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**Datasheet for the decision  
of 6 December 2018**

**Case Number:** T 1402/14 - 3.3.09

**Application Number:** 02789744.6

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**IPC:** A23L2/02, A23L2/52, A23L2/60,  
A23L2/66, A23L2/68

**Language of the proceedings:** EN

**Title of invention:**  
JUICE BASED BEVERAGE COMPOSITIONS

**Patent Proprietor:**  
Nestec S.A.

**Opponent:**  
N.V. NUTRICIA

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(c), 123(2)  
RPBA Art. 12

**Keyword:**

Main request - added subject-matter (yes)  
Auxiliary request 1 - admitted  
Auxiliary request 1 - added subject-matter (no)  
remittal for further prosecution

**Decisions cited:**

T 1511/07

**Catchword:**



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

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Case Number: T 1402/14 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 6 December 2018**

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 29 April 2014  
revoking European patent No. 1484989 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** W. Sieber  
**Members:** N. Perakis  
E. Kossonakou

## Summary of Facts and Submissions

I. This decision concerns the appeal filed by the patent proprietor against the decision of the opposition division revoking European patent No. 1 484 989.

Claim 1 as granted reads as follows:

"1. A clear fruit-juice based beverage composition comprising:

- (a) a source of protein in an amount from 2 to 8 wt% of the composition, wherein the protein source is whey protein isolate or a combination of whey protein isolate and whey protein hydrolysate, and wherein the whey protein hydrolysate comprises up to 20 wt% of the combination;
- (b) a source of carbohydrate in an amount from 1 to 30 wt% of the composition;
- (c) a source of edible acids in an amount from 0.01 to 3 wt% of the composition;
- (d) a source of fruit juices in an amount from 5 to 40 wt% of the composition."

II. In the notice of opposition the opponent requested that the patent be revoked in its entirety on the grounds of Article 100(a), 100(b) and 100(c) EPC.

The opposition division's decision was based on a main request (claims as granted) and auxiliary requests 1 to 3 filed with a letter of 24 January 2014. The opposition division held that:

- the subject-matter of claim 1 of the main request extended beyond the content of the application as filed (Article 100(c) EPC),
- the subject-matter of claim 1 of auxiliary requests 1 and 3 extended the protection conferred by the granted patent (Article 123(3) EPC), and
- the subject-matter of claim 1 of auxiliary request 2 extended beyond the content of the application as filed (Article 123(2) EPC).

III. The decision was appealed by the patent proprietor (in the following: the appellant), which requested that the decision of the opposition division be set aside and that the patent be maintained on the basis of the main request (claims as granted) or on the basis of any of auxiliary requests 1 to 4 filed with the statement setting out the grounds of appeal dated 23 July 2014.

The subject-matter of claim 1 of auxiliary request 1, the only auxiliary request relevant to this decision, derives from the subject-matter of claim 1 as granted with the following features added at the end:

"wherein the composition has a pH of 4.0 or less, and has a viscosity of less than 40 centipoises".

IV. The opponent (in the following: the respondent) filed observations on the appeal by its letter of 3 November 2014. It requested that the appeal be dismissed. It also requested that auxiliary requests 1 to 4 not be admitted to the proceedings.

V. By letter of 9 March 2015, the appellant filed amended auxiliary requests 2 and 4 to replace the previously filed auxiliary requests 2 and 4.

- VI. On 27 February 2018 the board issued a communication in preparation for the oral proceedings, indicating its intention to remit the case to the opposition division for further prosecution if any of the requests were found not to contain subject-matter extending beyond the content of the application as filed.
- VII. By letter of 3 April 2018, the appellant filed auxiliary requests 5 and 6. Furthermore, it requested that the case be remitted to the opposition division for further prosecution, were the board to find that one of the requests did not contain added subject-matter.
- VIII. By letter of 4 April 2018, the respondent agreed to have the case remitted to the opposition division for further prosecution if the board were to find that one of the requests did not contain added subject-matter.
- IX. Oral proceedings were held before the board on 18 May 2018, as scheduled. During the discussion relating to the interpretation of the expressions "source of carbohydrate" and "source of edible acids", the respondent requested that the oral proceedings be adjourned in order to verify whether HFCS 42 and HFCS 55 cited within a list of carbohydrates in the application as filed (page 3, lines 21-25) were indeed "carbohydrates" or "a source of carbohydrate" (a syrup of carbohydrates containing water).

At the end of the oral proceedings the board gave the following decisions:

- the main request is found to be not allowable;
- auxiliary request 1 is admitted to the proceedings;

- the appeal proceedings are to be continued in writing; and
- the respondent is given a time limit of three months from the notification of the minutes to file observations and/or evidence on the issue of HFCS, and in particular HFCS 42 and HFCS 55, containing water.

X. By letter of 10 September 2018, the respondent essentially reiterated its arguments, in particular that there was a difference between a "source of compound x" and "compound x (obtained from a source)".

XI. Second oral proceedings were held before the board on 6 December 2018.

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

Main request

- Claim 1 of the main request did not contain subject-matter extending beyond the content of the application as filed. The fact that the beverage composition was clear had been disclosed in the application as filed in isolation, and not only in combination with the pH and the viscosity, as alleged by the respondent (paragraph [0009]).

Auxiliary request 1

- Auxiliary request 1 should be admitted to the proceedings. It was filed with the grounds of appeal, i.e. at the earliest stage of these proceedings, in response to the opposition

division's decision. The subject-matter of claim 1 had been amended by incorporating the pH and viscosity of the beverage composition in order to overcome the objection that subject-matter had been added to the "clear" beverage composition of claim 1 as granted.

- The amounts indicated in claim 1, when construed by the person skilled in the art, concerned the total amount of each component/ingredient in the beverage composition. Thus the term "a source of ingredient x" should be read as "ingredient x obtained from a source". This was the sole technically meaningful interpretation, in particular where the ingredients were carbohydrates and edible acids, since their source was not only carbohydrates and edible acids but also the fruit juices. This interpretation was also supported by the application as filed.
  
- In the light of that interpretation, claim 1 of auxiliary request 1 did not contain added subject-matter since the amount of carbohydrates in the beverage composition was disclosed in paragraph [0023] and the amount of edible acids in paragraph [0026] of the application as filed. These amounts, which were disclosed in the form of value ranges, were not the result of combining arbitrarily selected value ranges from two lists of ranges, since the selected ranges corresponded in each case to the broadest disclosed range.

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



Main request

- Claim 1 of the main request contained subject-matter extending beyond the content of the application as filed. The feature relating to the "clarity" of the beverage composition was intrinsically linked to the pH and the viscosity of the composition (paragraph [0009] and claim 2). Singling out the "clarity" feature constituted an impermissible extension of the subject-matter beyond the content of the application as filed.

Auxiliary request 1

- Auxiliary request 1 should not be admitted into the proceedings, because it was filed late. It should have been submitted before the opposition division.
- Claim 1 of auxiliary request 1, which was defined by the source of the various ingredients and their respective amount, could only be construed to mean that the respective sources were mixed to provide the claimed beverage composition. This interpretation was supported by the application as filed, which made a clear distinction between "a source of an ingredient" and "an ingredient obtained from a source". The distinction between these two expressions was obvious to the skilled person.
- On the basis of that interpretation, the subject-matter of claim 1 of auxiliary request 1 contained subject-matter extending beyond the content of the application as filed, since the appellant had used values disclosed for the ingredients "carbohydrate" and "edible acids" as the basis for the lower limit

in claim 1 of the value ranges of "a source of carbohydrate" and "a source of edible acids".

XIV. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims as granted (main request) or on the basis of any of auxiliary requests 1 and 3 filed with its letter of 23 July 2014, auxiliary requests 2 and 4 filed with letter of 9 March 2015 or auxiliary requests 5 and 6 filed with its letter dated 3 April 2018.

The appellant further requested that the case be remitted to the opposition division, were the board to find that one of the requests did not contain subject-matter extending beyond the content of the application as filed.

XV. The respondent requested that the appeal be dismissed, and further that the auxiliary requests not be admitted to the proceedings. Finally, it consented to the case being remitted to the opposition division, were the board to find that one of the requests complied with the requirements of Article 84 EPC and did not contain subject-matter extending beyond the content of the application as filed.

## **Reasons for the Decision**

### ***Main request (claims as granted)***

1. Added subject-matter

1.1 Claim 1 as granted refers to a clear fruit-juice based beverage composition. The respondent agreed with the

decision under appeal that the feature "clear" was disclosed in the application as filed only in combination with the pH and the viscosity of the composition, as disclosed in particular in claim 2 as filed. The omissions of the pH and the viscosity in claim 1 as granted resulted in added subject-matter.

With regard to the application as filed, the board refers in the following to the published document WO 03/043446.

1.2 Claim 2 as filed reads as follows:

"2. The composition of claim 1 wherein the composition is clear, has a pH of 4.0 or less, and has a viscosity of less than about 40 centipoises."

It is immediately evident that the feature "clear" was singled out from the context of the embodiment of claim 2 as filed, where "clear" is intrinsically linked to the pH and to the viscosity of the beverage composition.

1.3 The existence of such an intrinsic link between "clear", the pH and the viscosity of the claimed beverage composition is corroborated by the passage in paragraph [0011] of the description as filed:

"The composition containing the above ingredients is clear, has a pH of about 4 or less, and has a viscosity of less than about 40 centipoises, preferably less than about 20 centipoises, at room temperature.",

and a rather similar passage bridging page 5 and 6:

"The composition containing the above ingredients is clear, has a pH of about 4 or less, and has a viscosity of less than about 40 centipoises, preferably of less than about 20 centipoises, at room temperature and no viscosity increase during storage."

- 1.4 The appellant relied on the sentence bridging pages 2 and 3 of the application as filed as a support for the feature "clear" disclosed in isolation:

"By carefully selecting the ingredients and their amounts, the clarity, viscosity, pH, color, texture, taste, aftertaste, mouth-feel, stability, and other physical properties of the composition can be controlled to produce a palatable composition with an extended shelf-life."

The board disagrees. If anything, this passage links a clear beverage composition with other requirements, namely the careful selection of the ingredients and their amounts, but it does not present clarity of the beverage composition as an isolated independent feature.

- 1.5 In view of the above, the board concludes that the subject-matter of claim 1 of the main request extends beyond the scope of the application as filed, so that the ground for opposition pursuant to Article 100(c) EPC prevents the patent from being maintained in this form.

***Auxiliary request 1***

2. Admittance

The appellant filed auxiliary request 1 at the earliest stage of the appeal proceedings, namely with the statement setting out the grounds of appeal, when it addressed the reasons of the contested decision. The board sees nothing in the appellant's actions that would make auxiliary request 1 inadmissible under Article 12(4) RPBA.

3. Interpretation of claim 1

3.1 Both claim 1 as granted and claim 1 of auxiliary request 1 refer to a source of protein, carbohydrate, edible acids and fruit juices in certain amounts. It was a matter of dispute as to how the "source of" language in relation to the amount of protein, carbohydrate, edible acids and fruit juices was to be interpreted:

- The appellant considered that the "source of" language related to the total amount of compound x, i.e. proteins, carbohydrates, edible acids and fruit juices, in the final beverage composition.
- In contrast, the respondent and the opposition division considered that the "source of" language referred to a source that contained compound x, i.e. protein, carbohydrate, edible acids, and fruit juices, and provided it in the indicated amount to the beverage composition. In other words, the indicated amount did not relate to the total amount of the ingredient/component.

3.2 In the board's view, the only technically meaningful interpretation of claim 1 is indeed that of the appellant, namely that the "source of" language defines the total amount of the four components, protein,

carbohydrate, edible acids and fruit juices, in the beverage composition. The skilled person would understand that what matters in a beverage composition is the total amount of the four components and not the contribution of an individual source of a component. In a situation where more than one carbohydrate source is present, defining only the amount from one individual carbohydrate source would lead to a virtually meaningless feature in claim 1. Thus, the person skilled in the art would rule out the respondent's interpretation of the "source of" language. This finding is also supported by the application as filed as a whole, and in particular by the following passages (emphasis added by the board):

Paragraph [0072]:

"The total carbohydrate content of the beverage is approximately 12.5%. This amount includes the sucrose and fructose added to the protein slurry (approximately 9.19% of the total weight of the beverage) plus the carbohydrates naturally present in fruit juices".

Paragraph [0074]:

"The total carbohydrate content of the beverage is approximately 12.5 wt%. This amount includes the sucrose and fructose added to the protein slurry (approximately 9.19 wt% of the total weight of the beverage) plus the carbohydrates naturally present in fruit juices".

And paragraph [0033]:

"A preferred process for producing a juice based beverage composition according to the present invention comprises the steps of mixing a protein selected from the group consisting of ... in amounts sufficient to form from about 0.5 to about 10 wt% of the final

composition with water to form a protein slurry;  
dissolving a carbohydrate selected from the group  
consisting of ... in amounts sufficient to form from  
about 1 to about 30 wt% of the final composition;  
mixing the protein slurry and carbohydrate solution;  
adding an edible acid selected from the group  
consisting of ... in amounts sufficient to form from  
about 0.01 to about 3 wt% of the final composition to  
the mixture of protein slurry and carbohydrate  
solution; adding one or more fruit juices in amounts  
sufficient to form from about 5 to about 40 wt% of the  
final composition to the mixture of protein slurry and  
carbohydrate solution ...".

3.3 It is evident from the above citations that (i) the amounts given for protein, carbohydrate, edible acids and fruit juices are given on the basis of the final product and (ii) these amounts include the amounts obtained from all possible sources and not only from a single source: in the case of carbohydrate the added sucrose **and** fructose **and** the carbohydrates inherently present in fruit juices are taken into account; in the case of edible acids those added **and** those present in fruit juices are taken into account.

3.4 In summary, the "source of" language does not have any delimiting or explanatory meaning. Claim 1 has to be interpreted as simply referring to the four components - protein, carbohydrate, edible acids and fruit juices - present in the beverage composition in the indicated amounts.

It might be worth mentioning at this juncture that this was the respondent's (then opponent's) initial interpretation of the "source of" language in its

notice of opposition, according to which the words "a source of" have to be disregarded.

4. Added subject-matter

4.1 Claim 1 of auxiliary request 1 refers to "[a] clear fruit-juice based beverage composition comprising:

(a) a source of protein in an amount from 2 to 8 wt% of the composition, wherein the protein source is whey protein isolate or a combination of whey protein isolate and whey protein hydrolysate, and wherein the whey protein hydrolysate comprises up to 20 wt% of the combination;

(b) a source of carbohydrate in an amount from 1 to 30 wt% of the composition;

(c) a source of edible acids in an amount from 0.01 to 3 wt% of the composition;

(d) a source of fruit juices in an amount from 5 to 40 wt% of the composition

wherein the composition has a pH of 4.0 or less, and has a viscosity of less than 40 centipoises."

4.1.1 The incorporation of the pH and the viscosity at the end of the claim overcomes the objection with regard to the main request (point 1 above). The amendment is literally based on the wording in claim 2 as filed, which reads as follows:

"2. The composition of claim 1 wherein the composition is clear, has a pH of 4.0 or less, and has a viscosity of less than about 40 centipoises."



- 4.1.2 The respondent's further objection under Article 100(c) EPC in relation to the main request (claims as granted) relates to the ranges recited in features (b) and (c). Whilst claim 1 as filed required an amount of "up to 30 wt% (feature (b)) and "up to 3 wt%" (feature (c)), claim 1 now requires an amount from "1 to 30 wt%" and "0.01 to 3 wt%", respectively.

The respondent concurred with the view of the opposition division that the ranges in claim 1 as filed were linked to the term "a source of" and could not therefore be combined with values from the description relating to the ingredients/components, i.e. the ranges given for the total amounts of protein, carbohydrate, edible acids and fruit juices.

- 4.1.3 Paragraphs [0023] and [0026] of the application as filed disclose the now required ranges (emphasis added by the board) as follows:

"The carbohydrate comprises from about 1 to about 30 wt% of the composition, preferably from about 5 to about 25 wt%, most preferably from about 8 to about 20 wt%."

"The edible acid comprises from about 0.01 to about 3 wt% of the composition, preferably from about 0.5 to about 2 wt%."

These paragraphs disclose the broadest ranges provided in the application as filed for both the carbohydrate and the edible acids in the beverage composition. Furthermore, taking into account the board's interpretation of the "source of" language in claim 1, it is evident that both claim 1 and the description as

filed relate to the same "concept" for the amount of protein, carbohydrate, edible acids and fruit juices despite the different wording used, namely the total amount of these components in the beverage composition. Therefore the combination of the ranges from the description as filed with the subject-matter of claim 1 as filed does not extend beyond the content of the application as filed.

- 4.1.4 The respondent argued that the application as filed disclosed two lists of ranges (see paragraphs [0023] and [0026]) without any pointer towards the selection of each of the claimed ranges, let alone their combination.

The board does not agree. Each of these paragraphs discloses broader and narrower ranges which converge. The broadest ranges have simply been selected for features (b) and (c), which disclose the teaching with regard to these features in the most general way. Thus, their combination with the remaining features of claim 1 would be regarded by the person skilled in the art as being directly and unambiguously derivable from the application as filed.

- 4.1.5 The respondent contested the claimed combination of ranges on the basis of the case law, and referred to T 1511/07. However, the situation in the present case is different from that of T 1511/07, where the board considered that the application as filed did not contain any pointer towards combining two ranges of different level of preference. In the present case, the combined ranges are of the same level of preference (broadest definition of each range). Consequently, this argument of the respondent must also fail.

4.2 Dependent claims 2-20

The respondent did not raise any objection regarding added subject-matter to dependent claims 2-20. The board does not see any reason to raise an objection on its own motion.

4.3 In summary, the claims of auxiliary request 1 do not contain any subject-matter extending beyond the content of the application as filed.

5. Remittal

In the decision under appeal the grounds for opposition relating to insufficiency of disclosure, lack of novelty and lack of inventive step were not dealt with. Furthermore, the appellant requested that the case be remitted to the opposition division for the assessment of these grounds for opposition, and the respondent consented to this. The board therefore decides to remit the case to the opposition division 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 opposition division for further prosecution on the basis of claims 1 - 20 of auxiliary request 1 filed with the statement setting out the grounds of appeal dated 23 July 2014.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated