Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 29 September 2025

Case Number:	T 1964/23 - 3.3.09
Application Number:	11773735.3
Publication Number:	2640200
IPC:	A23P10/30, A23L33/00, A23L33/12, A23L33/135, A23L33/155, A23L33/16, A23L33/15
Language of the proceedings:	EN

Title of invention:
AGE-TAILORED NUTRITIONAL FORMULA WITH PARTICULARLY ADAPTED CALORIC DENSITY FOR YOUNG INFANTS

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponent:
N.V. Nutricia

Headword:
Age-tailored nutritional formula/NESTLE

Relevant legal provisions:
EPC Art. 56

Keyword:
Inventive step - (no)

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: T 1964/23 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 29 September 2025

Appellant: (Patent Proprietor)	Société des Produits Nestlé S.A. Entre-deux-Villes 1800 Vevey (CH)
Representative:	Elkington and Fife LLP Prospect House 8 Pembroke Road Sevenoaks, Kent TN13 1XR (GB)
Respondent: (Opponent)	N.V. Nutricia Eerste Stationsstraat 186 2712 HM Zoetermeer (NL)
Representative:	Nederlandsch Octrooibureau P.O. Box 29720 2502 LS The Hague (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 12 October 2023 revoking European patent No. 2640200 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	A. Haderlein
Members:	F. Rinaldi
	R. Romandini

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the patent proprietor (appellant) against the opposition division's decision to revoke the patent.

II. In the opposition proceedings, the opponent requested that the patent be revoked on grounds including a lack of inventive step (Article 100(a) EPC).

III. The following documents are relevant to the decision:

D1: J. Spalinger *et al.*, "Infants fed with an innovative nutrition system manifest healthy growth", poster, American Academy of Pediatrics National Conference & Exhibition, 24-27 October 2016

D2: J. Spalinger *et al.*, "Growth of infants fed formula with evolving nutrition composition: a single-arm non-inferiority study", Nutrients 9, 2017, 219, 1-13

D3: R. v. Kries *et al.*, "Breast feeding and obesity: cross sectional study", BMJ 319, 17 July 1999, 147-150

D4: WO 2009/068549 A1

D6: N. C. R. Räihä *et al.*, "Whey predominant, whey modified infant formula with protein/energy ratio of 1.8 g/100 kcal: adequate and safe for term infants from birth to four months", Journal of Pediatric Gastroenterology and Nutrition 35, 2002, 275–281

D8: D. Turck *et al.*, "Adequacy and safety of an infant formula with a protein/energy ratio of

1.8 g/100 kcal and enhanced protein efficiency for term infants during the first 4 months of life", Journal of Pediatric Gastroenterology and Nutrition 43, 2006, 364-371

D11: WO 2006/069918 A1

IV. With its statement setting out the grounds of appeal, the appellant filed four claim requests (main request and auxiliary requests 1 to 3). These requests are identical to the claim requests underlying the decision under appeal.

V. It is the wording of claim 1 of the main request that is relevant to this decision. All of the auxiliary requests include a claim with the same wording as claim 1 of the main request, which reads as follows.

"*A set of nutritional compositions for infants, the set comprising:*

- *a first composition for infants between 0 and 4 weeks having a caloric density of between more than 66 and 69 kcal/100ml,*
- *a second composition for infants between 4 and 8 weeks having a caloric density of between 63 and 66 kcal/100ml; and*
- *a third composition for infants between 3 and 6 months having a caloric density of between 61 and 64.5 kcal/100ml,*

wherein the energy density of the first composition is higher than the energy density of the second composition, and wherein the energy density of the second composition is higher than the energy density of the third composition."

VI. Final requests

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request as filed with the statement setting out the grounds of appeal or, alternatively, on the basis of one of auxiliary requests 1 to 3 as filed with the statement setting out the grounds of appeal.

The opponent (respondent) requested that the appeal be dismissed.

Reasons for the Decision

1. *Patent in suit*

The patent relates to nutritional formulas designed to address the needs of infants. A set of nutritional compositions for infants is provided, wherein each nutritional composition has an age-specific caloric density. The set of nutritional compositions aims at providing long-term benefits to infants, such as a reduced risk of obesity, cardiovascular diseases and metabolic disorders associated with obesity later in life (paragraph [0001]).

2. *Main request - inventive step*

2.1 In the decision under appeal, the opposition division concluded that the subject-matter of claim 1 of the main request did not involve an inventive step. The reasons given were as follows.

- Example 2 of D4 was the closest prior art. It disclosed a staged set of nutritional compositions for infants comprising:
  - a first composition for infants between 0 and 1 month, with a caloric density of 65 kcal/100ml
  - a second composition for infants between 1 and 2 months, with a caloric density of 65 kcal/100ml
  - a third composition for infants between 3 and 6 months, with a caloric density of 63 kcal/100ml.

- The subject-matter of claim 1 differed from Example 2 in that the first composition of claim 1 had a caloric density of between more than 66 and 69 kcal/100ml.

- The contested patent did not provide evidence that a caloric density of more than 66 kcal/100ml as compared with 65 kcal/100ml resulted in healthier growth in infants or rendered the set of nutritional compositions for infants more nutritionally balanced.

- Consequently, the problem to be solved was to provide an alternative set of nutritional compositions suitable for infants.

- The solution to the problem would have been obvious in the light of D4 alone or in combination with the other cited prior-art documents, such as D6.

2.2 The appellant contested this conclusion and presented the following arguments.

- While the decision correctly identified the closest prior art and the distinguishing features, the subject-matter of claim 1 did in fact provide

several effects. It ensured healthy and normal growth according to WHO standards, as shown in D1 and D2. Such growth provided the therapeutic effects of reducing the risk of obesity, diabetes and cardiovascular diseases later in life.

- These effects had to be considered in the formulation of the problem to be solved.

- The difference in caloric density was not insignificant. The difference in caloric intake between 65 kcal/100 ml and 66 kcal/100 ml over the first month of an infant's life was calculated to be equivalent to more than three additional feeding sessions.

2.3 However, the appellant's arguments are not convincing.

2.4 D4 concerns infant formulas which replicate human milk as far as possible in terms of nutritional properties, for the benefit of infants who are not exclusively breastfed in the first few months of life. D4 is therefore similar to the patent in suit in terms of its general purpose. Moreover, like the contested patent, Example 2 of D4 describes administering three different compositions within the first six months of an infant's life.

2.5 D4 does not mention reducing obesity, diabetes and cardiovascular diseases at all, while the contested patent does not include any evidence that the preventive effects are achieved due to the administration of the three compositions of claim 1, and in particular due to the first composition.

2.6 The appellant argued that the alleged effects were credible in view of the findings in the scientific publication D3.

2.7 This document discloses a positive correlation between breastfeeding (by which infants generally receive less energy and protein) and a reduced risk of obesity, diabetes and cardiovascular diseases. The contested patent advises against the "tendency to overfeed infants" with nutritional formulas (paragraph [0006]). However, the disclosure of D4 corresponds to this teaching; the first composition has a slightly lower caloric density than that of claim 1. Thus, it cannot be seen that the patent in suit credibly solves a different problem from that of D4.

2.8 The appellant argued that the compositions according to claim 1 led to healthy growth in accordance with WHO growth standards as shown in D2, for instance. However, it is observed that D2 focuses on the reduced protein content of the nutritional compositions administered. Even if it is accepted that healthy growth is indeed shown by D2, such an effect does not constitute a fundamental difference over the objective of D4, which is to replicate human milk as far as possible in terms of nutritional and caloric properties.

2.9 Moreover, the appellant's calculations as to the differences in caloric density do not outweigh the lack of evidence identified by the opposition division. As the respondent correctly noted, it has not been shown that the three additional feeding sessions in the first month, as calculated by the appellant, actually have any effect.

2.10 Considering all of this, the opposition division's definition of the problem to be solved, namely that it is simply to provide an alternative set of nutritional compositions suitable for infants, is correct.

2.11 The question to be answered is whether the increased caloric density of the first composition, i.e. from 65 kcal/100ml to between more than 66 and 69 kcal/100ml, would have been obvious to the skilled person.

2.12 The answer to this is affirmative. The prior art discloses that the caloric density of nutritional compositions consumed by infants in their first weeks of life is precisely in this range. This is exemplified by, for instance, D6 (66.3 kcal/100ml, page 276), D8 (67 kcal/100ml, Table 1) and D11 (67 kcal/100ml or 68 kcal/100ml, tables on pages 7 and 9).

2.13 Therefore, the solution of modifying the caloric density of the first composition would have been obvious to the skilled person.

2.14 Thus, to conclude, the subject-matter of claim 1 of the main request does not comply with the requirements of Article 56 EPC.

3. *Auxiliary requests*

The wording of the first claim in all of the auxiliary requests on file is identical to that of claim 1 of the main request. Therefore, none of the auxiliary requests complies with the requirements of Article 56 EPC either, for the reasons set out above.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

K. Götz-Wein A. Haderlein

Decision electronically authenticated