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Datasheet for the decision of 9 August 2018

Case Number: T 0847/14 - 3.3.01

Application Number: 05759763.5

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Language of the proceedings: EN

Title of invention:
PACKAGED POWDER COMPOSITION FOR BAKERY

Patent Proprietor:
Puratos Naamloze Vennootschap

Opponent:
Lesaffre International

Relevant legal provisions:
EPC Art. 56, 83
RPBA Art. 12(2), 12(4)

Keyword:
Late-filed facts - submitted with the statement of grounds of appeal - admitted (yes)
Grounds for opposition - insufficiency of disclosure (no)
Inventive step - main request (yes)

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Case Number: T 0847/14 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 9 August 2018

Appellant: (Opponent)	Lesaffre International 137 rue Gabriel Péri 59700 Marcq-en-Baroeul (FR)
Representative:	Cabinet Plasseraud 66, rue de la Chaussée d'Antin 75440 Paris Cedex 09 (FR)
Respondent: (Patent Proprietor)	Puratos Naamloze Vennootschap Industrialaan 25 1702 Groot-Bijgaarden (BE)
Representative:	Desaix, Anne Ernest Gutmann - Yves Plasseraud S.A.S. 3, rue Auber 75009 Paris (FR)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 7 February 2014 concerning maintenance of the European Patent No. 1761130 in amended form.**

Composition of the Board:

Chairman	A. Lindner
Members:	R. Hauss
	M. Blasi

Summary of Facts and Submissions

I. European patent No. 1 761 130 was granted with fifteen claims.

II. The patent was opposed under Article 100(a) and (b) EPC on the grounds that the claimed subject-matter lacked novelty and inventive step and was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

III. The patent proprietor requested the rejection of the opposition (main request) and filed three sets of claims as auxiliary requests.

The independent claims of auxiliary request 1 read as follows:

*"**1**. A product for bakery industry comprising a container (3) and a powdered composition (1), said powdered composition (1) comprising an improver composition, a flavour improvement composition and an active yeast, wherein the headspace (2) of said container (3), after sealing, consists of at least 5% of inert atmosphere, based on the total volume of said container (3), wherein said flavour improvement composition comprises a sourdough product, a sponge product, or a mixture thereof.*

***10**. A process for the preparation of a product for bakery industry comprising the steps of:*

- admixing an improver composition and an active yeast, both in powder form,

- adding a bread flavour improvement composition in powder form, wherein said flavour improvement composition comprises a sourdough product, a sponge product, or a mixture thereof,

- optionally adding (a) bread flavour improvement compound(s) in powder form,

- optionally adding salt,

- filling a container with the resulting powdered composition, and

- sealing said container under inert atmosphere, while leaving a headspace of at least 5% based on the volume of said container, said headspace consisting essentially of said inert atmosphere.

13. *Use of a product according to any of claims 1 to 9 for the preparation of bread, cake, biscuits, pastries, snacks or pizzas."*

These claims differ from the corresponding independent claims in the patent as granted solely in the mandatory presence of the flavour improvement composition.

IV. The documents cited in the course of the opposition proceedings included the following:

D1: GB 1 230 205

D2: US 4 328 250

V. The decision under appeal is the interlocutory decision of the opposition division, announced on 24 September 2013 and posted on 7 February 2014, finding that the patent as amended in the form of auxiliary request 1 met the requirements of the EPC.

VI. In the decision under appeal, the opposition division concluded that a person skilled in the art would have no difficulty in carrying out the claimed subject-matter. Starting from the technical teaching of document D1, which related to compositions containing dried active yeast conditioned under vacuum or inert atmosphere, the subject-matter of claim 1 as

granted (main request) did not however involve an inventive step.

There were no objections to the claims of auxiliary request 1 regarding lack of novelty. The product of claim 1 differed from products disclosed in document D1 in the presence of the flavour improvement composition and of at least 5% inert atmosphere based on the total volume of the container. Starting from the teaching of document D1 as the closest prior art, the technical problem to be solved was to provide a packaged powder composition comprising a combination of yeast and flavour improvement composition comprising a sourdough product, a sponge dough product or a mixture thereof, said powder composition being stable. On the basis of examples 1 and 2 of the patent in suit it was acknowledged that the subject-matter of independent claims 1 and 11 (*sic*; correctly: claims 1 and 10) of auxiliary request 1 involved an inventive step due to reduced caking of the powder when packaged in conformity with the patent in suit. As a consequence, auxiliary request 1 was considered to be allowable.

VII. The opponent (appellant) filed an appeal against that decision and requested the revocation of the patent.

VIII. The patent proprietor (respondent) requested the dismissal of the appeal. Thus the claims according to the respondent's main request in the appeal proceedings are those of former auxiliary request 1 (see point III above). In addition, the respondent submitted eight sets of claims as auxiliary requests 1 to 8.

IX. The respondent also filed evidence including the following documents:

D5: Comparative tests relating to the product of claim 1 (October 2014)

D8: R. Coles et al. (editors): Food Packaging Technology, Blackwell Publishing, Oxford 2003, page 284

D9: M. Fayed, L. Otten (editors): Handbook of Powder Science & Technology, 2nd ed New York 1997, pages 202 to 205

D10: Comparative tests relating to the product of claim 1, June 2018

X. Oral proceedings before the board of appeal were held on 9 August 2018.

XI. The arguments presented by the appellant may be summarised as follows:

Sufficiency of disclosure

The person skilled in the art did not receive any guidance from the patent in suit for preparing a product in which the headspace consisted of inert gas only, as required in claim 1. In practice, the powdered compositions themselves would, for instance, contain a certain quantity of oxygen, which would not remain separate from the inert gas in the headspace of the packaged product. For these reasons, a product as defined in claim 1, which should be devoid of oxygen, could not readily be prepared.

Furthermore, the use of a container that was impermeable to oxygen was not a mandatory technical feature of claims 1 and 10. Hence the packaged composition would not exhibit the desired storage stability over the entire scope covered by the claims of the main request.

Moreover, the patent did not indicate how the volume of the headspace should be determined. There might be

deviations depending on the method and conditions chosen, e.g. it might be imagined that the powder would, in certain circumstances, be in a loose, even dispersed, state without a distinct borderline between powder and headspace.

Inventive step

The technical problem identified in the patent in suit was the provision of a packaged product containing active yeast and improver components for the bakery industry that was stable and did not exhibit caking.

Since the claims did not specify a lower limit for the concentration of flavour improvement composition in the mixture, it could not be assumed that the behaviour of the mixture was determined by the unspecific flavour improvement composition over the entire scope claimed. Hence the flavour improvement composition was not relevant for the assessment of inventive step, since it could, in any case, not give rise to a technical effect for all embodiments covered by the claims.

It could not be derived from the information provided in the examples of the patent in suit that packaging under vacuum really caused caking resulting in a block difficult to break (as defined in paragraph [0011] of the patent specification). Rather, the samples packaged and stored under vacuum according to the examples of the patent were still referred to as being powdered compositions having a powder structure (paragraphs [0092] and [0104] in examples 2 and 5 of the patent specification). Furthermore, it had not been rendered credible by the respondent's test reports D5 and D10 that compositions packaged under at least 5 vol% inert atmosphere (relative to the volume of the container) generally preserved a better powder

structure than compositions packaged under less than 5 vol% inert atmosphere, since mere visual inspection (photographs) could not provide conclusive results. Thus it was to be doubted, firstly, that particle agglomeration and caking was really a problem, and secondly, that the lower limit of 5 vol% inert atmosphere in the container was a generally valid threshold value for overcoming potential handling problems associated with caking, as argued by the respondent.

Thus the lower limit of 5 vol% had to be considered as arbitrary, as set out in the decision under appeal with regard to claim 1 as granted, and also considering that packaging under an inert atmosphere was a conventional method for stabilising a composition, with typical headspace volumes in any case being at least 5% of the container volume.

Even if it were to be acknowledged that documents D5 and D10 demonstrated a technical effect in the reduction of caking for one specific powder sample, that result could not support a case in favour of inventive step over the entire scope claimed, since caking phenomena only became critically relevant with particle sizes below 100 µm (D9: page 204), whereas in actual practice in the industry, larger particle sizes were normal.

The arguments against inventive step were the same in respect of claim 1 and claim 10 of the main request. The process steps additionally recited in claim 10 were conventional and therefore could not provide any inventive contribution.

XII. The arguments presented by the respondent may be summarised as follows:

Non-admission of a new line of argument

In belatedly raising the objection that the person skilled in the art would not find, in the examples described in the patent in suit, the disclosure of a packaged product devoid of residual oxygen, the appellant deviated from the objections originally presented in the first-instance proceedings with regard to the issue of sufficiency of disclosure. This amounted to an attempt to present a fresh case in the appeal proceedings.

Sufficiency of disclosure

The appellant's objections relating to the impossibility of achieving the absence of all oxygen in the product or headspace were mere allegations that were moreover based on a misinterpretation of claim 1. The technical feature "inert atmosphere" would be understood by the person skilled in the art, with a mind willing to understand, as referring to an atmosphere primarily consisting of non-reactive gases but that might contain residual oxygen (as evidenced, for instance, by document D8 representing common general knowledge in the field of food packaging). Nowhere in the patent specification was it mentioned that the total absence of oxygen was required.

The person skilled in the art would also understand that the material of the sealed container must be suitable for the purpose of preserving the dried yeast, and possibly further ingredients of the powder composition, from the degradation that would take place in contact with oxygen. The possibility that residual oxygen could be present in the container at low levels

not affecting stability was not at odds with the requirement that the container must be impermeable to prevent contact of the composition with relevant quantities of additional oxygen.

Normal practical conditions would be employed for determining the headspace volume.

Inventive step

In the statement setting out the grounds of appeal, the appellant had not adequately substantiated the objection regarding lack of an inventive step, thus contravening the requirement of Article 12(2) RPBA.

The objective technical problem was to provide a powder composition for the bakery industry packaged under improved conditions, wherein the composition comprised an active yeast, an improver composition and a flavour improvement composition comprising a sourdough product, a sponge dough product, or a mixture thereof, wherein the packaging conditions enabled the powder to remain stable in terms of yeast activity and powder structure (namely by preventing caking).

It would be evident to the person skilled in the art that, within the meaning of the patent in suit, "caking" was not to be understood exclusively to denote the formation of a firm block difficult to break. Rather, the invention aimed at generally improving the powder structure by counteracting the tendency for particle agglomeration, which in bakery technology might cause handling difficulties (e.g. by affecting the precision of dosing operations that required a homogeneous powder). In industrial practice, these undesirable properties would be exacerbated by large batch sizes and prolonged storage times.

The compositions tested according to example 2 of the patent in suit and documents D5 and D10 (giving evidence of a better powder structure) were adequately representative of the compositions defined in claim 1, *inter alia* with respect to proportions of the components usual in the industry. As confirmed in particular by the data reported in documents D5 and D10, a volume of at least 5% inert atmosphere relative to the total container volume was required to maintain not only the function (in terms of yeast activity), but also the structural stability of the powder mixtures during storage, i.e. specifically, to prevent caking. The appellant had not replied in writing to the respondent's submissions, which included test reports D5 and D10, and had in particular not provided any counter-evidence. Thus the appellant's late-filed arguments against inventive step were mere allegations not supported by any data.

Since neither document D1 nor the other prior-art documents cited in the proceedings discussed powder structure or caking phenomena, it would not have been obvious to package the compositions with at least 5 vol% inert atmosphere in order to solve the objective technical problem of achieving a better powder structure in addition to preserving yeast activity.

The arguments in favour of inventive step applied equally to claims 1 and 10 of the main request, which shared the same relevant technical features.

XIII. The appellant requested that the decision under appeal be set aside and the patent be revoked in its entirety.

XIV. The respondent requested that the appeal be dismissed, or in the alternative, that the patent be maintained

in amended form according to one of the sets of claims filed:

- as auxiliary request 1 with the reply to the appellant's statement setting out the grounds of appeal, or

- as auxiliary requests 2 to 8 with letter of 11 June 2018.

The respondent also requested that the appellant's line of argument that the person skilled in the art would not find guidance in the patent in suit for preparing a product devoid of oxygen, raised in the context of Article 100(b) EPC, not be admitted into the proceedings.

Reasons for the Decision

1. Admission of a new line of argument (Article 12(4) RPBA)

1.1 In the first-instance proceedings the appellant argued with regard to the issue of sufficiency of disclosure that a powder-filled container with more than 5% headspace might, according to the independent product claim, contain any gas, e.g. air, in addition to the required volume of 5% inert gases. As a consequence, the desired stability of the packaged composition could not be achieved over the entire scope claimed, due to the possible presence of oxygen and humidity.

In the decision under appeal (see section II.3.2), the opposition division held that the wording "the headspace of said container, after sealing, consists of at least 5% of inert atmosphere, based on the total volume of the container" meant that there was only

inert atmosphere in the headspace of the container, contrary to the appellant's reading of the claim.

While this issue was discussed in the context of granted claim 1, the opposition division's conclusion applies equally to claim 1 of former auxiliary request 1 (i.e. the present main request).

1.2 The appellant's new objection that the person skilled in the art would not find guidance in the patent in suit for preparing a product devoid of oxygen in the headspace was presented in point III of the statement setting out the grounds of appeal in reaction to the opposition division's above-mentioned conclusion regarding the interpretation of claim 1.

1.3 Since the new objection was presented, in conformity with Article 12(1) and (2) RPBA, at the start of the appeal proceedings and in reaction to the decision under appeal and it does not change the legal or factual framework of the proceedings, the board sees no reason not to admit it pursuant to Article 12(4) RPBA.

2. Sufficiency of disclosure (Articles 101(3) and 83 EPC)

2.1 The question to be answered with regard to sufficiency of disclosure is whether the product/process defined in the main request can be prepared/carried out, taking into account the information provided in the patent application and common general knowledge.

2.2 Employing inert atmospheres is a conventional measure in food packaging technology for protecting packaged goods from oxidation and/or the influence of humidity. The board has no doubt that a variety of products containing powdered bakery mixtures (containing conventional components as defined in claims 1 and 10

of the main request) and an inert atmosphere in a suitable container can be routinely prepared by a person skilled in the field of food technology, e.g. by resorting to a process covered by claim 10.

2.3 The question whether such products exhibit certain alleged advantages or technical effects, such as storage stability or reduced caking, is irrelevant to the issue of sufficiency, since those effects are not expressed in the claims. If said effects are part of the technical problem to be solved, that question may however be relevant for the assessment of inventive step.

2.4 As to the technical feature in claim 1 specifying that the headspace "consists of" inert atmosphere, the board agrees with the respondent's argument that the usual meaning of the term "inert atmosphere" in the field of food technology applies. As commonly understood, that term does not exclude the presence of residual oxygen, it merely indicates that the atmosphere as a whole is inert. In that context, reference is also made to document D8 (a textbook on food packaging technology) mentioning that modified atmosphere packaging would typically achieve residual oxygen levels of 0.3% to 3.0% (see D8: page 284, paragraph 4).

Thus, in view of common general knowledge, a person skilled in the art reading claim 1 of the main request would not assume that the inert atmosphere must be completely devoid of oxygen. As long as the residual oxygen is not present in concentrations that would counteract the desired protective effect of the inert atmosphere on the packaged powder composition, there would be no contradiction with the definition of claim 1.

While the person skilled in the art would thus have no doubt with regard to the meaning of the term "inert atmosphere" and would not have any reason to consult the description for clarification, this meaning is also consistent with the passages in the patent specification mentioning that in preferred products according to the invention, the residual oxygen content is less than 5%, 2%, 1% or 0.5%, based on the gas-phase volume of the container after sealing (see paragraphs [0055] and [0056] of the patent specification and the corresponding passages in paragraphs [0053] and [0054] of the application as filed). In contrast, the specification does not contain any passage stating unambiguously that the inert atmosphere must be completely devoid of oxygen.

In the specific circumstances of the present case, the board is furthermore unable to discern any difference in meaning between the respective definitions of this feature given in claims 1 and 10. Claim 10 defines that the headspace consists "essentially" of inert atmosphere. As established above, the inert atmosphere consists essentially of inert gas(es). Thus the headspace according to claim 10 must also consist essentially of inert gas(es). Reading either claim, it would be clear to the person skilled in the art that for practical purposes, the gas-filled headspace should not contain levels of reactive (or "non-inert") gases which would detract from the protective effect of the inert atmosphere. In the present instance it would therefore seem unrealistic to construe an artificial difference in meaning, based on the presence or absence of the term "essentially" in the claim definition.

2.5 The board also takes the view that the person skilled in the art would be well aware, in view of common

general knowledge, that an inert atmosphere serves to prevent stability problems caused by oxygen and/or humidity (see point 2.2 above), and that therefore the container material must accordingly be chosen to be impermeable to oxygen and humidity. As already mentioned in point 2.3 above, the question of whether a technical effect not mentioned in the claims is achieved is not however pertinent to the issue of sufficiency of disclosure.

2.6 Regarding the appellant's argument that the skilled person would not know how to determine the headspace volume, the board observes that a potential difficulty in establishing the exact scope claimed is an issue relating to lack of clarity (Article 84 EPC) rather than insufficiency of disclosure. Since lack of clarity is not a ground for opposition according to Article 100 EPC, and the potential non-compliance with Article 84 EPC was not introduced by amendment after grant, that objection cannot be examined in opposition appeal proceedings.

2.7 No objections of insufficient disclosure were raised against the dependent claims or against independent claim 13, which relates to the conventional use of the product of claim 1 for preparing certain baked goods.

2.8 For these reasons, the subject-matter of the claims of the main request meets the requirements of the EPC with regard to sufficiency of disclosure.

3. Inventive step (Articles 52(1) and 56 EPC)

Initial substantiation

3.1 In the statement setting out the grounds of appeal, the appellant substantiated its objection regarding

lack of inventive step by referring to the opposition division's finding that the subject-matter of claim 1 as granted did not involve an inventive step because the lower limit of 5 vol% inert atmosphere in the container was an arbitrary choice. The amendment to that claim that required the mandatory presence of a flavour improvement composition could not provide an inventive contribution, since it could not be assumed that the behaviour of the mixture was determined by the flavour improvement composition over the entire scope claimed, which also covered compositions containing very low amounts of that component. Taking into account the assessment of inventive step as set out in the decision under appeal (see section II.5), this line of argument is readily comprehensible to the reader of the appeal brief.

3.2 The board therefore considers that these arguments, although concisely presented, suffice to substantiate the appellant's objection regarding lack of inventive step, at least as far as claim 1 of the present main request is concerned (Article 12(2) RPBA).

Patent in suit

3.3 The patent in suit aims at providing a packaged product containing a powdered mixture of components for the bakery industry which includes active yeast, and a process for the preparation of such a product. In that context, two potential drawbacks should be avoided or overcome, namely lack of stability of the powder components during storage (in particular with regard to diminishing yeast activity) and caking phenomena.

It is explained in this regard in paragraph [0011] of the patent specification that "another problem [is] encountered when the mix of dry yeast and improvers

(such as emulsifiers) is packed under vacuum: the product tends to make a bloc, difficult to break (referred to as the caking)".

3.4 In order to resolve these difficulties, claim 1 of the present main request requires that the powdered mixture, which contains active yeast, bread improver(s) and a specified flavour improvement composition, be packaged in a container having a headspace filled with an inert atmosphere, the volume of the headspace being at least 5% of the total volume of the container.

Starting point in the prior art

3.5 It was common ground between the parties that document D1 was a suitable starting point for the assessment of inventive step.

3.6 D1 discloses an instant yeast bakery pre-mix containing dried active yeast and emulsifier. The composition may be packed and kept under reduced pressure or in a nitrogen atmosphere (see D1: page 2, lines 34 to 102; page 3, lines 23 to 39; and claims 1, 2, 6, 7, 15, 16, 25, 29, 30, 37).

Technical problem and solution

3.7 It was not contested that the emulsifier meets the definition of the bread improver component according to claim 1 of the present main request, or that the nitrogen atmosphere of D1 is an inert atmosphere (also see paragraphs [0037] and [0053] of the patent in suit, listing emulsifiers as bread improvers and identifying nitrogen as the preferred inert gas).

Thus the product for bakery industry according to claim 1 of the main request differs from the products disclosed in document D1, firstly, in the presence of

the flavour improvement composition and secondly, in the requirement that the headspace of the container, after sealing, consists of at least 5% of inert atmosphere based on the total volume of the container.

3.8 It was not contested that packaging under reduced pressure or under an inert atmosphere (as disclosed in document D1 and as claimed according to the present main request) serves to stabilise the components by protecting them from the influence of oxygen and humidity, and in particular to preserve the activity of the yeast during storage (see also document D2 mentioning in column 9, lines 14 to 58, that oxidation is harmful to the preservation of yeast and that the yeast should be dried and conditioned under vacuum or an inert atmosphere).

3.9 According to the respondent, the technical effect provided by choosing the range of at least 5 vol% inert atmosphere in the container is the prevention of caking phenomena, typically encountered when the powders are packaged under vacuum. In contrast, a relative volume of inert atmosphere below the threshold value of 5% is not sufficient to prevent caking.

3.9.1 Example 2 of the patent in suit describes a storage test carried out with a product covered by claim 1 of the main request (including a headspace of 5 vol% filled with nitrogen) that resulted in the finding that the yeast activity remained sufficiently stable and the structure of the powder composition was better than that of the same powder composition when packaged under vacuum.

3.9.2 Test reports D5 and D10 describe similar tests with powdered samples containing the components specified in claim 1 of the main request and packaged either

under vacuum or with a headspace of 4%, 5% or 6% based on the total volume of the container, filled with an inert atmosphere.

While the inert atmosphere is not explicitly mentioned in document D5, which only speaks of the headspace, the board accepts that the headspace of the product samples tested according to D5 did indeed contain an inert atmosphere, which is also in line with the statement relating to D5 on page 10 of the respondent's reply to the statement setting out the grounds of appeal: "Experiments carried out when the container has a headspace representing a volume of 6%, meet the conditions of the claimed subject-matter".

The photographs provided in documents D5 and D10, showing the powders after storage, seem to suggest that some caking occurred in the case of the samples which were packaged under vacuum and those packaged with a headspace of 4 vol% inert atmosphere (the powder forming a block), while the powder surface does not look caked in the case of the samples packaged with a headspace of 5 or 6 vol% inert atmosphere, but presents the aspect of a fairly loose powder.

3.10 During the written phase of the appeal proceedings, the appellant did not submit any comments on the respondent's experimental results.

During the oral proceedings before the board the appellant contended that the degree of caking could not be properly assessed and compared based on visual inspection only, and that, since caking phenomena were not relevant to all powder mixtures defined in the claims, the avoidance of caking could not support a case in favour of inventive step over the entire scope claimed.

However, the appellant did not provide any counter-experiments which might have involved the comparison of samples on the basis of measurable quantitative parameters reflecting the degree of caking or which might have examined the impact of the nature and concentration of the flavour improvement composition or other components on powder agglomeration.

3.10.1 In support of the argument that caking was not critical for particle sizes above 100 µm, the appellant cited document D9. That document relates to powder technology in general rather than to specific materials used in bakery, and the relevant passage (see page 204, 6.1.3) states that

"The critical particle size is approx. 100 µm, but it is also possible that much coarser particulate matter may be affected if a sufficiently large fraction of finer particles is present or if specific binding mechanisms become effective".

Hence, agglomeration phenomena depend on specific individual conditions and the information in D9 is not conclusive with regard to the present issue.

3.10.2 Further in support of the argument that caking phenomena would not be encountered across the entire scope of powder mixtures according to claim 1 of the main request or according to document D1, the appellant submitted that the information provided in the examples of the patent in suit demonstrated that caking was not a problem for the sample compositions tested, even when packaged under vacuum. The samples according to example 2 contained a flavour improvement composition as defined in claim 1, while the samples tested according to example 5 did not (thus being representative of the product of D1).

The board does not come to the same conclusion, for the following reasons:

The relevant statement in example 2 concerning the powder structure (paragraph [0092]) reads as follows:

"But after these 2 years-equivalent of storage, the powdered composition of a bakery product of the invention has a better powder structure compared to the powdered composition packaged under vacuum."

Contrary to the appellant's view, it cannot be inferred from this statement that the powdered composition, when packaged under vacuum, kept its structure as a loose homogeneous powder. Rather, the term "powdered composition" relates to the composition before it was packaged, either under vacuum or with an inert atmosphere. If the structure of the composition packaged under vacuum turned out to be worse after storage than that of the same powdered composition packaged according to the invention, such an outcome is not incompatible with the information about caking phenomena provided in paragraph [0011] of the patent (see point 3.3 above).

The same conclusion applies to example 5, which in paragraph [0104] refers explicitly to caking: "And it could be noticed after 12 months of storage that the powdered composition packaged under vacuum had the tendency to form a block, losing its powder form. To the contrary, the powdered composition of a bakery product of example 4 had kept its powder structure."

Hence the appellant's argument about the teaching of the examples of the patent in suit cannot succeed.

3.11 In summary, while the test reports provided by the respondent lend a degree of credibility to the alleged technical effect (i.e. the prevention of caking),

the appellant did not substantiate its doubts in that regard with verifiable facts or data. In these circumstances, the board accepts the respondent's contention that packaging the powder mixtures with a headspace of at least 5% of the total container volume filled with an inert atmosphere results in the prevention of caking.

3.12 Accordingly, the objective technical problem to be solved is to provide a packaged powdered composition for the bakery industry with improved properties, containing an active yeast and improver components.

3.13 In view of the considerations above, that problem is solved by the product according to claim 1 of the main request.

Obviousness of the solution

3.14 As already mentioned, it was not contested that both the packaged products according to D1 and those according to claim 1 of the main request, due to conditioning under vacuum or inert atmosphere, preserve the activity of the dried yeast during storage.

3.15 While it is conventional practice to package foods under an inert atmosphere to enhance storage stability, as also proposed in document D1 to preserve yeast activity, it has not been established that this would inevitably involve headspace volumes of at least 5% of the total container volume, as argued by the appellant.

3.16 Thus the range defined by the lower limit of 5 vol% inert atmosphere is a selection from the possible packaging options disclosed in document D1.

3.17 Since document D1 does not discuss caking phenomena, the person skilled in the art would not have found an

incentive in D1 to choose a headspace volume of at least 5% of the total container volume filled with an inert atmosphere (as opposed to a smaller volume of inert atmosphere) in order to avoid caking of the powder composition, nor, to the board's knowledge, is such a measure mentioned in any other prior-art document cited in the proceedings.

3.18 As a consequence, the subject-matter of claim 1 of the main request involves an inventive step within the meaning of Article 56 EPC.

3.19 The same reasoning also applies to claims 2 to 9, which are dependent on claim 1, and to independent claim 13 which is directed to a use of the product according to claim 1.

3.20 Independent process claim 10 defines the packaged product by the same technical features as claim 1. While the statement setting out the grounds of appeal does not address the assessment of inventive step of the subject-matter of claim 10, the appellant contended at the occasion of the oral proceedings before the board that its arguments against inventive step were the same in respect of claim 1 and claim 10 of the main request. On that basis, the objection against claim 10 is rejected by the board for the same reasons as set out with regard to claim 1. The same conclusion applies to dependent claims 11 and 12.

3.21 In conclusion, the appellant's objections with regard to lack of inventive step do not succeed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

K. Boelicke A. Lindner

Decision electronically authenticated