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**Datasheet for the decision  
of 5 April 2016**

**Case Number:** T 1274/13 - 3.3.09

**Application Number:** 07017564.1

**Publication Number:** 2036447

**IPC:** A23L3/16, A23L3/22, A23L1/01,  
A23L1/212, A23L1/29

**Language of the proceedings:** EN

**Title of invention:**  
Process for producing infant food products

**Patent Proprietor:**  
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**Opponents:**  
CFT S.p.A.  
HIPPA GmbH & Co. Vertrieb KG  
N.V. Nutricia

**Headword:**

**Relevant legal provisions:**  
EPC Art. 54, 56  
RPBA Art. 12(4), 13(1)

**Keyword:**

Main request - novelty (yes); inventive step (no)

Auxiliary requests 1 to 6 - inventive step (no)

Late-filed auxiliary request 7 - admitted (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 1274/13 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 5 April 2016**

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**Decision under appeal:**      **Decision of the Opposition Division of the  
European Patent Office posted on 2 April 2013  
rejecting the opposition filed against European  
patent No. 2036447 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman**                    W. Sieber  
**Members:**                 J. Jardón Álvarez  
                                   D. Prietzel-Funk

## **Summary of Facts and Submissions**

I. This decision concerns the appeals filed by opponents O2 and O3 against the decision of the opposition division to reject the oppositions filed against European patent No. 2 036 447.

II. The granted patent contained 42 claims, independent claims 1, 36 and 41 reading as follows:

"1. A process for producing an infant food product comprising a protein ingredient and a vegetable ingredient wherein, in a first stage, a vegetable ingredient is cooked, and a protein ingredient is cooked separately from the vegetable ingredient to provide pre-cooked ingredients, and in a second stage, the pre-cooked ingredients are mixed and submitted to UHT processing at a temperature of about 130°C to about 140°C for a time of about 30 seconds to about 240 seconds to sterilize the product."

"36. A range of infant food products obtainable according to the process of any one of claims 1 to 35."

"41. Equipment for producing a range of infant food products according to any one of claims 36 to 40 comprising a cooker for cooking vegetables, a fryer for frying meat or fish, a mixer, UHT apparatus, and apparatus for cold aseptic filling of aseptic containers with the food product wherein the UHT apparatus comprises tubing for moving food product from the mixer to the apparatus for cold aseptic filling."

The remaining claims were dependent claims.

III. The three opponents had requested revocation of the patent in its entirety on the grounds of Article 100(a) EPC (lack of novelty and inventive step). Additionally, opponent O2 invoked the grounds of Article 100(c) EPC and opponent O3 the grounds of Article 100(b) EPC.

The documents submitted during the opposition proceedings included:

O2-D1: Brochure "Einzigartige Vielfalt. *combibloc* Food Aseptic." SIG Combibloc (20 pages), with the remark "food 0306 D" on the last page;

O2-D4: Affidavit of Axel Meier dated 19 February 2013: "Erklärung zur Vorlage beim Europäischen Patentamt in der Einspruchssache zum Patent EP 2 036 447" (1 page);

O3-D1: Label of Blédichef: "légumes verts cabillaud". (1 page), undated;

O3-D2: Publications on the launch of Blédichef dated 20 August 1993, 17 December 1993, 9 February 1994 and 25 May 1994 (each publication 1 page);

O3-D3: "Aseptic Processing of Foods", Edited by H. Reuter, Behr's Verlag, Hamburg, 1993, pages 25-43, 59-85 and 125-143; and

O3-D5: "Minimal processing technologies in the food industry", Edited by T. Ohlsson and N. Bengtsson, Woodhead Publishing Limited, 2002, pages 4-33.

IV. The opposition division's decision can be summarised as follows:

- Granted claim 1 was identical to claim 1 as filed and fulfilled the requirements of Article 123(2) EPC;
- Document O2-D1 was prior art in the sense of Article 54(2) EPC. On the other hand, it could not be concluded that the documents filed by opponent 01 were available to the public at the filing date of the patent;
- None of O2-D1, O3-D3, O3-D1 and O3-D2 anticipated the claimed subject-matter; and
- The claimed subject-matter involved an inventive step starting from either O2-D1 or O3-D3 as closest prior art.

V. Appeals against this decision were filed on 29 May 2013 by opponent 02 and on 11 June 2013 by opponent 03. The statements setting out the grounds of appeal and requesting the revocation of the patent in its entirety were filed in due time. The statement of grounds of appeal of opponent 03 included the following new documents:

O3-D7: "Food Processing Technology - Principles and Practice", Second Edition, P. Fellows, Woodhead Publishing Limited and CRC Press LLC, 2000, pages vii-xvi; 40-44, 229-240, 250-277 and 355-362;

O3-D8: EP 1 346 650 A1; and

O3-D9: FR 2 613 589 A1.

For simplicity the board will continue to refer to the parties in the appeal proceedings as the patent proprietor, opponent 01, opponent 02 and opponent 03, respectively.

VI. In its reply filed on 11 September 2013 the patent proprietor disputed the arguments submitted by the opponents and requested that the appeals be dismissed (main request). It also filed five auxiliary requests.

VII. Further submissions were filed by opponent 02 and by the patent proprietor. The submissions of opponent 02 included the following documents:

O2-AJ: Email from Alexandra Jäger dated 15 March 2013 (1 page);

O2-D5: "Handbuch für die Konserventechnik", edited by H. Ohler, Hugo Matthaes Verlag Stuttgart, 1948, pages 150-161 (filed as O2-D2 and renumbered by the board); and

O2-D6: Copy of bills of Publicis Kommunikations Agentur Erlangen GmbH dated 1 June 2006 (20 pages).

VIII. In a communication issued in preparation for the oral proceedings, the board indicated the points to be discussed and expressed its preliminary view that O2-D1 was state of the art according to Article 54(2) EPC and did not anticipate the subject-matter of claim 1 of the main request.

IX. Further submissions were filed by the patent proprietor and by opponent 02. The submissions of the patent proprietor included six auxiliary requests to replace



its previous auxiliary requests and the following document:

Annex 1: "Webster's New Encyclopedic Dictionary", Black Dog & Leventhal Publishers Inc., 1995, page 221.

- X. Opponent O1 (party as of right) did not file any submissions during the appeal proceedings. Nor did it attend the oral proceedings.
- XI. During the oral proceedings held on 5 April 2016, the respondent filed auxiliary request 7.

The claims of the main request are the granted claims (see point II above).

The claims of auxiliary request 1 are the granted claims wherein the equipment claims (claims 41 and 42) have been deleted.

Claim 1 of auxiliary request 2 is based on claim 1 as granted wherein the vegetable ingredient to be cooked in the first stage is further specified by indicating:

"wherein the vegetable ingredient optionally comprises at least two varieties of vegetables, and, when the vegetable ingredient comprises at least two varieties of vegetables, the at least two varieties of vegetables are cooked separately from each other and mixed after cooking".

Claim 1 of auxiliary request 3 is based on claim 1 as granted wherein the first stage is further specified by indicating:

"wherein the vegetable ingredient comprises at least two varieties of vegetables, and wherein the at least two varieties of vegetables are cooked separately from each other and mixed after cooking".

Claim 1 of auxiliary request 4 results from the combination of granted claims 1 and 5. It specifies that in the first stage:

"the vegetables are cooked for a time of about 1 minute to about 5 minutes at about 85°C to about 95°C".

Claim 1 of auxiliary request 5 results from the incorporation of the subject-matter of granted claims 6 and 7 into claim 1. It specifies that in the first stage:

"the protein ingredient comprises a source of protein selected from meat and fish and wherein the meat or fish is cooked separately by frying it or pressure-cooking it for a time of about 10 minutes".

Claim 1 of auxiliary request 6 results from the incorporation of the subject-matter of granted claims 5 to 7 into claim 1. It reads as follows (amendments over claim 1 as granted underlined):

"1. A process for producing an infant food product comprising a protein ingredient and a vegetable ingredient wherein, in a first stage, a vegetable ingredient is cooked, and a protein ingredient is cooked separately from the vegetable ingredient to provide pre-cooked ingredients, wherein the vegetables are cooked for a time of about 1 minute to about 5 minutes at about 85°C to about 95°C, wherein the protein ingredient comprises a source of protein

selected from meat and fish and wherein the meat or fish is cooked separately by frying it or pressure-cooking it for a time of about 10 minutes, and in a second stage, the pre-cooked ingredients are mixed and submitted to UHT processing at a temperature of about 130°C to about 140°C for a time of about 30 seconds to about 240 seconds to sterilize the product."

Claim 1 of auxiliary request 7 is based on claim 1 of auxiliary request 6 wherein the word "about" in relation with the UHT-processing conditions has been deleted.

XII. The arguments of the opponents, insofar as they are relevant for the present decision, may be summarised as follows:

- Opponent O2 maintained that the disclosure of O2-D1 disclosed, at least implicitly, all the features of the claimed process and was therefore novelty-destroying for the subject-matter of claim 1 of the main request.
- Both opponents argued that the claimed subject-matter lacked inventive step starting from either O3-D3 or O2-D5 as closest prior art. In particular, O3-D3 disclosed explicitly all the features of the claimed process except that the vegetable and the protein ingredients were separately cooked. This feature, however, could not justify an inventive step as it was obvious for the skilled person from his common general knowledge.
- The features of claims 1 of auxiliary requests 1 to 6 were all commonly known in the field of

preparing infant food and could not justify an inventive step.

- Lastly, auxiliary request 7 should not be admitted into the proceedings as it had been filed late without good reason and introduced new issues into the proceedings.

XIII. The relevant arguments of the patent proprietor may be summarised as follows:

- Documents O3-D7 to O3-D9 and O2-D5 should not be admitted into the appeal proceedings. They had been filed late, namely together with the grounds of appeal or later in the appeal proceedings, and were *prima facie* not relevant for the claimed subject-matter.
- O2-D1 did not represent prior art because (i) its publication date was not verifiable and (ii) there was no evidence for its public availability before the filing date of the patent.
- In any case, the subject-matter of claim 1 was novel over O2-D1. O2-D1 merely disclosed advantages and application possibilities of a package technology known as '*combibloc*', but it did not disclose any process for the production of infant products as claimed in claim 1.
- The invention was based on the finding that only the separate pre-cooking in combination with the required sequence of processing steps, i.e. first mixing and then submitting the mix to UHT treatment, resulted in the beneficial effects of high vitamin retention, significant lower furan

formation, retention of the colour of the ingredients and an overall improved sensory taste. The claimed combination of features was neither disclosed in the documents cited nor was it part of the common general knowledge. The skilled person had no motivation to provide the claimed process in order to attain the improvements as stated in the patent.

- Auxiliary requests 1 to 6 had been further limited to the specific cooking conditions that ensured that the low furan content and the other advantages of the process were achieved. They also involved an inventive step.
  
- Auxiliary request 7 should be admitted into the appeal proceedings. It had been filed as a direct reaction to the finding by the board that the subject-matter of claim 1 of the main request lacked inventive step. It merely deleted the word 'about' in connection with the temperature and time ranges in order to narrow the UHT-processing conditions over those disclosed in O3-D3.

XIV. Opponents O2 and O3 requested that the decision under appeal be set aside and that the European patent be revoked.

The patent proprietor requested that the appeals be dismissed (main request), or alternatively that the patent be maintained on the basis of the claims of auxiliary requests 1 to 7, auxiliary requests 1 to 6 submitted with the letter dated 18 November 2015, and auxiliary request 7 filed on 5 April 2016 during the oral proceedings. It also requested that documents

O3-D7 to O3-D9 and O2-D5 not be admitted into the appeal proceedings.

## **Reasons for the Decision**

### *1. Admission of O3-D7 to O3-D9 and O2-D5*

1.1 These documents constitute new evidence cited for the first time in appeal proceedings, namely O3-D7 to O3-D9 with the statement of grounds of appeal of opponent O3 and O2-D5 by opponent O2 with letter of 2 April 2014.

1.1.1 O3-D7 is a handbook reflecting common general knowledge in the art of food processing. It was filed as a direct reaction to the opposition division's decision and supplements the objections of opponent O3 using O3-D3 as closest prior art. The board sees no reason to hold O3-D7 inadmissible under Article 12(4) RPBA.

1.1.2 O2-D5 was filed by opponent O2 to support its existing argument that separate cooking prior to sterilisation was well known in the field. The board exercised its discretionary power to admit O2-D5 into the proceedings in accordance with Article 13(1) RPBA.

1.1.3 O3-D8 and O3-D9 were not used by the parties during the oral proceedings, so that it was not necessary to decide on their admission.

MAIN REQUEST (granted claims)

2. *Novelty*

2.1 Claim 1 is directed to a process for producing an infant food product comprising protein and vegetable ingredients wherein,

- (a) in a first stage,
- (a1) a vegetable ingredient is cooked, and
- (a2) a protein ingredient is cooked separately from the vegetable ingredient to provide pre-cooked ingredients, and
- (b) in a second stage, the pre-cooked ingredients
- (b1) are mixed and
- (b2) submitted to UHT processing at a temperature of about 130°C to about 140°C for a time of about 30 to about 240 seconds to sterilize the product.

2.2 The novelty of this claim was contested by opponent O2 in view of the disclosure of O2-D1. The patent proprietor maintained that O2-D1 did not represent prior art and it is therefore first to be established whether this is the case.

2.3 Public availability of O2-D1

2.3.1 The patent proprietor considered that this document was not prior art because in its view its publication date and public availability were neither verifiable nor unambiguously derivable from the information on file.

2.3.2 The board agrees with the finding in the appealed decision that O2-D1 represents prior art in the sense of Article 54(2) EPC. As indicated by the opposition

division in its decision, the evidence on file at that time (in particular O2-D4) convincingly showed that the brochure O2-D1 had been made publicly available during the ANUGA fair which took place in Cologne on 4 to 7 April 2006. Furthermore, as conceded by the patent proprietor itself, this document was published in electronic form on the website of the Company SIG Combibloc on 10 April 2006 at the latest, that is to say more than one year before the date of filing of the patent in suit, 7 September 2007.

2.3.3 The bills O2-D6 filed during the appeal proceedings also show that thousands of copies of the brochure O2-D1 in various languages had been published prior to the ANUGA fair.

2.3.4 For these reasons the board confirms the finding of the opposition division that the teaching of O2-D1 is prior art in the sense of Article 54(2) EPC.

2.4 However, O2-D1 fails to disclose a process including the specific combination of features according to claim 1. O2-D1 is mainly directed to food packaging. Opponent O2 conceded in paragraph [06] of its letter dated 30 June 2014 that there is no explicit disclosure of a process for producing infant food with all the features of claim 1.

2.5 Moreover, there is also no implicit disclosure of such a process in O2-D1. In particular, the passage on page 14, right column, last paragraph ("Die 2-Phasen-Fülltechnologie") on which opponent O2 mainly relied discloses a two-phase filling technology. In this particular technology two different ingredients are individually pre-treated in two separate tanks. The separately treated ingredients must have also been



subjected to separate UHT treatment because they are brought together in the package (cf. "und mischen sich dann in der Packung").

2.6 Contrary to this, the process of claim 1 requires that the separately pre-cooked ingredients are, in the second stage of the process, first mixed and then together subjected to UHT processing (claim 1, features (b1) and (b2)).

2.7 For these reasons, the subject-matter of claim 1 is novel over O2-D1.

### 3. *Inventive step*

3.1 The patent relates to an aseptic process for producing infant food products in which each ingredient is processed to the minimum extent necessary so that distinctive natural colours and natural taste are retained after processing (see paragraph [0001]). According to the patent proprietor, traditional cooking techniques, for example retorting, sterilise foods but at the cost of losing nutrients, taste, quality and visual properties (see paragraph [0012]).

The drawbacks of traditional retorting sterilization methods are said to be avoided by the claimed process having the features of claim 1 (see point 2.1 above) wherein the vegetable and the protein ingredients are pre-cooked separately and then processed under UHT conditions, namely at a high temperature for a short period of time.

3.2 Closest prior art

3.2.1 The board agrees with opponent O3 that O3-D3 concerning UHT sterilisation of food products represents the closest prior-art document, in particular because the document focuses also on product quality.

3.2.2 It discloses on page 69 under 2.2.2 that there are many possibilities for using UHT sterilisation in the food industry, including baby food. UHT-sterilised food products comprising both a vegetable ingredient and a meat ingredient are also disclosed in O3-D3. Thus, it is disclosed in section 4.1.4.1 starting on page 129 that, among others, vegetables and meat are suitable ingredients to be UHT sterilised (see also fig 4.1.2 on page 128). For vegetables it is mentioned that "fresh, deep-frozen and dehydrated vegetables can be used" and that they should be stable and not too fibrous. Pretreatment, if necessary, is also mentioned (see page 129 under "vegetables and vegetable products"). For meat it is mentioned that it should be treated in such a way that it will not become fibrous, strawy or tough (see page 131, under "meat and meat products").

3.2.3 O3-D3 further teaches that, compared to retort sterilisation, UHT sterilisation results in improved quality of the food products, in particular less undesirable thermal damage leading to undesired changes in odour, flavour and colour and less reduction of nutrients and denaturation of proteins (see O3-D3, page 25 penultimate paragraph).

3.2.4 Although O3-D3 does not give the specific UHT-processing conditions for baby food or soups, the board agrees with opponent O3 that it is well known to the skilled person how to determine these conditions for a

specific food product with a given particle size in order to obtain the required sterilisation. Thus, O3-D3 already shows processing conditions of a temperature of ca. 130 to 140°C for 25 seconds (page 76, left diagram of figure 2.2.4). Also O2-D1 discloses similar conditions for a soup on page 12, right figure (about 130°C for about 90 seconds).

These conditions overlap with those of claim 1 of the patent, in particular taking account that the word "about" in claim 1 is intended to mean plus or minus 20% (cf. page 4, line 15 of the patent specification).

3.2.5 In summary, the teaching of O3-D3, a handbook directed to aseptic processing of foods, shows that at the filing date of the patent:

- (i) UHT was a well established technique for sterilisation of food products, including baby food;
- (ii) food products comprising vegetable and meat were suitably prepared using UHT processing; and
- (iii) compared to retorting, UHT processing resulted in less damage to nutrients.

3.2.6 Opponent O2 relied instead on O2-D5 as closest prior art disclosing the separate processing of protein and vegetable ingredients which are then mixed and retort-sterilised (see, for instance the recipe for Irish stew on page 159).

In a similar approach, the patent starts from traditional cooking techniques such as retorting to

sterilise foods at the cost of losing nutrients, taste quality and visual properties (see 3.1 above).

- 3.2.7 The board disagrees with these approaches. At the filing date of the patent, it was well known that the severe heat treatments carried out during in-container sterilisation (retorting) produced substantial changes in the nutritional and sensory qualities of foods. It was further known that to reduce or minimise the damage to nutrients and sensory components, heating at high temperature for a short time (UHT processing) was appropriate.

Not only O3-D3, as discussed above, shows that this was indeed common general knowledge, but also other documents in the proceedings, such as O3-D5 and O3-D7, confirm the teaching of O3-D3 (see, for instance, O3-D5, page 4 first two paragraphs and/or O3-D7, chapter 12, in particular page 265, table 12.7 comparing conventional and aseptic processing).

- 3.2.8 For these reasons, O3-D3 is considered to represent the closest prior-art document. The process according to claim 1 is distinguished from this known prior art essentially by the separate cooking of the vegetable and protein ingredients (claim 1, features (a1) and (a2)) prior to UHT sterilisation of the mixed ingredients.

### 3.3 Problem to be solved

- 3.3.1 According to the patent proprietor, the technical problem underlying the patent in view of O3-D3 is the provision of a process allowing the preparation of a nutritionally highly valuable infant food product with an essential content of nutrients, which does not

contain harmful compounds, in particular furans, that may be generated during processing.

3.3.2 The patent proprietor relied on the experimental evidence in the patent to show that this problem has indeed been credibly solved. The experimental results in the patent show less destruction of ingredients/nutrients when processing the products according to the claimed process. Thus, while processing the food by retorting results in a high level of furans in the infant food, only low levels developed when processing the food according to the claimed process using UHT sterilisation (see paragraphs [0104] to [0116] and figures 5 to 7).

3.3.3 It is however observed that these experiments actually compare the claimed process with the conventional retorting methods but not with the closest prior-art process of O3-D3. Thus, they cannot demonstrate any advantage of the claimed process over that of O3-D3. Moreover, it is noted that minimal loss of nutrients and less formation of undesired by-products is already achieved by the UHT processing method of O3-D3 as discussed above.

3.4 Reformulation of the problem and its solution

3.4.1 In view of the above, the objective problem underlying the invention has to be reformulated in a less ambitious manner not involving the advantages due to the use of UHT processing instead of retorting.

3.4.2 The objective problem can thus be formulated as the provision of a process allowing the preparation of nutritionally highly valuable infant food products with

an essential content of nutrients while improving sensory quality in the final product.

3.4.3 This less ambitious problem is undisputedly solved by the process of claim 1.

3.5 Obviousness

3.5.1 It remains to be decided whether, in view of the available prior art, it would have been obvious for the skilled person to solve this technical problem by the means claimed.

3.5.2 In the board's view, this would be indeed the case. For food technologists it is common general knowledge that each food ingredient has its own optimum cooking conditions in order to retain nutrients, flavour, colour and taste. O3-D3 itself mentions different cooking treatments for vegetables (see page 129) and meat (see page 131). The skilled person is also well aware that separately cooking a vegetable and a protein ingredient would result in a product with improved sensory quality, each ingredient maintaining its own taste.

This is done for instance in O2-D1 wherein an optimal product is said to be obtained by treating the soup with a vegetable ingredient and the soup containing meat separately in two tanks and then mixing both ingredients in the package (see page 14, right column, last paragraph).

3.5.3 Nothing inventive can be seen in the separate pre-cooking of different ingredients to improve the flavour, colour and taste of the infant food product. Thus, the improvement of the sensory quality of the

infant food by the measures of the claimed process is seen as the logical consequence of these measures and cannot give rise to an inventive step.

3.5.4 The patent proprietor argued essentially that only the combination of separate cooking of the vegetable and protein ingredient prior to the mixing and UHT processing resulted in the beneficial effects of nutrients and vitamin retention as well as in the maintenance of visual and sensory properties in the final infant food product.

3.5.5 The board is not convinced by these arguments. As explained above, it was known that UHT sterilisation resulted in improved quality of the food products compared to retort sterilisation, and that cooking the ingredients separately helps to retain their individual taste. The combination of these two well-known measures was obvious for the skilled person and cannot justify an inventive step.

3.6 For these reasons, the board concludes that the person skilled in the art would have arrived in an obvious manner at the subject-matter of claim 1. Consequently, the subject-matter of claim 1 of the main request lacks an inventive step.

#### AUXILIARY REQUESTS 1 AND 2

#### 4. *Inventive step*

4.1 Claim 1 of auxiliary request 1 is identical to claim 1 of the main request. Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that it includes the optional presence of "at least two varieties of vegetables". Optional features do not

limit the scope of the claims and consequently the subject-matter of claim 1 of auxiliary request 2 is the same as that of claim 1 of the main request.

- 4.2 The reasoning given above for the main request applies *mutatis mutandis* to the subject-matter of claim 1 of auxiliary requests 1 and 2, which therefore lacks an inventive step.

#### AUXILIARY REQUESTS 3 TO 6

##### 5. *Inventive step*

- 5.1 Claim 1 of auxiliary requests 3 to 5 is based on claim 1 of the main request wherein it is further specified that:

- the vegetable ingredient comprises at least two vegetables that are cooked separately (auxiliary request 3);
- the vegetables are cooked for about 1 to 5 minutes at about 85°C to about 95°C (auxiliary request 4); and
- the protein ingredient is meat or fish and is cooked by frying for about 10 minutes (auxiliary request 5).

Claim 1 of auxiliary request 6 combines the features of auxiliary requests 4 and 5.

- 5.2 All these features are known in the art of preparing sterilised infant food products and it has not been shown that any of them results in an unexpected technical effect.



- 5.2.1 Nothing inventive can be seen in using two different vegetables. The skilled person aiming to improve the quality of an infant food would, based on his general knowledge, cook each vegetable separately in order to preserve its taste. Separate cooking of the vegetables as required by claim 1 of auxiliary request 3 would thus be obvious for the skilled person.
- 5.2.2 There is no technical effect associated with the times and temperatures defined in claims 1 of auxiliary requests 4 to 6. They are, in fact, the typical values used for cooking the claimed ingredients and they cannot give rise to an inventive step.
- 5.3 For these reasons the subject-matter of claim 1 of auxiliary requests 3 to 6 also lacks an inventive step.

#### AUXILIARY REQUEST 7

##### 6. *Admission*

- 6.1 Auxiliary request 7 was filed during the oral proceedings, after the board had decided that the subject-matter of claim 1 of the main request lacked inventive step, i.e. at the very last moment. Auxiliary requests filed at such a late stage of the proceedings are usually only admitted into the appeal proceedings under exceptional circumstances.
- 6.2 The patent proprietor justified the late filing of auxiliary request 7 as a reaction to the negative finding of the board on inventive step of the main request. The only amendment made compared with claim 1 of auxiliary request 6 was the deletion of the word "about" in order to limit the temperature and time

ranges for the UHT processing. Moreover, the amendment did not give rise to any new issue.

- 6.3 Both opponents contested the admissibility of the request, as it could have been filed earlier in the proceedings. An objection relating to the broad meaning of the word 'about' had been already mentioned in the statement of grounds of appeal of opponent O3. Additionally, the amendments gave rise to new objections under Articles 123(2) and 84 EPC.
- 6.4 The board agrees with the opponents that the objection to which the patent proprietor 'reacted' had in fact been in the appeal proceedings since the beginning. Filing this request could certainly not be considered a reaction to something discussed for the first time at the oral proceedings, let alone a reaction to the announcement of the board that the subject-matter of claim 1 of the main request was not inventive. Thus, the respondent could and should have filed this request earlier in the proceedings.
- 6.5 Moreover, the patent proprietor did not explain how the amendment could alter the finding on inventive step, in particular as the conditions for UHT processing and the advantages over retorting were already well known in the food field, as discussed above in relation to the main request.
- 6.6 Consequently, the board exercised its discretion not to admit auxiliary request 7, because it had been filed at an extremely late stage and there were no exceptional circumstances justifying such late filing (Article 13(1) RPBA).

7. In summary, none of the requests of the patent proprietor is allowable.

## 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:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated