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**Datasheet for the decision
of 26 March 2026**

Case Number: T 0385/24 - 3.3.09

Application Number: 12775022.2

Publication Number: 2779846

IPC: A23L33/19, A61K35/20, A61P3/10,
A23C21/00

Language of the proceedings: EN

Title of invention:
USE OF WHEY PROTEIN MICELLES FOR INFANTS AT RISK OF OBESITY OR
DIABETES

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponent:
N.V. Nutricia

Headword:
Use of whey protein micelles/NESTLE

Relevant legal provisions:
EPC Art. 100(c), 83

Keyword:
Grounds for opposition - extension of subject-matter (yes)
Sufficiency of disclosure - (yes)

Decisions cited:

T 1780/12, T 0109/23



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0385/24 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 26 March 2026

Appellant: N.V. Nutricia
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted/electronically
transmitted on 10 January 2024 rejecting the
opposition filed against European patent No.
2779846 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman S. Arrojo
Members: F. Rinaldi
T. Bokor

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent (appellant) against the opposition division's decision to reject the opposition against the European patent.
- II. In its notice of opposition, the opponent had requested that the patent be revoked under Article 100(b) and 100(c) EPC, among other grounds.
- III. The documents cited during the opposition proceedings included the following.
- D10: B. Koletzko *et al.*, "Can infant feeding choices modulate later obesity risks?", American Journal of Clinical Nutrition 89 (supplement), 2009, 1502S-1508S
- D24: W. Kopp, "High-Insulinogenic Nutrition - An Etiologic Factor for Obesity and the Metabolic Syndrome?", Metabolism 52(7), July 2003, 840-844
- D28: L. L. Birch *et al.*, "Early Childhood Obesity Prevention Policies", Washington, DC, The National Academies Press, 2011, 35-58
- IV. The patent proprietor (respondent) filed auxiliary requests 1 to 7 with its reply to the grounds of appeal.
- V. Relevant to this decision are the following claims.

Claims 1, 5 and 8 of the patent as granted (main request) read as follows:

"1. *Whey protein micelles for use in the treatment and/or prevention of a disorder linked to an increase in insulin secretion and/or plasma IGF-1 concentration in an infant at risk of developing obesity or diabetes.*"

"5. *A nutritional composition for infants for use in the treatment and/or prevention of a disorder linked to an increase in insulin secretion and/or plasma IGF-1 concentration, wherein the nutritional composition comprises whey protein micelles, wherein the whey protein micelles constitute from 80 to 100% of the protein content of the nutritional composition and wherein the protein content ranges from 1.4 to 3.8 g per 100 kcal.*"

"8. *An infant feeding formula comprising whey protein micelles, wherein the content of whey protein micelles ranges from 0.4 to 3.8 g per 100 kcal, preferably from 0.8 to 2.7 g per 100 kcal, wherein the whey protein micelles constitute from 80 to 100% of the protein content of the nutritional composition and wherein the protein content ranges from 1.4 to 3.8 g per 100 kcal.*"

Claims 2 to 4 of the main request are dependent claims which further characterise the whey protein micelles of claim 1. Claims 6 and 7 of the main request are dependent claims which further characterise the nutritional composition for a therapeutic use of claim 5.

Auxiliary requests 1 to 3 comprise a claim having the same wording as claim 8 of the main request.

Auxiliary request 4 consists of claims 1 to 7 of the main request. Auxiliary request 4 does not comprise a claim directed to the infant feeding formula of claim 8 of the main request.

VI. The appellant's arguments are summarised as follows.

- Claim 8 as granted involved added subject-matter. The features added to claim 8 as granted were disclosed in the application as filed only in conjunction with a nutritional composition for a therapeutic use. The terms "nutritional composition" and "infant feeding formula" were not interchangeable.
- The inventions set out in claims 1 and 5 of auxiliary request 4 were not sufficiently clearly and completely disclosed within the meaning of Article 83 EPC. The skilled person would not have been able to determine the disorders encompassed by these claims or identify the infants at risk.

VII. The respondent's arguments are summarised as follows.

- Claim 8 as granted did not involve added subject-matter. In the application as filed, the terms "nutritional composition" and "infant feeding formula" were used interchangeably. This also applied to the entire description of the application as filed. The features disclosed in conjunction with the nutritional compositions of the application as filed also applied to the infant feeding formula of the application as filed.
- The skilled person would have had no difficulty in carrying out the invention over the whole scope of the claims.

VIII. In the oral proceedings before the board, the parties' final requests were as follows.

The appellant requests that the impugned decision be set aside and that the patent be revoked.

The respondent requests that the appeal be dismissed and thus that the patent be maintained as granted (main request). As an auxiliary measure, the respondent requests the maintenance of the patent in amended form on the basis of one of the claim sets filed with the reply to grounds of appeal as auxiliary requests 1 to 7. Auxiliary request 4 is further specified as being a request for the decision under appeal to be set aside and for the case to be remitted to the opposition division with the order to maintain the patent as amended in the following version: description with pages 2, 3 and 5 of the patent specification and page 4 as filed during the oral proceedings before the board, claims 1 to 7 of auxiliary request 4 as filed with the reply to the grounds of appeal dated 16 September 2024, and Figures 1 to 3 of the patent specification.

Reasons for the Decision

1. *Article 100(c) EPC*

1.1 In the decision under appeal, the opposition division concluded that claim 8 as granted did not extend beyond the content of the application as filed. The following reasoning was provided.

- Claim 8 as granted was based on the following disclosures in the application as filed: claims 12 and 13 (which disclosed an infant feeding formula comprising whey protein micelles and a content of whey protein micelles of 0.4 to 3.8 g per 100 kcal and preferably 0.8 to 2.7 g per 100 kcal); claims 9 and 10; and lines 15 to 19 and 25 to 26 on page 10 of the description.

- Claims 9 and 10 of the application as filed referred back to claim 5, a claim directed to a nutritional composition for use in the treatment and/or prevention of a disorder linked to an increase in insulin secretion and/or plasma IGF-1 concentration. The corresponding subject-matter in the application as filed (lines 15 to 19 and 25 to 26 on page 10) was directed to a nutritional composition in general and did not disclose a therapeutic treatment. The paragraph bridging pages 11 and 12 of the application as filed confirmed that the features described for the therapeutic use of the whey protein micelles could be combined with the therapeutic and non-therapeutic uses of the nutritional compositions and vice versa.

- Furthermore, the terms "nutritional composition" and "infant feeding formula" were used interchangeably in the application as filed.

- Hence, the feature according to which the whey protein micelles constituted 80 to 100% of the protein content of the nutritional composition and the feature specifying the protein content added to claim 8 merely restricted the subject-matter of claims 12 and 13 of the application as filed.

1.2 On appeal, the parties disagreed as to whether claim 8 as granted encompassed an unallowable amendment.

1.3 The respondent argued that the amendment in claim 8 as granted was allowable. Its arguments can be summarised as follows.

- The paragraph starting on page 4, line 27, of the application as filed described in its first sentence that "*[i]n a second aspect, the invention relates to a nutritional composition for infants comprising whey protein micelles*". The next sentence explained that the same composition was used for treating and/or preventing disorders linked to an increase in insulin secretion and/or plasma IGF-1 concentration.
- The two paragraphs on page 10, lines 15 to 26, of the application as filed disclosed two features which had been added to claim 8 as granted (i.e. the whey protein micelles constituting from 80 to 100% of the total protein content and the total protein content ranging from 1.4 to 3.8 g per 100 kcal). These two paragraphs had to be read in conjunction with the first sentence on page 4, line 27, of the application as filed. The two paragraphs on page 10 had to be understood as defining the features of the nutritional composition in general.
- The last paragraph on page 9 (lines 26 to 33) disclosed a "further aspect" of the invention for use in the treatment and/or prevention of a disorder linked to an increase in insulin secretion and/or plasma IGF-1 concentration. However, this

paragraph had to be read as a narrower embodiment of the "second aspect" described on page 4 of the application as filed, not as a detailed description of the "second aspect". This confirmed again that in light of the description as a whole the two paragraphs on page 10, lines 15 to 26, of the application as filed were not restricted to a therapeutic use of the nutritional composition.

- The terms "nutritional composition" and "infant feeding formula" in the application as filed were interchangeable. What was disclosed for the nutritional composition of the invention also applied to the infant feeding formula of claims 12 and 13. The subject-matter of these two claims could, in fact, be considered redundant.

1.4 The board observes that the application as filed discloses four different aspects, respectively defined in independent claims 1, 5, 11 and 12, as follows.

- Whey protein micelles for use in the treatment and/or prevention of a disorder linked to an increase in insulin secretion and/or plasma IGF-1 concentration in an infant at risk of developing obesity or diabetes.
- A nutritional composition for infants for use in the treatment and/or prevention of a disorder linked to an increase in insulin secretion and/or plasma IGF-1 concentration (see also page 9, last paragraph).
- A non-therapeutic use of a nutritional composition for infants, to decrease insulin secretion and/or

plasma IGF-1 levels in an infant (see also pages 10, last paragraph).

- An infant feeding formula not directed at a particular use/purpose (see also page 11, second and third paragraphs).

1.5 It is uncontested that claims 12 and 13 of the application as filed provide a basis for some of the features of claim 8 as granted, namely that the infant feeding formula comprises whey protein micelles and that the content thereof ranges from 0.4 to 3.8 g per 100 kcal, preferably from 0.8 to 2.7 g per 100 kcal.

1.6 The question is whether there is a basis in the application as filed for the quantitative features which define that in the infant feeding formula:

- the whey protein micelles constitute from 80 to 100% of the protein content of the nutritional composition; and
- the protein content ranges from 1.4 to 3.8 g per 100 kcal.

1.7 A key argument of the respondent was that the terms "nutritional composition" and "infant feeding formula" were used interchangeably in the application as filed and in the patent as granted. In its view, the skilled person would not have made a distinction between these two terms. The respondent even contended that the subject-matter of claims 12 and 13 might be considered redundant.

1.8 This is not persuasive, however. The application as filed discloses these two different terms to define

various aspects of the invention. The independent claims of the application as filed are directed to these aspects and there is no direct and unambiguous disclosure that these terms or aspects are to be regarded as being interchangeable.

- 1.9 In particular, the passage bridging pages 11 and 12 of the application as filed discloses that *"features described for the therapeutic use of the whey protein micelles may be combined with the therapeutic and non-therapeutic uses of the compositions and vice versa"*. This passage explicitly addresses features relating to the therapeutic and non-therapeutic uses of the compositions described in the application. Nevertheless, nothing is stated about the infant feeding formula. This passage cannot be seen to further define the infant feeding formula with features disclosed for the nutritional composition. No such feature is disclosed in or derivable from the first paragraph on page 11 of the application as filed either.
- 1.10 As discussed during the oral proceedings before the board, the argument that the terms "nutritional composition" and "infant feeding formula" are generally considered interchangeable or even redundant is not persuasive. As the appellant convincingly explained, an "infant feeding formula" is a sub-group of the generic term "nutritional composition". The latter encompasses, for example, fortifiers, supplements and, arguably, at least according to the appellant's opinion, human milk. None of these compositions would be regarded by the skilled person as being an infant feeding formula.
- 1.11 The board therefore concludes that the terms "nutritional composition" and "infant feeding formula"

in the application as filed are not interchangeable. In view of this, none of the features, apart from those in claims 12 and 13 of the application as filed, directly and unambiguously characterise the infant feeding formula. In particular, there is no indication as to which specific features of the nutritional compositions in the application as filed might be used to further define the infant feeding formula.

- 1.12 This is all the more the case for the technical feature according to which the whey protein micelles constitute from 80 to 100% of the protein content of the nutritional composition. The respondent argued that this feature was disclosed in the paragraph on page 10, lines 15 to 23.
- 1.13 The board took note of the respondent's argument that the skilled person would have considered that the paragraph on page 10 was intended to further characterise the nutritional composition of the invention, i.e. the composition described on page 4, line 27.
- 1.14 However, on the face of it, the paragraph on page 10 is embedded in the section of the application as filed (starting on page 9, line 26) that describes the nutritional composition for a specified therapeutic use. This section of the description, which concludes on page 10, line 26, corresponds to claims 5 to 9 of the application as filed, which are likewise directed to a nutritional composition for a specified therapeutic use.
- 1.15 Notwithstanding the above, the indicated paragraph on page 10 of the application as filed states that the nutritional compositions are advantageously

administered to pre-term infants and/or infants suffering from intra-uterine growth retardation (IUGR). In the board's view, the feature that the whey protein micelles constitute from 80 to 100% of the protein content of the nutritional composition is manifestly linked to a therapeutic use. Consequently, this feature cannot be regarded as a direct and unambiguous disclosure for the purpose of characterising the infant feeding formula in its most general scope, i.e. without being directed at a particular use (beyond serving as infant nutrition).

1.16 For this reason, the amendment in claim 8 as granted is not allowable.

1.17 For the sake of completeness it should be noted that the respondent argued in its written submissions that the amendment had to be regarded as being allowable in view of the considerations made by the present board (in a different composition) in decision T 0109/23.

1.17.1 According to the respondent's reading of the cited decision, a first broad embodiment directed to a composition comprising a mixture of specified oligosaccharides for reducing an infant's risk of obesity later in life could be combined with a second narrow embodiment directed to a composition per se, which comprised specific amounts of oligosaccharides but without mentioning a therapeutic application of the more narrowly defined composition.

1.17.2 To put things into context, in the case underlying T 0109/23 (see, in particular, Reasons 1.3 and 2.1), the allegedly "broad" embodiment was a Swiss-type claim, claim 1, of the application as filed (i.e. a purpose-limited process claim, see, for example,

T 1780/12, Reasons 16) and the allegedly "narrow" embodiment was product claim 7 of the application as filed. During the examination and opposition proceedings, the product claim was amended and restricted to a product claim for a therapeutic use under Article 54(5) EPC.

1.17.3 Leaving aside the aspect that the terms "broad" and "narrow" are not appropriate when comparing the scope of a Swiss-type claim with a purpose-limited product claim (see, for completeness, T 1780/12, Reasons 17 to 25), let alone a standard product claim, it is plain to see that the two amended claims at issue in T 0109/23 related to therapeutic uses and the competent board regarded the effects underlying these uses as being interrelated. The situation is different in the current case, in which the infant feeding formula is not restricted to any therapeutic use.

1.17.4 Therefore, the board fails to see any analogy in T 109/23 that would support the respondent's case.

1.18 To conclude, the subject-matter of claim 8 as granted extends beyond the content of the application as filed. The ground for opposition under Article 100(c) EPC therefore prejudices the maintenance of the patent as granted.

2. *Auxiliary requests 1 to 3*

Auxiliary requests 1 to 3 comprise a claim having the same wording as claim 8 of the main request. Thus, for the same reasons as those set out above with respect to the main request, auxiliary requests 1 to 3 do not comply with the requirement of Article 123(2) EPC.

3. *Auxiliary request 4*

3.1 With respect to auxiliary request 4, the only objection the appellant raised was that the invention as set out in claims 1 and 5 was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 83 EPC).

3.2 The wording of claims 1 to 7 of auxiliary request 4 is identical to that of claims 1 to 7 of the main request (see point V. above).

3.3 On appeal, the appellant acknowledged that the invention according to dependent claim 2 of the patent as granted (and consequently of auxiliary request 4) was sufficiently disclosed. The board observes that claim 2 is directed to treating or preventing disorders such as obesity, insulin resistance and glucose intolerance. As regards claims 1 and 5, however, the appellant argued that these claims went beyond the disorders defined in dependent claim 2. When reproducing claims 1 and 5, the skilled person would not have been able to:

- identify further disorders linked to an increase in insulin secretion and/or plasma IGF-1 concentration; and/or
- establish whether an infant was at a risk of developing obesity or diabetes.

3.4 This is not persuasive, however. As the opposition division correctly concluded, there is a link between elevated plasma levels of insulin and IGF-1 and the risk of developing metabolic disorders. Such a link is described and explained in D10, a scientific

publication concerning the effect of early feeding choices on later obesity. Furthermore, Figure 1 of the patent in suit shows that the postprandial insulin level in humans is lower if the protein in their meal is in the form of whey protein micelles rather than whey protein isolates or hydrolysed whey proteins. Although the data was collected in experiments with adults, it is credible that the same results would be obtained with infants. Finally, the parties agree that whey protein micelles prevent the disorders set out in claim 2, such as obesity.

- 3.5 Turning to the first objection raised by the appellant, the skilled person is aware of other disorders linked to an increase in insulin secretion and/or plasma IGF-1 concentration, beyond those mentioned in claim 2 as granted. Such disorders are specified in D24, page 841, right-hand column, for example. Therefore, the skilled person would have been able to identify further disorders linked to an increase in insulin secretion and/or plasma IGF-1 concentration that are suitable for treatment or prevention by the use of whey protein micelles.
- 3.6 As concerns the second objection, paediatricians are generally trained to monitor the growth of infants and identify any risk of overweight or obesity. This is shown in D28, pages 35 to 44, for example. Therefore, the skilled person would have been able to identify infants at risk.
- 3.7 To conclude, the appellant's argument that the skilled person would not have been able to carry out the invention over its entire scope is not convincing. Therefore, the requirements of Article 83 EPC are met.

4. The appellant did not raise any further objections and the description of the patent has been adapted to correspond to the claims of auxiliary request 4. Therefore, there are no further issues for the board to consider. The board is satisfied that the amended description also meets the requirements of the Convention. Thus, the patent can be maintained on the basis of auxiliary request 4 (Article 101(3)(a) EPC).

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 as amended in the following version:

Description:

Pages 2, 3 and 5 of the patent specification
Page 4 as filed during the oral proceedings before the board

Claims:

Claims 1 to 7 of auxiliary request 4 as filed with the reply to the grounds of appeal dated 16 September 2024

Drawings:

Figures 1 to 3 of the patent specification.

The Registrar:

The Chairman:



L. Stridde

S. Arrojo

Decision electronically authenticated