

EUROPEAN QUALIFYING EXAMINATION 2018

Paper D

This Paper comprises:

Part I (40 points)

*** Questions 1-5**

2018/D/EN/1-5

- Question 1: 10 marks
- Question 2: 8 marks
- Question 3: 8 marks
- Question 4: 6 marks
- Question 5: 8 marks

Part II (60 points)

*** Questions 1-4**

2018/D/EN/6-11

TOTAL: 100 POINTS

- * Annexes: calendars for 2016, 2017 and 2018 with indication of the days on which at least one of the EPO filing offices is not open for the receipt of documents**

2018/D/EN/12-14



Part I: Legal Questions

QUESTION 1

(10 POINTS)

On 20 February 2018, the last day of the priority period, applicant A filed international application PCT-A with the EPO as receiving Office. The request was filed using form PCT/RO/101. PCT-A was filed in French and duly claims priority of FR-A filed by applicant A in French. FR-A contains a description, drawings and one claim, the claim spanning two pages. PCT-A was intended to be identical to FR-A.

Today, 27 February 2018, the applicant noticed that the second page of the claim of PCT-A is missing from the documents submitted to the EPO.

The applicant would like to obtain provisional protection in the EPC Contracting States for the subject-matter claimed in FR-A as soon as possible.

Advise the applicant.



QUESTION 2

(8 POINTS)

On 14 December 2016, the mention of the grant of European patent EP-B was published in the European Patent Bulletin. EP-B was granted to company B with independent claims 1 and 2, and claim 3 dependent on claim 2. On 12 September 2017, an opposition was validly filed against EP-B by company C. The notice of opposition only mentions the ground of Article 100(c) EPC against claims 1 to 3. In response to an invitation under Rule 79(1) EPC, the proprietor requested on 6 February 2018 maintenance of the patent in amended form based on granted claim 1 and amended claim 2 combining granted claims 2 and 3. In addition, the proprietor indicated the basis in the application as filed for the subject-matter of claim 1 as granted. Together, the amendment and the indicated basis overcome the objections raised under Article 100(c) EPC.

On 22 February 2018, company B instituted proceedings against company D at a Swedish court for infringement of EP-B. Today, 27 February 2018, the opposition proceedings are pending.

Company D, who wants to be a party to the proceedings before the EPO, provided you with document D1, which is prior art pursuant to Article 54(3) EPC for EP-B and discloses the subject-matter of claim 1 of EP-B. Company D is of the opinion that claim 3 as granted does not meet the requirements of Article 84 EPC. Advise company D what steps can be taken in the proceedings before the EPO against:

- a) claim 1 of EP-B; and
- b) amended claim 2 of EP-B.



QUESTION 3

(8 POINTS)

On 2 November 2017, applicant E, an inventor having his residence in Argentina, filed application EP-E online in Spanish at the EPO using Form 1001. EP-E does not claim priority of a previous application. Applicant E filed only claims and drawings.

On 15 November 2017, applicant E filed the missing description in Spanish at the EPO.

On 27 November 2017, applicant E filed at the EPO a translation of the description, claims and drawings of EP-E into English with an accompanying letter and paid the filing and search fees.

Applicant E received from the EPO an invitation dated 5 February 2018 to appoint a representative.

Yesterday, 26 February 2018, you were asked by applicant E to represent him in proceedings before the EPO.

- a) Which date of filing will be accorded?
- b) Which actions do you need to take as representative for the search of the application to be started?



QUESTION 4

(6 POINTS)

During oral proceedings on 1 September 2017 the opposition division announced, in accordance with Article 101(3)(a) EPC, that taking into consideration the amendments made by the proprietor patent, EP-F and the invention to which it relates meet the requirements of the EPC. The interlocutory decision dated 15 September 2017 was notified by registered letter with advice of delivery.

Both the opponent and the patent proprietor are adversely affected by this decision. You are the representative for one of the parties who immediately after the oral proceedings instructed you to file an appeal against this decision.

Today, 27 February 2018, you received from the EPO a communication under Rule 82(2) EPC. From said communication you realise that no appeal has been filed.

Through online file inspection you notice that your assistant has returned to the EPO the acknowledgement of receipt of the notification of the interlocutory decision on 20 September 2017.

Due to an isolated mistake within a normally satisfactory system for monitoring time limits, your file records do not contain any information about the decision, nor have any corresponding time limits been recorded.

How can you improve your client's position before the EPO, if

- a) you are the representative for the patent proprietor?
- b) you are the representative for the opponent?



QUESTION 5

(8 POINTS)

The EPO issued a communication under Rule 71(3) EPC, in which the Examining Division informed applicant G that it intends to grant a patent based on European patent application EP-G containing independent claim 1 and dependent claim 2. Yesterday, 26 February 2018, was the last day of the period for responding to said communication. Applicant G duly filed the required translations and paid the fee for grant and publishing.

Today, applicant G became aware of European patent application EP-H which is state of the art pursuant to Article 54(3) EPC. The subject-matter of claim 1 lacks novelty with respect to EP-H. The subject-matter of claim 2 is new with respect to EP-H.

G now wants to restrict the subject-matter for which protection is sought in EP-G to the subject-matter of claim 2 of EP-G.

- a) Discuss how G can restrict without paying any further fees to the EPO.
- b) Discuss how G can restrict without having to explain why.



Part II: Legal Opinion

[001] Today is 27 February 2018.

We, Bollebozen B.V. (BB) are active in the food industry, both in the manufacture and design of processes and processing equipment and in the large-scale production of processed food. One of our products is a Dutch speciality, called “Oliebollen” (in English: “oil balls”), which are consumed at the turn of the year. They consist of a ball of dough mixed with dried fruit, which is fried. One concern with all fried products is that they have high levels of acrylamide, a substance some studies have indicated is carcinogenic in high doses.

[002] We have a European patent, EP-BB1, which validly claims priority from an earlier application filed in October 2013. An opposition has been filed against EP-BB1. Granted claim 1 is directed to a method of preparing a fried food product (FFP) with an acrylamide level below 225 ppb, by frying a ball of dough containing at least 5 % by weight of dried fruit, wherein the fruit comprises fruit A. Claim 2 of the granted patent is dependent on claim 1 and requires the fruit further to comprise fruit B. Claim 3 is dependent on claim 1 or 2 and requires the fruit further to comprise fruit C.

[003] The opponent attacked the patent under Article 100(b) EPC, demonstrating that a fried ball of dough prepared according to claim 1 using fruit A and no other dried fruit had a higher level of acrylamide than claimed.



[004] The patent was maintained in amended form on the basis of granted claim 2. The written decision, dated 2 October 2017 was received by us on 16 October 2017. The opponent and we each filed a notice of appeal on time and paid the appeal fee. We included a main request to reject the opposition. The opponent filed grounds of appeal in January 2018, including the results of tests in which a method according to the patent using only fruits A and B as dried fruit did not result in a product having the claimed acrylamide level.

[005] Due to time pressure, we filed on 15 February 2018 grounds of appeal in the form of a letter that merely refers the Board of Appeal to our submissions made at first instance. We have since reflected and come to the conclusion that a possible fallback position that would cover our product is a combination of claims 1 and 3.

[006] Tests had revealed to us that the acrylamide level remains lower than 225 ppb regardless of the fruit content and type if the frying temperature is kept at 220°C or lower. If fruit C is present, any frying temperature within the usual range may be chosen.

[007] We know all this because we investigated the temperature-dependency after the opposition had been filed. These investigations led us to further patent applications.



