As a solution to the above problem, a system according to claim 1 is proposed which is characterised in that it has containment walls and in that the cover is fixed on said walls.

The claim feature "*that during the biostabilization process a space is formed between the top of the pile and the cover (3)*" is not part of the solution, since it is not an apparatus feature, but part of the process occurring in the apparatus. It is the inevitable result of the biostabilisation process occurring in the apparatus.

2.5 Success of the solution

It can be accepted that the problem is solved, since the presence of containment walls allows the piles to be made larger and provides for better fixing of the cover.

2.6 Obviousness

The claimed solution is obvious in view of the prior art, however, for the following reasons:

D2 also relates to the problem of providing a simple and effective method for biomass treatment (page 3, lines 5 to 7). In figure 1 it discloses a system with containment walls and teaches the advantages thereof. It suggests the use of containment walls that can be adapted in size depending on the heap to be treated (see page 10, second full paragraph). In addition, it specifies that the heaps are covered and that the cover is fixed on the containment walls (page 12, lines 7 to 9).

In view of the problem posed, the board has no doubt that the skilled person would consider D2 when starting from D1, since both documents relate to the treatment of organic waste.

The skilled person would thus find a clear indication in D2 that containment walls are beneficial, thereby providing a clear pointer towards the claimed solution.

The fact that nobody had published the present solution within four years cannot be taken as an indication that a prejudice existed against the combination of the teachings of D1 and D2. There is no support in the form of a publication representing the skilled person's general knowledge showing that such a prejudice existed.

- 2.7 The board concludes that the subject-matter of claim 1 is obvious in view of D1 in combination with D2. Therefore, the main request is not allowable.

First and second auxiliary requests

3. Inadmissible requests

According to Article 12(4) RPBA the board may hold inadmissible facts, evidence or requests which could have been presented in the first-instance proceedings.

In the present case, the applicant, by letter of 10 May 2013, had filed a main request and an auxiliary request during the examination procedure. These requests were discussed during oral proceedings before the examining division. After the discussion of these requests, the examining division informed the applicant that an inventive step could not be acknowledged. The applicant declined to file a new request and subsequently withdrew these requests (see Minutes of the oral proceedings of 18 June 2013, page 1, paragraphs 9 and 11). Only one request was maintained, on which the decision of the examining division was

based.

With the statement of grounds of appeal, the appellant filed two auxiliary requests that are essentially similar, but broader in scope than the requests withdrawn before the examining division.

By withdrawing the requests before the examining division, the appellant avoided the issuing of a negative decision on them by the examining division. Therefore, admitting the first and secondary auxiliary requests into the appeal proceedings now would entail the board having to decide on subject-matter that was already present before the examining division (relating to the position of the humidity sensor and relating to means for setting internal reference process parameter values defining an equilibrium condition), but for which no reasoned decision had been given by the examining division. The main purpose of the appeal proceedings is, however, to review the decisions of the department of first instance (see T 1231/09, Reasons 1.3).

In addition, the applicant had declined the examining division's express invitation to file new requests (see Minutes of the oral proceedings of 18 June 2013, page 1, paragraph 9). It did not give any reasons why the current requests had again been filed with the statement of grounds of appeal.

The board considers that the applicant cannot simply withdraw requests when it believes that the examining division does not correctly assess the inventive step of the claimed subject-matter and later on reinstate these or substantially similar requests during appeal proceedings. Such behaviour constitutes "forum

shopping", which is not the purpose of appeal proceedings (see T 1067/08, Reasons 7.2).

Therefore, as indicated in the communication pursuant to Rule 100(2) EPC, the board exercises its discretion under Article 12(4) RPBA to the effect that the first and second auxiliary requests are not admitted into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Vodz

H. Engl

Decision electronically authenticated