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**Datasheet for the decision  
of 14 January 2014**

**Case Number:** T 0937/11 - 3.3.02

**Application Number:** 01125692.2

**Publication Number:** 1181867

**IPC:** A21D10/00, A21D2/00, A21D8/04

**Language of the proceedings:** EN

**Title of invention:**  
Granulated bread improver for the preparation of bakery products

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

**Opponents:**  
CSM Nederland B.V.  
BASF Personal Care and Nutrition GmbH

**Headword:**  
Bread improver/ PURATOS

**Relevant legal provisions:**  
EPC Art. 76(1), 123(2)

**Keyword:**  
Divisional application - added subject-matter (yes)

**Decisions cited:**  
T 0390/07, T 1525/10

**Catchword:**



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Case Number: T 0937/11 - 3.3.02

**D E C I S I O N  
of Technical Board of Appeal 3.3.02  
of 14 January 2014**

**Appellant:**  
(Patent Proprietor)

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 14 February  
2011 revoking European patent No. 1181867  
pursuant to Articles 101(2) and 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman:** M.C. Ortega Plaza

**Members:** H. Kellner

L. Bühler

## Summary of Facts and Submissions

I. European patent No. 1 181 867, based on application No. 01 125 692.2 as a divisional from earlier application No. 99 904 634.5, was granted with thirteen claims. The earlier application relates to international application No. PCT/BE99/00025 published as WO99/43213.

Independent claims 1 and 8 as granted read as follows:

"1. Bread improver in the form of a powder, characterised in that it is made of agglomerated particles having a mean particle size of at least 250  $\mu\text{m}$ .

8. Method for obtaining the granulated bread improver according to any of the preceding claims, said method comprising the steps of:

- preparing a starting material being a bread improver comprising at least an emulsifier, in the form of a dried powder having a mean particle size lower than 200  $\mu\text{m}$ ,
- introducing and maintaining said starting material in a fluidised bed reactor at a temperature lower than 45°C, under spraying of an atomised liquid, in order to obtain an agglomeration of the dried powder particles of said material, and
- recovering a bread improver in the form of a dried powder made of agglomerated particles having mean particle size of at least 250  $\mu\text{m}$  and comprising at least an emulsifier and an enzyme."

II. Oppositions were filed against the granted patent under Article 100(a) EPC (lack of novelty and inventive step) and under Article 100(c) EPC in conjunction with

Articles 76(1) and 123(2) EPC (added subject-matter with respect to the content of the application and the earlier application as originally filed).

- III. By its decision pronounced at oral proceedings on 11 January 2011 and posted on 14 February 2011, the opposition division revoked the patent under Articles 101(2) and 101(3) (b) EPC.

The opposition division held that the subject-matter of the patent as granted, in particular with respect to claims 2, 6 and 7, was not originally disclosed in the earlier application as originally filed (Article 100(c) EPC in conjunction with Articles 123(2) and 76(1) EPC).

During the oral proceedings before the opposition division the patent proprietor replaced auxiliary requests 1 and 2 with a single one in which granted claims 2, 3, 6 and 7 were deleted.

In the opinion of the opposition division, however, the subject-matter of this auxiliary request being still based on claim 1 as granted, was anticipated by each of eight documents on file (Article 54 EPC).

- IV. The patent proprietor lodged an appeal against that decision and filed grounds of appeal together with a request that the patent be maintained in amended form according to its main request or the auxiliary request.

The main request corresponded to auxiliary request 1 which had been filed in the written proceedings before the opposition division and replaced during the oral proceedings.

The single auxiliary request was based on method-claim 8 of the patent as granted.

- V. Both respondents filed a response to the grounds of appeal dated 14 November 2011 and 23 November 2011 respectively.
- VI. After the summons to oral proceedings had been dispatched on 15 July 2013, the appellant by fax of 22 November 2013 submitted a further document and two further auxiliary requests as auxiliary requests 1 and 2, and the former single auxiliary request (filed with the grounds of appeal) in amended form as auxiliary request 3. The amendment in claim 1 of auxiliary request 3 was intended to correct an obvious error in claim 1 of the former single auxiliary request.

Claim 1 of the main request is derived from claim 1 as granted by adding the features of claim 2 as granted and consequently reads as follows (added text in bold):

"Bread improver in the form of a powder, characterised in that it is made of agglomerated particles having a mean particle size of at least 250  $\mu\text{m}$ , **wherein said particles comprise at least an emulsifier and an enzyme.**"

Independent claim 7 of the main request is identical to claim 8 as granted.

In claim 1 of auxiliary request 3, the passage

"that is made of agglomerated particles having a mean particle size of at least 250  $\mu\text{m}$ "

has been inserted into the text of claim 8 as granted (identical to independent claim 7 of the main request) replacing the reference to "any of the preceding claims". Thus, the wording of claim 1 of auxiliary request 3 starts (amendments compared to claim 8 as granted shown in bold or strikethrough):

"Method for obtaining ~~a~~the granulated bread improver **that is made of agglomerated particles having a mean particle size of at least 250  $\mu\text{m}$** ~~according to any of the preceding claims~~, said method comprising the steps of:  
..."

- VII. With letter of 10 December 2013 respondent 01 (opponent 01) filed a reasoned request that new auxiliary requests 1 and 2 not be admitted into the proceedings.
- VIII. With letter dated 20 December 2013 respondent 01 filed arguments on the allowability of these requests together with four further documents.
- IX. In a brief communication dated 19 December 2013, the board indicated that the date of the oral proceedings was maintained and that admission into the appeal proceedings of the new requests and the document received on 22 November 2013 would be discussed in the light of Article 13 of the Rules of Procedure of the Boards of Appeal (RPBA, OJ EPO 2007, 536).
- X. With fax dated 6 January 2014, respondent 01 expressed its view that the appellant's main request was inadmissible because the appellant had abandoned the identical set of claims as auxiliary request 1 during the oral proceedings before the opposition division.



XI. On 10 January 2014 the appellant filed a fax comprising arguments with respect to the admissibility of all the requests and also filed a further auxiliary request 4, based on the method-claim 8 of the patent as granted.

Claim 1 of auxiliary request 4 reads (amendments compared to claim 8 as granted shown in bold or strikethrough):

"Method for obtaining ~~a~~the granulated bread improver **in the form of a powder that is made of agglomerated particles having a mean particle size of at least 250  $\mu$ m**~~according to any of the preceding claims~~, said method comprising the steps of:

- preparing a starting material being a bread improver comprising at least an emulsifier, in the form of a dried powder having a mean particle size lower than 200  $\mu$ m,
- introducing and maintaining said starting material in a fluidised bed reactor at a temperature lower than 45°C, under spraying of an atomised liquid, in order to obtain an agglomeration of the dried powder particles of said material, and
- recovering a bread improver in the form of a dried powder made of agglomerated particles having mean particle size of at least 250  $\mu$ m and comprising at least an emulsifier and an enzyme."

XII. On 14 January 2014, oral proceedings took place before the board.

Auxiliary requests 1 and 2 were not admitted into the proceedings.

XIII. The appellant's submissions, as far as relevant for the present decision, may be summarised as follows:

The main request before the board of appeal was admissible despite the fact that this set of claims corresponded to auxiliary request 1 of 11 November 2010 which it had withdrawn before the opposition division. It had not avoided a decision on the ground for opposition pursuant to Article 100(c) EPC with respect to claims 1, 5 and 6 of auxiliary request 1 of 11 November 2010, because their subject-matter was identical to that of claims 2, 6 and 7 of the main request decided upon by the opposition division. Therefore, the current situation was to be distinguished from the situation underlying decisions T 390/07 of 20 November 2008 and T 1525/10 of 20 September 2011 cited by the respondents.

Auxiliary requests 1 and 2 were to be admitted into the proceedings because they merely clarified the subject-matter of claim 1 of the main request and clarifications could be introduced at any stage of the proceedings, including the oral proceedings themselves.

Concerning Article 76(1) EPC in conjunction with Article 123(2) EPC with respect to the main request and auxiliary requests 3 and 4, it was clear from page 5, lines 10 to 13 and page 2, lines 8 to 14 of the earlier application as originally filed (citation referring to WO99/43213) that a bread improver as defined in claim 1 as originally filed must contain more than one, i.e. at least two, ingredients, and the text on page 6, lines 28 to 29 and on page 2, lines 14 to 16 made it clear that these basic two ingredients were from the classes of enzymes and emulsifiers. In particular, the reference to enzymes and emulsifiers on page 2 under

the heading "background of the decision" as being necessary to constitute any bread improver was a basic definition of a bread improver directly applicable to the subject-matter of these requests.

The auxiliary request filed with the statement of the grounds of appeal had related to a method of production and had still contained the wording "according to any of the preceding claims" in its claim 1. In order to amend this formerly single auxiliary request, in claim 1 of auxiliary request 3, for the sake of clarity, all the features of claim 1 of the earlier application as originally filed excluding the passage "in the form of a powder" had been inserted.

In claim 1 of auxiliary request 4, all the features of original claim 1 had been introduced.

Thus, based on method-claim 7 of the earlier application as originally filed, the features of method-claims 1 of auxiliary requests 3 and 4 were also originally disclosed. On the one hand, the complementary text in the description on page 6, lines 28 to 29 now had more weight, because it related to characteristics of the method. On the other hand, all arguments brought forward contra the product claims of the main request, in so far as they were based on the description of characteristics of the product, were no longer relevant. In particular, objections relating to product-claims 4, 5 and 6 of the earlier application as originally filed had ceased to be applicable.

XIV. The respondents' arguments, as far as relevant for the present decision, may be summarised as follows:

The main request was not admissible, because in fact the appellant, for whatever reason, had prevented the opposition division from taking a decision on it. The cited decisions T 390/07 of 20 November 2008 and T 1525/10 of 20 September 2011 applied.

With regard to Article 13 RPBA, auxiliary requests 1 and 2 could not be admitted. Additionally, they contained subject-matter which had not been previously claimed and they were not clearly allowable. Moreover, the appellant had not provided any justification for their late filing at a stage in the proceedings where no new issues had been brought forward by the other parties or the board, since the responses of the respondents to the grounds of appeal had been filed at the end of 2011.

Regarding the allowability of the requests on file, the arguments and conclusions of the opposition division also applied to them. With respect to the method-claims, the arguments were to be applied *mutatis mutandis*. Because of the reference of the independent method-claims in the earlier application as originally filed and in the patent as granted "to any of the preceding claims", all arguments objecting to the product-claims remained relevant. Therefore, and based on additional arguments regarding the introduction of a temperature, auxiliary requests 3 and 4 likewise contravened Article 76(1) EPC in conjunction with Article 123(2) EPC.

- XV. The appellant (patent proprietor) 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 with the statement of grounds of appeal, or, alternatively, on the basis of one of auxiliary

requests 1 to 3 filed by fax on 22 November 2013, or on the basis of auxiliary request 4 filed by fax on 10 January 2014.

The respondents (opponents) requested that the appeal be dismissed.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Admissibility of the requests*
  - 2.1 *Main request (identical to auxiliary request 1 filed on 11 November 2010 and withdrawn before the opposition division)*

The circumstances of the present case have to be distinguished from the situation underlying T 1525/10 and T 390/07, cited by respondent 01. In the present case, the subject-matter of claims 1, 5 and 6 of auxiliary request 1 filed on 11 November 2010 was identical to that of claims 2, 6 and 7 of the main request before the opposition division (claims as granted). These claims of the main request were discussed and decided upon with respect to the ground of opposition pursuant to Article 100(c) EPC in the course of the oral proceedings before the opposition division held on 11 January 2011. Because the opposition division's reasons for rejecting the main request evidently applied likewise to the claims of auxiliary request 1 of 11 November 2010, the appellant did not avoid a decision on the ground for opposition pursuant to Article 100(c) EPC when it withdrew auxiliary request 1.

Moreover, the appellant neither surprised nor disadvantaged the opposing parties on appeal when it turned the withdrawn auxiliary request 1 into its main request before the board. The appellant maintained the claims that had been rejected by the opposition division, took issue with the ground for revocation upon which the decision on the main request was based, viz. Article 100(c) EPC, and gave reasons as to why the decision taken by the opposition division was incorrect. The appellant thus did not change its case on appeal but sought to obtain a judicial ruling on whether the contested decision with respect to Article 100(c) EPC was correct.

Under these circumstances, the board, in the exercise of its discretion, pursuant to Article 12(4) RPBA saw no reason to hold the current main request inadmissible.

## 2.2 *Auxiliary requests 1 and 2*

Auxiliary requests 1 and 2 were not admitted because each claim 1 contained totally new definitions of the products to be protected which did not derive from any of the claims as granted. These sets of claims thus amounted to a change of the appellant's case. Additionally, the amended definitions raised new problems, in particular whether product-by-process features are appropriate (auxiliary request 1) or whether a disclaimer could be allowable (auxiliary request 2).

No justification was provided for the late filing of these claims. The board failed to see any reason for the late submission since no new arguments had been

raised in the replies to the statement of grounds of appeal, and auxiliary requests 1 and 2 could thus not constitute a justified reaction to changes during the appeal proceedings.

2.3 Auxiliary requests 3 and 4

The respondents did not object to the admission into the appeal proceedings of auxiliary requests 3 and 4 and the board itself had no reason to object. Thus, these requests were admitted into the proceedings.

3. *Claim 1 of the main request; Article 76(1) EPC in conjunction with Article 123(2) EPC*

3.1 The subject-matter of claim 1 of the main request relates to

- a bread improver
- in the form of a powder,
- which is made of agglomerated particles
- having a mean particle size of at least 250  $\mu\text{m}$ ,
- wherein said particles comprise at least an emulsifier and an enzyme.

3.2 These features with the exception of "wherein said particles comprise at least an emulsifier and an enzyme" are to be found in claim 1 of the earlier application as originally filed or in the corresponding part of the description (page 5, lines 2 to 5).

The feature "wherein said particles comprise at least an emulsifier and an enzyme" is composed of two parts, namely

- that the bread improver is made of agglomerated particles comprising at least two active ingredients or components and

- that one of these active ingredients or components belongs to the class of emulsifiers and the other to the class of enzymes.

A wording relating to the first part of the feature is to be found on page 5, lines 10 to 13 and on page 2, lines 8 to 14 of the description of the earlier application as originally filed.

"Enzymes" and "emulsifiers" are mentioned together on page 2, lines 14 to 16 and on page 6, lines 28 to 29.

- 3.3 However, on page 6, lines 28 to 29, the two classes of ingredients "enzymes" and "emulsifiers" are mentioned together in the context that they specify (the most) sensitive ingredients of a bread improver. This aspect of a particular sensitivity characteristic among the possible classes of ingredients of a bread improver is fully independent of the question as to which classes of ingredients have to be present in a bread improver.

Therefore, this part of the description of the earlier application as originally filed cannot constitute or endorse a definition of a bread improver as containing at least an emulsifier and an enzyme.

- 3.4 On page 2, lines 8 to 14, under the headline "background of the invention and state of the art" (page 1, line 19), the following is stated:

"A mixture of ingredients active in the preparation process of baked goods is called an improver as soon as it contains more than one class of active components mixed together as to optimise by a synergetic effect their performances in the baking process. The mixing of several enzymes does not lead to obtain an improver. On



the other hand, mixing one or more enzymes with an emulsifier (for example DATEM) or with ascorbic acid gives the formulation of an improver."

However, the paragraph on page 5 of the earlier application as originally filed, following the statement that "in a preferred embodiment of the present invention, the particles are made of at least 2 different active ingredients", specifies that "the improver according to the invention can **further** comprise one or more ingredients selected from the group consisting of **emulsifiers**, fats, **enzymes**, sugars, organic acids, minerals, polysaccharides, proteins and/or a mixture thereof" (bold by the board).

Therefore, a coherent reading of the content of page 5 excludes enzymes and emulsifiers from possibly being these "at least 2 different active ingredients".

3.5 In addition, the first and only definition of the basic ingredients of a bread improver according to the invention that is given in the claims of the earlier application as originally filed defines these two ingredients as fat and proteins (original claim 4). This definition is also in contradiction to the passage on page 2 lines 8 to 16, of the respective description which, was argued, it provided a definition of an improver.

3.6 Finally, even in the set of claims of the current main request itself, namely in its claim 7, under the first bullet, a "starting material ... comprising at least an emulsifier" is mentioned as being a bread improver. In this context, no enzyme is necessary for such a material in order to fulfil the definition of a bread

improver, contrary to the definition given on page 2, lines 8 to 16, of the description.

