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**Datasheet for the decision  
of 13 June 2024**

**Case Number:** T 1274/22 - 3.3.04

**Application Number:** 13737679.4

**Publication Number:** 2861087

**IPC:** A61K31/201, A61K31/683,  
A61K35/20, A23L33/10,  
A23L33/115, A23L33/19,  
A23L33/21, A23L33/00, A23L33/12

**Language of the proceedings:** EN

**Title of invention:**  
Metabolic imprinting effects of nutrition with large lipid  
globules comprising milk fat and vegetable fat

**Patent Proprietor:**  
N.V. Nutricia

**Opponents:**  
Société des Produits Nestlé S.A.  
Arla Foods Amba

**Relevant legal provisions:**  
EPC Art. 113(2)

**Keyword:**  
Basis of decision



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
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Case Number: T 1274/22 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 13 June 2024**

**Appellant:** Société des Produits Nestlé S.A.  
(Opponent 1) Avenue Nestlé 55  
1800 Vevey (CH)

**Representative:** Plougmann Vingtoft a/s  
Strandvejen 70  
2900 Hellerup (DK)

**Appellant:** Arla Foods Amba  
(Opponent 2) Sønderhøj 14  
8260 Viby J (DK)

**Representative:** Guardian  
IP Consulting I/S  
Diplomvej, Building 381  
2800 Kgs. Lyngby (DK)

**Respondent:** N.V. Nutricia  
(Patent Proprietor) Eerste Stationsstraat 186  
2712 HM Zoetermeer (NL)

**Representative:** Nederlandsch Octrooibureau  
P.O. Box 29720  
2502 LS The Hague (NL)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
22 March 2022 concerning maintenance of the  
European Patent No. 2861087 in amended form.**

**Composition of the Board:**

<b>Chairwoman</b>	M. Pregetter
<b>Members:</b>	R. Hauss
	A. Bacchin

## **Summary of Facts and Submissions**

- I. Following the grant of European patent No. 2 861 087, the patent was opposed under Article 100(a), (b) and (c) EPC.
- II. The decision under appeal is the opposition division's interlocutory decision, announced on 2 March 2022 and posted on 22 March 2022, finding that the opposed patent as amended in the form of the main request met the requirements of the EPC.
- III. Both opponents (appellants) appealed against this decision, requesting that it be set aside and that the patent in suit be revoked.
- IV. The patent proprietor (respondent) requested, as its main request, that the appeals be dismissed, or in the alternative, that the patent in suit be maintained on the basis of the claims of one of auxiliary requests 1 to 50.
- V. Oral proceedings before the board were held on 13 June 2024. At the end of the oral proceedings,
  - (a) the patent proprietor (respondent) stated that it no longer approved of the text of the patent as granted and that it withdrew all its requests.
  - (b) Both appellants confirmed that they maintained their requests that the decision under appeal be set aside and that the patent be revoked.

### **Reasons for the Decision**

1. Article 113(2) EPC requires that the EPO may decide upon a European patent only in the text submitted to it, or agreed, by the proprietor of the patent.
2. Since the text of the patent is at the disposition of the patent proprietor, the patent cannot be maintained against its will.
3. In the case in hand, the patent proprietor unequivocally withdrew its approval of any text for the maintenance of the patent in suit (see point V.(a) above). As a consequence, there is no valid text on the basis of which the board can consider the appeal.
4. In the circumstances described above, it is established case law that the appeal proceedings must be terminated by a decision ordering the revocation of the patent without going into the substantive issues (see, for instance, T 0073/84, OJ EPO 1985, 241; T 0758/01; T 0116/04; T 1123/03).

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairwoman:



I. Aperribay

M. Pregetter

Decision electronically authenticated