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Questions about this communication ?
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Formalities officer
Heim, Patrick

Then Christoph
Frohschammerstr. 14
80807 München
ALLEMAGNE

Date
08.07.2021

Reference	OPPO 02	Application No./Patent No.
		11729247.4 - 1118 / 2575433
Applicant/Proprietor		
Carlsberg Breweries A/S, et al		

EPA/EPO/OEB Formblatt/Form/Formulaire : 2310

Empfangsbescheinigung über den Zugang des vorstehend bezeichneten Schriftstücks
Acknowledgement of receipt of the document specified above
Récépissé du document spécifié ci-dessus

Unter Bezugnahme auf die Mitteilung im ABl EPA 7/2010, 377 wird gebeten, die Empfangsbescheinigung mit Empfangsdatum und Unterschrift zu versehen und **umgehend** an das EPA zurückzusenden:

With reference to the Notice in OJ EPO 7/2010, 377, you are requested to date and sign the acknowledgement of receipt and return it to the EPO **immediately**:

Conformément au communiqué paru au JO OEB 7/2010, 377, vous êtes prié d'indiquer sur le récépissé la date de réception du document, de signer le récépissé et de le renvoyer **sans délai** à l' OEB:

- **über die Online-Dienste des EPA** (als Anlage zu EPA Form 1038) / **through EPO Online Services** (as annex to EPO Form 1038) / **par les services en ligne de l'OEB** (en tant que pièce jointe au formulaire OEB 1038),
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Reference	Application No./Patent No.
OPPO 02	11729247.4 - 1118 / 2575433

Applicant/Proprietor
Carlsberg Breweries A/S, et al

Summons to attend oral proceedings pursuant to Rule 115(1) EPC

You are hereby summoned to attend oral proceedings arranged in connection with the above-mentioned European patent.

The matters to be discussed are set out in the communication accompanying this summons (EPO Form 2906).

The oral proceedings, which will be public, will take place before the opposition division

on 10.05.22 at 09.00 hrs *

No changes to the date of the oral proceedings can be made, except on serious grounds (see OJ EPO 1/2009, 68). If you do not appear as summoned, the oral proceedings may continue without you (R. 115(2) EPC).

Your attention is drawn to Rule 4 EPC, regarding the language of the oral proceedings, and to the Special edition No. 3 OJ EPO 2007, 128, concerning the filing of authorisations for company employees and lawyers acting as representatives before the EPO.

The final date for making written submissions and/or amendments (R. 116 EPC) is 10.03.22.

* The parties will be informed on the form of oral proceedings nearer to the scheduled date.

1st Examiner:
Obel, Nicolai

2nd Examiner:
Kania, Thomas

Chairman:
Mundel, Christophe

For the Opposition Division

Annexes:
Confirmation of receipt (Form 2936)
Rule 4 EPC (EPC Form 2043)
Communication (EPO Form 2906)

Registered letter

to EPO postal service: 05.07.21

I. Summary of Facts and Submissions

1 European patent 2 575 433 having the title "ENERGY SAVING BREWING METHOD" is based upon European patent application No. 11 729 247.4 filed on 31-05-2011. It claims priority of DK 201070243 filed on 03-06-2010.

The mention of the grant of the patent has been published in the European Patent Bulletin of 07-09-2016. Proprietor (P) of the patent is
Applicant 1:
Carlsberg Breweries A/S
Ny Carlsberg Vej 100
1799 Copenhagen V
DK

Applicant 2:
Heineken Supply Chain B.V.
2de Weteringplantsoen 21
1017 ZD Amsterdam
NL.

2 Notices of opposition have been filed by
Opponent 1 (O1):
Privatbrauerei Hirt Vertrieb GmbH /
Braucommune Freistadt/
Privatbrauerei Zwettler karl Schwarz GmbH et al
Hirt 1
9322 Micheldorf
AT
on 02-06-2017

Opponent 2 (O2):
Then Christoph
Frohschammerstr. 14
80807 München
DE
on 16-05-2017.

Opponents have requested revocation of the patent in its entirety based on Article 53(b) EPC, Article 54 EPC and Article 56 EPC with their notices of opposition.

O2 requested oral proceeding in case of an unfavourable decision.

3 A preliminary opinion was issued to the parties with a communication of 03-08-2018. OD introduced on its own motion an objection under Article 100(b) EPC corresponding to Article 83 EPC.

4 With letter of 30-11-2018, O1 provided further arguments and raised an objection under Article 83 EPC.

5 With letter of 13-12-2018, P provided further arguments and requested oral proceedings if the patent was not to be maintained as granted.

6 The parties were informed with communication of 27-06-2019 that OD intended to stay the proceedings because of the referral to the Enlarged Board of Appel of the case G3/19.

7 On 14-05-2020 the Enlarged Board of Appel issued the decision on the case G3/19.

8 On 11-06-2020, P requested the proceedings to be resumed.

II Preliminary and Non-Binding Opinion

Article 53(b) EPC

8.1 O1 has expressed the opinion that that the opposed patent is to be revoked as it describes subject matter within the exception to patentability. O1 referred also the European directive 98/44/EC.

8.2 O2 has also raised an objection with regard to Article 53(b) EPC and O2 referred also to the directive 98/44/EC. O2 observed that the scope of the claims encompasses any plant having the features as defined in claims 7-16 and O2 finds that subject matter of these claims is within the exception to patentability, Article 53(b) EPC.

8.3 P has in the response of 03-04-2018 presented the argument that claims 7-16 are directed to mutagenized plants thus representing a product of a technical process. P has referred to the specification of the opposed patent and pointed out that the claimed plant was a result of chemical mutagenesis and P referred to CA/56/17 (points 40-42) wherein chemical mutagenesis is considered to represent a technical process.

8.4 In opinion G 3/19 of 14 May 2020 the Enlarged Board of Appeal held (see Conclusion) that *"taking into account developments after decisions G 2/12 and G 2/13 of the Enlarged Board of Appeal, the exception to patentability of essentially biological processes for the production of plants or animals in Article*

53(b) EPC has a negative effect on the allowability of product claims and product-by-process claims directed to plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process features define an essentially biological process." However the Enlarged Board of Appeal also held (ibid.) that *"this negative effect does not apply to European patents granted before 1 July 2017 and European patent applications which were filed before that date and are still pending*."

Accordingly, as the present European patent was granted before 1 July 2017, OD is of the preliminary opinion that the subject-matter of the claims (7-16) is not excluded from patentability pursuant to Article 53(b) EPC in conjunction with Rule 28(2) EPC, irrespective of the question whether the claimed plants are exclusively obtained by an essentially biological process or produced by a technical process as explained by P with reference to chemical mutagenesis.

Article 54(1) and(2) EPC

9 O1 has presented the argument that the subject matter of claims 1-7 and 8-12 represents the usual steps during a malting process.

9.1 P has presented the argument that the subject matter of claims 1-7 and 8-12 is novel because no process is described in the prior art wherein a barley plant with mutations in LOX-1, LOX-2 and MMT leading to total loss of function of the enzymes is used.

9.2 OD has not been able to identify within the cited prior art methods and products having all the features of the claims. In this respect, claim 1(i) and claim 7 refer to a mutated barley plant having a number of technical features such as a) a first mutation that results in a total loss of functional LOX-1, b) a second mutation resulting in a total loss of functional LOX-2 and c) a third mutation resulting in a total loss of functional MMT.

O1 has stated that products and methods are well established in the art. However, OD has not been able to identify facts and evidence provided by O1 which would substantiate such allegations.

OD is thus of the preliminary opinion that the subject matter of the claims is new.

Article 56 EPC

10 O1 has argued that the subject matter of the opposed patent is not inventive as it relies an random mutations.

10.1 O2 has presented the argument that the subject matter of claims 1-16 is obvious in light of the common general knowledge which is cited in the opposed patent.

10.2 P has presented the argument that EPO has previously found the subject matter inventive in the sense of Article 56 EPC.

P has argued that the objection under Article 56 EPC cannot be considered as a valid ground in the present opposition proceedings because neither opponent has substantiated their arguments.

P has pointed out that EP2384110 and EP2373154 cannot be relied upon under Article 56 EPC because these documents were published after the priority date of the present application.

10.3 The parties are reminded that Article 56 EPC is to be discussed using the problem-solution-approach as set out in the Guidelines, see GL GVII-5.

10.3.1 OD notes that O2 with the notice of opposition argued that the description of the filed patent renders it clear that only known steps were combined for arriving at the claimed subject matter. OD is thus of the preliminary opinion that arguments regarding Article 56 EPC have been provided thus allowing P to understand and address the objection under Article 56 EPC. Consequently, it is the preliminary opinion of OD that Article 56 with reference to Article 100(a) EPC represents a ground for opposition, Rule 76(2)(c) and GL D-IV.1.2.2.1 - point (v).

10.3.2 O1 has with the notice of opposition referred to EP2384110 and EP2373154 in support of his argument under Article 56 EPC. OD is of the preliminary opinion that P is correct when observing that these documents cannot be relied upon under Article 56 EPC because they were published after the priority date. The opponents have not provided any proof that the priority of the opposed patent is not valid, see GL G-VII.2.

10.3.3 O2 has referred to the specification of the opposed patent as evidence of a lack of an inventive step. OD is of the preliminary opinion that the specification (§0010) of the opposed patent refers to WO02/053721 or WO2005/087934 which appear as suitable starting points as closest prior art.

It will be discussed whether any particular technical effect can be associated with the claimed products. If the number of plants can be screened in manner which is not an undue burden and can be be adequately reproduced (see below

regarding Article 83 EPC), OD is of the preliminary opinion that provision of an arbitrary plant with mutations in known genes not associated with any particular effect is obvious and contravenes Article 56 EPC.

Article 83 EPC.

11 In the initial communication issued on 03-08-2018, OD introduced Article 83 EPC corresponding to Article 100(b) EPC as ground for opposition on it own motion.

11.1 With letter of 13-12-2018, P has argued that Article 83 EPC was not a ground for opposition and no new facts or evidence allow OD to introduce this new ground for oppositions, P referred to G10/91 and GL D-V.2.2.

11.2 OD remains of the preliminary opinion that Article 100(b) can be introduced as a ground for opposition.

OD considers that Article 114(1) EPC applies to all proceedings before the EPO and Rule 81(1) EPC gives OD the possibility to examine on its own motion grounds which would prejudice the maintenance of the patent. This is reflected in GL DV-2.2.

"*Once proceedings for examining the opposition(s) have been initiated because an admissible opposition has been filed (although it may have been withdrawn in the interim), there may be reason to believe that other grounds exist which, prima facie, in whole or in part prejudice the maintenance of the European patent. If that is the case, these grounds should generally be examined by the opposition division of its own motion pursuant to Rule 81(1). Such other grounds may result from facts emerging from the search report or the examination procedure, the examiner's personal knowledge or observations presented by third parties pursuant to Art. 115 (see also E-VI, 3).*" - [emphasis by OD]

11.3 OD maintains the preliminary opinion that the subject matter of is not sufficiently disclosed over the full breadth of the claims as set out in the communication of 03-08-2018.

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Wichtige Hinweise zur mündlichen Verhandlung

Das Europäische Patentamt verfügt über keine eigenen Dolmetscher. Diese müssen im Bedarfsfall von außerhalb, teilweise sogar aus anderen Ländern, beigezogen werden, was mit einem hohen Aufwand an Kosten und organisatorischen Vorbereitungen verbunden ist. Muss ein Verhandlungstermin kurzfristig abberaumt werden, können Kosten für bestellte Dolmetscher nicht mehr vermieden werden.

Es wird daher gebeten, eine Simultanübersetzung nur bei wirklichem Bedarf in Anspruch zu nehmen. Es wäre wünschenswert, wenn sich die Beteiligten (zweckmäßigerweise gleichzeitig mit der Terminabstimmung) auf die Benutzung einer Amtssprache einigen könnten. Bei Verständigungsschwierigkeiten sind die Mitglieder der Einspruchsabteilung bereit zu helfen.

Nachstehend führen wir den Zeitpunkt auf, bis zu dem die Verfahrensbeteiligten aus organisatorischen Gründen gebeten werden, ihre bevorzugte (abgestimmte) Verhandlungssprache mitzuteilen. Bis dahin bitten wir auch bei Bedarf eine Simultanübersetzung zu beantragen. Regel 4 (1) EPÜ bleibt hiervon unberührt.

☐ Verfahrenssprache ist **Deutsch**

Von der/dem/den Einsprechenden wurde

☐ Englisch

☐ Französisch benutzt.

Es wird um eilige Mitteilung, möglichst per Online Filing (OLF), gebeten.

möglichst bis

Datum **10.03.22**

1. welche Sprache(n) Sie in der mündlichen Verhandlung verwenden (**Sprechen**)
2. aus welcher Sprache Sie eine Simultanübersetzung benötigen (**Hören**).

Important information concerning oral proceedings

The European Patent Office has no interpreters of its own. When interpreters are needed they have to be brought in from outside, sometimes even from other countries, which is costly and involves considerable organisation. If oral proceedings have to be cancelled at short notice, the cost of interpreters already engaged still has to be borne.

Please therefore make use of simultaneous interpreting facilities only where strictly necessary. If possible the parties should agree on an official language for the proceedings, preferably at the time when they arrange a date. The members of the Opposition Division witl be willing to help should any communication problems arise.

For organisational reasons, we ask parties to inform us by the date specified below of their preferred (agreed) language for the oral proceedings. We also ask them to request any simultaneous interpreting required by the same date. This does not affect application of Rule 4(1) EPC.

☑ Language of the proceedings is **English**

The language used by the opponent/s was

☒ German

☐ French.

Please inform us urgently, where possible by Online Filing (OLF).

if possible by

Date **10.03.22**

1. which language(s) you intend to use during the oral proceedings (**Speaking**)
2. from which language you need simultaneous interpretation (**Listening**).

Tres important Procédure orale

L'Office européen des brevets ne dispose pas de son propre service d'interprètes. Aussi faut-il appel le cas échéant à des interprètes de l'extérieur, qui viennent même parfois de l'étranger, ce qui occasionne des frais élevés et demande un grand travail d'organisation. Si la date d'une procédure orale doit être annulée au dernier moment, il n'est plus possible d'éviter les frais d'interprètes.

Les parties à une procédure sont donc priées de ne demander une traduction simultanée qu'en cas de réel besoin. Il serait souhaitable qu'elles puissent se mettre d'accord en même temps qu'elles conviennent de la date sur l'utilisation d'une langue officielle comme langue des débats. Si les parties éprouvent des diffícultés de compréhensíon lors des débats, les membres de la división d'opposition sont disposés à leur prêter leur assistance.

Est indiquée ci-dessous la date jusqu'à laquelle, pour des raisons d'organisation, les parties sont priées de communiquer leur langue préférée (sur laquelle elles se sont préalablement mises d'accord). Les parties sont également priées, le cas échéant, de demander une interprétation simultanée avant cette date. La règle 4(1) CBE ne s'en trouve pas affectée.

☐ La langue de la procédure est le **français**

La langue utilisée par l'opposant/les opposants était

☐ l'allemand

☐ l'anglais.

Prière d'indiquer d'urgence par dépôt en ligne (OLF) si possible.

si possible jusqu'au

Date **10.03.22**

1. quelle(s) langue(s) vous utiliserez au cours de la procédure orale (**pour parler**)
2. à partir de quelle langue vous aurez besoin d'une traduction simultanée (**pour écouter**).

Sollten Sie Ihren Antrag auf mündliche Verhandlung zurückziehen oder zum anberaumten Verhandlungstermin nicht erscheinen wollen bzw. aus wichtigem Grund daran gehindert sein, werden Sie gebeten,

- **unverzüglich das Amt - möglichst per Online Filing (OLF) - davon zu benachrichtigen, wobei das Schriftstück mit einem deutlichen Vermerk "Dringend, mündliche Verhandlung am..." oder sinngemäß gekennzeichnet sein sollte;**
- **in dringenden Fällen** (weniger als 1 Monat vor dem Verhandlungstermin) zusätzlich **auch dem/die anderen Verfahrensbeteiligten** bzw. ihre(n) Vertreter auf schnellstem Weg **direkt zu unterrichten.**

In jedem solchen Fall obliegt der Einspruchsabteilung die Entscheidung, ob die Verhandlung durchgeführt oder abberaumt wird. Es wird jedoch darauf hingewiesen, dass einem Verfahrensbeteiligten, der eine nicht rechtzeitige oder unterbliebene Benachrichtigung zu verantworten hat, die dadurch den anderen Beteiligten verursachten Kosten auferiegt werden können (Art. 104 EPÜ).

Hinweis auf Regel 4 EPÜ

Regel 4
Sprache im mündlichen Verfahren

(1) Jeder an einem mündlichen Verfahren vor dem Europäischen Patentamt Beteiligte kann sich anstelle der Verfahrenssprache einer anderen Amtssprache des Europäischen Patentamts bedienen, sofern er dies dem Europäischen Patentamt spätestens einen Monat vor dem angesetzten Termin mitgeteilt hat oder selbst tür die Übersetzung in die Verfahrenssprache sorgt. Jeder Beteiligte kann sich einer Amtssprache eines Vertragsstaats bedienen, sofern er selbst für die Übersetzung in die Verfahrenssprache sorgt. Von diesen Vorschriften kann das Europäische Patentamt Ausnahmen zulassen.

Should you decide to withdraw your request for oral proceedings or not wish to attend on the date set, or if for some special reason you are unable to do so, you are requested

- **to notify the EPO immediately, where possible by Online Filing (OLF), marking the document clearly with the words "Urgent, oral proceedings on ..." or similar;**
- **in urgent cases** (less than one month before the date set for the proceedings), additionally to **notify the other party/parties** and/or their representative(s) **direct as rapidly as possible.**

In all such cases the Opposition Division will decide whether the proceedings are to go ahead or be cancelled. You should however note that costs incurred by the other parties may be charged to a party who either fails to notify them or does not do so in good time (Article 104 EPC).

Attention is drawn to Rule 4 EPC

Rule 4
Language in oral proceedings

(1) Any party to oral proceedings before the European Patent Office may use an official language of the European Patent Office other than the language of the proceedings, if such party gives notice to the European Patent Office at least one month before the date of such oral proceedings or provides for interpretation into the language of the proceedings. Any party may use an official language of a Contracting State, if he provides for interpretation into the language of the proceedings. The European Patent Office may permit derogations from these provisions.

Si vous retirez votre requête tendant à recourir à la procédure orale ou si vous ne souhaitez pas vous présenter à la date fixée pour la procédure orale ou ne pouvez vous y présenter pour une raison sérieuse, veuillez

- **en faire avis sans retard à l'Office, par dépôt en ligne (OLF) si possible, en partant sur votre communication clairement la mention "Urgent, procédure orale le..." ou une indication similaire;**
- **dans les cas urgents** (moins d'un mois avant la date fixée pour la procédure orale) **en faire avis également directement** pas la voie la plus rapide à **l'autre/aux autres partie(s)** ou bien à son/leurs mandataire(s).

Il appartient alors à la division d'opposition de décider si la procédure orale aura lieu ou non. Il est néanmoins souligné que les frais causés aux autres parties par une partie qui est responsable de l'omission d'un tel avis ou de ce que cet avis n'a pas été fait en temps utile peuvent être mis à la charge de cette partie (art. 104 CBE).

Rappel de la Règle 4 CBE

Règle 4
Langues admissibles lors de la procédure orale

(1) Toute partie à une procédure orale devant l'Office européen des brevets peut utiliser une langue - officielle de l'Office européen des brevets autre que la langue de la procédure, à condition soit d'en aviser l'Office européen des brevets un mois au moins avant la date de la procédure orale, soit d'assurer l'interprétation dans la langue de la procédure. Toute partie peut utiliser une langue officielle de l'un des Etats contractants à condition d'assurer l'interprétation dans la langue de la procédure. L'Office européen des brevets peut autoriser des dérogations aux présentes dispositions.

(2) Die Bediensteten des Europäischen Patentamts können sich im mündlichen Verfahren anstelle der Verfahrenssprache einer anderen Amtssprache des Europäischen Patentamts bedienen.

(2) In the course of oral proceedings, employees of the European Patent Office may use an official language of the European Patent Office other than the language of the proceedings

(2) Au cours de la procédure orale, les agents de l'Office européen des brevets peuvent utiliser une langue officielle de l'Office européen des brevets autre que la langue de la procédure.

(3) In der Beweisaufnahme können sich die zu vernehmenden Beteiligten, Zeugen oder Sachverständigen, die sich in einer Amtssprache des Europäischen Patentamts oder eines Vertragsstaats nicht hinlänglich ausdrücken können, einer anderen Sprache bedienen. Erfolgt die Beweisaufnahme auf Antrag eines Beteiligten, so werden die Beteiligten, Zeugen oder Sachverständigen mit Erklärungen, die sie in einer anderen Sprache als in einer Amtssprache des Europäischen Patentamts abgeben, nur gehört, sofern dieser Beteiligte selbst für die Übersetzung in die Verfahrenssprache sorgt. Das Europäische Patentamt kann jedoch die Übersetzung in eine seiner anderen Amtssprachen zulassen.

(3) Where evidence is taken, any party, witness or expert to be heard who is unable to express himself adequately in an official language of the European Patent Office or of a Contracting State may use another language. Where evidence is taken upon request of a party, parties, witnesses or experts expressing themselves in a language other than an official language of the European Patent Office shall be heard only if that party provides for interpretation into the language of the proceedings. The European Patent Office may, however, permit interpretation into one of its other official languages.

(3) Lors de l'instruction, les parties, témoins ou experts appelés à être entendus, qui ne possédent pas une maîtrise suffisante d'une langue officielle de l'Office européen des brevets ou d'un Etat contractant, peuvent utiliser une autre langue. Si la mesure d'instruction est ordonnée sur requête d'une partie, les parties, témoins ou experts qui s'expriment dans une langue autre qu'une langue officielle de l'Office européen des brevets ne sont entendus que si cette partie assure l'interprétation dans la langue de la procédure. L'Office européen des brevets peut toutefois autoriser l'interprétation dans l'une de ses autres langues officielles.

(4) Mit Einverständnis aller Beteiligten und des Europäischen Patentamts kann jede Sprache verwendet werden.

(4) If the parties and the European Patent Office agree, any language may be used.

(4) Sous réserve de l'accord des parties et de l'Office européen des brevets, toute langue peut être utilisée.

(5) Das Europäische Patentamt übernimmt, soweit erforderlich, auf seine Kosten die Übersetzung in die Verfahrenssprache und gegebenenfalls in seine anderen Amtssprachen, sofern ein Beteiligter nicht seibst für die Übersetzung zu sorgen hat.

(5) The European Patent Office shall, if necessary, provide at its own expense interpretation into the language of the proceedings, or, where appropriate, into its other official languages, unless such interpretation is the responsibility of one of the parties.

(5) L'Office européen des brevets assure à ses frais, en tant que de besoin, l'interprétation dans la langue de la procédure, ou, le cas échéant, dans ses autres langues officielles, à moins que cette interpretation ne doive étre assurée par l'une des parties.

(6) Erklärungen von Bediensteten des Europäischen Patentamts, Beteiligten, Zeugen und Sachverständigen, die in einer Amtssprache des Europäischen Patentamts abgegeben werden, werden in dieser Sprache in die Niederschrift aufgenommen. Erklärungen in einer anderen Sprache werden in der Amtssprache aufgenommen, in die sie übersetzt worden sind. Änderungen einer europäischen Patentanmeldung oder eines europäischen Patents werden in der Verfahrenssprache in die Niederschrift aufgenommen.

(6) Statements by employees of the European Patent Office, parties, witnesses or experts, made in an official language of the European Patent Office, shall be entered in the minutes in that language. Statements made in any other language shall be entered in the official language into which they are translated. Amendments to a European patent application or European patent shall be entered in the minutes in the language of the proceedings.

(6) Les interventions des agents de l'Office européen des brevets, des parties, témoins et experts faites dans une langue officielle de l'Office européen des brevets sont consignées au procès-verbal dans cette langue. Les interventions faites dans une autre langue sont consignées dans la langue officielle dans laquelle elles sont traduites. Les modifications apportées à une demande de brevet européen ou à un brevet européen sont consignées au procès verbal dans la langue de la procédure.