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**Datasheet for the decision
of 13 January 2017**

Case Number: T 0096/14 - 3.2.07

Application Number: 08835156.4

Publication Number: 2205494

IPC: B65D5/20, B65D85/60

Language of the proceedings: EN

Title of invention:
PACKAGING FOR BAR- LIKE FOODSTUFFS

Patent Proprietor:
Nestec S.A.

Opponents:
Paveci AG
Kraft Foods Group, Inc.

Headword:

Relevant legal provisions:
EPC Art. 54(1), 111(1)
EPC R. 115(2)
RPBA Art. 15(3)

Keyword:

Novelty - (no)

Remittal to the department of first instance - (yes)

Decisions cited:

Catchword:



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Case Number: T 0096/14 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 13 January 2017

Appellant: Kraft Foods Group, Inc.
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 14 November 2013 rejecting the opposition filed against European patent No. 2205494 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman K. Poalas
Members: V. Bevilacqua
 C. Brandt

Summary of Facts and Submissions

- I. The appellant (opponent 2) lodged an appeal against the decision rejecting the oppositions against European patent 2 205 494.
- II. Two oppositions had been filed by opponent 1 and opponent 2 against the patent as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step) and Article 100(b) EPC (insufficient disclosure).
- III. The opposition division held that none of the above-mentioned grounds for opposition prejudiced the maintenance of the patent as granted.
- IV. Oral proceedings before the board took place on 13 January 2017.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or, alternatively, that the decision under appeal be set aside and the patent maintained on the basis of any of auxiliary requests 1 to 9 filed with letter dated 13 December 2016.

Although duly summoned, opponent 1, being a party as of right, did not attend the oral proceedings, as announced on 12 January 2017. According to Rule 115(2) EPC and Article 15(3) RPBA, the proceedings were continued without this party.

- V. The text of independent claim 1 of the **main request**, corresponding to the patent as granted, is as follows:

"Packaging (1) for bar-like foodstuffs with a rectangular base (2), two side elements (3) which are arranged on opposite sides of the rectangular base (2), are separated from the base (2) via folding lines (5) and are folded inwards along the folding lines (5), and a first and a second cover element (4.1, 4.2) which are each arranged on one of the two other opposite sides of the rectangular base (2), separated from the latter via folding lines (5), and which partially overlap with the two side elements (3) in the folded state, characterised in that the first cover element (4.1) has a V-shaped perforation (6) by means of which a flap (7) can be separated from a fixing region (9), the fixing region (9) being operatively connected in the folded state to the second, opposite cover element (4.2) via first adhesive bonding points (11.1), and the second cover element (4.2) having an opening (10) into which a tab (8) of the flap (7) can be inserted for re-closing of the packaging."

Each of the sets of claims of the first to ninth auxiliary requests discloses a claim 1 which has been amended over claim 1 of the main request.

VI. Insofar as relevant to the present decision, the appellant argued substantially as follows

Claim 1 of the main request defined a packaging in the folded state.

On that basis, D6 (US 3 549 082) disclosed a packaging with all the features of claim 1, in spite of the fact that said packaging was formed by folding a blank into a tubular form.

VII. Insofar as relevant to the present decision, the respondent argued substantially as follows

Claim 1 of the main request defined a packaging in both the folded and the unfolded state, as it contained features applying to both.

This interpretation was necessary in order to achieve consistency with the description, where "packaging" referred to both states.

This claim required the packaging to have a "rectangular base". This "rectangular base" therefore had to be present in both the folded state and the unfolded state of the packaging.

Accordingly, a skilled reader willing to understand claim 1 would infer that the shape of the base panel remained unchanged before and after the folding, because the term "rectangular base" designated the same rectangular panel in both states.

D6 failed to disclose a packaging having such a rectangular base in both the folded state and the unfolded state, because no base at all could be identified in the unfolded state.

The base of D6 was also clearly not rectangular, as flap 33 was much narrower than flaps 34 and 31, and flap 31 had a tab 26' cut away from its bottom side.

The combination of the panels 31 to 34 did not keep its shape unchanged before and after folding of the packaging.

The side elements 13, 19 and 15, 21 of D6 were separated via a folding line only from the small flaps 32 and 33 and not from the panels 31 and 34, all together constituting the base of the packaging in the folded state.

D6 did not define a packaging having a cross-shaped layout in both the folded and the unfolded state as claimed in claim 1 of the main request, whereby the side elements and the cover elements were separated from the rectangular base by folding lines.

Folding a packaging could not change the nature of its layout by changing the arrangement of the side elements and of the cover elements with respect to the rectangular base.

The cross-shaped layout was described in the patent in suit as an essential feature of the invention because it allowed folding of the packaging elements around a chocolate bar.

A V-shaped perforation according to claim 1 had to have two joining perforation segments which converged so as to form a spike. D6 showing two perforation lines which enclosed a very large angle between them and which were not even connected with each other did not disclose a V-shaped perforation.

The subject-matter of claim 1 of the main request was therefore new over the disclosure of document D6.

Reasons for the Decision

1. *Subject-matter of claim 1 of the main request*

1.1 The respondent argues that claim 1 of the main request is formulated in such a way as to define a packaging in both the unfolded and the folded state, as it contains features applying to both conditions, and that this interpretation is the only one which is consistent with the description of the patent in suit, where "packaging" is used to refer to both conditions.

A skilled reader, willing to understand claim 1, would therefore have inferred that the shape of the base panel remains unchanged before and after the folding, because the term "rectangular base" designates the very same rectangular panel in both states.

1.2 The board disagrees.

1.2.1 According to the wording of claim 1 of the main request, the claimed packaging has a rectangular base, two side elements **folded inwards**, and a first and a second cover element which partially overlap with said side elements in the **folded state**.

1.2.2 As a consequence of these features this claim defines a packaging in the **folded** state.

1.2.3 Contrary to what has been argued by the respondent, the description of the patent in suit supports this interpretation, as it uses the term "packaging" also to refer to the folded state (see for example paragraph 24, according to which figure 1 shows a "packaging in an unfolded state", and figure 2 shows the same

"packaging in a folded, unopened state").

- 1.2.4 Even if, for the sake of argument, the board were to follow the respondent's argument that claim 1 defines the packaging in both the unfolded **and the folded state**, this means that a packaging in the folded state is in any case claimed in claim 1, and accordingly, if a packaging in the folded state with all the features of claim 1 is known from a prior-art document, for example D6, the subject-matter of claim 1 lacks novelty.
- 1.2.5 The board further disagrees with the respondent's argument that the shape of the base panel should not change before and after folding, because the term "rectangular base" not only designates a panel of the blank, but also designates, in the description of the patent in suit, a base element of the folded packaging.
- 1.2.6 Claim 1 does not contain any explicit or implicit restriction requiring that the shape of the base panel remains unchanged before and after folding. The fact that this is the case in the example depicted in figures 1 to 3 of the patent in suit does not impose such a restriction on the packaging claimed in claim 1.
- 1.3 The respondent further argues that claim 1 of the main request defines a packaging having a cross-shaped layout in both the folded and the unfolded state, because folding a blank where the side elements and the cover elements are separated from the rectangular base by folding lines cannot change the nature of this layout, as the arrangement of the side elements and of the cover elements with respect to the rectangular base remains the same.

1.4 The board disagrees, because, as discussed above, claim 1 claiming a packaging in the folded state does not require that also in the unfolded state:

(a) the two side elements are arranged on opposite sides of a rectangular base and are separated from the base via folding lines, and

(b) a first and a second cover element are each arranged on one of the two other opposite sides of the rectangular base and are separated from the latter via folding lines.

1.5 The respondent then argues that such a cross-shaped structure should be regarded by a skilled reader of the patent in suit as an implicit feature of claim 1 of the main request, as it is described as an essential feature of the invention (see paragraph 19) because it allows folding of the packaging elements around the chocolate bar.

1.6 In paragraph 15 of the patent in suit it is stated that in one embodiment of the claimed invention the packaging in the unfolded state has an approximately cross-shaped shape (layout) and that further, depending on the shape of the foodstuffs to be packaged, other layouts are also possible. Therefore, the packaging claimed in claim 1, without any restriction concerning the layout of the packaging in the unfolded state, is not to be understood in the restrictive way proposed by the respondent.

2. *Content of the disclosure of D6*

- 2.1 D6 discloses a packaging (see figure 3 depicting it in the folded state) which due to its parallelepipedal shape is suitable for bar-like foodstuffs.
- 2.2 This packaging comprises a rectangular base formed by the superposition of the panels 31, 32, 33 and 34 in the folded state, see figures 1 and 2.
- 2.3 The respondent's argument that in order to be novelty-destroying D6 should disclose a "rectangular base" in both the folded state and the unfolded state of the packaging is not followed by the board (see point 1.2 above). Accordingly, the fact that D6 does not disclose a base which is not rectangular in the unfolded state is not of relevance for assessing novelty in the present case.
- 2.4 The respondent further argues that in D6 the panels 13, 19 and 15, 21 are separated via a folding line only from the small flaps 32 and 33 and not from the panels 31 and 34, all together constituting the base of the packaging in the folded state.
- 2.5 The board disagrees.

The packaging of D6 comprises two side elements (formed by panels 13, 19 and 15, 21) which are arranged in the folded state on opposite sides (left side and right side according to figure 3) of the rectangular base. Accordingly, these side elements are separated from the base, i.e. from the folded panels 31 to 34, via folding lines. The panels 13, 19, 15 and 21 are also folded inwards along said folding lines.

- 2.6 The respondent argues that in D6 only panels 27 and 24 (see figures 1 to 4) can be regarded as cover elements, since panels 10 and 11 are to be regarded as laterally disposed side elements when the packaging is in the folded state.
- 2.7 The board cannot accept that argument.
- 2.7.1 Given that when the packaging is in the folded state the panels 11 and 27 are arranged on the same side of the rectangular base, they both belong, in accordance with the wording of claim 1 of the main request and also in accordance with paragraphs 26 and 27 of the patent in suit, to the same cover element. The same applies to the panels 10 and 24.
- 2.7.2 Accordingly, the packaging of D6 also comprises a first and a second cover element (11, 27 and 10, 24) being each arranged on one of the two other opposite sides of the rectangular base (front side and back side, as can clearly be derived from the drawings), separated from the latter via folding lines, and which partially overlap (in the upper portion, as clearly shown in figure 2) with the two side elements (panel 19 and 21) in the folded state.
- 2.8 The respondent finally argues that D6 fails to disclose a V-shaped perforation, having two joining segments which converge so as to form a spike. This is because D6 shows two distinct perforation lines which enclose a very large angle between them and which are not even connected to each other. Such a configuration, with two oblique, disjointed perforation segments, cannot be regarded as being V-shaped, but rather as a U-shaped or a hat-shaped perforation.

- 2.9 The board considers the perforation lines on the first cover element of D6 to be a V-shaped perforation because, exactly as shown in figure 1 of the patent in suit, it comprises two converging perforated segments 37, said segments being connected via a non-perforated portion 26, said last corresponding to the tab 8 of the patent in suit connecting the two perforation segments of the perforation 6.
- 2.10 The board therefore concludes that the first cover element 11, 27 has a V-shaped perforation 37 (see column 2, lines 50 to 56) by means of which a flap 27 can be separated from a fixing region 38, the fixing region 38 being operatively connected in the folded state to the opposite, second cover element 10, 24 (as clearly derivable from figure 2) via first adhesive bonding points 39, and the second cover element 10, 24 having an opening 25 into which a tab 26 of the flap 27 can be inserted for re-closing of the packaging (as shown in figures 6 and 7).
- 2.11 As a consequence, the subject-matter of claim 1 of the main request is not novel over the disclosure of D6.

3. *Remittal*

- 3.1 Under Article 111(1) EPC the board may either decide on the appeal or remit the case to the department which was responsible for the decision appealed. The appropriateness of remittal to the department of first instance is a matter for decision by the board, which assesses each case on its merits.
- 3.2 The only issue of the appealed opposition division's decision was the allowability of the main request, see

points III and IV above.

- 3.3 Due to the board's finding that the subject-matter of claim 1 of the main request is not novel, see point 2.11 above, said decision is to be set aside.
- 3.4 The first to ninth auxiliary requests filed with letter dated 13 December 2016 differ from the main request, see point V above, and have therefore not been the subject of the appealed decision.
- 3.5 Given that it is not for the board to conduct the necessary evaluation in detail of said auxiliary requests for the first time, and in order not to deprive the parties of the opportunity to argue their case before two instances, the board considers it appropriate to make use of its power under Article 111(1) EPC to remit the case to the department of first instance for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:



G. Nachtigall

K. Poalas

Decision electronically authenticated