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**Datasheet for the decision
of 25 September 2023**

Case Number: T 0623/21 - 3.3.09

Application Number: 14796066.0

Publication Number: 3073841

IPC: A23K50/42, A23L7/135, A23L2/39,
A23L2/52, A23L7/143, A23L23/00,
A23L23/10, A23L33/00

Language of the proceedings: EN

Title of invention:

EXTRUDED FLAKES AND MANUFACTURING METHOD

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponent:

N.V. Nutricia

Headword:

Extruded Flakes/Nestlé

Relevant legal provisions:

EPC Art. 84

Keyword:

Main request: Clarity - (yes)

Main request: Claims - support in the description (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0623/21 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 25 September 2023

Appellant: Société des Produits Nestlé S.A.
(Patent Proprietor) Entre-deux-Villes
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Representative: Plougmann Vingtoft a/s
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Respondent: N.V. Nutricia
(Opponent) Eerste Stationsstraat 186
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Representative: Wohlfahrt, Jan Günther
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
11 March 2021 concerning maintenance of the
European Patent No. 3073841 in amended form.

Composition of the Board:

Chairman N. Obrovski
Members: A. Veronese
M. Ansorge

Summary of Facts and Submissions

- I. The appeal was filed by the patent proprietor (appellant) against the decision of the opposition division finding that the European patent as amended according to auxiliary request 1 (filed during the oral proceedings held before the opposition division) met the requirements of the EPC.
- II. With its notice of opposition the opponent had requested revocation of the patent in its entirety on the grounds under Article 100(a) (lack of inventive step), and 100(b) EPC.
- III. During the opposition proceedings the proprietor (now appellant) filed a main request. Claims 1 and 10 of that main request read as follows:

"1. A food-grade cereal flake having a porosity of between 40% and 70%, a mean wall thickness of between 100 and 180 microns, a thickness of between 0.5 and 2 mm, a length of between 2 and 8 mm, a liquid absorption index of between 80 and 200 g liquid/100 g of flakes."

"10. A process for manufacturing food-grade cereal flakes which comprises:

mixing a carbohydrate material in a single-screw or twin-screw extruder to form a dough;

cooking the dough in the extruder at a temperature comprised between 100°C and 180°C and at a water content comprised between 5% and 30%;

extruding the dough through an extrusion die;

cutting the dough into flakes directly at the outlet of the die, at a cutting frequency ranging from 250 Hz to 1000 Hz; and

drying the flakes to a water content between 2% and 8%,

wherein said process does not contain a flattening step."

- IV. Claims 1 and 10 of the main request differ from the corresponding claims as granted in that, *inter alia*, the food-grade flake has been qualified as being a "food-grade cereal flake".
- V. In its decision, the opposition division found, *inter alia*, that:
- the addition of the term "cereal" to claim 1 of the main request rendered the claimed subject-matter unclear,
 - the subject-matter of auxiliary request 1 met the requirements of the EPC.
- VI. With its statement setting out the grounds of appeal the appellant filed a main request as well as auxiliary requests 1 and 2. The main request corresponds to the main request filed with a letter dated 23 July 2020.
- VII. In reply to the Board's communication under Article 15(1) RPBA 2020, the appellant filed - with its letter dated 24 March 2023 - a description adapted to the amended claims of the main request.

VIII. The following documents were filed, *inter alianter alia*, during the opposition and the appeal proceedings:

- D25: Cereals, Novel Uses and Processes, edited by G. M. Campbell et al., Plenum Press, 1996, Chapter "The potential of cereals as industrial raw materials", by J. Coombs et al., Introduction, page 1
- D26: Cereals processing technology, edited by G. Owens, Woodhead Publishing Limited, 2001, Section "Biotechnology, cereal and cereal products quality", pages 61 to 63
- D28: Handbook of Cereal Science and Technology, edited by K.J. Lorenz et al., Marcel Dekker Inc., 1991, page 746
- D30: Commercial brochure "PROTEIN FLAKES 4ER PAKET"
- D31: Internet page: <https://medicalxpress.com/news/2014-03-cereal-flake-size-calorie-intake.html>
- D32: B. McKeivith, British Nutrition Foundation, Nutrition Bulletin, 2004, Vol. 29, pages 111-142
- D33: Internet page: <https://www.britannica.com/topic/cereal>

The requests

- IX. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or, alternatively, on the basis of one of auxiliary requests 1 and 2.
- X. The opponent did not reply to the statement setting out the grounds of appeal and did not formulate any requests either.

- XI. The Board summoned the parties to oral proceedings. The opponent informed the Board that it would not be attending the oral proceedings, and that it agreed that the oral proceedings be cancelled and that a decision be taken in writing. The oral proceedings were then cancelled.

Reasons for the Decision

Main request

1. *Article 84 EPC*
- 1.1 Claims 1 and 10 of the main request were modified by adding the term "cereal" to characterise the claimed "food-grade flake". The opposition division found that the addition of this term rendered the claimed subject-matter unclear.
- 1.2 Following an argument put forward by the opponent, the opposition division considered that the term "cereal" had different meanings when taking account of the description of the patent. In particular, according to the patent this term encompassed vegetables - such as potatoes, peas and beans - which could not be considered cereals. In this connection, the opposition division drew attention to paragraph [0021], lines 43 and 44 of the patent, which reads: "*For instance, the carbohydrate cereal includes maize, oat, rice, barley, rye, wheat, sorghum, buckwheat, sweet potato, cassava, bean, pea, amaranth, and mixtures thereof*" (emphasis added by the Board). In view of this teaching, according to the opposition division there was a degree

of uncertainty regarding the actual meaning of the term "cereals". The scope of claim 1 was therefore unclear.

- 1.3 The appellant has cited several documents showing that before the relevant date both "cereals" and "cereal flakes" were well-known terms that were commonly used in the field of food products: see D28, D30 and D31, which describe "cereal flakes", and D25, D26, D32 and D33 describing "cereals".
- 1.4 These documents show that the person skilled in the art using common general knowledge would understand that a "cereal" is a grass cultivated for the edible components of its grain (botanically, a type of fruit called caryopsis). Cereals include, for example, corn, wheat, maize, oats, barley, sorghum and rice.
- 1.5 Furthermore, these documents show that the skilled person would understand that the expression "food-grade cereal flake" in claims 1 and 10 identifies a food made by the processing of the grains of a "cereal". Cereal flakes, such as "corn flakes", are well-known and are usually eaten for breakfast with milk and sometimes with sugar.
- 1.6 Therefore, in the light of the above, claims 1 and 10 are clear in themselves.
2. The section of the description mentioned by the opponent, paragraph [0021], has been modified by deleting the reference to all vegetables which cannot be considered "cereals", namely potato, peas and beans.
- 2.1 This amendment removes - in line with the requirement for the claims to be supported by the description - any inconsistency between the claims as understood by the

person skilled in the art and what is considered - according to the description - to fall under the claimed invention.

2.2 Since claims 1 and 10 are clear and the description has been adapted to support the wording of the amended claims, the main request satisfies the requirements of Article 84 EPC.

3. *Other issues*

3.1 The opposition division found that the main request does not contain added subject-matter. No reasons were provided, and the Board does not see any reason to deviate from the opposition division's finding.

3.2 Furthermore, the opposition division found that auxiliary request 1 filed during the oral proceedings on 12 February 2021 (now auxiliary request 2) met the requirements of sufficiency of disclosure, novelty and inventive step. No reasons were provided, and the Board does not see any reason why these findings would not apply to the main request as well.

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 grant a patent on the basis of:
 - claims: 1 to 12 of the main request, as filed with the statement setting out the grounds of appeal

- description:
 - paragraphs 1 to 7, 11, 15 to 20, 22 to 60 of the patent specification,
 - paragraphs 8, 10, 12, 13 and 21 as amended by letter dated 24 March 2023
 - wherein paragraphs 9 and 14 have been deleted
- drawings: figures 1 to 4 of the patent specification

The Registrar:

The Chairman:



H. Jenney

N. Obrovski

Decision electronically authenticated