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**Datasheet for the decision  
of 20 December 2023**

**Case Number:** T 0119/21 - 3.3.09

**Application Number:** 13867023.7

**Publication Number:** 2939542

**IPC:** A21D2/26, A21D2/18, A21D2/36,  
A21D13/02

**Language of the proceedings:** EN

**Title of invention:**  
BAKED CONFECTIONERY

**Patent Proprietor:**  
Kao Corporation

**Opponent:**  
Société des Produits Nestlé S.A.

**Headword:**  
Baked confectionery/KAO

**Relevant legal provisions:**  
EPC Art. 56  
RPBA 2020 Art. 12(4), 13(2)

**Keyword:**

Admittance of documents (no)

Inventive step - main request and auxiliary requests 1 to 6  
(no)

Amendment after summons - auxiliary requests 7 to 12 -  
exceptional circumstances (no)

**Decisions cited:**

T 1707/06, T 0041/16

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0119/21 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 20 December 2023**

**Appellant:** Société des Produits Nestlé S.A.  
(Opponent) Entre-deux-Villes  
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**Representative:** Elkington and Fife LLP  
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**Respondent:** Kao Corporation  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 23 October 2020  
rejecting the opposition filed against European  
patent No. 2939542 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** A. Haderlein  
**Members:** M. Ansorge  
R. Romandini

## Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal against the opposition division's decision rejecting the opposition.
- II. With its notice of opposition, the opponent had requested that the patent be revoked *inter alia* on the ground for opposition under Article 100(a) EPC (lack of inventive step).
- III. The opposition division had decided *inter alia* that the subject-matter of claim 1 of the patent as granted involved an inventive step in view of D6 or D16 as the closest prior art.
- IV. Claim 1 of the patent as granted (main request) reads as follows:

*"Baked confectionery, comprising:*

*insoluble dietary fiber in an amount of from 4.0 to 12.0 mass%;*

*protein in an amount of from 12.0 to 30.0 mass% of[sic]; and*

*lipid in an amount of from 10.0 to 15.0 mass%;*

*wherein the insoluble dietary fiber includes wheat-bran-derived insoluble dietary fiber, wherein a ratio of the wheat-bran-derived insoluble dietary fiber in the insoluble dietary fiber is 30.0 mass% or more."*

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the term "Baked confectionery,

comprising" is amended to "*Baked confectionery obtained by preparing a dough by blending therein at least wheat flour, wheat bran, protein-containing powder, and fat and oil, and then baking the dough, wherein the baked confectionery comprises*" (hereinafter also referred to as "product-by-process formulation").

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the feature "saccharide in an amount of from 1.0 to 50 mass%" is introduced.

Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 1 in that the feature "saccharide in an amount of from 1.0 to 50 mass%" is introduced.

Claim 1 of auxiliary request 4 differs from claim 1 of auxiliary request 3 in that the feature "an egg" is introduced into the product-by-process formulation.

Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary request 4 in that the protein-containing powder is specified as "soybean protein-containing powder".

Claim 1 of auxiliary request 6 differs from claim 1 of auxiliary request 5 in that the fat and oil is specified as "margarine".

Claims 1 of auxiliary requests 7 to 12 (filed by letter of 10 August 2023) each relate to a method of producing baked confectionery, the product claims having been deleted in auxiliary requests 7 to 12.

V. The following documents were cited in the present case:

D6: WO 2004/084637 A1

- D13: Mintel Database "Italian Shortbread 40-30-30 Biscuits", published July 2007
- D14: Mintel Database "Frollini 40-30-30", published August 2012
- D15: Amazon.it web page "Enervit Protein Frollini Godark", 30 May 2012
- D16: Mintel Database "Salty Wholemeal Crackers", published January 2007
- D17: V.A. Mikesch et al., "Sugar, Sweets Play Roles in Food Texture and Flavoring", 1969, pages 232 to 236
- D18: B. Pareyt et al., "The role of sugar and fat in sugar-snap cookies: Structural and textural properties", Journal of Food Engineering 90, 2009, pages 400 to 408
- D19: S. Chevallier et al., "Contribution of Major Ingredients during Baking of Biscuit Dough Systems", Journal of Cereal Science, 31, 2000, pages 241 to 252
- D20: Z. Maache-Rezzoug et al., "Effect of Principal Ingredients on Rheological Behaviour of Biscuit Dough and on Quality of Biscuits", Journal of Food Engineering, 35, 1998, pages 23 to 42
- D21: B. Pareyt et al., "The Role of Wheat Flour Constituents, Sugar, and Fat in Low Moisture Cereal Based Products: A Review on Sugar-Snap Cookies", Critical Reviews in Food Science and Nutrition, 2008, 48, pages 824 to 839
- D22: Y.H. Hui et al., "Bakery Products - Science and Technology", Blackwell Publishing, 2006, pages 18 to 36 and 161
- D27: Catherine Saxelby, "Which bran is best - wheat bran or oat bran?", <https://foodwatch.com.au/blog/healthy-eating-for-wellness/item/q-which-bran-is-best-wheat-bran-or-oat-bran.html>, 2014
- D28: Leo Stevenson et al., "Wheat bran: its composition

and benefits to health, a European perspective", International Journal of Food Science and Nutrition, December 2012, 63(8), pages 1001 to 1013

D29: Oxford Dictionary entry "saccharide"

D31: Sara Hedayati et al., "Effect of total replacement of egg by soymilk and lecithin on physical properties of batter and cake", Food Sci. Nutr. 2018(6), pages 1154 to 1161.

VI. The parties' relevant arguments, submitted in writing and during the oral proceedings, are reflected in the reasons for the decision below.

VII. Requests

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

The proprietor (respondent) requested that the appeal be dismissed (as its main request) or, as an auxiliary measure, that the patent be maintained on the basis of one of auxiliary requests 1 to 6, filed with the reply to the statement of grounds of appeal, or one of auxiliary requests 7 to 12, filed by letter of 10 August 2023.

## **Reasons for the Decision**

### MAIN REQUEST

1. Admittance of documents D27 to D29 and D31

1.1 The respondent filed documents D27 and D28 with its reply to the appellant's statement setting out the

grounds of appeal. The filing of documents D27 and D28 is an amendment to the respondent's appeal case, and its admittance is therefore at the discretion of the board (Article 12(4) RPBA).

- 1.1.1 The respondent argued that D27 and D28 had been filed to rebut the appellant's assertion that no technical effect could be associated with the use of wheat bran instead of another fibre source and that it was routine to incorporate large amounts of wheat bran in baked confectionery. However, neither the appellant nor the respondent considered the presence of wheat bran and the amount of wheat bran a distinguishing feature over the closest prior art (D6). The respondent further claimed that it had filed D27 and D28 in response to the introduction of D16 as the closest prior art. However, D16 is not considered as closest prior art hereinafter.

Thus the arguments provided by the respondent do not justify D27 being admitted into the appeal proceedings.

- 1.1.2 Moreover, the board shares the appellant's view that D27 and in particular D28 were filed to assert a new technical effect (alleged effect on faeces bulk) which was not described in the patent and was not presented in the first-instance proceedings. In addition, the appellant correctly stated that D27 was published after the priority date of the patent, so D27 is not prior art. The board considers that there were no convincing reasons in the present case which could justify admitting D27 and D28 into the appeal proceedings.

In view of the above, D27 and D28 are not admitted into the appeal proceedings (Article 12(4) RPBA).



- 1.2 The respondent filed D29 after it had filed its reply to the appellant's statement setting out the grounds of appeal to support what a skilled person would understand by the term "saccharide". Even if D29 were admitted into the proceedings, the outcome of the case would not be changed. A skilled person in the present technical field is familiar with the meaning of "saccharide". The presence of a saccharide is also not a distinguishing feature over the closest prior art (D6). The question of admittance of this document can thus remain unanswered.
  
- 1.3 The respondent filed document D31 after notification of the summons to oral proceedings and even after the board's communication pursuant to Article 15(1) RPBA. Consequently, the question of admittance of document D31 is to be assessed under Article 13(2) RPBA.
  - 1.3.1 The respondent filed D31 in reaction to the board's communication indicating its preliminary opinion. In the respondent's view, the board had raised a new argument ("comparative example 4 is not representative of the closest prior art (D6)") which justified the filing of D31.
  
  - 1.3.2 However, the respondent had argued in its reply to the grounds of appeal that comparative example 4 of the patent was representative of the biscuit of D6. In view of the detailed arguments provided by the appellant as to why no effect resulting from the only distinguishing feature was shown over D6, the board merely concluded that comparative example 4 of the patent was not considered representative of the biscuit of D6, i.e. it merely dealt with the argument put forward by the respondent. The board does not see that a new argument based on new facts was introduced into the proceedings

of the board's own motion. No exceptional circumstances can be recognised in the present case. For this reason, the board has not taken into account D31 (Article 13(2) RPBA).

2. Inventive step

2.1 The appellant argued that the claimed subject-matter did not involve an inventive step in view of D6 or D16 as the closest prior art.

2.2 The respondent submitted that D6 was the closest prior art and not D16, the claimed subject-matter involving an inventive step in view of both attacks.

2.3 Even assuming that D16 was not a suitable starting document in assessing inventive step, but D6 was the closest prior art, as outlined below the claimed subject-matter does not involve an inventive step in view of D6 as closest prior art.

2.4 D6 discloses a high-fibre biscuit composition which, among other things, comprises 30 to 55 wt% of refined wheat flour, 5 to 40 wt% of fibre, 10 to 25 wt% of sugar powder, 8 to 15 wt% of fat, 0.8 to 1.5 wt% skimmed milk powder and 0.8 to 1.5 wt% of liquid glucose (see claim 8 and the table on page 3 of D6). The fibre may be bran obtained from wheat (see for instance page 3, lines 8 and 9 of D6).

2.5 There was agreement among both parties that the subject-matter of claim 1 differed from D6 only in the content of protein, the claimed protein content being slightly higher than that disclosed in D6. The board agrees with this assessment.

- 2.6 The parties disagreed on the question of whether an effect was shown over D6 and whether an effect was credible over the whole claimed range. As a consequence, there was also disagreement on how to formulate the objective technical problem.
- 2.7 With respect to the effect(s) resulting from the only distinguishing feature over D6, the respondent held that the following improvements (i) to (iv) which could be taken from a comparison of e.g. examples 4 and 5 of the patent and comparative example 4 of the patent resulted therefrom:
- (i) less-dry feeling in the mouth,
  - (ii) a softer food texture that is easier to bite through,
  - (iii) improved shape stability (e.g. less crumbling), and
  - (iv) improved dough shape stability.
- 2.8 For the following reasons, improvements (i) to (iv) cannot be acknowledged over D6. In particular, it cannot be acknowledged that these improvements result from the only distinguishing feature over D6 and that these improvements exist over the whole claimed range.
- 2.8.1 The respondent argued that comparative example 4 of the patent having a protein content of only 9.80 mass% (and thus representative of D6) was a poorly performing example, whereas examples 4 and 5 of the patent (having the protein content required in claim 1) were superior and led to improvements (i) to (iv).
- 2.8.2 The respondent stressed that it was problematic to have a high fiber content and a high protein content at the same time. However, instead of defining features which

might be suited to solving the latter problem, claim 1 requires the problematic high content of fibers in combination with a high content of protein. This rather reflects the problem mentioned by the respondent instead of specifying those features which might solve it. Even when considering the examples of the patent (having desirable properties) in comparison with the comparative examples of the patent, it is not credible that a slight difference in protein content is responsible for the alleged improvements over the closest prior art.

- 2.8.3 The respondent mentioned that it was possible according to the patent to create palatable baked confectionery that comprised a high amount of wheat-bran-derived insoluble dietary fibers and protein if the amount of these two components is balanced with the lipid content. However, the content of lipid cannot be considered the feature to balance the problematic high content of fibers and protein, since the lipid content in claim 1 is broadly defined, without specifying which lipid is to be used. In addition, the content of lipid is already disclosed in the closest prior art (D6).
- 2.8.4 Under these circumstances, the board does not consider it credible that the only distinguishing feature, i.e. a slightly higher protein content over D6, is responsible for achieving improvements (i) to (iv).
- 2.8.5 In this context, the respondent referred in particular to T 41/16. This decision, however, does not support the respondent's case since according to this decision too an effect must be shown by corresponding compositions differing solely by the distinguishing feature (see Reasons 3.2.4). As set out above, this was not shown in the present case.

- 2.8.6 Moreover, as correctly outlined by the appellant, other ingredients commonly present in baked confectionery play an essential role in texture, moistness and shape stability (see D17 to D22), but are not specified in claim 1. For instance, the amount of sugar, type of sugar, type of protein, type of lipid and amount of water, to name only a few, have a significant impact on the alleged improvements (i) to (iv).
- 2.8.7 In this context, the respondent confirmed that for instance the amount of sugar may affect the texture of baked confectionery or that the type of lipid also has an effect, but it still considered that the improvements resulted from the only distinguishing feature over D6.
- 2.8.8 The board is not convinced by this line of argument and does not consider it credible that the only distinguishing feature is responsible for achieving the alleged improvements (i) to (iv).
- 2.8.9 In addition, it is not credible that there is an improvement over the whole claimed range, keeping in mind that commonly-used ingredients typically used in baked confectionery and having a significant impact on the desired properties of the final product are not defined in claim 1.
- 2.8.10 It is further noted that the ingredients in claim 1 are defined using generic terms (protein, lipid, insoluble dietary fiber including wheat-bran-derived insoluble dietary fiber). For instance, the type of protein and type of lipid are not specified in claim 1. However, it is well known in the present technical field that different types of proteins and

lipids lead to different properties of the final product (see D17 to D22).

- 2.8.11 The respondent submitted, referring in particular to T 1707/06, that D17 to D22 did not substantiate any serious doubts that the technical problem could be solved over the entire claimed scope, since none of these documents concerned high-protein and high-fibre baked confectioneries.

This argument is not convincing. Admittedly, D17 to D22 do not explicitly refer to the fibre and protein content required in claim 1. However, a person skilled in the art would infer from these documents that common ingredients typically used in baked confectionery, such as sugar, fat, etc., have a significant effect on the desired properties of baked confectionery. Under these circumstances, it cannot be acknowledged that the alleged improvements (i) to (iv) might exist over the whole claimed range.

- 2.8.12 The respondent argued that it was surprising that one could improve the texture of baked confectionery by increasing the amount of protein in the composition. This argument also fails to convince, however, for two reasons. Firstly, as explained above (see points 2.8.1-2.8.4), it is not credible under the present circumstances that there is an improvement resulting merely from a slightly increased protein content over that disclosed in D6. A high protein content in combination with a high fibre content, rather, reflects the problem mentioned by the respondent instead of specifying those features which might solve it. Secondly, it is not credible that there is an improvement over the whole claimed range.

In view of the above, the alleged improvements (i) to (iv) cannot be acknowledged over D6.

2.9 Accordingly, the objective technical problem is considered to be the provision of alternative baked confectionery.

2.10 A skilled person confronted with the above-identified technical problem, taking into account their common general knowledge, would increase the protein content of the product of D6 by routine modifications, e.g. by adding a protein-containing ingredient, without inventive effort. This modification would result in a product falling within the range claimed by the main request.

This is supported for instance by each of documents D13 to D16, which demonstrate that baked confectionery having a high protein content is common in the present technical field.

2.11 The respondent submitted that D6 did not indicate or suggest that it would be possible to obtain baked confectionery with a good mouth feel when using wheat bran as an ingredient. However, it was common ground among the parties that the presence of wheat-bran-derived insoluble fibers is disclosed in D6 as well and does not represent a distinguishing feature over D6. Thus this argument is not convincing.

2.12 The respondent also argued that D6 taught away from including wheat bran and it was known that the incorporation of high amounts of protein in combination with high amounts of fiber was challenging. However, as outlined above, the presence of wheat bran is not a distinguishing feature over D6. The board does not see

any reason which might have prevented a skilled person from contemplating a slightly higher protein content.

Under the present circumstances, the claimed subject-matter is considered an obvious alternative over D6.

In view of the above, the subject-matter of claim 1 of the main request does not involve an inventive step in view of D6 as the closest prior art.

#### AUXILIARY REQUESTS

3. Auxiliary request 1 differs from claim 1 of the main request in that the product-by-process formulation "*obtained by preparing a dough by blending therein at least wheat flour, wheat bran, protein-containing powder, and fat and oil, and then baking the dough, wherein the baked confectionery*" is introduced into claim 1.

D6 already discloses these process steps in the production of the biscuit of D6 (see for instance the flow chart on page 8). The biscuit of D6 also contains wheat flour and a protein-containing powder (e.g. skimmed milk powder). Thus there is no further distinguishing feature over D6 in claim 1 of auxiliary request 1 compared with claim 1 of the main request. This was also not disputed by the respondent, who submitted that the amendment was made in order to address the concerns that the alleged improvements did not occur over the whole range claimed. But, as set out above, the board's primary reason for denying inventive step of the subject-matter claimed by the claim requests on file is that there is no credible effect in comparison with the closest prior art. Therefore even restricting the claim further using features which are



also disclosed in combination in the closest prior art would not lead to a different finding. Thus claim 1 of auxiliary request 1 does not involve an inventive step over D6 as closest prior art for the same reasons as given for the main request.

4. With respect to auxiliary requests 2 to 6, the respondent did not submit further arguments as to why these claim requests could be judged differently compared with the main request or auxiliary request 1. Thus the subject-matter claimed in these claim requests is also considered to lack inventive step for the reasons given for the main request and auxiliary request 1.

5. Article 13(2) RPBA

5.1 The respondent filed auxiliary requests 7 to 12 after notification of the summons to oral proceedings and even after the board's communication. Thus the question of admittance of these claim requests is to be assessed under Article 13(2) RPBA.

5.2 Submitting auxiliary requests 7 to 12 is an amendment to the respondent's appeal case. According to the respondent, these were filed in reaction to the preliminary opinion of the board, in particular, considering that the subject-matter was to a large extent undefined, and to arguments submitted by the appellant.

5.3 The respondent has not argued that the preliminary opinion set out in the communication of the board raised new issues, nor that the appellant's arguments, to which these requests were intended to react, could not have been addressed earlier. Moreover, the

amendments do not address the primary reason for not acknowledging an effect, namely the absence of an effect irrespective of the breadth of the claim. Rather, they only address the breadth of the claim as confirmed by the respondent at the oral proceedings.

- 5.4 It follows that neither is the filing of these requests justified by a new development in the case nor do they *prima facie* overcome the reasons for lack of inventive step of the main request and auxiliary requests 1 to 6. It is therefore irrelevant whether, as the respondent argues, their filing is not detrimental to procedural economy.

In view of the above, auxiliary requests 7 to 12 are not taken into account in the present case (Article 13(2) RPBA).

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated