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**Datasheet for the decision  
of 17 September 2021**

**Case Number:** T 2170/17 - 3.3.09

**Application Number:** 07113805.1

**Publication Number:** 2025240

**IPC:** A23G9/34, A23G9/32, A23G9/42

**Language of the proceedings:** EN

**Title of invention:**

Natural stabiliser system for frozen dessert

**Patent Proprietor:**

Société des Produits Nestlé S.A.

**Opponent:**

Delica AG

**Headword:**

Natural stabiliser system/NESTLÉ

**Relevant legal provisions:**

EPC Art. 54, 56

**Keyword:**

Novelty - main request (yes)  
Inventive step - main request (yes)  
Oral proceedings - withdrawal of request for oral proceedings



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

**Case Number: T 2170/17 - 3.3.09**

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 17 September 2021**

**Appellant:** Société des Produits Nestlé S.A.  
(Patent Proprietor) Entre-deux-Villes  
1800 Vevey (CH)

**Representative:** Rupp, Christian  
Mitscherlich PartmbB  
Patent- und Rechtsanwälte  
Postfach 33 06 09  
80066 München (DE)

**Appellant:** Delica AG  
(Opponent) Bresteneeggstrasse 4  
5033 Buchs AG (CH)

**Representative:** Riederer Hasler & Partner Patentanwälte AG  
Elestastrasse 8  
7310 Bad Ragaz (CH)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
19 July 2017 concerning maintenance of the  
European Patent No. 2025240 in amended form.**

**Composition of the Board:**

**Chairman** A. Haderlein  
**Members:** F. Rinaldi  
D. Rogers  
A. Veronese  
F. Blumer

## Summary of Facts and Submissions

- I. This decision concerns the appeals filed by the patent proprietor and the opponent against the opposition division's interlocutory decision that European patent No. 2 025 240 as amended met the requirements of the EPC.
- II. All parties to the proceedings are appellants. In the following they will be referred to by their party status before the opposition division.
- III. With its notice of opposition, the opponent had requested that the patent be revoked based on Article 100(a) EPC for lack of novelty and inventive step.
- IV. The documents submitted during the opposition proceedings included:
  - 03: "160410200000 Vieille Prune Sélection Becher" (Midor recipe)
  - 04: "160410000000 Grappa Sélection Becher" (Midor recipe)
  - 05: "160410100000 Marc de Champagner Sélection Becher" (Midor recipe)
  - 023: J. Fischer, "Ballaststoffe in Speiseeis" (print-out of a slide presentation at: Inter-Eis 2000, International ZDS Symposium, 13-15 November 2000)
  - 080: "Meyprogen™ FA-1675/IC - Basis Rezeptur" (Rhodia product information, not dated)

V. In the decision under appeal, the opposition division decided, *inter alia*, that:

- claim 8 of the patent as granted (main request) lacked novelty over the prior-use ice-cream products P1 to P3; and
- auxiliary request 2, filed at the oral proceedings on 21 March 2017, fulfilled the requirements of the EPC.

VI. On appeal, the patent proprietor filed seven auxiliary requests. The opponent filed, *inter alia*, the following documents:

- O97: J. Schormüller, "Lehrbuch der Lebensmittelchemie", 2nd ed., Berlin: Springer-Verlag, 1974, 104-107
- O98: "Stärkenachweis mit Iodlösung" (photos of experiment)
- O100: "Amtliche Sammlung von Untersuchungsverfahren nach § 35 LMBG: Untersuchung von Lebensmitteln - Bestimmung von Stärke in Kinder-Zwieback und Zwiebackmehl", May 1985, 1-4
- O101: Ohtsubo K et al., "Cultivar identification of rice by PCR method and its application to processed rice products", International Union for the Protection of New Varieties of Plants, Geneva, 15 August 2003, 1-8
- O103: "Amtliche Sammlung von Untersuchungsverfahren nach § 35 LMBG: Untersuchung von Lebensmitteln - Bestimmung der Ballaststoffe in Lebensmitteln", January 1997, 1-6
- O104: "Prüfbericht" (No.: 17-13302, Sample: Glacemix 8170672), 11 July 2017

VII. The claims that are relevant for this decision are claims 1, 2, 3 and 8 of the patent as granted (main request):

"1. Stabiliser system of natural ingredients for use in frozen confectionery characterised in that it comprises native rice starch, egg yolk as a natural emulsifier and citrus fibres.

2. Use of a stabiliser system according to claim 1 in the manufacture of frozen confectionery.

3. Method for the manufacture of a frozen confectionery comprising the steps of:

a. Blending frozen confectionery ingredients with a stabiliser system of natural ingredients comprising native rice starch, egg yolk and citrus fibres,

b. Pasteurising the mix,

c. Homogenising the ice cream mix in a first stage at a pressure of 150-250 bars, preferably 180-250 bars, more preferably 200-230 bars and in a second stage at pressures between 10-80 bars,

d. Freezing the mix.

8. Frozen confectionery product characterised in that it comprises native rice starch, egg yolk as a natural emulsifier and expanded citrus fibers."

VIII. The board summoned the parties to oral proceedings and issued a communication under Article 15(1) RPBA 2020. In this communication, the board explained its preliminary opinion that it appeared that the main request was allowable, that the decision under appeal had to be set aside and that the patent had to be maintained as granted.

IX. The opponent informed the board that neither it nor its representative would attend the oral proceedings.

X. The board cancelled the oral proceedings.

XI. The patent proprietor's arguments that are relevant to the present decision can be summarised as follows:

Novelty: it was not possible to analyse the composition of ice-cream products P1 to P3 and identify the components.

Inventive step: there was no suggestion in the art of how to provide an "all natural" frozen confectionery having good organoleptic aspects such as creaminess. In particular, the stabiliser system from the patent was not suggested in the prior art.

XII. The opponent's arguments that are relevant to the present decision can be summarised as follows:

Novelty: the skilled person did not face any obstacle to analysing the composition of ice-cream products P1 to P3. Methods for identifying starch, rice cultivar and fibres were known in the art.

Inventive step: starting from any of O23, O80 or P1 to P3 as the closest prior art, the skilled person would have arrived at the stabiliser system from the patent. The solution to the technical problem of providing an ice-cream product with a creamier texture would have been obvious. The claims of the main request lacked inventive step.

XIII. The parties' requests are as follows:

The patent proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, alternatively, based on auxiliary request 1 or auxiliary request 2, which were filed with the statement setting out the grounds of appeal, or based on one of auxiliary requests 3 to 7, which were filed by letter dated 6 August 2018.

The opponent requested that the decision under appeal be set aside and that the patent be revoked.

### **Reasons for the Decision**

1. The patent relates to an "all natural" frozen confectionery which can be manufactured without resorting to artificial ingredients. Standard stabiliser systems which comprise "E numbers" or chemically synthesised compounds can be dispensed with and organoleptic aspects such as creaminess are not compromised. The stabiliser system in the patent comprises native rice starch, egg yolk and citrus fibres. The citrus fibres may be expanded, i.e. processed so as to increase their surface area (paragraphs [0020], [0042] and [0052]).
2. *Main request - novelty*
  - 2.1 In the decision under appeal, the opposition division concluded that:
    - ice-cream products P1 ("Vieille Prune Sélection Becher"), P2 ("Grappa Sélection Becher") and P3

("Marc de Champagne Sélection Becher"), based on recipes O3 to O5, respectively, had been sold to the public;

- P1 to P3 comprised expanded citrus fibres, egg yolk and native rice starch;
- their composition was available to the public before the date of filing of the patent in suit; and
- claim 8 as granted was not novel.

2.2 The opponent agreed with the decision and argued that claims 1 and 2 also lacked novelty in view of P1 to P3. The patent proprietor contested the opposition division's decision.

2.3 One of the issues in dispute was whether the composition of P1 to P3 was analysable. Here, the question was whether it would have been possible to determine that P1 to P3 included native rice starch, (expanded) citrus fibres and egg yolk.

2.4 As regards the question of whether the composition of P1 to P3 is analysable, the board's communication sets out the following (in points 4.3 and 4.4):

*"... The opposition division considered this analysis 'difficult and tedious' but possible. No further explanations were provided. On appeal, the opponent filed several documents to support its view that the composition of P1 to P3 was analysable (including O96 to O107). The patent proprietor argued that this evidence should not be admitted and that it was not conclusive.*

*It appears that even if the opponent's evidence is admitted into the proceedings, there will still be*



*uncertainty as to whether the skilled person could have determined analytically the relevant aspects of the composition of P1 to P3. For instance, O97, O98 and O100 show that starch can be identified in a sample and O101 that rice cultivar can be analysed by PCR method. However, it appears that this evidence, taken together, still does not allow to conclude that a sample (here: P1 to P3) includes rice starch, more particularly native rice starch. Similar considerations apply also for the (expanded) citrus fibres: O103 and O104 do not appear to show that apple fibres and citrus fibres are analytically distinguishable.*

*Consequently, it appears that P1 and P3 do not disclose at least the features native rice starch and (expanded) citrus fibres.*

*4.4. Thus, on this basis already, the subject-matter of claims 1, 2 and 8 appears to be novel over P1 to P3."*

2.5 The opponent did not provide any counter-arguments. Therefore, the board has no reason to review its preliminary opinion.

2.6 The subject-matter of claims 1, 2 and 8 is novel (Article 54 EPC).

3. *Main request - inventive step*

3.1 The opponent argued that all the claims of the main request, in particular claims 1 to 3 and 8, lacked inventive step. The closest prior art used was P1 to P3, O23 or O80.

3.2 As regards the inventive step of the main request, the board's communication sets out the following (in points 5.2 to 5.6):

*"5.2 Whether P1 to P3 may be used as closest prior art depends on whether the composition and structure of these products is analysable, as discussed above. At present this seems to be questionable.*

*5.3 O23 as the closest prior art*

*5.3.1 In the context of the discussion on inventive step of auxiliary request 2, the opposition division decided that O23 was available to the public and that it was the closest prior art ...*

*5.3.4 It appears to be uncontested that the distinguishing features of claims 1 and 3 are native rice starch and egg yolk. O23 does not disclose these ingredients.*

*5.3.5 The opponent acknowledged that the distinguishing features provide an ice cream composition that does not comprise stabilisers having an E-number and yet has an improved creaminess. Therefore, in line with the patent in suit (paragraph [0052]), the technical problem appears to be to provide a stabiliser system in which "E-numbers" or chemically synthesised compounds are dispensed with and which provides a more appealing product (ice cream) to the consumer.*

*5.3.6 The opponent argued that the solution would have been obvious in view of O80.*

*It is observed that the opposition division did not regard this document as prior art and did not admit it into the proceedings, a decision that the opponent contested. Therefore, whether O80 is prior art may have to be discussed.*

*5.3.7 However, irrespective of whether O80 is prior art, it appears that the skilled person starting from O23 would have had no motivation to turn to the stabiliser of O80 to provide an ice cream with an improved creaminess. There appears to be no pointer in that document to solve the technical problem.*

*5.3.8 Thus, it appears that starting from O23, claims 1 and 3 involve an inventive step.*

*5.4 O80 as the closest prior art*

*5.4.1 As explained above, the first question is whether this document, currently not in the proceedings, should be admitted into the proceedings.*

*5.4.2 Even if O80 was considered prior art, in particular closest prior art, there appears to be no motivation or pointer for the skilled person to add citrus fibres to improve organoleptic properties such as creaminess of the ice cream.*

*5.5 The opponent also argued that claims 2 and 8 lacked inventive step, starting from O23 as the closest prior art. In view of what is stated above (points 5.3 to 5.3.8), it appears that these claims too involve an inventive step.*

5.6 *To conclude, at present it appears that claims 1 to 3 and 8 involve an inventive step. The same applies to dependent claims 4 to 7 and 9 to 14."*

- 3.3 The opponent did not provide any counter-arguments. Therefore, the board has no reason to review its preliminary opinion.
- 3.4 For completeness, it is noted that the opponent's inventive-step attack based on P1 to P3 concerned claim 1. The opponent started from the assumption that P1 to P3 disclosed native rice starch, citrus fibres and egg yolk and argued that the skilled person would understand these three ingredients to be the natural stabiliser system of the ice-cream composition. However, as set out above, P1 to P3 do not disclose native rice starch and (expanded) citrus fibres. Therefore, the opponent's inventive-step attack based on P1 to P3 is also unsuccessful.
- 3.5 The subject-matter of claims 1 to 3 and 8 involves an inventive step (Article 56 EPC). The same applies to dependent claims 4 to 7 and 9 to 14.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated