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**Datasheet for the decision  
of 9 March 2021**

**Case Number:** T 0879/18 - 3.2.04

**Application Number:** 11155965.4

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**IPC:** A21B3/13, A23G3/54, A23G3/34,  
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**Language of the proceedings:** EN

**Title of invention:**  
FOOD PRODUCT WITH A MOULDED BODY

**Patent Proprietor:**  
Kraft Foods R & D, Inc.

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

**Headword:**

**Relevant legal provisions:**  
RPBA Art. 12(4)  
EPC Art. 114(2), 123(2)

**Keyword:**

Late submitted material - correct exercise of discretion (no)  
- request admitted  
Amendments - allowable (no) - intermediate generalisation

**Decisions cited:**

T 0390/07, T 1018/02, T 2221/10

**Catchword:**

Reasons 3 : incorrect exercise of discretion



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Case Number: T 0879/18 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 9 March 2021**

**Appellant:** Kraft Foods R & D, Inc.  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
8 February 2018 concerning maintenance of the  
European Patent No. 2491788 in amended form.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** J. Wright  
W. Van der Eijk

## **Summary of Facts and Submissions**

- I. The appeals were filed by the proprietor and opponent against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 1 (now auxiliary request 2), the patent in suit met the requirements of the EPC.
- II. Amongst other things, the opposition division decided not to admit a new main request (now auxiliary request 1) into the proceedings. Moreover, it decided that the subject matter of the claims as amended during the opposition proceedings according to the present auxiliary request 2 did not extend beyond the content of the application as filed.
- III. Oral proceedings were held before the Board on 9 March 2021.
- IV. The appellant-proprietor requests that the decision under appeal be set aside and that the patent be maintained in amended form according to a main request or according to one of auxiliary requests 1 to 5 all refiled with the grounds of appeal.

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

- V. Independent claim 1 of the requests reads as follows:

Main request: "A food product (1), comprising at least one moulded chocolate body (10) and an array of baked items (20) wherein at least one member of the array of baked items forms a consumable unit together with at least a portion of the moulded body (10), and at least

one portion of at least one baked item (20) is not covered with chocolate and is visible from at least one side (14, 16) of the moulded body (10), and wherein the moulded body of a consumable unit extends beyond the periphery of at least one baked item (20) so that a gap is present between the periphery of the at least one baked item and the boundary of the consumable unit".

Auxiliary request 1: claim 1 reads as for the main request except that the *array feature* "and an array of baked items (20) wherein at least one member of the array of baked items forms a consumable unit together with at least a portion of the moulded body (10)" is replaced by the following feature (amendments emphasised by the Board):

"and an array of baked items (20) arranged on at least one side of a pair of opposing sides of the moulded body wherein ~~at least one~~ the members of the array of baked items forms a consumable unit together with at least a portion of the moulded body (10)"

Auxiliary request 2 reads as for the main request except that the *array feature* is replaced by the following feature:

"and an array of baked items (20) on each side of at least one pair of opposing sides (14, 16) of the moulded body wherein at least one member of the array of baked items forms a consumable unit together with at least a portion of the moulded body (10)"

Auxiliary request 3: "A food product (1), comprising at least one moulded chocolate body (10) and an array of baked items (20) or a substantially centrally located baked item (20), wherein at least one member of the

array of baked items or the centrally located baked item forms a consumable unit together with at least a portion of the moulded body (10), and at least one portion of at least one baked item (20) is not covered with chocolate and is visible from at least one side (14, 16) of the moulded body (10), and wherein the moulded body of a consumable unit extends beyond the periphery of at least one baked item (20) so that a gap is present between the periphery of the at least one baked item and the boundary of the consumable unit, and wherein at least one baked item (20) is placed within a cavity (15) of the moulded body (10)".

Auxiliary request 4: "A food product (1), comprising at least one moulded chocolate body (10) and an array of baked items (20) wherein each member of the array of baked items forms a consumable unit together with at least a portion of the moulded body (10), and at least one portion of each baked item (20) is not covered with chocolate and is visible from at least one side (14, 16) of the moulded body (10), wherein the moulded body of a consumable unit extends beyond the periphery of at least one baked item (20) so that a gap is present between the periphery of the at least one baked item and the boundary of the consumable unit, and wherein the consumable unit has predetermined breaking points, configured to facilitate the breakage of the food product (1) into smaller pieces by applying an external load".

Auxiliary request 5: "A food product (1), comprising at least one moulded chocolate body (10) and an array of baked items (20) or a substantially centrally located baked item (20), wherein at least one member of the array of baked items or the centrally located baked item forms a consumable unit together with at least a

portion of the moulded body (10), and at least one portion of at least one baked item (20) is not covered with chocolate and is visible from at least one side (14, 16) of the moulded body (10), and wherein the moulded body of a consumable unit extends beyond the periphery of at least one baked item (20), so that a gap is present between the periphery of the at least one baked item and the boundary of the consumable unit, and wherein at least one baked item (20) is arranged on each side of at least one pair of opposing sides (14,16) of the moulded body portion of a consumable unit"

VI. The appellant-proprietor's arguments can be summarised as follows for the decisive issues:

The first auxiliary request should be admitted into the proceedings because it was filed in response to objections first made at the oral proceedings before the opposition division.

The first and second auxiliary requests do not add subject matter extending beyond the application as filed.

The auxiliary requests 3 to 5 are allowable for reasons presented in the opposition proceedings.

VII. The appellant-opponent's arguments can be summarised as follows:

The main request should not be admitted into the proceedings because it was withdrawn in the opposition proceedings.

The first auxiliary request should not be admitted into the appeal proceedings because it was not admitted into the opposition proceedings.

Both the first and second auxiliary requests add subject matter extending beyond the application as filed.

Regarding auxiliary requests 3 to 5, since the appellant-proprietor relies on its submissions in the opposition proceedings, the appellant-opponent will do likewise.

### **Reasons for the Decision**

1. The appeals are admissible.
2. Main request, admittance, Article 12(4) RPBA with Article 114(2) EPC
- 2.1 In its communication in preparation for the oral proceedings, the Board informed the parties that it intended not to admit the main request. The reasons it gave were the following:

*"2.1 According to Article 12(4) RPBA, a Board may hold inadmissible requests that could have been filed during first instance proceedings. This applies all the more so to requests which were filed and subsequently withdrawn in the opposition proceedings. Such a course of events clearly shows that these could have been presented in those proceedings. Moreover, the purpose of an appeal is to review what was decided in the first instance (opposition proceedings), and not was not decided (see CLBA, V.A.4.11.3.f, in particular case (i)*



*and the cited decisions, for example T390/07, headnote and reasons 1 to 3).*

*2.2 In the present case (see minutes, annex dated 8 February 2018, points 13 to 15), the appellant-proprietor replaced the main request on file at the beginning of opposition oral proceedings (main request in appeal) with an amended main request (first auxiliary request in appeal). This is the same as withdrawing the original main request and the consequence of the appellant-proprietor's actions is that the opposition division was prevented from giving a reasoned decision on the critical issues, thereby compelling the Board either to give a first ruling on these issues or remit the case to the opposition division, which would be contrary to overall procedural efficiency.*

*For these reasons the Board intends to exercise its discretion under Article 12(4) RPBA by not admitting the main request into the proceedings".*

2.2 The parties made no substantive comments to this aspect of the Board's preliminary opinion, neither in writing nor at the oral proceedings. Nor did the Board see any reason to deviate from this opinion and the reasoning given therein. Therefore, the Board decided not to admit the main request.

3. Auxiliary request 1, admittance, Article 12(4) RPBA with Article 114(2) EPC

3.1 The opposition division decided (see impugned decision, reasons, point 14) to exercise its discretion under Article 114(2) EPC by not admitting this request into the opposition proceedings.

3.2 According to settled jurisprudence of the Boards of appeal (see CLBA IV.C.4.5.2, and the cited decisions, for example T0640/91, headnote III and reasons, 6.3) a board of appeal should only overrule the way in which a department of first instance has exercised its discretion if it concludes that it has done so according to the wrong principles, or without taking into account the right principles, or in an unreasonable way.

3.3 In the impugned decision (see reasons, point 14), the opposition division reasoned this point as follows:

*"P [The proprietor] argued that this new MR [main request] was filed in response to the new argument relating to the definition of an array.*

*The opposition division is however of the opinion that MR was late filed in the sense of that O [the opponent] could not anticipate such an amendment due to the fact that the alleged basis was only present in the description. The opposition division therefore holds the view that MR is not admissible in accordance with Article 114(2) EPC".*

3.4 It appears to the Board that the *new argument* referred to by the opposition division was a new interpretation of the term "array" submitted in connection with a new lack of novelty objection against the current main request with respect to D5 and D13 (see the minutes, points 8 and 13). This objection based on a new interpretation was first raised by the opponent at the oral proceedings, as acknowledged by the appellant opponent at the oral proceedings before the Board. Indeed, neither the summons of 19 July 2017 nor the

opponent's subsequent submission dated 23 November 2017 which deal with this request (filed as 2nd auxiliary request with letter of 9 March 2017) mention novelty vis-a-vis D5 or D13 or the new interpretation of the term "array".

3.5 In accordance with the Guidelines for examination (in the 2017 version then valid), section E-VI.2.2 point (a), if new facts and evidence are admitted a request of the proprietor for corresponding amendment would have to be admitted as the subject of the proceedings has changed. A new objection of lack of novelty based on documents not previously cited in this context constitutes new facts and evidence. As these were discussed (and thus admitted) the proprietor should have been given an opportunity to amend. That they did so by adding detail from the description to clarify the meaning of the term "array" in order to delimit the claimed subject-matter from the cited prior art appears an appropriate response, that could be expected.

3.6 Consequently, the Board finds that the opposition division exercised its discretion unreasonably in not admitting the amended main request (now auxiliary request) in response to the opponent's fresh objection.

3.7 Therefore, the Board decided to admit the first auxiliary request into the appeal proceedings.

4. Auxiliary request 1, added subject matter

4.1 Auxiliary request 1 defines, amongst other things, an array of baked items (20) arranged on at least one side of a pair of opposing sides of the moulded body. Here, the expression *at least one* covers the possibility that an array is arranged on *each* side of the moulded body.

Therefore, claim 1 adds subject matter if the application as originally filed does not disclose the feature of an array of baked items on *each* side of a moulded body. The Board will concentrate on this feature in the discussion that follows. In the Board's view, it is not disclosed in the application as filed.

#### 4.2 Meaning of the wording *an array of baked items*

Before looking in detail at the issue of added subject matter, it is helpful to consider what is meant by the word *array* in its claim 1 context. The Board notes that the skilled person reads the claim giving terms their usual meanings and with their mind willing to understand.

The usual definition of an array when applied to things, (see Oxford English Dictionary (OED), meaning 6.a) is *[a] series of things exhibited or displayed in line or order*. The appellant-proprietor refers to a broader definition given in paragraph [0015] of the patent, and which would include also deliberately disordered, though not random, arrangements of items. The Board sees no reason to interpret an otherwise clear term contrary to its normal meaning, cf. Case Law of the Boards of Appeal, 9th edition, 2019 (CLBA), II.A.6.3.1. Regardless, the Board is unable to find a basis in the originally filed application for arrays - interpreted either way - that are located on both sides of the moulded body in isolation from any other feature.

#### 4.3 Turning now to the issue of added subject matter in detail (references are to the published patent application), the appellant-proprietor has argued that, since original claim 1 discloses *an array of baked*

*items, its dependent claim 3, which specifies at least one baked item on each side of at least one pair of opposing sides of the moulded body, discloses an array of baked items on both opposing sides of the moulded body. The Board disagrees.*

- 4.4 In the Board's view, the combination of claims 1 and 3 only discloses a single array of baked items.

Considering, for the sake of argument, that this array is a planar array arranged on one side of a moulded body (though claim 1 is silent on this), the information claim 3 adds (at least one baked item on each side), does not directly and unambiguously lead to the conclusion that there is also an array on the opposite side of the moulded body, as the appellant-proprietor has argued. This is because claim 3 is silent as to how the *at least one baked item* should be arranged. So, whilst there would be an array on the one side of the moulded body, even if the *at least one* baked item on the moulded body's opposite side is a plurality of baked items, these could be in any possible arrangement including also arrangements that do form a series in a line or order, in the conventional meaning of the term *array*. The plurality of baked items could also be randomly (non deliberately) arranged, contrary even to the broader meaning given in the description.

Therefore, the combination of original claims 1 and 3 does not directly and unambiguously disclose an array of baked items on each of a pair of opposing sides of a moulded body.

- 4.5 Therefore, if there is a direct and unambiguous disclosure of an array of baked items (20) on each side

of at least one pair of opposing sides of a moulded body, this can only come from the original description and/or the drawings.

4.6 The appellant-proprietor has argued that such a disclosure is to be found in both paragraphs [0016] and [0039]. The Board disagrees.

4.6.1 Paragraph [0016] mirrors the wording of original claim 3, stating: "In another embodiment, the at least one baked item is arranged on each side of at least one pair of opposing sides of the moulded body portion of a consumable unit."

This statement includes the possibility of there being a plurality of baked items on each opposing side of a moulded body. However, as with original claim 3, it is silent as to how these are arranged, let alone states they form an array, whether in the conventional sense or the broader meaning given the term in the patent. Therefore, this paragraph does not directly and unambiguously disclose arrays of baked items on opposing sides of a moulded body as covered by claim 1.

4.6.2 Paragraph [0039] describes how the food products are made. In particular at least one baked item is placed in a mould before applying the moulded body and then at least one baked item may be arranged on the moulded body after the latter has solidified. The Board agrees with the appellant-proprietor that this implies there can be a plurality of baked items on each opposing sides of the moulded body. However, just as for paragraph [0016], no conclusion as to how the baked items are arranged on the moulded body can be drawn. They could be randomly distributed. Therefore, paragraph [0039] does not, directly and unambiguously,

disclose arrays of baked items on opposing sides of a moulded body as covered by claim 1.

4.7 It is not in dispute that other passages of the general part of the description disclose an array of baked items. For example, paragraphs [0018] and [0019] explain that such an array aids splitting off sections of the food product by the user. Whilst it is implicit that this is a planar array on one side of the moulded body, there is no mention of a further array on the opposite side of the moulded body. Similarly, paragraphs [0024] and [0036] mention an array of baked items, but without disclosing that there are two such arrays on opposite sides of the moulded body.

4.8 Therefore, the general part of the description does not disclose arrays on opposite sides of a moulded body, as covered by claim 1.

4.9 The appellant-proprietor has also argued (see for example its reply to appeal dated 29 October 2018, section 3.2) that, the feature of an array on each opposing side of a moulded body is directly and unambiguously disclosed by the detailed embodiments of the invention (see figures 1 and 2 with paragraphs [0056] to [0059]), and can be isolated therefrom and incorporated into claim 1 without creating an unallowable intermediate generalisation of the embodiment.

4.10 According to established jurisprudence (see CLBA, II.E. 1.9, and for example T1067/97, reasons 2.1.3), it is normally not justified to amend a claim by adding an isolated feature extracted from an embodiment where it was originally only disclosed in combination with other features, unless there is no clearly recognisable

functional and structural relationship among the features. Where such a structural and functional relationship exists, such an amendment would represent an unallowable intermediate generalisation.

- 4.11 In the present case, figure 1 shows an embodiment with an array of baked items on opposing sides of the moulded body 10 (see column 10, lines 34 to 36). However, this feature is disclosed with other features which have not been claimed. Amongst other things, each baked item on the one side is arranged equidistantly spaced in a clear order (an array in the conventional sense) and directly opposite a similar array (in the conventional sense) on the other side of the moulded body 10. The baked items are separated from each other by gaps 22 which run in straight lines from one end of the moulded body to the other.

With each baked item being directly opposite another on the other side, the straight lines of gaps between baked items of each array are likewise aligned on opposite sides of the moulded body. In the Board's view, this constitutes a particular structural relationship between the arrays on opposite sides of the moulded body, which has not been claimed. Moreover, this particular arrangement of the arrays results in a functional relationship, because the food product can be divided by applying a bending moment (see column 10, lines 42 to 47), so that division occurs along the aligned gaps between the baked items on opposing sides of the moulded body.

- 4.12 In this embodiment (see column 10, lines 36 to 42), the dividing process is also aided by breaking points in the form of grooves 12 delimiting the moulded body along the gaps so that parts of the array, each with a



pair of baked items, can be easily separated into a consumable unit with a pair of baked items. If individual members of the array (and thus also the gaps) were not aligned, this breaking off of pairs of baked items as explained would, in the Board's view, at least be more complicated.

4.13 Therefore, the idea of providing arrays of baked items on each of a pair of opposing sides of a moulded body, as claim 1 covers, is only disclosed in the detailed embodiment in a tight functional and structural relationship with other features (such as the vertical alignment of respective baked items in an ordered arrangement and provision of grooves), which have not been claimed. Therefore, extracting this idea (arrays on opposite sides) in isolation and adding it to claim 1, results in an unallowable intermediate generalisation.

4.14 Nor does the Board come to a different result because the general part of the description teaches that some features identifiable in the embodiment of claim 1 are optional. Describing a feature as optional without reference to any context does not change what is actually disclosed in a particular detailed embodiment.

For example, whilst breaking point grooves may not be essential to carry out the invention in general (see paragraphs [0022] and [0023]), this does not alter the fact that, in the specific embodiment of figure 1, they are present and structurally related to the two arrays of baked items (the grooves run in gaps between members of each array) and also functionally related in that they make it easier to split the food product into consumable units, each with a pair of baked items from respective arrays.

4.15 In another embodiment (see paragraph [0059] with figure 2) which also has baked items 20 arranged in two arrays, one on each side of a moulded body 10, the arrays of baked items (as in figure 1) are structurally related because they are vertically aligned. This means that baked items of each array are separated by straight lines of vertically aligned gaps 22 on opposing sides of the moulded body 10, which functionally allow baked items and parts of the moulded body to be easily separated into consumable units, just as for the embodiment of figure 1.

Moreover, in this embodiment, the two arrays are structurally related in other ways: their baked items are fully integrated into the moulded body, forming a continuous surface (see column 11, lines 12 to 16), which is not claimed. Furthermore, the vertically aligned baked items are sandwiched with another edible product 28 between them (see column 11, lines 18 to 22). This is said to add a structural property to the food product, but has likewise not been claimed.

4.16 From all of the above, the Board considers that, in the embodiments of figures 1 and 2, the feature of an *array on each of a pair of opposing sides* is functionally and structurally linked to other features which have not been claimed.

The remaining detailed embodiments (see figures 3 to 6) disclose food products with only a single array of baked items.

4.17 Therefore, the detailed embodiments do not provide a basis for the feature of having an array on *at least one (in the sense of more than one) of a pair of*

*opposing sides* of a moulded body in isolation, as covered by claim 1.

4.18 The Board concludes that the subject matter of claim 1 adds subject matter extending beyond the application as filed. Therefore, the appellant-proprietor's first auxiliary request must fail.

5. Second auxiliary request, claim 1, added subject matter

5.1 The array feature of this claim essentially limits the corresponding feature (array on at least one of a pair of opposing sides of the moulded body) of claim 1 of the first auxiliary request by saying there is an array of baked items on *each* of these opposing sides. As already explained for the first auxiliary request, there is no basis for this feature in the application as originally filed.

5.2 Therefore, this request fails for the reasons which have been explained for the first auxiliary request.

6. Auxiliary requests 3 to 5, admittance

6.1 In its communication in preparation for the oral proceedings, the Board made observations regarding admittance of these requests and gave a preliminary opinion that they should not be admitted into the appeal proceedings for the reasons explained. The Board wrote the following:

*"6. Auxiliary requests 3 to 5, admissibility*

*6.1 In accordance with the RPBA, Article 12(3), the statement of grounds of appeal and the reply shall contain a party's complete appeal case. Accordingly,*

*they shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the requests, facts, objections, arguments and evidence relied on.*

*6.2 According to established jurisprudence, a generic reference in the grounds of appeal to the appellant's submissions in opposition cannot be retroactively interpreted as expressly specifying particular aspects contained therein (see CLBA,V.A.2.6.4 a, and the decisions cited therein).*

*6.3 In the present case, in its grounds of appeal (letter of 15 June 2018, page 9/10), the appellant-proprietor stated that its case for these requests was as presented in letters of 9 March 2017 and 22 November 2017.*

*6.4 In the Board's opinion, it is not possible to identify from these broad references what arguments the Board and the appellant-opponent should consider in response to the arguments submitted in the appellant-proprietor's appeal, should higher ranking requests fail. Therefore, the appellant-proprietor's arguments in respect of these requests do not meet the requirements of Article 12(3) RPBA. In particular it is unclear to the Board how the amendments of these requests address the relevant issues of the decision under appeal, or those raised by the appellant opponent in their appeal against claim 1 in the version maintained (2nd auxiliary request).*

*Therefore, the appellant-proprietor's auxiliary requests 3 to 5 appear not to have been substantiated*

*in appeal and the Board therefore does not intend to admit them into the proceedings".*

- 6.2 The parties presented no further arguments in this regard. Nor did the Board see any reason to deviate from its preliminary opinion. Therefore, the Board decided not to admit auxiliary requests 3 to 5 into the appeal proceedings.
7. In summary, the main request and auxiliary requests 3 to 5 have not been admitted into the proceedings and the remaining requests (auxiliary requests 1 and 2) add subject matter extending beyond the application as filed, so do not meet the requirements of Article 123(2) EPC. Therefore, the Board must revoke the patent in accordance with Article 101(3)b 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 Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated