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**Datasheet for the decision  
of 30 September 2016**

**Case Number:** T 0334/14 - 3.3.09

**Application Number:** 01959585.9

**Publication Number:** 1313373

**IPC:** A23G3/20, A23G3/26, A23G4/00

**Language of the proceedings:** EN

**Title of invention:**  
CONTINUOUSLY FORMING COATED CENTER-FILLED GUM PRODUCTS

**Patent Proprietor:**  
Cadbury Adams USA LLC

**Opponent:**  
Wm. Wrigley Jr. Company

**Headword:**

**Relevant legal provisions:**  
RPBA Art. 12, 13

**Keyword:**  
New main request: admission (no)

**Decisions cited:**

**Catchword:**



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

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Case Number: T 0334/14 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 30 September 2016**

**Appellant:** Cadbury Adams USA LLC  
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**Representative:** Wilson Gunn  
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**Respondent:** Wm, Wrigley Jr, Company  
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**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**  
**29 November 2013 maintaining European patent**  
**No. 1313373 in amended form.**

**Composition of the Board:**

**Chairman** W. Sieber  
**Members:** N. Perakis  
D. Prietzel-Funk

## Summary of Facts and Submissions

I. This decision concerns the second appeal relating to European patent No. 1 313 373. In the first appeal (T 728/09 of 29 September 2011), this board, in a different composition, decided that the subject-matter of independent claim 6 as granted was novel over the cited prior art and remitted the case to the opposition division for further examination, basically for inventive step.

II. Claim 6 as granted reads as follows:

"6. A method for continuously producing coated pieces of liquid-filled tablet-type gum material comprising the steps of:

supplying a rope of liquid-filled gum material;  
sizing said rope of liquid-filled gum material;  
feeding said rope of liquid-filled gum material into a tablet-forming mechanism; characterized by:

forming individual pieces of liquid-filled gum material from said rope of gum material in said tablet-forming mechanism, said individual pieces of gum material having substantially curved non-flat exterior surfaces;

cooling said formed pieces of gum material; and  
coating said individual pieces of gum material with a hard coating."

III. In the continued opposition proceedings the opposition division held that the main request (claims as granted) was not allowable because the subject-matter of claim 6 as granted lacked inventive step. D1/D1a (JP 26 5888 and its translation into English) was considered to

represent the closest prior art. D1/D1a disclosed all the features of the process of claim 6 as granted, apart from a hard coating for the individual pieces of gum material. However, the skilled person looking for a suitable sugar coating for the gum product was aware that a hard coating was well-known in the art and available for coating gum products. Reference was made to various documents. He would therefore be motivated to combine D1/D1a with any of these documents and would arrive at the subject-matter of claim 6 as granted without the exercise of inventive step.

The opposition division further decided that the patent could be maintained in amended form on the basis of the claims of the first auxiliary request filed with letter of 30 May 2012.

- IV. On 10 February 2014, the patent proprietor (in the following the appellant) filed an appeal against the interlocutory decision of the opposition division. The statement setting out the grounds of appeal was filed on 9 April 2014. The appellant's main request was that the decision of the opposition division be set aside and that the patent be maintained as granted. The appellant also filed a first auxiliary request in case the board considered that the main request was not allowable for any reason. Additionally the appellant indicated that it was in the process of obtaining experimental data to supplement arguments made in the statement of grounds of appeal and that it intended to file this data in due course once it was complete.
- V. By letter of 26 June 2014, the opponent (in the following the respondent) filed observations on the appeal and requested that it be dismissed. It also requested that the auxiliary request not be admitted

into the proceedings, and that any experimental data provided in the future by the appellant not be admitted either.

VI. On 26 February 2016 the board issued a communication in preparation for the oral proceedings.

VII. By letter of 8 July 2016, the appellant filed a new main request to replace the previous main request, withdrew the first auxiliary request and submitted additional technical evidence, namely E1 and E2.

The new main request differs from the previous main request (granted claims) only in that claim 6 has been amended as follows (amendment in bold):

"6. A method for continuously producing coated pieces of liquid-filled tablet-type gum material comprising the steps of:

supplying a rope of liquid-filled gum material;  
sizing said rope of liquid-filled gum material;  
feeding said rope of liquid-filled gum material into a **single** tablet-forming mechanism;  
characterized by:

forming individual pieces of liquid-filled gum material from said rope of gum material in said **single** tablet-forming mechanism, said individual pieces of gum material having substantially curved non-flat exterior surfaces;  
cooling said formed pieces of gum material; and  
coating said individual pieces of gum material with a hard coating."

- VIII. By letter of 5 August 2016, the respondent commented on the new submissions of the appellant. It requested that the new main request and the additional technical evidence, E1 and E2, not be admitted into the proceedings.
- IX. On 30 September oral proceedings were held before the board.
- X. The arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:
- The new main request should be admitted into the proceedings. The addition of the word "single" in the wording of claim 6 illustrated the results of the technical evidence E1 and E2. The appellant had become aware that this was a crucial point of the invention. Indeed, the highly relevant technical evidence showed that the invention as now claimed provided tablets with a long-lasting leakage stability compared to the tablets of D1, which were only stable for a short time after production.
  - This critical technical evidence had been obtained only recently, upon gaining access to the apparatus of D1. This technical evidence should also be admitted into the proceedings.
  - Contrary to the assertions of the respondent, amended claim 6 complied with the requirements of clarity, non-extension of subject-matter and inventive step.

XI. The arguments put forward by the respondent in its written submissions and during the oral proceedings may be summarised as follows:

- The new main request should not be admitted into the proceedings. It had not been filed in compliance with Article 12 RPBA, i.e. together with the grounds of appeal, but more than two years later. The board should not exercise its discretion under Article 13(1) RPBA and admit this request into the proceedings since the subject-matter had become more complicated regarding the issues of clarity, added subject-matter and inventive step, the assessment of which would mean adjourning the oral proceedings. Furthermore, the new main request had shifted the core of the invention, after inventive step had been discussed for many years in opposition and appeal proceedings from a different perspective.
  
- The board should also not admit E1 and E2 into the proceedings because they were late-filed and the respondent could not be expected to deal with them without adjournment of the oral proceedings (Article 13(3) RPBA). The appellant had acknowledged during the oral proceedings that the experimental data had been obtained using the apparatus of D1. However, the respondent had no access to this apparatus and was unable to verify the completeness/correctness of the experimental results of E1 and E2, which allegedly showed a recently identified advantage over D1, namely improved leakage stability, which now lasted a long time rather than ending only shortly after the tablets' formation.



- XII. The appellant requested that the decision of the opposition division be set aside and that the patent be maintained on the basis of the claims of the new main request filed with letter of 8 July 2016.
- XIII. The respondent requested that the appeal be dismissed and that the new main request and documents E1 and E2, all submitted with the appellant's letter of 8 July 2016, not be admitted into the proceedings.

### **Reasons for the Decision**

1. Claim 6 of the new main request specifies now that the "tablet-forming mechanism" is a "**single** tablet-forming mechanism" (see point VII).
2. The respondent disputed the admissibility of the new main request in view of Articles 12 and 13 RPBA.

Although Article 12(2) RPBA stipulates that the statement of grounds of appeal should contain a party's complete case, an amendment to a party's case may still be admitted under Article 13(1) RPBA. The board therefore examined whether the late submission of the new main request complied with the requirements set out in Article 13(1) RPBA.

- 2.1 Article 13(1) RPBA stipulates that any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion, which is to be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

2.2 Thus, one criterion for admitting the new main request is the complexity of the newly submitted subject-matter.

2.2.1 Although at first glance the insertion of the term "single" appears to be a rather simple amendment, a closer look reveals the difficulties it involves. In particular, the addition of the term "single" to "a tablet-forming mechanism" introduces a lack of clarity.

2.2.2 First of all it is not clear whether the term "single" refers to the tablet or to the mechanism.

According to the appellant, the word "single" refers to "mechanism" and was added to distinguish the process of claim 6 from the process disclosed in D1/D1a, which uses two separate die mechanisms. However, as pointed out by the respondent, another possible interpretation is that "single tablet-forming mechanism" means a mechanism which forms a single tablet. In that case, the amendment would not provide a distinguishing feature over D1/D1a.

2.2.3 But even if, in favour of the appellant, it were accepted that the amendment means single mechanism, the meaning of a single mechanism is not clear, in particular in view of the contradiction between independent claim 6 and dependent claim 8. Although amended claim 6 requires a single (tablet-forming) mechanism, dependent claim 8 refers in the context of this mechanism to forming the individual pieces of gum material by introducing the rope of gum material between two rotating chain mechanisms. Thus the single mechanism specified in claim 6 may in the end comprise two mechanisms as stated in claim 8, which gives rise to the question as to the true meaning of "single".

- 2.3 Furthermore, the addition of "single" shifts the core of the invention at a very late stage in the proceedings. The appellant itself acknowledged that only after it had had the opportunity to use the apparatus of D1 and had carried out the experiments as set out in E1 and E2 did it realise that the crucial point of the invention was the use of a single mechanism. E1 and E2 showed that the claimed single mechanism was responsible for the improved, longer leakage stability of the chewing gum tablets. Previously, the appellant had thought and argued that the leakage properties were improved due to the use of a hard coating. However, were the board to accept this new argument, the previous inventive-step argument, pursued for many years in opposition and appeal proceedings, would be redundant. Such a procedure is not in line with the requirement of procedural economy set out in Article 13(1) RPBA.
3. Moreover, as set out above, the new main request is inextricably linked to the late-filed experiments E1 and E2. Had this request been admitted, the oral proceedings would have had to be postponed in order to give the respondent a fair opportunity to deal with the new request. In this context, the respondent would have had to be given time to verify the content of E1 and E2, which are ultimately the basis for the amendment of the appellant's case. As pointed out by the respondent, this was not possible because the moulding dies were not available and could not be made in time. Furthermore, after announcing further experimental data in the statement of grounds of appeal, it took the appellant more than two years to file it, and some of the data, namely the moisture levels to show leakage over time as set out in E2, clearly could not have been

repeated by the respondent in time. The check in E2 was done after 2.5 months. Thus, the experiment would have taken longer than the time between the respondent being provided with the experimental report and the date of the oral proceedings, even if the respondent had somehow been able to start an experiment on the day it received the report. Thus, also in view of Article 13(3) RPBA the board was not in a position to admit the new main request into the proceedings.

4. In view of the above, the board decided not to admit the new main request into the appeal proceedings.
5. As the main request was not admitted into the proceedings and the appellant had not submitted any further requests, the appeal had to be dismissed.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated