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**Datasheet for the decision  
of 11 December 2013**

**Case Number:** T 2011/09 - 3.3.02

**Application Number:** 97870052.4

**Publication Number:** 806145

**IPC:** A21D 10/00, A21D 2/18,  
A21D 2/26, A21D 2/16

**Language of the proceedings:** EN

**Title of invention:**  
Improver for microwave reheated bakery products

**Patent Proprietor:**  
PURATOS N.V.

**Opponent:**  
LESAFFRE INTERNATIONAL

**Headword:**  
Improver for microwave reheated bakery products

**Relevant legal provisions:**  
EPC Art. 100(c), 123(2), 84

**Keyword:**  
"Claim 4 of the main request lacks clarity"  
"Main request and auxiliary request: Added matter (yes)"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 2011/09 - 3.3.02

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.02  
of 11 December 2013

**Appellant:** PURATOS N.V.  
(Patent Proprietor) Industrialaan 25  
BE-1702 Groot-Bijgaarden (BE)

**Representative:** Pronovem  
Office Van Malderen  
Avenue Josse Goffin 158  
BE-1082 Bruxelles (BE)

**Appellant:** LESAFFRE INTERNATIONAL  
(Opponent) 147 Rue Gabriel Péri  
BP 6027  
F-59706 Marcq-en-Baroeul Cedex (FR)

**Representative:** Cabinet Plasseraud  
52, Rue de la Victoire  
F-75440 Paris Cedex 09 (FR)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
on 5 August 2009 concerning maintenance of the  
European Patent No. 806145 in amended form.**

**Composition of the Board:**

**Chairman:** U. Oswald  
**Members:** M. C. Ortega Plaza  
D. Prietzel-Funk

## Summary of Facts and Submissions

I. European patent No. 0 806 145, based on European patent application No. 97870052.4, was granted with 16 claims.

Claim 1 as granted read as follows:

"1. Yeast-raised baked product improver, characterised in that the improver comprises the following ingredients:

- 5-15 weight % proteins selected from the group of soy and egg proteins,
- 40-60 weight % fat,
- 1-6 weight % methylcellulose,
- 19-54% additional ingredients,

wherein all the weight % are based on the total weight of the composition being 100%."

Independent claim 4 as granted read as follows:

"4. Yeast raised fully or partially baked products comprising a yeast-raised baked product improver, wherein the improver comprises at least the following ingredients:

- fat,
- proteins selected from the group of soy and egg proteins,
- Methylcellulose."

Dependent claim 5 as granted read as follows:

"5. Yeast raised fully or partially baked products according to claim 4, characterised in that said products comprise

- 0.5-3 weight % proteins selected from the group consisting of soy and egg proteins,
- 4-15 weight % fat,
- 0.1-1.2 weight % methylcellulose and
- additional ingredients,

wherein the weight % are based on the total flour weight."

Dependent claim 6 as granted read as follows:

"6. Fully or partially baked products according to claim 4 or 5, characterised in that its amount of sugar is equal or less than 15%."

Dependent claim 8 as granted read as follows:

"8. Fully or partially baked products according to any of the claims 4 to 7, characterised in that the improver content varies being [sic] 2% and 20% on flour weight (weight/weight)."

Independent claim 9 as granted read as follows:

"Process for the preparation of fully or partially baked products according to any of the preceding claims 4 to 8, characterised in that a yeast-raised baked product improver is added into the dough of said

fully or partially baked products, said improver comprising at least the following ingredients:

- fat,
- proteins selected from the group of soy and egg proteins,
- Methylcellulose."

Independent claim 13 as granted read as follows:

"13. Use of an improver comprising at least the following ingredients:

- fat,
- proteins selected from the group of soy and egg proteins, and
- Methylcellulose,

for the preparation of fully or partially yeast raised baked products that are less tough after microwave reheating."

II. Opposition was filed and revocation of the patent in its entirety was requested, in particular pursuant to Article 100(c) EPC (the subject-matter of the patent extends beyond the content of the application as filed), 100(a) EPC (lack of novelty and lack of inventive step) and 100(b) EPC (lack of sufficiency of disclosure).

III. The following documents were cited *inter alia* in the opposition and appeal proceedings:

E1 D. A. Bell and L. W. Steinke, Cereal Foods World, November 1991, pages 941-944

E2 US 5110614

E3 I. Toufeili et al., Cereal Chemistry, 71(6), 594-601.

IV. The present appeal lies from an interlocutory decision of the opposition division maintaining the patent in amended form on the basis of the first auxiliary request filed during the oral proceedings before the opposition division (Articles 101(3)(a) and 106(2) EPC).

V. The opposition division considered that claim 1 of the main request (set of claims filed as auxiliary request 1 with the letter of 11 May 2009) did not extend beyond the content of the application as filed (Article 100(c) EPC) and that the amendments introduced in claim 4 ff. of the main request met the requirements of Article 123(2) EPC.

Furthermore, the opposition division was of the opinion that the claimed invention was sufficiently disclosed (Article 100(b) EPC). However, the opposition division stated in its decision that example 1 did not fall within the subject-matter of claims 1 or 4.

The opposition division considered that independent claim 4 of the main request lacked novelty vis-à-vis document E3, since the percentages were to be determined in relation to flour (weight by weight) for which the amount was not fixed in the product. Thus, only the lower limits could be found to be limitative. Furthermore, the claimed subject-matter lacked novelty since additional ingredients could also contain methylcellulose, proteins (soy or egg) and/or fat.

The opposition division considered that the subject-matter in claim 4 of the first auxiliary request was novel, since it stated specific ranges of components which were not disclosed in document E3. In particular, the fat amount (2.18%) disclosed for the compositions in document E3 was lower than the limitation 4 to 15% in amended claim 4.

Additionally, the opposition division was of the opinion that document E2 represented the closest prior art. It considered that the problem to be solved was the provision of an improver for the microwave reheating of yeast-raised baked products. According to the opposition division's findings, the solution, which concerned replacing microcrystalline cellulose by methylcellulose, involved an inventive step. The opposition division further considered that the subject-matter claimed in independent claims 1, 4, 8 and 12 met the requirements of Article 56 EPC.

- VI. The opponent (appellant-opponent) lodged an appeal against said decision and filed grounds of appeal which also contained objections against the main request, *inter alia* under Article 123(2) and (3) and Article 83 EPC. The appellant-opponent requested that the decision under appeal be set aside and that the patent be revoked in its entirety.
- VII. The patent proprietor (appellant-patentee) also lodged an appeal against the first-instance decision and filed grounds thereto. It requested that the decision under appeal be set aside (insofar as claim 4 of the main request was found to lack novelty) and that the patent be maintained on the basis of the main request.

VIII. Claim 1 of the main request is identical to claim 1 as granted.

Independent claim 4 of the main request reads as follows:

"4. Yeast raised fully or partially baked products comprising a yeast-raised baked product improver according to any of claims 1 to 3, wherein the improver content varies between 2% and 20% on flour weight (weight/weight)."

Dependent claim 6 of the main request reads as follows:

"6. Fully or partially baked products according to claim 4 or 5, characterised in that its amount of sugar is equal or less than 15%."

Claim 1 of auxiliary request 1 is identical to claim 1 as granted.

Claim 4 of the auxiliary request 1 reads as follows:

"4. Yeast raised fully or partially baked products comprising a yeast-raised baked product improver, wherein the improver comprises at least the following ingredients:

- fat,
- proteins selected from the group of soy and egg proteins,
- Methylcellulose,



characterised in that said products comprise

- 0.5-3 weight % proteins selected from the group consisting of soy and egg proteins,
- 4-15 weight % fat,
- 0.1-1.2 weight % methylcellulose and
- additional ingredients,

wherein the weight % are based on the total flour weight."

Dependent claim 5 of auxiliary request 1 has the same wording as dependent claim 6 of the main request.

- IX. The appellant-patentee filed with a letter dated 28 April 2010 a response to the opponent's appeal.
- X. The board sent a communication pursuant to Article 15(1) RPBA as an annex to the summons to oral proceedings.

In said communication the board analysed *inter alia* the wording of claims 1 and 4 of the main request and expressed the preliminary opinion that claim 4 had to be investigated in relation to Article 123(2) and (3) EPC and Article 84 EPC. In particular, the board pointed out that the incorporation in claim 4 of a reference to claim 1 as granted (where the percentages of the components of the improver were defined in relation to 100% of the improver composition, which also contained additional ingredients including flour) at the same time as the specification of the percentage of improver content expressed as weight by weight on the basis of (total, added?) flour weight lacked clarity, since it was unclear which total sum of

individual components was meant to constitute the improver to be present as 2% to 20% weight by weight relative to flour. The board also mentioned that a similar problem arose in relation to claim 5 which was dependent on amended claim 4.

- XI. With a letter dated 24 October 2013 the appellant-patentee informed the board that it would not attend the oral proceedings.
- XII. Oral proceedings took place on 11 December 2013 in the absence of the appellant-patentee.
- XIII. The appellant-patentee did not file any substantive response to the board's communication sent as an annex to the summons to oral proceedings.

As regards the grounds pursuant to Article 100(c) EPC and Articles 123(2) and (3) EPC, the appellant-patentee submitted with its letter of 28 April 2010 that the basis for the expression "yeast raised baked product" was to be found on page 9, lines 13-14 of the application as filed, in the examples and in claims 8 and 13 as originally filed.

Concerning the basis in the application as originally filed for the sugar content, the appellant-patentee referred to page 9, lines 14, 17 and 23, and claims 9 and 12 as originally filed.

XIV. The appellant-opponent's arguments, as far as relevant for the present decision, may be summarised as follows.

Claim 4 of the main request did not result from the combination of granted claims. Therefore, claim 4 was open for the assessment of clarity under Article 84 EPC. Claim 4 of the main request lacked clarity since the final product contained an improver which in content varied between 2% and 20% on flour weight (weight/weight). The improver was defined in claim 4 according to claims 1 to 3. Claim 1 defined the improver as containing ingredients in certain % weight by weight based on the total composition. The improver of claim 1 could contain flour as an additional ingredient (paragraph [0024] of the patent in suit). Therefore, it was manifestly unclear how to calculate the percentages of ingredients in the product claimed in claim 4, since it was unclear to which flour content the percentages related. Additionally, the ranges of values by weight specifically mentioned in claim 1 for proteins and fat overlapped with the definitions of additional ingredients present as 19-54% (paragraph [0023] of the patent in suit). Moreover, the definition of the preferred embodiment for the final product given in paragraph [0031] of the patent in suit defined that the fat content varied between 0% and 14% (expressed as percentages of flour weight). The fact that the preferred embodiment did not fall within claim 4 of the main request brought additional problems in relation to Article 84 EPC.

The sugar content in the final product, which was defined in claim 6 as "its amount of sugar is equal or less than 15%", related to unallowable added matter

under Article 100(c) EPC. Originally filed claim 9 related to fully or partially baked products defined in claims 6 to 8 as originally filed, characterised in that their amount of polysaccharides was equal to or less than 15%. The disclosure on page 9 of the application as originally filed defined fully or partially baked products wherein the amount of sugar was equal to or less than 15% and the amount of flour was equal to or more than 50%. Claim 6 brought the amount of sugar in the final product out of its context on page 9 of the application as originally filed, since the amount of flour was not defined.

The appellant-opponent stated that the arguments it had submitted in relation to claim 6 of the main request applied *mutatis mutandis* to claim 5 of auxiliary request 1.

- XV. The appellant (patentee) requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the main request (filed as auxiliary request 1 with the letter of 11 May 2009) or, alternatively, on the basis of auxiliary request 1 filed on 11 June 2009.

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

## Reasons for the Decision

1. The appeals are admissible.
2. As stipulated by Article 15(3) RPBA the board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case.
3. *Main request*
  - 3.1 Claim 4 of the main request does not merely result from the combination of granted claims. Therefore, claim 4 is open for the assessment of clarity under Article 84 EPC.

Claim 4 relates to a final product, namely a yeast-raised fully or partially baked product which contains an improver defined according to claims 1 to 3. Moreover, claim 4 requires that the improver content varies between 2% and 20% on flour weight (weight/weight). Claim 1 relates to the improver which is defined by means of a list of ingredients in weight % based on the total weight of the composition. The ingredients specifically mentioned in claim 1 are proteins, fat and methylcellulose. However, the improver of claim 1 also contains 19-54% of additional ingredients. Paragraph [0023] of the patent in suit defines "the additional ingredients which may be incorporated into the improver". They are "preferably chosen among the group consisting of proteins (such as gluten), fat (such as hydrogenated soya oil),..., yeast and products that are based on yeast". Paragraph [0024]

of the patent in suit further states that the improver may also comprise as additional ingredients usual ingredients such as salt, water and flour.

Apart from the fact that some of the ingredients (proteins and fat) overlap with the definition and percentages of the additional ingredients appearing also in claim 1 and mentioned in the description (paragraph [0023] of the patent in suit), the improver may contain flour (paragraph [0024] of the patent in suit).

Therefore, it is unclear how to calculate the percentages of ingredients in the product claimed in claim 4, since it is unclear in relation to which flour the percentages are expressed (total or added amount of flour in the composition?).

Although the board's communication sent as an annex to the summons to oral proceedings drew the parties' attention to this manifest lack of clarity of claim 4 of the main request, the appellant-patentee did not file any counter-arguments in support of the clarity of claim 4.

Therefore, the main request fails for lack of clarity of claim 4 (Article 84 EPC).

- 3.2 Additionally, the amount of sugar in the final product defined in claim 6 of the main request as being equal to or less than 15%, relates to unallowable added matter under Article 100(c) EPC, since the application as originally filed discloses this specifically defined amount of sugar content in the fully or partially baked

product only in connection with a fixed amount of flour defined as equal to or more than 50% (page 9, lines 15 to 17). Moreover, the ranges of values for the sugar content varying between 0% and 15% are defined on page 9, line 23, only in connection with the definition of the other ingredients and their ranges of amounts, which do not correspond to those of claim 4. Example 1 illustrates a particular improver and, thus, the nature and amounts of the ingredients are specific and example 2 illustrates a specific final product ("hamburger buns") with a specific recipe. Therefore, the examples cannot be used as an allowable basis for claim 6.

Claim 9 as originally filed defined a content of polysaccharides equal to or less than 15%. However, this definition, which encompasses any suitable polysaccharide additives in bakery products, cannot serve as an allowable basis for the specific sugar (meaning the sweetener) content in the final products.

Consequently, the main request also fails since it contains added subject-matter under Article 100(c) EPC (Article 123(2) EPC).

4. *Auxiliary request 1*

The content of sugar in the final product of claim 4 is defined in claim 5 as being equal to or less than 15%. Therefore, an analysis analogous to that made for claim 6 of the main request applies. The composition of the fully or partially baked products in claim 4 does not correspond to the definition of the products on page 9, either regarding the flour content (lines 15 to

17) or the content of the other ingredients such as fat  
(lines 21 to 24).

Therefore, auxiliary request 1 fails since it contains  
added subject-matter under Article 100(c) EPC.

## **Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

C. Rodríguez Rodríguez

U. Oswald