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**Datasheet for the decision
of 10 March 2015**

Case Number: T 0322/11 - 3.3.07

Application Number: 96911560.9

Publication Number: 0820307

IPC: A61K47/00, A23D7/00

Language of the proceedings: EN

Title of invention:

INCREASING THE HDL LEVEL AND THE HDL/LDL RATIO IN HUMAN SERUM
BY BALANCING SATURATED AND POLYUNSATURATED DIETARY FATTY ACIDS

Patent Proprietor:

BRANDEIS UNIVERSITY

Opponents:

UNILEVER N.V. / UNILEVER PLC
Loders Croklaan BV

Relevant legal provisions:

EPC Art. 84, 100(c), 123(2), 123(3)
RPBA Art. 12(1), 13(1)

Keyword:

Grounds for opposition - extension of subject-matter (yes)
Late-filed auxiliary requests - admitted (yes)
Amendments - broadening of claim (yes)
Claims - clarity after amendment (no)



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Case Number: T 0322/11 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 10 March 2015

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 28 December
2010 revoking European patent No. 0820307
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman J. Riolo
Members: D. Semino
 P. Schmitz

Summary of Facts and Submissions

I. The appeal of the patent proprietor (appellant) lies against the decision of the opposition division announced at the oral proceedings on 14 July 2010 to revoke European Patent 0 802 307. The patent was granted on the basis of 26 claims, independent claims 1 and 5 reading as follows:

"1. A margarine, comprising a blend of at least one polyunsaturated fat and at least one saturated fat, forming a cholesterol-free blended fat composition, wherein said blended fat composition comprises between 15% by weight and 40% by weight linoleic acid, between 20% and 40% by weight saturated fatty acids, wherein said saturated fatty acids comprise at least one saturated fatty acid selected from the group consisting of lauric acid and palmitic acid, and no more than 1% elaidic acid or other hydrogenation associated trans fatty acids by weight; wherein the ratio of polyunsaturated fatty acids to saturated fatty acids is from 0.5:1 to 2:1, and wherein said margarine is suitable for ingestion by a human as a food product and for increasing the HDL concentration and the HDL/LDL concentration ratio in the blood serum following ingestion by a human."

"5. A prepared food product suitable for human consumption, comprising fat, wherein said prepared food product is free of cholesterol, and said fat in said prepared food product consists of a blended fat composition consisting of a blend of at least one saturated fat and at least one polyunsaturated fat and comprises between 15% and 40% by weight linoleic acid,

between 20% and 40% by weight saturated fatty acids, wherein said saturated fatty acids comprise lauric acid or palmitic acid or both, and no more than 1% by weight elaidic acid or other hydrogenation associated trans fatty acids; wherein said prepared food product is prepared using said blend of saturated fat and polyunsaturated fat, and the ratio of polyunsaturated fatty acids to saturated fatty acids in said blend is from 0.5:1 to 2:1."

II. Two notices of opposition were filed in which revocation of the patent in its entirety was requested on the grounds of lack of novelty and of inventive step, of insufficiency of disclosure and of extension of the subject-matter beyond the content of the application as filed (Article 100(a), (b) and (c) EPC).

III. The decision was based on 11 sets of claims, namely those of the main request (corresponding to the granted claims), of auxiliary requests 1 to 8 filed with letter of 13 July 2010 and of auxiliary requests 15 and 17 filed during oral proceedings on 14 July 2010.

The independent claims according to auxiliary requests 1 to 7 corresponded to granted claims 1 and 5 with subsequent cascaded amendments, namely the addition of "between 20 and 50% by weight oleic acid" and the specification that the "weight" ratio of polyunsaturated fatty acids to saturated fatty acids is from "0.5:1 to 1:1" (from auxiliary request 1), the deletion of "or other hydrogenation associated trans fatty acids" (from auxiliary request 2), the specification of the blend in the margarine as "consisting of a mixture" of one polyunsaturated vegetable fat and one saturated vegetable fat and that in the prepared food product it is the "blended fat composition" which comprises the

list ingredients (from auxiliary request 3), the deletion of the condition on elaidic acid and the specification that the margarine or the prepared food product are "free of trans fatty acids" (from auxiliary request 4), the specification that the margarine is free of cholesterol (from auxiliary request 5) and the specification of "said polyunsaturated fat consisting of at least one polyunsaturated vegetable oil selected from the group from the group [sic] consisting of corn oil, sunflower oil, safflower oil, soybean oil, cottonseed oil, canola oil, and peanut oil; and said saturated fat consisting of at least one saturated vegetable oil selected from the group consisting of palm fat, coconut fat and cocoa butter" (auxiliary request 6), then further limited to "said polyunsaturated fat consisting of soybean oil and said saturated fat consisting of palm fat" (auxiliary request 7). The independent claims of auxiliary request 8 correspondent to the ones of auxiliary request 1 with the further restriction of the weight ratio to "1:1 to 1:1.2".

Auxiliary request 15 comprised a single claim which read as follows:

"A prepared food product suitable for human consumption consisting of a blend of one part palm oil and one part soybean oil containing 10% palmitic oil, 51% linoleic acid and 7% linolenic acid; and wherein said blend comprises 27% palmitic acid, 30% linoleic acid and 3% linolenic acid; between 20% and 40% by weight saturated fatty acids and is free of trans fatty acids, wherein said prepared food product is prepared using said blend and the ratio of polyunsaturated fatty acids to saturated fatty acids is from 0.5:1 to 2:1."

Auxiliary request 17 corresponded to auxiliary request 15 with the redefinition of the subject-matter as a "blended fat composition" instead of a "prepared food product".

IV. The decision under appeal can be summarised as follows:

a) Claims 1 and 5 as granted contained subject-matter which extended beyond the content of the application as filed for a number of reasons:

i) they defined a blend of at least one polyunsaturated fat and at least one saturated fat contrary to the original disclosure defining a ratio of one part by weight polyunsaturated fatty acids to at least one part by weight saturated fatty acids; in the definition of the granted claims the condition on the quantity was lost and the fatty acids were replaced by fats which were not the same chemical compounds;

ii) they contained a condition on the maximum amount of "hydrogenation associated" trans fatty acid, while the original disclosure referred to "unnatural" trans fatty acids and the terms "unnatural" and "hydrogenation associated" were not equivalent;

iii) they defined a condition on the elaidic acid to be no more than 1% by weight, which in the original application was not disclosed in isolation from other features not present in the claims (the amount of oleic acid and the daily dietary fat);

- iv) they defined margarine and food products "free of cholesterol", while this feature was inextricably linked in the original disclosure to other features which were absent from the claims (the dietary use and the balanced proportion of the saturated and polyunsaturated fatty acids);
 - v) they represented a combination of individually disclosed features which was not directly and unambiguously derivable from the application as filed.
- b) Auxiliary requests 1 to 8 contained unallowable subject-matter for the same reasons as the main request.
- c) Auxiliary request 15 was admitted into the proceedings in view of the large number of new objections under Article 123(2) EPC presented during the oral proceedings. Claim 1 of this request extended beyond the content of the application as filed, as the specific fat blend constituted a combination of features selected from two independent lists, as the wording "free of trans fatty acid" was not derivable from the condition that the trans fatty acid were "substantially absent" and as there was no disclosure for the specific blend in combination with the specific ratio of polyunsaturated to saturated fatty acids. Moreover the deletion of the condition "free of cholesterol" and the definition of the prepared food product as consisting of a fat blend (i.e. excluding the presence of any other ingredient) resulted in lack

of clarity (the latter also in an unallowable amendment).

- d) Claim 1 of auxiliary request 17 extended beyond the content of the application as filed for the same reasons as claim 1 of auxiliary request 15.

V. The appellant lodged an appeal against that decision. With the statement setting out the grounds of appeal, the appellant maintained his main request that the patent be maintained as granted and filed nine sets of claims as auxiliary requests 1 to 9.

The only independent claim of auxiliary request 1 read as follows:

"1. A fat blend suitable for human consumption, comprising fat, wherein said fat blend is free of cholesterol, and said fat in said fat blend consists of a blended fat composition consisting of at least one saturated fat and at least one polyunsaturated fat and comprises between 15% and 40% by weight linoleic acid, between 20% and 40% by weight saturated fatty acids, wherein said saturated fatty acids comprise lauric acid or palmitic acid or both, between 20% and 50% by weight oleic acid and no more than 1% by weight elaidic acid by weight; wherein said fat blend is prepared using said blend of saturated fat and polyunsaturated fat, and the weight ratio of polyunsaturated fatty acids to saturated fatty acids in said blend is from 0.5:1 to 2:1."

Claim 1 of auxiliary request 2 corresponded to claim 1 of auxiliary request 1 with the amendment that the blended fat composition consists of "at least one part

by weight cholesterol-free saturated fat and one part by weight polyunsaturated fat".

Claim 1 of auxiliary request 3 corresponded to claim 1 of auxiliary request 2 with the addition that "the source of saturated fatty acids includes vegetable fats selected from palm fat, coconut fat and cocoa butter, and the source of polyunsaturated fatty acids includes vegetable oils chosen from corn oil, sunflower oil, soybean oil, and cottonseed oil".

Claim 1 of auxiliary request 4 corresponded to claim 1 of auxiliary request 1 with the amendment that the blended fat composition consists of "one part by weight of at least one polyunsaturated vegetable oil selected from the group including corn oil, sunflower oil, safflower oil, soybean oil, cottonseed oil, canola oil, and peanut oil blended with at least one part by weight of vegetable fat comprising saturated fatty acids".

Claim 1 of auxiliary request 5 corresponded to claim 1 of auxiliary request 1 with the amendment that the blended fat composition consists of "at least one part by weight saturated fatty acids and one part by weight polyunsaturated fatty acids".

Claim 1 of auxiliary request 6 corresponded to claim 1 of auxiliary request 2 with the fat blend defined as a "cholesterol-free natural triglyceride fat blend" and the conditions on the quantity of linoleic acid and on the quantity and type of saturated fatty acid modified as "approximately 30% by weight linoleic acid plus linolenic acid with between 15% and approximately 30% by weight linoleic acid, approximately 30% by weight palmitic acid".

Claim 1 of auxiliary request 7 corresponded to claim 1 of auxiliary request 1 with the deletion that "the fat blend consists of a blended fat composition consisting of at least one saturated fat and at least one polyunsaturated fat and comprises between 15% and 40% by weight linoleic acid" and the specification that "one part palm oil is blended with one part soybean oil to provide a fat blend containing approximately 27% palmitic acid, 30% linoleic acid and 3% linolenic acid".

Claim 1 of auxiliary request 8 corresponded to claim 1 of auxiliary request 2 with the deletion of the condition on elaidic acid, the specification that the fat blend is "essentially free of trans fatty acids" and the amendment of the range for the ratio of polyunsaturated fatty acids to saturated fatty acids as from "0.5:1 to 1:1".

Claim 1 of auxiliary request 9 corresponded to claim 1 of auxiliary request 2 with the specification of "said polyunsaturated fat consisting of soybean oil and said saturated fat consisting of palm fat".

VI. In their replies to the statement of grounds the respondents (opponents 1 and 2) raised *inter alia* new objections under Article 123(3) EPC against the newly filed auxiliary requests. Additionally the respondents requested that the Board not admit any further request into the proceedings.

With a further letter dated 18 November 2011 respondent-opponent 2 submitted two further documents (D38: J. H. Lee et al., *Journal of Nutrition*, Volume 119(12), 1989, pages 1893 to 1899 and D39: R. P. Mensink et al., *Journal of Lipid Research*, Volume 33, 1992, pages 1493

to 1501) relevant for the analysis of novelty and inventive step.

- VII. With letter of 8 August 2012 the appellant filed three further sets of claims as auxiliary requests 0A, 4A and 8A.

The claims of auxiliary requests 0A corresponded to the granted ones with the redefinition of the margarine as a "cholesterol-free margarine" in all claims directed thereto. The claims of auxiliary requests 4A and 8A corresponded to those of the fourth and eighth auxiliary requests with the redefinition of the subject-matter as a "prepared food product" instead of a "fat blend".

- VIII. In a communication sent in preparation of oral proceedings the Board addressed in detail several problematic issues related to the amendments of all requests on file.

- IX. Oral proceedings were held on 10 March 2015 in the absence of all parties to the proceedings as announced in writing.

- X. As far as relevant to the present decision, the arguments of the appellant can be summarised as follows:

Granted claims - amendments

- a) The focus of the invention was on fat and fat blends as used in foods. The effect of a balanced fat composition could, however, be measured only in studies with strictly controlled intake of the diet, which explained why the findings were described in the original application with respect to the dietary intake or diet. As a diet fulfills

the criteria of a balanced mix only if its composition fulfills the criterion, all the requirements of the diet should *a fortiori* apply to the composition of the diet, i.e. to the individual food products. That applied to the whole disclosure and in particular to the condition on the maximum amount of elaidic acid and other hydrogenation associated trans fatty acid, which was valid for all types of food disclosed including a margarine or a prepared food product. As to the term "hydrogenation associated", it was known that trans fatty acids originate from hydrogenation of vegetable oil (as apparent from the definition in a number of dictionaries) and that, hydrogenation being part of an industrial process, it can be called "unnatural". Therefore hydrogenation associated trans fatty acids was a synonym of unnatural trans fatty acids. On that basis the inclusion of the condition that the margarine or the prepared food product included "no more than 1% elaidic acid or other hydrogenation associated trans fatty acids by weight" was directly and unambiguously derivable from the application as filed. The other features objected to were also directly and unambiguously derivable from the application as filed.

Auxiliary requests - amendments

- b) The arguments developed for the main request applied for even stronger reasons to the auxiliary requests, most of which included a single independent claim directed to a fat blend. As to

the feature "no more than 1% elaidic acid or other hydrogenation associated trans fatty acids by weight", the deletion of the term "or other hydrogenation associated trans fatty acids" did not offend Article 123(3) EPC, as it deleted one of two alternatives of the granted claims while leaving the other. Alternatively the replacement with the feature "essentially free of trans fatty acids" resulted in the introduction of a feature which was disclosed as such in the original application and was in conformity with Article 123(3) EPC, as it provided a stricter limitation than "no more than 1% elaidic acid".

XI. As far as relevant to the present decision, the arguments of the respondents can be summarised as follows:

Granted claims - amendments

- a) The passages concerning dietary fat, daily ingested fat or diet could not provide a basis for the combination of features of the independent claims which concerned a margarine or a prepared food product. There was therefore no basis for the combination of the features of independent claims 1 and 5 as granted in the application as originally filed. This applied in particular to the feature "no more than 1% elaidic acid or other hydrogenation associated trans fatty acids by weight", which was plucked from the description and separated from its associated disclosure of daily dietary fat and oleic acid content and randomly added to the selection of a margarine or a prepared food product. Hydrogen associated trans fatty acids were not the same as unnatural trans

fatty acids. The two groups were not identical, as there exist unnatural trans fatty acids not generated by hydrogenation and natural occurring trans fatty acid which can be produced by hydrogenation, such as vaccenic acid.

Auxiliary requests - amendments

- b) Further problems existed with respect to the amendments in the auxiliary requests. In particular there were several amendments which caused infringement of Article 123(3) EPC including the deletion of the term "or other hydrogenation associated trans fatty acids". While the original claims limited the content of these acids to a maximum of 1% by weight, no limit was present in the claims of the auxiliary requests in which the term was deleted. The replacement of the condition on the maximum amount of some trans fatty acids by "essentially free of trans fatty acids" resulted in a lack of clarity, in view of the wording "essentially free".

XII. The appellant requested that the decision under appeal be set aside and the patent be maintained as granted or, in the alternative, according to the one of the sets of claims of auxiliary requests 0A, 1 to 4, 4A, 5 to 8, 8A or 9, whereby auxiliary requests 1 to 9 have been filed with the statement setting out the grounds of appeal and auxiliary requests 0A, 4A and 8A have been filed with letter of 8 August 2012. In case the Board found that any of the requests met the requirements of Article 123(2) and (3) EPC, it was requested that the case be remitted to the opposition division.

XIII. The respondents requested that the appeal be dismissed.

Reasons for the Decision

Granted claims - amendments

1. Independent claims 1 and 5 as granted are directed to a margarine and a prepared food product comprising a cholesterol-free blended fat composition. With respect to the only independent product claim of the application as originally filed (claim 26), which is directed to a liquid and/or solid dietary composition, they comprise several amendments, including the definition of the claimed product as a "margarine" or as a "prepared food product" respectively and the addition of the feature "no more than 1% elaidic acid or other hydrogenation associated trans fatty acids by weight" as a limitation of the blended fat composition.
 - 1.1 The basis in the application as originally filed indicated by the appellant for the latter feature is page 9, lines 25 to 27 which reads "no greater than 1% elaidic acid (or other unnatural trans fatty acids) by weight". A similar wording is to be found in original method claim 4 dependent on claim 1.
 - 1.2 Those passages can, however, in the opinion of the Board not provide a basis for the feature as present in granted claims 1 and 5 for the reasons which follow.
 - 1.3 Firstly, the condition is given in the original application in the context of the daily dietary fat ingested by a human (see page 8, line 25 to the bottom of page 9 and claim 1 of the application as originally filed) and not with reference to a specific food product, let alone in the context of a margarine.

- 1.4 While it is true that the original application concerns both the daily diet (in particular the daily dietary fat, see independent claims 1, 7 and 8 and the summary of the invention starting on page 5) and food products including fats and fat blends (see independent claim 26, first paragraph on page 1 and page 18, lines 1 to 21), the skilled person is not taught in the application that any information given for the daily dietary fat will equally apply to a specific food. On the contrary, based on the common general knowledge, he will know that the daily fat intake will depend on the composition of all the different ingested foods (each normally with a different composition) and not exclusively on specific ones.
- 1.5 On that basis conditions and criteria given for the daily dietary fat cannot be transferred to the individual food product which together constitute the daily diet, which must fulfill the criteria when summed up and weighted according to the ingested quantities and not individually. This reasoning applies in particular to the condition on the maximum amount of "elaidic acid or other hydrogenation associated trans fatty acid", which cannot be carried over to a specific food product, all the more as the specific food product of granted claim 1 (a margarine) finds basis only in a generic part of the description (page 18, line 14) within a list of several food product with no indication of a possible preference and no information about any specific composition.
- 1.6 In addition, the term "hydrogenation associated trans fatty acids" cannot find a basis in "unnatural fatty acids", as the two terms are not synonyms. Even if the fatty acids indicated by the two classes may be largely overlapping, there exist natural trans fatty acids which

can be seen as hydrogenation associated, as submitted by the respondents with reference to vaccenic acid, and it cannot be excluded that unnatural trans fatty acids exist which are not the result of a hydrogenation process.

- 1.7 On that basis the subject-matter of granted claim 1 and 5 is not directly and unambiguously derivable from the application as originally filed and extends therefore beyond its content. As a consequence the grounds of opposition under Article 100(c) EPC prejudice maintenance of the patent as granted.
- 1.8 As maintenance of the patent as granted is not possible, it is not necessary for the Board to deal with the other objections under Article 100(c), which were raised by the respondents and extensively analysed by the Board in its communication (see point VIII, above).

Auxiliary requests - admittance

2. It is evident from the appealed decision (see point IV, above) that a large number of objections covered by the grounds of Article 100(c) EPC were raised against the granted claims and decided upon in most cases against the appellant. While the objections were clear during opposition proceedings, it is not foreseeable that it was completely clear to the appellant before the decision itself was available which objections would be retained by the opposition division and on the basis of which arguments. It is apparent also from the many corresponding objections in appeal both to the main request and to the auxiliary requests that a clear solution to the multiple issues was not available.

- 2.1 Under such circumstances the Board finds it acceptable that the appellant, which had tried already several solutions to the many problems by filing auxiliary requests in opposition, files with the statement of grounds a number of auxiliary requests (auxiliary requests 1 to 9), which are meant to address the many issues which were decided against him.
- 2.2 The respondents in their letters of reply raised a number of further objections, in particular under Article 123(3) EPC, and filed two further documents relevant for novelty and inventive step (see point VI, above).
- 2.3 In view of this also the filing of further requests (auxiliary requests 0A, 4A and 8A) in reply to the new objections and to the newly filed documents is in the opinion of the Board an acceptable reaction of the appellant, all the more as it took place a long time before oral proceedings were arranged.
- 2.4 Under such circumstances the Board finds it appropriate to apply its discretion by admitting auxiliary requests 0A, 1 to 4, 4A, 5 to 8, 8A and 9 into the proceedings (Articles 12(1) and 13(1) RPBA).

Auxiliary request 0A - amendments

3. The amendment in auxiliary request 0A, which is meant to highlight the difference with respect to newly filed documents D38 and D39, does not change the situation with respect to extension of the subject-matter beyond the application as filed, which was analysed for the main request. The same conclusion as reached above

applies therefore to auxiliary request 0A for the reasons as given for the main request (see point 1, above) with the consequence that the grounds under Article 100(c) EPC still prejudice maintenance of the patent.

Auxiliary request 1 - amendments

4. The feature "no more than 1% elaidic acid or other hydrogenation associated trans fatty acids by weight" is amended in the single independent claim of auxiliary request 1 (claim 1) as "no more than 1% elaidic acid by weight", thereby deleting "or other hydrogenation associated trans fatty acids". Moreover, the claim is directed to a fat blend and no longer to a margarine or a prepared food product comprising a blended fat composition.
- 4.1 Independently of the change of the subject-matter from a margarine or a prepared food product comprising a blended fat composition to a fat blend as such, claim 1 is still directed to a composition including (now as sole ingredient) a fat blend. In order for the requirements of Article 123(3) EPC to be met, it needs to be analysed *inter alia* whether the deletion of the term "or other hydrogenation associated trans fatty acids" results in an extension of the protection conferred by the patent.
- 4.2 The condition present in claims 1 and 5 as granted means unequivocally that the blended fat composition included in the margarine or in prepared food product contains not more than 1% of trans fatty acids obtained by hydrogenation including elaidic acid. In view of the words "no more than" defining not a range, but only an upper limit for the quantity of undesired compounds and

"or other" indicating that the upper limits applies not just to elaidic acid, but also to all "other" members of the specific class, the condition cannot be understood as expressing two alternatives, namely either a limit on the quantity of elaidic acid (with other hydrogenation associated trans fatty acids in unlimited quantity) or a limit on the hydrogenation associated trans fatty acids other than elaidic acid (with unlimited elaidic acid). Such a reading proposed by the appellant does not only contrast with the wording of the claim, which is clearly meant to exclude a high quantity for the whole class of compounds, but also with the whole teaching of the application as filed, which express the need to avoid trans fatty acids as a class as far as possible (see e.g. page 8, lines 21 to 24).

- 4.3 While the products of claims 1 and 5 as granted exclude the presence of trans fatty acids obtained by hydrogenation (including elaidic acid) in a quantity above 1% by weight, the fat blend of claim 1 of auxiliary request 1 may comprise, in view of the open definition by means of the word "comprises", trans fatty acids obtained by hydrogenation other than elaidic acid in any desired quantity, thereby extending the protection conferred to products which are not covered by the granted claims.
- 4.4 The subject-matter of claim 1 of auxiliary request 1 therefore does not meet the requirements of Article 123(3) EPC. In view of this it is not necessary for the Board to analyse other issues, in particular whether the reformulation of the claims with a single independent one has succeeded in solving the issues objected to for the main request (see point 1, above).

Auxiliary requests 2 to 4, 4A, 5 to 7 - amendments

5. Claim 1 according to auxiliary requests 2 to 7 is directed to a fat blend as claim 1 of auxiliary request 1 and also includes the open definition by means of the word "comprises" and the feature "no more than 1% elaidic acid by weight" with reference to a limitation for the fat blend (with no mention of "other hydrogenation associated fatty acids"). Claim 1 of auxiliary request 4A is instead directed to a prepared food product, but still includes the open definition by means of the word "comprises" and the feature "no more than 1% elaidic acid by weight" with reference to a limitation for the fat blend (with no mention of "other hydrogenation associated fatty acids"). The subject-matter of claim 1 of auxiliary requests 2 to 4, 4A and 5 to 7 therefore does not meet the requirements of Article 123(3) EPC for the same reasons as detailed for auxiliary request 1 (see point 4, above).

Auxiliary request 8 - amendments

6. In claim 1 of auxiliary request 8, which is directed to a fat blend, the condition on the trans fatty acid is amended to specify that the fat blend is "essentially free of trans fatty acids", while the quantitative condition on the maximum quantity of elaidic acid or other hydrogenation associated trans fatty acids is deleted.
- 6.1 Independently of the basis given for such an amendment (page 8, lines 21 to 24), which refers to a diet and not to a specific food, the Board is of the opinion that claim 1 of auxiliary request 8 by virtue of the added feature does not meet the requirements of clarity according to Article 84 EPC, as this feature does not clearly delimit the maximum amount of trans fatty acids

which may be present, leaving it uncertain under what condition a fat blend will fall under the claim. This is all the more relevant, as this uncertainty does not even make it possible to check whether the requirements of Article 123(3) EPC are met. In this respect it is to be noted that a limit of "no greater than 1% elaidic acid (or other unnatural trans fatty acids) by weight" appears in the original description as a preferred embodiment with reference to the daily dietary fat (page 9, line 22 to page 10, line 6), after the condition that the "diet is essentially free of trans fats (e.g., elaidic)" has been enunciated (page 8, lines 21 to 24), so as to present the "essentially free" condition as potentially broader than the 1% limit.

- 6.2 On that basis claim 1 of auxiliary request 8 does not meet the requirements of Article 84 EPC.

Auxiliary request 8A - amendments

7. Claim 1 according auxiliary request 8A is directed to a prepared food product, but still includes the feature "essentially free of trans fatty acids" as a limitation for the fat blend. The subject-matter of claim 1 of auxiliary request 8A therefore does not meet the requirements of Article 84 EPC for the same reasons as detailed for auxiliary request 8 (see point 6, above).

Auxiliary request 9 - amendments

8. Claim 1 according auxiliary request 9 is directed to a fat blend as claim 1 of auxiliary request 1 and also includes the open definition by means of the word "comprises" and the feature "no more than 1% elaidic acid by weight" with reference to a limitation for the fat blend (with no mention of "other hydrogenation

associated fatty acids"). The subject-matter of claim 1 of auxiliary request 9 therefore does not meet the requirements of Article 123(3) EPC for the same reasons as detailed for auxiliary request 1 (see point 4, above).

Conclusion

9. As all the requests on file fail for extension of the subject-matter beyond the content of the application as filed, extension of the protection conferred or lack of clarity, there is no need for the Board to analyse any other issue and the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated