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**Datasheet for the decision  
of 20 January 2017**

**Case Number:** T 1649/14 - 3.3.09

**Application Number:** 07741278.1

**Publication Number:** 2025239

**IPC:** A23G3/50, A21D13/08, A23G3/54,  
A21C15/04, A21D8/02, A21D10/02,  
A21D13/00

**Language of the proceedings:** EN

**Title of invention:**  
Stick shaped snack and process for producing the same

**Patent Proprietor:**  
Ezaki Glico Co., Ltd.

**Opponent:**  
Bahlsen GmbH & Co. KG

**Headword:**

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

**Keyword:**

Prior use - admitted (no)  
Inventive step (yes)

**Decisions cited:**

**Catchword:**



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

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Case Number: T 1649/14 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 20 January 2017**

**Appellant:** Bahlsen GmbH & Co. KG  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
19 May 2014 maintaining European patent  
No. 2025239 in amended form.

**Composition of the Board:**

**Chairman** W. Sieber  
**Members:** J. Jardón Álvarez  
E. Kossonakou

## Summary of Facts and Submissions

I. This decision concerns the appeal filed by the opponent against the interlocutory decision of the opposition division that European patent No. 2 025 239 as amended met the requirements of the EPC.

II. The opponent had requested revocation of the patent in its entirety on the grounds that the claimed subject-matter lacked novelty and inventive step (Article 100(a) EPC). The documents cited during the opposition proceedings included:

D1: US 2002/0098267 A1;

D8: Betriebsanleitung zu einer Stickauspressmaschine des Unternehmens Werner & Pfleiderer, 1956 and 1958 (8 pages);

D9: Prospekt "Komplette Sticks- und Brezelanlagen Complete Stick and Pretzel Plants", Werner & Pfleiderer, Stuttgart, 1977 (8 pages); and

D10: GB 2 329 570 A.

III. The set of the amended claims maintained by the opposition division included two claims. Claim 1 read as follows:

"1. A method for producing a stick-shaped snack having a maximum cross-sectional width of 2.5 mm to 3.5 mm from a string-like dough containing a cereal flour as a principal component, the method comprising:  
a sheet-like dough forming step of forming a sheet-like dough by rolling a base dough into a sheet-like shape

to give a sheet-like dough having a thickness of 2 mm to 3 mm,  
a string-like dough forming step of forming a string-like dough by cutting the sheet-like dough into a string-like shape having a width of 2 mm to 3 mm,  
a non-through cut forming step of forming a plurality of non-through cuts on the string-like dough at predetermined intervals along the longitudinal direction of the string-like dough,  
an alkali treatment step of impregnating the string-like dough provided with a plurality of non-through cuts with lye,  
a baking step of baking the string-like dough impregnated with lye, the string-like dough being mounted on a heating surface, and  
a cutting step of cutting the baked string-like dough at the non-through cuts to thereby form stick-shaped pastries."

Claim 2 was a dependent claim.

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

- No novelty objection was raised against the subject-matter of the amended claims.
- Starting from D8 as closest prior art, the objective technical problem to be solved by the patent was the provision of extremely thin stick-shaped snacks with a favourable appearance. The opposition division considered that the use of sheeting and cutting instead of extrusion justified the acknowledgement of an inventive step. In this context, D10 and D1 were also considered.

- Also starting from D9 as closest prior art, inventive step was acknowledged for the same reasons.

V. On 28 July 2014 the opponent (in the following: the appellant) lodged an appeal and requested that the decision of the opposition division be set aside and that the patent be revoked in its entirety. The statement setting out the grounds of appeal was filed on 24 September 2014, including a new allegation of prior use supported by the following document:

D11: Affidavit of Mr Sala dated 10 September 2014 (one page) including an Annex 1 (two pictures) and an Annex 2 (two technical drawings).

VI. With its reply dated 26 March 2015 the patent proprietor (in the following: the respondent) disputed the arguments submitted by the appellant and requested that the appeal be dismissed. It also requested that D11 not be admitted into the appeal proceedings. Furthermore, it noted that D8 and D9 did not show any publication date and argued that these documents were not prior art for the patent in suit.

VII. In a communication dated 16 September 2016 the board indicated the points to be discussed during the oral proceedings. It also expressed its preliminary opinion that the allegation of prior use and D11 should not be admitted into the appeal proceedings.

VIII. On 20 January 2017 oral proceedings were held before the board. During the oral proceedings the respondent accepted that D8 and D9 were state of the art for the patent in suit. The appellant stated that it no longer pursued the alleged prior use but wished to rely on

part of D11 as the opinion of an expert. The appellant also argued for the first time in the oral proceedings that the problem underlying the patent in suit was not solved over the whole scope of the claim, because there was no information about how to prepare "round" sticks and sticks having a cross-sectional width of e.g. 1 mm. The chairman noted that this objection appeared to relate rather to sufficiency of disclosure than to inventive step, and asked the respondent whether it gave its consent to discuss this objection as a new ground of opposition. The respondent did not give its consent.

IX. The relevant arguments of the appellant may be summarised as follows:

- Even if D11 was not admitted into the proceedings as prior use, the penultimate paragraph of the affidavit of Mr Sala should be considered as an expert opinion.
- The claimed subject-matter lacked inventive step starting from D8 as closest prior art. The problem underlying the patent in view of D8 was to provide an alternative method to prepare stick-shaped snacks, and the solution according to claim 1, namely the use of a sheet-like dough instead of an extruder to obtain a string-like dough, was obvious to the skilled person in view of D10 and/or D9.
- Alternatively, the claimed subject-matter lacked inventive step because the problem underlying the patent had not been credibly solved over the entire scope of the claim. In particular, the appellant indicated that there was no information in the patent about how to prepare "round" sticks and

sticks having a cross-sectional width of e.g. 1 mm, embodiments covered by the broad scope of claim 1.

X. The arguments of the respondent may be summarised as follows:

- Starting from D8 as the closest prior-art document, the problem underlying the patent was the provision of a method for the production on an industrial scale of straight, thin, stick-shaped snacks having a uniform diameter and straight ends and providing a pleasant mouthfeel. The claimed solution, namely the process of claim 1, was not hinted at by the cited prior art. In particular, D10 did not address any of the present problems relating to the production of thin, stick-shaped snacks. The strip-shaped biscuits or rusks produced in D10 were much thicker.
- Concerning the objection of the appellant that the problem was not solved over the entire scope of the claim, the respondent noted that the claimed method required first the preparation of a sheet-like dough having a thickness of 2 mm to 3 mm and then cutting this sheet-like dough into a string-like shape having a width of 2 mm to 3 mm that would expand during baking. Since the "starting material" was already thicker than 1 mm, it would be absurd to assume that claim 1 encompassed sticks having a cross-sectional width of 1 mm. Apart from the fact that claim 1 did not claim rounded snacks, the sticks expanded during baking, thereby taking on a rounded form.
- If that objection were to be pursued under sufficiency of disclosure, i.e. a new ground of



opposition, the respondent did not agree to its discussion.

XI. The appellant requested that the decision under appeal be set aside, and that the patent be revoked in its entirety.

The respondent requested that the appeal be dismissed. It further requested that document D11 not be admitted into the appeal proceedings.

### **Reasons for the Decision**

1. Document D11

1.1 D11 was filed by the appellant in support of an allegation of prior use presented with its statement of grounds of appeal, i.e. well after the nine-month opposition period. According to Article 12(4) RPBA the board can hold inadmissible facts, evidence or requests which could have been presented in the first-instance proceedings.

1.2 The board had indicated in point 4 of its communication in preparation for the oral proceedings that it was inclined to hold inadmissible the allegation of prior use and the filing of D11 itself, essentially because:

- the appellant itself admitted that it had already tried during the opposition procedure to find a document or a prior use relating to forming sheet-like dough which was subsequently cut into strings;
- Annex 2 to D11 originated from "H. Bahlsens Keksfabrik KG Hannover", which, if not a

predecessor to the appellant, appeared to be at least somehow associated with the appellant, Bahlsen GmbH & Co. KG, which also spoke against excusing the late filing of the alleged prior use and D11; and,

- D11 did not provide sufficient information concerning the public availability of its subject-matter and the circumstances of the act of use, *i.e.* where, how and by whom the subject-matter had been made public through that use. In particular, the board noted that the expression "not particularly severe secrecy arrangements" used in D11 did not necessarily indicate free accessibility for any- and everybody, and that the photos of Annex 1 were neither dated nor contained any indication as to where they had been taken, or that they were related to the drawings of Annex 2.

1.3 The appellant did not provide any further arguments or information in support of the alleged prior use. At the oral proceedings it stated that D11 should not be considered as a prior use but rather as an expert opinion on what the person skilled in the art would have considered and implemented at the filing date of the opposed patent. The appellant wanted to rely only on the sentence stating that the process of D11 included the formation of a flat dough ("carpet-like" or "sheet-like" in the terminology of the patent):

"Vor der Walze wurde der Teig flächig ausgerollt und als eine Art Teig-Teppiche der Walze zugeführt"  
(D11, page 1, fifth paragraph).

1.4 However, a party's submission cannot be turned on its head and reinterpreted at its convenience, especially

in view of the rather unclear circumstances associated with D11 and the extremely late stage of the proceedings. Therefore the board decided to hold the alleged prior use and the filing of D11 inadmissible (Articles 12(4) and 13(1) RPBA).

2. *Inventive step*

2.1 The invention relates to a method for producing a thin stick-shaped snack having a maximum cross-sectional width of 2.5 to 3.5 mm from a string-like dough. In particular, in the form of a feature analysis claim 1 reads as follows:

- (a) A method for producing a stick-shaped snack having a maximum cross-sectional width of 2.5 mm to 3.5 mm from a string-like dough containing a cereal flour as a principal component, the method comprising:
- (b) a sheet-like dough forming step of forming a sheet-like dough by rolling a base dough into a sheet-like shape to give a sheet-like dough having a thickness of 2 mm to 3 mm,
- (c) a string-like dough forming step of forming a string-like dough by cutting the sheet-like dough into a string-like shape having a width of 2 mm to 3 mm,
- (d) a non-through cut forming step of forming a plurality of non-through cuts on the string-like dough at predetermined intervals along the longitudinal direction of the string-like dough,

- (e) an alkali treatment step of impregnating the string-like dough provided with a plurality of non-through cuts with lye,
- (f) a baking step of baking the string-like dough impregnated with lye, the string-like dough being mounted on a heating surface, and
- (g) a cutting step of cutting the baked string-like dough at the non-through cuts to thereby form stick-shaped pastries.

## 2.2 Closest prior art

- 2.2.1 D8 was agreed to represent the closest prior-art document. It discloses the manufacture of stick-shaped snacks having a diameter of about 3 to 5 mm (see page 2, line 5) that are prepared by extruding strings of dough (see page 2, lines 14 to 17), forming indentations (see page 2, lines 22 to 24), immersing the string in lye (see page 2, lines 9 to 11) and baking the strings to form stick-shaped snacks (see page 2, line 32).
  - 2.2.2 Basically, the method of claim 1 differs from the disclosure of D8 in that the string-like dough is not extruded but obtained by first forming a sheet-like dough having a thickness of 2 to 3 mm and then cutting it into a string-like shape having a width of 2 to 3 mm (claim 1, features (b) and (c)).
- ## 2.3 Problem and solution
- 2.3.1 According to the respondent, the process of D8 presents some drawbacks when applied to the preparation of thin

stick-shaped snacks, in particular because the snacks deform during production.

- 2.3.2 Thus, when a string-like dough with a small diameter is produced using an extruder, intending to form the string-like dough efficiently and at a high speed, the dough deaerates like pasta when the pressure for extruding the dough is increased. When the deaerated dough is baked, the dispersion of moisture contained inside the dough undesirably decreases and the moisture in the dough is barely emitted from the dough. This worsens the mouthfeel after baking, adversely affecting the palatability of snacks like pretzels. Further, when the pressure for extruding the dough is increased, the load applied to the extruder becomes unduly large.

In order to obtain a desirable mouthfeel of the dough after baking, decreasing the pressure for extruding the dough, so as not to deaerate the dough, is one possibility. However, this leads to an undesirably long time for extruding the dough, making industrial production difficult.

Another possible way to obtain desirable mouthfeel of the baked dough is to soften the dough. However, when a dough is unduly soft, problems such as the string-like dough easily warping, the bottom surface becoming flattened, the dough being undesirably stretched, and bumps and dents being formed by contact with the mesh band of an oven can easily occur while the dough is being transported to an oven using a belt conveyor or the like. This makes it difficult to produce a straight stick-shaped snack free of deformation. Furthermore, providing non-through cuts on unduly soft dough strips using cutters is difficult in terms of controlling the depth of the cut, and often results in completely

cutting through the dough strips midway. This also lowers the bending strength of the baked dough, causing problems in quality and processability.

Furthermore, when a plurality of columns of string-like dough strips are extruded, the diameter of the string-like dough formed by each column can easily vary. This makes it difficult to mass-produce string-like dough with a uniform diameter. Furthermore, in order to form a thin string-like dough, e.g. when the diameter of the extruder is set at 3 mm, when the dough is actually extruded from the extruder it will expand due to the release of the pressing pressure; therefore, the diameter of the string-like dough after extrusion becomes greater than 3 mm. The diameter of this string-like dough can be reduced if the speed of the conveyer carrying the extruded string-like dough is increased.

However, if the speed of the conveyer is increased, due to the high tension of the string-like dough, forming non-through cuts on soft dough using a cutter or the like is more difficult, since controlling the cut depth is troublesome, causing problems such as cutting completely through the dough midway.

2.3.3 According to the respondent, the technical problem underlying the patent in view of D8 would then be the provision of an efficient method for the production of stick-shaped snacks that avoids such drawbacks (see paragraph [0008] of the specification).

2.3.4 This problem is solved by the method of claim 1 wherein, instead of using an extruder, the string-like dough is formed by cutting a sheet-like dough (cf. claim 1, steps (b) and (c)). This ensures that the resulting string-like dough will not be deformed,

making it possible to produce a straight stick-shaped snack with a small diameter that could not be satisfactorily produced by the method of D8.

2.3.5 The board is satisfied that the above problem has been credibly solved, in particular because the embodiment described in paragraphs [0015] to [0022] (see also figures 1 and 2) is said to result in snacks that do not deform after baking, and wherein warping of the stick-shaped snack is also prevented (see [0023] to [0025]). This problem thus constitutes the objective technical problem.

2.3.6 The appellant argued that there was no experimental evidence on file showing that the problem was credibly solved. However, paragraphs [0015] to [0025] provide a sound explanation of how the method has to be carried out and the reasons why it results in thin stick-shaped snacks which do not deform. The appellant has not provided any reason or experimental data showing that the method would not provide the desired result, and the board sees no reason or possibility to challenge these explanations.

2.4 Obviousness

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

2.4.2 The appellant thereby relied on D10 and/or D9.

2.4.3 D10 relates to a food preparation method for teething rusks wherein sheets of dough are cut into dough fingers to obtain strip-shaped biscuits or rusks. The

appellant relied mainly on page 2, lines 5 to 7 of D10 wherein it is stated that the dough is kneaded and formed into an elongated sheet or "mat" from which the strips are to be cut.

2.4.4 However, it is undisputed that the biscuits of D10 have a cross-sectional diameter that is well above the maximum cross-sectional width of 3.5 mm allowed by claim 1 of the patent in suit. Moreover, D10 aims to provide teething rusks that will not shatter into small pieces which could easily choke a child (see page 1, lines 9 and 10) and it does not deal at all with the problem underlying the patent in suit relating to the production of thin, stick-shaped snacks having a maximum cross-sectional width of 2.5 to 3.5 mm.

2.4.5 The objection of the appellant based on the combination of D8 with D10 is thus based on an *ex-post-facto* analysis with hindsight knowledge of the invention. In fact, the appellant has not given any reason why the skilled person would have turned to D10 to solve the above technical problem.

2.4.6 D9 discloses a unit for the formation of sticks comprising a stick press (extruder), a soda bath, a notching device, and an oven (see page 4, left-hand column). The process for the production of snacks of D9 is thus closely related to the one disclosed in D8. The appellant relied on the first sentence of the second paragraph from the bottom of page 2 of D9, stating that "This brochure contains information on a WP production line for the manufacture of both sticks and pretzels ..." to argue again that the use of a sheet-like dough would be an obvious alternative to the use of an extruder.



- 2.4.7 The board can also not follow this objection. In D9 sticks are prepared only using an extruder. That other products could be prepared using a different method cannot be seen as a hint to the use of a sheet-like dough in the process of D8. D9 gives no hint to the claimed method.
- 2.5 During the oral proceedings before the board the appellant relied on an alternative inventive step attack and argued that the problem was not solved over the whole scope of the claim. It argued that it had not been shown how certain embodiments falling within the scope of the claim could be made, namely the production of "round" sticks and/or of sticks having a cross-sectional width of e.g. 1 mm.
- 2.5.1 The board noted during the oral proceedings that this objection appeared to relate to sufficiency of disclosure, a new ground of opposition, rather than to inventive step. The respondent did not give its consent to the introduction of this fresh ground for opposition. The appellant insisted that the objection related to inventive step.
- 2.5.2 Even if one considers this objection under Article 56 EPC, it fails, because it seems to arise from a wrong understanding of the claim. According to EPO practice, a claim should be interpreted by a mind willing to understand, not by a mind desirous of misunderstanding (see Case Law of the Boards of Appeal of the EPO, 8th edition 2016, Section II.A.6.1).
- 2.5.3 The appellant relied on feature (a) of claim 1 defining in general terms the snack to be obtained, to argue that certain embodiments were covered (or not excluded) by claim 1. At the same time it ignored, features (b)

to (g) of claim 1 that specify the process steps that are to be carried out to obtain the snack. These steps further contribute to defining the "final" snack that is obtained according to feature (a).

2.5.4 Thus, with regard to a process starting from a dough in a string-like shape having a width of 2 mm to 3 mm that normally further expands during baking, it is, to say the least, unreasonable to argue that such a process would envisage sticks having a cross-sectional width of 1 mm.

2.5.5 As to the further argument that there was no information about how to prepare "round" sticks, the board notes that claim 1 does not require the preparation of rounded snacks. Apart from that, as stated above, a dough in a string-like shape having a width of 2 mm to 3 mm normally further expands during baking, taking on a somewhat rounded form.

2.5.6 In view of the above, the appellant's alternative inventive step-attack is flawed from the outset.

2.6 In summary, the subject-matter of claim 1, and by the same token of dependent claim 2, involves an inventive step.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated