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**Datasheet for the decision
of 7 March 2019**

Case Number: T 1232/14 - 3.3.02

Application Number: 07014890.3

Publication Number: 1852020

IPC: C07K5/075, A23L1/236, A23L2/60

Language of the proceedings: EN

Title of invention:
Sweetener composition improved in taste, its use and process
for preparing it

Patent Proprietor:
Ajinomoto Co., Inc.

Opponent:
The Nutrasweet Company

Headword:

Relevant legal provisions:
RPBA Art. 12(4)
EPC Art. 54, 56

Keyword:

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 1232/14 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 7 March 2019

Appellant: The Nutrasweet Company
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Representative: CMS Cameron McKenna Nabarro
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Respondent: Ajinomoto Co., Inc.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
31 March 2014 concerning maintenance of the
European Patent No. 1852020 in amended form.**

Composition of the Board:

Chairman M. O. Müller
Members: P. O'Sullivan
L. Bühler

Summary of Facts and Submissions

- I. The opponent's appeal lies from the interlocutory decision of the opposition division according to which European patent 1 852 020 as amended and the invention to which it relates were found to meet the requirements of the EPC.
- II. The patent was opposed under Article 100(a), (b) and (c) EPC on the grounds that the claims thereof lacked novelty and did not involve an inventive step, the invention defined therein was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, and its subject-matter extended beyond the content of the application as filed.
- III. The appealed decision was based on the sets of claims of the main request (patent as granted) and auxiliary request 1, the latter corresponding to the main request on which the present decision is based.

According to that decision, the claims of auxiliary request 1 met the requirements of Articles 123(2) and 84 EPC, and the invention defined therein was sufficiently disclosed. Novelty was acknowledged over D1, which was also considered to represent the closest prior art for the assessment of inventive step. The technical problem was to provide N-[N-(3,3-dimethylbutyl)-L- α -aspartyl]-L-phenylalanine 1-methyl ester (hereinafter: DMB-APM) compositions having at least one of an improved early taste, a weakened late taste and reduced astringency, and the solution involved an inventive step.

IV. The following evidence *inter alia*, was cited during opposition proceedings:

- D1 : FR 2697844
- D1a: Certified Translation of FR2697844
- D2 : Well, A.G., in "Progress in Sweeteners", 1989, pp 169-214
- D3 : Verdi, R.J. *et al.*, L.L., 94 Food Technology 1993 (June), p.94-100
- D9 : Schiffman, *et al.*, Neuroscience and Biobehavioral Reviews, Vol. 17, 1993, pp 313-345
- D14: Hanger, L. *et al.*, J. Food Sci. 1996, 61, 2 pp 456-459
- D16: Guinard, J. *et al.*, Journal of Sensory Studies 10, 1995, pp 47-71
- D17: DuBois, G.E. *et al.*, Chemical Senses, 1983, Vol. 7, pp 237-247
- D20: Decision of the USPTO Board of Patent Appeals & Interferences relating to US 09/355,980
- E1 : Declaration of D. Eric Waters dated 23 February 2011
- E2 : Second Declaration of D. Eric Walters dated 7 September 2012
- E3 : Declaration of B. Thomas Carr dated 6 September 2012

With the statement of grounds of appeal the opponent (appellant) filed the following evidence:

- D22: Transcript of the deposition of M. Kawauchi dated April 2, 2005.

V. The appellant requested that the decision under appeal be set aside and that the patent be revoked.

VI. The respondent (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained on the basis of the claims found allowable by the opposition division (corresponding to auxiliary request 1 filed during the oral proceedings before the opposition division on 5 March 2014) and the corresponding description, with amended page 4 of the description as filed with the reply to the grounds of appeal.

As an auxiliary measure, maintenance of the patent was requested on the basis of the first auxiliary request, or the second to fifth auxiliary requests filed with the reply to the grounds of appeal, and descriptions to be adapted thereto.

Furthermore, it was requested not to admit D22 into the proceedings.

Lastly, it was requested that the appellant's arguments as regards added subject-matter (Article 123(2) EPC) in claim 1 be disregarded.

VII. The independent claims of the main request read as follows:

"1. The use as a sweetener of a composition comprising N-[N-(3,3-dimethylbutyl)-L- α -aspartyl]-L-phenylalanine 1-methyl ester and Aspartame, wherein the amount of the N-[N-(3,3-dimethylbutyl)-L- α -aspartyl]-L-phenylalanine 1-methyl ester is between 0.1% by weight and 35% by weight based on the total amount of the N-[N-(3,3-dimethylbutyl)-L- α -aspartyl]-L-phenylalanine 1-methyl ester and the Aspartame.

5. *The use of Aspartame in a sweetener composition comprising N-[N-(3,3-dimethylbutyl)-L- α -aspartyl]-L-phenylalanine 1-methyl ester (DMB-APM), for improving the sweetness characteristics of the DMB-APM.*

7. *A process for preparing a composition as defined in any one of claims 1 to 2, which comprises combining the N-[N-(3,3-dimethylbutyl)-L- α -aspartyl]-L-phenylalanine 1-methyl ester and Aspartame in the required ratio or amount to give said composition."*

VIII. A communication of the board was sent in preparation for oral proceedings pursuant to Article 15(1) RPBA. Therein the board noted deficiencies in the objections submitted by the appellant with the grounds of appeal in respect of sufficiency of disclosure. The board also took the preliminary view that the subject-matter of claim 1 was novel over D1. Furthermore, concerning the allegation of added subject-matter, the board provided the preliminary view that the appellant's attack against claim 1 of the main request was insufficiently substantiated.

IX. Oral proceedings before the board were held on 7 March 2019 in the absence of the parties, who had been duly summoned.

X. The arguments of the appellant, insofar as relevant to the present decision, may be summarised as follows:

Main request - sufficiency of disclosure

The evidence provided by D20 and D22 and E1, E2 and E3, was sufficient to cast doubt on the reliability of the data and results provided in the patent. Consequently, the subject-matter of the patent did not achieve the

desired technical results and the patent was not sufficiently disclosed.

Novelty (Article 54 EPC)

The subject-matter of claim 1 lacked novelty over D1. DMB-APM was singled out therein as a preferred sweetener, and could be combined with Aspartame (hereinafter: APM), disclosed in a single list of possible sweeteners. The weight range recited in claim 1 was arbitrary, did not provide any effect, and was thus not to be considered as a distinguishing feature of the claim.

Inventive step (Article 56 EPC)

Either of D1 or D3 was the closest prior art. Starting at D1, DMB-APM was a preferred embodiment. The selection of APM to be combined therewith was obvious given the position of APM as the world's mostly widely used and approved sweetener, its use in blends, and the fact that the respondent was among the biggest industrial producers thereof. The range recited in claim 1 was arbitrary. D20 and D22 were sufficient proof of the unreliability of the data in the patent, which was to be ignored in the assessment of inventive step. Even if an effect were recognised, the skilled person would have conducted routine tests taught e.g. in D3, thereby arriving at the claimed subject-matter.

Alternatively D3 was the closest prior art. D3 mentioned APM in the context of sweetener blending and described the ideal alternative sweetener as duplicating the sensory properties of sucrose. The problem was the provision of a sweetener blend with improved taste and stability. The skilled person

seeking a solution to this problem would look to newly developed sweeteners such as DMB-APM developed in D1 and apply the teaching of D3 to combine it into a blend with known sweeteners such as APM and test its properties at different concentration ratios. In doing so, the skilled person would arrive at the subject-matter of the claimed invention without exercising inventive step.

Amendments (Article 123(2) and (3) EPC)

The subject-matter of claim 1 (main request) and page 4 of the description (found allowable by the opposition division) extended beyond the content of the application as originally filed in violation of Article 123(2) EPC and/or amounted to an extension of the protection conferred in violation of Article 123(3) EPC.

XI. The arguments of the respondent, insofar as relevant to the present decision, may be summarised as follows:

Main request - sufficiency of disclosure

The existence of a technical effect was more relevant to the issue of inventive step than to sufficiency of disclosure. D22 did not indicate that Mr Kawauchi considered the technical effect alleged in the examples of the US equivalent of the opposed patent to be unjustified based on the data presented. Rather, it was his understanding that the data had not been subjected to a formal statistical examination. The finding of the opposition division that E1 and E2 supported the existence of a technical effect underlying the invention was challenged by the appellant, but no

reasons were provided. Thus the invention as defined in the claims was sufficiently disclosed.

Novelty (Article 54 EPC)

Claim 1 was novel over D1. A series of selections from the range of possibilities in D1 was required to arrive at the subject-matter of claim 1. Furthermore, the specific range recited in claim 1 was not disclosed therein.

Inventive step (Article 56 EPC)

D1 was the closest prior art. D3 was further from the invention and less suitable. The technical effects and the underlying technical problem set out in the contested decision were correct. The evidence D20 and D22 did not cast doubt on the results in the patent, which were further corroborated by the results set out in E1 and E2. The approach that the skilled person starting at D1 wishing to solve the problem would arrive at the subject-matter of the claims was fundamentally based on hindsight and must therefore fail.

Amendments (Article 123(2) and (3) EPC)

The submissions of the opponent in the context of Article 100(c) EPC as regards claim 1 were not substantiated and should be disregarded. The objections with respect to page 4 of the description had been overcome by page 4 filed with the reply to the statement of grounds of appeal.

Reasons for the Decision

1. Absence of the respondent at the oral proceedings
 - 1.1 By letter dated 16 August 2018, the respondent requested that the oral proceedings be rescheduled. The reason given was that at the date scheduled for oral proceedings, the respondent's representative who had taken over representation from a retired colleague would be on holiday which had already been firmly booked before the notification of the summons to oral proceedings.
 - 1.2 In a communication dated 10 September 2018, the board informed the respondent that it could not accede to the request for postponement and gave its reasons why the date for oral proceedings was maintained. In particular, the board did not accept the fact that the respondent's representative had considerable experience in dealing with the respondent to be a sufficient reason to preclude substitution which not only was not a point for consideration according to the Notice of the Vice-President of Directorate-general 3 dated 16 July 2007 concerning oral proceedings (OJ EPO 2007, Special Edition No. 3, 115), but was already necessary in view of the retirement of the professional representative acting on behalf of the respondent during opposition proceedings.
 - 1.3 On 11 October 2018, the respondent withdrew its request for oral proceedings. On 27 February 2019, the respondent informed the board that it would not be attending oral proceedings.
 - 1.4 The purpose of oral proceedings is to settle as far as possible all outstanding questions relevant to the

decision. They are an opportunity for the parties to submit their observations on issues that have been raised in the written proceedings or on new matter that, in the light of the prevailing legal and factual situation, can be reasonably expected to be admitted and considered at the oral proceedings in accordance with Article 13(1) and (3) RPBA. Therefore, a duly summoned party who has decided not to attend oral proceedings has nonetheless had the opportunity to be heard, and the requirements of Article 113(1) EPC are thus met even if the oral proceedings are continued without that party. In view of the above and in accordance with Rule 115(2) EPC and Article 15(3) RPBA, the oral proceedings were held in the absence of the respondent who was treated as relying only on its written case.

2. Admittance of evidence

2.1 D22 was filed by the appellant with the grounds of appeal. The respondent requested that this document not be admitted into the proceedings.

2.2 As regards this request, the history of the case in particular in relation to D20 needs to be consulted. D20 was filed by the appellant during first instance proceedings with the letter of 14 September 2012. In the annex to the summons to oral proceedings dated 11 November 2013, the opposition division provided the preliminary opinion that D20 should be admitted into the procedure, but did not identify any shortcoming concerning the absent witness deposition transcript D22. The minutes of oral proceedings do not record that this issue was discussed, and it appears in the written record for the first time in the contested decision, according to which the alleged summary of Mr Kawauchi's

statements provided in D20 could not be taken at fact value due to the absence of the full deposition document (D22). Consequently, as noted by the appellant, the filing of D22 with the grounds of appeal was in direct response to the finding in the contested decision, and was filed at the earliest possible opportunity. For this reason the board decided to admit D22 into the procedure in accordance with Article 12(4) RPBA.

Main Request

3. Sufficiency of disclosure
 - 3.1 According to Article 12(1) RPBA, appeal proceedings shall be based *inter alia* on the notice of appeal and the statement of grounds of appeal. According to Article 12(2) RPBA, the statement of grounds of appeal and the reply thereto shall contain a party's complete case. They shall **set out clearly and concisely the reasons** why it is requested that the decision under appeal be reversed, amended or upheld, and **should specify expressly all the facts, arguments and evidence** relied on (emphasis added).
 - 3.2 According to Article 12(4) RPBA, everything presented by the parties under (1) shall be taken into account by the board **if and to the extent** it relates to the case under appeal and **meets the requirements in (2)** (emphasis added).
 - 3.3 Consequently, the board has discretion under Article 12(4) RPBA not to take into account submissions which fail to meet the criteria laid down in Article 12(2) RPBA.

3.4 In its statement of grounds of appeal, the appellant raised an objection concerning sufficiency of disclosure. It submitted on the basis of an alleged lack of reliability of the results provided in the patent, based on the evidence provided by D20, D22 and E1-E3, that the "desired technical result" was not achieved by the indications provided in the patent, and that as a consequence of this, the patent was insufficiently disclosed. The appellant was silent with regard to which specific claim(s) the sufficiency of disclosure objection was directed and as to which specific technical result was allegedly not achieved.

More specifically, claims 5 and 6 at issue (corresponding to claims 6 and 7 as granted) are the only claims in which a technical effect is recited, while according to the notice of opposition, granted claims 1, 3 and 8 formed the basis for an insufficiency objection at that stage of proceedings. Thus the board is at a loss as to which claims the objections in the statement of grounds of appeal are directed.

Furthermore, as noted by the respondent (reply, paragraph 26), the decision of the opposition division sets out (page 6, paragraph 7.4) that the technical effect of improved early taste was corroborated by exhibits E1 and E2, while the appellant in the statement of grounds of appeal, without providing any reasons, merely stated that the contrary was true. E1 - E3 comprise a large body of opinion and test results.

3.5 Consequently, only elements of the appellant's argumentation are present and its complete case in accordance with Article 12(2) RPBA, is lacking in the statement of grounds of appeal.

- 3.6 Even after having received the board's communication sent in preparation for oral proceedings in accordance with Article 15(1) RPBA, which addressed this issue (paragraph 2.2), the appellant did not file any submissions on this point.
- 3.7 In view of this, it is not clear to the board on which basis the decision under appeal acknowledging sufficiency of disclosure should be reversed - both in terms of the claims under attack, and the specific facts underlying the evidence cited.
- 3.8 For the foregoing reasons, the submissions of the appellant concerning the ground for opposition under Article 100(b) EPC are insufficiently substantiated, and are thus not part of the appeal proceedings in accordance with Article 12(4) RPBA.
4. Novelty (Article 54 EPC)
- 4.1 The appellant submitted that the subject-matter of claim 1 lacked novelty over the disclosure in D1. It was argued that D1 disclosed DMB-APM "singled out", in combination with aspartame chosen from a list, amounting to a selection from a single list for the purpose of assessing novelty. Furthermore, the range of 0.1 to 35% recited in claim 1 was arbitrary and not to be considered as a distinguishing feature.
- 4.2 D1 (reference is made to the original document rather than to the translation D1a) discloses compounds for use as sweeteners (page 1, lines 1-4). DMB-APM is disclosed as one of a number of preferred compounds (page 6, first structure; claim 4). It is stated that the sweeteners of the invention may be used alone or in combination with other sweeteners chosen from a list

which includes aspartame (APM) (page 11, lines 20-32). Specific combinations of sweeteners are not exemplified.

- 4.3 DMB-APM is disclosed in D1 as being preferred, along with further compounds also described as being preferred (e.g. structure V, page 6, and the general disclosure of compounds of formula (VI), page 6, exemplified by compounds of structures (VII) and (VIII), page 7). These preferred embodiments constitute a list from which the skilled person, in a first selection, must choose DMB-APM.

APM is disclosed as a member of a list of a plurality of sweeteners which may optionally be combined with the sweeteners of the invention (page 11, lines 20-32). Hence, a second selection is necessary to arrive at the subject-matter of claim 1.

According to established jurisprudence, the choice of two substances to be combined together from two separate lists in a prior art document constitutes a novel selection.

- 4.4 That D1 does not disclose the range of 0.1 to 35% by weight (for DMB-APM) recited in claim 1 was not disputed by the appellant. Rather it was argued that said range is merely arbitrary and consequently not to be considered as a distinguishing feature. However, whether a feature is arbitrary is not relevant to the question of whether it is directly and unambiguous disclosed in the prior art for the purpose of assessing novelty. Consequently, this feature further distinguishes the subject-matter of claim 1 from D1. Accordingly, even if the skilled person were to make the above-mentioned selections from the disclosure in

D1, he would still not arrive at the subject-matter of claim 1.

4.5 In view of the above, the subject-matter of claim 1 is novel over D1.

5. Inventive step (Article 56 EPC)

5.1 Claim 1 concerns the use as a sweetener of a composition comprising APM and a certain amount of DMB-APM.

5.2 The appellant's statement setting out the grounds of appeal fails to identify the specific claims against which the objections with respect to inventive step are raised. Nevertheless, since the arguments submitted repeatedly discuss the "specified range" and the "claimed range" (page 8, first full paragraph and page 9, penultimate paragraph), it is assumed, to the appellant's advantage, that said objections are directed to the subject-matter of claims 1 and 7, the only claims in which a range is specified.

5.3 Closest prior art

5.3.1 According to the decision under appeal and the respondent, D1 represents the closest prior art. The appellant submitted that either of D1 or D3 could serve as potential starting points for the skilled person.

5.3.2 According to established jurisprudence, in selecting the closest prior art, a central consideration is that it must be directed to the same purpose or effect as the invention, otherwise it cannot lead the skilled person in an obvious way to the claimed invention. The closest prior art is that which corresponds to a

similar use requiring the minimum of structural and functional modifications.

5.3.3 Consequently D1, which discloses DMB-APM as a new sweetener compound and mentions the possibility of employing APM, is a closer prior art document than D3, the disclosure of which is directed to the advantages of alternative sweetener blends in general, and does not mention DMB-APM as a possible sweetener compound. D3 is thus a less realistic starting point for the skilled person.

5.4 Problem solved

5.4.1 Starting from the disclosure in D1 of DMB-APM (page 6, structure (IV)), the subject-matter of claim 1 at issue differs in that:

- DMB-APM is combined with APM
- the DMB-APM is present in an amount of 0.1 to 35 % by weight based on the total amount of DMB-APM and APM

5.4.2 According to the specification, the general object of the invention is to provide DMB-APM in the form of a sweetener composition which has a high level of sweetness and whose sweetness quality is closer to that of sucrose by strengthening the early taste, and weakening the late taste and the astringent taste (paragraph [0007]).

5.4.3 In order to formulate the objective technical problem effectively solved by the claimed subject-matter, it must be determined whether the distinguishing features

of the claim provide the alleged technical effects or advantages.

5.4.4 Test examples 1-3 of the patent report comparative tests of carbonated cola solutions comprising DMB-APM as the sole sweetener, APM as the sole sweetener, or a mixture of DMB-APM and APM against a reference solution comprising a carbonated cola solution sweetened with sucrose. The solutions comprising either DMB-APM or APM were found to be weak in early taste and strong in later taste when compared to the solution comprising sucrose. On the other hand, compared to the sucrose solution, the solutions comprising a mixture of DMB-APM and APM were found to be strengthened in early taste, and weakened in later taste and astringent taste and thus greatly improved in sweetness quality. In example 2 of the patent (distinct from "Test Example 2", discussed above), three solutions of uncarbonated cola were prepared comprising DMB-APM, a mixture of DMB-APM and APM (at 1.7 % wt DMB-APM) and sucrose, respectively. In the evaluation of the sweetness quality of the solutions comprising DMB-APM compared to the sucrose solution, it was found that the mixture of DMB-APM and APM had an improved early taste, a weakened later taste and a weakened astringent taste compared to the solution comprising DMB-APM alone. Further tests were carried out and are summarised in Table 1 (patent, page 8). In each run (1-6) carbonated cola solutions comprising various ratios of DMB-APM to APM were compared with a carbonated sucrose solution as control and were found to yield the same results as those provided for the mixture of DMB-APM and APM when compared to DMB-APM alone.

5.4.5 The appellant challenged the validity of these results on the basis that D20 (a decision of the boards of

appeals and interferences of the USPTO with respect to a US family member of the patent in suit) in conjunction with the witness deposition of Mr Kawauchi D22 demonstrated that the data in the patent was not statistically significant, and thus could not be taken into account.

5.4.6 The results presented in said US patent are discussed in several places in D22. On page 36, lines 20-24, Mr Kawauchi states that rather than there being no statistically significant data in the patent, that there was no data which were subjected to statistical investigation. This understanding was repeated on page 37, lines 7-10, despite a further question directed to the lack of statistically significant data (lines 4-6), and again on page 38 (lines 1-5). These clear indication are not contradicted by the answer provided by Mr Kawauchi on page 41 (lines 1-2), namely "... I don't think there were any data which were statistically significant", since the latter must also be interpreted as meaning "data which were subjected to statistical examination", and not to be a reference, in contradiction to his previous submissions, to actual data which was not statistically significant.

5.4.7 Thus the evidence in D22 only demonstrates the view of Mr Kawauchi that, in the tests of the patent, there was no data subjected to statistical examination, but **not** that the data presented in the patent are statistically insignificant. Since the absence of statistical data in the patent does not *per se* render the test results presented therein implausible, D22 does not cast sufficient doubt on the validity of the results presented.

5.4.8 Furthermore, the tests filed by the appellant, e.g. E1, table 1 even support the data in the patent at least insofar as **one** of the effects of improved early taste, a weakened later taste and a weakened astringent taste are concerned. Thus table 1 of E1 shows that the composition of samples 103 and 104 falling within the terms of claim 1 have a weakened later taste and (for sample 104) an intermediate early taste.

5.4.9 The objective technical problem underlying the subject-matter of claim 1 is consequently the use of a further sweetener composition with at least one of an improved early taste, a weakened later taste and a weakened astringent taste.

5.5 Obviousness

5.5.1 The appellant submitted that with a view to solving this problem, the skilled person starting at the disclosure in D1 would have conducted routine sensory testing on sweetening agents to determine the appropriate amount and proportions of sweeteners as a standard step in determining desirable amounts, as taught for example in D3.

5.5.2 While D1 does provide the skilled person with a list of further sweeteners including APM which could be combined with DMB-APM, there is no indication that in order to solve the above-mentioned problem he should make this specific combination in the specific ratio recited in claim 1 at issue. In fact, D1 is concerned with providing alternatives to APM, which is described therein as being of relatively low sweetening intensity, low stability, and high cost, and sets out to find new sweeteners overcoming these problems (D1, page 1, line 17 - page 2, line 9). Consequently, D1 if

anything provides the skilled person with an incentive **not** to employ APM.

5.5.3 Furthermore, none of the additional prior art documents mentioned by the appellant (D2, D3, D9, D14, D16 and D17) would guide the skilled person from the disclosure in D1 to the claimed composition in order to solve the problem. D3 concerns sweetener blends in general and while it teaches guidelines on routine sensory analysis, it provides no hints or indications as to how the specific above-mentioned problem could be solved. D2, D9 and D14 disclose the general characteristics of APM (D2, section 5.1.2; D9, page 328, "Aspartame", D14, table 1)), while D16 and D17 concern scientific studies on the understanding of sweet and bitter taste, and the evaluation of temporal taste properties, respectively.

5.6 Consequently, the subject-matter of claim 1 involves an inventive step starting from D1 as closest prior art.

5.7 Although the board does not consider D3 as the closest prior art, the same conclusions would apply if one were to start from this document. Although D3 teaches in general that blending of alternative sweeteners (including APM) may be effective in matching the temporal properties of sucrose (page 98, column 1, middle paragraph), it would not be possible from this teaching to predict which specific mixtures and amounts would provide the technical result demonstrated by the examples in the patent. Consequently, also starting from D3 as closest prior art, the subject-matter of claim 1 involves an inventive step.

5.8 Claim 7 concerns a process for the preparation of a composition as defined in *inter alia* claim 1. Since as concluded above, the subject-matter of claim 1 involves

an inventive step, the same applies to the subject-matter of claim 7 *mutatis mutandis*.

6. Amendments (Articles 123(2) and (3) EPC)

6.1 The appellant submitted that the subject-matter of the patent as found allowable by the opposition division, specifically claim 1 and page 4 of the description, extended beyond the content of the application as originally filed contrary to Article 123(2) EPC and/or amounted to an extension of the protection conferred, contrary to Article 123(3) EPC.

6.2 With regard to claim 1, in the statement setting out the grounds of appeal, the appellant merely stated that "[w]e respectively disagree with the finding [of the opposition division] and maintain the arguments presented before the Opposition Division for consideration by the Board of Appeal" (page 5, first paragraph). The respondent requested that the appellant's submission in this regard be disregarded as insufficiently substantiated.

6.3 Devoid of substantive argumentation, the appellant's submission does not provide the board with sufficient information to understand why the opposition division's decision that the requirements of Articles 123(2) and (3) EPC were met, is to be reversed. It is not the purpose of the appeal proceedings for the board to make the case for the appellant. Furthermore, despite this issue having been raised in the communication of the board pursuant to Article 15(1) RPBA sent in preparation of oral proceedings (page 9, central paragraph), no further submissions were received from the appellant.

Consequently, the appellant's objection in respect of claim 1 is not sufficiently substantiated, and thus is not part of the appeal proceedings in accordance with Article 12(4) RPBA.

6.4 The appellant was furthermore of the view that the amendments to page 4 of the description filed at oral proceedings before the opposition division were contrary to the requirements of Article 123(2) and (3) EPC. The first objection concerns the addition of the term "optionally" preceding "with AceK" (final four lines of the central paragraph). Since this passage has been deleted from new page 4 filed with the respondent's reply, the corresponding objection has been overcome.

6.5 The second objection of the appellant concerned the alleged addition of "optionally" before "AceK at a ratio ..." in the second full paragraph on page 4 as filed during oral proceedings before the opposition division (which is unamended in page 4 filed with the respondent's reply), which reads as follows:

*"The sweetener composition of the present invention contains DMB-APM and APM and **optionally** AceK at a ratio where the sweetness quality closer to that of sucrose than that of each sweetener when singly used, can be obtained"* (emphasis added by the board)

6.5.1 As noted by the respondent, this text is identical to paragraph [0010] of the specification and consequently does not infringe Article 123(3) EPC.

6.5.2 In the application as originally filed (page 4 of the application, line 22), the corresponding relevant text reads " ... contains DMB-APM and APM **and/or**

AceK ..." (emphasis added). Thus the text "and/or" has been replaced by "optionally". The term "optionally" however merely excludes the possibility that APM is absent from the three possible permutations provided by "and/or" (i.e. DMB-APM and APM; DMB-APM and APM and AceK; or DMB-APM and AceK), and consequently merely represents a deletion of one of the originally-disclosed alternatives (DMB-APM and AceK), such a deletion fulfilling the requirements of Article 123(2) EPC.

- 6.6 The appellant furthermore suggests that the application as originally filed and the patent as granted specified that AceK was essential to the functioning of the invention (page 5, paragraph 5 of the grounds). However, it is clear from the application as originally filed (page 1, first paragraph; page 4, line 21 - page 5, line 13; examples 1 and 2) that this is not the case.

Consequently, page 4 of the description filed with the respondent's reply fulfills the requirements of Article 123(2) and 123(3) EPC.

7. It follows that the set of claims according to the main request is allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent as amended in the following version:

Description:

pages 1, 2, 3 and 5 to 29 filed during the oral proceedings before the opposition division on 5 March 2014;
page 4 filed with letter dated 18 December 2014.

Claims:

claims 1-7 of auxiliary request 1 filed during the oral proceedings before the opposition division on 5 March 2014.

The Registrar:

The Chairman:



N. Maslin

M. O. Müller

Decision electronically authenticated