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**Datasheet for the decision
of 18 January 2022**

Case Number: T 0298/18 - 3.3.09

Application Number: 10779417.4

Publication Number: 2498626

IPC: A23L1/29, A23L1/308, A61P1/00,
A61P1/12

Language of the proceedings: EN

Title of invention:

NUTRITIONAL COMPOSITION FOR PROMOTING GUT MICROBIOTA BALANCE
AND HEALTH

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponent:

N.V. Nutricia

Headword:

Nutritional composition/NESTLÉ

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

Amendments - added subject-matter (yes)



Beschwerdekammern

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Case Number: T 0298/18 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 18 January 2022

Appellant: Société des Produits Nestlé S.A.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 28 November
2017 revoking European patent No. 2498626
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
F. Blumer

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the patent proprietor (appellant) against the decision of the opposition division to revoke European patent No. 2 498 626.
- II. In the notice of opposition, the opponent (respondent) had requested that the patent be revoked in its entirety based on, *inter alia*, Article 100(c) EPC.
- III. On appeal, the appellant filed several claim requests. Only the main request and auxiliary requests 1 to 3, all filed by letter of 29 November 2021, are relevant to the decision.
- IV. The wording of the relevant claims is as follows:

Claim 1 of the main request:

"A nutritional composition for administration to an individual, comprising:

soluble fibre which is the combination of a fructo-oligosaccharide (FOS) in an amount of 35 to 44% by weight; a polysaccharide, wherein the polysaccharide is acacia gum ('AG') and is not partially hydrolysed guar gum (PHGG) and is present in an amount of 38% to about 50% by weight; and inulin in an amount of 12 to 24% by weight;

wherein the FOS and polysaccharide are present in a weight ratio of 62:38 to 38:62; and the FOS and inulin are present in a weight ratio of 82:18 to 58:42."

Claim 1 of auxiliary request 1:

Claim 1 is based on claim 1 of the main request. The term "which is the combination of" in the latter is replaced by "consisting of".

Claim 1 of auxiliary request 2:

Claim 1 is based on claim 1 of the main request with the feature "wherein the FOS and polysaccharide are present ... to 58:42" being deleted.

Claim 1 of auxiliary request 3:

Claim 1 is based on claim 1 of auxiliary request 1 with the feature "wherein the FOS and polysaccharide are present ... to 58:42" being deleted.

V. Final requests

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or one of auxiliary requests 1 to 3, all requests as filed with the letter dated 29 November 2021.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The patent's disclosure relates to nutritional compositions comprising dietary fibres for promoting gut microbiota balance and health. The nutritional composition includes the combination of a fructo-oligosaccharide (FOS), a polysaccharide, which is acacia gum (AG), and inulin in specified relative amounts (paragraphs [0001] and [0016]).
2. *Main request - added subject-matter*
 - 2.1 Claim 1 of the main request is directed to a nutritional composition comprising soluble fibre which is the combination of a FOS, AG and inulin. Further, it specifies amounts and ratios of the three components.
 - 2.2 The appellant's interpretation of claim 1 is that it is directed to a nutritional composition in which "soluble fibre" is only the combination of a FOS, AG, and inulin. In other words, claim 1 excludes any soluble fibre other than FOS, AG and inulin.
 - 2.3 The board accepts that claim 1 should be construed as proposed by the appellant.
 - 2.4 Thus the question is whether there is a basis in the application as filed for a nutritional composition in which the use of a soluble fibre other than FOS, AG and inulin is excluded.
 - 2.5 Claim 1 of the application as filed is directed to a composition comprising specified amounts and ratios of

- a FOS;
- a polysaccharide that is not partially hydrolysed guar gum (PHGG); and
- inulin.

2.6 This claim is the most generic disclosure of the invention of the application as filed. The claim does not require the polysaccharide to be a soluble fibre.

2.7 In paragraph [0020] of the application as filed, FOS and inulin are described as soluble fibres.

According to paragraph [0023] of the application as filed, the polysaccharide is preferably ("typically") an arabinogalactan, such as a gum. In an embodiment, it is AG. This gum is a highly branched, high molecular weight molecule that comprises galactose, arabinose, rhamnose and glucuronic acid. AG is slowly fermented compared with other soluble fibres.

2.8 Thus, according to the application as filed, FOS, AG and inulin are characterised as being soluble fibres. The three components have the property of being soluble fibres, so their combination is a combination of soluble fibres as well.

2.9 The skilled person would also derive from the application as filed that the nutritional composition includes FOS, AG and inulin in specified amounts and ratios. Support for this may be found for instance in paragraphs [0026] and [0106] and example 3.

2.10 However, this does not mean that the application as filed has a direct and unambiguous disclosure or teaching to exclude any soluble fibre other than FOS, AG and inulin.

- 2.11 The appellant referred to paragraph [0029] of the application as filed to support its argument that only FOS, AG and inulin were to be counted as part of the "soluble fibre". The paragraph reads:

"In yet another embodiment, the nutritional composition of the present disclosure further comprises at least one insoluble fiber, such as a soy fiber, an outer pea fiber or both. In an embodiment, at least one insoluble fiber is a combination of a soy fiber and an outer pea fiber. The ratio between the soluble fiber of the composition, i.e., FOS, arabinogalactans such as AG, and inulin, and the insoluble fiber is between 1.5:1 and 1:1.5, or between 1.25:1 and 1:1.25, or about 1:1 ..."

- 2.12 This paragraph discloses that the nutritional composition may include an insoluble fibre. The same optional feature is found in claim 7 of the application as filed. Furthermore, the paragraph discloses that the nutritional composition comprises the insoluble fibre in a defined ratio with the total of FOS, AG and inulin. These three fibres are described as the soluble fibre of the composition. A corresponding disclosure is found in claim 8 of the application as filed.

- 2.13 The expression "soluble fibre" (in the original text: "soluble fiber") as a class or category of fibres comes into play when the content of the insoluble fibre has to be defined. In this context, several observations are made.

Firstly, in the application as filed, "soluble fibre" is mostly used to characterise a property of a (dietary) fibre. This is already explained above, in

points 2.7 and 2.8. Moreover, it is used as a class or category of (dietary) fibres, in particular if the nutritional composition also includes an insoluble fibre. Thus "soluble fibre" in the application as filed does not have an unambiguous meaning.

Secondly, claim 1 of the main request does not call for an insoluble fibre. Thus the definition of soluble fibre given in this context, namely that of a class or category of dietary fibres, is not relevant.

Thirdly, both paragraph [0029] and claim 8 of the application as filed teach what is to be done if the nutritional composition includes an insoluble fibre: its content has to be in line with the content of the soluble fibre, which is FOS, AG and inulin. This disclosure underscores that a ratio of insoluble fibre and the total amount of FOS, AG and inulin has to be complied with. There is no teaching regarding other ingredients of the nutritional composition.

2.14 Thus paragraph [0029] and claim 8 of the application as filed provide no support for the contention that the application as filed teaches excluding any soluble fibre other than FOS, AG and inulin.

2.15 Rather, the opposite is true. The application as filed discloses that soluble fibre is preferably added to the nutritional composition. Therefore there is no teaching to (categorically) exclude it from the composition.

In particular, paragraph [0085] discloses a list of prebiotics that may be included in the nutritional composition. It is uncontested that the skilled person would regard many of the exemplified prebiotics (e.g. galactooligosaccharides) as soluble fibres.

Moreover, paragraph [0027] discloses that the nutritional composition may comprise FOS, AG and inulin (in specified concentrations) and, additionally, partially hydrolysed guar gum (PHGG). This is a soluble fibre, as paragraph [0121] confirms, and a preferred ingredient of the nutritional composition (paragraphs [0028] and [0120]).

- 2.16 It is true that claim 1 of the application as filed discloses the feature "polysaccharide that is not partially hydrolysed guar gum (PHGG)". This feature is retained in claim 1 of the main request.

However, the feature does not mean that adding a further soluble fibre is restricted or even excluded. As explained above, adding PHGG is a preferred option disclosed in the application as filed. The feature "polysaccharide that is not partially hydrolysed guar gum (PHGG)" merely ensures that PHGG is not taken into account in the calculation of the amounts and ratios of FOS, polysaccharide and inulin.

- 2.17 To conclude, the application as filed underscores that the nutritional composition, as a mandatory feature, requires specific amounts and ratios of three components, namely FOS, polysaccharide (which is preferably AG) and inulin. However, there is no direct and unambiguous disclosure to exclude any soluble fibre other than FOS, AG and inulin.
- 2.18 It follows from this that claim 1 has no basis in the application as filed.
- 2.19 Therefore the subject-matter of claim 1 involves added subject-matter (Article 123(2) EPC).

3. *Auxiliary requests 1 to 3 - added subject-matter*

- 3.1 Claim 1 of auxiliary request 1 is based on claim 1 of the main request. The term "which is the combination of" in the latter is replaced by "consisting of".

However, this amendment does not change the assessment of added subject-matter set out above. Therefore the same conclusion as for the main request applies.

- 3.2 Claim 1 of auxiliary requests 2 and 3 is based on the higher-ranking requests, with the feature "wherein the FOS and polysaccharide are present ... to 58:42" being deleted.

However, this amendment has no relevant impact on the assessment of added subject-matter set out above. For these claims too, the same conclusion as for the main request and auxiliary request 1 applies.

- 3.3 Therefore the subject-matter of claim 1 of auxiliary requests 1 to 3 involves added subject-matter (Article 123(2) EPC).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated