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Datasheet for the decision of 16 January 2019

Case Number: T 0678/13 - 3.3.08

Application Number: 05731459.3

Publication Number: 1716258

IPC: C12R1/01, A23B4/12, A23L1/314, A23L1/03

Language of the proceedings: EN

Title of invention:
METHOD FOR REDUCING THE CONTENT OF PATHOGENIC ORGANISMS PRESENT IN FOOD MATERIALS

Patent Proprietor:
Chr. Hansen A/S

Opponent:
DuPont Nutrition Biosciences ApS

Headword:
Suppression Listeria fermented meat/HANSEN

Relevant legal provisions:
EPC Art. 113(1), 123(2)
RPBA Art. 12(4)

Keyword:
Main request, auxiliary requests 2, 3 and 6 - added subject-matter (yes);
Auxiliary requests 1, 1A, 4, 5 and 7 - admitted into the proceedings (no);
New documentary evidence - admitted into the proceedings (no);

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 0678/13 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 16 January 2019

Appellant: (Patent Proprietor)	Chr. Hansen A/S P.O. Box 407 Boge Alle 10-12 2970 Horsholm (DK)
Representative:	von Menges, Albrecht Uexküll & Stolberg Partnerschaft von Patent- und Rechtsanwälten mbB Beselerstraße 4 22607 Hamburg (DE)
Respondent: (Opponent)	DuPont Nutrition Biosciences ApS Langebrogade 1 P.O. Box 17 1001 Copenhagen K (DK)
Representative:	Alcock, David D Young & Co LLP 120 Holborn London EC1N 2DY (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 17 December 2012 revoking European patent No. 1716258 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	B. Stolz
Members:	P. Julià
	D. Rogers

Summary of Facts and Submissions

I. European patent no. 1 716 258 is based on European patent application no. 05 731 459.3, which was published under the PCT as International patent application WO 2005/100614 (hereinafter "the patent application"). The patent was opposed on the grounds as set forth in Articles 100(a), (b) and (c) EPC. The opposition division considered the main request and auxiliary requests 4 and 5 to contravene Article 123(2) EPC and auxiliary requests 1 to 3 not to fulfil the requirements of Article 56 EPC. Accordingly, the patent was revoked.

II. An appeal was lodged by the patent proprietor (appellant). With the statement setting out its grounds of appeal, the appellant filed a main request, auxiliary requests 1 to 7, and new evidence (documents (12) to (14)).

III. In reply thereto, submissions were filed by the opponent (respondent).

IV. The appellant replied thereto and filed auxiliary request 1A.

V. As an auxiliary measure, both parties requested oral proceedings.

VI. The parties were summoned to oral proceedings. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the parties were informed of the board's provisional, non-binding opinion on the issues of the case.

The board stated, *inter alia*, that it was inclined not to admit auxiliary requests 1, 1A, 4, 5 and 7 into the appeal proceedings, and that the main request and auxiliary requests 2, 3 and 6 appeared to contravene Article 123(2) EPC. Therefore, the appeal would likely have to be dismissed.

VII. The appellant withdrew its request for oral proceedings and, without making any substantive submissions, informed the board of its intention not to attend the oral proceedings.

VIII. The respondent, without making any substantive submissions, announced its intention to attend the oral proceedings and filed document (6a), a translation of document (6).

IX. Oral proceedings were held on 16 January 2019 in the absence of the appellant.

X. Claims 1 and 7 of the **main request** read as follows:

"1. A method for improving the suppression of growth of pathogens such as *Listeria spp.* in a fermented food product, said method comprises the steps of:

(i) providing a food material,
(ii) mixing the food material with a starter culture providing the desired change in the characteristics of the food matrix during fermentation,
(iii) mixing the food material with at least one adjunct culture in form of a bacteriocin-producing *Pediococcus acidilactici*,
(iv) subjecting the mixture obtained in step (iii) to a fermentation process, said fermentation process being conducted at a temperature which is equal to or below

30°C and further characterized in that the additional acidification caused by the adjunct culture is 0.5 pH-unit or less while allowing for a production of bacteriocin in an amount sufficiently high to result in a reduction of *Listeria* counts expressed as log cfu/g fermented product that is more than 2 at end of the ripening, and obtain the fermented food product,

wherein the fermented food product is subjected to a drying process simultaneously with the fermentation process in step (iv) and/or subsequent to the fermentation process in step (iv) to obtain a dry fermented food product,
and wherein the fermented food product is a fermented meat product."

"7. Use of a bacteriocin-producing *Pediococcus acidilactici* strain as an adjunct culture for suppression of *Listeria spp.* in a fermented food product, wherein said culture, when added to a food fermentation process, is being subjected to a temperature equal to or below 30°C, thereby producing bacteriocin while affecting the acidification profile of the fermentation 0.5 pH-unit or less,
wherein the fermented food product is subjected to a drying process simultaneously with the fermentation process and/or subsequent to the fermentation process to obtain a dry fermented food product."

XI. Claims 1 and 6 of **auxiliary request 1** read as claims 1 and 7 of the main request, except for the amendments:

"1. ... (iv) subjecting the mixture obtained in step (iii) to a fermentation process, said fermentation process being conducted at a temperature which is equal to or below 30°C and further characterized in that the

maximum difference in pH-value caused by the addition of the at least one adjunct culture is 0.25 pH-unit or less ~~the additional acidification caused by the adjunct culture is 0.5 pH-unit or less~~ while allowing ..."

"6. ... thereby producing bacteriocin while the maximum difference in pH-value caused by the addition of the at least one adjunct culture is 0.25 pH-unit or less ~~affecting the acidification profile of the fermentation 0.5 pH-unit or less~~, wherein ..."

XII. Claims 1 and 6 of **auxiliary request 1A** read as claims 1 and 7 of the main request except for the amendments:

"1. ... (iv) subjecting the mixture obtained in step (iii) to a fermentation process, said fermentation process being conducted at a temperature which is equal to or below 30°C and further characterized in that the additional acidification caused by the adjunct culture results in a maximum difference in pH-value of 0.25 pH-unit ~~is 0.5 pH-unit~~ or less while ... "

"6. ... thereby producing bacteriocin while affecting the acidification profile of the fermentation 0.25 pH-unit or less, wherein ..."

XIII. Claim 1 of **auxiliary request 2** reads as claim 1 of the main request. Claims 7 to 10 of the main request have been deleted.

XIV. Claim 1 of **auxiliary request 3** reads as claim 1 of the main request, except for the following amendment:

"1. ... and wherein the fermented food product is ~~a~~ fermented ~~meat product~~ dried sausages."

Claims 7 to 10 of the main request have been deleted.

XV. Claim 1 of **auxiliary request 4** combines the amendment introduced into claim 1 of auxiliary request 1 with the amendment introduced into claim 1 of auxiliary request 3.

Claims 7 to 10 of the main request have been deleted.

XVI. Claim 1 of **auxiliary request 5** reads as claim 7 of the main request except for the amendment:

"1. ... to obtain a dry fermented meat product ~~food product~~."

XVII. Claim 1 of **auxiliary request 6** reads as claim 1 of auxiliary request 5 except for the amendment:

"1. ... to obtain ~~a dry~~ fermented dried sausages ~~meat product~~."

XVIII. Claim 1 of **auxiliary request 7** reads as claim 1 of auxiliary request 6 except for the amendment:

"1. ... thereby producing bacteriocin while the maximum difference in pH-value caused by the addition of the at least one adjunct culture is 0.25 pH-unit or less ~~affecting the acidification profile of the fermentation 0.5 pH-unit or less~~, wherein ..."

XIX. The following documents are cited in this decision:

(12): Expert declaration by Dr Véronique Zuliani, signed on 18 April 2013;

(13): "The Genera of Lactic Acid Bacteria", ed. by B.J.B. Wood and W.H. Holzapfel, page 158, Chapman & Hall, Glasgow, 1995;

(14): "The Science of Meat and Meat Products", American Meat Institute Foundation, pages 362 and 363, W.H. Freeman and Company, San Francisco and London, 1960.

XX. The submissions made by the appellant, insofar as relevant to the present decision, may be summarised as follows:

Admission of documents (12) to (14)

Document (12) was a declaration of Dr Zuliani which provided, *inter alia*, a detailed summary of the disclosure of the patent, in particular the results of Example 1, with regard to the effect of the adjunct culture on acidification during fermentation and ripening. On this basis, Dr Zuliani concluded that the term "without significantly affecting the acidification of the fermentation" represented a different way to describe the feature "limited acidification".

Main request
Article 123(2) EPC; Claim 1

The method of claim 1 was based on claims 1, 2 and 22 of the patent application and the corresponding disclosure of the method in the summary of the invention on page 2, line 31 onwards. The feature introduced into claim 1 concerning the reduction of *Listeria* cell counts was supported by the patent application which disclosed that the adjunct culture with *Pediococcus spp*. caused the production of

bacteriocins capable of reducing/inhibiting the amount/ activity of pathogenic organisms, in particular *Listeria spp.* (page 5, line 33 onwards). The inhibition of *Listeria* growth and the reduction of *Listeria* cell counts represented the most preferred forms of microbial safety disclosed in the patent application. In Example 2, the inhibition of *Listeria* growth in sausages during fermentation with different starter and adjunct cultures was analysed. The use of an adjunct culture diminished *Listeria* cell counts by 2 and 3 logs cfu/g. The example contained a section with a more general discussion of the results and, in that context, the reduction of *Listeria* cell counts was disclosed as "more than 2 logs cfu/g", providing thereby a literal support for the feature introduced into claim 1. Although this paragraph was part of the example, it could be generalised because these features were reflected in a more general discussion. Indeed, the disclosure of a range was already a generalisation of the results obtained, it only made sense in the context of a generalised teaching, as otherwise only specific data points would have been reported.

According to the case law, values and ranges from the examples could be generalised, if the skilled person would have understood that these features were not linked to the other features of the examples. In the present case, the feature "more than 2 log cfu/g reduction of *Listeria* cell count" was achieved in more than one experiment and the general discussion after the description of the results emphasized that this result could be generally obtained. Therefore, the requirements for deriving a range from an example were fulfilled. The more so, since the patent application made abundantly clear that the reduction of *Listeria* cell counts was the purpose and aim of the invention,

for example on page 5, lines 32 to 35, page 6, lines 6 to 19, and page 6, last paragraph, and in all examples.

Article 123(2) EPC; Claim 7

Claim 7 was based on claim 14 of the patent application, which was amended by incorporating a number of features from the description. The feature in claim 7 "while affecting the acidification profile of the fermentation 0.5 pH-unit or less" replaced the feature "without significantly affecting the acidification profile of the fermentation" in claim 14 of the patent application. The patent application disclosed that certain adjunct cultures were able to produce - at low temperatures - sufficient amounts of pediocin to suppress *Listeria* growth without affecting the acidification, as supported by the passages on page 3, lines 5 to 7, 15, 16, 31 and 32 of the patent application. The numerical range introduced into claim 7 was derived from the definition of the term "limited acidification", literally supported on page 8, lines 29 to 34 of the patent application.

The terms "acidification profile" and "without significantly affecting the acidification profile" were not explicitly defined in the patent application. However, the patent application explicitly disclosed and exemplified that, under the temperature conditions provided in the claims, the adjunct culture did not contribute significantly to acidification at any point of time during the fermentation and ripening. Therefore, the adjunct culture could not affect the acidification profile. On this basis, it was clear that the definition of "limited acidification" as provided on page 8, lines 29 to 34 of the patent application also referred to the "acidification profile". Claim 7

was supported by claim 14 of the patent application and these parts of the patent application disclosing that a "limited acidification" meant additional acidification by the adjunct culture of 0.5 pH unit or less.

The replacement of the feature "securing microbial safety of a fermented food product" of claim 14 of the patent application with the feature "for suppression of *Listeria spp.* in a fermented food product" in claim 7 did not contravene Article 123(2) EPC, because the patent application disclosed that the suppression of *Listeria spp.* was the most preferred act of securing microbial safety, such as for instance in the first paragraph of the patent application and in the paragraph bridging pages 1 and 2, all of them equating safety problems with *Listeria* infection. The skilled person, when reading the patent application with a mind willing to understand, would have understood that the invention disclosed in the patent application was directed to fermentation methods using *P. acidilactici* which caused a reduction of *Listeria* cell counts.

Admission of the auxiliary requests

In the statement of grounds of appeal, no reasons were provided as regards the admission of the auxiliary requests into the appeal proceedings.

Auxiliary requests; Article 123(2) EPC

No submissions were made in reply to the communication pursuant to Article 15(1) RPBA, wherein the board expressed its provisional opinion that all auxiliary requests contravened Article 123(2) EPC.

XXI. The submissions made by the respondent, insofar as relevant to the present decision, may be summarised as follows:

Admission of documents (12) to (14)

These documents could have been filed at earlier stages of the procedure at first instance. The objection under Article 123(2) EPC was already raised in the Notice of opposition at the beginning of the opposition.

Main request
Article 123(2) EPC; Claim 1

The feature "a reduction of *Listeria* counts expressed as log cfu/g fermented product that is more than 2 at end of ripening" in part (iv) of claim 1 had no basis in the patent application. The basis given in the patent application by the appellant and the opposition division referred to specific examples, namely trials 1 and 2 of Example 2. According to the case law, features or restrictions present in a specific example could only be combined into a claim together with each of the other features present in that example. It was not permissible to make an intermediate generalisation and take individual features out of context of an example. Trials 1 and 2 related to the use of a culture of a *Pediococcus acidilactici* B-LC-20 strain in the preparation of fermented sausage under particular conditions, such as a particular temperature. Any disclosure in Example 2 that a batch showed a *Listeria* reduction of more than 2 logs could not be generalised to a broader range of food materials, all cultures, all process steps, conditions and temperatures. Example 2 provided a summary and a discussion of the results, but this summary and discussion related only to the

specific batches in the specific trials 1 and 2 of Example 2, they did not provide a basis for any intermediate generalisation.

Article 123(2) EPC; Claim 7

The feature "suppression of *Listeria spp.*" in claim 7 replaced the feature "for securing microbial safety" in claim 14 of the patent application, but it had no basis in the patent application. All references to "*Listeria spp.*" found throughout the patent application were concerned with "reducing the concentration" of *Listeria spp.*, wherein said "reduction" was explicitly defined as "killing, inactivating or inhibiting the activity" of the pathogenic (*Listeria spp.*) organism (cf. page 7, lines 1 to 6 of the patent application). However, there was no reference to a "suppression" alone in the patent application, let alone a definition of such a suppression.

Admission of the auxiliary requests

Auxiliary requests 1, 1A, 4, 5 and 7 could have been filed before the opposition division at an earlier stage of the proceedings.

XXII. The appellant requested, in writing, that the decision under appeal be set aside and that the patent be maintained upon the basis of a main request, or alternatively, upon the basis of one of auxiliary requests 1, 1A, or 2 to 7. In addition, the appellant requested that documents (12) to (14) be admitted into the proceedings.

XXIII. The respondent requested that the appeal be dismissed, that auxiliary requests 1, 1A, 4, 5 and 7 and

documents (12) to (14) not be admitted into the proceedings.

Reasons for the Decision

Article 113(1) EPC

1. By its decision not to attend the oral proceedings and not to file substantive arguments in reply to the issues raised in the board's communication, the appellant has chosen not to make use of the opportunity to comment on the board's provisional opinion, either in writing or at oral proceedings, although this opinion was to the appellant's disadvantage. According to Article 15(3) RPBA, the board is not 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 on its written case.

2. Therefore, the present decision is based on the same grounds, arguments and evidence on which the provisional opinion of the board was based.

Admission of documents (12) to (14) into the appeal proceedings

3. According to the case law, the function of an appeal is to give a judicial decision upon the correctness of a separate earlier decision taken by an examining or opposition division. Appeal proceedings are not an opportunity to re-run the proceedings before any of these divisions. The admission of new evidence in these proceedings is at the discretion of the board (Articles 12(4) and 13(1) RPBA; see "Case Law of the Boards of Appeal of the EPO", 8th edition 2016, I.C.1.3 and IV.E.4, 939 and 1127, respectively).

4. With the statement of grounds of appeal, the appellant filed a declaration of Dr Véronique Zuliani (document (12)), with two documents annexed thereto (documents (13) and (14)), addressing issues related to Articles 123(2) and 56 EPC. In the communication pursuant to Article 15(1) RPBA, the board noted that no reasons were provided by the appellant why this declaration and the documents annexed thereto could not have been filed at an earlier stage of the proceedings, such as during the opposition procedure and that, in view thereof, the board was inclined not to admit these documents into the appeal proceedings (Article 12(4) RPBA).

5. The appellant has chosen not to make use of the opportunity to comment on the board's provisional opinion, either in writing or at oral proceedings, although this opinion was to the appellant's disadvantage as regards this issue. In view thereof, the board sees no reason to change its opinion.

6. Thus, the board, in the exercise of its discretion (Article 12(4) RPBA), does not admit documents (12) to (14) into the appeal proceedings.

Main request

7. The main request is identical to the main request underlying the decision under appeal and it is thus part of the present proceedings. The opposition division considered that, whilst claim 1 of this request did not contravene Article 123(2) EPC, claim 7 did. Therefore, the opposition division decided that the main request contravened Article 123(2) EPC.

Article 123(2) EPC; Claim 1

8. In the decision under appeal, the opposition division considered the feature "a reduction of *Listeria* counts expressed as log cfu/g fermented product that is more than 2 at end of ripening" in part (iv) of claim 1 to be directly and unambiguously derivable from a generalised teaching based on the results of batches B and C of trial 1 in Example 2 of the patent application. Example 2 is also given by the appellant as a basis for this feature. The respondent disputes the findings of the opposition division and argues that there is no basis in the patent application for this feature.

9. It is common ground between the parties that the contested feature is taken from the specific results obtained in batches B and C of trial 1 of Example 2 of the patent application and that the introduction of this feature into claim 1 represents an intermediate generalisation. The criteria for allowing intermediate generalisations have been established in the case law of the Boards of Appeal (cf. "Case Law", *supra*, II.E. 1.7, 439). The Boards have also established criteria for allowing the introduction of isolated values taken from an example and for singling out combinations of features (cf. "Case Law", *supra*, II.E.1.3.2 and II.E. 1.4, 416 and 419, respectively). According thereto, a generalisation is justified only in the absence of a clearly recognisable functional or structural relationship among the features of the specific combination or if the extracted feature is not inextricably linked with those features. Likewise, in the absence of at least a pointer or indication concerning the extracted feature, its selection may not

be clearly and directly evident from the patent application.

10. The trials disclosed in Example 2 were performed under very specific conditions, such as the concentration of the control starter culture (lactic acid bacteria inoculum) and of the adjunct culture (B-LC-20). It is clear from a comparison of the batches B and C (low and high B-LC-20 concentration, respectively) of trials 1 and 2 that, at higher concentrations of adjunct culture, there is a greater reduction of *Listeria* counts. In the trials disclosed in Example 2, the fermentation was carried out at a temperature of 24°C (cf. page 13, line 24 of the patent application), a temperature which falls within the "reasonable compromise between optimal conditions for the starter vs. optimal conditions for the *Pediococcus* strain" (cf. page 6, lines 6 to 16 of the patent application). The skilled person would have certainly recognised that the reduction of *Listeria* counts depends on this compromise and on the specific temperature at which the fermentation is carried out. It follows from all the above, that the contested feature is inextricably linked to the other features/ parameters/conditions used in the trials disclosed in Example 2.

11. Indeed, in the description of the patent application, several ranges of temperatures for fermentation and drying are disclosed (cf. page 9, lines 4 to 11), as well as several concentration ranges of an adjunct culture (cf. page 9, lines 20 to 30), which results in a broad range of possible "limited acidifications" (cf. page 8, lines 29 to 34) and, accordingly, different percentages of "reduction, killing, inactivating or inhibiting" the activity of the pathogenic (*Listeria* spp.) organism (cf. page 7, lines 1 to 6). Likewise,

these disclosures are not limited to the specific "fermented dried sausages" used in Example 2 of the patent application (cf. page 7, lines 31 to 34). In the light thereof, the board considers that the specific combination of: i) a fermentation temperature "equal to or below 30°C", ii) an additional acidification caused by the adjunct culture of "0.5 pH-unit or less", iii) for a "fermented meat product" in general, with iv) "a reduction of *Listeria* counts expressed as log cfu/g fermented product that is more than 2 at end of ripening", is not directly and unambiguously derivable from the patent application.

12. Thus, claim 1 contravenes Article 123(2) EPC.

Article 123(2) EPC; Claim 7

13. The appellant contests the decision of the opposition division concerning the feature in claim 7 "while affecting the acidification profile of the fermentation 0.5 pH-unit or less" which replaces the feature "without significantly affecting the acidification profile of the fermentation" in claim 14 of the patent application. The opposition division considered that this feature has no basis in the patent application.

14. It is common ground between the parties that the feature "acidification profile" is not defined in the patent application. The first reference in the patent application to this feature is found in the context of the prior art (cf. page 1, lines 27 and 28). In the board's view, it is derivable from this reference that the feature "acidification profile" is characterised not only by, in the words of the respondent, the total pH drop, i.e. the amount by which the pH level changes between the beginning and end of the fermentation (cf.

page 1, lines 25 and 26 of the patent application), but also by the manner in which this acidification (pH drop) takes place, such that "a fast pH-lowering may impair the quality" of the food product (cf. page 1, lines 28 to 31, and page 2, lines 10 to 13 of the patent application).

15. All other references to the feature "acidification profile" in the patent application inform the skilled person that the fermentation process (by the starter culture) and the bacteriocin production (by the adjunct culture) take place "without significantly affecting the acidification profile" (cf. page 3, lines 12 to 16), "does not adversely affect the acidification profile" (cf. page 3, lines 30 to 32), "does not alter the overall acidification profile", and "did not influence the acidification profile" (cf. page 18, line 16 and lines 26 to 28). This requirement is also explicitly found in claim 14 of the patent application.

16. In the board's view, it is derivable from all these references that the "limited acidification" (pH drop) caused by the adjunct culture (values defined on page 8, lines 29 to 34 of the patent application, including "0.5 pH-unit or less") must not (significantly) affect the acidification profile of the fermentation, i.e. the manner (fast, slow) in which the acidification changes or varies during the fermentation of the food product, "the curve of pH" referred to in the patent application (cf. page 17, lines 17 to 24; compare the pH values of batch A with those of batches B and C in trials 1 and 2, Tables 2 and 4; see also Tables 1 and 2 of Example 1 of the patent application). This requirement, however, is not comprised in claim 7.

17. Thus, claim 7 contravenes Article 123(2) EPC.

18. The findings of the opposition division concerning the feature "suppression of *Listeria spp.*" in claim 7, namely that this feature has a basis in the patent application, are contested by the respondent.

19. In view of the fact that none of the parties has filed any further submissions in reply to the board's communication and, since the board considers claim 7 to contravene Article 123(2) EPC for other reasons, there is no need for the board to examine in further detail the feature "suppression of *Listeria spp.*" in claim 7 and to decide thereupon.

Admission of the auxiliary requests into the appeal proceedings

20. As stated above and according to the case law of the Boards of Appeal, the function of an appeal is to give a judicial decision upon the correctness of a separate earlier decision taken by an examining or opposition division. Appeal proceedings are not an opportunity to re-run the proceedings before any of these divisions. The admission of new requests in appeal proceedings is at the discretion of the board (Articles 12(4) and 13(1) RPBA; see "Case Law", *supra*, IV.E.4, 1127).

21. Auxiliary requests 2, 3 and 6 filed with appellant's grounds of appeal are identical to auxiliary requests 1 (filed at oral proceedings before the opposition division), 2 and 4 (originally filed on 2 August 2012 as auxiliary requests 3 and 5) underlying the decision under appeal. Thus, they are part of the appeal proceedings.

22. Auxiliary requests 1, 4, 5 and 7 filed with the statement of grounds of appeal, and auxiliary

request 1A filed in reply to the respondent's submissions, are new in the proceedings. In all these requests, a feature related to the difference in the pH-value caused by the addition of the adjunct culture - corresponding to the subject-matter of claim 3 of the main request ("0.25 pH-unit or less") - has been introduced into the independent claim(s). In its communication pursuant to Article 15(1) RPBA, the board noted that no reasons had been provided by the appellant why these new auxiliary requests could not have been filed at an earlier stage of the proceedings, and that, in view thereof, the board was inclined not to admit any of them. The more so, since they were all considered to comprise features that appeared to contravene Article 123(2) EPC (cf. points 29 to 33 of the board's communication).

23. As stated above, the appellant has chosen not to make use of the opportunity to comment on the board's provisional opinion, either in writing or at oral proceedings, although this opinion was to the appellant's disadvantage as regards this issue. In view thereof, the board sees no reason to change its opinion.

24. Therefore, the board, in the exercise of its discretion (Article 12(4) RPBA, does not admit auxiliary requests 1, 1A, 4, 5 and 7 into the appeal proceedings.

Auxiliary requests 2, 3 and 6
Article 123(2) EPC

25. Auxiliary requests 2 and 3 comprise the functional feature "reduction of *Listeria* counts ... that is more than 2 at end of ripening". The presence of this

feature in claim 1 of the main request is considered to contravene Article 123(2) EPC (cf. points 8 to 12 *supra*). For the same reasons, auxiliary requests 2 and 3 contravene Article 123(2) EPC.

26. Auxiliary request 6 contains an independent use-claim comprising the feature "while affecting the acidification profile". The presence of this feature in claim 7 of the main request is considered to contravene Article 123(2) EPC (cf. points 13 to 17 *supra*). Therefore, auxiliary request 6 is considered to suffer from the same deficiency as the main request and to contravene Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

L. Malécot-Grob B. Stolz

Decision electronically authenticated