[008] We filed EP-BB2 on 3 February 2017. EP-BB2 describes and claims a method of preparing a fried food product (FFP) by frying a ball of dough at a temperature in the range of 150-220°C. The description states that the preferred range is between 175°C and 200°C. EP-BB2 also discloses an apparatus we had designed previously. It includes a dough mixer and a nozzle mounted thereon for forming the balls of dough. This nozzle is shown and described as having the shape of a trumpet. Nozzles with such a shape had been used in totally different fields of technology before EP-BB2 was filed. From the end of the 20th century onwards, conically shaped nozzles have been used in combination with dough mixers and screw conveyors to force the dough through the nozzles. No fees were paid for EP-BB2 and we received a notice of loss of rights in June 2017. Instead of continuing with EP-BB2 we filed an international application, PCT-BB2, on 4 December 2017. We paid the filing fee, search fee and transmittal fee on filing. PCT-BB2 has the same claim as EP-BB2 and claims priority from it.

[009] We had realised that the trumpet-shaped nozzle presented the advantage, that the liquid content of the dough could be higher than with the conical shape, further lowering acrylamide levels. Consequently, we left out the description of the shape of the nozzle in PCT-BB2 in order to file a separate patent application directed to this invention. We added to the description that it is crucial that the nozzle is combined with a screw conveyor to expel the dough from the mixer. The description of the apparatus and method in PCT-BB2 is otherwise identical to that of EP-BB2.



[010] We filed EP-BB3 on 26 January 2018. EP-BB3 describes and claims the apparatus, including both the dough mixer and the trumpet-shaped nozzle. The screw conveyor is not mentioned because it is not required for this type of nozzle. We have not paid the fees for this application and intend to file an international application claiming priority from EP-BB3 in due course and to enter the regional phase before the EPO.

[011] Today, we realised we accidentally included in PCT-BB2 the drawing showing the trumpet-shaped nozzle we had also used for EP-BB2 and EP-BB3.

[012] We have been approached by a research institute, the Forschungsgemeinschaft des Konditorgewerbes (FK), with an offer for sale of a European patent application EURO-PCT-FK1 based on an international application, PCT-FK1. This application has a filing date of 31 March 2015. No priority is claimed. PCT-FK1 was filed with two independent claims. The first independent claim is directed to an apparatus comprising a dough mixer having a nozzle arranged to deposit balls of dough into a bath of frying oil. The only disclosed embodiment includes a nozzle with a conical shape and a screw conveyor. Due to the nozzle, large quantities of foodstuffs can be prepared efficiently. The second independent claim is directed to a method of preparing a fried food product (FFP) containing fruit D by frying dough at between 155°C and 250°C. The chosen fruit and the temperature range in combination make the products crispy on the outside and fluffy on the inside for longer. The international search report drawn up by the European Patent Office covers both claims. PCT-FK1 entered the regional phase before the EPO on time.

[013] FK has told us that they would offer the patent application to one of our European competitors if we don't accept their offer.



[014] In December 2017, our latest variety of “Oliebollen” won a competition organised by a Dutch newspaper. We explained in an interview published in the newspaper that we think this variety tastes so good because we use fruits A, C and D in the mix of dried fruit and that any temperature between 160°C and 210°C leads to these tasty products.



1. What is our current position in the appeal proceedings and how should we proceed?
2. What is the current position as regards:
 - 2.1 - EP-BB2;
 - 2.2 - PCT-BB2;
 - 2.3 - EP-BB3 and the international application we intend to file;
and
 - 2.4 - EURO-PCT-FK1?
3. How can we improve our position as regards our own patent applications?
4. Please give us all reasons why we should buy EURO-PCT-FK1.



Annex 1

2016

JANUARY						
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FEBRUARY						
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MARCH						
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APRIL						
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MAY							
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JUNE						
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JULY						
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AUGUST						
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SEPTEMBER						
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OCTOBER						
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NOVEMBER						
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DECEMBER						
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Tage / Days / Jours		München Munich	Den Haag The Hague La Haye	Berlin
Neujahr - New Year's Day - Nouvel An	01.01.2016	x	x	x
Heilige Drei Könige - Epiphany - Epiphanie	06.01.2016	x		
Karfreitag - Good Friday - Vendredi Saint	25.03.2016	x	x	x
Ostermontag - Easter Monday - Lundi de Pâques	28.03.2016	x	x	x
Nationalfeiertag - National Holiday - Fête nationale	27.04.2016		x	
Christi Himmelfahrt - Ascension Day - Ascension	05.05.2016	x	x	x
Pfingstmontag - Whit Monday - Lundi de Pentecôte	16.05.2016	x	x	x
Fronleichnam - Corpus Christi - Fête-Dieu	26.05.2016	x		
Mariä Himmelfahrt - Assumption Day - Assomption	15.08.2016	x		
Nationalfeiertag - National Holiday - Fête nationale	03.10.2016	x		x
Allerheiligen - All Saints' Day - Toussaint	01.11.2016	x		
2. Weihnachtstag - Boxing Day - Lendemain de Noël	26.12.2016	x	x	x



Annex 2

2017

JANUARY						
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FEBRUARY						
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MARCH						
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APRIL						
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MAY						
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JUNE						
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JULY						
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AUGUST						
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SEPTEMBER						
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OCTOBER						
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NOVEMBER						
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DECEMBER						
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25	26	27	28	29	30	31



Tage / Days / Jours		München Munich	Den Haag The Hague La Haye	Berlin
Heilige Drei Könige - Epiphany – Epiphanie	06.01.2017	x		
Karfreitag - Good Friday - Vendredi Saint	14.04.2017	x	x	x
Ostermontag - Easter Monday - Lundi de Pâques	17.04.2017	x	x	x
Nationalfeiertag - National Holiday - Fête nationale	27.04.2017		x	
Mai feiertag - Labour Day - Fête du Travail	01.05.2017	x	x	x
Tag der Befreiung - Liberation Day - Journée de la Libération	05.05.2017		x	
Christi Himmelfahrt - Ascension Day - Ascension	25.05.2017	x	x	x
Pfingstmontag - Whit Monday - Lundi de Pentecôte	05.06.2017	x	x	x
Fronleichnam - Corpus Christi - Fête-Dieu	15.06.2017	x		
Mariä Himmelfahrt - Assumption Day – Assomption	15.08.2017	x		
Nationalfeiertag - National Holiday - Fête nationale	03.10.2017	x		x
Allerheiligen - All Saints' Day – Toussaint	01.11.2017	x		
1. Weihnachtstag – Christmas Day - Jour de Noël	25.12.2017	x	x	x
2. Weihnachtstag - Boxing Day - Lendemain de Noël	26.12.2017	x	x	x



Annex 3

2018

JANUARY M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	FEBRUARY M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	MARCH M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	APRIL M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30
MAY M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	JUNE M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30	JULY M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	AUGUST M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
SEPTEMBER M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30	OCTOBER M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	NOVEMBER M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30	DECEMBER M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

Tage / Days / Jours		München Munich	Den Haag The Hague La Haye	Berlin
Neujahr - New Year's Day - Nouvel An	01.01.2018	x	x	x
Karfreitag - Good Friday - Vendredi Saint	30.03.2018	x	x	x
Ostermontag - Easter Monday - Lundi de Pâques	02.04.2018	x	x	x
Nationalfeiertag - National Holiday - Fête nationale	27.04.2018		x	
Maifeiertag - Labour Day - Fête du Travail	01.05.2018	x	x	x
Christi Himmelfahrt - Ascension Day - Ascension	10.05.2018	x	x	x
Pfingstmontag - Whit Monday - Lundi de Pentecôte	21.05.2018	x	x	x
Fronleichnam - Corpus Christi - Fête-Dieu	31.05.2018	x		
Mariä Himmelfahrt - Assumption Day - Assomption	15.08.2018	x		
Nationalfeiertag - National Holiday - Fête nationale	03.10.2018	x		x
Allerheiligen - All Saints' Day - Toussaint	01.11.2018	x		
Heiliger Abend - Christmas Eve - Veille de Noël	24.12.2018	x	x	x
1. Weihnachtstag - Christmas Day - Jour de Noël	25.12.2018	x	x	x
2. Weihnachtstag - Boxing Day - Lendemain de Noël	26.12.2018	x	x	x
Silvester - New Year's Eve – Saint-Sylvestre	31.12.2018	x	x	x

