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Datasheet for the decision of 6 October 2022

Case Number: T 1109/18 - 3.3.09

Application Number: 07816204.7

Publication Number: 2079319

IPC: A23L2/60, A23L29/30, A23L27/30, A23L33/105

Language of the proceedings: EN

Title of invention:
CONSUMABLES

Patent Proprietor:
Givaudan SA

Opponents:
Geitz, Holger
Cargill, Incorporated

Headword:
Consumables/GIVAUDAN

Relevant legal provisions:
EPC Art. 123(2), 123(3), 84, 83, 54, 56
EPC R. 80, 103(1)(a)

Keyword:
Amendments - added subject-matter (no) - broadening of claim (no)
Amendment occasioned by ground for opposition - (yes)
Claims - conciseness (yes) - clarity (yes)
Sufficiency of disclosure - (yes)
Novelty - (yes)
Inventive step - (yes)
Reimbursement of appeal fee - substantial procedural violation (no)
Opposition division's alleged "suggestion" to delete claims

Decisions cited:
T 0173/89, T 1072/93, T 0446/00

Catchword:

Europäisches Patentamt
European Patent Office
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Beschwerdekammern

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Case Number: T 1109/18 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 6 October 2022

Appellant: (Patent Proprietor)	Givaudan SA Chemin de la Parfumerie 5 1214 Vernier (CH)
Representative:	Haseltine Lake Kempner LLP Redcliff Quay 120 Redcliff Street Bristol BS1 6HU (GB)
Appellant: (Opponent 1)	Geitz, Holger Geitz Truckenmüller Lucht Patentanwälte, Kriegsstrasse 234 76135 Karlsruhe (DE)
Representative:	Eisenführ Speiser Patentanwälte Rechtsanwälte PartGmbB Postfach 31 02 60 80102 München (DE)
Appellant: (Opponent 2)	Cargill, Incorporated 15407 McGinty Road West Wayzata, MN 55391 (US)
Representative:	Forresters IP LLP Skygarden Erika-Mann-Straße 11 80636 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 1 March 2018 concerning maintenance of the European Patent No. 2079319 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	M. Ansorge
	A. Jimenez

Summary of Facts and Submissions

I. This is the second appeal concerning European patent No. 2079319 (for first appeal, see decision T 692/14).

II. The proprietor and opponents 1 and 2 all lodged an appeal against the opposition division's interlocutory decision holding the then auxiliary request 7 allowable.

III. With their notice of opposition, the opponents had requested that the patent be revoked on the grounds for opposition under Article 100(a) EPC (lack of novelty and lack of inventive step), Article 100(b) EPC and Article 100(c) EPC.

IV. The opposition division decided, *inter alia*, that the subject-matter of claims 1 and 13 of the then main request and the then auxiliary request 1 lacked novelty, but that the set of claims of the then auxiliary request 7 filed during the oral proceedings met the requirements of the EPC.

V. The following documents were cited in the proceedings:

E3: WO 94/18855 A1
E5: S.S. Schiffman et al., "Investigation of Synergism in Binary Mixtures of Sweeteners", Brain Research Bulletin, vol. 38, no. 2, 1995, pages 105-120
E7: US 4,612,942
E12: JP 2001-120218 A
E12'': English translation of E12

E13: JP 10262599 A
E30: US 2003/0138538 A1

Annex 4: Declaration of Prof. Knepper

VI. During the oral proceedings before the board, the proprietor made the thirteenth auxiliary request filed with the reply to the opponents' grounds of appeal the main request. All higher-ranking claim requests were withdrawn.

VII. Independent claims 1 and 13 of the main request read as follows:

"1. A sweetened consumable comprising

a) at least 0.0001% of at least one sweetener, wherein said sweetener is sucrose, fructose, glucose, high fructose corn syrup, corn syrup, xylose, arabinose, rhamnose, xylitol, mannitol, sorbitol, inositol, acesulfame potassium, aspartame, neotame, sucralose, saccharine, or combinations thereof,

wherein said at least one sweetener or sweetener combination is present in a concentration above the sweetness detection threshold in a concentration isosweet to 2% to 15% sucrose, and

b) more than one sweetness enhancer selected from the group consisting of naringin dihydrochalcone, mogroside V, swingle extract, rubusoside, rubus extract, stevioside and rebaudioside A,

wherein each sweetness enhancer is present in a concentration near its sweetness detection threshold, and wherein for naringin dihydrochalcone this

concentration is from 2 to 60 ppm, for rubusoside from 1.4 ppm to 56 ppm, for rubus extract from 2 ppm to 80 ppm, for mogroside V from 0.4 ppm to 12.5 ppm, for swingle extract from 2 to 60 ppm, for stevioside from 2 to 60 ppm and for rebaudioside A from 1 to 30 ppm."

"13. A method of sweetening consumables utilizing

a) at least 0.0001% of at least one sweetener, wherein said sweetener is sucrose, fructose, glucose, high fructose corn syrup, corn syrup, xylose, arabinose, rhamnose, xylitol, mannitol, sorbitol, inositol, acesulfame potassium, aspartame, neotame, sucralose, saccharine, or combinations thereof,

wherein said at least one sweetener or sweetener combination is present in a concentration above the sweetness detection threshold in a concentration isosweet to 2% to 15% sucrose, and

b) more than one sweetness enhancer selected from the group consisting of naringin dihydrochalcone, mogroside V, swingle extract, rubusoside, rubus extract, rebaudioside A and stevioside,

wherein each sweetness enhancer is present in a concentration near its sweetness detection threshold, and wherein for naringin dihydrochalcone this concentration is from 2 to 60 ppm, for rubusoside from 1.4 to 56 ppm, for rubus extract from 2 to 80 ppm, for mogroside V from 0.4 to 12.5 ppm, for swingle extract from 2 to 60 ppm, for stevioside from 2 to 60 ppm, and for rebaudioside A from 1 to 30 ppm, are admixed to a consumable."

Claims 2 to 12 are directly or indirectly dependent on claim 1.

Dependent claims 2, 7 and 8 read as follows:

"2. The sweetened consumable of claim 1 comprising naringin dihydrochalcone as a sweetness enhancer."

"7. The sweetened consumable of any one of claims 1 to 6 comprising two of the sweetness enhancers."

"8. The sweetened consumable of claim 2 comprising a second sweetness enhancer selected from the group consisting of mogroside V, swingle extract, rubusoside, rubus extract, rebaudioside A, and stevioside."

VIII. The parties' relevant arguments, submitted in writing and during the oral proceedings, are reflected in the reasons for the decision below.

IX. Requests

The proprietor requested that the decision be set aside and that the patent be maintained on the basis of the main request (filed as the thirteenth auxiliary request with the reply to the opponents' grounds of appeal) or, as an auxiliary measure, on the basis of one of the fourteenth to eighteenth auxiliary requests filed with the reply to the opponents' grounds of appeal.

The opponents requested that the decision be set aside and that the patent be revoked.

Opponent 2 also requested that the appeal fee be reimbursed.

Reasons for the Decision

MAIN REQUEST

1. Admittance

1.1 The opponents submitted that the main request should not be admitted into the current, second appeal proceedings. This request corresponds to a request which was filed on 3 June 2016 in the first appeal proceedings as the then auxiliary request 2. However, it was not filed with the proprietor's grounds of appeal but, instead, only in reply to the opponents' grounds of appeal. In the opponents' view, this behaviour is to be considered as an abandonment of this request, which should not therefore be admitted into the current appeal proceedings. The opponents referred in this context to case T 446/00. Also, the request was not convergent with the higher-ranking requests filed with the reply.

1.2 For the following reasons, the main request is admitted into the current appeal proceedings.

1.2.1 The main request was filed on 3 June 2016 as auxiliary request 2 in the first appeal proceedings. The then competent board admitted a broader claim request (the main request of 3 June 2016) and remitted the case to the opposition division for further prosecution. The proprietor maintained and re-filed the current main request as auxiliary request 8 with its letter of 17 November 2017 in the proceedings before the opposition division (see also corrected minutes of 20 April 2018, points 2.2 and 6.5). This was also

formally "admitted" into the proceedings by the opposition division (see point 3.5 of the minutes and point 3.7 of the decision under appeal: the then auxiliary requests 7 to 13 were eventually renumbered from 8 to 14, the current main request corresponding to auxiliary request 9 thereof). This request was not included in the proprietor's grounds of appeal, but was filed as the thirteenth auxiliary request with the proprietor's reply to the opponents' grounds of appeal.

1.2.2 Not filing the main request already with its own grounds of appeal, but only in reply to the opponents' grounds of appeal, cannot be considered as the abandonment of this claim request. The main request was filed with the reply to the opponents' grounds of appeal and thus in compliance with Article 12(3) RPBA 2020, which explicitly stipulate that the statement of grounds of appeal and the reply are to contain a party's complete appeal case. The situation is hence not comparable to that in case T 446/00, in which the patent proprietor was the sole appellant against a decision of the opposition division to revoke the patent.

1.2.3 With respect to the question of whether the main request is to be considered or not, Article 12(4) RPBA 2007 is to be applied, which reads as follows:

"Without prejudice to the power of the Board to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first instance proceedings, everything presented by the parties under (1) shall be taken into account by the Board if and to the extent it relates to the case under appeal and meets the requirements in (2)."

1.2.4 Firstly, as explained above, the claim request in question had already been presented in the first appeal proceedings as auxiliary request 2 (filed on 3 June 2016). It was then maintained before the opposition division in the subsequent proceedings and formally admitted into the proceedings in the decision under appeal.

1.2.5 Secondly, the main request relates to the case under appeal and meets the requirements of Article 12(2) RPBA 2007.

1.2.6 The current main request, which is identical to auxiliary request 2 filed during the first appeal proceedings, is convergent with the then main request admitted into the proceedings by the competent board and on the basis of which the case was remitted to the opposition division for further prosecution (limited in terms of sweetener concentration and the number of sweetness enhancers). For these reasons, the question of whether this request is allegedly not convergent with higher-ranking requests filed in the current appeal proceedings (which are now withdrawn) is irrelevant.

Consequently, the main request is taken into account in the current appeal proceedings.

2. Article 84 EPC

2.1 The opponents argued that claim 13 was unclear and that dependent claims 7 and 8 were redundant (when compared to the wording of claim 1), thus leading to a lack of clarity as well.

2.2 For the following reasons, the board does not agree.

2.2.1 The feature "wherein said at least one sweetener or sweetener combination is present in a concentration above the sweetness detection threshold in a concentration isosweet to 2% to 15% sucrose" (emphasis added) was introduced into claim 13. In the opponents' view, it was not clear from the latter feature whether the sweeteners were present in a sweetener composition, in the consumable to be sweetened or in the final product, i.e. the sweetened consumable, or whether the "concentration isosweet to" was directed to the sweetener or to the final sweetened consumable.

In this context, the board shares the proprietor's view that a skilled person would understand that the concentration level of the sweeteners indicated in claim 13 (isosweet to 2% to 15% sucrose) is directed to the final sweetened consumable while the sweeteners are clearly present in the sweetener composition used in the method according to claim 13. This is the only sensible interpretation of how a skilled person would understand the wording of claim 13 with a mind willing to understand. Any other interpretation would, in the board's view, not make technical sense.

2.2.2 Claim 7 specifies that the sweetened consumable comprises two of the sweetness enhancers. The board is unable to recognise that there might be any redundancy compared to claim 1. Claim 1 specifies that more than one sweetness enhancer is present in the sweetened consumable, which means that two, three or more sweetness enhancers may be present, whereas claim 7 specifies that two are comprised in the sweetened consumable. There is no redundancy and consequently also no lack of clarity.

2.2.3 Claim 8 refers back to claim 2, which mentions naringin dihydrochalcone as a sweetness enhancer, and specifies that the sweetened consumable comprises a second sweetness enhancer selected from the group consisting of mogroside V, swingle extract, rubusoside, rubus extract, rebaudioside A and stevioside. Due to the back-reference to claim 2 it is apparent that claim 8 encompasses naringin dihydrochalcone as a first sweetness enhancer. Specifying further that a second sweetness enhancer is selected from the group consisting of mogroside V, swingle extract, rubusoside, rubus extract, rebaudioside A and stevioside (as in claim 8) merely specifies a subset of the numerous combinations covered by claim 1, which simply limits the possible combinations of sweetness enhancers covered by claim 1. Thus, there is no redundancy in claim 8 either.

In view of the above, the claims of the main request meet the requirements of clarity and conciseness set forth in Article 84 EPC.

3. Article 83 EPC

3.1 It is noted that claim 1 is a composition claim (directed to a sweetened consumable) which requires certain components to be present in the given amounts. While it is true that the sweetness detection threshold varies somewhat in different individuals, this merely amounts, at most, to a question of clarity and not sufficiency. The indication "near its sweetness detection threshold" in claim 1, which at first glance might be considered vague, is further specified and clarified by the ppm ranges given for each sweetness

enhancer. The same applies to the feature "concentration isosweet to 2% to 15% sucrose".

3.2 The opponents did not submit any verifiable facts which could cast serious doubts as to whether the invention can be performed. Moreover, there is no functional feature in claim 1 requiring a particular sweetness-enhancing effect. The question of whether such an effect is achieved over the whole claimed range is a question of inventive step and not a question of sufficiency.

3.3 Similar considerations apply for the independent method claim 13.

In view of the above, the invention can be carried out (Article 83 EPC).

4. Article 123(2) EPC

4.1 The opponents argued that the subject-matter of claims 1 and 13 infringes the requirement of Article 123(2) EPC.

4.2 The opponents submitted that the following amendments to claim 1 were not disclosed in the application as filed in the particular combination indicated below:

- replacing "include" by "is" (see line 3 of claim 1)

- deleting "at least" before the expression "isosweet to 2% ..." (see line 7 of claim 1)

- amending "at least one sweetness enhancer" to "more than one sweetness enhancer" (see line 9 of claim 1).

4.3 For the following reasons, claim 1 complies with the requirement of Article 123(2) EPC.

4.3.1 Replacing the term "include" by "is" in line 3 of claim 1 has no impact on the subject-matter of claim 1, since both terms have the same meaning.

4.3.2 Deleting the term "at least" before the expression "isosweet to 2% ..." in line 7 of claim 1 does not lead to added-matter either. The range "isosweet to 2 to 15% sucrose" is disclosed in the application as filed (see page 10, lines 9 to 11, of the application as filed). Since claim 1 no longer encompasses the open-ended range "at least 2%" but the specific range "2% to 15%", the deletion of "at least" cannot be considered to add subject-matter.

4.3.3 Amending the term "at least one sweetness enhancer" to "more than one sweetness enhancer" in line 9 of claim 1 is supported in the application as filed at least when taking the whole content thereof into account.

Claim 1 of the application as filed specifies that at least one sweetness enhancer is present in the claimed sweetened consumable. In the broadest context of the application as filed, the "at least" is used without a particular upper limit. Claim 7 of the application as filed specifies that two sweetness enhancers are comprised in the claimed sweetened consumable and, in claim 9 of the application as filed, three sweetness enhancers are comprised in the claimed sweetened consumable. Examples 10 to 12 also exemplify embodiments having two or three sweetness enhancers. In the present specific case, the board considers the term "at least" as an abbreviation for "one or more".

Omission of the possibility of having only one sweetness enhancer is considered as being disclosed in the application as filed, at least when considering the application as filed as a whole.

Thus, the subject-matter of claim 1 does not extend beyond the content of the application as filed.

4.4 With respect to claim 13, the opponents argued that the following amendments were not disclosed in combination:

- introducing the feature "wherein said at least one sweetener or sweetener combination is present in a concentration above the sweetness detection threshold in a concentration isosweet to 2% to 15% sucrose" (see lines 6 and 7 of claim 13),

- amending "at least one sweetness enhancer" to "more than one sweetness enhancer" (see line 8 of claim 13).

4.5 For the following reasons, claim 13 also complies with the requirement of Article 123(2) EPC.

4.5.1 Although the feature "wherein said at least one sweetener or sweetener combination is present in a concentration above the sweetness detection threshold in a concentration isosweet to 2% to 15% sucrose" is explicitly disclosed in the application as filed only in the context of the claimed sweetened consumable, the board considers that the disclosure insofar as the sweetened consumable is concerned also applies to the claimed method of sweetening consumables. There is no indication in the application as filed that anything other than the sweetened consumable could be the final product in the claimed method of sweetening

consumables. Thus, inserting the feature in question into claim 13 does not lead to an added-matter problem.

4.5.2 For the same reason as outlined above for claim 1 (see point 4.3.3), amending "at least one sweetness enhancer" to "more than one sweetness enhancer" in line 8 of claim 13 does not extend beyond the content of the application as filed.

In view of the above, the claims comply with the requirement of Article 123(2) EPC.

5. Rule 80 EPC, Article 123(3) EPC

5.1 Opponent 1 was of the opinion that claim 13 infringes the requirements of Rule 80 EPC and Article 123(3) EPC.

5.2 The board does not agree. There is no doubt that claim 13 is clearly limited in scope compared to the respective claim as granted. Thus, the amendments to claim 13 are occasioned by a ground of opposition and claim 13 does not extend the protection it confers.

Thus, the main request complies with the requirements of Rule 80 EPC and Article 123(3) EPC.

6. Novelty over E30

6.1 The opponents argued that the subject-matter of the independent claims lack novelty over E30. Opponent 1 particularly emphasised that the peaks at the retention times 8.722 min and 8.070 min were wrongly allocated in Figure 1, but that the allocation in Table 4 was correct. Table 4 demonstrated that the rebaudioside A peak had a retention time of 8.070 min and the β-1,4-monogalactosyl stevioside peak had a retention time

of 8.722 min. It submitted further that the values for stevioside and rebaudioside A as given in Table 8 of E30 were within the claimed range. Even assuming a certain failure resulting from a peak overlap of the peaks at around 8 min retention time, as shown in Figure 1, it could be taken from the declaration of Prof. Knepper (see Annex 4) that application example 1 of E30 is still novelty-destroying for the claimed subject-matter.

6.2 For the following reasons, the board does not agree with opponent 1.

6.2.1 As correctly assessed by the opposition division, there is an inconsistency in the values for the peak retention time for rebaudioside A and stevioside between Table 4 and Figure 1 of E30. The board concludes that this inconsistency in the retention times for rebaudioside A and stevioside in Table 4 and Figure 1 of E30, which has a substantial impact on the calculation of the final concentration of these components, raises doubts concerning the true values for stevioside and rebaudioside A disclosed in E30. Thus, the values given in Table 8 cannot be taken as a clear and unambiguous disclosure for the amount of rebaudioside A and stevioside in the sweetener 1 as used in application example 1 of E30.

6.2.2 In the declaration of Prof. Knepper (Annex 4), opponent 1 has presented a calculation which attempts to calculate the concentration of rebaudioside A in application example 1 of E30. In this declaration Prof. Knepper admits, however, that the resolution of the peaks at around 8 min retention time does not allow a precise integration for both compounds independently.

Prof. Knepper makes the assumption that the rebaudioside A peak is that shown at 8.070 min retention time in Figure 1, but no explanation is given as to why he made that assumption, contrary to the labelling of Figure 1 of E30. The reference to Table 4 of E30 is not enough to prove the correct retention time for rebaudioside A.

Furthermore, it is noted that Table 4 of E30 is inconsistent with Figure 1 in relation to all of the retention time peaks at 8.070, 8.722 and 9.138 min, meaning that a skilled person would not know which is wrong in which location.

Prof. Knepper assumes that the minimum area under the rebaudioside A peak would be the same as the area under the stevioside peak, but there is no further explanation as to why he made that assumption.

The calculation of Prof. Knepper concludes that, with the assumptions that were made, the soda pop of application example 1 would contain between 16.0 ppm and 29.5 ppm rebaudioside A. However, too many assumptions have been made to arrive at that result, meaning that no evidential weight can be placed on the range indicated.

In view of the above, E30 cannot be considered as novelty-destroying for the claimed subject-matter.

7. Inventive step

7.1 The opponents raised inventive-step objections in view of E5, E7 and E12 (E12'' being an English translation thereof) as the closest prior art.

7.2 Since no inventive-step objection using E7 as the closest prior art was raised in the current appeal proceedings before the date of the oral proceedings and no exceptional circumstances were pleaded either, this objection cannot be taken into consideration (Article 13(2) RPBA 2020).

7.3 The question to be answered is: which document represents the closest prior art in the present case?

7.4 According to established case law, a central consideration in selecting the closest prior art is that it must be directed to the same purpose or effect as the invention, otherwise it cannot lead the skilled person in an obvious way to the claimed invention.

7.5 As can be taken from paragraph [0009] of the patent, the purpose thereof is to enhance sweetness. This is also supported by the large number of examples, all of which focus on the sweetness intensity.

7.6 E5 is a document investigating synergism in binary mixtures of sweeteners, i.e. the sweetness intensity of sweeteners. There can be no doubt that the purpose of E5 is to investigate sweetener combinations having an enhanced sweetness. Thus, E5 undoubtedly qualifies as the closest prior art in the present case.

7.7 The purpose of E12'' was to improve sweetness and sweetness quality of an acesulfame K-containing sweetener. Acesulfame K was known to have a refreshing and clean sweet taste and a fast onset of sweetness, but it has a slight and bitter aftertaste as well as a sweet taste that does not linger as much as sugar. As can be taken from E12'', in particular the examples of E12'', this document is about finding a solution to

mask or modify the bitterness inherent in acesulfame K and finding a sweetness as close as possible to (normal) sugar. There is no indication or hint in E12'' that the purpose of this document could also be to enhance sweetness or to look for sweetness intensity. Thus, the board concludes that given the present specific circumstances E12'' is not an appropriate starting document for assessing inventive step in the present case.

7.8 In view of the above, E5 is considered the closest prior art in the present case.

7.9 E5 relates to a document investigating synergism in binary mixtures of sweeteners, such as acesulfame K, aspartame, fructose, glucose, mannitol, rebaudioside A, sodium saccharine, sorbitol, stevioside and sucrose. The binary sweetener mixtures were tested in E5 by a trained panel at concentrations isosweet with 3%, 5% and 7% sucrose, based on each individual sweetener. For example, the concentration of aspartame (or fructose, glucose, mannitol, acesulfame K or sucrose) equivalent to 3% sucrose was mixed with the concentration of rebaudioside A (or stevioside) also equivalent to 3% sucrose. In the same way, the concentration of sweeteners equivalent to 5% sucrose was mixed with the concentration of sweeteners equivalent to 5% sucrose or two times 7% of the two sweeteners. In E5 it was found that synergism occurred most frequently at the lower concentrations, in particular at 3% isosweetness compared to sucrose.

7.10 The subject-matter of claim 1 differs from E5 in that:

(i) a significantly lower level of sweetness enhancer (near its detection threshold in the given ppm ranges) is used in claim 1 (first difference) and

(ii) more than one sweetness enhancer is required in claim 1 (second difference).

The same differences also apply to the method of claim 13.

7.11 It is true that no enhanced sweetness was shown over the binary sweetener mixtures of D5. Bearing in mind that a significantly higher concentration of sweeteners is used in E5, this would also be illogical from a technical viewpoint. However, it is derivable from a large number of examples in the patent which tested the given sweetness enhancers in a concentration near their sweetness detection threshold that an enhanced sweetness is obtained by the sweetened consumable of claim 1, which is above the sweetness of a sucrose control without these low levels of sweetness enhancers.

7.12 In view of the above, the objective technical problem to be solved is considered the provision of an alternative consumable having enhanced sweetness.

7.13 With respect to the question of obviousness, it is noted that E5 always used equal amounts of sweeteners. In cases in which rebaudioside A or stevioside were chosen in E5 as sweeteners (the only sweeteners mentioned in E5 falling within the definition of the "sweetness enhancer" of claims 1 and 13), these were always used at the same concentrations of 3%, 5% or 7% equivalent to sucrose.

7.14 There is no hint that one of the sweeteners of the binary mixture as investigated in E5 could be lowered, let alone to a significantly lower level.

7.15 E5 taught that two sweeteners equivalent in sweetness intensity to 3% sucrose were more likely to be synergistic than the same two sweeteners equivalent in sweetness intensity to 5% or 7% sucrose. However, this would not have motivated a skilled person to maintain one of them at a sweetness intensity equivalent to, for instance, 3% and, at the same time, to lower the other one far below said sweetness level.

7.16 As an example, the rebaudioside A concentration corresponding to 3% sucrose sweetness intensity in E5 is 0.009%, which is about 90 ppm. The stevioside concentration corresponding to 3% sucrose sweetness intensity is 0.018%, which is about 180 ppm. Accordingly, the lowest concentration disclosed for rebaudioside A and stevioside in E5 is about three times higher than the upper limit of the respective ppm ranges required in claim 1 and claim 13 .

7.17 There is no motivation in E5 to lower the concentration of rebaudioside A or stevioside to such a low level in order to arrive at alternative consumables having enhanced sweetness.

7.18 In addition, E5 does not teach or hint at any ternary mixture of sweeteners, whereas claim 1 requires at least one sweetener to be present in a specific concentration isosweet to 2% to 15% sucrose in combination with two or more of the sweetness enhancers required in claim 1.

7.19 E3 does not enable the skilled person to bridge the gap between E5 and the claimed subject-matter. Claim 12 of E3, as mentioned by opponent 1 in its argumentation relating to obviousness, defines a sweetener composition containing a sweet juice derived from the *Siraitia* species, which contains from 0.1% to 5% (1000 ppm to 50000 ppm) terpene glycosides selected from mogroside V, mogroside IV, siamenoside, 11-oxo-mogroside V and mixtures thereof. To arrive at the proposition to mix fructose, sucrose, glucose and/or mixtures thereof at at least 0.0001% with mogroside V being present near its sweetness detection threshold (concentration = 0.4 to 12.5 ppm), as required by claims 1 and 13, the skilled person would need to disregard the requirement of claim 12 of E3 to use 1000 to 50000 ppm terpene glycosides. Not only does that requirement have to be disregarded, it has to be modified by reducing the concentration by nearly 100 times below the minimum. There is no conceivable reason why the skilled person would do this.

7.20 E7 is directed to enhancing and modifying the flavour and not to enhancing sweetness. A skilled person seeking to obtain an enhancement of sweetness had no reason to consider E7. Thus, it cannot teach the skilled person how to bridge the gap between E5 and the claimed subject-matter.

7.21 In some examples of E12'', a low level of rebaudioside A is used in combination with acesulfame K. However, E12'' is silent with respect to sweetness intensity and it does not therefore give any incentive for a skilled person to apply the required low levels of sweetness enhancers in the binary mixtures disclosed in E5.

7.22 E13 does not enable the skilled person to bridge the gap between E5 and the claimed subject-matter, because it is not concerned with providing an alternative combination of sweeteners for consumables in which the sweetness is enhanced. On the contrary, the purpose of mixing a naringin dihydrochalcone with erythritol in an amount which does not exhibit sweetness (0.05 to 5 ppm based on the weight of erythritol) is to reduce characteristic irritation of erythritol in the throat. It is further stated explicitly that the purpose of the naringin dihydrochalcone is to act as a flavour improver and not to show enhanced sweetness with erythritol. Moreover, erythritol is not one of the sweeteners listed in claim 1 or claim 13, and there is no suggestion in E13 that its disclosure could apply to any other sweetener.

7.23 In view of the above, the sweetened consumable of claim 1 is not obvious in view of E5 as the closest prior art. The same applies *mutatis mutandis* to the method of sweetening consumables of claim 13.

Thus, the subject-matter of claims 1 and 13 involves an inventive step in view of E5 as the closest prior art. The same applies to claims 2 to 12, because they are directly or indirectly dependent on claim 1.

8. Reimbursement of the appeal fee

8.1 Opponent 2 requested that the appeal fee be reimbursed due to the presence of a substantial procedural violation. Opponent 2 argued that the opposition division made a suggestion to the benefit of the proprietor concerning how to successfully modify the claim requests. In addition, the opponents were deprived of the opportunity to argue against the

admission of the then auxiliary request 7, which the opposition division held allowable.

8.2 Under Rule 103(1)(a) EPC, second alternative, the appeal fee is to be reimbursed in full in the event of the board of appeal deeming an appeal to be allowable if such reimbursement is equitable by reason of a substantial procedural violation.

8.3 For the following reasons, the board does not agree with opponent 2 in this respect, since it cannot identify a substantial procedural violation.

8.3.1 Opponent 2 argued that the opponents had no opportunity during the oral proceedings before the opposition division to present comments against the admission of the then auxiliary request 7.

In this context, the board refers to point 5.2.1 of the decision, from which it can be taken that both opponents requested that the then auxiliary request 7 should not to be admitted into the proceedings. Furthermore, it is explicitly mentioned that the opponents argued that the request was late-filed and that its filing was surprising for the opponents.

This part of the decision leaves no doubt that the opponents had the opportunity to comment on the question of admission of the then auxiliary request 7.

Also from point 7 of the corrected minutes dated 20 April 2018, under the heading "Admissibility of AR7", it can be taken that both opponents at least argued that Rule 116 EPC was "violated" as the then auxiliary request 7 was late-filed.

Under these circumstances, the board does not see that the opponents were deprived of a chance to present their arguments against the admission of the then auxiliary request 7. Therefore, this line of argument is not found to be convincing.

8.3.2 Opponent 2 furthermore argued that the opposition division was not impartial and that it actively suggested to the benefit of the proprietor how to successfully amend the claim requests, which was not acceptable and amounted to a substantial procedural violation.

In this context, the board refers to point 3.6 of the decision, which reads as follows:

"For these reasons, the opposition division decided not to admit auxiliary requests 2-6 into proceedings, but to offer the patent proprietor, if he so whishes, the occasion to introduce corresponding auxiliary requests without the use claims."

Reference is also made to the following passage on page 2 of the corrected minutes dated 20 April 2018, which reads as follows:

"P requested to postpone the decision on admissibility in case the opposition division (OD) was minded to not admit AR 1-13.

3.5 After a break (9:58-10:42) Ch announced the decision that MR, AR1 and AR7-13 are admitted into the proceedings and that AR2-6 are admitted under the condition that all use claims were deleted."

8.3.3 In this context, the board wishes to emphasise that the opposition division needs to be neutral and impartial, impartiality being a paramount requirement in *inter partes* proceedings. Therefore, in such proceedings the opposition division's freedom to offer specific advice to one of the parties as to how an objection might be overcome is severely limited and the opposition division should refrain from giving one-sided assistance in such proceedings (T 173/89, Reasons 2, penultimate paragraph; T 1072/93, Reasons 5.3).

8.3.4 The passages of the decision cited above might be interpreted to mean that the opposition division mentioned that the non-admitted auxiliary requests might be amended by deleting the use claims. While these passages from the decision alone do not clarify that there was an explicit suggestion by the opposition division, it seems to be derivable from the minutes that the opposition division's chair stated that the then auxiliary requests 2 to 6 without the use claims could be admitted into the proceedings if all use claims were deleted.

However, this statement needs to be seen in the context of the preceding discussion, in which the opponents had argued that these requests should not be admitted in particular because they included additional use claims (see point 3.1 of the minutes) as well as in the context of the proprietor's statement, as mentioned above, requesting postponement of the decision on admissibility. It is not clear from these statements whether the proprietor had at least implied, if not stated, that it was prepared to delete the contentious use claims. From the minutes and the decision under appeal, however, it is clear that the opposition division was attempting to strike a balance between the

interests of the proprietor and those of the opponents. Although this resulted in a rather unfortunate course of events, taking the specific circumstances of the case into account, the board concludes that the opposition division's behaviour cannot be said to amount to a procedural violation of such severity that it could be qualified as substantial within the meaning of Rule 103(1)(a) EPC.

In view of the above, the request of opponent 2 for reimbursement of the appeal fee is to be refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division with the order to maintain the patent based on the claims 1-13 of the main request filed as the thirteenth auxiliary request with the reply to the opponents' grounds of appeal, and a description to be adapted thereto.

3. The request of the appellant (opponent 2) for reimbursement of the appeal fee is refused.

The Registrar: The Chairman:

M. Schalow A. Haderlein

Decision electronically authenticated