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**Datasheet for the decision
of 10 January 2024**

Case Number: T 1261/21 - 3.3.09

Application Number: 13792250.6

Publication Number: 2916661

IPC: A23D9/00, A23G1/56, C11C3/00

Language of the proceedings: EN

Title of invention:

METHOD FOR OBTAINING BLOOM-RETARDING COMPONENTS FOR
CONFECTIONARY PRODUCTS

Patent Proprietor:

AAK Denmark A/S

Opponents:

Bunge Loders Croklaan B.V.
Cargill, Incorporated

Headword:

Bloom-retarding components for confectionary products/AAK

Relevant legal provisions:

EPC Art. 54, 56, 83, 84, 123(2), 100
RPBA 2020 Art. 12(4), 13(2)

Keyword:

Choice of elements from a "list of converging alternatives"
Amendments - allowable (yes)
Claims - clarity (yes)
Sufficiency of disclosure - (yes)
Novelty - (yes)
Inventive step - (yes)
Amendment after summons - taken into account (no)
Amended description consistent with the claims - (yes)

Decisions cited:

G 0001/03, G 0002/10, T 2237/10, T 1621/16, T 1937/17,
T 0149/18, T 1210/20, T 1133/21

Catchword:



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Case Number: T 1261/21 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 10 January 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 June 2021 concerning maintenance of the
European Patent No. 2916661 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: M. Ansorge
 R. Romandini

Summary of Facts and Submissions

- I. The proprietor and opponent 2 lodged appeals against the opposition division's interlocutory decision holding the then auxiliary request 16 allowable.
- II. With their notice of opposition, opponents 1 and 2 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.
- III. The opposition division decided that the subject-matter of the then main request and auxiliary requests 1 to 14 did not meet the requirement of Article 123(2) EPC and that claims 7 and 8 of the then auxiliary request 15 violated Article 84 EPC. The then auxiliary request 16 was held to be allowable.
- IV. With its statement of grounds of appeal, the proprietor filed, *inter alia*, auxiliary request 26. At the oral proceedings before the board, the proprietor withdrew all higher-ranking requests.
- V. Claim 1 of auxiliary request 26 (main request in this appeal case) reads as follows:

"A method for producing a bloom-retarding component for chocolate and chocolate-like products, the method comprising the step of:

Deodorizing a triglyceride composition, said triglyceride composition comprising at least 40% by weight of mono unsaturated symmetric triglycerides selected from the group consisting of POP, StOSt and POSt, where P equals palmityl, St equals stearyl and O

equals oleyl, wherein said triglyceride composition is cocoa butter, the deodorizing taking place for between 80 and 480 minutes at a temperature of at least 235°C."

Claims 2 to 9 of auxiliary request 26 are dependent method claims.

VI. The following documents were cited in this case:

- D1: R.E. Timms, "Confectionary Fats Handbook, properties, production and application", published by The Oily Press, 2003
- D2: W. Soon, "Speciality Fats versus Cocoa Butter", 1991, 33-9
- D4: WO 2008/113524 A1
- D7: N. Garti et al., "Cocoa Butter and Related Compounds", AOCS Press, 2012, 213-32
- D9: P. Lonchamp et al., "Fat bloom in chocolate and compound coatings", Eur. J. Lipid Sci. Technol., 106, 2004, 241-74
- D11: US 2005/0014237 A1
- D21: S.P.J. Namal Senanayake et al., "Modification of Fats and Oils via Chemical and Enzymatic Methods", Bailey's Industrial Oil and Fat Products, 6th edn., 555-84
- D22: US 2,378,005

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

VIII. Requests

The proprietor (appellant) requested that the decision be set aside and that the patent be maintained on the

basis of auxiliary request 26, filed with the proprietor's grounds of appeal or, as an auxiliary measure, that the patent be maintained on the basis of one of auxiliary requests 27 to 31, filed with the proprietor's grounds of appeal, or one of auxiliary requests 32 and 33, filed with the proprietor's reply to the grounds of appeal of opponent 2.

Opponent 2 (appellant) requested that the decision be set aside and that the patent be revoked.

Opponent 1 (party as of right) requested that the proprietor's appeal be dismissed.

Reasons for the Decision

1. Admittance of auxiliary request 26

1.1 Opponents 1 and 2 requested that auxiliary request 26 not be admitted into the proceedings.

1.2 For the following reasons, the board comes to a different conclusion.

Claims 1 to 9 of auxiliary request 26 correspond to claims 1 to 9 of auxiliary request 7 (filed on 21 April 2020 in the first-instance proceedings, renumbered before the opposition division as then auxiliary request 12, see the decision), except for the deletion of the alternative "chocolate like" in claim 8. This minor amendment is neither complex nor raises new issues.

Accordingly, auxiliary request 26 is admitted into the proceedings (Article 12(4) RPBA).

2. *Admittance of the inventive-step objection starting from D11 as the closest prior art (Article 12(4) RPBA); the one starting from D4 as the closest prior art in combination with D11 (Article 13(2) RPBA); and the new facts, arguments and objections, together with D22 (Article 12(4) RPBA)*
- 2.1 The proprietor requested that the inventive-step objection in view of D11 as the closest prior art; the one starting from D4 as the closest prior art in combination with D11; and the new facts, arguments and objections, together with D22, not be admitted.
- 2.2 The board takes the following position on these requests.
 - 2.2.1 Opponent 1 argued in its reply to the proprietor's grounds of appeal that the subject-matter of claim 1 of the main request lacked an inventive step starting from D11 as the closest prior art.

As correctly pointed out by the proprietor, this objection was not raised during the first-instance proceedings, and it did not form the basis for the decision. Consequently, the inventive-step objection in view of D11 as the closest prior art is an amendment to the appeal case which may be admitted only at the discretion of the board (Article 12(4) RPBA).

Article 12(4) RPBA further states that a party must clearly identify each amendment and provide reasons for submitting it in the appeal proceedings. However, opponent 1 has neither identified this amendment to their case nor provided reasons why this new inventive-step objection was submitted for the first time in the

appeal proceedings. As can be taken from the decision, all parties considered D4 the closest prior art (see point 7.4.1 of the decision), so there was common ground among the parties in the first-instance proceedings that D4 was the closest prior art.

Under these circumstance, the inventive-step objection in view of D11 as the closest prior art is not admitted into the appeal proceedings (Article 12(4) RPBA).

- 2.2.2 An inventive-step objection using the combination of documents D4 and D11 was mentioned in opponent 2's grounds of appeal, but opponent 2 did not substantiate it at this stage, nor did either opponent substantiate it in their replies to the proprietor's grounds of appeal. Only after notification of the summons and the board's communication pursuant to Article 15(1) RPBA did opponent 2 submit a substantiation of this objection explaining the potential relevance of the combination document D11 (see opponent 2's letters of 26 June 2023 and 5 January 2024).

Admittance of this objection is to be assessed under Article 13(2) RPBA, which stipulates that any amendment to a party's case after notification of a summons to oral proceedings must not be taken into account unless there are exceptional circumstances justified with cogent reasons by the party concerned.

Opponent 2 did not explain that there might have been exceptional circumstances. The board is unable to identify any exceptional circumstances either. Thus, this objection is not taken into account (Article 13(2) RPBA).

2.2.3 Opponent 2 submitted that D22 provided evidence that heat treatment at high temperatures for a relatively long reaction time as defined in claim 1 was, in reality, a chemical interesterification without a catalyst - something which had been known for many years before the patent was filed. It was further of the opinion that D22 casts doubts that the technical problem underlying the opposed patent has been solved.

Even if D22 were admitted into the proceedings, this document is not suited to question that a bloom-retarding component can be achieved by the claimed method. "Producing a bloom-retarding component" is a claim feature and thus a limiting feature of claim 1.

3. *Admittance of the clarity objection raised in opponent 2's letter of 26 June 2023*

3.1 In its letter of 26 June 2023, opponent 2 submitted that it was allegedly not clear to the person skilled in the art whether the bloom-retarding component produced according to the method of claim 1 was suitable for chocolate-like products. This thus rendered claim 1 unclear.

3.2 This clarity objection was only raised after notification of the summons and the board's communication pursuant to Article 15(1) RPBA. Therefore, whether it can be taken into account has to be assessed under Article 13(2) RPBA. According to opponent 2, admitting this new line of attack did not affect the procedural economy or the fairness to the proprietor. However, even if this were true, it would not constitute an exceptional circumstance within the meaning of Article 13(2) RPBA.

Thus, this late-submitted clarity objection is not taken into account (Article 13(2) RPBA).

4. *Article 123(2) EPC*

4.1 The opponents argued that claim 1 of auxiliary request 26 contravenes Article 123(2) EPC. In essence, they were of the opinion that there was no pointer in the application as filed towards the amendment made. To arrive at the claimed subject-matter, a three-fold selection was necessary, i.e.:

- the selection of cocoa butter from the list in claim 10 of the application as filed

- the selection of the range "between 80 and 480 min" from the ranges of claim 3 of the application as filed

- the selection of the temperature "at least 235°C" in claim 4 of the application as filed

The features "between 80 and 480 min" (see claim 3 of the application as filed) and "at least 235°C" (see claim 4 of the application as filed) were not the most preferred or narrowest ranges for the deodorisation time and deodorisation temperature. In their view, cocoa butter was not a preferred triglyceride composition, and selecting it was an arbitrary selection from a list of non-converging alternatives.

4.2 For the following reasons, the board comes to a different conclusion.

4.2.1 Claim 1 of auxiliary request 26 is based on claim 1 of the application as filed. Compared to claim 1 of the

application as filed, the following amendments were made:

- limiting the triglyceride composition based on the disclosure in claim 10 of the application as filed, being "selected from the group consisting of **cocoa butter**, shea oil (*Butyrospermum parkii*), palm oil (*Elaeis guineensis*, *Elaeis olifera*), illipe oil (*Shorea spp.*), mango oil (*Mangifera indica*), sal oil (*Shorea robusta*), kokum oil (*Garcinia indica*), fractions thereof or any combination thereof", to cocoa butter

- limiting the deodorisation time based on the disclosure in claim 3 of the application as filed, being defined as "between 60 minutes to 600 minutes, such as **between 80 minutes to 480 minutes**, or between 100 minutes and 360 minutes", to the second range "between 80 minutes to 480 minutes"

- limiting the deodorisation temperature based on the disclosure in claim 4 of the application as filed, being defined as "at least 225°C, such as at least 230°C or **at least 235°C**", to the third range of "at least 235°C"

4.2.2 Consequently, in claim 1, the deodorisation time and the deodorisation temperature are limited based on a disclosure of converging numerical ranges or converging elements of the same feature (also named "converging alternatives" in some board decisions) in claims 3 and 4 of the application as filed, and the triglyceride composition is limited based on a list of non-converging alternatives in claim 10 of the application as filed.

4.2.3 The "gold standard" is to be applied universally to assess whether amendments to a claim comply with Article 123(2) EPC (G 2/10). In this case, the criteria specified in T 1621/16 are helpful.

4.2.4 T 1621/16 contains the following ruling (see Catchword):

"1) When fall-back positions for a feature are described in terms of a list of converging alternatives, the choice of a more or less preferred element from such a list should not be treated as an arbitrary selection, because this choice does not lead to a singling out of an invention from among a plurality of distinct options, but simply to a subject-matter based on a more or less restricted version of said feature.

2) A claim amended on the basis of multiple selections from lists of converging alternatives might be considered to meet the requirements of Article 123(2) EPC if:

- the subject-matter resulting from the multiple selections is not associated with an undisclosed technical contribution, and
- the application as filed includes a pointer to the combination of features resulting from the multiple selections."

4.2.5 The board concurs with the view expressed in T 1937/17 that the first criterion of point 2) of the Catchword of T 1621/16 ("the subject-matter resulting from the multiple selections is not associated with an undisclosed technical contribution") should not be considered a criterion in establishing whether there is

a direct and unambiguous disclosure for the combination of features resulting from a multiple selection (see point 4.3.1 of T 1937/17).

- 4.2.6 Otherwise, the board shares the conclusion reached in T 1621/16 that the choice of a more or less preferred element from a list of converging elements (or alternatives) should not be treated as an arbitrary selection because this choice does not lead to a "singling out" (see point 1 of the Catchword of T 1621/16); and that in general a pointer to the combination of features resulting from multiple selections is necessary to meet the requirements of Article 123(2) EPC (see second criterion of point 2) of the Catchword).
- 4.2.7 The current board derives from this decision that the assessment of situations like the one underlying T 1621/16 should not be treated in the same way as amendments resulting from selections from two or more lists of non-converging alternatives (see Case Law of the Boards of Appeal, 10th edn., chapter II.E.1.6.2). This board endorses this approach.
- 4.2.8 In this context, the board prefers the term "converging elements" over "converging alternatives". To the board, "alternatives" seems to imply that there are real alternatives having no overlap with each other. However, where the broadest feature, such as a numerical range, simply converges towards the narrowest feature, fully lying within the broadest feature and not merely partly overlapping it or lying beside it, as in the case at hand, it seems misleading to use the term "alternatives". Thus, in the case at hand, the board prefers the term "converging elements".

- 4.2.9 The board also shares the assessment in T 1133/21 (point 2.15) of the current board in a different composition that the mere fact that features are described in terms of lists of more or less converging elements (converging alternatives) does not give the proprietor carte blanche to freely combine features selected from a first list with features selected from a second list disclosed in the application as filed and that any amendment is only allowable under Article 123(2) EPC if it complies with the gold standard. This is particularly relevant where an application as filed provides a large reservoir of options and alternatives to be selected and combined to create a vast number of embodiments as in the case underlying T 1133/21 (see point 2.17 of T 1133/21).
- 4.2.10 The board also agrees with the conclusion reached in T 1133/21 that the assessment of compliance with Article 123(2) EPC in situations like the present one should be case specific, as also stated by the opposition division (see page 26, third paragraph of the decision under appeal). Factors playing a role in this assessment are, *inter alia*, the number of elements (alternatives) disclosed in the application; the length, convergence and any preference in the lists of enumerated features; and the presence of examples pointing to a combination of features (see point 2.16 of T 1133/21).
- 4.2.11 In addition, the board considers that whether the claimed combination of features merely results from the combination of claims having an appropriate back-reference to each other (see also T 2237/10, Reasons 4.5) plays a role in the assessment of the compliance with Article 123(2) EPC and in particular whether there is a pointer to the claimed combination

of features. This is especially so in cases like the one at hand where only very few "selections" were necessary to arrive at the combination of features in question (see claims 3 and 4 of the application as filed only covering three numerical ranges converging from the broadest range towards the narrowest range being fully within the broadest range).

- 4.2.12 A pointer is an (implicit or explicit) indication or hint towards the combination of features in question. The pointer needs to be suited to demonstrate that the claimed combination of features is envisaged in the application as filed. Such information must be provided in the application as filed. Typically, it consists of an example or embodiment disclosed in the application which demonstrates that the combination of features was already envisaged in the application as filed, e.g. by the fact that the new combination of features falls within an example. The existence of a pointer must exclude that arbitrary new combinations of features are created which are merely conceptually comprised in the application as filed.

In the board's view, there is not normally only one pointer towards the most preferred example or embodiment, e.g. exemplified by a specific example or embodiment of the invention.

- 4.2.13 Finally, the board is of the opinion that an overly formalistic application of the concept of multiple selections from lists of alternatives should be avoided (see also T 1210/20, Reasons 3.11). Instead, it is to be assessed, on a case-by-case basis, what a skilled person would directly and unambiguously derive from the whole application as filed as being disclosed in combination. This is the only test adopted by the

Enlarged Board of Appeal which is binding on the boards.

- 4.2.14 Thus, the relevant question is whether there is a pointer in the application as filed towards the combination of the two numerical ranges, relating to different levels or enumerations of converging elements (claims 3 and 4 of the application as filed), and a selection from a list of non-converging alternatives (claim 10 of the application as filed).
- 4.2.15 In the case at hand, example 1 of the application as filed qualifies as a pointer to the choice of cocoa butter for the following reasons.
- 4.2.16 Example 1 of the application as filed exemplifies the deodorisation of cocoa butter. In the board's view, this emphasises that cocoa butter is a preferred triglyceride composition. This assessment is supported by page 1, lines 4 to 6 of the application as filed, which mentions that "the present invention relates to bloom-retarding components based on cocoa butter". Thus, the selection of cocoa butter from the list in claim 10 of the application as filed is not arbitrary.
- 4.2.17 In comparison to claim 1, narrower temperature and time ranges in the deodorising step are applied in example 1. However, the experiments of example 1 applying a temperature of 240°C, 250°C and 260°C for 2, 4 and 6 hours (i.e. 120 min, 240 min and 360 min) in the deodorisation of cocoa butter all fall within the requirement "between 80 and 480 minutes at a temperature of at least 235°C" of claim 1. The board does not take issue with the fact that these experiments of example 1 not only fall within the scope

of claim 1 but also within an even further restricted scope of more preferred options.

- 4.2.18 Concerning the temperature feature, the narrowest range of "at least 235°C" in claim 4 of the application as filed, although not explicitly designated as the "most preferred", is considered the most preferred definition of this open-ended temperature range in light of the whole description. The board shares the opposition division's conclusion that "when read meaningfully by the skilled person, the narrowest range in each claim corresponds to the most preferred embodiment" (see decision under appeal, point 7.1, page 29, lines 3 to 6). The fact that higher temperatures are preferred is also supported at numerous places in the description (see page 6, lines 1 to 11; page 8, lines 13 to 17 and page 15, lines 14 to 17 of the application as filed).
- 4.2.19 As indicated under point 4.2.11 above, the fact that there are only three levels of converging elements disclosed in dependent claims 3 and 4 of the application as filed also plays a role. This represents, in the board's view, only a very limited number of possible choices. The current situation is different from when there is a high number of converging elements or a large reservoir of options (as, for instance, in T 1133/21).
- 4.2.20 In view of the above, the board does not take issue with the deodorisation times of 120 min, 240 min and 360 min used in the above experiments of example 1 of the application as filed that only cover a part of the range "between 80 and 480 minutes" and not the entire claimed range. As outlined above, all these deodorisation experiments of cocoa butter according to example 1 fall within the scope of claim 1 and, thus,

support that the claimed combination of features is not the result of an arbitrary selection.

- 4.2.21 The opponents referred to T 149/18, which in their view supported that in the case at hand, there was no pointer towards the combination of claimed features. The board is of the opinion that T 149/18 differs from the case at hand and thus is not applicable. The following differences are relevant.

Firstly, in T 149/18, the pH range of the final product ("4 to 8") was constructed by combining the upper limit of a broad range of 2 to 8 disclosed in claim 5 with the lower limit of a narrower preferred range of 4 to 7 disclosed in the same claim. In the case at hand, numerical ranges literally mentioned in dependent claims of the application as filed are inserted into claim 1. No new numerical range is created; only literally mentioned ranges are chosen.

Secondly, in T 149/18, a product-by-process claim was created which was not present in the parent application as filed. This is not the case in the current proceedings.

Thirdly, in T 149/18, the pH range of 4 to 8 for the pH adjustment step a) (being part of the newly created product-by-process formulation and not necessarily representing the pH range of the final product) is constructed using a value of 4 (which is not originally disclosed as a lower limit) in combination with the upper limit from the range 2 to 8. Other non-convergent ranges and values are also disclosed. According to the parent application as filed, the pH of the composition prepared during this pH adjusting step a) is not

necessarily that of the final product, and these pH values are independent from each other.

Finally, in T 149/18, the pH values of the pH adjustment step a) mentioned in the examples are associated with a specific choice of temperature. In contrast, in the case at hand, numerous experiments of example 1 fall within the scope of claim 1, but no further specific adaptation of additional features is required. Example 1 merely requires the presence of cocoa butter and specific time and temperature conditions in an otherwise typical deodorisation step.

Thus, T 149/18 is not relevant for the case at hand.

- 4.2.22 In view of the above circumstances, the subject-matter of claim 1 is directly and unambiguously derivable from the application as filed, i.e. there is sufficient basis for the selection of cocoa butter (from a list of non-converging alternatives in claim 10 of the application as filed) in combination with the limitation of the deodorisation time to a range of 80 to 480 min (disclosed in claim 3 of the application as filed) and the limitation of the deodorisation temperature to the range of at least 235°C (disclosed in claim 4 of the application as filed).

In view of the above, the subject-matter of claim 1 complies with Article 123(2) EPC.

5. *Clarity*

- 5.1 The opponents argued that the triglyceride composition was defined in claim 1 of auxiliary request 26 in a limiting manner, thus excluding the presence of further triglycerides. Since claim 9 of auxiliary request 26

comprised the step of adding milk fat to the triglyceride composition, they argued that there was a contradiction between claims 1 and 9, this being objectionable under Article 84 EPC.

- 5.2 The board does not agree. The feature "said triglyceride composition is cocoa butter" (emphasis added) in claim 1 is not to be interpreted in a restrictive manner, meaning that the triglyceride composition needs to contain solely cocoa butter, as if it were a "consisting of" formulation. While claim 1 needs to contain at least cocoa butter, the presence of further fats or oils is not excluded. The feature "adding milk fat to the triglyceride composition pre deodorization ..." in claim 9 referring back to claim 1 merely exemplifies that milk fat may be added to the triglyceride composition defined in claim 1.

Thus, there is no contradiction between claims 1 and 9 (Article 84 EPC).

6. *Sufficiency*

- 6.1 The opponents argued that the invention could not be carried out by a skilled person. In their opinion, a deodorisation treatment according to claim 1 did not implicitly achieve a bloom-retarding effect across the claimed scope, the addition of water being necessary to achieve this effect. D22 was cited to support this assertion. In the opponents' view, there was no guidance in the patent that would have allowed the skilled person to determine the amount of water to be added to achieve a sufficient interesterification of the heat-treated cocoa butter. They argued that D22 raised serious doubts that the claimed method could be put into practice without undue burden.

- 6.2 For the following reasons, the board does not agree.
- 6.2.1 The board shares the proprietor's view that the allegation that there are serious doubts concerning the formation of sufficient amounts of asymmetric triglycerides at reaction times not tested in the examples is speculative. The patent provides experimental data across the range of the deodorisation times recited in claim 1, and no evidence has been provided which supports the assertion that the claimed process cannot be carried out across the full claimed scope.
- 6.2.2 The patent provides ample guidance on the conditions of the deodorisation process. The board shares the proprietor's view that the opponents did not provide evidence that a skilled person would be incapable of avoiding deodorisation conditions so extreme that they could destroy the product.
- 6.2.3 The patent discloses examples in which the bloom-retarding effect of compositions is demonstrated (see examples 3a, 3b, 3c and 4). In addition, example 1 of the patent covers numerous experiments having the required deodorisation time and deodorisation temperature required in claim 1. The opponents did not demonstrate that these experiments in example 1 might fail to provide a bloom-retarding effect. The skilled person having knowledge of the application as filed would therefore face no difficulties in achieving a bloom-retarding effect.
- 6.2.4 The opponents' line of argument that water is required to achieve the interesterification is at most a question of clarity (lack of essential features,

Article 84 EPC) but not a matter of sufficiency of disclosure. A skilled person in this technical field is familiar with typical deodorisation conditions. In addition, paragraphs [0046] to [0049] of the patent mention that water may be added, and example 1 mentions that steam from a steam generator is added (see paragraph [0077] of the patent). No evidence was submitted by the opponents that typical deodorisation conditions under the temperature and time requirements of claim 1 would not lead to a bloom-retarding effect.

6.2.5 The opponents' insufficiency assertions are not backed by experimental data to demonstrate verifiable facts that the invention cannot be carried out but instead are based on speculations having a low probative value.

6.2.6 As outlined above, the description provides sufficient guidance on how to put the invention into practice, and the examples demonstrate ways of carrying out the invention.

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

7. *Novelty*

7.1 The opponents argued that the subject-matter of claim 1 of auxiliary request 26 lacked novelty over D11. The opponents mentioned that the same standard should be applied when assessing the amendments under Article 123(2) EPC and the disclosure of prior-art document D11.

7.2 For the following reasons, the claimed subject-matter is novel over D11.

- 7.2.1 It is established case law that the same standard applies when assessing amendments under Article 123(2) EPC and novelty (G 2/10, Reasons 4.6 citing G 1/03, point 2.2.2) and what is directly and unambiguously disclosed in a prior-art document such as D11. However, when applying this standard in the current situation, D11 is not novelty-destroying for the claimed subject-matter as outlined below.
- 7.2.2 D11 discloses a method of making an esterified, transesterified or interesterified product, comprising, among other things, the step of deodorising an initial substrate comprising one of more fats or oils to produce a deodorised substrate (step (b) of claim 1 of D11) and the step of contacting the deodorised substrate with an enzyme to make the esterified, transesterified or interesterified product (step (c) of claim 1 of D11). The deodorisation temperature is given as "25°C to 320°C" (claim 4), "100°C to 300°C" (claim 5) and "150°C to 270°C" (claim 6 and paragraph [0042] of D11). The deodorisation time is described as "5 min to 10 hours" (claim 20) and "30 min to 3 hours" (claim 21 and paragraph [0042] of D11). The (unrefined and/or unbleached) fats or oils are defined in a list in claim 9 which includes cocoa butter (see also paragraph [0044] of D11).
- 7.2.3 To fall within the scope of claim 1, a selection of the upper temperature limit of 320°C (claim 4), 300°C (claim 5) or 270°C (claim 6); a selection of the upper time limit of 3 hours (claim 21) and a selection of cocoa butter from the list of claim 9 is necessary. This requires a three-fold selection (twice selecting the upper limit of a numerical range and once selecting from a list of non-converging alternatives). The examples of D11 neither fall within the scope of

claim 1 nor are suited as pointers towards the latter three-fold selection in D11. None of the examples of D11 contains cocoa butter, and the time and temperature requirements are outside those required in claim 1. Moreover, it cannot be derived from D11 that cocoa butter is a preferred fat or oil in D11. Thus, applying the same standard as for Article 123(2) EPC (see above), the disclosure of D11 cannot be considered novelty-destroying for the combination of features according to claim 1.

In view of the above, the subject-matter of claim 1 is novel over D11.

8. *Inventive step*

8.1 The opponents argued as follows on inventive step.

8.1.1 The subject-matter of claim 1 did not involve an inventive step in view of D4 as the closest prior art in combination with the skilled person's common general knowledge evidenced by D1, D2, D7 or D21, or in combination with D22. In the oral proceedings, D9 was also used as a combination document.

8.1.2 It was obvious for a skilled person to replace the interesterification step taught in D4 with a deodorisation step as in claim 1. A skilled person would consider this exchange an obvious choice to solve the objective technical problem of providing an alternative process for producing a bloom-retarding component. In addition, the opponents argued that the term "deodorization" of claim 1 was misleading and should be disregarded. In their view, the method step recited in claim 1 did not fall under the definition of the term "deodorization" as it was known and used in

the art, this step instead being a simple heat-treatment step. According to claim 1, in reality an interesterification rather than a deodorisation step was claimed. Since D4 already disclosed that an interesterified cocoa butter improved bloom stability, it was obvious for a skilled person to contemplate different interesterification conditions applying high temperatures and long times. D4 taught not only to use enzymatic or chemical interesterification but also other interesterification methods.

8.1.3 Moreover, a skilled person would be guided by their common general knowledge evidenced by D1, D2, D7 and D21; or D9 or D22 that a deodorisation treatment at a temperature of at least 235°C for 80 to 480 min led to a bloom-retarding component. They further argued that a skilled person having knowledge of D4 would consider replacing the interesterification step taught in D4 with such a deodorisation step as suited to solve the objective technical problem.

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

8.3 D4, the closest prior art, discloses a process for the manufacture of a chocolate composition comprising adding a fat composition to a cocoa liquor, where the fat composition comprises at least one modified fat, which comprises an interesterified fat consisting of interesterified cocoa butter having a melting point of 25 to 50°C (see claim 14 of D4), and the use of an interesterified cocoa butter to improve the bloom stability of a chocolate composition compared to a chocolate composition prepared with only unmodified cocoa butter (see claim 25 of D4). In D4 (page 4, lines 25 to 27), a "modified fat is a fat whose chemical structure or composition has been changed by

some chemical, enzymatic and/or mechanical means". D4 also mentions that interesterification may be carried out by any conventional chemical or enzymatic interesterification process (see page 5, lines 11 and 12 of D4). Example 1 of D4 relates to an enzymatic interesterification of cocoa butter, applying Lipozyme TL IM as the enzyme, a temperature of 70°C and a reaction time of 16 hours. D4 does not disclose a deodorisation treatment.

8.4 There was common ground that the method of claim 1 differs from that disclosed in D4 by a deodorisation step.

Such a step is not disclosed in D4. As a consequence, D4 also fails to disclose the conditions of the deodorisation, which takes place (i) for between 80 and 480 min and (ii) at a temperature of at least 235°C.

8.5 Even when considering that the objective technical problem is merely to provide an alternative method for producing a bloom-retarding component, the claimed method involves an inventive step for the following reasons.

8.6 On obviousness, the board comments as follows.

8.6.1 The board does not agree with the opponents that the method step recited in claim 1 is not a deodorisation treatment (having its typical meaning) and that claim 1 instead claims a (thermal) interesterification and not a deodorisation step. In the board's view, such an interpretation would go against the wording of claim 1. The deodorising step defined in claim 1 is deodorisation having the normal meaning in the art.

This conclusion is in line with the description of the patent, which does not give any indication that only a simple heat treatment might have been meant by "deodorization" in claim 1. A deodorisation step is not identical to or exchangeable with interesterification as alleged by the opponents.

8.6.2 Claim 1 requires that a specific deodorising step be carried out and that a bloom-retarding component for chocolate and chocolate-like products be produced.

8.6.3 The board also does not share the opponents view that the deodorised cocoa butter of claim 1 was, in essence, chemically interesterified cocoa butter, as disclosed by D4.

Claim 1 requires a deodorising step under specific time and temperature conditions, which as a final product leads to a deodorised bloom-retarding agent. D4 teaches the use of an interesterified cocoa butter to improve the bloom stability of a chocolate composition compared to a chocolate composition prepared with unmodified cocoa butter. There is no mention of a deodorisation step. When starting from the teaching of this document, a person skilled in the art would not have found it obvious to solve the objective technical problem by subjecting cocoa butter to a deodorising process for between 80 and 480 minutes at a temperature of at least 235°C. This is because neither the skilled person's common general knowledge (evidenced by D1, D2, D7 or D21) nor document D9 or D22 suggests replacing the interesterification step taught in D4 with a deodorisation step as required in claim 1.

8.6.4 D1 provides the following relevant teaching on the deodorisation conditions to be applied for cocoa butter (see page 199, lines 17 to 22 of D1):

"Whereas most edible oils and fats are deodorised by passing steam through the oil under vacuum of about 5 mbar at 200-270°C, as described in Chapter 5, a cocoa butter is deodorised at lower temperatures, typically 130-180°C for 10-30 minutes. At these temperatures, if carried out correctly, deodorisation has no effect on the physical properties (Timms & Stewart, 1999)."

In the board's view, this teaching in D1 does not prompt a skilled person towards a deodorisation treatment at the high temperature and time requirements of claim 1.

The opponents argued that D1 also taught that high temperatures can cause rearrangement of the fatty acids within and among the triglycerides, leading both to a reduction in these SOS triglycerides and to the generation of others such as PPO, PStO, etc. and trisaturated triglycerides (see page 199, lines 10 to 14 from the bottom of D1), the generated asymmetric triglycerides implicitly leading to a bloom-retarding effect.

The board disagrees. The core teaching of D1 is that cocoa butter is deodorised at low temperature conditions of typically 130 to 180°C and for a short time such as 10 to 30 min. This teaching of D1 does not motivate a skilled person to replace the interesterification step taught in D4 with a high-temperature deodorisation step applied for a relatively long time as required in claim 1.

8.6.5 While from Figure 19 of D2 it can be derived that the SSO content in cocoa butter increases at high temperatures of 240°C or above, a high SSO content is considered undesirable processing damage to cocoa butter. Thus, this teaching also fails to motivate a skilled person to replace the interesterification step taught in D4 with a high-temperature deodorisation step applied for a relatively long time as required in claim 1.

8.6.6 With respect to D7, the opponents argued that the skilled person was not seeking to provide an alternative deodorisation method but an alternative interesterification method applied to obtain a bloom-retarding component added in minor fractions to the final chocolate product. D7, rather than discouraging the skilled person from applying high-temperature treatment, even prompted the skilled person seeking an alternative to the method of D4 to simply heat the cocoa butter to high temperatures for interesterification.

This is not convincing. Like D1, D7 teaches that typical temperatures for deodorising cocoa butter are 104 to 110°C and 130 to 180°C (see page 215, lines 14 and 15 of D7), i.e. much lower temperatures than required in claim 1. A skilled person is not motivated by D7 to replace the interesterification step taught in D4 with a high-temperature deodorisation step applied for a relatively long time as required by claim 1.

8.6.7 The opponents argued that D21 provided evidence for the skilled person's common general knowledge that:

- fatty acid "shuffling" or rearrangement was the defining result of interesterification (see D21, page 558, section 5)
- interesterification could be achieved chemically or enzymatically (see D21, page 563, section 5.2.3; page 565, sections 5.2.4 and 5.2.5; and page 566, section 5.3)
- chemical interesterification could be achieved through high-temperature treatment, preferably in the presence of catalysts (see D21, first sentence in section 5.2.3 on page 563)

Even in view of this teaching provided in D21, a skilled person would not contemplate replacing the interesterification taught in D4 with the deodorisation step required in claim 1.

8.6.8 With respect to D22 as a combination document, the opponents argued that D22 taught applying temperatures of more than 235°C to vegetable oils for interesterification. On page 2, right column, lines 10 to 12, D22 also taught that the process was applicable to all natural fats and fat mixtures. The skilled person therefore had reasonable hope in providing an interesterified cocoa butter when applying reaction temperatures of above 235°C.

For similar reasons as outlined above, D22 also fails to motivate a skilled person to replace the interesterification taught in D4 with the deodorisation step required in claim 1.

8.6.9 According to the opponents, D9 taught that adding an asymmetrical triacylglycerol such as SSO or PPO inhibited bloom. This allegedly made it obvious to replace the interesterification taught in D4 with the

high-temperature deodorisation set out in claim 1 (see point 6.1.1.1 of D9).

This argument was put forward for the first time at the oral proceedings before the board. It is unconvincing for the simple reason that the text passage of D9 quoted by the opponents does not relate at all to high-temperature deodorisation. It cannot therefore provide any motivation for the skilled person to replace the interesterification step taught in D4 with a high-temperature deodorisation step applied for the relatively long time required by claim 1.

8.6.10 Thus, the claimed method is at least a non-obvious alternative starting from D4 as the closest prior art.

Consequently, the subject-matter of claim 1 of auxiliary request 26 involves an inventive step in view of D4 as the closest prior art. The same applies to the dependent claims.

9. Adaptation of the description

9.1 Opponent 2 raised an objection under Article 84 EPC against the term "triglyceride composition" in paragraphs [0043] and [0044] of the amended description filed by the proprietor at the oral proceedings. It argued that the term "triglyceride composition" in paragraphs [0043] and [0044] should be replaced by the term "cocoa butter" as otherwise these paragraphs were not clear.

9.2 The board disagrees. Claim 1 of auxiliary request 26 requires that the triglyceride composition be cocoa butter. This is also clear from the whole adapted description including e.g. paragraph [0041].

9.3 Paragraphs [0043] and [0044] of the adapted description read as follows:

"[0043] In further embodiments of the invention, the method further comprises the steps of adding milk fat to the triglyceride composition pre deodorization followed by deodorizing said milk fat together with the triglyceride composition.

[0044] By adding milk fat to the triglyceride composition, the bloom retarding properties of the deodorized blend are not compromised and a deodorized bloom retarding fat composition with a different nutritional profile may be obtained." (Emphasis added by the board.)

9.4 It is clear from these paragraphs that milk fat may be added to the triglyceride composition which is cocoa butter and not to any kind of triglyceride composition or as a replacement for cocoa butter. In addition, "adding milk fat to the triglyceride composition" is the same wording used in claim 9 of auxiliary request 26.

9.5 Thus, the board concludes that there is no inconsistency between the claims of auxiliary request 26 and the description submitted at the oral proceedings.

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 following documents:
 - claims 1 to 9 according to the main request filed as auxiliary request 26 submitted with the proprietor's grounds of appeal
 - paragraphs 1 to 41 and 43 to 136 of the description as submitted at the oral proceedings before the board
 - Figure 1 of the patent specification

The Registrar:

The Chairman:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated