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**D E C I S I O N**  
**of 30 March 2006**

**Case Number:** T 0859/04 - 3.3.09

**Application Number:** 99906178.1

**Publication Number:** 1049387

**IPC:** A23L 1/06

**Language of the proceedings:** EN

**Title of invention:**  
Additive pre-mix for food products

**Applicant:**  
Pre Gel S.P.A.

**Opponent:**  
-

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54, 56, 123(2)

**Keyword:**  
"Novelty, inventive step (yes)"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0859/04 - 3.3.09

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.09  
of 30 March 2006

**Appellant:** Pre Gel S.P.A.  
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**Representative:** Luppi, Luigi  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 16 December 2003  
refusing European application No. 99906178.1  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** P. Kitzmantel  
**Members:** W. Ehrenreich  
W. Sekretaruk

## Summary of Facts and Submissions

- I. European patent application No. 99 906 178.1 in the name of *Pre Gel S.p.A.* was filed as International application PCT/EP99/00370 on 22 January 1999 and published on 29 July 1999 as WO 99/37168. The application entitled "*Additive Pre-Mix for Food Products*" was refused by a decision of the Examining Division orally announced on 7 November 2003 and issued in writing on 16 December 2003.
- II. The decision was based on a set of Claims 1 to 25 according to the main request filed with the letter dated 17 February 2003, Claims 1 to 19 according to the first auxiliary request and Claims 1 to 18 according to the second auxiliary request, both submitted with a letter dated 4 September 2003.

The wording of Claims 1 of the main request and the auxiliary requests 1 and 2 was as follows:

### *Main Request*

"1. A room-temperature pasty compound for food use, comprising:

- a sugar,
  - water,
  - a stabilising and thickening agent,
- and at least one of the following agents: antioxidant agent; preservative agent; acidifying agent, wherein said compound is free of fruit products and is intended to be directly mixed with a type of fruit product selected from a desired group of fruit products."

*Auxiliary Request 1*

"1. Fruitless compound to be added to fruit for preparing a flowable or semifluid fruit-based product, said compound comprising:

- an antioxidant agent,
- a preservative agent,
- an acidifying agent,
- a stabilising and thickening agent."

*Auxiliary Request 2*

"1. Compound to be added to fruit for preparing a flowable or semifluid fruit-based product, said compound consisting of:

- an antioxidant agent,
- a preservative agent,
- an acidifying agent,
- a stabilising and thickening agent,
- possibly sugar,
- possibly water."

With regard to the main request it was held in the decision that the combination of sugar, water, stabilising and thickening agent with at least one of antioxidant, preservative agent and acidifying agent, indicated in Claim 1, had no basis in the application as filed.

Furthermore, there was also no basis in the application as filed for the feature in Claim 1 that the compound "*is free of fruit products*". The same applied to the feature "*Fruitless*" in Claim 1 of the first auxiliary request.

Therefore, the subject-matter of the main request and the first auxiliary request was held not to comply with the requirements of Article 123 (2) EPC.

The Examining Division considered the subject-matter of the second auxiliary request to be not based on an inventive step, in particular in view of D5 (US-A 4 387 109) and the common general knowledge of the skilled person.

It was argued that the example 5 of D5, describing a premix to which fruit may be added, represented the closest prior art. The claimed compound differed therefrom in that an antioxidant was present in order to improve the stability of the fruit product. However, it was obvious for a skilled person to add antioxidants to the compound of D5 in order to prevent fruits from enzymatic browning.

III. On 10 February 2004 the Applicant (hereinafter referred to as the Appellant) lodged an appeal against the decision of the Examining Division with simultaneous payment of the prescribed fee.

The Statement of the Grounds of Appeal was filed on 22 April 2004, accompanied by a main request and three auxiliary requests. The main request and the auxiliary requests 1 and 2 corresponded to the respective requests underlying the appealed decision. Auxiliary request 3 was new and was directed to a method of preparing a fruit salad.

IV. In a communication issued on 9 December 2005 the Board raised objections as to lack of novelty of the subject-matter of the main request and the auxiliary request 1

vis à vis D5 and D3 (FR-A 1 585 399). In the oral proceedings held on 30 March 2006, following discussion of the issues of novelty and inventive step of the subject-matter of the afore-mentioned requests, the Appellant withdrew all previous requests and submitted a new main request consisting of product Claims 1 to 7 and process Claims 8 to 17. Claims 1 and 8 read as follows:

"1. Fruitless ready-to-use pre-mix package containing a compound for a professional user intended to be added to fruit for preparing a flowable or semifluid fresh fruit-based product, said compound being a pasty compound and comprising:

- an antioxidant agent,
- a preservative agent,
- an acidifying agent,
- a stabilising and thickening agent."

"8. A method of preparing a fruit salad, comprising mixing pieces of fresh fruit with a compound from a ready-to-use pre-mix package containing:

- an antioxidant agent,
- a preservative agent,
- an acidifying agent,
- a stabilising and thickening agent,
- possibly sugar,
- possibly water."

Claims 2 to 7 are dependent on Claim 1 and Claims 9 to 17 are dependent on Claim 8.

- V. The Appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of Claims 1 to 17 of the main request filed during the oral proceedings.

### **Reasons for the Decision**

1. *The appeal is admissible.*
2. *The claims meet the requirements of Article 84 EPC and are also allowable under the provisions of Article 123 (2) EPC.*

The feature "fruitless" in Claim 1 is implicitly disclosed in the application as filed (represented by the WO publication). Claim 14, several passages in the description (see for instance page 6, lines 17 to 21, page 7, lines 9 to 12 and page 11, lines 23 to 26) and the examples 1 to 5 imply that fruit (e.g. fresh fruit) may be added to the compound, which, of course has to be fruit-free before.

The features that the compound is intended for a professional user and is contained in a ready-to-use premix package are disclosed in the WO publication at page 1, lines 4 to 7 from the bottom and the last paragraph at page 11, respectively. Although, strictly speaking, the term "ready-to-use package" is mentioned there in the context of a prior art product (ie sauce), the concept of a "ready-to-use package" also applies to the invention and is indeed at its very heart as clearly emerges from the content of the application as

a whole (see especially page 1, paragraphs 2 to 5 and page 11, half way down to page 12).

3. *Novelty*

None of the documents cited disclose a package containing a compound with the composition as indicated in Claim 1 and the use of the compound for the preparation of a fruit salad as mentioned in Claim 8.

The subject-matter according to the main request is therefore novel over the available prior art.

4. *Inventive step*

In the oral proceedings the Appellant convincingly argued that the problem to be solved by the invention consisted in providing a sauce composition for fresh fruit products which could be sold to a potential professional user. The intention behind it was, that one manufacturer could pre-mix all ingredients of the sauce composition in certain weight proportions for a professional user, who could then add fresh fruit to this pre-fabricated sauce composition according to the wishes of the end consumer.

In this respect, the Appellant referred to page 1, lines 4 to 7 from the bottom and page 11, lines 23 to 31 of the WO publication.

According to Claims 1 and 8, this problem is solved by providing the respective ingredients as a fruitless premix contained in a ready-to-use package (Claim 1) which package, if needed, is opened and whose contents is then mixed with fresh fruit (Claim 8).



D5, pertaining to microbiologically stable foods, inter alia fruit-based fillings for bakery products, may be considered representative of the closest prior art.

It is evident in D5 that the foods are provided in the form of complete mixtures of food ingredients (e.g. fruit or fruit products) with stabilising formulations containing high amounts of sugar and optionally other stabilisers (cf. the examples).

Accordingly, example 3 of the document describes the preparation of a donut filling by preparing a fruitless premix comprising dextrose-fructose syrup, starch (thickener), potassium sorbate (preservative agent) and ascorbic acid (acidifying agent/antioxidant) and thereafter adding rehydrated apple pieces to it. The example implies that the premix, after its preparation, is immediately mixed in the same container with the apple pieces.

Because there is no indication in D5 that the fruitless premix compositions are stored separately for a later use, the skilled person has no incentive to provide the compositions in premix packages which are ready for sale in order to solve the problem posed. Therefore, D5 cannot render the claimed subject-matter obvious.

The other documents cited in the procedure do not provide any further indications which would motivate a skilled person to provide the compositions of D5 as ready-to-use premix-packages. Therefore, the claimed subject-matter is also based on an inventive step over a combination of D5 with one of the other documents.

**Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division with the order to grant a patent on the basis of the following documents:
  - Claims 1 to 17 of the main request filed during the oral proceedings;
  - Description to be adapted.

The Registrar

The Chairman

A. Wolinski

P. Kitzmantel