

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 6 February 2020**

Case Number: T 1932/15 - 3.3.09

Application Number: 08752255.3

Publication Number: 2156753

IPC: A23L1/305, A23C9/152,
A23D9/007, A23L1/22, A23L1/24,
A23L1/227, A23L1/228

Language of the proceedings: EN

Title of invention:
LOW-FAT FOOD

Applicant:
Ajinomoto Co., Inc.

Headword:
Low-fat food/AJINOMOTO

Relevant legal provisions:
EPC Art. 84, 123(2)

Keyword:
Main request and auxiliary request 3 - clarity (no)
Auxiliary requests 1 and 2 - added subject-matter (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1932/15 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 6 February 2020

Appellant: Ajinomoto Co., Inc.
(Applicant) 15-1, Kyobashi 1-chome
Chuo-ku
Tokyo 104-8315 (JP)

Representative: Strehl Schübel-Hopf & Partner
Maximilianstrasse 54
80538 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 15 June 2015
refusing European patent application No.
08752255.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: A. Veronese
D. Rogers

Summary of Facts and Submissions

I. The appeal was filed by the applicant against the decision of the examining division refusing European patent application No. 08 752 255. The decision was based on a main request and an auxiliary request.

II. Claim 1 of the main request read:

"1. A low-fat food, wherein a compound having a calcium receptor-activating effect is added thereto at a final concentration of 1 ppb to 99.91% by weight, wherein the compound is selected from the group consisting of γ -Glu-Val-Gly and γ -Glu-Abu-Gly, and wherein the low-fat food is one kind or two or more kinds selected from the group consisting of a dairy product, a food containing animal oil and fat and/or vegetable oil and fat, and an emulsified food and has a smaller fat content than a conventional similar fat-containing food, which is not subjected to the treatment for reducing the fat content".

Claim 1 of the auxiliary request read:

"1. A method for improving the taste of food comprising the steps of

- (a) reducing the fat content of a food,*
- (b) adding a compound having a calcium receptor-activating effect to the food obtained in step (a) at a final concentration of 1 ppb to 99.9% by weight,*

wherein the compound is one kind or two or more kinds of amino acids or peptides selected from the group consisting of γ -Glu-X-Gly (X represents an amino acid or an amino acid derivative), γ -Glu-Val-Y (Y represents an amino acid or an amino acid derivative), γ -Glu-Ala, γ -Glu-Gly, γ -Glu-Met, γ -Glu-Thr, γ -Glu-Val, γ -Glu-Orn, Asp-Gly, Cys-Gly, Cys-Met, Glu-Cys, Gly-Cys, Leu-Asp, D-Cys, γ -Glu-Met(O), γ -Glu- γ -Glu-Val, γ -Glu-Val-NH₂, γ -Glu-

Val-ol, γ -Glu-Ser, γ -Glu-Tau, γ -Glu-Cys(S-Me)(O), γ -Glu-Leu, γ -Glu-Ile, γ -Glu-t-Leu, and γ -Glu-Cys(S-Me, wherein X is Val, Gly, Ala, Leu, Ileu, Ser, Thr, Met, Asn, Gln, Pro, Hyp, t-Leu, Asp, Glu, Lys, Arg, His, Phe, Tyr, Trp, homocystein, citrulline, ornitine, Abu, norvaline, norleucine, taurine, Cle, Aib, Pen, Cys(SNO), Cys(s-allyl) or Csy(S-Me) and Y is Gly, Val, Glu, Lys, Phe, Ser, Pro, Arg, Asp, Met, Thr, His, Orn, Asn, Cys, GlyA, LacA, or Gln."

III. The examining division found *inter alia* that:

- the expression "conventional similar fat-containing food" rendered claim 1 of the main request unclear, and
- the step of "reducing the fat content of a food" characterising claim 1 of the auxiliary request was not disclosed in the application as filed; thus this claim contained added subject-matter.

IV. With the statement setting out the grounds of appeal, the appellant filed a main request and auxiliary requests 1 and 2, the main request and auxiliary request 1 corresponding to the main and auxiliary request on which the impugned decision was based.

V. Claim 1 of auxiliary request 2 reads:

"1. A method of imparting fat-like richness and smoothness to a fat-containing food comprising adding a compound having a calcium receptor-activating effect to a fat-containing food, wherein the compound is selected from the group consisting of Y-Glu-Val-Gly and Y-Glu-Abu-Gly and wherein the food is one kind or two or more kinds selected from the group consisting of a dairy product, a food containing animal oil and fat and/or vegetable oil and fat,

and an emulsified food, with the proviso that the following food is excluded:

- (i) a product obtained by preparing a consomme soup by dissolving consomme soup powder (35% of sodium chloride, 18% of sodium glutamate, 0.2% of inosine monophosphate, 0.3% of white pepper powder, 0.5% of black pepper powder, 8.0% of beef extract powder, 3.0% of white wine powder, 2.0% of celery powder, 8.0% of Chinese cabbage extract powder, 2.5% of onion extract powder, 25.5% of lactose) at a concentration of 5 g/dl and mixing γ -Glu-Val-Gly to said consomme soup at a concentration of 0.0001 to 1 g/dl;
- (ii) a product obtained by mixing a corn soup with γ -GluVal-Gly at a concentration of 0.0001 to 1 g/dl; and
- (iii) a product obtained by mixing a curry roux with γ Glu-Val-Gly at a concentration of 0.0001 to 1 g/dl."

VI. By letter dated 16 December 2019 the appellant filed auxiliary request 3.

VII. Claim 1 of auxiliary request 3 reads:

"A low-fat coffee milk, wherein a compound having a calcium receptor-activating effect is added thereto at a final concentration of 1 ppb to 99.9% by weight, wherein the compound is selected from the group consisting of γ -Glu-Val-Gly and γ -Glu-Abu-Gly, and wherein the low-fat coffee milk has a smaller fat content than a conventional similar fat-containing coffee milk."

VIII. The documents mentioned during the proceedings included:

D13: EC Regulation No. 1924/2006 of the European Parliament and Council on nutrition and health claims made for foods (filed by the applicant in the proceedings before the examining division)

IX. The appellant's arguments, where relevant for this decision, may be summarised as follows.

- The expression "smaller fat content than a conventional similar fat-containing food [*or coffee milk*], which is not subjected to the treatment for reducing the fat content" had a generally accepted meaning and was clear to the skilled person. The fat content of conventional foods was also known. Thus, claim 1 of the main request and auxiliary request 3 was clear.
- Auxiliary requests 1 and 2 did not contain subject-matter extending beyond the content of the application as filed. Claim 1 of auxiliary request 1 was based on page 7, paragraph [0012] of the application as filed and claim 1 of auxiliary request 2 was based on page 7, penultimate paragraph; page 8, paragraph 2; and page 17, paragraph 2 of the application as filed. The omission of the term "low-fat" in claim 1 of auxiliary request 2 did not add new subject-matter.

X. Requests

The appellant requested that the decision under appeal be set aside and a patent granted upon the basis of the main request, filed with the statement of grounds of appeal, or alternatively upon the basis of one of the following auxiliary requests considered in the following order: auxiliary request 3, filed under cover of a letter dated 16 December 2019, or auxiliary request 1 or auxiliary request 2, both filed with the statement of grounds of appeal.

Reasons for the Decision

Main request

1. *Clarity*

1.1 Claim 1 relates to a low-fat food to which certain specific tripeptides are added, the food:

- being selected from the group consisting of a dairy product, a food containing animal oil and fat and/or vegetable oil and fat, and an emulsified food, and
- having a smaller fat content than a conventional similar fat-containing food, which is not subjected to the treatment for reducing the fat content.

1.2 The wording of claim 1 does not clearly define the subject-matter for which protection is sought, as required by Article 84 EPC. This is because characterising the claimed food by referring to a "conventional similar fat-containing food which is not subjected to a fat reducing treatment" renders the claim unclear.

1.3 No evidence has been provided to show that a commonly recognised standard exists for defining a food as a "conventional fat-containing food" and specifying the amount of fat which is present in that food.

1.4 The appellant argued that certain products such as coffee milk, and their fat content, could be considered "conventional" and that their fat content was known and clear to the skilled person. In its opinion this was evident from the table on page 2 of its letter dated

16 December 2019. Drawing attention to the fact that the fat content of all commercial coffee milk products shown in the table was above 25%, the appellant asserted that the term "coffee milk" had a generally accepted meaning with regard to its fat content. Since the composition of that conventional food was clear, the definition of a corresponding food with a lower fat content was also clear.

1.5 This argument is not convincing. It is readily apparent from the aforementioned table that the fat content of the listed products varies considerably, with percentage differences of almost 20%. Due to this variability it is impossible to identify unequivocally the "conventional" coffee milk product which has to be used as a reference for determining whether a similar coffee milk does or does not fall within the claimed scope.

1.6 For these reasons, claim 1 is unclear (Article 84 EPC).

Auxiliary request 3

2. Clarity

2.1 Claim 1 of auxiliary request 3 is formulated essentially in the same way as claim 1 of the main request, but is limited to a "coffee milk". In a similar manner, it defines a low-fat coffee milk by referring to a "conventional similar fat-containing coffee milk". Accordingly, for the reasons already given in relation to the main request (points 1.2-1.6), claim 1 of auxiliary request 3 is unclear (Article 84 EPC).

Auxiliary request 1

3. *Added subject-matter*

3.1 Claim 1 relates to a method for improving the taste of a food comprising the following two steps:

- (a) reducing the fat content of a food,
- (b) adding a certain amount of specific peptides to the food obtained in step (a).

3.2 According to the appellant the basis for this method can be found in paragraph [0012] of the application as filed, and in particular in the two sentences stating that:

"The term 'low-fat food' means a food which originally contains fat, but the fat content of which is reduced"

and that

"...preferred is a food having a smaller fat content than a conventional similar fat-containing food, which is not subjected to the treatment for reducing the fat content".

3.3 In its opinion these two sentences teach implicitly that step (a), in which the fat content of a food is reduced, is disclosed in the application as filed as part of a method defined in claim 1.

3.4 The board does not find this argument convincing. Paragraph [0012] cannot be read in isolation, but has to be read by taking into account the teaching of the application as filed as a whole. Paragraphs [0001], [0002], [0009] and [0011] explain that the invention

relates to a low-fat food and to a method for improving the taste of that low-fat food. They also teach that, although there is an interest in the development of low-fat foods, these foods are less attractive in terms of palatability and taste. This occurs because fats contribute greatly to the organoleptic characteristics of foods. Thus, according to the application as filed, the starting point for carrying out the invention is a food having an amount of fat which is lower than that which imparts optimal taste and palatability. This starting point is different from that according to claim 1 of auxiliary request 1. Furthermore, the low-fat food mentioned in the application as filed is not necessarily obtained by reducing the fat of a previously prepared fat-containing food, but can also be obtained by mixing together the desired ingredients in appropriate proportions.

- 3.5 Moreover, the step in claim 1 in which the fat present in a food is reduced as part of a method for improving the taste of that food is in contradiction to the teaching of the application as filed, which clearly teaches that a decrease in the amount of fat present in a food results in a worsening, rather than an improvement of its taste and palatability.
- 3.6 Accordingly, the application as filed does not directly and unambiguously disclose a method of improving the taste of a food which includes step (a) indicated in claim 1. For these reasons the subject-matter of claim 1 of auxiliary request 1 extends beyond the content of the application as filed (Article 123(2) EPC).

Auxiliary request 2

4. *Added subject-matter*

4.1 Claim 1 relates to a method for imparting fat-like richness and smoothness to a fat-containing food wherein:

- certain tripeptides are added to the food, and
- the food is selected from the group consisting of a dairy product, a food containing animal oil and fat and/or vegetable oil and fat, and an emulsified food (certain particular foods being disclaimed).

4.2 According to the appellant, claim 1 is based on page 7, penultimate paragraph; page 8, second paragraph; and page 7, second paragraph of the application as filed.

4.3 However, claim 1 does not require, as the application as filed does, that the food to which the peptide is added is a "low-fat" food. This requirement is repeated consistently in various parts of the application as filed: see the claims and paragraphs [0001], [0007-0012], [0015], [0018] and [0043-0046]. It is also mentioned in the parts of the application disclosing the specific foods listed in claim 1: see page 8, second paragraph; page 5, fourth paragraph; and claim 5 as filed.

4.4 The appellant argued that the term "low-fat" could be omitted without adding new subject-matter because it had no limiting effect.

4.5 This argument is not persuasive. The term "low-fat food" is frequently used in the fields of nutrition and

food technology to label certain foods. As shown for instance in D13, even before the filing date the use of this term for labelling commercial products could be subject to regulatory requirements. These may prescribe, for example, that a food can only be labelled as "low-fat" if it contains less than a specified amount of fat. Therefore, the term "low-fat" has a technical meaning and has a limiting effect when used to characterise a food.

- 4.6 For these reasons, the omission of the term "low-fat" in claim 1 creates new subject-matter extending beyond that disclosed in the application as filed (Article 123(2) EPC).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Magliano

A. Haderlein

Decision electronically authenticated