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**Datasheet for the decision  
of 19 October 2021**

**Case Number:** T 1819/19 - 3.3.09

**Application Number:** 14736055.6

**Publication Number:** 2999347

**IPC:** A23C9/00, A23P30/40, A23L5/00,  
A23L9/10

**Language of the proceedings:** EN

**Title of invention:**

CREAM PRODUCT PRODUCED BY USING NATURAL PRODUCTS SUCH AS MILK,  
CLOTTED CREAM, MOLASSES AND HONEY AND THE PRODUCTION METHOD  
THEREOF

**Applicant:**

ETI Gida San. Tic. A.S.

**Headword:**

Cream product/ETI

**Relevant legal provisions:**

EPC Art. 123(2)

**Keyword:**

Amendments - added subject-matter (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1819/19 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 19 October 2021**

**Appellant:** ETI Gıda San. Tic. A.S.  
(Applicant) Organize Sanayi Bölgesi 11. cadde  
Eskisehir (TR)

**Representative:** Sevinç, Cenk  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 14 March 2019  
refusing European patent application No.  
14736055.6 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** A. Haderlein  
**Members:** M. Ansorge  
D. Rogers

## **Summary of Facts and Submissions**

- I. The appeal was filed by the applicant (appellant) against the examining division's decision to refuse European patent application No. 14736055.6.
- II. The examining division decided that the claimed subject-matter did not involve an inventive step and that it lacked clarity (Article 84 EPC).
- III. With its grounds of appeal, the appellant filed an amended (initial) claim request.
- IV. The board issued a communication pursuant to Rule 100(2) EPC and indicated its preliminary opinion that the subject-matter of claim 1 of this initial claim request did not meet the requirements of Article 123(2) EPC and Article 84 EPC. In particular, the board stated that there was no basis in the application as filed for the feature that the viscosity values mentioned in claim 1 are to be measured at "5°C to 20°C" (Article 123(2) EPC).
- V. In response to the board's communication, the appellant filed a further claim request by letter of 22 March 2021, replacing the initial claim request, and the following document:  
  
D1: Declaration of Mr. Görgülü
- VI. Claim 1 (filed on 22 March 2021) reads as follows:  
  
"A food product consisting of completely natural ingredients and not containing any additive or preservative or emulsifier or additional sugar or non-

milk-based fats, characterized in that; [sic] it contains 25-45% fresh milk, 10-20% clotted cream, 10-45% natural sweetener selected from one or more of honey, palm essence, molasses or natural aromas, 15-40% milk fat by mass and one or more of functional nutritional ingredients selected from fibers, yoghurt and cheese, additionally in different mixtures without containing additional agents that form composition, prevent decomposition and enhance the emulsion, and its viscosity is in the range of 1.000-20.000 cp (centipoise) at 5-20°C." (emphasis added by the board)

- VII. The appellant was duly summoned to oral proceedings to be held on 19 October 2021 by videoconference.
- VIII. On 19 October 2021, oral proceedings took place. The representative of the appellant did not attend the oral proceedings. In accordance with Article 15(3) RPBA, the oral proceedings were continued in the absence of the duly summoned appellant.
- IX. At the end of the oral proceedings, the decision was announced.
- X. The appellant's arguments submitted in writing, as far as relevant for the present decision, can be summarised as follows:

The subject-matter of claim 1 meets the requirement of Article 123(2) EPC.

More specifically, the appellant argued as follows:

- The feature relating to the viscosity range of 1000 to 20000 cp is disclosed in the original claim 7.

It is also based on page 8, lines 17 to 18, of the application as filed.

- Page 8, lines 22 to 24, of the application as filed also discloses that the temperature of the end product can be regulated in the range of 5-20°C. From these statements, the person skilled in the art can conclude that the end product disclosed in the subject-matter of claim 1 can have a temperature in the range of 5-20°C and that the same end product's viscosity will be in the range of 1000 to 20000 cp.
  
- The skilled person would easily understand that a food product having a wide viscosity range, which is in the range of 1000 to 20000 cp, is meant to be in the temperature range of 5-20°C. According to the declaration of Mr. Görgülü (D1), the viscosity range of the end product disclosed in the application in the present case is to be understood as 20000 cp at 5°C and 1000 cp at 20°C when measured by a rotational measurement method with a Brookfield DV II + Pro Model Viscometer. In the light of the above arguments and the declaration, claim 1 meets the requirement of Article 123(2) EPC.

#### XI. Request

The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the set of claims filed by letter of 22 March 2021.

## Reasons for the Decision

1. Article 123(2) EPC
  - 1.1 Claim 1 contains the feature "its viscosity is in the range of 1.000-20.000 cp (centipoise) **at 5-20°C**" (emphasis added). This feature implies that the viscosity of the food product is to be measured in the temperature range of 5°C to 20°C.
  - 1.2 The feature "viscosity is in the range of 1.000-20.000 cp (centipoise)", without an indication of the temperature for measuring the viscosity, is disclosed in claim 7 of the application as filed. However, there is no disclosure in the application as filed that the viscosity values of the claimed food product are to be measured over the range of 5°C to 20°C. This was communicated to the appellant in the board's communication with respect to claim 1 of the initial claim request. The same conclusion is equally applicable to the present claim 1, since the viscosity feature against which the objection was raised is unchanged and is still contained in claim 1 (see point 4.1.1 of the board's communication).

On page 8, lines 22 to 24, of the application as filed, it is mentioned that the temperature of the end product can be regulated in the range of 5-20°C, without any further explanation. This latter text passage does not disclose, however, the temperature at which the viscosity is to be measured. Instead, it merely mentions that the temperature of the end product can be regulated in the given temperature range. This indication does not allow any conclusion concerning the

temperature for measuring the viscosity. The expression "the temperature of the end product can be regulated at the range of 5-20°C" might relate to the desired temperature of consumption, storage, etc. However, it does not unambiguously disclose that the temperature range of 5°C to 20°C relates to the reference point for measuring the viscosity.

- 1.3 A skilled person would expect the viscosity to be measured at a precisely defined temperature to achieve reliable and comparable values, and not over a temperature range. Indeed, that would inherently result in largely varying values due to the temperature variations alone. As can, for instance, be derived from D1, the viscosity values of a sample to be measured significantly depend on the measuring temperature. This is part of the common general knowledge of a skilled person.

In view of the above, a skilled person would not consider the temperature range mentioned on page 8, lines 22 to 24, of the application as filed to represent the temperature conditions for measuring the viscosity. This text passage is not, therefore, a direct and unambiguous disclosure for the range of 5°C to 20°C representing the temperature conditions for measuring the viscosity.

- 1.4 The appellant argued that the skilled person would understand that a food product having a wide viscosity range (1000 to 20000 cp) is meant to be in the temperature range of 5°C to 20°C. In this context, the applicant assumed that the skilled person would understand the relationship between the data, since the wording "end product" is used for both, i.e. for the viscosity values of the end product and also for the

temperature of the end product mentioned on page 8 of the application as filed.

These considerations, however, are insufficient to show that the skilled person would directly and unambiguously derive from the application as filed that the viscosity is to be measured at any temperature within the claimed range. The reasons for this are set out in point 1.3 above.

In view of the above, the subject-matter of claim 1 does not meet the requirement stipulated in Article 123(2) EPC.

2. Accordingly, the only claim request on file is not allowable.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated