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Datasheet for the decision of 3 February 2022

Case Number:	T 3209/19 - 3.3.09
Application Number:	13760131.6
Publication Number:	2869707
IPC:	A23D9/00, A61K38/01, A61K38/17, A61K47/46, A61K36/48, A23L33/18, A23L33/185, A23L33/19, A23J3/14, A61K38/16, A61K9/00, A61K35/20, A23L33/00
Language of the proceedings:	EN

Title of invention:
METHOD FOR PRODUCING A PROTEIN AND LIPID COMPRISING COMPOSITION WITH REDUCED DIGESTIVE COAGULATION

Patent Proprietor:
N.V. Nutricia

Opponent:
Société des Produits Nestlé S.A.

Headword:
Protein and lipid-comprising composition/Nutricia

Relevant legal provisions:
EPC Art. 83, 54(1), 56
RPBA 2020 Art. 13(2)

Keyword:
Sufficiency of disclosure - main request (yes)
Novelty - main request (yes)
Inventive step - main request (yes)

Decisions cited:
G 0001/03, T 0726/16, T 1312/16, T 1571/17

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Case Number: T 3209/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 3 February 2022

Appellant: (Patent Proprietor)	N.V. Nutricia Eerste Stationsstraat 186 2712 HM Zoetermeer (NL)
Representative:	Nederlandsch Octrooibureau P.O. Box 29720 2502 LS The Hague (NL)
Respondent: (Opponent)	Société des Produits Nestlé S.A. Entre-deux-Villes 1800 Vevey (CH)
Representative:	Elkington and Fife LLP Prospect House 8 Pembroke Road Sevenoaks, Kent TN13 1XR (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 23 October 2019 revoking European patent No. 2869707 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	A. Haderlein
Members:	C. Meiners
	E. Kossonakou

Summary of Facts and Submissions

I. The appeal was filed by the patent proprietor (appellant) against the opposition division's decision to revoke European patent No. 2 869 707.

II. With its notice of opposition, the opponent (respondent) had requested that the patent be revoked in its entirety, *inter alia,* on the grounds for opposition under Article 100(a) EPC (lack of novelty and inventive step) and Article 100(b) EPC (insufficiency of disclosure).

III. The following documents, filed by the opponent/ respondent in the opposition and appeal proceedings, are relevant to the present decision:

D1 EP 1 314 361 A1
D2 WO 2010/126362 A1
D3 WO 2011/093693 A1
D4 WO 2010/131952 A1
D5 WO 2006/029298 A1
D6 WO2014/011039 A1
D8 Clinical Nutrition 32(2013) pp. 765-771
D13 EP 1 972 345 A1
D14 EP 1 972 346 A1

IV. In the decision under appeal, the opposition division found, *inter alia,* that the subject-matter of the then main request was directly and unambiguously derivable from the application as filed (Article 123(2) EPC) and that the claimed invention was sufficiently disclosed (Article 83 EPC). However, the subject-matter of the product-by-process claim 6 lacked novelty.

The opposition division held that the subject-matter of the auxiliary requests was not novel or did not involve an inventive step in view of document D2 as the closest prior art.

V. The board issued a communication pursuant to Article 15(1) RPBA 2020 in which it set out its preliminary opinion in preparation for the oral proceedings, which took place on 3 February 2022.

VI. In the course of the oral proceedings before the board, the respondent filed documents D13 and D14 and requested their admission into the appeal proceedings.

VII. The present decision is only concerned with the main request. The relevant claims of which read:

"1. A process of producing a composition comprising at least one lipid and a mixture of two different proteins, of which at least one is a casein and at least one is an anti-coagulating protein, comprising the steps of:
a) heat-sterilising a first liquid component which comprises said casein in an amount of at least 85wt% of the total protein content of the first component, and wherein said first liquid component comprises less than 5wt% anti-coagulating protein based on the total protein content of the first liquid component, and
b) heat-sterilising a second liquid component comprising said anti-coagulating protein, wherein said anti-coagulating protein is selected from pea protein and soybean protein; and wherein said second liquid component comprises less than 0.1 wt% of casein based on the total protein content of the second liquid component, and

c) mixing said first component with said second component to obtain a mixture of said proteins, wherein said first and/or said second liquid component comprises said lipid, preferably at least said second liquid component comprises said lipid, and wherein said mixture has a weight ratio of said casein to said anti-coagulating protein of between 10:1 and 1:1."

"5. A dry or liquid composition obtainable by the process according to any one of claims 1-4."

"6. A composition according to claim 5, comprising a mixture of casein and anti-coagulating protein which, in the Gastric Digestion Test of Example 1, produces an amount of wet weight coagulate fraction larger than 0.25 mm which is at least 10% less than the amount produced by the same protein mixture prepared by first mixing the two different protein components followed by heat-sterilising the mixed protein components."

"7. A non-therapeutic process for reducing coagulation in the upper gastrointestinal tract in a person, comprising administering or consuming the composition according to any one of claims 5 and 6."

"8. Non-therapeutic use of the composition according to any one of claims 5 and 6 in the reduction of coagulation in the upper gastrointestinal tract in a person."

VIII. The appellant's arguments, relevant to the decision, may be summarised as follows.

(a) The claimed subject-matter met the requirement of sufficiency of disclosure. The objections over the expressions "anti-coagulating protein" and

"reduction in coagulation" concerned clarity issues but did not give rise to insufficiency of disclosure.

(b) All the anti-coagulating proteins had to be taken into account when calculating the ratio of casein to anti-coagulating proteins. Consequently, D2 and D3 did not anticipate the subject-matter of claim 5, which was thus novel.

(c) The claimed subject-matter involved an inventive step over D2 as the closest prior art.

(d) The documents D13 and D14 should not be admitted into the appeal proceedings. There were no cogent reasons justifying their admission at this late stage.

IX. The respondent's arguments, relevant to the decision, may be summarised as follows.

(a) As to sufficiency of disclosure, the expression "anti-coagulating protein" was a functional feature. However, pea and soy proteins were not anti-coagulating proteins within the meaning of the patent in suit. No synergistic effect on reduction of (casein) coagulation beyond what was expected arithmetically had been demonstrated in the patent for these proteins. As to claims 7 and 8, their wording required an overall reduction of coagulation in the upper gastrointestinal tract. This was, however, not possible, in particular in view of Example 1 of the patent.

(b) The product-by-process claim 5 lacked novelty over D2 and D3 since there could only be one "casein"

and only one "anti-coagulating protein" in the required mixture of two different proteins. Moreover, the process features of the claim did not confer distinction over D2.

(c) The subject-matter of claim 1 was obvious in view of document D2 as the closest prior art. The distinguishing technical feature was that, compared to D2, casein and pea protein were heat-sterilised separately.

The resulting objective technical problem was merely to provide an alternative process for preparing the compositions of D2. The solution, however, was obvious in view of D1 or D5. A composition obtainable by an obvious process was necessarily also obvious. Thus, the subject-matter of claims 1 and 5 also lacked an inventive step. The same applied to the subject-matter of claims 7 and 8.

(d) Documents D13 and D14 should be admitted into the appeal proceedings. They had been filed as a reaction to the board's interpretation of claim 1 in its preliminary opinion issued in preparation for the oral proceedings and were particularly relevant to the question of novelty and inventive step, respectively.

X. 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 of one of auxiliary requests 1 to 20, all filed with the statement setting out the grounds of appeal.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. Admissibility of documents D13 and D14 (Article 13(2) RPBA 2020)

1.1 The respondent filed documents D13 and D14 at the beginning of the oral proceedings before the board. According to the respondent, in view of the board's interpretation of claim 1 of the main request set out in the communication under Article 15(1) RPBA, it had realised during the final preparation for the oral proceedings that D13 was highly relevant with regard to novelty. D14 was very similar to D13 and considered the closest prior art for the assessment of inventive step. D14 had been filed to establish the link to T 1312/16 and to complete the picture. Document D13 had been filed in the appeal proceedings relating to T 1571/17. Both cases had been dealt with by the current board and also involved the appellant as a party. Exceptional circumstances applied since these documents were well-known to the parties.

1.2 The filing and citing of documents D13 and D14 and the attempt to base a novelty and inventive-step attack on

them on the very day of the oral proceedings constitutes an amendment to the respondent's case within the meaning of Article 13(2) RPBA 2020.

1.3 The board is not convinced by the respondent's arguments.

1.3.1 Regarding the extreme lateness of the filing of D13 and D14, the board notes that the respondent was aware of the content of these documents well in advance of the oral proceedings before the board as it was also party to the proceedings in the other relevant appeal cases T 1571/17 (decision posted on 19 July 2021) and T 1312/16 (decision posted on 3 February 2021). Therefore, the party could and in fact should have filed these documents considerably earlier.

1.3.2 The respondent's argument that the appellant and the board were familiar with the content of D13 and D14 does not convince the board either. Notwithstanding the fact that the board's composition was not the same in all cases, if this line of argument were to be followed, the parties would be free to file any document filed in one of the numerous proceedings this (and any) board is dealing with, rendering the provisions of the rules of procedure moot.

1.3.3 Finally, the board notes that the claim interpretation according to the preliminary opinion set out in the communication under Article 15(1) RPBA 2020 corresponded to the interpretation of claim 1 of the main request forming part of the statement setting out the grounds of appeal. Therefore, no new element was introduced by the board which could possibly justify the late filing of new evidence.

1.4 It follows that there were no exceptional circumstances justified by cogent reasons by the respondent for the amendment in its case. Consequently, the board decided not to take D13 and D14 into account (Article 13(2) RPBA 2020).

2. The patent

The patent relates to protein- and lipid-containing nutritional compositions and aims to reduce digestive coagulation of these compositions in the upper gastro-intestinal tract, in particular in the stomach (see paragraphs [0002], [0003] and [0009] of the patent).

3. Sufficiency of disclosure

3.1 "Anti-coagulating protein" - claim 1

3.1.1 In the view of the opponent, the feature "anti-coagulating protein" (ACP) includes an implicit functional requirement, namely that the proteins specified in claim 1 as ACPs, namely soy proteins and pea proteins, had to deliver "ACP action". This meant exhibiting an anti-coagulating action within the meaning of the patent which involved a synergistic effect. A synergistic effect on reduction of (casein) coagulation beyond what was expected arithmetically was required in paragraph [0077] of the patent in suit, and paragraph [0078] required that the ACP had the effect of reducing the coagulation of the casein with which it was combined in the presence of at least one lipid.

3.1.2 The board does not agree with this argument. Firstly, the compounds which should be considered "anti-coagulating proteins" in claim 1 are specifically called for in the claim, i.e. soy proteins and pea

proteins. Secondly, claim 1 does not require any kind of synergism. Such a required synergism cannot be derived from the expression "anti-coagulating" in the feature "anti-coagulating protein". Finally, an effect not claimed but only described in the specification does not render the claimed subject-matter insufficiently disclosed (see G 1/03, Reasons 2.5.2). The board sees no reason why the process of claim 1 could not be carried out across the full breadth of the claim, using the mentioned components.

3.1.3 In this context, the respondent has neither demonstrated nor rendered plausible that the process according to claim 1 would not be operable due to the fact that the examples of the patent do not use soy protein. As mentioned in the impugned decision, it is plausible in view of the results featured in D6 that similar effects can be expected when using soy protein instead of pea protein.

3.1.4 In view of the clear limitation of the feature "anti-coagulating protein" in claim 1 to specific meanings, there is no need to consult the specification to determine the meaning of the expression "anti-coagulating protein" either.

3.1.5 These conclusions are not invalidated by the reference of the respondent to document D4 and the technical teaching it contains relating to ACPs within the meaning of D4. The respondent argued that the data in D4 did not support an "anti-coagulating effect" for pea protein. This effect, which is not supported in D4, is not called for in the claims under examination and, thus, this argument fails.

3.1.6 Finally, the board holds that the fact that the examples do not demonstrate which component of the prepared compositions is affected by the heating step does not have a bearing on the operability of the subject-matter of claim 1.

3.1.7 Even if - for the sake of argument - it were accepted that a skilled person wishing to put claim 1 into practice would have deemed it necessary to consult the description, they would first be confronted with the teaching of paragraph [0076], which mirrors the results described in Example 1.

Paragraph [0076] sets out that the mixture obtained by a process as called for in claim 1 has reduced coagulation properties compared to the same mixture obtained by first mixing and subsequently heat-sterilising casein and ACP(s) and the at least one lipid.

Paragraph [0077] is of an explanatory nature, relating to the reduction of coagulation mentioned in paragraph [0076]. There, however, the meaning of "reduced coagulation" is of a comparable nature, and the expression is used *relative* to the same mixture obtained by heating all the components together.

It follows that the non-linearity (i.e. the "synergy") of the measured coagulum content (the mass retained on a sieve having a mesh width of 0.25 mm) in the digestion test of the patent has to be interpreted as the reduction of coagulation observed when applying the process of claim l relative to a scenario in which the combined protein components and the at least one lipid are heat sterilised in one composition. According to paragraph [0078] of the patent, the reduction of

coagulation of casein with which the ACP is combined can be characterised by the gastric digestion test. Hence, the reduction of coagulation as observed for pea protein in the digestion test applied in Example 1 is in line with the teaching of the description.

3.1.8 Following this line of argument further, sample 1 in Figure 1 of the patent reflects the scenario representing the expected arithmetic incremental contributions of casein and ACP(s) in the artificial gastric digestion test, whereas sample 2 represents the scenario exhibiting the "synergy", as described in paragraphs [0078] and [0122] of the patent.

3.1.9 For these reasons, the board does not see insufficiency of disclosure arising from the feature "anti-coagulating protein".

3.2 "Reducing coagulation" - claims 7 and 8

3.2.1 According to the respondent, the expressions "for reducing coagulation in the upper gastrointestinal tract in a person" referred to in claim 7 and "in the reduction of coagulation in the upper gastrointestinal tract in a person" in claim 8 mean that the sought purpose is to reduce overall coagulation of proteins in the upper gastrointestinal tract of a person. The composition used contains casein, which is a coagulating protein, and thus clearly could not reduce overall coagulation of proteins. Therefore, a lack of sufficiency of disclosure arises.

3.2.2 The board does not agree. A skilled person, being familiar with the concept of pH-dependent coagulation of proteins, infers from the information provided in the claims (and especially in claims 7 and 8 in view of

the back-reference to claim 6) that these expressions relate to the casein (a coagulating protein) contained in the composition to which claims 7 and 8 refer, and the process/use of claims 7 and 8 leads to less coagulation of this protein contained in this composition.

3.2.3 This interpretation of the meaning of claims 7 and 8 is seconded by the additional information provided in the specification, such as in paragraph [0020], to which the appellant referred in this context. Paragraph [0020] sets out that, surprisingly, the compositions have reduced coagulation properties when ingested, i.e. the compositions themselves coagulate less.

3.2.4 Consequently, the board does not agree with the argument of the respondent that claim 7 includes embodiments directed towards the overall reduction of (protein) coagulation in the upper gastrointestinal tract.

Such an interpretation of reduction of coagulation (by providing compositions prepared according to the process of claim 1) was also put forward in point 3.3.3.2 of the impugned decision to which the appellant referred. There, it is concluded, *inter alia,* that "..., the example provided in the patent specification corroborates an anti-coagulating effect in form of a reduction of coagulation induced by the coagulating protein due to the presence of pea as anti-coagulating protein when applying separate sterilisation of the two components (see [0121] and Fig. 1). Moreover, as stated before, similar effects when using soybean protein have been acknowledged in the patent, and were confirmed by the disclosure of D6".

3.2.5 The board agrees with this conclusion and adopts the position of the opposition division in this matter.

This understanding does not require a "further reduction" in coagulation with respect to the prior art, such as the protein-containing compositions of D2 and D3, or of document D8. When applying the *board's interpretation* of claim 1 as outlined under points 4.2 and 4.3 below, the scope of claim 1 does not include the embodiments of the ACP-containing compositions disclosed in D2 and D8, as conceded by the respondent in the oral proceedings. Analogous conclusions apply *mutatis mutandis* to document D3, which does not disclose directly and unambiguously, *inter alia,* a weight ratio of casein to all the ACPs, selected from pea and soy protein, of between 10:1 and 1:1. Hence, the argument that some compositions meeting the structural requirements of claim 1 but prepared according to the prior art (those of D2 and D3) already produced no detectable coagulate is not valid.

3.2.6 The respondent also argued that the patent in suit only included a single example, using a specific ratio of sodium caseinate and pea protein as well as a specific lipid (canola oil). It was not plausible that the claimed effect would be observed for all claimed ratios of casein to ACP, for all types of casein (e.g. hydrolysed casein) and for all types of lipid.

3.2.7 The board, however, notes that the respondent has not adduced any evidence or pertinent facts which would corroborate that a reduced coagulation (relative to a corresponding scenario in which all the components of the lipid- and protein-containing mixtures are heat sterilised together) could not be observed for all claimed ratios of casein to ACP, for all types of

casein (e.g. hydrolysed casein) and for all types of lipid.

3.2.8 Thus, no insufficiency arises from the objected expressions "for reducing coagulation in the upper gastrointestinal tract in a person" and "reduction of coagulation in the upper gastrointestinal tract in a person". Therefore, the subject-matter of claims 7 and 8 also meets the requirements of Article 83 EPC.

3.3 Consequently, the subject-matter of the main request is sufficiently disclosed, thus meeting the requirement of Article 83 EPC.

4. Further claim construction for assessing novelty and inventive step

4.1 The respondent is of the opinion that claim 1 requires the presence of exactly two proteins in the protein mixture forming part of its compositions. This claim construction is in line with the corresponding findings in the decision under appeal. As one of these proteins had to be a casein, this left space for a single ACP. The respondent argues that, in view of the open language of claim 1, more than one ACP could be present in the composition. However, in this case only one of them could be taken as the "said anti-coagulating protein" which formed part of the required "mixture of two different proteins". Consequently, the limitation of the weight ratio of the casein to ACP of between 10:1 and 1:1 in claim 1 only related to the casein and one ACP. This meant that either pea protein or soybean protein had to be taken into account in the calculation of this weight ratio. This interpretation was also supported by the application as originally filed.

4.2 The board does not agree with this interpretation of claim 1. The wording "wherein said anti-coagulating protein is selected from pea protein and soybean protein" includes scenarios in which both pea protein and soy protein are present in the protein mixture, and thus both have to be taken into account when calculating the mentioned weight ratio of the casein to ACP. In other words, the expression "a mixture of two different proteins" signals a mixture of two different types of proteins (namely, caseins and ACPs).

Already step a) of claim 1 refers to "said casein". This "said casein" refers to the casein of the mixture referred to in line 2 of claim 1. Likewise, step b) of claim 1 refers to "said anti-coagulating protein", mentioned for the first time in line 2 of claim 1. Hence, the wording and the structure of claim 1 leaves no room for the interpretation of the respondent that the ratio of casein to ACP had to be calculated based on the first casein of the first component and the first ACP (being either soybean or pea protein) of the second component only.

4.3 Likewise, the board agrees with the appellant that the description of the patent also supports this interpretation of claim 1 allowing for the presence of a mixture of pea protein and soy protein (see for instance the explanations provided in paragraph [0014]). What is more, the weight ratio of between 10:1 and 1:1 between caseins and ACPs disclosed in paragraph [0015] of the patent takes all the ACPs into account. The board concurs with the appellant that the only sensible interpretation of the ratio in claim 1 is one in which all the caseins and all the ACPs, selected from pea and soy protein, contribute to the weight

ratio and are taken into account for calculating the mentioned weight ratio.

5. Novelty

5.1 The respondent acknowledges that the method according to claim 1 is novel but objects to the subject-matter of the product-by-process claims 5 and 6 for lack of novelty in view of D2 and D3 as also held by the opposition division. The respondent's objection is based on its own interpretation of claim 1 to which claims 5 and 6 refer (see point 4.1 above).

5.2 The board adopts a different interpretation (see points 4.2 and 4.3 above), under which documents D2 and D3 do not take away novelty of the subject-matter of claims 5 and 6. Undisputedly, neither D2 nor D3 divulge compositions comprising a ratio of caseins to all ACPs selected from pea protein and soy protein as required in claim 1, to which claims 5 and 6 refer.

In the same line of argument, the blend P4 of D8, relied on by the respondent and exhibiting no detectable coagulation, undisputedly does not fall within the scope of claim 5 as regards its protein composition.

5.3 As a consequence, the evidentiary burden to corroborate that separately heat-sterilising the first and the second component in claim 1 results in intrinsic/ structural differences is not shifted to the appellant. Such a shift of the evidentiary burden had been ascertained in the impugned decision based on the argument that the products of D2 and D3 were already free of coagulate and that therefore coagulation behaviour did not represent a distinctive feature.

5.4 Likewise, merely extrapolating data from D4 (which does not disclose the content of the coagulum having particle size from 0.25 to 1 mm), as in the graph on page 6 of the respondent's reply to the grounds of appeal, cannot shift this evidentiary burden. These results were presented by the respondent to show that no aggregation/coagulation of casein took place below a concentration of about 3% (w/v) below which no coagulate of significant size was to be expected in solution. As demonstrated in Figure 1 of the patent, significant amounts of coagulate can be present having a particle size between 0.25 mm and 1 mm.

5.5 Consequently, the respondent has not corroborated that the products of claim 5, which have been prepared by the process of claim 1, could not be discerned from corresponding compositions in which the first and second liquid components have been heat-sterilised together.

5.6 In contrast, it has been demonstrated in the patent that two otherwise identical exemplary compositions, falling within the scope of claim 1 and claim 5 in terms of the composition of the components from which they have been prepared, exhibit a different aggregation behaviour, depending on the preparation process. This aggregation behaviour is assessed by the amount of coagulum formed in the "gastric digestion test". It is the core teaching of the patent that separate heat sterilisation of the first and second liquid component of the protein- and lipid-containing compositions to be formed gives rise to reduced coagulation.

5.7 The respondent has speculated but not submitted any evidence that such a structural difference could not be observed across the full breadth of claim 1 (to which claim 5 refers), not contesting the evidence contained in the patent *per se* but only raising doubts as to whether it could be extrapolated.

It follows that the case at hand differs from the one underlying T 726/16 referred to by the respondent as to the convincing power of the evidence relied on by the proprietor.

5.8 The board thus concludes that also the process features of claim 1, to which product claim 5 refers, give rise to different structural properties.

5.9 For these reasons, the board concludes that the subject-matter of claims 5 and 6 is novel vis-à-vis documents D2 and D3. It thus meets the requirements of Article 54(1) EPC.

6. Inventive step

6.1 Closest prior art

It is uncontested that document D2 is a suitable starting point for the assessment of inventive step and can thus be taken as the closest prior art. Like the patent, it is directed towards the provision of protein-containing nutritional compositions. The compositions comprise pea protein as a non-coagulating protein under the conditions of a gastric digestion test. Further ingredients, such as fat (lipid) can be added to the protein mixtures of D2.

6.2 Distinguishing features

The subject-matter of claim 1 differs from the process disclosed in D2 i) by separately heat-sterilising the first and second liquid components and ii) in the ratio of casein to ACPs of between 10:1 and 1:1.

6.3 Problem to be solved

The respondent argued that no technical effect was ascribable to the distinguishing features. This question can, however, be left open, since, as shown below, the subject-matter of claim 1 is not obvious even considering the problem to be solved to be an alternative process for producing an alternative composition comprising a lipid and a mixture of two different proteins.

6.4 Obviousness

6.4.1 The respondent argued that, based on the teaching of page 18, lines 4 to 17 of D2, a skilled person would readily consider adjusting the amounts of casein/whey/soy/pea proteins in D2 (disclosed in the protein- and lipid-containing compositions B1 to B3 in table 3) to values of 34/40/13/13 w.-%, falling within the scope of claim 1. Such a combination would remain within the preferred ranges for these components of D2 and still contain 66 w.-% of ACPs based on the total protein content in the mixture. A skilled person consulting D2 would expect there to be no problem of coagulate formation in such a scenario, also in view of the results for the casein/ACP 50/50-mixture presented in D4, forming no coagulate.

6.4.2 The board notes that D4 does not disclose the coagulate content of protein compositions in the range of 0.25 to 1 mm mesh width/particle size. Consequently, even considering that a skilled person considering D2 as the closest prior art would have been aware of the information content of D4, they would not have inferred that aqueous casein/ACP 50/50-mixtures would not form coagulate particles having a particle size of 0.25 mm or greater after heat sterilisation.

6.4.3 It is thus questionable whether a skilled person would depart from the examples provided in D2 by modifying their protein composition towards a protein mixture falling within the scope of claim 1 by lowering the pea and soy protein content as the ACP component relative to the casein content as a coagulating protein component.

6.4.4 Secondly, even if they considered making such a first adaptation of any of the examples B1 to B3 with regard to the protein composition, a skilled person would not depart from the heat sterilisation of the combined protein mixture by separately sterilising casein and the ACPs to solve the problem posed.

6.4.5 A skilled person gets no prompting from D2 to depart from the sterilisation of the combined protein mixture in favour of separately sterilising the casein component and the ACPs. They would thus have no motivation to adduce secondary documents, such as D1 or D5, to adapt the preparation process of D2 by implementing the alternative, i.e. separate sterilisation of the (protein) components (such as described in D1 and D5). They would thus not realistically arrive at something falling within the scope of claim 1.

6.4.6 Consequently, the subject-matter of claim 1 is not obvious to a skilled person in view of D2 as closest prior art and meets the requirements of Article 56 EPC.

6.4.7 No arguments have been put forward by the respondent which addressed the assessment of inventive step of the subject-matter of independent claim 5. The respondent argued that an obvious process for the preparation of a product would also render the product obtainable or obtained by this process obvious.

6.4.8 As to this line of argument, the board concludes that a skilled person not prompted to modify the preparation process of D2 towards one including also distinguishing features i) and ii) as identified above in an obvious manner would not arrive at products prepared by this process in an obvious manner. Consequently, the subject-matter of independent claim 5 is also based on an inventive step and meets the requirements of Article 56 EPC.

6.4.9 As mentioned above, such products are distinguished from D2 by feature ii) and also exhibit structural/ intrinsic properties conferred by process feature i).

6.4.10 This finding also renders the use of such compositions to reduce coagulation in the upper gastrointestinal tract of a person non-obvious. Therefore, the subject-matter of claims 7 and 8 is likewise not obvious to a skilled person in view of document D2 as the closest prior art.

6.4.11 Consequently, the subject-matter of the main request meets the requirements of Article 56 EPC.

7. Adaptation of the description

No objections were raised by the respondent over the final version of the adapted description. The board had no objections over the amended specification either. The claims of the main request are supported by the amended description.

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 as amended in the following version:

- description pages 2 to 13 filed at the oral proceedings before the board
- claims 1 to 8 of the main request filed with the statement setting out the grounds of appeal
- Figure 1 of the patent specification

The Registrar: The Chairman:

A. Nielsen-Hannerup A. Haderlein

Decision electronically authenticated