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**Datasheet for the decision  
of 9 August 2018**

**Case Number:** T 2183/14 - 3.3.09

**Application Number:** 04762910.0

**Publication Number:** 1796482

**IPC:** A23G3/00

**Language of the proceedings:** EN

**Title of invention:**  
CONFECTIONERY PRODUCT

**Patent Proprietor:**  
Fertin Pharma A/S

**Opponent:**  
Wm. Wrigley Jr. Company

**Headword:**

**Relevant legal provisions:**  
EPC Art. 84, 100(a), 100(b), 100(c)

**Keyword:**  
Main request - novelty (no)  
New auxiliary request 1 - fulfils the requirements of the EPC

**Decisions cited:**

G 0003/14

**Catchword:**



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Case Number: T 2183/14 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 9 August 2018**

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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
25 September 2014 concerning maintenance of the  
European patent No. 1796482 in amended form.

**Composition of the Board:**

**Chairman** W. Sieber  
**Members:** N. Perakis  
D. Prietzel-Funk

## Summary of Facts and Submissions

- I. This decision concerns the appeals filed by the patent proprietor and the opponent against the opposition division's interlocutory decision that the European patent No. 1 796 482 as amended meets the requirements of the EPC.
- II. In its notice of opposition, the opponent requested that the patent be revoked in its entirety on the grounds of Article 100(a) (lack of novelty and lack of inventive step), 100(b) and 100(c) EPC.

Claims 1 and 19 as granted read as follows:

"1. Confectionery product comprising a polymer system, flavor and sweetener, at least 70% by weight of said polymer system comprising polyvinyl acetate (PVAc) and less than 10% by weight of said polymer system comprises polymer having a molecular weight (Mw) of greater than 50000 g/mol, wherein said confectionery product comprises a polymer system in an amount of from 5 to 99% by weight, flavor in an amount of 0.001 to 30% by weight and sweeteners in an amount of 5% to 80% by weight, wherein said sweeteners comprises artificial sweeteners, and wherein the polymers of the polymer system consist of polyvinyl acetate."

"19. Confectionery product according to any of the claims 1-18 comprising at least one high molecular

weight PVA having a molecular weight of 40000 to 100000 in an amount of from 0.5 to 10% by weight of the polymer system."

The terms PVAc and PVA are used interchangeably in the patent in suit. The board will use the term PVAc in this decision.

III. The documents cited in the notice of opposition included:

D1: US 5 116 626 A.

IV. The opposition division's decision was based on a main request (claims as granted) and an auxiliary request 1 (the only auxiliary request) filed during the oral proceedings on 10 September 2014.

The opposition division held that the main request was not allowable since the subject-matter of claim 1 lacked novelty over D1.

The claims of auxiliary request 1 differed from the claims as granted in that the features of claim 19 had been introduced into claim 1. The opposition division held that auxiliary request 1 met the requirements of the EPC. In particular, the subject-matter of claim 1 was considered to be novel and inventive over D1.

V. Both the patent proprietor and the opponent appealed against the opposition division's interlocutory decision. The patent proprietor requested that the decision be set aside and the patent be maintained as granted. The opponent requested that the decision be set aside and that the patent be revoked in its

entirety. The opponent reiterated all the objections raised before the opposition division.

- VI. Since the patent proprietor and the opponent are both appellants and respondents in these proceedings, for simplicity the board will continue to refer to them as the patent proprietor and the opponent.
- VII. With its observations on the opponent's appeal dated 5 May 2015, the patent proprietor submitted auxiliary requests 1 and 2.
- VIII. By letter of 8 June 2015, the opponent submitted further arguments with regard to the subject-matter of the main request and auxiliary request 1.
- IX. On 22 May 2018, the board issued a communication in preparation for oral proceedings setting out its preliminary opinion on the outstanding issues. With regard to the main request, the board gave its preliminary view that the subject-matter of claim 1 lacked novelty over D1.
- X. By letter of 15 June 2018, the opponent announced that it would not attend the oral proceedings.
- XI. By letter of 25 July 2018, the patent proprietor commented on the board's preliminary opinion and filed an amended auxiliary request 2.
- XII. Oral proceedings before the board took place on 9 August 2018 as scheduled, and in the absence of the opponent. Although the patent proprietor had said that auxiliary request 1 was the same as the auxiliary request held allowable by the opposition division, the board noted that some linguistic amendments had been

made to the claims: (i) the word "confectionary" was used throughout the claims whereas the claims held allowable by the opposition division mostly referred to "confectionery";

(ii) dependent claim 6 had been amended to refer to a "plasticizer", i.e. the singular form.

The use of "confectionary" appeared to be a linguistic mistake and was in contradiction of the description. The patent proprietor then filed a new auxiliary request 1 where "confectionary" was changed throughout to "confectionery" and "plasticizers" was reintroduced into dependent claim 6.

Claim 1 of the new auxiliary request 1 reads as follows:

"1. Confectionery product comprising a polymer system, flavor and sweetener, at least 70% by weight of said polymer system comprising polyvinyl acetate (PVAc) and less than 10% by weight of said polymer system comprises polymer having a molecular weight (Mw) of greater than 50,000 g/mol, wherein said confectionery product comprises a polymer system in an amount of from 5 to 99% by weight, flavor in an amount of 0.001 to 30% by weight and sweeteners in an amount of 5% to 80% by weight, wherein said sweeteners comprises artificial sweeteners, and wherein the polymers of the polymer system consist of polyvinyl acetate,

the product comprising at least one high molecular weight PVA having a molecular weight of 40,000 to 100,000 in an amount of from 0.5 to 10% by weight of the polymer system."

XIII. The arguments put forward by the patent proprietor in its written submissions and during the oral proceedings that are relevant to the present decision may be summarised as follows:

Main request

The invention underlying the claimed subject-matter was sufficiently disclosed. The objection relating to the definition of the term "toffee", a term which did not appear in the claims, actually concerned inventive step.

The claimed subject-matter did not extend beyond the content of the application as filed, as the restriction that all the polymers of the polymer system consisted of PVAc was clearly and unambiguously derivable from the application as filed (page 5, lines 16-17 and 21-22; page 19, lines 7-9; examples).

Furthermore, the claimed subject-matter was novel over D1 (example 3 of table III) because the requirement that the polymer system comprise less than 10% of polymer (i.e. PVAc) with a molecular weight of greater than 50,000 g/mol made this component mandatory. In other words, the opposition division was wrong in its finding that "less than 10%" included the value 0%. Even if claim 1 were considered to be ambiguous as to whether the value of 0% was included or not, the skilled person would understand from the patent specification as a whole that the presence of high-



molecular-weight PVAc was mandatory and the value of 0% excluded.

New auxiliary request 1

The claimed subject-matter did not extend beyond the content of the application as filed. For the reasons given for the main request, the invention underlying the claimed subject-matter was sufficiently disclosed.

The subject-matter of claim 1 was a combination of granted claims 1 and 19 and therefore clarity was not an issue (G 3/14).

This subject-matter was novel over D1, which did not disclose a confectionery product with all the ingredients of the claimed confectionery product.

The claimed subject-matter also involved an inventive step. It related to a new type of chewing gum product, a "hybrid product", having properties in common with chewing gum (elastomeric) and toffee (not elastomeric) (see paragraph [0007]). As regards the term "toffee-like", it was a qualitative term and meant the same as "chewable but substantially non-elastomeric" (see paragraphs [0010] and [0033]). The many overlapping definitions given by the opponent had no bearing on this case. The skilled reader would understand what the inventors were talking about from the application as filed and its context. Interpretations where the toffee texture was something brittle had to be dismissed as they made no sense. "Toffee-like" was related to the degree of elasticity of the gum. Elasticity was a familiar concept and it was not problematic to ask a test panel to evaluate the elasticity of a chewing gum product. Furthermore, there was no need for a

comparative test since there was no relevant prior art relating to a toffee-like chewing gum.

D1 was not the closest prior art because it had almost nothing in common with the claimed invention, such that the skilled person would not have considered it as a promising springboard for further development. D1 was about making chewing gum with interesting and unusual visual properties (appearance) (column 1, lines 5-6). The opponent's assertion that the skilled person would have started from D1 made use of hindsight knowledge of the claimed invention.

As there was no cited document which constituted a reasonable starting point, the board should conclude that the claimed subject-matter was not obvious.

Even if prior art had to be considered for the sake of the problem-solution approach, then conventional chewing gum should be considered to be the closest prior art. Amending such conventional chewing gum in order to manufacture the hybrid confectionery product was not obvious to the skilled person.

But even if D1 were taken as the starting point, the technical problem should be seen as the provision of a confectionery product with interesting and unusual textural properties, combining conventional chewing gum and conventional toffee (paragraphs [0005] and [0010]). The evidence that the technical problem had been solved was provided in the examples in the patent in suit (paragraphs [0141], [0145], [0149], [0153], [0157] and [0162]). It was credible that the technical problem was solved across the entire scope of the claims. The opponent, who bore the burden of proof, had not pointed to any specific embodiment which would not work.

Furthermore, the solution to the technical problem was not obvious. Starting from D1 and aiming to obtain a confectionery product with properties comparable to both chewing gum and toffee, the skilled person would find in neither D1 nor any cited prior-art document an indication of such a chewing gum texture or any motivation to modify the disclosed chewing gum composition in order to arrive at the claimed confectionery product.

XIV. The arguments put forward by the opponent in its written submissions that are relevant to the present decision may be summarised as follows:

The subject-matter of claim 1 of auxiliary request 1 contained added subject-matter, because it was not disclosed in the application as filed that all of the polymers of the polymer system consisted of PVAc.

The invention underlying the claimed subject-matter was not disclosed in a manner sufficiently clear and complete for it to be carried out by a skilled person. The term "toffee-like" had no generally accepted meaning in the art of confectionery products and the patent did not provide any technical definition of this term. Furthermore, no test methodology was provided to demonstrate how this property could be determined. Moreover, the broad scope of the claims rendered it not credible that any chewing gum composition falling within the scope of the claims would show the asserted technical effect.

The subject-matter of claim 1 of auxiliary request 1 lacked clarity because the term "molecular weight" was ambiguous.

The subject-matter of claim 1 of auxiliary request 1 lacked novelty in view of D1 (example 3 of table III, and gum bases EE and GG of table II).

As regards example 3, a skilled person could show that the low-molecular-weight PVAc of the type used in D1 contained about 5% PVAc with a molecular weight in the range of 40,000 to 100,000 g/mol. This resulted in more than 0.5% of high-molecular-weight PVAc in the range of 40,000 to 100,000 g/mol. Thus, D1 implicitly disclosed the further limitation of claim 1 of auxiliary request 1.

As regards gum bases EE and GG, they may not have been used in any of the gum compositions in table III; however their use was implicit (column 5, lines 39-42).

The subject-matter of claim 1 of auxiliary request 1 lacked an inventive step in view of D1. D1 was a relevant prior-art document since it referred to chewing gums having "good texture and mouth feel" (column 1, lines 64-67), a type of such mouth feel being a toffee-like chew feel. D1, table II, disclosed the gum base EE, which contained 10% of high-molecular-weight PVAc (between 45,000 and 95,000 g/mol). The use of this gum base in a specific gum composition was implicit bearing in mind the definition of what constituted a gum base, common general knowledge relating to the composition of typical chewing gums and the fact that a skilled person was knowledgeable in his field and not devoid of intellectual capacity. The resulting chewing gum compositions would have toffee-like textural properties in as far as it was possible to determine what constituted such toffee-like textural properties.

Anyway, nothing in D1 indicated that the transparent gums would not have a toffee-like texture.

- XV. The patent proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted, or, alternatively, that the patent be maintained in amended form on the basis of the claims filed as the new auxiliary request 1 during the oral proceedings before the board, or the claims filed as auxiliary request 2 with the letter of 25 July 2018.
- XVI. The opponent requested in writing that the decision under appeal be set aside and that the patent be revoked in its entirety.

## **Reasons for the Decision**

### ***Main request (claims as granted)***

1. Added subject-matter (Article 100(c) EPC)

Claim 1 as granted is derived from the combination of claims 1, 2 and 24 as filed. It also contains the feature "the polymers of the polymer system consist of polyvinyl acetate", which is directly and unambiguously derived from the application as filed, more specifically the description (page 2, line 26), which discloses:

*"Basically, a polymer system comprising solely polyvinyl acetate(s) alone is preferred ..."*

The board understands this passage to mean that the polymer system contains only polymers which are made of

polyvinyl acetate. The term "comprising" in this passage relates to further ingredients that can be added to the polymer system besides the polymers. This is clear from, for example, dependent claim 7 as filed, which discloses that the polymer system comprises plasticisers.

Furthermore, the application as filed suggests this interpretation in several places, more specifically:

- page 19, lines 8-10, where it is disclosed that the polymer system "comprises very few components, preferably three components: a LMw PVAc, a HMw PVAc and a plasticiser, e.g. triacetin"; it is self-evident that, in this three-component embodiment, the polymers of the polymer system consist of PVAc;
- page 27, lines 18-20, where it is disclosed that the polymer systems of the invention are typically prepared by adding amounts of the high-molecular-weight PVAc, low-molecular-weight PVAc and plasticiser to a heated sigma blader mixer; and
- the examples in which the polymer system comprises 95 wt.% of low-Mw PVAc, 1 wt.% of high-Mw PVAc and 4 wt.% of the plasticiser triacin.

Thus the subject-matter of claim 1 does not extend beyond the content of the application as filed.

## 2. Sufficiency of disclosure

In so far as it can be assumed that the opponent's objection under Article 100(b) EPC also applied to the main request, it did not provide any evidence showing that it was unable to reproduce the invention of

claim 1 of the main request. In particular, as regards its objections raised in the context of the allegedly unclear definition of the term "toffee", this term does not appear in the claim. Thus, the board agrees with the patent proprietor that these objections actually relate to inventive step, not to sufficiency of disclosure. The invention underlying the subject-matter of claim 1 of the main request is therefore considered to fulfil the requirements of Article 100(b) EPC.

### 3. Novelty

- 3.1 The opposition division decided that claim 1 as granted lacked novelty over example 3 of D1 (table III including the information for the gum base in table II).

This example discloses a transparent gum composition which comprises:

- 75% of the gum base formulation DD, consisting of
  - 74% low-molecular-weight PVAc (i.e. a molecular weight from 2,000 to 15,000 g/mol in view of column 2, lines 59-60);
  - 15% medium-molecular-weight PVAc (i.e. a molecular weight from 15,000 to 45,000 g/mol in view of column 2, lines 65-66);
  - 5% glycerol triacetate (triacin), a plasticiser;
  - 6% peppermint oil, a typical flavouring agent;
- 11% sweetener (10% corn syrup and 1% aspartame);
- 9% peppermint oil, a typical flavouring agent;
- 5% centre filling III, 97% of which is sucrose.

Thus, the gum base used in the gum composition of example 3 of D1 (table III) does not contain any PVAc with a molecular weight above 45,000 g/mol.

- 3.2 Therefore the novelty issue boils down to the question of whether the subject-matter of claim 1 of the main request encompasses the confectionery product of example 3 of D1, which does not contain PVAc with a molecular weight greater than 50,000 g/mol. The relevant feature of claim 1 reads:

"and less than 10% by weight of said polymer system comprising polymer having a molecular weight (Mw) of greater than 50000 g/mol".

- 3.3 According to the patent proprietor's interpretation, the expression "**less than 10% by weight**" does not include the value of 0% by weight. The patent proprietor argued that, even if the skilled reader considered that there was an ambiguity as regards the lower value of the claimed range, he or she would consult the patent in suit in order to interpret the meaning of this expression and would realise that a high-molecular-weight PVAc was a compulsory component of the polymer system.

- 3.4 The board does not agree. There is no compelling reason to interpret the expression "less than 10% by weight" as to require the presence of PVAc with a molecular weight of greater than 50,000 g/mol in a non-zero amount. Any polymer system having no PVAc with a molecular weight of greater than 50,000 g/mol meets the requirement of claim 1, because it comprises less than 10% of a high-molecular-weight PVAc. There is no ambiguity in the definition of the relevant feature of claim 1 and thus there is no need for interpretation.



In the absence of a lower limit for the range provided in this feature, this range encompasses the value of 0%.

- 3.5 Therefore the opposition division was right in its conclusion that D1 discloses the subject-matter of claim 1 and that this claim lacks novelty. Consequently, the main request is not allowable.

***New auxiliary request 1***

4. Amendments

- 4.1 Compared with claim 1 of the main request, claim 1 of the new auxiliary request 1 contains the following additional feature:

"the product comprising at least one high molecular weight PVA having a molecular weight of 40,000 to 100,000 in an amount of from 0.5 to 10% by weight of the polymer system".

- 4.2 The subject-matter of claim 1 corresponds to the combination of granted claims 1 and 19 and thus it does not extend the protection conferred by the patent (Article 123(3) EPC).

- 4.3 Furthermore, this additional feature is disclosed in dependent claim 21 as filed, which depends on any preceding claim. Thus, the amendment to claim 1 as granted does not result in added subject-matter (Article 123(2) EPC).

- 4.4 The opponent's objection to the feature "the polymers of the polymer system consist of polyvinyl acetate"

under Article 100(c) EPC has been dealt with in relation to the main request (point 1 above).

5. Clarity

Since the subject-matter of claim 1 is derived from the combination of granted claims 1 and 19, it is not open to an objection of lack of clarity, as set out in G 3/14.

Thus, irrespective of whether the term "molecular weight Mw" is clear or not, the clarity of this term cannot be challenged at this stage.

6. Sufficiency of disclosure

This objection has been dealt with in relation to the main request (point 2 above). The reasoning there equally applies to the subject-matter of claim 1 of the new auxiliary request 1.

7. Novelty

7.1 The subject-matter of claim 1 of the new auxiliary request 1 differs from claim 1 of the main request in that it comprises the following additional feature:

"the product comprising at least one high molecular weight PVA having a molecular weight of 40,000 to 100,000 in an amount of from 0.5 to 10% by weight of the polymer system".

This additional feature can only be part of the polymer system of the claim because

- no further polymer system is conceivable in view of the wording of claim 1 (anything else would not be technically meaningful);
- the polymers of the sole polymer system consist of PVAc, so "the high molecular weight PVA" must be a constituent of the sole polymer system; and
- its content is provided in relation to the weight of the polymer system.

Thus, this additional feature is a more restrictive definition of the polymers of the polymer system defined in claim 1 of the main request, although there is an inconsistency as regards the upper limit of the high-molecular-weight PVAc. If the polymer system contains a PVAc with a molecular weight of greater than 50,000 and up to 100,000 g/mol, the amount of this component has to be as per the first requirement already present in granted claim 1, i.e. less than 10% by weight, but the requirement now added allows for this component to be 10% by weight. Again, this inconsistency is not objectionable since it was already present in the granted claims. In conclusion, a high-molecular-weight PVAc with a molecular weight of 40,000 to 100,000 g/mol is a compulsory component of the polymer system referred to in claim 1 of the new auxiliary request 1 since its lowest amount is 0.5% by weight of the polymer system.

Hence, the confectionery composition of claim 1 is novel over the gum composition of example 3 of D1 (table III), which does not disclose the presence of a high-molecular-weight PVAc with a molecular weight of 40,000 to 100,000 g/mol in an amount of from 0.5 to 10% by weight of the polymer system.

7.2 The opponent asserted that the other gum bases disclosed in table II of D1 would be novelty-destroying for the claimed confectionery product because the skilled reader would implicitly use them as gum compositions (confectionery products) without the addition of further components.

The board does not agree.

Firstly, D1 neither discloses nor implies that all the gum bases in table II could be used as "final" gum compositions. Only gum bases FF and II were used as such (see table III, examples 4 and 6), the polymer systems of which did not contain any high-molecular-weight PVAc.

Secondly, even if it were accepted that such a use were implicit, which it is not, none of the gum bases in table II discloses all the constituents of claim 1 of the new auxiliary request 1: the amount of high-molecular-weight PVAc in gum bases AA, KK and LL is too high (20%, 15% and 20%, respectively); gum bases BB and MM also contain polyisobutylene (i.e. the polymer system does not consist of PVAc); gum bases CC, DD, JJ and HH do not contain any high-molecular-weight PVAc; in gum base EE the amount of sweetener is too low; and gum base GG contains neither a sweetener nor a flavour.

7.3 The opponent also alleged that the subject-matter of claim 1 of auxiliary request 1 still lacked novelty over the gum composition in example 3 of D1. According to its submission, a skilled person could show that the low-molecular-weight PVAc of the type used in gum base DD, which in turn was used in the gum composition of example 3 (see point 3.1 above), contained about 5% of

PVAc in the range of 40,000 to 100,000 g/mol. This would result in more than 0.5% of the low-molecular-weight PVAc of gum base DD actually consisting of high-molecular-weight PVAc and therefore implicitly teaching the further limitation in claim 1.

However, the opponent did not provide any technical evidence or further explanation to substantiate this assertion. Therefore, this line of argument must fail.

7.4 To conclude, the subject-matter of claim 1 of the new auxiliary request 1 is novel over D1, the only document cited against the novelty of the claimed subject-matter.

8. Inventive step

8.1 Closest prior art

8.1.1 The patent in suit aims to produce confectionery products with properties of conventional chewing gum compositions but having a different texture. Thus, paragraph [0007] explains that the product is a toffee-like chewing gum whose backbone is a polymer system, basically equivalent in function to the gum base of conventional chewing gum although with significant textural differences. According to paragraph [0010], such a hybrid confectionery product may be dimensioned to be a hybrid toffee/chewing gum product. The toffee-like texture is obtained by the use of a substantial amount of polyvinyl acetate (actually the polymers of the polymer system consist of PVAc), avoiding the use of substantial amounts of high-molecular-weight polymers, in particular elastomers. This is also disclosed in paragraph [0093], which mentions that the main difference between the claimed products and the

prior-art ones is found in the composition and textural properties of the polymer system.

Example 1 of the patent in suit shows the manufacture of a gum base with a polymer system as defined in claim 1 of the new auxiliary request 1 that comprises 95 wt.% of a low-molecular-weight PVAc, 1 wt.% of a high-molecular-weight polyvinyl acetate, and 4 wt.% of triacin (plasticiser). As disclosed in the following examples, which make use of the gum base of example 1, the confectionery products obtained using that polymer system look like chewing gums, but the textural properties are comparable to the texture of toffee (paragraph [0141]).

- 8.1.2 By contrast, D1 relates to chewing gum compositions whose primary characteristic is that they have interesting visual properties, i.e. they are substantially transparent (column 1, lines 5-6). D1 makes no particular reference to the texture of the chewing gums and certainly does not mention any texture other than that of conventional chewing gums.
- 8.1.3 The patent proprietor argued that D1 was not a reasonable starting point for assessing whether the present invention involves an inventive step. Therefore, it claimed, since the opponent had not provided any other closest prior-art document, the board should find that the claimed subject-matter involved an inventive step for this reason alone.
- 8.1.4 The board does not agree. D1 is a possible piece of prior art which can be used for applying the problem-solution approach.

8.2 Technical problem and its solution

8.2.1 The technical problem underlying the subject-matter of claim 1 in view of D1 is considered to be the provision of a confectionery product which combines conventional chewing gum properties with toffee-like textural properties, i.e. a hybrid confectionery product.

8.2.2 It may be true that the patent in suit does not give a definition of the term "toffee-like". However, as credibly explained by the patent proprietor, it is generally known that toffee is a chewable confectionery product which is typically made by caramelising sugar along with butter. Although "toffee-like" is a qualitative term, in the context of the patent in suit it means the same as "chewable but substantially non-elastomeric". This is apparent from paragraphs [0010] and [0033], where toffee texture is repeatedly associated with a lack of elastomeric properties. Accordingly, the many overlapping definitions for the term "toffee-like" referred to by the opponent have no bearing on this case. It is clear from the application as filed that the aim was to develop a chewing gum product which has the textural properties of toffee. It is also clear that, in this context, interpretations whereby toffee texture is something brittle must be dismissed.

Evaluating the toffee-like texture of a chewing gum composition does not seem to be a problem. The opponent did not contest the patent proprietor's argument that testing the elasticity of a chewing gum product is common. Thus, it would not be problematic to ask a test panel to evaluate a confectionery product according to claim 1, namely whether it had the textural properties

of conventional chewing gums (elastomeric), or instead the texture of toffee (non-elastomeric).

- 8.2.3 The technical problem is solved by the use of a polymer system whose polymers consist of PVAc polymers, a rather small part thereof being a high-molecular-weight PVAc polymer.

The examples in the patent in suit show that the problem has indeed been solved (see paragraphs [0141], [0145], [0149], [0153], [0157] and [0162]). In all these examples, the confectionery product is a chewing gum whose textural properties are comparable to the texture of toffee.

- 8.2.4 There is no reason to doubt that the technical problem is solved across the entire scope of the claimed subject-matter. The opponent, which bears the burden of proof, did not submit any evidence to substantiate its assertion that it was not.

### 8.3 Obviousness

- 8.3.1 The skilled person, starting from the confectionery products of D1 and aiming for a hybrid confectionery product combining conventional chewing gum properties and toffee-like textural properties, would not find any motivation in D1 to use a polymer system whose polymers consist of PVAc polymers including a rather small portion of a specific high-molecular-weight PVAc in order to obtain the properties sought.

- 8.3.2 It may be true that D1 refers to chewing and bubble gums having good texture and mouth feel (see column 1, lines 65-66), however, this statement appears to relate to the prior art referred to in D1. More importantly,



the opponent did not explain why "good texture and mouth feel" implies, as it contended, that the chewing gum has a toffee-like texture.

8.3.3 The opponent also asserted that the skilled person would obviously have used the gum base EE in table II of D1 (with 10% high-molecular-weight PVAc) in order to manufacture a gum base composition and that he would have arrived at the claimed confectionery product with the advantageous properties without exercising inventive step. The board does not agree. Firstly, D1 does not disclose that gum base EE was ever tested and considered to be an appropriate gum base for the manufacture of a gum composition. Secondly, and more importantly, D1 does not provide any information regarding the textural properties of any of the gum bases in table II, and therefore the skilled person would not have found in D1 any motivation to choose specifically the gum base EE (with the claimed percentage of high-molecular-weight PVAc) rather than the other gum bases (without the claimed percentage of high-molecular-weight PVAc) for the manufacture of a gum base composition with a toffee-like texture. Therefore, the opponent's assertions are based on an *ex post facto* analysis.

8.4 In view of the above, the subject-matter of claim 1 of the new auxiliary request 1 involves an inventive step.

9. The dependent claims

Dependent claims 2 to 25 are preferred embodiments of independent product claim 1. They are therefore allowable *mutatis mutandis*.

10. Method claims

Claims 26 and 27 are for methods of manufacturing a confectionery product according to any of claims 1-25 by a batch or an extruder process. Since the confectionery product as such is patentable, any process for making such a product is also allowable.

11. Since the new auxiliary request 1 is allowable, any discussion of the patentability of the subject-matter of auxiliary request 2 is redundant.

12. Amended description

During the oral proceedings the patent proprietor submitted an amended page 1b of the description, thereby removing any linguistic inconsistency between the claims of the new auxiliary request 1 and the description.

## 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 in the following version:
  - claims 1-27 filed as the new auxiliary request 1 on 9 August 2018 during the oral proceedings before the board;
  - description pages 1a, 2 and 3 as filed during the oral proceedings before the opposition division on 10 September 2014;
  - description page 1b as filed during the oral proceedings before the board on 9 August 2018;
  - description pages 4 to 12 of the patent specification.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated