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**Datasheet for the decision
of 10 October 2018**

Case Number: T 0674/17 - 3.3.09

Application Number: 10703814.3

Publication Number: 2395849

IPC: A23C20/00, A23C20/02,
A23L1/314, A23L1/317

Language of the proceedings: EN

Title of invention:
EMULSION-LIKE COMPOSITIONS

Applicant:
Cargill, Incorporated

Headword:

Relevant legal provisions:
EPC R. 137(3)
EPC Art. 113(2), 111(1) sentence 2

Keyword:
Oral proceedings - held in absence of appellant

Catchword:



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Case Number: T 0674/17 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 10 October 2018

Appellant:
(Applicant)

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Representative:

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Decision under appeal:

**Decision of the Examining Division of the
European Patent Office posted on 10 November
2016 refusing European patent application No.
10703814.3 pursuant to Article 97(2) EPC**

Composition of the Board:

Chairman W. Sieber
Members: F. Rinaldi
D. Prietzel-Funk

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the applicant against the decision of the examining division to refuse European patent application No. 10 703 814.3.
- II. The documents cited in the course of the examination proceedings included:
- D1: EP 0 363 741 A1
D2: US 2003/017242 A1
- III. The examining division's decision was based on a main request and an auxiliary request. Claim 1 of the main request read as follows:
- "1. An emulsion-like composition selected from processed food or food intermediate that mimics traditional food emulsion, comprising water, flavoring agents, edible lipids, pregelatinized starch and hydrocolloids, said hydrocolloids being selected from carrageenan, n-octenylsuccinated starch, galactomanans (sic) and mixtures thereof, wherein said emulsion-like composition is free of emulsion stabilizing aids selected from emulsifiers, melting salts, dairy ingredients or proteins and mixtures thereof."*
- Claim 1 of auxiliary request 1 differed from the main request in that the wording "said hydrocolloids [...]" wherein" was amended to read "said hydrocolloids selected (sic) from carrageenan and guar gum, wherein".
- IV. In the appealed decision, the examining division decided that the subject-matter of both requests

complied with the requirements of Article 123(2) EPC and was novel. However, the subject-matter of claim 1 of the main request lacked inventive step over D1 alone, while the subject-matter of the auxiliary request lacked inventive step over D1 as the closest prior art in combination with D2.

- V. In its statement setting out the grounds of appeal, the applicant (hereinafter: the appellant) requested that the appealed decision be set aside and that a patent be granted on the basis of the main request or one of auxiliary requests 1 and 2 filed with the statement.

The main request and auxiliary request 1 were identical to the requests before the examining division (see point III above). Claim 1 of auxiliary request 2 differed from that of auxiliary request 1 in that the wording "said hydrocolloids selected from carrageenan and guar gum, wherein" was amended to read "said hydrocolloids being carrageenan and guar gum, wherein".

- VI. The board summoned the appellant to oral proceedings and set out its preliminary and non-binding opinion on added subject-matter (Article 123(2) EPC) and lack of inventive step (Article 56 EPC) in a communication.

- VII. By letter dated 31 August 2018 the appellant submitted a new main request which replaced all initial requests and stated that its subject-matter complied with the requirements of Articles 123(2), 54 and 56 EPC. Furthermore, it informed the board that it did not intend to be present at the oral proceedings. Claim 1 of the new main request reads:

"1. An emulsion-like composition selected from processed food or food intermediate that mimics

traditional food emulsion, comprising water, flavoring agents, edible lipids, agglomerated porous starch and hydrocolloids, said hydrocolloids being selected from carrageenan, galactomanans (sic), edible gums, pectins, n (sic) octenylsuccinated starch, native starches, modified starches, pregelatinized starches, alginates, agar-agar, xanthan, or cellulosic derivatives and mixtures thereof, wherein said emulsion-like composition is free of emulsion stabilizing aids selected from emulsifiers, melting salts, dairy ingredients or proteins and mixtures thereof."

Claims 2 to 4 are dependent claims.

- VIII. Oral proceedings took place on 10 October 2018, in the absence of the duly summoned appellant.
- IX. The appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of the claims of the new main request submitted with the letter dated 31 August 2018.

Reasons for the Decision

1. The oral proceedings before the board took place in the absence of the appellant who was duly summoned but decided not to attend. As stipulated by Article 15(3) RPBA, the board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case.

2. Admission of the new main request
 - 2.1 The subject-matter of claim 1 of the main request and the auxiliary request underlying the appealed decision concerned an emulsion-like composition which *inter alia* contained pregelatinized starch as a mandatory ingredient in combination with specific, selected hydrocolloids. Claim 1 of all requests filed with the statement setting out the grounds of appeal likewise concerned compositions comprising pregelatinized starch as a mandatory ingredient.
 - 2.2 In the new main request, claim 1 refers to an emulsion-like composition comprising, *inter alia*, **agglomerated porous starch** as a mandatory ingredient in combination with one or more hydrocolloids (selected from a list containing twelve components). In view of this modification, pregelatinized starch is no longer a mandatory ingredient required in claim 1. On the contrary, the subject-matter of claim 1 of the new main request comprises a different starch as a mandatory feature, namely agglomerated porous starch. However, the combination of this starch with hydrocolloids was not the object of any of the claims before the examining division or filed with the statement setting out the grounds of appeal.
 - 2.3 Although the amendment in claim 1 might overcome the board's objections under Article 123(2) EPC as regards previous requests, it nevertheless amounts to the presentation of a fresh case. If the new main request were to be admitted into the proceedings, the examination carried out so far on the basis of documents D1 and D2 would become pointless. Moreover, the focus of the proceedings would shift to clarity and to interpretation of the feature "agglomerated porous

starch" and, more importantly, examination would have to concentrate on a different set of prior-art documents. In short, admitting this request at this stage of the proceedings would go against the EPO's and the boards' interest in bringing the examination and appeal procedure efficiently to a close.

2.4 The fact that the new main request concerns fresh subject-matter is additionally highlighted by the following:

2.4.1 The present application was filed as an international application, and the EPO had acted as the International Searching Authority. In that role it had carried out an international search and established a written opinion, in which it raised objections of lack of unity because two groups of inventions had been identified in the set of claims:

- the first group of inventions related to an emulsion-like composition comprising water, flavouring agents, edible lipids and **porous starch** as principal carbohydrate component; and
- the second group of inventions related to an emulsion-like composition comprising water, flavouring agents, edible lipids and a carbohydrate component chosen from the group consisting of **pregelatinized starch**, maltodextrins and mixtures thereof.

2.4.2 Upon entry into the European phase, in reply to the examining division's communication pursuant to Rules 161(1) and 162 EPC, the appellant/applicant maintained a set of claims wherein the subject-matter of the sole independent claim 1 was limited to

pregelatinized starch as a mandatory feature. The set of claims no longer referred to porous starch, let alone agglomerated porous starch. All sets of claims filed in the subsequent examination proceedings, including those filed with the statement setting out the grounds of appeal, were limited to pregelatinized starch as the mandatory, essential ingredient. It was not until the new main request was filed that (agglomerated) porous starch was introduced into claim 1 as a mandatory feature.

2.4.3 Thus, the appellant's new main request effectively aims at starting second examination proceedings on an invention that it had not pursued before.

2.5 In summary, the new main request might be suitable for resolving objections raised under Article 123(2) EPC, but at the same time it introduces into the proceedings considerably different subject-matter which in fact amounts to the presentation of a fresh case. By virtue of its powers under Article 111(1), second sentence, EPC the board exercises its discretion not to admit the new main request into the proceedings, in accordance with Rules 137(3) and 100(1) EPC.

2.6 Consequently, there is no valid set of claims on file which has been approved by the applicant and allowed by the board, Article 113(2) EPC. Thus, the appeal is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated