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**Datasheet for the decision
of 30 September 2014**

Case Number: T 1853/13 - 3.3.09

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A61K31/35

Language of the proceedings: EN

Title of invention:
COMPOSITIONS AND METHODS FOR IMPROVING VASCULAR HEALTH

Patent Proprietor:
MARS, INCORPORATED

Opponent:
Raisio Nutrition Ltd.

Headword:

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - Added subject-matter (yes) - all requests

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T 0686/99

Catchword:



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Chambres de recours**

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Case Number: T 1853/13 - 3.3.09

**D E C I S I O N
of Technical Board of Appeal 3.3.09
of 30 September 2014**

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 21 June 2013
revoking European patent No. 1274319 pursuant to
Article 101(3) (b) EPC.**

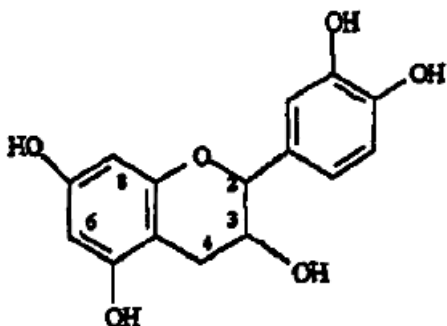
Composition of the Board:

Chairman W. Sieber
Members: N. Perakis
K. Garnett

Summary of Facts and Submissions

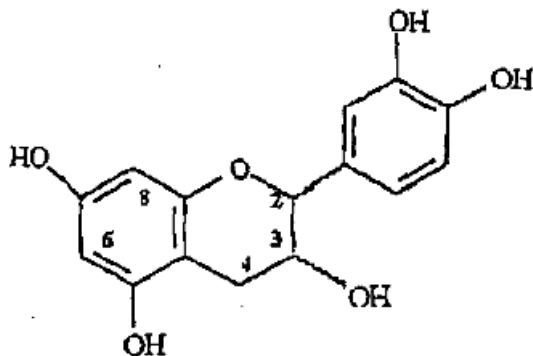
I. Mention of the grant of European patent No. 1 274 319 in the name of Mars Incorporated was published on 12 August 2009 (Bulletin 2009/33). The patent was granted with 15 claims. Claims 1 and 8 read as follows:

"1. A non-chocolate food product comprising (i) cocoa procyanidins selected from cocoa procyanidin monomers and oligomers derived from said monomers, and (ii) a sterol and/or stanol based cholesterol lowering agent; wherein the cocoa procyanidin monomers have the formula:



and the oligomers comprise from 2 to 18 monomeric units connected via interflavan linkages of (4→6) and/or (4→8); and wherein the food product comprises at least 10 µg/g of cocoa procyanidins."

"8. A cholesterol reducing chocolate comprising (i) cocoa procyanidins selected from cocoa procyanidin monomers and oligomers derived from said monomers, and (ii) a sterol and/or stanol based cholesterol lowering agent; wherein the cocoa procyanidin monomers have the formula:



and the oligomers comprise from 2 to 18 monomeric units connected via interflavan linkages of (4→6) and/or (4→8); and wherein the chocolate is either a dark chocolate comprising at least 3,600 µg of cocoa procyanidins per gram of chocolate, or a milk chocolate comprising at least 1,000 µg of cocoa procyanidins per gram of chocolate, the amounts being based on the total amount of nonfat cocoa solids in the product."

- II. A notice of opposition was filed on 12 May 2010 by Raisio Nutrition Ltd., requesting revocation of the patent in its entirety *inter alia* on the ground of Article 100(c) EPC.

- III. By a decision announced orally on 5 June 2013 and issued in writing on 21 June 2013 the opposition division revoked the patent. It held that the main request filed during the oral proceedings was not admissible and that the subject-matter of all independent claims of each auxiliary request, namely auxiliary requests 1 to 6 filed on 3 June 2013, infringed Article 123(2) EPC.

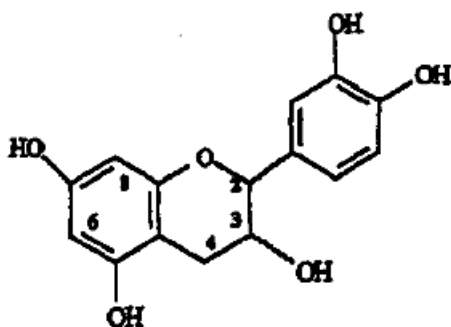
For the purposes of the present decision only auxiliary requests 2, 5 and 6 are of relevance. These requests contained an independent claim relating to a non-

chocolate food product (claim 1 of all these requests) as well as an independent claim relating to a cholesterol-reducing chocolate (claim 6 of auxiliary requests 2 and 5).

Auxiliary request 2

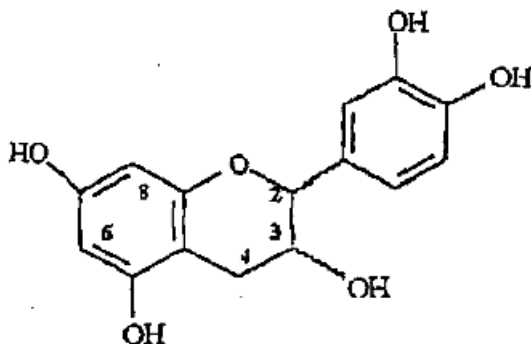
Independent claims 1 and 6 of auxiliary request 2 read as follows:

"1. A non-chocolate food product comprising (i) cocoa procyanidins selected from cocoa procyanidin monomers and oligomers derived from said monomers, and (ii) a sterol and/or stanol based cholesterol lowering agent; wherein the cocoa procyanidin monomers have the formula:



and the oligomers comprise from 2 to 10 monomeric units connected via interflavan linkages of (4→6) and/or (4→8); wherein the food product comprises at least 100 µg/g of cocoa procyanidins and from 0.5 g - 10 g per 45 g serving size of sterols/stanols; and wherein the cocoa procyanidins are present in the form of (i) a procyanidin-containing cocoa extract, or (ii) a fraction of the cocoa extract containing at least one procyanidin monomer or oligomer."

"6. A cholesterol reducing chocolate comprising (i) cocoa procyanidins selected from cocoa procyanidin monomers and oligomers derived from said monomers, and (ii) a sterol and/or stanol based cholesterol lowering agent; wherein the cocoa procyanidin monomers have the formula:

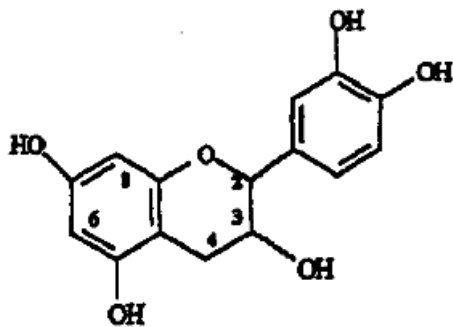


and the oligomers comprise from 2 to 10 monomeric units connected via interflavan linkages of (4→6) and/or (4→8); and wherein the chocolate is either a dark chocolate comprising at least 10,000 µg of cocoa procyanidins per gram of chocolate, or a milk chocolate comprising at least 5,000 µg of cocoa procyanidins per gram of chocolate, the amounts being based on the total amount of nonfat cocoa solids in the product."

Auxiliary request 5

Independent claim 1 of auxiliary request 5 reads as follows:

"1. A non-chocolate food product comprising (i) a cocoa extract containing cocoa procyanidins selected from cocoa procyanidin monomers and oligomers derived from said monomers, and (ii) a sterol and/or stanol based cholesterol lowering agent; wherein the cocoa procyanidin monomers have the formula:



and the oligomers comprise from 2 to 10 monomeric units connected via interflavan linkages of (4→6) and/or (4→8); wherein the food product comprises at least 100 µg/g of cocoa procyanidins and from 0.5 g - 10 g per 45 g serving size of sterols/stanols."

Independent claim 6 of auxiliary request 5 is identical to independent claim 6 of auxiliary request 2.

Auxiliary request 6

The sole independent claim 1 of auxiliary request 6 is identical to independent claim 1 of auxiliary request 5.

The opposition division accepted that basis for the preferred procyanidins to be selected from monomers or oligomers having 2 to 10 monomeric units was to be found on page 4 of the application as filed, and that the required levels for the procyanidins were disclosed on page 14 for the non-chocolate food products and on page 15 for the chocolate food products. However, these levels were provided for the total of cocoa procyanidins (reference was made to pages 14 and 15) or cocoa polyphenols (page 20), including oligomers with monomeric units higher than 10. Therefore the levels disclosed on pages 14 and 15 could not be attributed to the specific claimed monomers or oligomers with 10 or

less monomeric units. In the same way, the amounts of sterols/stanols per 45 g serving size (reference was made to page 15, last paragraph) were disclosed in the context of the procyanidins in general and not of procyanidins oligomers comprising from 2 to 10 monomeric units.

IV. On 21 August 2013 the patent proprietor (in the following: the appellant) filed an appeal against the decision of the opposition division and on the same day paid the appeal fee. On 1 November 2013 the appellant filed a statement setting out the grounds of appeal together with a new main request and new auxiliary requests 1 to 6.

The new main request and new auxiliary request 1 are irrelevant for this decision since they were withdrawn at the beginning of the oral proceedings before the board.

The new auxiliary requests 2, 3 and 4 correspond to auxiliary requests 2, 5 and 6 of the appealed decision (cf. above point III).

The new auxiliary request 5 corresponds to auxiliary request 5 of the appealed decision in all but two aspects:

(i) the sterol/stanol concentration in claim 1 is limited to "2 g - 4.5 g per 45 g serving size" and

(ii) claim 10 (relating to a package for a food product as defined in the previous claims and a label and/or instructions) is cancelled.

The new auxiliary request 6 contains only claims relating to cholesterol-lowering chocolate, which correspond to claims 6 to 9 of auxiliary request 2 before the opposition division and which have been renumbered as claims 1 to 4.

The appellant requested that the decision of the opposition division be set aside and that if the claims of one of the main or auxiliary requests were found to meet the requirements of Article 123(2) EPC, the case be remitted to the opposition division for consideration of the other grounds of opposition raised in the opposition proceedings.

- V. By letter of 17 March 2014 the opponent (in the following: the respondent) filed observations on the appeal.
- VI. In a communication dated 21 May 2014 the board expressed its preliminary non-binding opinion.
- VII. On 30 September 2014 oral proceedings were held before the board. At the beginning of the oral proceedings the appellant withdrew the new main request and the new auxiliary request 1.
- VIII. The relevant arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:

Auxiliary request 2

- The subject-matter of claim 1 met the requirements of Article 123(2) EPC, since the skilled person would directly and unambiguously derive it from the application as filed. The skilled person would

start from the preferred embodiment disclosed on the final paragraph of page 14 concerning a non-chocolate food product containing a cholesterol-lowering agent. According to this embodiment the most preferred amount of cocoa procyanidins (threshold value) is "at least 100 µg/g" which would be understood by the skilled person as not restricted by any specific upper limit. This upper limit would be determined by manufacturing considerations and taste limitations.

- The structural formula of the cocoa procyanidin monomers was disclosed on page 5, which also disclosed the most preferred number of monomeric units for the procyanidin oligomers, namely 2 to 10.
- On page 5, lines 8-11, it was disclosed that cocoa procyanidins could be added in the form of an extract or an extract fraction.
- The disclosure that sterols/stanols could be used as cholesterol-lowering agents was provided on page 14, first full paragraph. The amount of 0.5 g to 10 g per 45 g serving size was disclosed on page 15, lines 30-31.
- With regard to the selection of 2 to 10 monomeric units for the oligomers present in cocoa procyanidins, the range of 2 to 10 units was the most preferred degree of polymerisation, which would directly and unambiguously be selected by the skilled person according to established practice. This selection was also supported by the disclosure of example 3 (reference was made to page 24). In this example a procyanidin standard

was used which contained dimers through decamers. This meant that the skilled person would find clear instructions in the application as filed to combine such oligomers with the most preferred amount of 100 µg of cocoa procyanidins per g of non-chocolate food product as disclosed on page 14.

- Regarding the amount of sterols/stanols per 45 g service size disclosed on page 15, lines 30-31, the skilled person would legitimately consider the combination with the most preferred amount of 100 µg of cocoa procyanidin per gram of non-chocolate food product.

- With regard to the presence of the cocoa procyanidins in the form of an extract, this was disclosed in claim 8 as filed. Anyway, the skilled person would consider the cocoa extract as the most usual form in which the cocoa procyanidin could be used for the manufacture of such products.

Auxiliary request 3-5

- The arguments put forward for auxiliary request 2 likewise applied to auxiliary requests 3-5, which therefore met the requirements of Article 123(2) EPC.

Auxiliary request 6

- The subject-matter of claim 1 of auxiliary request 6 met the requirements of Article 123(2) EPC, as the skilled person would directly and unambiguously derive it from the application as

filed. The claimed cholesterol-reducing chocolate, which combined cocoa procyanidins and a sterol/stanol cholesterol-lowering agent, was disclosed in claim 17 as filed. The feature relating to dark chocolate with 10,000 µg of cocoa procyanidins per gram of chocolate was disclosed on page 15, first paragraph. The feature relating to milk chocolate with at least 5,000 µg of cocoa procyanidins per gram of chocolate was disclosed on page 15, second paragraph.

- Regarding the term "at least" in the expression "at least 10,000 µg" of claim 1, which was not disclosed in the corresponding passage of the application as filed, the appellant requested to have it deleted if this was considered by the board as the only deficiency under Article 123(2) EPC.

- The combination of the nature of cocoa procyanidins, namely oligomers comprising from 2 to 10 monomeric units, with the amount of the cocoa procyanidins, namely 10,000 µg of cocoa procyanidins per gram of dark chocolate or with at least 5,000 µg per gram of milk chocolate, derived from the application as filed since the selected monomeric units and the selected amounts of cocoa procyanidins were of the same hierarchical level, namely the most preferred embodiment.

IX. The relevant arguments put forward by the respondent in its written submissions and during the oral proceedings may be summarised as follows:

Auxiliary request 2

- The subject-matter of claim 1 did not meet the requirements of Article 123(2) EPC. There was no direct and unambiguous disclosure in the application as filed of a non-chocolate food product combining the claimed specific cocoa procyanidins with the specific cholesterol lowering agents. This concerned in particular the specific formula of cocoa procyanidin, the specific number of monomeric units comprised in the oligomer, the specific amount of cocoa procyanidins in the food product including the absence of an upper limit for this amount, the specific amount of sterols/stanols per 45 g serving size and the specific form of the cocoa procyanidins.

- The level of preference, namely "most preferred" as argued by the appellant, for the combination of the number of monomeric units in the cocoa procyanidin oligomer (page 5, penultimate paragraph) and for the amount of cocoa procyanidins (page 14, last paragraph) could not be considered as a valid criterion for the combination of the corresponding features.

- The application as filed concerned procyanidin monomer and oligomers with up to 18 monomeric units, the amount of which in the non-chocolate food product was most preferably at least 100 µg. There was, however, no disclosure of the proportion of the cocoa procyanidin oligomers with up to 10 monomeric units within the total amount of procyanidins in the non-chocolate food product. Thus, the combination of the range of monomeric

units 2-10 with the total amount of cocoa procyanidins did not meet the requirements of Article 123(2) EPC.

- Additionally, the application as filed (page 14, last paragraph) disclosed an upper limit of 10mg/g for the amount of cocoa procyanidins which was absent from claim 1. This was another reason why claim 1 did not meet the requirements of Article 123(2) EPC.

- The presence of the cocoa procyanidins in the form of an extract did not derive from page 5, lines 6-12. This passage concerned cocoa polyphenols in general and clearly indicated that the cocoa polyphenols might be added "independently of cocoa ingredients", i.e. not necessarily as a chocolate liquor in chocolate, the latter being absent from the claimed subject-matter.

- The claimed form of cocoa procyanidins was not disclosed in claim 8 as filed, which depended on claim 5, the latter relating to "a food other than a confectionery" and not to the claimed "non-chocolate food product". Thus, this disclosure could not be used as base for this feature.

- Regarding the claimed sterols/stanols, they were simply examples of cholesterol lowering agents (bridging paragraph of pages 8 and 9; page 14, lines 7-8) and the skilled person would not necessarily combine them with the other features of the claim.

Auxiliary requests 3-5

- The subject-matter of claim 1 of these auxiliary requests suffered from the same defects as that of claim 1 of auxiliary request 2. These requests likewise did not meet the requirements of Article 123(2) EPC.

Auxiliary request 6

- The subject-matter of claim 1 did not meet the requirements of Article 123(2) EPC since it was not directly and unambiguously disclosed in the application as filed. This concerned the combination of a cholesterol-reducing chocolate combining the specific cholesterol-lowering agents sterols/stanols with the specific cocoa procyanidins in amounts of at least 10,000 µg per gram of dark chocolate or of at least 5,000 µg per gram of milk chocolate. The disclosed amounts of cocoa procyanidins in chocolate, be it dark or milk (page 15, lines 1-17), corresponded to the total amount of procyanidins and not to the specific oligomers with 2-10 monomeric units. Furthermore, these amounts related to chocolate confectionery in general and not only to dark or milk chocolate. There was, therefore, no direct and unambiguous link in the application as filed between the dark or milk chocolate and the amounts of at least 10,000 µg or 5,000 µg cocoa procyanidins per gram of chocolate.

- X. The appellant requested that the decision under appeal be set aside and that, if one of the second to sixth auxiliary requests filed with the grounds of appeal were found to meet the requirements of

Article 123(2) EPC, the case be remitted to the opposition division for consideration of the other grounds of opposition raised by the respondent.

XI. The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. The requests

Since the appellant withdrew the main request and auxiliary request 1 during the oral proceedings before the board, this decision deals with the remaining auxiliary requests 2 to 6.

3. Auxiliary request 2

The respondent considered that the subject-matter of claim 1 of auxiliary request 2 was not directly and unambiguously disclosed in the application as filed and concluded that this claim did not meet the requirements of Article 123(2) EPC.

3.1 Claim 1 relates in general terms to a non-chocolate food product which comprises two components, namely
(i) cocoa procyanidins and
(ii) a cholesterol-lowering agent.

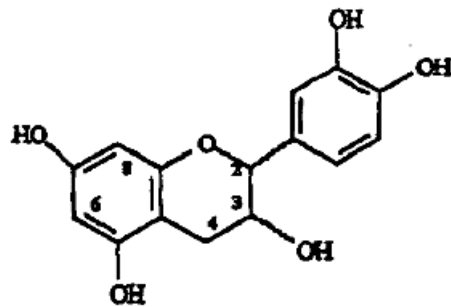
The only disclosure in the application as filed which comes close to such an embodiment is to be found on page 14, lines 28-31, which recites:

"In preferred embodiments, the non-chocolate food products containing a cholesterol lowering agent contains from about at least 5 µg/g to about 10 mg/g, and, for example, at least 5 µg/g food product, preferably at least 10 µg, more preferably at least 100 µg/g of cocoa procyanidins".

3.2 However, compared with this disclosure, claim 1 contains further features which define constituents (i) and (ii) more precisely. In the analysis which follows features (a) to (e) concern the cocoa procyanidins, and (f) and (g) the cholesterol-lowering agent:

(a) the cocoa procyanidins are selected from cocoa procyanidin monomers and oligomers derived from said monomers;

(b) the cocoa procyanidin monomers have the formula:



(c) the oligomers comprise from 2 to 10 monomeric units connected via interflavan linkages of (4→6) and/or (4→8);

(d) the food product comprises at least 100 µg/g of cocoa procyanidins;

(e) the cocoa procyanidins are present in the form of (i) procyanidin-containing cocoa extract, or (ii)

a fraction of the cocoa extract containing at least one procyanidin monomer or oligomer;

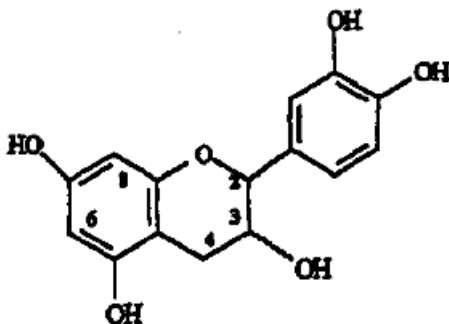
(f) the food product comprises a sterol and/or stanol based cholesterol lowering agent; and

(g) The food product comprises from 0.5 g - 10 g per 45 g serving size of sterols/stanols.

3.3 It is not disputed that each and every feature is disclosed in the application as filed.

Features (a) and (b) are disclosed on page 5, starting from line 12:

"The cocoa polyphenols include cocoa procyanidins, which may be monomers and/or oligomers of epicatechin and catechin. Procyanidin monomers include (+)-catechin, (-)epicatechin and their respective epimers (e.g. (-)-catechin and (+)-epicatechin) and have the structure



,"

Feature (c) is disclosed on page 5, second full paragraph:

"The procyanidin oligomer may have from 2 to about 18, preferably from 2 to about 12, and most preferably from 2 to about 10 monomeric units ... In the oligomer,

monomers are connected via interflavan linkages of (4→6) and/or (4→8)".

Feature (d) is disclosed on page 14, lines 28-31:

"In preferred embodiments, the non-chocolate food products containing a cholesterol lowering agent contains from about at least 5 µg/g to about 10mg/g and, for example, at least 5 µg/g food product, preferably at 10 µg, more preferably at least 100 µg/g of cocoa procyanidins".

Feature (e) is disclosed on page 5, starting from line 8:

"Cocoa polyphenols [i.e. cocoa procyanidins, in view of page 4, fourth paragraph, third sentence] may be included in the composition as ... an extract, extract fraction ...".

Feature (f) is disclosed in the bridging paragraph of pages 8/9 and to page 14, lines 7-8:

"The composition further comprises a cholesterol lowering agent ... Examples of suitable agents are phytosterols, phytostanols ..."

"The foods comprising cocoa polyphenols and at least one cholesterol lowering agent (e.g. a sterol and/or stanol based cholesterol lowering agent)..."

Feature (g) is disclosed on page 15, last paragraph:

"A food composition, for example, may contain from about 0.5 to about 10 g per 45 g serving size, preferably about 1.5 to about 5 g per 45 g serving

size, most preferably about 2 to about 4.5 g per 45 g serving size of sterols stanols".

3.4 What is disputed is the disclosure of the combination of these features. In the following it is shown that the application as filed discloses an upper limit for the amount of cocoa procyanidins which is not part of feature (d) of claim 1, that the application as filed does not directly and unambiguously disclose the combination of features (c) and (d), and that it does not directly and unambiguously disclose the combination of the specific cholesterol-lowering agents in specific amounts with the specific cocoa procyanidin monomers in specific amounts, i.e. combination of features (a)-(e) with features (f) and (g).

3.4.1 Regarding the absence of an upper limit for the amount of the cocoa procyanidins, i.e. feature (d), the appellant referred to page 14, lines 28-31 (see point 3.1), and argued that in this passage the disclosure of *"more preferably at least 100 µg/g of cocoa procyanidins"* was to be interpreted so that the value of 100 µg/g concerned only the lower limit (threshold) of the amount of cocoa procyanidins, the upper limit depending on taste requirements (the cocoa procyanidins are relatively bitter) and on the manufacturing constraints.

However, the board does not agree with the appellant's assertion because this specific passage discloses the broadest definition of the amount of cocoa procyanidins, which is given in the form of a range, namely *"from about at least 5 µg/g to about 10 mg/g"*. This clearly and unambiguously means that also the preferred and the more preferred amounts, namely

"at least 5 µg/g food product, preferably at least 10 µg, more preferably at least 100 µg/g of cocoa procyanidins",

are disclosed in the context of the broadest range and must necessarily have an upper limit at the value of 10 mg/g. Thus, feature (d), by not containing this upper limit, infringes the requirements of Article 123(2) EPC.

- 3.4.2 Regarding the combination of feature (c) with feature (d), it is remarked that nowhere in the application as filed can there be found a direct and unambiguous disclosure of the most preferred definition of the cocoa procyanidin oligomers, feature (c), with the most preferred amount of cocoa procyanidins, feature (d). The appellant argued that the combination of embodiments of the same level of preference, "the most preferred", is common practice. The board cannot accept this argument. The person skilled in the art would take from the relevant passage on page 14 of the application as filed that the levels of "**cocoa procyanidins**" refers to all cocoa procyanidins present in the food product and does not relate specifically to the content of the now claimed oligomers having 2 to 10 monomeric units. In the absence of a specific disclosure in the application as filed, the amounts referred to in the passage on page 14 cannot be attributed to the particular oligomers of feature (c).

The appellant also argued that this combination was supported by example 3 of the application as filed. The board disagrees with the appellant because example 3 merely discloses an attempt to quantify the totality of cocoa procyanidins in a beverage. It does not provide any information to the monomeric structure of the cocoa

procyanidin oligomers involved and does not hint at any specific relation between the quantity measured and an oligomer comprising from 2 to 10 monomeric units. The reference in example 3 to a mixture of dimers through decamers of cocoa procyanidins concerns a commercial standard used for the quantification of the cocoa procyanidins in the beverage and has nothing to do with structure of the cocoa procyanidins in this beverage. The board concurs with the respondent that example 3 describes nothing else than an attempt to quantify the total cocoa procyanidins. There is no statement in this example that only a specific fraction of the cocoa procyanidins was measured.

3.4.3 Regarding the selection of the sterol and/or stanol cholesterol lowering agents, i.e. feature (f), it is noted that the relevant passage on page 14 is far more general and does not mention any specific cholesterol lowering agents. Sterols and/or stanols are disclosed on top of page 9 as examples of cholesterol lowering agents among other candidate products. The passage on page 14 does also not disclose any amount for the cholesterol lowering agents, i.e. feature (g). Thus, there is no direct and unambiguous disclosure in the application as filed for the combination of features (f) and (g), let alone in combination with the specific cocoa procyanidins in the specified amount now claimed, i.e. features (c) and (d).

3.5 In view of the above considerations, the board comes to the conclusion that the appellant has used the content of the original application as **a reservoir** from which features pertaining to separate embodiments were arbitrarily combined in order to artificially create a particular claim construction. Since there is no pointer to that particular combination, this combined

selection of features does not, for the skilled person, emerge clearly and unambiguously from the content of the application as filed (in this context see T 686/99, point 4.3.3 of the reasons). Therefore, claim 1 of auxiliary request 2 contains subject-matter extending beyond the content of the original application, contrary to the requirements of Article 123(2) EPC.

4. Auxiliary requests 3 to 5

4.1 Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 only in a slightly amended definition of the cocoa extract, i.e. feature (e) (for the exact wording see the identical claim 1 of auxiliary request 5 before the opposition division, point III above). However, in the same way as claim 1 of auxiliary request 2 the claim still provides no upper limit for the amount of the cocoa procyanidins, and combines specific cocoa procyanidins with specific sterol and/or stanol cholesterol-lowering agents. Thus, for the reasons given for claim 1 of auxiliary request 2 the combination of features in claim 1 of auxiliary request 3 is not considered to be directly and unambiguously disclosed in the application as filed with the consequence that this request infringes the requirements of Article 123(2) EPC.

4.2 Claim 1 of auxiliary request 4 is identical to claim 1 of auxiliary request 3 and likewise does not meet the requirements of Article 123(2) EPC.

4.3 Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary 3 only in that a different amount of sterol and/or stanol cholesterol-lowering agent is used, namely 2 g to 4.5 g per 45 g serving size instead of 0.5 g to 10g. However this amendment does not overcome

the objections with regard to Article 123(2) EPC. Thus, for the reason given for claim 1 of auxiliary request 2 the combination of features in claim 1 of auxiliary request 5 is not considered to be directly and unambiguously disclosed in the application as filed with the consequence that also this request infringes the requirements of Article 123(2) EPC.

5. Auxiliary request 6

The respondent considered that the subject-matter of claim 1 of auxiliary request 6 was not directly and unambiguously disclosed in the application as filed and concluded that this claim did not meet the requirements of Article 123(2) EPC.

5.1 Claim 1 is based on claim 17 as filed which discloses a cholesterol-reducing chocolate which comprises two essential components:

- (i) cocoa procyanidins selected from cocoa procyanidin monomers and/or oligomers and
- (ii) a sterol and/or stanol based cholesterol-lowering agent.

5.2 Compared with claim 17 as filed, claim 1 of auxiliary request 6 further specifies that:

- the oligomers of the cocoa procyanidins comprise from 2 to 10 monomeric units connected via interflavan linkages of (4→6) and/or (4→8) (feature (c), as defined in above point 3.2)
- the chocolate is a dark chocolate comprising at least 10,000 µg of cocoa procyanidins per gram of chocolate, the amounts being based on the total

amount of nonfat cocoa solids in the product (feature (h)); or

- the chocolate is a milk chocolate comprising at least 5,000 µg of cocoa procyanidins per gram of chocolate, the amounts being based on the total amount of nonfat cocoa solids in the product (feature (j)).

5.3 Also in this case, the board does not dispute the fact that the added features (c), (h) and (j) are disclosed as such in the application as filed.

(It should be mentioned at this point that there is a discrepancy between claim 1 and the original description, since the claim requires that the amount is of at least 10,000 µg whereas the original description discloses that this amount is of 10,000 µg. However, during the oral proceedings the appellant requested amendment of claim 1 so that this discrepancy be removed if the board considered this discrepancy to be the only defect of claim 1 under Article 123(2) EPC).

5.4 However, the board considers that Article 123(2) EPC is infringed by the absence in the application as filed of a direct and unambiguous disclosure relating to the combination of all features, in particular the combination of the specific oligomers of the cocoa procyanidins with the specific amount of cocoa procyanidins. As already explained for the previous requests the level of cocoa procyanidins given in the application as filed refers to all cocoa procyanidins present and cannot be attributed to the particular oligomers of feature (c).

Hence, claim 1 of auxiliary request 6 contains subject-matter extending beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

6. In view of the above considerations none of the requests of the appellant meets the requirements of Article 123(2) EPC and the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated