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**Datasheet for the decision
of 4 February 2021**

Case Number: T 0960/17 - 3.3.07

Application Number: 06770085.6

Publication Number: 1888042

IPC: A61K9/36

Language of the proceedings: EN

Title of invention:

FLAVORING OF DRUG-CONTAINING CHEWING GUMS

Patent Proprietor:

Johnson & Johnson Consumer Inc.

Opponent:

Fertin Pharma A/S

Headword:

Flavoring of drug-containing chewing gums / JOHNSON & JOHNSON

Relevant legal provisions:

EPC Art. 100(a), 56

RPBA Art. 13

Keyword:

Late-filed request - admitted (yes)

Inventive step - (no)



Beschwerdekammern

Boards of Appeal

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Case Number: T 0960/17 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 4 February 2021

Appellant: Fertin Pharma A/S
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 9 February 2017
rejecting the opposition filed against European
patent No. 1888042 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairwoman Y. Podbielski
Members: E. Duval
M. Steendijk

Summary of Facts and Submissions

- I. European Patent 1 888 042 (the patent) was granted on the basis of 18 claims.

Claim 1 of the patent as granted read as follows:

"A chewing gum comprising:

- (a) a core;
- (b) at least one active pharmaceutical ingredient (API) within the core wherein the API comprises nicotine in any form;
- (c) at least one inner polymer film coating applied onto the core, wherein the polymer is selected from hydroxypropylmethyl cellulose (HPMC) and/or hydroxypropyl cellulose (HPC); and
- (d) at least one outer hard coating applied onto the outermost inner polymer film coating,

wherein the core comprises at least one first flavoring agent and the at least one inner polymer coating comprises at least one second flavoring agent, whereby the flavor perceived upon chewing of the chewing gum predominantly is the flavor provided by the at least one second flavoring agent."

Claim 18 of the patent as granted read as follows:

"A process for the manufacture of a nicotine-containing chewing gum comprising the following steps:

- (a) loading a chewing gum base into a pre-heated mixer with agitation;
- (b) adding at least one flavoring agent, at least one sweetener, a pH regulating agent and a nicotine resin complex;

(c) forming a mixture with agitation until a homogenous distribution of ingredients is obtained as a gum mass;

(d) extruding the gum mass;

(e) conditioning the extruded gum mass;

(f) rolling the extruded gum mass;

(g) scoring the rolled gum mass to form one or more sheets;

(h) breaking apart each scored sheet to form individual chewing gum cores;

(i) preparing a polymer-containing coating solution comprising hydroxypropylmethyl cellulose (HPMC), a second sweetener and a second flavoring agent;

(j) loading the chewing gum cores into coating pans;

(k) spraying the chewing gum cores with the solution of (i) to form coated gum cores;

(l) preparing a hard coating solution comprising a third sweetener and, optionally, a third flavoring agent and, optionally, a non-ionic emulsifier;

(m) loading the coated gum cores into coating pans;

(n) spraying the coated gum cores in cycles with the hard coating solution of (l) to form hard coated gums; and

(o) optionally spraying a wax onto the hard coated gums in order to provide a glossy finish."

II. An opposition was filed against the patent on the grounds that its subject-matter lacked inventive step, was not sufficiently disclosed and extended beyond the content of the application as filed.

III. In the present decision, reference is made to the following documents:

D1: WO 02/102357

D2: WO 93/20709

D3: US 2003/0053962

D4: WO 00/35298

D6: Declaration by Gregory Koll dated 20 May 2010

D8: Annex A (comparative data) to the letter of the patent proprietor dated 7 October 2016

IV. The opposition division took the decision to reject the opposition filed against the patent.

In particular, the opposition division decided that:

(a) Claim 1 of the patent met the requirements of Article 123(2) EPC and of sufficiency of disclosure.

(b) Example 2 of D1 represented the closest prior art. The claimed subject-matter differed by the at least one outer hard coating applied onto the HPMC and/or HPC polymer film coating, and by the at least one second flavouring agent in the inner polymer film coating. No resulting technical effect had been shown. The objective technical problem was the provision of an alternative chewing gum. The claimed solution was not obvious in light of the prior art.

V. The opponent (appellant) lodged an appeal against the decision of the opposition division.

VI. In reply to the appellant's grounds of appeal, the patent proprietor (respondent) defended its case on the

basis of the patent as granted as the main request (see I. above), and on the basis of auxiliary requests 1 and 2 filed on 7 October 2016 during the proceedings before the opposition division.

Claim 1 of auxiliary request 1 differed from claim 1 as granted by the additional feature that the amount of second flavouring agent in the inner polymer coating was "from 30 to 60% by weight".

Claim 1 of auxiliary request 2 differed from claim 1 as granted by the additional feature "the polymer coating is from 0.5% and 20% by weight of the uncoated gum core".

VII. On 13 June 2019, the Board summoned the parties to oral proceedings. The Board set out its preliminary opinion in a communication under Article 15(1) RPBA 2020 dated 28 January 2020.

VIII. By letter dated 27 March 2020, the respondent filed auxiliary request 3.

Claim 1 of auxiliary request 3 differed from claim 1 as granted by the additional feature that the amount of second flavouring agent in the inner polymer coating was "from 30 to 50% by weight".

IX. On 4 February 2021, oral proceedings were held before the Board. During the oral proceedings, the respondent filed auxiliary request 4, which consisted of a single claim 1 identical to process claim 18 as granted (see I. above).

X. The appellant's arguments can be summarised as follows:

(a) Main request, inventive step

Example 2 of D1 could be taken as the closest prior art. It disclosed the preparation of a buffered film coating comprising HPMC. This coating could be applied to any of the cores from example 5, as disclosed in the paragraph bridging pages 10 and 11 of D1. All the cores of example 5 comprised nicotine and a flavour.

The differentiating features of claim 1 were:

- 1) the requirement for the polymer film to comprise a flavour, which is predominant upon chewing; and
- 2) the presence of a hard outer coating on top of the polymer film.

Regarding the presence of a flavour in the polymer film, no effect had been shown. The processing advantages mentioned in paragraph [0049] of the patent were not associated with the product, but at best with a method of making that product. As such, these could not be taken into account when assessing inventive step of the product. The claimed product was not superior in any way as a result of the flavour being in the coating, as opposed to anywhere else in the composition. There was no evidence either showing any effect of the hard coating.

Therefore, the objective technical problem was the provision of an alternative chewing gum.

Inclusion of a flavour into the HPMC layer of the gum compositions of D1 was obvious in particular in

view of D2 or D3, and would inevitably result in "flavour predominance" considering paragraph [0049] of the opposed patent. D2 discloses a chewing gum with an HPMC film comprising an active agent, such as a flavour component. D2 specifically mentioned that "improved flavour impact" could be achieved by placing the flavour in the polymer film. D3 taught that HPC films containing flavour could be used to coat confectionary products and other food. According to paragraph [0017] of D3, the flavour component could amount to up to 60% of the film.

D1 indicated that a hard coating on the outside may be present, and contemplated that the chewing gum composition contain multiple coatings. D4 also advised the use of a hard coating for nicotine gum compositions.

Thus the main request did not meet the requirements of inventive step.

- (b) Admittance of the appellant's objections to auxiliary requests 1-3 into the proceedings

The appellant's objections to auxiliary requests 1-3 should be admitted into the proceedings, because these objections relied on the same facts and passages of the same documents. Furthermore, the appellant had requested revocation of the patent in its entirety. The appealed decision was based on the main request only, which was addressed in the appellant's grounds of appeal.

(c) Auxiliary requests 1-3, inventive step

Starting from D1 as closest prior, the subject-matter of auxiliary requests 1 and 3 additionally differed in that the amount of second flavouring agent in the inner polymer coating was 30-60% or 30-50%. It was however obvious to incorporate such high amounts of flavouring agent into the coating to achieve a dominant flavouring. D3 disclosed contents of up to 60% flavours.

As to auxiliary request 2, the sum of the components in the core of example 5 of D1 amounted to about 1000 mg per unit. The sum of the components in the polymer coatings of example 2 of D1, excluding water and ethanol, amounted to about 40-80mg, and thus fell within the broad range of 0.5%-20% by weight of the uncoated gum core, as required by claim 1 of auxiliary request 2. Accordingly, auxiliary request 2 did not introduce any additional differentiating features over D1 in comparison with the main request.

Thus auxiliary requests 1-3 did not meet the requirements of Article 56 EPC either.

(d) Auxiliary request 4, inventive step

The process of claim 1 of auxiliary request 4 defined conventional method steps and led to a product which did not involve itself an inventive step. Step (i) of this claimed process differed from the closest prior art represented by example 2 of D1 in that a second sweetener and a second additive were incorporated. The presence of these additives was however considered in D1 (see page

18, lines 8-15). The panning technique of the subsequent steps was also known from D1 (see page 10 and example 1). The order of the claimed steps was obvious since it was dictated by the sequence of core and coating layers in the chewing gum.

Accordingly, auxiliary request 4 did not meet the requirements of Article 56 EPC.

XI. The respondent's arguments can be summarised as follows:

(a) Main request, inventive step

Starting from example 2 of D1 as closest prior art, the subject-matter of claim 1 differed in that:

(1) the chewing gum comprised at least one outer hard coating applied onto the polymer film coating, and

(2) the inner polymer coating comprised at least one second flavouring agent, whereby the flavour perceived upon chewing of the chewing gum predominantly was the flavour provided by the at least one second flavouring agent.

The inner polymer film coating containing flavour had among others the technical effect of prolonging flavour sensation (see paragraphs [0049] and [0051] of the patent). Also, as shown in comparative studies with other commercially available chewing gums (see D8), the inner polymer film containing a second flavouring agent provided a chewing gum with improved flavour characteristics. In addition, the inner polymer film coating containing a second flavour enabled a single core containing a first flavour to be used in different flavour gums. A

further advantage was that flavourings, such as cinnamon, which were incompatible with nicotine could be held in isolation from the nicotine (see paragraph [0051] of the patent).

Furthermore, an effect of the presence of the second flavouring in the inner polymer film was that the flavour of the gum was changed (see paragraphs [0033] and [0049] of the patent). As shown in D6 and in example 1 of the patent, only HPMC and HPC could contain high loading of the second flavouring agent allowing the first flavouring agent to be overpowered.

Consequently, the objective technical problem was the provision of a nicotine containing chewing gum which provided prolonged flavour sensation, has improved flavour characteristics, and which could be manufactured in a variety of flavours. The technical problem could also be formulated as the provision of a chewing gum in which the flavour of the core is overpowered.

Although the prior art taught that flavourings could be added to a polymer coating based on HPMC or HPC, the question to be asked was whether the skilled person would, not could, have done so. The essential aspect of the invention disclosed in D1 was that the outer coating contained a buffer and nicotine, so as to provide the immediate dose of nicotine (see D1, page 16, lines 6-8 and page 21, lines 5-11). Thus, there was no pointer in D1 to put another coating on top of the outer coating, and no motivation to use the outer film coating disclosed in example 2 as an inner layer. The prior art did not provide any pointer either to include a

second flavouring agent in an inner polymer film coating of a chewing gum which already comprises a first flavouring agent in the core. In D1, the HPMC polymer was used in example 2 as a moisture barrier to separate nicotine hydrogen tartrate (NHT) and the buffer (see page 11, lines 3-16 and claim 21). There was no disclosure in D1 that this moisture barrier could contain a flavouring agent, let alone a second flavouring agent.

Thus the main request met the requirements of inventive step.

- (b) Admittance of the appellant's objections to auxiliary requests 1-3 into the proceedings

Auxiliary requests 1-2 had already been filed during the opposition proceedings. Auxiliary request 3 was filed in March 2020. The appellant had not raised any objections in writing against these requests. If the appellant had objections to the auxiliary requests, then these objections should have been set out in writing. The submissions made for the first time during oral proceedings represented new arguments which should not be admitted into the proceedings.

- (c) Auxiliary requests 1-3, inventive step

Regarding auxiliary request 1 and 3, as explained in D6, a technical effect of the HPMC or HPC polymer film coating was the ability to load a high concentration of flavour. The prior art did not teach an inner polymer film coating containing 30-60% or 30-50% by weight of a second flavouring agent. D3 related to rapidly disintegrating films

and was silent about the possibility to use such films in chewing gums to overpower the flavour in the core. Accordingly, the claimed subject-matter was not obvious.

Regarding auxiliary request 2, the prior art did not teach that the inner polymer coating may be from 0.5% to 20% by weight of the uncoated gum core.

(d) Auxiliary request 4, inventive step

The process of claim 1 of auxiliary request 4 differed from the teaching of example 2 of D1 by steps (i)-(n). The combined presence of a second flavouring agent and of a sweetener was not disclosed in D1. The steps of spraying and panning were also not shown in D1. The presence of the second flavour in the coating allowed this second flavour to predominate over the flavour in the core. Additionally, the claimed process allowed to obtain different flavours without changing the flavour in the core, and was consequently cheaper. The problem was to provide a simple and cost effective process for the manufacture of flavoured nicotine chewing gums allowing to change the flavour of the chewing gum without changing the core. The claimed solution involved an inventive step.

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

XIII. The respondent requests that the appeal be dismissed, or, as an auxiliary measure, that the patent be maintained on the basis of one of auxiliary requests 1

and 2 filed on 7 October 2016, auxiliary request 3 filed with letter dated 27 March 2020 or auxiliary request 4 filed during the oral proceedings before the Board.

The respondent further requests that the appellant's objections to auxiliary requests 1-3 not be admitted into the proceedings.

Reasons for the Decision

1. Main request (patent as granted), inventive step
- 1.1 Both parties consider that D1 can be taken as closest prior art. The Board concurs.
- 1.2 D1 relates to coated nicotine-containing chewing gums. Example 2 of D1 (see page 28) discloses a buffered film coating comprising the polymer HPMC. This coating can be applied (see paragraph bridging pages 10-11) to the cores shown in example 5 (see pages 31-35), which all contain nicotine and a flavour.

Thus D1 discloses a chewing gum comprising:

- (a) a core;
- (b) nicotine within the core;
- (c) one HPMC polymer film coating applied onto the core; and

wherein the core comprises a flavouring agent.

- 1.3 The chewing gum of claim 1 differs from this embodiment of D1 in that:

- (i) the chewing gum comprises at least one outer hard coating applied onto the polymer film coating, and

(ii) the inner polymer coating comprises at least one second flavouring agent, whereby the flavour perceived upon chewing of the chewing gum predominantly is the flavour provided by the at least one second flavouring agent.

- 1.4 According to the respondent, the claimed nicotine-containing chewing gum provides prolonged flavour sensation, has improved flavour characteristics, and can be manufactured in a variety of flavours.

However, the above distinguishing features are not demonstrated to lead to any of these improvements.

- 1.4.1 The respondent provided no evidence supporting the allegation that embedding the second flavour in the polymer coating slows its release or prolongs the flavouring sensation (see paragraph [0049] of the patent).
- 1.4.2 According to paragraph [0051], in the claimed chewing gum, the flavouring agent is held isolated from the API in the core, thus avoiding the possible problem of chemical or pharmaceutical incompatibility between the API and the flavouring agent. However, it is neither required by claim 1 that the second flavouring agent be incompatible with nicotine nor that it be held in isolation therefrom, since the presence of nicotine in the coating is not excluded.
- 1.4.3 Finally, document D8 does not contain sufficient information about the compositions of the chewing gums compared to allow the Board to ascertain whether the comparison is meaningful. It is thus not convincingly

shown that any technical effect observed in D8 has its origin in the distinguishing features of the invention.

- 1.4.4 No improvement with respect to manufacturing can be taken into account for the formulation of the technical problem either. This is because claim 1 relates to the chewing gum *per se*, and is not limited in terms of the process used for its production. The advantages set out in paragraph [0049] - that by using the same core with differently flavoured coatings, manufacturing costs are reduced and product approval for similar chewing gums by health authorities is facilitated - can only be considered in the context of the preparation of several such similar chewing gums, which is not the subject-matter of claim 1.
- 1.5 The respondent further referred to D6, in particular to paragraphs 4 and 8, as evidence that the choice of HPC or HPMC as polymer allows to incorporate higher flavour amounts in the inner coating. However the choice of this polymer does not constitute a differentiating feature over D1, and the content in second flavouring in the polymer coating is not defined in claim 1.
- 1.6 The respondent further argued that an the effect achieved by the claimed subject-matter was that the flavour perceived upon chewing of the chewing gum predominantly is the flavour provided by the at least one second flavouring agent.

In the Board's opinion, there can be no doubt that, in the claimed chewing gum, the flavour perceived upon chewing predominantly is the flavour provided by the second flavoring agent, since this is a feature of the claim. However, the fact that the flavour perceived is predominantly that of the second flavoring agent

located in the inner coating merely describes a structural feature of the chewing gum, from which no technical effect achieved by the claimed chewing gum as a whole over the closest prior art can be inferred. As submitted by the appellant, the claimed product is not superior in any way as a result of the flavour being distributed in the chewing gum as required by claim 1. The fact that the structure of the chewing gum is as defined in claim 1 cannot as such be considered as an advantage.

1.7 Consequently, the objective technical problem, starting from D1, is the provision of an alternative chewing gum.

1.8 Regarding (i) the presence of an outer hard coating applied onto the polymer film coating, D1 contemplates that the chewing gum may comprise more than one coating layer (see page 9, lines 29-32). A sugar coating, i.e. a hard coating, is suggested on page 9, line 31, page 10 and claim 21 of D1.

According to the respondent, the crux of the invention of D1 is to employ an outer coating containing buffer and nicotine to provide the instant nicotine kick. Consequently, the skilled person, starting from D1, would not consider adding an outer hard coating onto the polymer film coating of example 2 and thus make this outer coating of D1 an inner coating.

The Board does not share this opinion. D1 does not require that the nicotine be present in the outer layer but merely in "at least one of the at least one coating layers" (see page 21, lines 5-11, and page 16, lines 6-8). Thus the nicotine-containing HPMC layer of example 2 of D1 is not necessarily the outer layer. On

the contrary, the above mentioned passages on pages 9-10 of D1 generally indicate that several coating layers may be present, including a hard coating on the outside. The Board notes that claim 1 of the main request does not preclude the presence of nicotine in any of the coating layers, including the outer hard coating. Thus the addition of a hard coating does not depart from the framework of the invention defined in D1.

- 1.9 As to (ii) the presence of a second flavoring agent in the inner polymer coating, D1 generally proposes to add additives, including flavours, "to the chewing gum core and/or to coating layers" (see page 18, lines 7-12). Contrary to the respondent's opinion, the HPMC layer of example 2 of D1 represents such a coating layer comprising nicotine and additives, and not merely a moisture barrier separating NHT and buffer as in the embodiment of claim 21.

The respondent argues that the prior art contains no pointer to include a second flavouring agent in an inner polymer film coating of a chewing gum which already comprises a first flavouring agent in the core. However, the skilled person, starting from D1 and seeking to provide an alternative flavoured nicotine-containing chewing, may contemplate any of the options suggested in D1 and may in particular choose to add additives such as flavours to the "core and/or to coating layers". The choice of the claimed structure, where flavours are present in both, is not associated with any technical effect and represents an arbitrary choice from the teaching of D1.

The skilled person is furthermore well aware that the flavour perceived upon chewing will be determined by

the flavours present in the chewing gum. It would be immediately apparent to the person skilled in the art that the presence of high amounts of the second flavoring agent would lead to the predominance of that flavour. The possibility for the claimed polymers to incorporate high amounts (up to 60%) of flavoring agent is known from D3 (see paragraph [0017]). The respondent acknowledged that the coating of D3, comprising both HPC and modified starch, qualifies as a polymer film coating wherein the polymer is selected from HPMC and/or HPC in the sense of claim 1. Thus the selection of a flavour make-up in the chewing gum such that the second flavoring agent is predominant does not require the exercise of inventive skills.

Considering that the problem to be solved has been defined as the provision of an alternative, the alleged lack of a pointer to the particular arrangement of coating layers and flavours of claim 1, or the opposition division's reference to the could/would approach, does not affect this conclusion. It is established case law that the simple act of arbitrarily selecting one among equally obvious alternative variations is devoid of any inventive character (see the Case Law of the Boards of Appeal, 9th edition, 2019, I.D.9.19.8).

In conclusion, the subject-matter of the main request does not involve an inventive step.

2. Admittance of the appellant's objections to auxiliary requests 1-3 into the proceedings

2.1 In the appeal proceedings the respondent filed auxiliary requests 1 and 2 with its reply to the grounds of appeal on 2 November 2017. These requests had already been filed during the opposition proceedings on 7 October 2016. Auxiliary request 3 was filed with a further letter dated 27 March 2020.

The appellant did not express its objections against these auxiliary requests between the time of their filing and the oral proceedings before the Board. Only during the oral proceedings did the appellant set out its objections as to inventive step against auxiliary requests 1-3.

The respondent requests that these objections not be admitted into the proceedings.

2.2 The RPBA 2020 entered into force on 1 January 2020. However, the summons to oral proceedings in the present case were notified before 1 January 2020. Accordingly, under Article 25(3) RPBA 2020, Article 13(2) RPBA 2020 does not apply to the present case. Instead, Article 13 RPBA 2007 is applicable.

2.3 The Board admitted the objections into the proceedings for the following reasons.

The appellant had, in its grounds of appeal, set out the reasons why it requested that the appealed decision be reversed and the patent revoked, and in particular the facts, arguments and evidence supporting its objection of lack of inventive step against the sole request underlying the appealed decision, namely the

patent as granted. The appellant's objection of lack of inventive step against auxiliary requests 1-3 relies on the same facts and evidence as for the main request, in particular on examples 2 and 5 of D1. The objection develops the arguments against claim 1 of the main request in light of the restrictions to claim 1 made in the auxiliary requests while remaining within the framework of the appellant's appeal case. In addition, neither the amendments to claim 1 introduced by the auxiliary requests nor the appellant's line of argument is complex.

3. Auxiliary requests 1-3, inventive step

Starting from the same closest prior art D1 as for the main request, the subject-matter of auxiliary requests 1 and 3 additionally differs in that the amount of second flavoring agent in the inner polymer coating is 30-60% or 30-50%. The Board shares the appellant's opinion that incorporating these high amounts of flavoring agent into the chewing gum coating to get a dominant flavoring is obvious, especially considering that the possibility for the claimed polymers to incorporate such high amounts of flavoring agent is known from D3 (see paragraph [0017]). Accordingly, the further limitations to claim 1 of auxiliary requests 1 and 3 do not overcome the lack of inventive step.

As to auxiliary request 2, the sum of the components in the core of example 5 of D1 amounts to about 1000 mg per unit. The sum of the components in the polymer coatings of example 2 of D1, excluding water and ethanol, amount to about 4-8% of the weight of the uncoated gum core, and thus fall within the range of 0.5%-20% of claim 1 of auxiliary request 2. Thus, claim 1 of auxiliary request 2 does not introduce any

additional differentiating features over D1 in comparison with the main request.

Accordingly, none of auxiliary requests 1-3 meets the requirements of inventive step.

4. Admittance of auxiliary request 4 into the proceedings

The Board admitted auxiliary request 4 into the proceedings. Given the Board's finding that auxiliary request 4 lacks an inventive step (see 5. below) the Board's reasoning as regards admittance of that request is of no relevance to the decision taken save for the considerations below.

The Board notes that the respondent, during the discussion on the admittance of auxiliary request 4, emphasised the fact that no specific objection had been made by the appellant during opposition or appeal proceedings to the process claim which is the only claim of auxiliary request 4, so that the respondent had no case to answer. The Board agrees with the appellant that in the present case, where the notice of opposition declared that the opposition was directed against the patent in its entirety, and where much of the arguments against the product claim can be seen as of relevance to the process claim, there is a case to answer. The Board also sees no reason why the appellant should have been prevented from arguing on inventive step given the timing of the filing of auxiliary request 4.

5. Auxiliary request 4, inventive step

In the closest prior art D1, the chewing gum core is prepared by mixing, rolling and scoring ingredients

(including nicotine complex, flavouring agent, a sweetener and pH regulating agent) and then coating with a an HPMC composition (see examples 2 and 5).

The Board agrees with the respondent that the process of claim 1 of auxiliary request 4 differs by steps (i)-(n): in steps (i)-(k), the combined presence of a second flavouring agent and of a sweetener in the (first) coating is not disclosed in said embodiment of D1. Since the chewing gum of examples 2 and 5 of D1 comprises only one coating layer, the steps (l)-(n) of spraying and panning to form a hard coating are also not described in D1. Regarding the remaining steps of claim 1, the appellant submitted, and the respondent did not contest, that these define conventional method steps.

According to the respondent, the presence of the second flavour in the coating allowed this second flavour to predominate over the flavour in the core. However, the Board notes that claim 1 of auxiliary request 4 requires neither that the second flavour in the coating predominates, nor that it be present in such amounts that it be predominant over the flavour in the core. There is no evidence for the allegation that the mere presence of this second flavour in the polymer would allow it to dominate over the flavour in the core, irrespective of the types and amounts of flavours considered (see paragraph [0049] of the patent). Therefore any manufacturing advantages associated with the possibility to overpower the flavor of the core cannot be taken into account. Even if the process of claim 1 of auxiliary request 4 were assumed to lead to the predominance of the second flavour, this would not constitute an advantage over the known process for the reasons set out above (see 1.6).

Thus the technical problem is the provision of an alternative process for the preparation of flavoured nicotine chewing gums.

D1 contemplates the presence of other additives in the chewing gum core and/or the coating layers. Among these additives, D1 mentions not only flavours but also sweeteners (see page 18, lines 8-12). The addition of these components as required by steps (i)-(k) is thus one of the options that the skilled person would consider starting from D1. As to the addition of a hard coating using the panning technique of the subsequent steps (l)-(n), it is also generally disclosed in D1 (see page 10 and example 1). Considering that these modifications are suggested by D1 and are not associated with any advantage, the subject-matter of claim 1 of auxiliary request 4 is not regarded as inventive.

Accordingly, auxiliary request 4 does not meet the requirements of Article 56 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairwoman:



B. Atienza Vivancos

Y. Podbielski

Decision electronically authenticated