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Datasheet for the decision of 27 July 2006

Case Number: T 1176/03 - 3.3.09

Application Number: 94906187.3

Publication Number: 0684769

IPC: A23D 7/015

Language of the proceedings: EN

Title of invention:
Low fat spread with non-proteinaceous crystal inhibitors

Patentee:
UNILEVER N.V., et al

Opponents:
01:Danisco Biotechnology
02:Carlshamn Mejeri Produktion AB

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56

Keyword:
"Main request - novelty (yes); inventive step(no)"
"Auxiliary requests 1 to 4 - inventive step (no)"

Decisions cited:
T 0770/00, T 0332/87, T 0939/92

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1176/03 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 27 July 2006

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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 24 September 2003 revoking European patent No. 0684769 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. Kitzmantel
Members: J. Jardón Alvarez
M. B. Tardo-Dino

Summary of Facts and Submissions

I. The grant of European patent No. 0 684 769 in respect of European patent application No. 94906187.3 in the name of UNILEVER N.V. and UNILEVER PLC, which had been filed on 28 January 1994, was announced on 23 April 1997 (Bulletin 1997/17) on the basis of 11 claims. Claim 1 read as follows:

"1. An edible, oil continuous emulsion spread product comprising:

(a) 30 to 40 wt.% of a fat phase, having 0.05 to 0.5 wt.% based on total composition of a non-proteinaceous fat crystallisation inhibitor having an HLB of from 5 to 10, and from 0.1 to 0.4 wt.% of a non-proteinaceous emulsifier system; and

(b) 70 to 60 wt.% of an aqueous phase containing 0.005 to less than 0.1 wt.% of a dairy protein based on total composition."

Claims 2 to 11 were dependent claims.

II. Two Notices of Opposition requesting the revocation of the patent in its entirety on the grounds of Article 100(a) and (b) EPC were filed against this patent by:

Danisco Biotechnology on 21 January 1998 and by

Carlshamn Mejeri Produktion AB on 22 January 1998.

III. The Opposition Division revoked the patent under Article 102(1) EPC on the ground of insufficiency of disclosure (Article 83 EPC). The Opposition Division did not express any view with regard to the objections under Article 100 (a) EPC.

IV. An appeal was filed by the Patentee against the decision. In decision T 0770/00 of 10 July 2002, Board 3.3.02 held that the invention was disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

The decision of the Board was based on the claims of the patent as granted and the Board concluded that the skilled person in the field was able to reproduce the claimed invention, which was illustrated at least by formulation E of Example 1. The Board then remitted the case to the Opposition Division for further prosecution.

V. The Opposition Division again revoked the patent by a second decision announced orally on 9 July 2003 and issued in writing on 24 September 2003 because, in its view, the subject-matter of the claims of the granted patent, although novel, did not involve an inventive step.

The Opposition Division held that the claimed subject-matter was a multiple selection within the general teaching of the prior art documents cited by the Opponents and was therefore novel.

Concerning inventive step the Opposition Division considered that the problem to be solved by the patent was the provision of a low fat spread with long term

stability in combination with good oral response, mouthfeel and melt without specialized and expensive processing equipment. This problem was, however, not solved by the claimed emulsions over the whole claimed range and an inventive step could thus not be acknowledged.

VI. On 19 November 2003 the Patent Proprietor (Appellant) lodged an appeal against the decision of the Opposition Division and paid the appeal fee on the same day.

In the Statement of Grounds of Appeal filed on 26 January 2004, the Appellant requested that the decision of the Opposition Division be set aside and the patent be maintained as granted (main request) or, alternatively, on the basis of sets of claims in accordance with the first or the second auxiliary request filed with the Statement of Grounds.

By letter dated 2 September 2005, the Appellant filed an experimental report in support of its arguments. It also submitted sets of claims for four auxiliary requests replacing the previous auxiliary requests. Compared to the main request, the following amendments were made to the Claims 1 of these requests:

- Auxiliary request 1. Claim 1 is identical to Claim 1 of the granted patent except that it contains the additional requirement that the spread is stable for at least 5 weeks at 5 °C.

- Auxiliary request 2. Claim 1 of this request is based on Claim 1 of the granted patent with the

additional requirement that the aqueous base is not stabilised with thickeners or gelling agents.

– Auxiliary request 3. Claim 1 of this request is based on Claim 1 of the granted patent with the additional features that the non-proteinaceous fat crystallisation inhibitor is now defined as in granted Claim 3 and the non-proteinaceous emulsifier is now defined as in granted Claim 5.

– Auxiliary request 4. Claim 1 of this request is a combination of granted Claims 1, 3 and 5 with the additional feature that the amount of dairy protein contained in the aqueous phase has been further limited. It reads as follows:

"1. An edible, oil continuous emulsion spread product comprising:

(a) 30 to 40 wt.% of a fat phase, having 0.05 to 0.5 wt.% based on total composition of a non-proteinaceous fat crystallisation inhibitor selected from the group of a polyglycerol ester and a sorbitan ester, said non-proteinaceous fat crystallization inhibitor having an HLB of from 5 to 10, and from 0.1-0.4 wt.% of a non-proteinaceous emulsifier system selected from the group of saturated monoglycerides, unsaturated monoglycerides, diglycerides and phosphatides and mixtures thereof; and

(b) 70 to 60 wt.% of an aqueous phase containing 0.005 to 0.02 wt.% of a dairy protein based on total composition."

VII. The Respondent (Opponent 01) presented its arguments in written submissions dated 5 August 2004 and 26 June 2006. The Respondent disputed all the arguments submitted by the Appellant and requested that the appeal be dismissed.

VIII. Opponent 02, a party as of right to the appeal proceedings, did not file any substantive submissions during the present appeal proceedings.

IX. The following documents and experimental evidence are referred to in the present decision:

D1: EP - A - 0 098 174

D4: EP - A - 0 496 466

D9: US - 4 632 841

D11: Fats and oils. Formulating and Processing for Applications. Richard D. O'Brien, page 300
[No publication date for this textbook has been submitted. It discloses the HLB values of several surfactants and its admittance into the proceedings was not questioned by the Patentee]

D13: "Lecithin and its Utilization in Margarine and Pan Release", Sonderdruck aus "ZFL Heft 10/90, Dr. A. Hüthig Verlag GmbH, Heidelberg"
[D13 was filed by the Respondent on 9 July 2003 during oral proceedings before the Opposition Division and not admitted into the proceedings by the Opposition Division. At the oral proceedings

before this Board of Appeal, the Appellant no longer objected its admittance into the appeal proceedings.]

E1: EP - A - 0 420 314

E2: EP - A - 0 237 120

E4: US - 4 160 850

D10: Experimental data filed by the Respondent with letter dated 8 March 2000

D15: Experiments filed by the Appellant with letter dated 21 September 2000

D16: Experimental Report filed by the Appellant with letter dated 2 September 2005

X. The arguments presented by the Appellant in its written submissions and at the oral proceedings held on 27 July 2006 may be summarized as follows:

– The claimed spread products including specific non-proteinaceous fat crystallisation inhibitor, emulsifier system and dairy protein in specific amounts were not disclosed in any of the prior art documents cited by the Respondent. The arguments of the Respondent failed because they relied on multiple selections of features from an array of options that were presented in said documents. Consequently, there was no direct and unambiguous disclosure of the claimed subject-matter.

In particular, example 1 of D9 was not novelty destroying because the lecithin therein used had not the required HLB value as could be deduced from the teaching of D11 and D13.

– Concerning inventive step, the Appellant considered D1 as the closest prior art. The problem to be solved by the patent was to provide protein containing spreads with improved long term stability. This problem was solved by the spreads of Claim 1 which showed the required long term stability. The Opposition Division was wrong when assuming that compositions H and I of example 2 did not fulfil the required stability criteria. The information in example 2 of the patent related to the different property of spreadability and the fact that these compositions had a low spreadability score did not imply that they would have bad long term stability. Having regard to the fact that compositions D and G had a very similar composition and that D had been observed to be stable at 5°C for 6 months, it could be expected that composition G (as well as compositions H and I) would also be very stable.

Concerning the objection that the problem to be solved has not been solved across the entire scope claimed because some spreads did not show the required long term stability, the Appellant argued that an inventive step should not be denied on that basis as it would be unfair to require an Applicant to work out every possible combination of features in order to ensure that only optimally workable embodiments were covered by the patent.

The scope of the claims should allow some room for failure.

The solution to the above mentioned problem, namely the selection of features within the teaching of D1, could not be derived from the combined teaching of the prior art cited by the Respondent. In particular, document E1 related to spreads with a very low amount of fat and using a gelling agent which was not to be used in the patent.

XI. The arguments presented by the Respondent in its written submissions and at the oral proceedings may be summarized as follows:

– The Respondent contested the novelty of the claims of the main request having regard to the disclosure of example 1 of D9. It further contested the novelty of Claim 1 of the patent having regard to the disclosure of documents D1 and E1. These documents disclosed all the components required by Claim 1 and according to the Case Law of the Boards of Appeal, as set out for instance in T 332/87, it was possible to combine different passages of one document provided that there were no reasons which would prevent a skilled person from making such combination. In its opinion it was for the Appellant to show that there was a prejudice to the combination of features made in order to justify novelty.

– Concerning inventive step, the Respondent pointed out that the problem underlying the opposed patent, namely the provision of a low fat spread displaying stability and good mouthfeel was already addressed in E1 and D1. It was argued that E1 was the closest prior art as the teaching of E1, by reference to E2, should also apply to spreads having a fat content of 35 wt.% or less ie within the range specified by Claim 1 of the patent. The selection of the specified claimed combination within the teaching of E1 did not require any inventive skill and was therefore lacking inventive step. Moreover, a number of embodiments covered by the claims did not solve the technical problem, and also for that reason the claimed subject-matter did not involve an inventive step.

– The Respondent additionally objected that Claim 1 of the auxiliary requests 1 and 2 contravened the requirements of Articles 83 and 84 EPC and that the subject-matter of the auxiliary requests 2 and 4 extended beyond the content of the application as filed (Article 123(2) EPC).

XII. The Appellant (Patentee) requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or, alternatively, on the basis of the claims of any of the auxiliary requests 1 to 4, filed with letter of 2 September 2005.

The Respondent (Opponent 01) requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

MAIN REQUEST.

2. *Novelty (Article 54 EPC)*

2.1 The novelty of Claim 1 of the main request has been contested by the Respondent having regard to example 1 of D9 and the general disclosure of the documents D1 and E1.

2.1.1 Example 1 of D9 discloses a soft low fat spread emulsion containing 39,4 wt.% partially hardened soybean oil and 57,3 wt.% water, and further containing 0.34 wt.% monogylcerides (a non-proteinaceous emulsifier) and 0.20 wt.% lecithin (according to D13, paragraph 5.4.3, a non-proteinaceous fat crystallisation inhibitor). However, the emulsion of example 1 of D9 does not contain a dairy protein as required by Claim 1 of the patent (see table I, where the amount of sweet whey is given as a "dash").

2.1.2 It has been argued by the Respondent that dairy protein must be present in the spread of this example because sweet whey is listed in table I as a component of the emulsion and because in its absence the ingredients of the aqueous phase add up to only 59.93 wt.% leaving a gap of 0.07 wt.% to the stated 60 wt.% aqueous phase. In the Respondent's opinion the dash in table I for sweet whey means that it is present in the amount required to fill this gap, which is 0.07 wt.%,

corresponding to 0.0084 wt.% dairy protein, an amount falling within the scope of Claim 1 of the patent.

2.1.3 The Board cannot agree with the Respondent as to this interpretation of the use of a dash. First of all it is noted that in the preparation process of the emulsion according to example 1, sweet whey is not added and consequently the only logical interpretation of the dash in table I is that sweet whey is absent. Indeed, this is the usual interpretation of a dash in a table, corresponding to the absence of an ingredient, something that is also apparent from the use of dashes in table V.

This interpretation is moreover in accordance with the information regarding the next example 4, where it is stated that the spread of table I "was reformulated with 0.5% whey" (emphasis by the Board).

2.1.4 For the sake of completeness it is noted that the subject-matter of Claim 1 of the patent also requires the presence of a non-proteinaceous fat crystallization inhibitor having a HLB (hydrophilic/lipophilic balance) value of from 5 to 10 and that D9 is silent about the HLB value of the lecithin used. As correctly pointed out by the Appellant, document D11 on page 300 discloses three different HLB values for lecithin, depending on the nature of the lecithin used: 3.5 for standard fluid, 4.5 for de-oiled 22% phosphatidylcholine and 6.5 for de-oiled 45% phosphatidylcholine. In the absence of an explicit teaching in D9 as to the kind of lecithin used, it cannot be assumed that the lecithin used is one falling within the scope of Claim 1 of the patent.

2.1.5 Consequently, the teaching of example 1 of D9 does not anticipate the subject-matter of Claim 1 of the patent.

2.2 Document D1 discloses low fat spreads with a fat amount which overlaps in part with the emulsion spreads now claimed (see Claim 1). The emulsion spread of D1 also contains emulsifiers at levels effective to achieve and maintain a stable emulsion, typically in the range of from 0.25 to 1.5 % (page 16, lines 18 - 21). The list of emulsifiers to be used includes, *inter alia*, polyglycerol esters (page 16, line 6), which according to D11 have HLB values of from 6 to 8.5, ie within the "inventive" range of 5 to 10, and which according to the patent in suit act as non-proteinaceous fat crystallisation inhibitors. The emulsions can contain dairy proteins (see page 6, line 7; page 15, lines 25 - 28 and example 1).

2.2.1 D1 teaches that several emulsifiers in amounts from 0.25 to 1.5 % can be used in low fat spreads but it does not teach an embodiment wherein 0.05 to 0.5 wt.% of a lipohilic glycerol ester is combined with 0.1 to 0.4 wt.% of another emulsifier and with 0.005 to less than 0.1 wt.% of a dairy protein. This claimed combination of features is therefore not made available to the skilled person by the teaching of D1.

2.2.2 The Respondent considered example 1 of D1 as disclosing all the components required by Claim 1 and referred to the decision T 332/87 of 23 November 1990, not published in OJ EPO, as indicating that the general teaching of the examples could be combined with the

general teaching elsewhere in the document, thus arriving at the claimed subject-matter.

2.2.3 It is however noted that in example 1 of D1 the HLB value of the lecithin used is not given (see point 2.1.4 above) and that the amount of emulsifier (monoglycerides) is outside the scope of Claim 1 of the patent. There is no technical teaching in this example lending itself to a combination with any general teaching in the same document in order to arrive at the claimed set of features.

2.2.4 For these reasons document D1 does not anticipate the subject-matter of Claim 1 of the main request.

2.3 Document E1 is concerned with spreads comprising less than 30 wt.% of a fat phase (see Claim 1) in which substantial amounts, more than 0.1 wt.%, of protein may be incorporated (see page 3, lines 23 - 27 and examples). These spreads do not fall within the scope of Claim 1 of the patent, which requires 30 to 40 wt.% of a fat phase and less than 0.1 wt.% of a dairy protein.

2.3.1 The Board cannot agree with the Respondent's interpretation of the expression "very low fat content" used on page 2, line 1 of E1. According to the Respondent this expression should be understood as including spreads containing less than 35 wt.% because this value was used in E2 which is referred on page 2, line 4 of E1.

However, E1 relates unequivocally to spreads containing less than 30 wt.% (see page 2, lines 11 - 14, claims

and examples) and is not concerned with other spreads. E1 merely acknowledges E2 as related prior art which is also concerned with low fat spreads, but with regard to a fat content of a different kind, ie permitting up to 35 wt.% fat phase. There is nothing in E1 which could be understood to extend its disclosure to such a "high" fat content.

2.3.2 E1 does not anticipate the subject-matter of Claim 1 of the main request.

2.4 The subject-matter of Claim 1 of the main request is therefore novel (Article 54 EPC).

3. *Inventive step (Article 56 EPC)*.

3.1 Closest prior art.

3.1.1 Low fat spreads having 40% or less fat are already well known in the field. They are required to have certain flow or spread characteristics and should resist free oil or free water separation. They should also simulate the characteristics of butter and margarine, including good mouthfeel and good stability. As acknowledged in the introduction of the patent, spreads containing less than 40 % fat suffer from emulsion instability and have been the source of considerable technical difficulty.

3.1.2 The art cited by the Opponents, such as documents D1, D4, E1, E2 and E4, relates to such low fat butter or margarine substitutes. Document D1 was considered by the Appellant as the closest prior art because it discloses closely related low fat spreads (see above, point 2.2) and it is directed to the same purpose as

the invention, namely the provision of low fat spreads having improved stability (see page 5, lines 17 - 20) and containing dairy proteins which are known to affect negatively the emulsion stability (see page 6, lines 4 - 9).

3.1.3 The Respondent considered document E1 as the closest prior art and the Board agrees that this document could be considered as appropriate starting point for the assessment of inventive step. The Board, however, prefers to consider D1 as the closest prior art because the spreads of E1 have a lower fat content than required by the patent and also include a gelling agent, which, according to the patent, is not to be used. In any case the Board would arrive at the same conclusion if E1 were to be considered the closest prior art document.

3.2 Problem to be solved.

Having regard to this prior art, the objective problem to be solved by the patent can be seen as the provision of a protein containing low fat spread which exhibits improved long term stability, wherein the term long term stability means that the product does not exhibit destabilisation caused by fat recrystallisation or post crystallisation after storage at about 5 °C for at least five weeks (see patent, page 2, lines 28 - 33 and 40 - 41).

3.3 Solution to the problem.

3.3.1 This problem is said to be solved by the claimed spreads, having a low dairy protein content (0.005 to

less than 0.1 wt.%) in combination with a fat crystallisation inhibitor having an HLB of from 5 to 10 and an emulsifier system (see Claim 1).

3.3.2 The patent contains several examples and comparative examples. The compositions D and E (see Example 1) show that spread products falling within the scope of the claims may have excellent spreadability and long term stability (see page 4, lines 55 - 57). Thus, these compositions solve the problem underlying the patent (see also the previous appeal decision T 770/00).

3.3.3 However, the question arises if this problem has been credibly solved within the whole area claimed. This question was hotly disputed during the proceedings and is the crucial point in the present case.

3.3.4 First of all it is noted that example 2 of the patent includes two compositions, composition H with a dairy protein content of 0.024 wt.% and composition I with 0.048 wt.% of dairy protein, which fall within the scope of Claim 1 and have low spreadability (page 5, lines 37 - 38; these percentages take account of the fact, which was not in dispute, that the dairy protein content of the whey powder used in these formulations is 12 wt.%). In fact, the spreadability value of composition I (score of 3 on a scale of 1 to 10) is the same as for the comparative compositions A to C of example 1, which are said to have poor spreadability due to emulsion destabilisation upon spreading, resulting in loose water droplets (page 4, lines 52 - 54).

These results given in the patent demonstrate that spreads falling within the scope of Claim 1 fail to solve the technical problem underlying the patent.

3.3.5 Additionally, the Respondent filed an experimental report (D10) to show that other spreads within the claimed range also show poor emulsion stability. Thus, the Respondent repeated the preparation of composition E of the patent (compositions 1 and 6 of D10) and prepared further compositions, similar thereto apart from a reduced amount of non-proteinaceous emulsifier but within the ranges covered by Claim 1. Compositions 3 and 4 of said report separated by spreading and showed poor emulsion stability after only one day (see Annex I to D10). These spreads indisputably represent fair variations of the claimed teaching and confirm the results in the patent, namely that spreads falling within the scope of the claims do not solve the problem underlying the present patent.

3.3.6 The Appellant did not agree with the above finding and argued:

(a) That it could not be assumed that the spreads H and I did not solve the problem underlying the invention merely because they had reduced spreadability. The patent did not mention the long term stability of the spreads and the low spreadability could not be equated with poor long term stability.

(b) That a claim directed to compositions in which the components are defined by ranges of values would inevitably cover embodiments which do not deliver

the desired technical effect. It would be unfair to require an Applicant to work out every possible combination of features in order to ensure that only optimally workable embodiments were covered by the patent. In a claim of this kind room for "some failure" should be allowed. It also filed further experiments (D15, D16) in order to show that it was indeed possible to prepare spreads having a higher amount of protein and still having good long term stability (D16, composition M having 0.4 wt.% whey, ie 0.052 wt.% protein).

3.3.7 These arguments cannot be accepted by the Board.

Concerning (a) it is noted that the Appellant itself points out on page 3, lines 4 to 6, of the description that the products of the invention show not only long term stability but also excellent spreadability. This good spreadability is clearly a requirement in order to solve the problem underlying the patent, namely the preparation of a low fat "spread". Thus, it is an implicit requirement of the patent that the claimed products have an appropriate spreadability conforming to their intended use. It is clear that non-spreadable compositions cannot be seen as embodiments solving the problem underlying the patent, even if they show long term stability.

Concerning (b) the Board points out that the embodiments mentioned above (compositions H and I of example 2 of the patent and compositions 3 and 4 of D10), which do not solve the problem of the invention, include amounts of dairy protein and emulsifiers well within the claimed ranges, not at the borderlines.

Moreover, even though it is accepted that a certain amount of experimentation would be necessary in order to arrive at the better embodiments of the invention, the specification should include adequate guidance of how the different parameters should be modified in order to turn failure into success. No such guidance can be found in the specification.

3.3.8 Also, the further experimental evidence filed by the Appellant cannot help its arguments. In D15 spreads similar to those of examples 2, 3 and 5 of D10 were prepared (compositions A, B and C of D15). These experiments were made by the Appellant to refute the results of the experiments of D10. However, these spreads were made with sunflower oil instead of the soybean oil used in D10 and in the patent. Thus, the fact that composition B of D15, which is similar to composition 3 of D10, shows good spreadability teaches merely that it is possible to prepare further spreads within the scope of the claims but it cannot bring into question the results of D10.

The experimental report D16 teaches that it is possible to prepare spreads displaying acceptable spreadability and stability with the amounts of dairy protein used in spreads H and I of example 2 of the patent by increasing the amount of polyglycerol ester (see sample M). These results again show that it is possible to prepare spreads having good stability working within the scope of the claim, something which is not disputed. The fact remains that the subject-matter of the claim also embraces embodiments which do not solve the problem posed, without there being adequate information

in the specification as to how this failure can be avoided.

3.3.9 For these reasons and on the basis of all the evidence on file, the Board is not satisfied that substantially all the claimed embodiments allow the preparation of spreads having the desired stability and spreadability. In such circumstances, namely where the achievement of the desired technical effect is not possible within the whole area claimed, the presence of an inventive step must be denied (see for instance T 939/92, OJ 1996, 309).

3.4 In view of the above findings, the subject-matter of Claim 1 of the main request lacks an inventive step (Article 56 EPC).

AUXILIARY REQUESTS 1 TO 4.

4. *Inventive step (Article 56 EPC).*

4.1 The subject-matter of Claim 1 of the auxiliary requests 1 to 3 still embraces the spreads of compositions H and I of the patent and the compositions 3 and 4 of D10 which do not solve the posed problem.

4.2 The amount of dairy protein of the spreads according to Claim 1 of the auxiliary request 4 has been limited to 0.005 to 0.02 wt.% and consequently compositions H and I of example 2 of the patent no longer fall under the scope of Claim 1 of this request. However, the compositions 3 and 4 of D10 still relate to experiments falling under the scope of the claim.

4.3 The Appellant has also questioned the accuracy of the experiments of D10 because this experimental report does not give the detailed method of preparation of the compositions 1 to 6 but merely notes that they were prepared as described in EP - B - 0 684 769.

The Board finds no reason to doubt the accuracy of these experiments. These experiments include a repetition of the composition E of the patent (cf. compositions 1 and 6) and give the same results in relation to spreadability and stability as reported in the patent. No convincing concrete reason has been provided by the Appellant as to why the results for compositions 3 to 5 of D10 should not be trusted. In any case, the subject-matter of Claim 1 is not limited to spreads obtained by any specific preparation method and if the process steps carried out according to D10 deviated in some minor aspects from those of the patent the obtained spreads would still fall within the scope of the claim due to their compositional features.

4.4 Under these circumstances, the reasoning in relation to the main request applies *mutatis mutandis* to the subject-matter of the auxiliary requests 1 to 4, which therefore do not involve an inventive step (Article 56 EPC).

5. In summary, none of the Appellant's requests is allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar The Chairman

G. Röhn P. Kitzmantel