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**D E C I S I O N**  
**of 29 August 2002**

**Case Number:** T 0069/00 - 3.3.2

**Application Number:** 89311357.1

**Publication Number:** 0377278

**IPC:** A23L 1/236

**Language of the proceedings:** EN

**Title of invention:**  
Dietetic sweetening composition

**Patentee:**  
XYROFIN OY

**Opponent:**  
ROQUETTE FRERES, S.A.

**Headword:**  
Sweetening Composition/XYROFIN

**Relevant legal provisions:**  
EPC Art. 52, 54, 84, 123(2)  
EPC R. 57a

**Keyword:**  
"Main and first auxiliary requests - Novelty (no): Confection product having a sweetening composition comprising.... The confection cannot be distinguished from the composition as such"  
"Third and fourth auxiliary requests - filed late, not admissible"

**Decisions cited:**

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**Catchword:**

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Case Number: T 0069/00 - 3.3.2

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.2  
of 29 August 2002

**Appellant:** XYROFIN OY  
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**Representative:** HOFFMANN - EITLÉ  
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**Respondent:** ROQUETTE FREFRE, S.A.  
(Opponent) F-62136 Lestrem (FR)

**Representative:** Boulinguiez, Didier  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 11 October 1999  
revoking European patent No. 0 377 278 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P. A. M. Lançon  
**Members:** G. F. E. Rampold  
B. J. Schachenmann

## Summary of Facts and Submissions

- I. The appellant is proprietor of European patent No. 0 377 278 which was granted with 24 claims on the basis of European patent application No. 89 311 357.1. Claim 1 as granted read as follows:
- "1. A sugar free confection product having a reduced calorie, non-cariogenic sweetening composition which retains stability after processing, the sweetening composition comprising xylitol and a reduced calorie bulking agent in a weight ratio of about 4 to about 0.05 based on the dry weight thereof."
- II. The respondent filed notice of opposition seeking revocation in full of the European patent pursuant to Article 100(a) EPC for alleged lack of novelty (Article 54 EPC) and inventive step (Article 56 EPC).
- III. Of the numerous documents cited during the first-instance opposition and subsequent appeal proceedings, the following are referred to in the present decision:
- (6) T. Pepper, P. M. Olinger, "Xylitol in Sugar-Free Confections", published in J. Food Technology, vol. 42, No. 10, October 1988, pages 98-105
- (15) WO 85/01421
- (16) "Webster's Ninth New Collegiate Dictionary", 1987, entries: "confection"; "confectionery"
- IV. At the hearing before the opposition division, the appellant requested maintenance of the patent in

amended form on the basis of its main request or, in the alternative, on the basis of one of its first, second or third auxiliary requests, all filed on 5 August 1999, or as further alternative, on the basis of its fourth or fifth auxiliary request, both filed during the oral proceedings. The opposition division decided, exercising its discretion under Article 114(2) EPC, not to admit the appellant's fourth and fifth auxiliary requests, both filed late during the oral proceedings.

The respondent raised objections to the amended claims under Articles 84 and 123(2) EPC.

The appellant's main request considered by the opposition division consisted of an amended set of 37 claims, claims 1 and 13 reading as follows:

- "1. A sugar free confection product having a reduced calorie, non-cariogenic sweetening composition which retains stability after processing, the sweetening composition comprising xylitol and a reduced calorie bulking agent in a weight ratio of about 4 to about 0.05 based on the dry weight thereof, but not including such sugar-free confection product of the hard candy type.
  
13. A sugar free hard candy confection product having a reduced calorie, non-cariogenic sweetening composition which retains stability after processing, the sweetening composition comprising between about 5% and about 40% by weight of xylitol and between about 20% and about 95% by weight of a reduced calorie bulking agent and the composition having a dry substance of no greater

than 96.4%."

The appellant's first auxiliary request consisted of an amended set of 23 claims, claim 1 reading as follows:

"1. A sugar free confection product having a reduced calorie, non-cariogenic sweetening composition which retains stability after processing, the sweetening composition comprising xylitol and a reduced calorie bulking agent in weight ratio of about 4 to about 0.05 based on the dry weight thereof, and the composition having a dry substance of no greater than 96.4%."

The appellant's second auxiliary request consisted of an amended set of 36 claims, claim 1 reading as follows:

"1. A sugar free confection product having a reduced calorie, non-cariogenic sweetening composition which retains stability after processing, the sweetening composition comprising xylitol and a reduced calorie bulking agent in a weight ratio of about 4 to about 0.05 based on the dry weight thereof and comprising an intense sweetener, but not including such sugar-free confection product of the hard candy type."

Claim 11 was identical with claim 13 in the above main request.

The appellant's third auxiliary request consisted of an amended set of 13 claims, claim 1 reading as follows:

"1. Use of xylitol for lowering the viscosity of a

reduced calorie, non-cariogenic sweetening composition which includes a reduced calorie bulking agent and which retains stability after processing, in a sugar free confection product of the hard candy type, comprising between about 5% and about 40% by weight of xylitol and between about 20% and about 95% by weigh of a reduced calorie bulking agent."

- V. The opposition division revoked the European patent pursuant to Article 102(1) EPC.

In its reasons for the decision the opposition division concluded that insertion of the reference in claim 13 of the main request to "hard candy confection product having a dry substance of no **greater than 96.4%**" was not supported by the application as filed and accordingly resulted in a contravention of Article 123(2)EPC. It found further that the proportions of the individual components of the claimed candy product in claim 13 added up to a total content of more than 100% and that the claim therefore lacked clarity. Finally the opposition division held that the addition in the opposition proceedings of new claims 25 to 37 having no counterpart in the granted patent was against Rule 57a EPC.

As to the first auxiliary request, the opposition division held that addition of the feature limiting the content of dry substance in the sweetening composition to an amount of no greater than 96.4% represented an unacceptably broad generalisation from some specifically disclosed examples. It found that this generalisation was, to the skilled reader, neither disclosed nor clearly implied on reading the disclosure

of the claimed invention in the application as filed and accordingly concluded that claim 1 contravened Article 123(2) EPC.

Concerning the second auxiliary request, the opposition division stated in its decision that claim 11 was identical with claim 13 in the main request and that this claim was accordingly open to all the objections under Articles 84 and 123(2) EPC raised in respect of claim 13 of the main request. Moreover, the objections under Rule 57a EPC raised to the addition of claims 25 to 37 in the main request applied equally to claims 24 to 36 of the second auxiliary request.

As to the third auxiliary request, the opposition division concluded that citation (6) was publicly available prior to the priority date of the patent and found that the content of citation (6) was prejudicial to the novelty of claim 1.

VI. The appellant lodged an appeal against the decision of the opposition division. Together with its statement setting out the grounds of appeal the appellant presented two newly amended sets of claims forming its main and auxiliary requests. The independent claims in the main request are worded as follows:

"1. A sugar free confection product having a reduced calorie, non-cariogenic sweetening composition which retains stability after processing, the sweetening composition comprising xylitol and a reduced calorie bulking agent in weight ratio of about 4 to about 0.05 based on the dry weight thereof and an intense sweetener.



22. A sugar-free praline product with reduced calories comprising between about 20% and 40% by weight of xylitol, between about 0% and about 30% by weight of a randomly bonded condensation polymer of dextrose, between about 10% and about 50% by weight of hydrogenated glucose syrup, between about 15% and about 45% by weight of cocoa fibre and an intense sweetener."

Dependent claims 2 to 21 relate to elaborations of the confection product according to claim 1.

The auxiliary request consists of claims 1 to 22 in the above main request, the intense sweetener in claim 1 being specified as one "selected from dipeptide sweeteners, acesulfame K, saccharin and cyclamates".

VII. At the beginning of the oral proceedings before the board, held on 29 August 2002, the appellant sought to introduce new second and third auxiliary requests. The respondent was given the opportunity to present its comments on the admissibility of the newly filed auxiliary requests.

VIII. After an adjournment for deliberation the Chairman announced that the board did not admit the appellant's second and third auxiliary requests into the proceedings.

IX. Concerning the issues addressed in this decision, the appellant in its written submissions and orally at the hearing before the board argued essentially as follows:

The primary reason for the late filing of the second and third auxiliary requests was, according to the

appellant, the resignation of one of the experts originally involved in the technical development of the claimed invention.

As regards the present version of the claims, the appellant held that the claimed confection products as defined in its current main and auxiliary requests basically differed from those claimed in the patent as granted by virtue of the mandatory presence of an intense sweetener as a constituent of the sweetening composition.

As regards novelty in respect of the disclosure in the state of the art according to citation (15), the appellant argued that this citation related exclusively to dietetic frozen desserts. In the appellant's opinion, dietetic frozen desserts were clearly distinguished from confection products which were the subject-matter of the appellant's claims. The two terms confection products and confectionery products were used interchangeably throughout the description to designate essentially the same kind of products and related consistently to hard candies, chewy candies, gelatin jelly candies and other confection products such as chocolate confections and pralines or fondants.

The appellant submitted that Example 14 E in citation (15) disclosed two mixtures of ingredients: on page 24 the milk-based "Mix 1" and on page 25 the sweetener-bulking composition "Mix 2". This example specified that "the ingredients in all the above formulations are combined in the conventional procedures for making the exemplified frozen dietetic dessert". In the appellant's opinion it was thus clear that citation (15) failed to disclose a confection product, let alone

a candy product, and that the disclosure in (15) was therefore not prejudicial to the novelty of the claimed subject-matter in the patent in suit.

- X. The respondent's written and oral submissions which are relevant to the particular issues addressed in this decision can be summarised as follows:

The respondent emphasised that the appellant had already presented 22 different requests in the course of the opposition and opposition appeal proceedings. The appellant's newly filed second and third auxiliary requests were filed late during the oral proceedings before the board, without any acceptable reason being given, and should therefore not be admitted into the proceedings.

The established jurisprudence of the boards of appeal made it clear that, in order to determine what had been made available to the public, it was necessary to consider carefully not only isolated disclosures or passages in a particular document but its complete content, ie its essential, explicit and implicit information content, for guidance as to what had really been taught in the prior document. Citation (15) disclosed in claim 12 a sweetener-bulking agent composition comprising aspartame in combination with the reduced calorie bulking agent polydextrose and xylitol or mannitol. More specifically, Example 14 E on page 25 of citation (15) related explicitly (i) to a reduced calorie sweetener-bulking agent comprising xylitol and polydextrose in a weight ratio of 2.45 in combination with the intense sweetener aspartame and (ii) to a sugar free confection product in the form of a frozen dessert which contained the above-mentioned

reduced calorie, non-cariogenic sweetener-bulking agent. Document (16) made it quite clear to the skilled reader that the reduced calorie sweetener-bulking agent itself disclosed in Example 14 E in (15) and a frozen dessert containing such a sweetener-bulking agent fell within the ordinary meaning and scope of the term "confection product". The content of citation (15) was thus, in the respondent's opinion, prejudicial to the novelty of claim 1.

- XI. The appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of claims 1 to 22 in the main request, or, in the alternative, on the basis of claims 1 to 22 in the auxiliary request, both requests filed on 21 March 2000, or on the basis of one of the second or third auxiliary requests filed at the oral proceedings.

The respondent requested that the appeal be dismissed.

### **Reasons for the Decision**

1. The appeal is admissible.
  
2. The amended sets of claims in the appellant's second and third auxiliary requests, which were presented during the oral proceedings before the board and were therefore filed at the latest possible date, were filed late. The first question to be decided is, therefore, whether such alternative sets of claims should be admitted for consideration in this appeal.
  - 2.1 In the present case, the appellant filed on 21 March

2000, together with its statement setting out the grounds of appeal, an amended set of 22 claims forming its main request and a further set of 22 claims forming its auxiliary request. The respondent filed its observations in reply to the statement of grounds of appeal on **5 October 2000**. In a communication dated 10 June 2002 both parties were duly summoned to oral proceedings, scheduled to take place on 29 August 2002. In advance of the oral proceedings the appellant filed on 29 July 2002 further written submissions.

- 2.2 As is apparent from the history of the case as set out above, the respondent's only submission in the written proceedings (ie its reply to the appeal statement) had already been filed as far back as October 2000 and the appellant therefore had ample time and opportunity to react adequately to the respondent's submissions in advance of the day appointed for the oral proceedings, for example by filing amended claims, if this was necessary or appropriate to support the appellant's case.

The only argument submitted by the appellant to justify the late filing of the second and third auxiliary requests during the oral proceedings was the resignation of an expert who was involved in the technical development of the claimed invention. Apart from the fact that, in the present case, no mention of the actual date of the expert's resignation has been made, the precise date of an expert's resignation is, in the board's experience, in most cases not entirely unforeseeable, and is usually known to the expert's employer (ie the appellant) a certain period of time in advance.

The board cannot accept such an argument as a proper justification for filing substantially modified auxiliary requests at the latest possible moment.

2.3 Moreover, in the present case, the appellant was given ample opportunity during the opposition and subsequent appeal proceedings to present about 20 different requests in advance of the oral proceedings before the board. The board therefore considers the late filing of further requests, substantially modified by arbitrarily selecting certain elements from the patent as granted and abandoning others, to constitute a violation of procedural fairness. In view of the substantial amendments, the appellant must be deemed to have been fully aware that it would be impossible for the respondent and also the board to deal properly with these modified requests during the oral proceedings. An adjournment, possibly to another day, or remittal to the department of first instance, in order to deal properly with these new requests, might have been necessary if these requests were to be admitted. This should however be avoided in the interests of both the parties and the public.

2.4 Consequently, since the appellant's second and third auxiliary requests were filed late during the oral proceedings before the board, without any proper justification for such late filing, the board rejects these requests as inadmissible.

3. Citation (15) relates **firstly** to a "sweetener-bulking agent composition" as such which is suitable for use in dietetic frozen desserts (see claims 1 to 13) and **secondly** to dietetic frozen desserts containing a "sweetener-bulking agent composition" in accordance

with claims 1 to 13.

Claim 1 of (15) reads:

"A sweetener-bulking agent composition suitable for use in dietetic frozen desserts comprising: as the sweetener, mixtures of aspartame with a synergistic sweetener or aspartame alone, and as the bulking agent, a material selected from the group consisting of polydextrose, microcrystalline cellulose, fermented whey, tofu or sucrose polyester or mixtures thereof, in combination with a minor amount of sugar alcohols, sugars, whey, rennet, lactase or mixtures thereof, with the proviso that when aspartame alone is the sweetener and polydextrose alone is the bulking agent, the sugar alcohol is not sorbitol."

3.1 Claim 12 relates to "a sweetener-bulking agent composition of claim 1 comprising mixtures of aspartame with a synergistic sweetener or aspartame alone, in combination with polydextrose and mannitol or xylitol." (emphasis added).

3.2 More specifically, Example 14 E on page 25 of (15) relates to a sugar free sweetener-bulking agent composition, designated "Mix 2", comprising

- (i) **polydextrose,**
- (ii) **xylitol** in a xylitol/polydextrose **weight ratio of 2.45** based on the dry weight, and
- (iii) **aspartame.**

The sugar free sweetener-bulking agent composition in

Example 14 E, designated "Mix 2", is combined in Example 14 with "Mix 1" comprising skim milk, yogurt fruit and a starter for making a "frozen dietetic dessert."

4. Claim 1 of the appellant's main request relates to a sugar free confection product having a reduced calorie, non-cariogenic sweetening composition comprising

- (i) **xylitol**,
- (ii) **a reduced calorie bulking agent** in a xylitol/bulking agent **weight ratio of between 4 and 0.05** based on the dry weight, and
- (iii) an **intense sweetener**.

Claim 1 of the appellant's auxiliary request corresponds to claim 1 in the above main request with the sole exception that constituent (iii) of the sweetening composition is limited to an "intense sweetener selected from dipeptide sweeteners, acesulfame K, saccharin and cyclamates".

- 4.1 A particularly preferred reduced calorie bulking agent according to the alleged invention is "polydextrose" (see patent specification, page 4, lines 27 to 28) and a particularly preferred sweetening agent is "aspartame" (see patent specification, page 4, line 35).
- 4.2 No definition or interpretation is available anywhere in the patent specification indicating the exact meaning and scope of the term "*confection product*" used in claim 1 for the designation of the subject-matter



for which protection is sought in the patent in suit.

4.3 According to the examples in the specification of the patent in suit the term "*confection product*" includes, on the one hand, shaped products, that is to say "hard candies" (Example 1), "chewy candies" (Example 2), "gelatin jellies" (Example 3), "chocolate" (Example 5), and on the other hand, sweet shapeless masses such as "praline filling" (Example 4).

5. In "Webster's Ninth New Collegiate Dictionary", 1987 (16), the word "**confection**" is given the meaning:

1: the act or process of confecting

2: something confected: as

a: a fancy dish or sweetmeat; also: a sweet food

b: a medicinal preparation usu. made with sugar, syrup or honey

c: a piece of fine craftsmanship;

the word "**confectionery**" is given the meaning:

1: sweet foods (as candy or pastry)

2: the confectioner's art or business

3: a confectioner's shop.

6. Claim 1 of the appellant's main and auxiliary requests relates to "a sugar free confection product having a reduced calorie, non-cariogenic sweetening

composition...." (emphasis added). A sugar free reduced calorie, non-cariogenic sweetening composition which is **identical** in its composition with that in present claim 1 is already disclosed in Example 14 E of document (15) - see point 3 above.

6.1 As is apparent from "Webster's Dictionary" (see point 5 above), the term "confection product" covers, *inter alia*, **anything confectioned** and **any sweet food**. In the board's judgment it is thus clear to a person skilled in the art that simply describing and claiming "the [known] sugar free, reduced calorie, non-cariogenic **sweetening composition**" disclosed in Example 14 E of (15) in present claim 1 as a "**sugar free confection product having that [known] sugar free, reduced calorie, non-cariogenic sweetening composition**" does not, in the absence of any definite distinguishing feature, add to or change the definition given for that sweetening composition in (15). In the present case the phrase "confection product having" must therefore be seen as a purely linguistic addition to claim 1, which does not give the person skilled in the art any specific guidance as to how the claimed product should be formed. The skilled person is thus not able to characterise the claimed product specifically and to distinguish it in terms of a technical feature from that disclosed in (15). Accordingly, the mere reference to an unlimited number of theoretically possible products with no details as to their structure and effect cannot be deemed in a claim to be a substantive, characterising addition to a structurally defined known product, ie the sweetening composition in Example 14 E in (15), which would confer novelty on such a product.

6.2 In other words, in view of the nearly unlimited scope

of the term "confection product" [cf. Webster: confection product = "something confectioned"; "a fancy dish or sweetmeat"; "a sweet food"] and, accordingly, the nearly unlimited number of confection products which might enter into consideration, the mere definition of the known "sweetening composition" as a "confection product having that known sweetening composition" cannot be deemed to add a substantive and distinctive feature to the sweetening composition as defined in (15) which could confer novelty on claim 1.

Consequently, the conclusion must be drawn that claim 1 in the main and the auxiliary requests lacks novelty, contrary to the requirements of Article 52(1) in conjunction with Article 54(1) and (2) EPC.

- 6.3 In view of the broad meaning and scope of the term "confection product" as evidenced by "Webster's Dictionary", the board cannot share the appellant's view that frozen desserts would not be confection products in the sense used in the present claim 1. The frozen dietetic desserts disclosed in Example 14 in (15), which result from the combination of the sugar free sweetener-bulking agent composition in Example 14 E, designated "Mix 2", with "Mix 1" comprising skim milk, yogurt fruit and a starter, are therefore also prejudicial to the novelty of claim 1 of the appellant's main and auxiliary requests.

The appellant's argument that a difference vis-à-vis the frozen dessert in (15) should be seen in the reference in claim 1 to a confection product having a reduced calorie, non-cariogenic sweetening composition **which retains stability after processing**, since a frozen dessert would not retain stability, is not

convincing. First of all, [shelf] stability is a property which is ascribed in the claims and in the description of the patent in suit to the sweetening composition as such, and **not** to the confection product (cf. page 4, lines 17 to 19), and the board sees no reason why the sweetening composition should not retain its stability in a frozen dessert. Second, the property of retaining [shelf] stability after processing would normally be considered to be present under the usual storage conditions for a given product. These are of course freezing temperatures for a frozen dessert.

The board therefore considers that to neither the main request nor the auxiliary request relates to subject-matter which is novel as required for patentability by Article 52(1) in conjunction with Article 54 EPC.

## **Order**

### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:

A. Townend

P. A. M. Lançon