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**Datasheet for the decision  
of 8 February 2011**

**Case Number:** T 0741/08 - 3.3.09

**Application Number:** 01933684.1

**Publication Number:** 1267645

**IPC:** A23L 1/40

**Language of the proceedings:** EN

**Title of invention:**

Cooking aid

**Patentee:**

SOCIETE DES PRODUITS NESTLE S.A.

**Opponent:**

Unilever N.V.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 123(2), 84, 54, 56

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Lack of clarity (no)"  
"Added subject-matter (no)"  
"Novelty, inventive step (yes)"

**Decisions cited:**

-

**Catchword:**

-



Case Number: T 0741/08 - 3.3.09

**DECISION**  
of the Technical Board of Appeal 3.3.09  
of 8 February 2011

**Appellant:** Unilever N.V.  
(Opponent) Weena 455  
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**Representative:** Wurfbain, Gilles L.  
Unilever Patent Group  
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**Respondent:** SOCIETE DES PRODUITS NESTLE S.A.  
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**Representative:** Rupp, Christian  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
8 February 2008 concerning maintenance of the  
European patent No. 1267645 in amended form.

**Composition of the Board:**

**Chairman:** W. Sieber  
**Members:** W. Ehrenreich  
K. Garnett

## Summary of Facts and Submissions

I. Mention of grant of European patent No. 1 267 645 in respect of European patent application No. 01 933 684.1 filed as International application No. PCT/EP2001/002724 in the name of *Société des Produits Nestlé S.A.* on 12 March 2001 was announced on 12 May 2004 in Bulletin 2004/20.

The patent was granted with 10 claims, independent claims 1 and 10 reading as follows:

"1. Cooking aid composed of an envelope based on fat which is solid at room temperature and a fluid or pasty flavouring filling."

"10. Method for rapid distribution of flavour within a food product by adding a cooking aid according to any preceding claims into hot foods or a hot frying pan."

Claims 2 to 9 were dependent claims.

II. An opposition against the patent was filed by *Unilever N.V.* on 8 February 2005.

The opposition was based on the grounds of Article 100(a) EPC, namely that the claimed subject-matter lacked novelty and lacked an inventive step.

In support of its objections the opponent *inter alia* cited the following documents:

D1 EP-A 324 072;

D3 JP-A 3/147 770 (English translation);

D8 EP-A 888 721; and

D11 US-B 6 399 129 - corresponding to D8 but published after the effective priority date of the patent in suit.

III. With its decision announced orally on 13 November 2007 and issued in writing on 8 February 2008 the opposition division maintained the patent in amended form on the basis of a set of 9 claims according to a new main request submitted by the proprietor with its letter dated 12 September 2007.

Independent claims 1 and 9 read as follows:

"1. Cooking aid composed of an envelope based on fat which is solid at room temperature and a fluid or pasty flavouring filling, wherein the filling comprises salt in a proportion of 10 to 40% of the weight of the filling."

"9. Method for rapid distribution of flavour within a food product selected from cooked pasta, rice, vegetables, meat, fish, prepared meals, sauce dishes, by adding a cooking aid composed of an envelope based on fat which is solid at room temperature and a fluid or pasty flavouring filling into hot foods or a hot frying pan, whereby the envelope melts rapidly and releases the filling."

The opposition division held that the amendments to the claims were in compliance with Articles 84 and 123(2) EPC and that the claimed subject-matter was novel over D3 and D11 and was based on an inventive step when starting from D3 as the closest prior art.

IV. Notice of appeal was filed by the opponent (hereinafter: the appellant) on 4 April 2008. The prescribed fee was paid at the same day.

In its statement setting out the grounds of appeal, which was filed on 9 June 2008, the appellant submitted that the amendment to claim 1, namely the introduction of the feature "*wherein the filling comprises salt in a proportion of 10 to 40% of the weight of the filling*" violated Article 123(2) EPC. The objections as to lack of novelty and lack of inventive step with reference to D1, D3 and D11 were maintained. Documents E1 to E5 relating to the meaning of "*pasty flavouring filling*" were newly cited.

V. The patent proprietor (hereinafter: the respondent), in its letter dated 14 January 2009, defended the maintenance of the patent as allowed by the opposition division (main request), alternatively sought maintenance of the patent on the basis of sets of claims according to auxiliary requests I to VI. All sets of claims were enclosed with the above letter.

VI. On 8 February 2011 oral proceedings took place before the board, at which the respondent replaced all previous requests by a set of claims numbered 1 to 9 as the basis for its new single request, which, after a discussion on admissibility, was admitted into the proceedings. The description was adapted to the new claims.

Claims 1 and 9 of the new request corresponded to claims 1 and 9 of the request allowed by the opposition

division (previous main request) except for the following amendments:

- in claims 1 and 9 the feature "or *pasty*" was deleted;
- in claim 9 the feature concerning the salt content of the filling was specified as in claim 1.

Claims 1 and 9 therefore now read as follows:

"1. Cooking aid composed of an envelope based on fat which is solid at room temperature and a fluid flavouring filling, wherein the filling comprises salt in a proportion of 10 to 40% of the weight of the filling."

"9. Method for rapid distribution of flavour within a food product selected from cooked pasta, rice, vegetables, meat, fish, prepared meals, sauce dishes, by adding a cooking aid composed of an envelope based on fat which is solid at room temperature and a fluid flavouring filling into hot foods or a hot frying pan, whereby the envelope melts rapidly and releases the filling, wherein the filling comprises salt in a proportion of 10 to 40% of the weight of the filling."

VII. The arguments of the appellant relating to the claims according to the new single request may be summarized as follows:

- (a) Added subject-matter - Article 123(2) EPC

Original claim 8 only referred back to claims 1 and 2. However, the introduction into claim 1 of the current request of the feature from original

claim 8, namely "wherein the filling comprises salt in a proportion of 10 to 40% of the weight of the filling", meant that this feature was now also a feature of the other sub-claims 3 to 7. However, such a combination was not disclosed in the application as filed.

Concerning process claim 9, there was no basis in the application as filed for (i) rapid distribution of flavour or (ii) a combination of the process feature "Method for rapid distribution of flavour ..." with the food products "selected from cooked pasta, rice, vegetable, meat, fish prepared meals, sauce dishes".

(b) Clarity - Article 84 EPC

The feature in granted Claim 1, namely "fluid or pasty flavouring filling", is explained in paragraph [0026] of the patent specification as having a viscosity in a "a range between liquid honey and a pasty spread". Deletion of the words "or pasty" from claims 1 and 9 was objectionable under Article 84 EPC because it was no longer clear where the boundaries of the remaining feature, namely "fluid" filling, lay.

(c) Novelty

Novelty objections against the subject-matter of the claims according to the new request were not raised by the respondent.

(d) Inventive step

The pre-published document D8 - corresponding to D11 - was representative of the closest prior art. The cooking aid claimed in claim 1 differed from the cooking aid disclosed in D8 essentially in that the flavouring filling was fluid.

As no specific effect caused by the use of a fluid filling was shown by the respondent, the problem to be solved had to be seen in the provision of an alternative cooking aid. It would, however, have been known to a skilled person that the distribution behaviour of a filling in food depended on its consistency and that fluid fillings distribute better in hot food than those having a pasty consistency.

Therefore, it would have been obvious for a skilled person to replace the pasty fluid according to D8 by a fluid filling. This all the more so as D1 disclosed beverage capsules to be mixed with hot milk or water, including beverage bases in liquid or syrup (i.e. fluid) form enclosed in a fat-based envelope, and the patent in suit itself disclosed in paragraph [0029] that the cooking aid of the invention might be dissolved in a hot liquid for the reconstitution of hot drinks.

The claimed cooking aid was therefore not inventive.

The same considerations also applied for the process for distribution of flavours in hot food



as claimed in claim 9 because the cooking aid of D8 - by definition - served the same purpose.

VIII. The respondent argued as follows:

(a) Article 123(2) EPC

The salt proportion of 10 to 40% by weight for the filling according to claim 1 was not only disclosed in original claim 8 but also on page 8, lines 21/22 for the product of the invention in general.

Concerning the amendments to claim 9, not only the literal combination of the words used but the teaching of the application as a whole had to be considered. It was clearly disclosed on page 3, lines 29 to 32, page 4, lines 1 to 6 and page 6, lines 9 to 23 that the cooking aid of the invention makes it possible to have a rapid and instant distribution of flavour within hot food products by adding it either to a hot frying pan followed by adding foods or by adding the cooking aid into hot foods.

(b) Article 84 EPC

A clear borderline between "fluid" and "pasty" existed in that "fluid" implied that the filling did not retain its shape, whereas a "pasty" filling was shapeable. Deletion of "pasty" in claims 1 and 9 did therefore not introduce lack of clarity.

(c) Novelty

The combination of the mandatory features in claims 1 and 9 that the flavouring filling is fluid and comprises salt in a proportion 10 to 40% of the weight of the filling rendered the claimed subject-matter novel over the prior art.

(d) Inventive step

The claimed cooking aid differed from that disclosed in the closest prior art D8 by two features, namely the salt content of the filling and its fluid consistency. This combination of features leads to various advantages of the cooking aid, namely good preservation of the product at room temperature, a rapid distribution of the filling in hot food and provision of novel flavour notes in good quality (patent specification, paragraphs [0015], [0016], [0026] and [0031]). Moreover, it was possible with the claimed cooking aid to portion and handle a non-shapeable fluid filling in a closed, quickly melting envelope without running the risk of the spilling of the filling material.

There was no information in D8 which would incite a skilled person to replace the soft filling by a fluid one in order to arrive at the above mentioned advantages.

It should further be noted that D1 related to beverage capsules for preparing hot drinks by mixing capsules consisting of a chocolate or a fat-based confectionery envelope and an optionally fluid beverage base with hot milk or water. D1

therefore pertained to a different technical field which a skilled person concerned with cooking aids would not contemplate.

Therefore, neither D8 alone nor in combination with D1 would lead to the claimed invention.

- IX. The appellant requested that the decision under appeal be set aside and the patent be revoked.
  
- X. The respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of the request filed during the oral proceedings.

### **Reasons for the Decision**

- 1. The appeal is admissible.
  
- 2. Admission of the respondent's request into the proceedings

As already noted, the claims of the respondent's request submitted during the oral proceedings differ from the claims according to the main request submitted with the letter of reply to the appellant's grounds of appeal by the following amendments:

- in claims 1 and 9 the feature "pasty" has been deleted;
  
- claim 9 has been brought into line with claim 1 in that the salt content of the filling is now incorporated.

These amendments did not increase the complexity of the case; furthermore, the appellant did not complain that

the amendments came as a surprise and could therefore not be dealt with in the oral proceedings.

The board therefore admitted the request into the proceedings in accordance with Article 13(1) of the Rules of Procedure of the Boards of Appeal.

3. Article 123(2) EPC

3.1 The amendment to claim 1 by introducing the feature "wherein the filling comprises salt in a proportion of 10 to 40% of the weight of the filling" is based on original claim 8 ("Cooking aid according to either of Claims 1 and 2, characterized in that the filling comprises salt in a proportion of 10 to 40% of the weight of the filling."). Since, however, original claim 8 only referred to claims 1 and 2, there was, according to the appellant, no basis in the application as filed for the combination of the specific salt content with the embodiments of the other dependent claims. For example, there was no direct disclosure of the embodiment of dependent claim 4, namely the combination of granted claim 1, original claim 8 (filling with salt content of 10-40% of the weight of the filling) and original claim 4 (filling/envelope proportion relative to the final product in a range from 70/30 to 10/90).

However, the appellant's argument is not persuasive. The amendment of claim 1 has as its basis not only original claim 8, but is also supported by the passage on page 8, lines 20 to 23 of the application as filed. Indeed, the disclosure of the salt content in that passage refers to "the product", which is mentioned throughout the application as filed as having all

possible embodiments disclosed in the dependent claims. Therefore a person skilled in the art would at least implicitly derive from the application as filed that the salt content of the filling, as now specified in claim 1, relates to all embodiments of the cooking aid. Consequently, the introduction of the feature "wherein the filling comprises salt in a proportion of 10 to 40% of the weight of the filling" into claim 1 does not violate Article 123(2) EPC.

3.2 Concerning the appellant's further objection that the rapid distribution of flavour within a food product referred to in claim 9 did not comply with Article 123(2) EPC, the board notes that granted claim 10 (which is the basis for present claim 9) already refers to a "Method for rapid distribution of flavour within a food product by adding a cooking aid into hot foods or a hot frying pan". Granted claim 10 was not objected to under Article 100(c) EPC. The feature of claim 9 based on granted claim 10 cannot therefore be attacked under Article 123(2) in the appeal proceedings. Apart from that, page 3, line 28-32 and page 4, lines 1-6 provide ample basis for instant and uniform distribution of the flavouring ingredients. As regards the specific food products referred to in claim 9, namely food products selected from cooked pasta, rice, vegetables, meat fish, prepared meals and sauce dishes, and the feature that the envelope melts rapidly and releases the filling, support for these features can be found on pages 3, lines 28 to 32 and page 6, lines 9 to 23 of the original description.

3.3 In summary, the claims of the single request meet the requirements of Article 123(2) EPC.

4. Article 84 EPC

Concerning the meaning of the feature "fluid flavouring filling", the board concurs with the respondent's view that a fluid filling is not shapeable and/or does not retain its shape, whereas a pasty filling does retain its shape, the latter becoming evident from D8, where it is disclosed in column 3, lines 4 to 14 that soft forms of broth are formed e.g. by extrusion, laminating or cutting.

The skilled person can therefore distinguish between a fluid filling according to claims 1 and 9 and a pasty filling. Because the claimed cooking aid has a fat-based envelope which is solid at room temperature, the skilled person would also relate the feature "fluid filling" to room temperature.

5. Novelty

The combination of features in independent claims 1 and 9, namely that the flavouring filling is fluid and comprises salt in a proportion of 10 to 40 % of the weight of the filling, establishes novelty over the cited prior art. In fact, novelty was no longer contested by the appellant.

6. Inventive step

6.1 The claimed subject-matter relates to a cooking aid which consists of two essential elements:

- a fat-based envelope and
- a fluid flavouring filling inside the envelope.

It is the aim of the invention to provide a cooking aid which has good mechanical resistance thereby allowing good handling at room temperature, but which also melts rapidly upon contact with hot food or the surface of a hot frying pan and thereby releases the fluid filling, which then becomes rapidly distributed in the food. The cooking aid should also be well preserved, e.g. against microbes (cf. patent specification, paragraphs [0001], [0013], [0015] and [0031]).

6.2 As agreed by the parties, D8 represents the closest prior art. D8 describes a cooking aid consisting of:

- a conditioned flavouring core (a filling) which is obtained by mixing 30-50 parts of salt, 10-20 parts of glutamate, 10-20 parts of fat and small amounts of other ingredients, and which may have a solid (in tablet form ) or soft (pasty) consistency (column 1, lines 3 to 5, lines 39 to 41; column 2, lines 24 to 27 and column 3, lines 4 to 14);
- a fat-based coating (envelope) for the flavouring core, which is solid at room temperature (column 1, lines 42 to 44, column 2, lines 33 to 36 and 49 to 52 and column 3, lines 21/22).

6.3 Apart from a somewhat lower salt content of the filling, the claimed cooking aid differs from that disclosed in D8 in that the flavouring filling is fluid.

It is stated in paragraph [0016] of the patent specification that the fluid filling makes it possible to provide novel and different flavour notes of a much better quality than with tablets. According to

example 1 of the patent specification a cooking aid containing a fluid flavouring filling containing 25% salt is prepared which, upon use at elevated temperature, melts and rapidly releases the fluid filling which becomes easily diluted in hot water.

Therefore, the problem to be solved is seen in the provision of a cooking aid with a preserved filling inside an envelope, in which the flavour profile of the filling can be varied in a more flexible way and which allows a rapid release and distribution of the filling in hot foods.

According to claim 1 this aim is achieved by the following essential features:

- (a) the fat-based envelope is solid at room temperature;
- (b) the filling is fluid;
- (c) the filling comprises salt in a proportion of 10 to 40% of the weight of the filling.

6.4 There is no information available in the prior art which would lead the skilled person to replace the solid or soft filling in the cooking aid described in D8 by a fluid filling in order to solve above problem.

Although a skilled person learns from D1 that fluid beverage bases (fillings) surrounded with a fat-based (chocolate) envelope can be used as beverage capsules (D1, claims 1 and 3 and page 2, lines 1 to 17), no advice is given that the filling in fluid form has any advantages over the semi-solid or solid fillings which are alternatively used in D1 (cf. page 2, line 26).



Moreover, and in contrast to the claimed cooking aid, the fillings described in D1 contain almost no salt and are designed to provide sweet drinks having a chocolate taste by mixing the beverage capsules with hot milk or hot water (page 2, lines 1 to 5, 50, 51 and examples 1 to 6).

Referring to paragraph [0029] of the patent specification, the appellant argued that the cooking aid of the invention may also be dissolved in hot water to prepare hot drinks. D1 would therefore be relevant for the assessment of inventive step.

This argument, however, is not convincing as this passage has to be read in context with the claimed composition of the fluid filling, which - in contrast to D1 - has to contain considerable amounts of salt (10 to 40%) and may exist as a more or less concentrated meat or vegetable broth (paragraph [0026]), which optionally contains flavourings such as basil, parsley, garlic, onion, etc. ([paragraph [0027])). Such fillings would be unsuitable for sweet drinks, such as those described in D1.

D1 therefore lies in a different technical field and would not be considered relevant by a skilled person intending to provide cooking aids which distribute flavouring fillings into hot foods.

The cooking aid according to claim 1 and the process for distribution of fluid flavouring fillings within food products according to claim 9 are therefore inventive over D8 alone or a combination of D8 with D1.

7. In the light of the above, the claims of the respondent's request are allowable.
  
8. The appellant raised no objections against the adapted description filed by the respondent during the oral proceedings. Also the board is satisfied that the description has been correctly brought into line with the amended claims.

## **Order**

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

1. The decision under appeal is set aside.
  
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of:
  - (a) claims 1 to 9 according to the request filed during the oral proceedings;
  - (b) the amended description pages numbered 2 to 5 as filed during the oral proceedings.

The Registrar

The Chairman

A. Wolinski

W. Sieber