- 3.7 Accordingly, the specification of "enzymes" and "emulsifiers" as the minimum two ingredients of a bread improver finds no allowable basis in the whole content of the earlier application as originally filed. On the contrary, it is even in contradiction to the content of the original description and claims as a whole. As far as the examples set out in the earlier application as originally filed are concerned, only example 4 contains only an enzyme and an emulsifier in the bread improver. In example 1 more classes of ingredients than enzymes and emulsifiers are contained (the identical composition is used in example 2). The bread improver used in example 3, however, that contains "no emulsifier or fat" (see page 10 of the original application, line 17) again contradicts a definition that a bread improver must contain at least an enzyme and an emulsifier.

Therefore, the condition that the at least two compounds in a bread improver had to be "enzymes" and "emulsifiers" is not directly and unambiguously derivable from the earlier application as originally filed, in particular not from its pages 2, 5 and 6.

- 3.8 It is also not possible to derive that "enzymes" and "emulsifiers" are the minimum two ingredients of a bread improver from page 1, line 29 to page 2, line 1, or page 5, lines 14 to 18, of the earlier application as originally filed. There, eight classes of compounds are mentioned as possibly specifying an ingredient of a bread improver: a bread improver according to the proposed invention may comprise one or more ingredients "selected from the group consisting of emulsifiers,

fats, enzymes, sugars, organic acids, minerals, polysaccharides and proteins" (see page 5, lines 15 to 17 and in a corresponding way on page 1, line 31 to page 2, line 1).

Under these circumstances and in the light of the reasons discussed under points 3.3 to 3.7 above, the teaching of claim 1 of the main request constitutes an arbitrary choice of two particular ingredients as the minimum content of a bread improver which is not directly and unambiguously disclosed in the earlier application as originally filed.

3.9 For the reasons given above, claim 1 of the main request does not comply with the provisions of Article 76(1) in conjunction with Article 123(2) EPC.

4. *Claims 1 of auxiliary requests 3 and 4;  
Article 76(1) in conjunction with Article 123(2) EPC*

4.1 The subject-matter of claim 1 of auxiliary request 3 relates to (amendments with regard to claim 7 of the earlier application as originally filed in bold)

- a method for obtaining **athe** granulated bread improver ...
- comprising the steps of:
- preparing a starting material being a bread improver **comprising at least an emulsifier, ...**
- introducing and maintaining ... **at a temperature lower than 45°C, ...**
- recovering a bread improver ... made of agglomerated particles having mean particle size of at least 250 µm **and comprising at least an emulsifier and an enzyme.**

4.2 This claim still relates to the provision of a bread improver containing "at least an emulsifier and an enzyme". Therefore, the allowability of this method-claim, concerning added subject-matter, still depends on the existence of a teaching directly and unambiguously derivable from the whole content of the earlier application as originally filed that "enzymes" and "emulsifiers" constitute the minimum two ingredients of a bread improver.

However, according to this method-claim itself, the starting material has to be a "bread improver comprising at least an emulsifier", with the consequence that within the same claim a composition comprising an emulsifier alone (without an enzyme) is already called a bread improver.

Moreover, the mention of "enzymes" and "emulsifiers" on the bottom of page 6 of the earlier application as originally filed is also no valid basis for the method-claim, for the same reasons as set out under point 3.3 of this decision. They apply directly to the method claimed, because even the mention of a maximum temperature in the claim does not require that both temperature-sensitive components have to be present together. It is also reasonable from a technical point of view to respect the temperature limit if only one of the sensitive components is contained in the bread improver.

4.3 Consequently, the teaching upon which the last feature in this claim depends in order not to represent added subject-matter cannot be directly and unambiguously inferred from the earlier application as originally filed and the claim is in breach of Article 76(1) in conjunction with Article 123(2) EPC.

4.4 In addition, all the reasons making product-claim 1 of the main request unallowable also apply mutatis mutandis to method-claims 1 of auxiliary requests 3 and 4, even those relating to the features characterising the product and appearing only in the product-related claims of the earlier application as originally filed (in particular in original claim 4 specifying fat and enzymes as the minimum ingredients of a bread improver).

5. The whole content of the application has to be taken into account and, in the present case, added subject-matter applies because of statements contradicting the only statement (on page 2, lines 8 to 16) that supports the feature of the bread improver comprising "at least an emulsifier and an enzyme" in claims 1 of the present requests. Under these circumstances, it does not matter whether such contradictory statements are present in the description or in any claim of the earlier application.

Since none of the requests admitted into the proceedings meets the requirements of the EPC, the appeal must be dismissed.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



N. Maslin

M. Ortega Plaza

Decision electronically authenticated