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D E C I S I O N
of 12 May 2006

Case Number: T 0350/03 - 3.3.09

Application Number: 96305242.8

Publication Number: 0758528

IPC: A23G 3/30

Language of the proceedings: EN

Title of invention:

Chewing gum composition containing erythritol

Applicant:

CERESTAR HOLDING BV

Opponent:

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Headword:

-

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Amendment: added subject-matter (yes)"

Decisions cited:

T 0201/83

Catchword:

-



Case Number: T 0350/03 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 12 May 2006

Appellant: CERESTAR HOLDING BV
Nijverheidsstraat 1
P.O. Box 9
NL-4550 AA Sas Van Gent (NL)

Representative: Knowles, James Atherton
Stevens Hewlett & Perkins
1 St Augustine's Place
Bristol BS1 4UD (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 8 November 2002
refusing European application No. 96305242.8
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: A.-T. Liu
Members: J. Jardón Alvarez
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. By decision despatched on 8 November 2002, the examining division refused European patent application No. 96 305 242 on the ground that Claim 1 as filed by letter of 12 September 2000 contravened the requirements of Article 123(2) EPC.
- II. A notice of appeal was lodged by the applicant on 21 December 2002. With the Statement of grounds of appeal filed on 6 March 2003, the appellant submitted a new set of 6 claims, which was later superseded by another set of 5 claims, filed by letter dated 8 May 2003. These claims were the basis for the appellant's sole request, Claim 1 of which reads as follow:
- "A chewing gum composition which does not become brittle upon storage during a few months comprising
- a) between 20 and 60% gum base,
 - b) between 5 and 60% polyol,
 - c) between 0 and 20% mannitol,
 - d) 5,2% maltitol syrup, and
 - e) between 0 and 8% glycerol,
- wherein 20% of the polyol is replaced with erythritol."
- III. In an annex to the summons to attend oral proceedings, the board indicated that it was inclined to share the view of the examining division in finding that the incorporation of the content of 5,2% maltitol syrup into the chewing gum composition of Claim 1 constituted added subject-matter with respect to the content of the application as originally filed.

IV. Oral proceedings before the board took place on 12 May 2006 as scheduled, in the absence of the appellant, who, by letter of 6 April 2006, informed the board that it would not be represented at these oral proceedings.

V. The appellant's written arguments may be summarised as follows:

- Claim 1 essentially corresponded to Claim 2 as originally filed, but with replacement of the original feature (d) "between 0 and 10% maltitol syrup" with "5.2% maltitol syrup" and the specification that 20% of the polyol was replaced with erythritol instead of originally "between 5 and 30%".
- The value of 5.2% maltitol syrup was encompassed by the definition in original Claim 2 and its incorporation into present Claim 1 therefore did not extend the original disclosure but merely restricted the claim to part of the originally disclosed range.
- There was a basis for the value of 5.2% maltitol syrup in Example 2 and Examples 4 to 6 of the application as originally filed.
- It would have been clear to the skilled person that the amounts of the various components in the examples might be varied separately. The situation was similar to that underlying the decision T 201/83. The contentious amendment should therefore be allowed for the same reasons.

VI. By the letter dated 6 April 2006, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of Claims 1 to 5 as filed by letter of 8 May 2003.

Reasons for the Decision

1. Claim 1 on file is directed to a chewing gum composition comprising inter alia 5.2% maltitol syrup and between 5 and 60% polyol, wherein 20% of the polyol is replaced with erythritol.
2. It is common ground that the value of 5.2% maltitol syrup in the claimed composition corresponds to the lower limit of the maltitol range specified in Claim 1 underlying the decision under appeal, this being the value objected to therein under Article 123(2) EPC. It is also common ground that this value is neither disclosed in the claims nor in the general part of the description as originally filed. In fact it is undisputedly taken from specific embodiments, namely Example 2 and Examples 4 to 6 as filed (see Statement of the grounds of appeal, page 2, penultimate paragraph).
3. As already observed in the annex to the summons to oral proceedings dated 7 February 2006, the chewing gum composition according to Example 2 as originally filed contains (in addition to 36.5% gum base, 3.1% glycerol and 1.6% flavour) various polyols in different amounts (page 9, Table 2). Thus, in Example 2, the basic chewing formulation contains as polyols: 51.5% sorbitol, 2.1% mannitol and 5.2 maltitol syrup. In the modified

formulations of the same example, 10% of the sorbitol is replaced by 10% of one of maltitol, xylitol, erythritol and FOS (fructo-oligosaccharide) type. Example 4 is a repeat of the basic formulation of Example 2, with the only difference that 5%, 20% and 50% of the sorbitol powder is replaced by erythritol. Example 5 is a repeat of the basic formulation of Example 2, with 20% of the sorbitol powder replaced by erythritol powders of three different average particle sizes. Lastly, Example 6 is also a repeat of the basic formulation of Example 2, with the difference that 20% of the sorbitol powder is replaced by one of the following alcohol powders: erythritol, maltitol, lactitol, xylitol, mannitol, isomalt.

As is clearly shown by these examples, the kind and amount of polyol used in the formulations confer different properties on the resulting chewing gums (Examples 2, 4 and 6). Even the particle size of the powder is described to have an influence on the hardness of the chewing gum (Example 5). On the other hand, as is pointed out in the annex to the summons to oral proceedings and not contested by the appellant, maltitol is also a polyol in the sense of the application (see Example 2: Table 2, page 9 and Example 6: Table 4, page 12). Thus, based on the original disclosure, the board has no reason to assume that the amount of maltitol syrup in the examples can be seen as an isolated feature, independent of the other polyol components in the chewing gum.

- 3.1 According to the decision T 201/83 (OJ EPO: 1984, 481), an amendment of a concentration range in a claim for a mixture is allowable on the basis of a particular value

described in a specific embodiment, provided the skilled person could have easily recognised this value as not so closely associated with the other features of the example as to determine the effect of the invention as a whole in a unique manner and to a significant degree (see Headnote). Since the value of 5.2% maltitol syrup cannot be seen as an isolated feature independent of the other polyols in the same formulation, the condition for its generalisation into the more general context of Claim 1 is not fulfilled in the present case.

3.2 As a corollary of the above, the board holds that the amendment of feature (d) of Claim 1, involving the incorporation of 5,2% maltitol syrup, constitutes added subject-matter, contrary to the requirements of Article 123(2) EPC.

3.3 The appellant's argument that the value of 5.2% is encompassed by the originally disclosed range is irrelevant for the question whether or not this value is part of the disclosure of the application as filed. According to the jurisprudence of the EPO, only individualised features are considered disclosed, in contrast to features which are "only" comprised by a general definition, eg a range characterised by its limiting values.

Insofar as this argument may be understood as relating to the relative extent of the scope of protection sought, it is ill-conceived and could not be addressed at this point since such question would only be relevant in opposition proceedings under Article 123(3) EPC.

4. Given that the patent application is refused because Claim 1 of the sole request does not fulfil the requirements of Article 123(2) EPC, the appellant's further arguments in support of novelty and inventive step need not be considered here.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

G. Röhn

A.-T. Liu