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**Datasheet for the decision  
of 20 March 2023**

**Case Number:** T 0315/21 - 3.2.04

**Application Number:** 13714278.2

**Publication Number:** 2833767

**IPC:** A47J31/40

**Language of the proceedings:** EN

**Title of invention:**

APPARATUS AND METHOD FOR PROVIDING METERED AMOUNTS OF  
INGREDIENT, ESPECIALLY FOR A TAILORED NUTRITION TO INFANTS

**Patent Proprietor:**

Société des Produits Nestlé S.A.

**Opponent:**

N.V. Nutricia

**Headword:**

**Relevant legal provisions:**

EPC Art. 84, 111(1)  
RPBA 2020 Art. 12(4), 12(6), 11

**Keyword:**

Claims - clarity (yes)

Amendment to case - amendment admitted (yes)

Remittal - (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

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Case Number: T 0315/21 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 20 March 2023**

**Appellant:** Société des Produits Nestlé S.A.  
(Patent Proprietor) Entre-deux-Villes  
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**Representative:** Plougmann Vingtoft a/s  
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**Respondent:** N.V. Nutricia  
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**Representative:** Nederlandsch Octrooibureau  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 9 February 2021  
revoking European patent No. 2833767 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** G. Martin Gonzalez  
K. Kerber-Zubrzycka

## **Summary of Facts and Submissions**

- I. The appeal was filed by the appellant (patent proprietor) against the decision of the opposition division to revoke the patent in suit.
- II. The division held that the main request before it lacked clarity.
- III. In preparation for oral proceedings the Board issued a communication setting out its provisional opinion on the relevant issues.

Oral proceedings before the Board were held as a videoconference on 20 March 2023.

- IV. The appellant proprietor requests that the decision under appeal be set aside and the case be remitted to the opposition division for further assessment of compliance with Article 100(a) EPC (novelty and inventive step) and Article 100(b) EPC (sufficiency) on the basis of the main request filed with letter of 17 March 2023, corresponding to the first auxiliary request filed with the statement of grounds for appeal. The previous main request (filed with letter of 15 April 2019) was withdrawn.

The respondent opponent requests that the appeal be dismissed. They further request an award of costs in case the Board remits the case on the main request.

- V. Claim 1 of the main request reads as follows (amendments with respect to the granted claim emphasised by the Board):

"An apparatus (1) for providing metered amounts of ingredients to a nutritional composition for use in administration to an infant, such as for use in an enteral administration, the apparatus:

- comprising a plurality of containers (2), each containing one or more ingredients for the nutritional composition,
- comprising a plurality of delivery devices (3), each being connected to a container (2) and adapted to deliver from a container (2) a metered amount of the one or more ingredients, to form part of the nutritional composition, to a receptacle (4),
- comprising input means (14) adapted to receive an input from a user relating to the amounts of the one or more ingredients to be delivered from the apparatus (1),
- comprising or having access to a database (6) storing recommended intake values of nutrients as a function of health parameters of an infant,
- comprising or having access to a database (6) storing values of nutrient content(s) of the ingredients present in the containers (2),

wherein

- the input from a user relating to one or more amounts of ingredients to be delivered from the apparatus (1) is health parameters of an infant,
- the delivery devices (3) being adapted to retrieve from the data base (6) recommended intake values of nutrients corresponding to the health parameters input, and determine the amounts of ingredient to be delivered from one or more of the containers (2) accordingly,
- comprising a controller (7) being adapted to control the metered amounts of ingredients delivered individually from the containers by the delivery

devices (3) in response to the input from the user and to

- retrieve from the data base (6) the amount of nutrient(s) in an ingredient,
- determine the amounts of ingredient to be delivered from the containers (2) corresponding to amounts of nutrients requested by the user through the input means (14), and
- control the delivery devices (3) to deliver into the receptacle (4) the determined amounts of ingredient from a container (2),

wherein the apparatus further comprises or has access to a database storing data of reactions of infants previous fed with a composition produced by the apparatus ~~according to any of the preceding claims or in general,~~ and wherein the amounts ingested earlier are also stored and used in the determination of an actual delivery of an ingredient."

VI. The appellant's arguments can be summarised as follows:

The main request is admissible as a fair response of the losing party to the appealed decision. This request is also admissible under Article 12(6) RPBA, since it could not have been submitted earlier. Its claim 1 is clear. Remittal to the opposition division for examination of the grounds and objections not considered in the decision under appeal is appropriate.

VII. The respondent's arguments can be summarised as follows:

The main request could and should have been presented at the oral proceedings before the opposition division. It is thus not admissible, Article 12(6) RPBA. Claim 1

of the main request is unclear. If the case is remitted to the opposition division, an award of costs in our favour would be appropriate.

### **Reasons for the Decision**

1. The appeal is admissible.

2. Background

The invention is directed to an apparatus and method for preparing individualized metered nutritional compositions to infants based on the infant's special needs, see patent specification paragraph [0001]. The apparatus has a plurality of containers with different ingredients. Each container has a delivery device for delivering metered amounts of the ingredient. The apparatus has input means for introducing health parameters of an infant, and control means to control the metered amounts of ingredients in response to the input. The control means uses a database storing recommended intake values of nutrients as a function of health parameters of an infant for determining the amount of ingredients to be delivered, see paragraphs [0015]-[0017]. The apparatus may further comprise a database where data of reactions of infants previously fed with a composition produced by the apparatus and the amounts ingested earlier of a specific infant are stored and used in the determination of an actual delivery of ingredients, see paragraph [0102].

3. Main request - Admission

3.1 The main request, filed on 17 March 2023, corresponds to auxiliary request 1 filed with the appellant's

statement of grounds of appeal. The request is new in appeal.

3.2 Its admission is subject to the discretion afforded to the Board under Article 12(6) RPBA. The Board shall not admit it if it should have been submitted in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.

3.3 The main request forming the basis for the impugned decision contained the following amendment vis-a-vis the granted claim:

"... wherein the apparatus further comprises or has access to a database storing data of reactions of infants previous fed with a composition produced by the apparatus, and wherein the amounts ingested earlier are also stored, and used in the determination of an actual delivery of an ingredient."

As explained in the written decision, cf. section 2.2.4, the comma between "stored" and "and used" makes unclear which data the claim requires for the last feature step of determining an actual delivery of an ingredient. Thus, the "used" of the final clause can be read as referring to the data stored in the database of the 1st clause of this feature, or to the amounts ingested earlier of the 2nd clause of this feature.

3.4 Present main request is only amended to delete the comma between "stored" and "and used", thereby clarifying that it is the amounts ingested earlier that are used for determining an actual delivery of an ingredient in the claim. This is clearly not a complex amendment. The question remains, why the proprietor did



not avail themselves of the opportunity to file such a simple amendment during the opposition oral proceedings. As is clear from the minutes, page 1, final two paragraphs, the proprietor requested and was given a break "to reflect on the strategy concerning a potential auxiliary request". After a short break (11:48 to 12:05) they decided not to file any.

3.5 The appellant proprietor refers to the course of the written and oral proceedings before the opposition division for justification.

3.5.1 The impugned decision is based on a request filed on 15 April 2019 in response to the opposition notice of 20 November 2018. The request contained the above quoted amendment. It eventually failed before the opposition division only on lack of clarity.

3.5.2 During the written proceedings, clarity of the amendment was only briefly addressed, namely in the opposition division's summons of 29 July 2019, section 7, and in the opponent's letter of 13 February 2020 in preparation to oral proceedings, page 2. The cited sections cursorily mention the need to discuss whether "the amounts ingested earlier" has a defined meaning and is clear and that the claim is silent as to how the new feature is actually implemented and which amounts and which ingredients are being determined.

The Board finds in these arguments no mention or suggestion that the now deleted comma gives rise to any lack of clarity.

3.5.3 At the oral proceedings before the opposition division, on 19 January 2021, clarity was then discussed in relation to a number of points raised by the opponent

(see minutes 1st paragraph of the section "Art.84 EPC, clarity of claim 1"). Some of these correspond to the points mentioned in the summons, but they also include new points, in particular "whether or not the determination includes the earlier amounts". This latter point is understood to relate to the issue of the comma, though that it is the comma that would be problematic is not expressly stated in the minutes. After a discussion of over an hour and a deliberation of just under an hour the chair announced the division's conclusion of lack of clarity and gave an explanation. The proprietor then asked for and was given a short break to consider an appropriate response.

3.6 As is apparent from their decision the division found a number of issues of lack of clarity including the comma issue, cf. section 2.2.4 of the impugned decision. The Board assumes that these correspond to the reasons given at the oral proceedings; indeed this is not contested. According to the opposition division it was unclear without any further definition which amounts ingested earlier are to be stored, the amounts of nutrients, of ingredients or composition amounts, and on what basis the amounts ingested earlier are to be determined, the amounts ingested by an average infant or a specific infant. The division found additional clarity objections related to the stored reaction of infants.

3.7 It is clear from the above that the issue of the comma was raised only at the oral proceedings together with a number of further clarity objections, some of which were also new, and that these issues together led the division to find lack of clarity. From the nature and detail of the reasoning in the decision, the Board

further finds that, apart from the question of the comma, the issues, including those first raised in the oral proceedings, were not easily resolved and would require considerable amendment. The Board certainly finds no indication in the minutes or decision that any particular amendment was suggested (which would have been improper in an inter partes proceedings anyway), much less that the issues could be resolved by simply removing the comma.

While deleting a comma may be a simple amendment, it is clear the division expected much more and the patent proprietor was faced with a rather unexpected and difficult situation. In the Board's estimation the proprietor could not fairly be expected to find a solution within a short time frame. Under these circumstances the division could have offered a longer break (several hours) or even an adjournment to give the proprietor a proper opportunity to fully absorb the issues raised and consider their options.

The Board therefore finds that the patentee was not in a position, in the little time available during the oral proceedings, to find an appropriate response to the complex and partially new situation with which they were confronted. Nor was this a situation of their own making as they had filed what was then the main request more than one and a half years before the oral proceedings. The Board cannot thus conclude in the light of the circumstances of the present case that the proprietor could or should have filed the present main request during oral proceedings before the opposition division.

3.8 Furthermore, this amendment by removal of the comma is without a doubt not complex and is eminently suitable

to address the ambiguity caused by its presence and which in part led to the decision under appeal. Moreover, it cannot be considered deleterious to the need for procedural economy as all other issues remain the same. Finally, withdrawal of the previous main request and promotion of this request to main request does not, as argued by the respondent, constitute an amendment to the proprietor's appeal case in the sense of Art 13(2) RPBA as it was filed with their statement of grounds.

- 3.9 The Board therefore decided to admit the main (previously auxiliary) request into the proceedings, Art 12(4) and Art 12(6) RPBA.
4. Main request - Clarity
- 4.1 The relevant claim wording reads (added features with respect to the granted version underlined by the Board): "...wherein the apparatus further comprises or has access to a database storing data of reactions of infants previous fed with a composition produced by the apparatus, and wherein the amounts ingested earlier are also stored and used in the determination of an actual delivery of an ingredient."
- 4.2 The deletion of the comma between "stored" and "and used" resolves the ambiguity identified by the opposition division in section 2.2.4 of what parameters. It is thus now clear from the claim wording without the comma that it is the amounts ingested earlier that are used in the determination of an actual delivery of an ingredient.
- 4.3 The division, see section 2.2.4 of the impugned decision, found the claim wording to lack clarity for

reasons that would apply also for the present main request, which but for the comma is unchanged. The Board is however unable to confirm these further findings of lack of clarity.

- 4.4 As variously stated in case law, claims lack clarity if the exact distinctions which delimit the scope of protection cannot be learnt from them, see Case Law of the Boards of Appeal, 10th edition 2022 (CLBA), II.A.3.1.

However, the clarity of a claim is not diminished by the mere breadth of a term contained in it, if the meaning of such term is unambiguous for a person skilled in the art, see CLBA II.A.3.3.

As regards **G3/14**, the claims of the patent may be examined for compliance with the requirements of Art. 84 EPC only when, and then only to the extent that, the amendment introduces non-compliance with Art. 84 EPC, see **G3/14**, catchword.

- 4.5 The kind of stored amount ingested by an infant is not specified in the claim. The respondent puts forward that it can be an amount of an ingredient or of various ingredients, of nutrients or of a composition. The Board does not see a clarity issue in this lack of specification. All options are technically meaningful in the context of preparing a nutritional composition, so that the claim covers all these technically meaningful options. The same holds for the absence of specification of the kind of ingested amount used for the actual determination argued by the opposition division, cf. section 2.2.4 last paragraph of the impugned decision, also argued by the respondent. Whether it is an average value for infants of a certain

age, or for a specific infant, or whether the ingested amount refers to the total of foodstuffs ingested or only a specific ingredient, the lack of specification makes the feature broad in scope but not unclear.

- 4.6 The feature of storing data of reactions of infants previously fed is not open to a clarity objection, **G3/14**, as that formulation already appeared in the granted claim and thus does not arise from any subsequent amendment per se.
- 4.7 How the stored amounts ingested earlier are specifically used for the determination of the actual delivery is not defined in the claim. The division appears to argue that this gives rise to a lack of clarity. For the Board it does not. As noted in **T 630/93** (see CLBA II.A.3.3 cited above, 4th paragraph) it is not always necessary for a claim to identify technical features or steps in full detail. The function of the essential features, although normally expressed in technical terms, is often to define the borders of an invention rather than details of the invention within those borders. Thus, essential features can often be of a very general character and in extreme cases indicate only principles or a new idea. This is applicable to the present case where the contested features define the general idea or concept that certain past use data can be used for the determination of an actual delivery.
- 4.8 The Board concludes that claim 1 of the main request is clear, Art 84 EPC.
5. Remittal

It is the primary object of the appeal proceedings to review the decision under appeal in a judicial manner, Article 12(2) RPBA. In its decision the division only considered the issue of clarity and did not consider any of the grounds originally raised and maintained by the respondent opponent against the amended claims.

In view of the appellate function of the Boards of Appeal it appears inappropriate for the Board to examine these grounds for the first time. Thus under the circumstances of the present case special reasons in the sense of Article 11 RPBA are present. Therefore the Board considers it appropriate to exercise its discretion under Article 111(1) EPC by remitting the case to the opposition division for further prosecution.

Both parties agree with this course of action.

6. Award of costs

The Board is unable to identify any act of the patent proprietor that goes beyond a normal defence of their patent and which might lead to the conclusion that reasons of equity would justify a different apportionment of costs under Article 104(1) EPC. The fact that the division chose to base its decision to revoke the patent on clarity only while not considering any of the grounds that were originally raised and maintained against the patent cannot be imputed to the appellant. As stated above the Board does not believe that the appellant proprietor could and should have submitted a new auxiliary request to address the clarity issues raised. And even if they had, it is by no means certain that they would have been successful. Indeed, extensive amendments might have given rise to

other issues with the same result, revocation of the patent without an examination of the original grounds of opposition. The situation would thus have been the same if not worse than that in which the respondent opponent finds themselves now.

## 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 for further prosecution.**

The Registrar:

The Chairman:



B. Brückner

A. de Vries

Decision electronically authenticated