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**Datasheet for the decision
of 23 September 2025**

Case Number: T 1042/23 - 3.3.09

Application Number: 14832764.6

Publication Number: 3028579

IPC: A23G1/00, A23D9/00, A23G1/30,
A23G1/36

Language of the proceedings: EN

Title of invention:
CHOCOLATE AND HARD BUTTER

Patent Proprietor:
The Nisshin Oillio Group, Ltd.

Opponents:
Arnold & Siedsma B.V.
AAK AB

Headword:
Chocolate and hard butter/NISSHIN OILLIO

Relevant legal provisions:
EPC Art. 100(a), 100(b), 56, 123(2)
RPBA 2020 Art. 12(4), 12(6)

Keyword:

Grounds for opposition - subject-matter extends beyond content
of earlier application (no) - insufficiency of disclosure (no)
Inventive step - (yes)
Late-filed objection - should have been submitted in first-
instance proceedings (yes)

Decisions cited:

T 1476/15, T 1621/16, T 2251/16, T 1261/21



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Case Number: T 1042/23 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 23 September 2025

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(Opponent 2)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
3 April 2023 concerning maintenance of the
European Patent No. 3028579 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	M. Ansorge
	G. Decker

Summary of Facts and Submissions

- I. Opponent 2 (appellant) lodged an appeal against the opposition division's interlocutory decision holding the then auxiliary request 1 allowable.
- II. With their notices 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 claims of the then auxiliary request 1, filed during the oral proceedings on 2 February 2023, met the requirements of Articles 123(2) EPC and 83 EPC. In addition, it concluded that the claimed subject-matter was novel and involved an inventive step in view of D1 or D13 as closest prior art.
- IV. Independent claims 1 and 3 of the main request (being identical to independent claims 1 and 3 of the then auxiliary request 1 before the opposition division) read as follows:

"1. A chocolate comprising an oil-and/or-fat in a content of 25 to 65 mass%, wherein the oil- and/or-fat meets the following requirements (1) to (6):

(1) an SOS content is 65 to 88 mass%;

(2) a POP content is 25 to 44 mass%;

(3) an StOSt content is 16 to 22 mass%;

(4) a *POSt* content is 15 to 32 mass%;

(5) a liquid oil-and/or-fat content is not less than 11.0 mass% and less than 14 mass%; and

(6) a mass ratio (*StOSt*/*POSt*) of the *StOSt* content to the *POSt* content is not more than 1.2;

wherein

SOS: a triglyceride on which oleic acid is bonded at a 2 position and a saturated fatty acid having a carbon number of not less than 16 is bonded at 1 and 3 positions;

POP: 1,3-dipalmitoyl-2-oleoylglycerin;

StOSt: 1,3-distearoyl-2-oleoylglycerin;

POSt: a triglyceride comprising an oleoyl group at a 2 position and comprising one palmitoyl group and one stearoyl group separately at 1 and 3 positions; and

liquid oil-and/or-fat: a triglyceride on which a fatty acid having a carbon number of not less than 16 is bonded, the triglyceride comprising not less than 2 double bonds per molecule."

"3. A hard butter meeting the following requirements (a) to (g):

(a) an *SOS* content is 65 to 88 mass%;

(b) a *POP* content is 57 to 64 mass%;

(c) an *StOSt* content is 3 to 19 mass%;

(d) a *POSt* content is 3 to 19 mass%;

(e) a liquid oil-and/or-fat content is not less than 11 mass% and less than 16 mass%;

(f) a mass ratio (*StOSt*/*POSt*) of the *StOSt* content to the *POSt* content is not more than 2.0; and

(g) a mass ratio (*POP*/(*POSt* + *StOSt*)) of *POP* to a sum of the *POSt* content and the *StOSt* content is not more than 4.0,

wherein

SOS: a triglyceride on which oleic acid is bonded at a 2 position and a saturated fatty acid having a carbon number of not less than 16 is bonded at 1 and 3 positions;

POP: 1,3-dipalmitoyl-2-oleoylglycerin;

StOSt: 1,3-distearoyl-2-oleoylglycerin;

POSt: a triglyceride comprising an oleoyl group at a 2 position and comprising one palmitoyl group and one stearoyl group separately at 1 and 3 positions; and

liquid oil-and/or-fat: a triglyceride on which a fatty acid having a carbon number of not less than 16 is bonded, the triglyceride comprising not less than 2 double bonds per molecule."

The wording of the claims of auxiliary requests 1-1, 1-2, 1-3, 1-4, 2-1, 2-2, 2-3, 2-4, 3-1, 3-2 or 3-3 is not relevant to the case at hand.

V. The following documents have been cited in this case:

D1: JP 7-155106

D1a: Computer-generated English translation of D1

D10: E. Deffense, "Fractionation of Palm Oil", JAOCS, vol. 62, no. 2, 1985, pages 376 to 385

D13: L. Depoortere, "The use and applicability of cocoa butter equivalents (CBEs) in chocolate products", pages 1 to 93

D16: G. Talbot, "Technology of coated and filled chocolate, confectionery and bakery products", pages 1 to 505

D20: US 4,283,436

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

VII. Requests

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

The patent proprietor (respondent) requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the patent be maintained on the basis of one of auxiliary requests 1-1, 1-2, 1-3, 1-4, 2-1, 2-2, 2-3, 2-4, 3-1, 3-2 or 3-3, filed with the reply to the appeal.

Opponent 1 (party as of right) did not submit any requests.

Reasons for the Decision

1. Admittance of the inventive-step objection in view of D1 as closest prior art in combination with D10 or D16, Article 12(4) and (6) RPBA
- 1.1 The respondent requested that the inventive-step objection in view of D1 as closest prior art in combination with D10 or D16 not be admitted into the appeal proceedings.
- 1.2 The appellant counter-argued that it was a mischaracterisation that this inventive-step objection was a new objection on appeal. In its view, it was in the proceedings from the beginning of the opposition proceedings: D10 and D16 had merely been used to demonstrate the skilled person's common general knowledge. The appellant submitted that there was no material change to its case, and no new line of attack was submitted with its grounds of appeal. As a consequence, there was no amendment under Article 12(4) RPBA. To support this line of argument, the appellant pointed out that Table 4.5 of D16 (which sets out the triglyceride compositions of cocoa butter of different origins, i.e. of South American, African and Asian origin) was already explicitly included in the appellant's notice of opposition (see point 8.33).
- 1.3 For the following reasons, the board decides not to admit this inventive-step objection into the appeal proceedings.
- 1.3.1 It is correct that Table 4.5 of D16, which describes the triglyceride compositions of cocoa butter of

different origins, was mentioned in the appellant's notice of opposition in the context of the question of inventive step.

- 1.3.2 However, the information provided by Table 4.5 was used in an inventive-step attack in view of D18 as starting document in combination with D16 (or D10 in combination with D8, according to the appellant's numbering provided in the notice of opposition: see points 8.30 to 8.34 of the appellant's notice of opposition). An objection using D1 as closest prior art in combination with D16 was not raised in the first-instance proceedings. The same applies to the objection using D1 as closest prior art in combination with D10. Thus the board does not agree with the appellant that this objection was not a new objection on appeal.
- 1.3.3 The inventive-step objection in question is an amendment to the appellant's case under Article 12(4) RPBA, and it is within the board's discretion to admit it into the appeal proceedings. Under Article 12(6) RPBA, the board shall not admit objections which should have been submitted in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.
- 1.3.4 The respondent correctly stated that Article 12(4) RPBA requires each amendment to be clearly identified and reasons to be provided for submitting it in the appeal proceedings. No such identification or reasoning was given in the grounds of appeal.
- 1.3.5 The board does not agree with the appellant that the respondent provided new arguments in its submission dated 20 June 2025 which could justify the admittance

of the inventive-step objection in question. The board considers the respondent's submissions in this letter a refinement of its case.

1.3.6 In addition, the appellant argued that the inventive-step objection in view of D1 in combination with D10 or D16 was a timely response to circumstances at the first-instance proceedings before the opposition division. In the first-instance proceedings, the opposition division gave a preliminary opinion that the claimed hard butter was obvious over D1 as closest prior art, since the opposition division considered a minor increase in liquid fat or oil (within the meaning of claim 1) merely a straightforward possibility which the skilled person would select without exercising inventive skill. In its decision, the opposition division changed its opinion and decided that the claimed hard butter involved an inventive step. The appellant was of the opinion that the first opportunity to address the opposition division's divergence from its preliminary opinion was in the appellant's grounds of appeal.

1.3.7 The board does not agree. The opposition division's change of opinion is not a justification for submitting a new objection only during the appeal proceedings, since it is merely based on the respondent's line of argument which was on file since the beginning of the first-instance proceedings. In addition, the limited content of "liquid oil/fat" (which represented the distinguishing feature over D1 as closest prior art) was present in all the claim requests submitted by the respondent as fallback positions in the first-instance proceedings. Although the then auxiliary request 1 before the opposition division was only filed at the

oral proceedings, the crucial limitation directed to the liquid oil/fat content was not changed.

- 1.3.8 The board also fails to see that the opposition division deviated from established case law, as asserted by the appellant.
- 1.3.9 Under these circumstances, the appellant should have submitted the inventive-step objection in question earlier, in the proceedings leading to the decision under appeal. The circumstances of the appeal case do not justify the admittance of this inventive-step objection.

In view of the above, the board does not admit the inventive-step objection in question into the appeal proceedings, under Article 12(4) and (6) RPBA.

2. Article 123(2) EPC

- 2.1 The appellant argued that claim 1 of the main request combined various different ranges from different parts of the application as filed to form combinations for which there was no direct and unambiguous basis in the application as filed. In its view, the opposition division was incorrect in its finding that the combinations present in claim 1 met the requirements of Article 123(2) EPC. In claim 1 the ranges of features (1), (2) and (4) corresponded to the broadest ranges present in the claims of the application as filed, while features (3) and (5) had been narrowed to preferred ranges, along with the yet further additional feature (6) from claim 2 of the application as filed. According to the appellant, there was no direct and unambiguous disclosure in the application as filed of such a combination of ranges. To support its line of

argument, the appellant referred to T 2251/16 ("pick and mix" approach). Reference was also made to T 1476/15 and T 1621/16. For similar reasons, in the appellant's view the subject-matter of claims 3 and 5 also violated the requirement of Article 123(2) EPC.

2.2 As outlined below, the board concludes that the claims of the main request meet the requirement of Article 123(2) EPC.

2.2.1 Claim 1 of the main request is based on claim 1 of the application as filed.

Compared with claim 1 of the application as filed, the following limitations have been carried out (emphasis added):

- the feature "(3) an StOSt content is 10 to 25 mass%" of claim 1 of the application as filed was amended to "(3) an StOSt content is **16 to 22** mass%" (based on paragraph [0016] of the application as filed, mentioning the range of "16 to 22 mass%" as the most-preferred range of the StOSt content of the claimed chocolate); and
- the feature "(5) a liquid oil-and/or-fat content is not less than 9 mass% and less than 14 mass%" was amended to "(5) a liquid oil-and/or-fat content is not less than **11.0** mass% and less than 14 mass%" (based on paragraph [0020] of the application as filed, mentioning the range "not less than 11.0 mass% and less than 14 mass%" as the preferred range of the liquid oil and/or fat content of the claimed chocolate).

In addition, the feature "(6) a mass ratio (StOSt/POSt) of the StOSt content to the POSt content is not more than 1.2" of claim 2 of the application as filed was introduced.

As outlined above, each individual feature (the numerical ranges) introduced into claim 1 is disclosed in the application as filed. This is uncontested. The board also concludes that in this specific case the combination of all these numerical ranges is envisaged and disclosed in combination when taking the application as filed as a whole. Examples 4 to 9 of the application as filed are considered pointers for the combination of the features of claim 1 of the main request. It is immaterial in this respect that these examples are also covered by narrower ranges. In addition, the numerical ranges introduced into claim 1 are all disclosed in the application as filed as being preferred ranges or more-preferred ranges. Under these circumstances, the board cannot see that an arbitrary new combination of features was created in claim 1 which was merely conceptually comprised in the application as filed. To the contrary, a skilled person would derive from the application as filed that the combination of all the features of claim 1 is envisaged and is disclosed in this combination in the application as filed.

The appellant argued that while the StOSt content was amended in claim 1, the StOSt/POSt ratio was not. In its view, this ratio was directly related to the StOSt content, so a skilled person would expect it to change with changes to the individual components. According to the appellant, narrowing the range for StOSt without amending the corresponding inextricably linked ratio was considered an added-matter issue.

This line of argument is not convincing. The crucial question is whether the combination of features is directly and unambiguously disclosed in the application as filed. As outlined above, the board concludes that this is the case. There is basis in the application as filed for narrowing the range for StOSt defined in claim 1 and there is also a pointer towards this limitation of the claimed scope in the examples. By doing so, the claimed ratio StOSt/POSt of not more than 1.2 is still satisfied.

The board shares the respondent's view that the situation in the present case is not comparable with the one decided in T 2251/16. In the latter case, the deciding board found that it was not possible to conclude from the application as filed whether or not the compositions in the examples were in accordance with claim 1 (see Reasons, point 4.5). The deciding board in T 2251/16 explained that consequently the examples could not be regarded as pointers to the combination of the features of claim 1.

In contrast, in the case at hand examples 4 to 9 of the application as filed are uncontestedly covered by the present claim 1 and are considered pointers for the combination of the features of claim 1.

The board also shares the opposition division's conclusion that T 1476/15 deals with a different situation (see impugned decision, paragraph bridging pages 6 and 7); T 1621/16 and T 1261/21 are considered to be more relevant to the case at hand.

To the board, the case at hand is in particular comparable to the situation underlying T 1261/21, as

mentioned by the respondent in its line of argument, which also deals with a similar case to the case at hand. In point 4.2.12 of T 1261/21, referred to by the respondent at the oral proceedings, it is mentioned that a pointer needs to be suited to demonstrating that the claimed combination of features is envisaged in the application as filed and that the existence of a pointer must exclude arbitrary new combinations of features being created which are merely conceptually comprised in the application as filed. As outlined above, the board concludes that this is the case in the case at hand. For the same reasons, T 1621/16 does not support the appellant's case.

In view of the above, the board concludes that the subject-matter of claim 1 of the main request meets the requirement of Article 123(2) EPC.

2.2.2 Claim 3 of the main request is based on claim 4 of the application as filed.

Compared with claim 4 of the application as filed, the following limitations have been carried out (emphasis added):

- the feature "(b) a POP content is 41 to 70 mass%" was amended to "(b) a POP content is **57** to **64** mass%" (based on paragraph [0024] of the application as filed, mentioning the range "57 to 64 mass%" as the further-preferred range of the POP content of the claimed hard butter); and
- the feature "(e) a liquid oil-and/or-fat content is 5 to 20 mass%" was amended to "(e) a liquid oil-and/or-fat content is not less than **11** mass% and less than **16** mass%" (based on paragraph [0029] of

the application as filed, mentioning the range "11 mass% to less than 16 mass%" as the further-preferred liquid oil and/or fat content of the claimed hard butter).

In addition, the features "(f) a mass ratio (StOSt/POSt) of the StOSt content to the POSt content is not more than 2.0" and "(g) a mass ratio (POP/(POSt + StOSt)) of POP to a sum of the POSt content and the StOSt content is not more than 4.0" of claims 5 and 6 of the application as filed were introduced.

For similar reasons as outlined above for claim 1 (see point 2.2.1 above), the board concluded that the combination of all the features of claim 3 of the main request is disclosed in combination when taking the application as filed as a whole into account. There is a pointer in the application as filed towards the combination of the numerical ranges of claim 3 of the main request. While it is true that example 1 does not satisfy all the features of claim 3 (the POP content falling outside the claimed range), examples 2 and 3 of the application as filed comply with all the features of claim 3 of the main request, and these examples are considered a pointer for the combination of the features of claim 3. The fact that example 1 falls outside the claimed scope, since it covers a POP content of 50.8 mass%, being outside the preferred range of 57 to 64 mass% (see paragraph [0024] of the application as filed) but within the broadest range of 48 to 66 mass% defined in claim 1 of the application as filed, cannot by itself result in denying that there is sufficient basis in the application as filed for the combination of the features of claim 3. The numerical ranges introduced into claim 3 are all disclosed as being preferred ranges or more-preferred ranges. The

board is of the opinion that this also stresses that the combination of these ranges was envisaged in the application as filed.

In view of the above, the board concludes that the subject-matter of claim 3 of the main request meets the requirement of Article 123(2) EPC.

- 2.2.3 For the reasons outlined above for claims 1 and 3, the subject-matter of method claim 5 of the main request, referring back to the chocolate of claims 1 or 2 and the hard butter of claims 3 or 4, also meets the requirement of Article 123(2) EPC.

3. Sufficiency of disclosure, Article 83 EPC

- 3.1 The appellant was of the opinion that the invention could not be carried out by a skilled person over the whole claimed range. In particular, it argued that it was not possible, based on the teaching of the patent, to work the invention at the upper limit of 88 mass% for the SOS content defined in claims 1 and 3, while also having, at the same time, at least 11.0 mass% liquid fat/oil. In its view, the patent did not provide any disclosure of what materials could be used to provide the claimed ranges of triglycerides (POP in particular), while avoiding more than 1 mass% of any fat including fatty acids having fewer than 16 carbons or any non-SOS fat having fewer than 2 double bonds. It submitted that the patent itself contained no disclosure of materials, other than those mentioned in the examples, that could feasibly be used to make the hard fat or chocolate with a sufficient proportion of POP.

- 3.2 As outlined below, the board comes to a different conclusion and shares the opposition division's conclusion that the invention can be carried out by a skilled person.
- 3.2.1 The examples of the patent demonstrate ways to carry out the invention: examples 2 and 3 show that blending specific fats or oils leads to a hard butter according to claim 3 and examples 4 to 9 show how to obtain a chocolate according to claim 1.
- 3.2.2 The appellant provided a theoretical consideration arguing that it was not possible to obtain a hard butter or a chocolate while having the upper limit of 88 mass% for the SOS content, and at the same time having at least 11.0 mass% liquid fat/oil.
- 3.2.3 The board shares the opposition division's conclusion that the patent is not limited to using palm mid fraction (PMF) having a high POP content. It is considered to be within the common knowledge of a skilled person to contemplate other fats or oils than those specifically exemplified in the examples of the patent when confronted with the task of arriving at the claimed subject-matter. Moreover, the board agrees with the finding in the impugned decision that *"the skilled artisan would read the claim with a mind willing to understand and would thus easily recognize that some corners of said claim 1 could possibly be unattainable"* and that *"each individual range in claim 1 of the patent in suit can be explored fully if the content of the other components is adjusted within the limits defined"* (see page 9, lines 2 to 15 from bottom of the impugned decision).

In view of the above, the invention can be carried out by a skilled person.

4. Inventive step

4.1 The appellant argued that:

- the hard butter of claim 3 of the main request did not involve an inventive step in view of D1, D13 or D20 as closest prior art
- the chocolate of claim 1 of the main request did not involve an inventive step in view of D1 as closest prior art.

4.2 In so far as claim 1 is concerned, there was only one inventive-step objection in view of D1 as closest prior art. Both parties considered D1 an appropriate starting document for assessing inventive step.

4.3 With respect to the selection of the closest prior art, in so far as claim 3 is concerned the board comments as follows.

4.3.1 The closest prior art (or most promising starting point) for assessing inventive step is normally a prior-art document disclosing subject-matter conceived for the same purpose or aiming at the same objective as the claimed invention and having the most relevant technical features in common, i.e. requiring the minimum of structural modifications. A further criterion for the selection of the most promising starting point is the similarity of the technical problem.

4.3.2 The board shares the respondent's view that D20 is not a suitable starting point for assessing inventive step. The object of D20 is to provide replacers for hard butter. D20 does not mention the problem of demoldability and meltability mentioned in paragraph [0007] of the patent. Thus it relates to a different technical problem from the patent. A skilled person would not consider D20 an appropriate starting point for assessing inventive step.

4.3.3 In contrast, D1 clearly refers to the problem relating to meltability in the mouth (paragraph [0008] of D1). D1 is consequently considered a suitable starting point for assessing inventive step.

In view of the above, D20 does not qualify as a suitable starting point for assessing inventive step.

4.3.4 The respondent also considered D13 an inadmissible starting point for assessing inventive step. For the reasons given under point 4.4.2 below, this question can be left undecided.

4.4 Claim 3 of the main request

4.4.1 D1 as closest prior art

D1 discloses a chocolate product comprising a sugar component and a fat and oil component comprising cacao fats and a hard butter which contains symmetric triglycerides (having saturated fatty acid residues at the 1,3 positions and an unsaturated fatty acid residue at the 2 position) in a content of 70 wt.% or more in which the content of 1,3-dipalmitoyl-2-oleoylglycerin (POP) is 30 wt.% or more, and asymmetric triglycerides (having saturated fatty acid residues at the 1,2

positions and an unsaturated fatty acid residue at the 3 position) in a content of 4 wt.% or less (see paragraphs [0010] and [0011] of D1). "Blend F" as shown in Table 2 of D1, which was used by the appellant as closest prior art in its inventive-step objection against claim 3, discloses a blend of a hard butter 1 (HB1), PMF and cocoa butter (CB).

There is agreement among the parties that when using D1 as closest prior art "Blend F" is the suitable starting point for assessing the question of inventive step of claim 3.

The subject-matter of claim 3 differs from "Blend F" of D1 in the liquid oil and/or fat content. "Blend F" contains 10 mass%, whereas claim 3 requires a content of not less than 11 mass% and less than 16 mass%.

With respect to the effect resulting from said difference, the board agrees with the opposition division that an improvement over D1 which is merely the result of the distinguishing feature cannot be acknowledged.

The objective technical problem is to provide an alternative hard butter.

With respect to the question of obviousness, the board comments as follows.

The appellant submitted that claim 3 relates to an arbitrary collection of ranges that would be arrived at by minor routine modifications. To demonstrate that these modifications are obvious in view of the closest prior art, the appellant provided three lines of argument.

In a first line of argument, the appellant argued that a 50:50 mixture of "Blend F" and "Blend a" (a 25:62.5:12.5 mixture of HB1:PMF:CB), a 25:65:10 mixture of HB1:PMF:CB or a 35:55:10 mixture of HB1:PMF:CB (as encompassed by D1) resulted in a fat falling within the scope of claim 3 and also complied with the feature "(e) a liquid oil-and/or-fat content is not less than 11 mass% and less than 16 mass%".

As outlined below, this line of argument is not convincing.

The respondent is correct in that the three mixtures proposed by the appellant have a content of asymmetric triglycerides (within the meaning of D1) of significantly above 4.0 wt.%, which lies outside the scope of D1. In other words, a content of asymmetric triglycerides of above 4 wt.% is contrary to the teaching of D1, which requires at most 4 wt.%, so a skilled person would not contemplate these mixtures when starting from D1 and seeking an alternative hard butter. While the appellant is correct in that there is no bias in D1 against the use of liquid oils or fats in D1, a skilled person starting from the fat mixtures proposed in D1 would nevertheless not go beyond a content of asymmetric triglycerides, as defined in D1, of above 4 wt.%, since the teaching of D1 prevents a skilled person from doing so.

In a second line of argument, the appellant argued that simply substituting the cocoa butter used in "Blend F" of D1 with an alternative cocoa butter of South American or African origin as disclosed in D16 would lead to a hard butter falling within the scope of claim 3. As outlined under point 1. above, this

inventive-step objection is the objection over D1 in combination with D16 which was not admitted into the appeal proceedings. The same applies to the inventive-step objection in view of D1 in combination with D10, which equally was not admitted into the appeal proceedings (see point 1. above).

In a third line of argument, the appellant argued that the skilled person would include individual triglycerides, such as PLP, in the hard butter according to "Blend F" and would arrive at the claimed subject-matter in an obvious manner.

The board is not convinced. First, D1 is silent about adding individual triglycerides to the hard butter disclosed therein and only contemplates combining complex mixtures like the hard butter, PMF and CB. Second, the board is not convinced that in the technical field of D1 it was common to add individual triglycerides to the mixtures such as disclosed in D1. Third, the appellant has not pointed to any evidence that would show that the skilled person would contemplate adding a triglyceride on which a fatty acid having a carbon number of not less than 16 is bonded and comprising not less than two double bonds per molecule (i.e. the liquid oil and/or fat as defined in claim 1), such as PLP, to "Blend F" of D1.

In view of the above, none of the obviousness lines of argument is suitable to question inventive step of the claimed hard butter.

A skilled person would not arrive at the claimed subject-matter having the required liquid oil and/or fat content without requiring inventive effort. The

claimed hard butter is consequently a non-obvious alternative over the teaching of D1.

In view of the above, the subject-matter of claim 3 of the main request involves an inventive step in view of D1 as closest prior art.

4.4.2 D13 as closest prior art

Even if D13 is considered a suitable starting point for assessing inventive step, as outlined below, the claimed hard butter is considered to involve an inventive step over D13 as closest prior art.

There was agreement among the parties that D13 discloses a hard palm mid fraction having an SOS content, a POP content, an StOSt content, a POSt content, a liquid oil-and/or-fat content and a mass ratio (StOSt/POSt) of the StOSt content to the POSt content in the claimed ranges of claim 3 (see Table 3.3 on page 31 of D13).

The subject-matter of claim 3 of the main request differs from D13 in that the mass ratio ($\text{POP}/(\text{POSt} + \text{StOSt})$) of POP to a sum of the POSt content and the StOSt content is 4.2 instead of "not more than 4.0" as defined in claim 3.

An effect resulting from this difference over the PMF described in D13 cannot be acknowledged. As a consequence, the objective technical problem to be solved is to provide an alternative hard butter.

With respect to the question of obviousness, the board shares the respondent's view that a skilled person having knowledge of D13 would not arrive at the claimed

mass ratio ($\text{POP}/(\text{POSt} + \text{StOSt})$) of not more than 4.0 in an obvious manner. In this context, the appellant argued that a skilled person would blend the PMF with cocoa butter or another cocoa butter equivalent, and when blending these fats a skilled person would arrive at the claimed hard butter.

The board is not convinced by this line of argument. The board is of the opinion that there is no incentive in D13 for a skilled person to contemplate the specific blends of a cocoa butter or cocoa butter equivalent with PMF as proposed by the appellant to arrive at the claimed hard butter in an obvious manner. While on page 41 of D13 blends of fats with cocoa butter are evaluated, this part of D13 is directed to checking the physical properties, but not to the inclusion of cocoa butter in cocoa butter equivalents.

The claimed hard butter is therefore a non-obvious alternative over D13.

In view of the above, the hard butter of claim 3 of the main request involves an inventive step in view of D13 as closest prior art.

4.5 Claim 1 of the main request

4.5.1 There is agreement among the parties that D1 is the suitable closest prior art for assessing inventive step. Both parties consider the chocolate product I-E of D1 the suitable starting point for assessing the question of inventive step of the chocolate of claim 1.

4.5.2 The difference between the chocolate of claim 1 and the chocolate product I-E of D1 is that the chocolate I-E has a fat content of 10 mass%, which is outside the

claimed range of not less than 11.0 mass% and less than 14 mass%.

- 4.5.3 With respect to the effect resulting from said difference, the board agrees with the opposition division that an improvement over D1 which is merely the result of the distinguishing feature over D1 cannot be acknowledged.
- 4.5.4 The objective technical problem is to provide an alternative chocolate.
- 4.5.5 With respect to the question of obviousness, the board comments as follows.

In this context, the appellant argued that D1 taught that the important considerations for providing the fats for chocolate that are desired in D1 are a high POP content and a low asymmetric triglyceride content. In its view, there was no bias against the use of liquid oils or fats in D1. It was of the opinion that a skilled person would arrive at the claimed subject-matter by simple and obvious modifications to the chocolate I-E of D1, thereby falling within the scope of claim 1. The appellant submitted that the fat of a chocolate composition I-E of D1 fell within the scope of claim 1 when the cocoa butter was replaced with either South American cocoa butter or African cocoa butter as disclosed in Table 4.5 of D16. It considered this replacement an obvious modification.

As outlined under point 1. above, the inventive-step objection in view of D1 in combination with D16 was not admitted into the appeal proceedings.

A skilled person starting from D1 as closest prior art would not arrive at the claimed chocolate having the required liquid oil and/or fat content without requiring inventive effort. The claimed chocolate is a non-obvious alternative over D1.

In the light of the above, the subject-matter of claim 1 of the main request involves an inventive step in view of D1 as closest prior art.

4.6 The subject-matter of the dependent product claims 2 and 4, the method of claim 5 referring to claims 1 or 2 and claims 3 or 4 and the confectionery and bakery products of claim 6 referring to claims 1 or 2 are considered to involve an inventive step for the same reasons as outlined above for independent product claims 1 and 3.

4.7 Finally, the appellant also argued that if an inventive step were to be acknowledged then the requirement of sufficiency of disclosure would not be met. The board disagrees. While for sufficiency of disclosure the question is whether the skilled person can carry out the invention given knowledge of the patent and using their common general knowledge, the question for inventive step is whether the skilled person, in view of the prior art, would arrive at the claimed subject-matter in an obvious way. As set out above, the requirements of both sufficiency of disclosure and inventive step are met.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated