

Internal distribution code:

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

**Datasheet for the decision
of 13 May 2026**

Case Number: T 0038/25 - 3.3.09

Application Number: 16879453.5

Publication Number: 3393264

IPC: A23C19/068, A23C19/06,
A23C19/064, A23C9/142,
A23C9/146, A23C19/05

Language of the proceedings: EN

Title of invention:
DAIRY PRODUCT AND PROCESSES

Patent Proprietor:
Fonterra Co-Operative Group Ltd

Opponent:
Arla Foods amba

Headword:
Dairy product/FONTERRA CO-OPERATIVE GROUP

Relevant legal provisions:
EPC Art. 56, 112a(2)(c), 112a(2)(d), 113
RPBA 2020 Art. 13(2)
EPC R. 106

Keyword:

Inventive step - main request and auxiliary requests 1 -4 (no)
Amendment after summons - exceptional circumstances (no) -
auxiliary request 5 was not admitted into the appeal
proceedings
Obligation to raise objections under Rule 106 EPC - objection
dismissed

Decisions cited:

Catchword:



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 0038/25 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 13 May 2026

Appellant: Arla Foods amba
(Opponent) Sønderhøj 14
8260 Viby J (DK)

Representative: Potter Clarkson
Chapel Quarter
Mount Street
Nottingham NG1 6HQ (GB)

Respondent: Fonterra Co-Operative Group Ltd
(Patent Proprietor) 109 Fanshawe Street
Auckland Central
Auckland 1010 (NZ)

Representative: Forresters IP LLP
Skygarden
Erika-Mann-Straße 11
80636 München (DE)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 November 2024 concerning maintenance of the
European Patent No. 3393264 in amended form.

Composition of the Board:

Chair A. Jimenez
Members: M. Ansorge
A. Veronese

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal against the opposition division's interlocutory decision holding the then auxiliary request 1 allowable.
- II. With its notice of opposition, the opponent had requested that the patent be revoked on the ground for opposition under Article 100(a) EPC (lack of inventive step), *inter alia*.
- III. The opposition division decided that the then auxiliary request 1 met the requirement of Article 123(2) EPC, that the invention was sufficiently disclosed, and that the claimed subject-matter was clear and involved an inventive step in view of D2 or D3 as the closest prior art. The objection relating to novelty over D2 was not admitted into the opposition proceedings.
- IV. Claims 1 and 5 of the then auxiliary request 1 before the opposition division (main request on appeal) read as follows:

"1. A pasta filata cheese comprising a moisture content of at least 55% by weight, a solids-non-fat content of up to 45% by weight, the solids-non-fat comprising at least 70% by weight protein, the protein comprising at least 65% by weight casein, and a mineral content comprising

 - a) a total divalent cation content of 25 to 50 mMol of divalent cations/100 g casein, and
 - b) a total monovalent cation content of 100 to 250 mMol monovalent cations/100 g casein, and

c) a total cation content of 150 to 300 mMol total cations/100 g casein."

"5. A process for making a pasta filata cheese of any one of claims 1-4, the process comprising

a) providing a source of milk protein comprising

- i) protein, the protein comprising at least 65 to 99% by weight casein, and
- ii) a pH of from about 4.9 to about 6,

b) contacting the source of milk protein with a coagulating agent at a temperature of 8 to 50 °C to produce a milk curd,

c) mixing at least one lipid ingredient and the curd to produce a mixture,

d) heating and mechanically working the mixture at a temperature from about 65 to about 90 °C to produce a heated cheese mass, and

e) processing the heated cheese mass to form a pasta filata cheese product, the pasta filata cheese product comprising a mineral content comprising

- i) a total divalent cation content of 25 to 50 mMol of divalent cations/100 g casein, and
- ii) a total monovalent cation content of 100 to 250 mMol monovalent cations/100 g casein, and
- iii) a total cation content of 150 to 300 mMol total cations/100 g casein[sic].

wherein

(1) the source of milk protein further comprises

- i) a total divalent cation content of about 25 to about 75 mMol of divalent cations/100 g casein,
- ii) a total monovalent cation content of about 100 to about 250 mMol monovalent cations/100 g casein, and
- iii) a total cation content of about 150 to about 300 mMol total cations/100 g casein, or

(2) the source of milk protein further comprises a total divalent cation content of about 25 to about 75 mMol of divalent cations/100 g casein, and the method further comprises adjusting the monovalent cation content of the mixture to obtain

- i) a total monovalent cation content of about 100 to about 250 mMol monovalent cations/100 g casein, and
- ii) a total cation content of about 150 to about 300 mMol total cations/100 g casein, or

(3) the pasta filata cheese product is a first pasta filata cheese product, and the method further comprises

(A) determining the monovalent and the divalent cation content of the first pasta filata cheese product,

(B) preparing a second pasta filata cheese product by a process comprising

- i) providing a source of milk protein comprising protein, the protein comprising at least 65 to 99% by weight casein and a pH of from about 4.9 to about 6,

- ii) contacting the source of milk protein with a coagulating agent at a temperature of 8 to 50 °C to produce a milk curd,
- iii) mixing at least one lipid ingredient to the curd to produce a mixture,
- iv) heating and mechanically working the mixture at a temperature from about 65 to about 90 °C to produce a heated cheese mass, and
- v) processing the heated cheese mass to form the second pasta filata cheese product;

(C) adjusting the monovalent cation content of the curd, the mixture, the cheese mass of the second pasta filata cheese product or a combination thereof, based on the measurement of the first pasta filata cheese product to produce a second pasta filata cheese product having

- vi) a total divalent cation content of about 25 to about 50 mMol of divalent cations/100 g casein, and
- vii) a total monovalent cation content of about 100 to about 250 mMol monovalent cations/100 g casein, and
- viii) a total cation content of about 150 to about 300 mMol total cations/100 g casein."

Claim 1 of auxiliary requests 1 and 4 is identical to claim 1 of the main request.

Claim 1 of auxiliary requests 2 and 3 differs from claim 1 of the main request in that the feature "a moisture content of at least 55% by weight, a solids-non-fat content of up to 45% by weight, the solids-non-fat comprising at least 70% by weight protein, the protein comprising at least 65% by weight casein" was amended to read "a moisture content of at least 55% by

weight, a fat content of at least about 1%, at least 10%, at least 14%, at least 15%, at least 16%, at least 17%, at least 17.5%, at least 18%, at least 19%, at least 20% or at least 30% by weight a solids-non-fat content of up to 15%, 25%, 26%, 27%, 27.5%, 28%, 29%, 30%, 31%, 35% or 44% by weight, the solids-non-fat comprising at least 70% by weight protein, the protein comprising at least 65% by weight casein" (amendments compared with claim 1 of the main request underlined).

V. During the oral proceedings before the board the respondent filed auxiliary request 5, which differs from the main request in that all the product claims have been deleted and in that, in process claim 1, the back-reference "of any one of claims 1-4" was deleted and all the features of product claim 1 of the main request were inserted instead.

VI. The following documents have been cited in the case in hand:

D2: WO 03/069982 A1

D3: B.M. Paulson et al., "Influence of Sodium Chloride on Appearance, Functionality, and Protein Arrangements in Nonfat Mozzarella Cheese", J Dairy Sci 81:2053-2064

D14: Encyclopedia of Dairy Sciences, edited by H. Roginski, J.W. Fuquay and P.F. Fox, volume three, page 2052

D15: Experimental report on measuring casein levels, submitted by the appellant

D16: Calculations on examples of document D2, submitted by the appellant

D19: Declaration by Mr Graeme Gillies, submitted by the respondent

VII. Requests

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) 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 to 4, filed with the reply to the statement setting out the grounds of appeal. In addition, it requested that auxiliary request 5 be admitted into the appeal proceedings.

Reasons for the Decision

MAIN REQUEST (the set of claims as held allowable by the opposition division)

1. Inventive step

1.1 The appellant argued that the subject-matter of claim 1 of the main request did not involve an inventive step in view of D2 or D3 as the closest prior art.

1.2 The respondent submitted that D3, rather than D2, was the closest prior art, since the purpose in D3 was the same as that mentioned in the patent. In its opinion, D2 related to a cheese-making process that applied to cheeses in general, and its focus was not on pasta filata cheeses. It focused on a process modification, so it was not a suitable starting point for assessing inventive step.

- 1.3 The board is of the opinion that not only D3, but also D2, qualifies as a suitable starting point in the assessment of inventive step.
- 1.4 The patent relates to a pasta filata cheese, such as mozzarella, having a high moisture content and an adjusted mineral content and a method of manufacturing it.
- 1.5 D2 explicitly discloses a process for producing mozzarella or mozzarella-like cheeses (see claim 6) and mozzarella or mozzarella-like cheeses (see claim 33 and e.g. examples 5, 6 and 15), i.e. a pasta filata cheese. Therefore, D2 not only relates to a process for making cheese, but also to the cheese as such. D2 mentions that the process in D2 includes the ability to closely control the functional and compositional characteristics of the final cheese products to enable the consistent production of cheeses having enhanced functional and compositional characteristics. In particular, the claimed process makes it possible to produce cheeses having a higher moisture content and lower calcium content than may be achieved using traditional processes (see page 3, lines 20 to 25 of D2). The board is of the opinion that the purpose of the process disclosed in D2 is close to the purpose and objective of the patent. Accordingly, both D2 and D3 are considered suitable starting points representing the closest prior art.
- 1.6 With respect to the question of inventive step in view of D2 as the closest prior art, the board comes to the following conclusion.
 - 1.6.1 D2 describes a process of making cheese comprising steps of:

- a) adding a coagulating agent to a starting milk under conditions of temperature time and coagulating agent concentration, which suppresses the formation of a coagulum;
- b) passing the milk of step a) along a flow path and adjusting the pH where necessary to between 4.0 and 6.0 by adding an acidulent;
- c) cooking the milk of step b) at a temperature which allows the formation of coagulated curd particles within the flow;
- d) separating the coagulated curd particles from the whey liquid;
- e) heating and mechanically working the curd particles into a cheese mass at a temperature of 50 to 90°C; and
- f) shaping and cooling the cheese (see claim 1 of D2).

1.6.2 Furthermore, D2 discloses a mozzarella or mozzarella-like cheese produced by the process in D2 (see claims 31 and 33 of D2).

1.6.3 Examples 5, 6 and 15 of D2 are relevant and considered appropriate starting points for identifying the differences between the claimed pasta filata cheese and that disclosed in D2. These examples all relate to a mozzarella or mozzarella-like cheese (a pasta filata cheese) and they fulfil the claimed moisture content of at least 55% by weight (the moisture content of the mozzarella in example 5 is 55.6%, the moisture content of the mozzarella in example 6 is 55.0% and the

moisture content of the mozzarella in example 15 is 55.1%).

- 1.6.4 The parties agreed that D2 discloses a pasta filata cheese fulfilling the feature "a solids-non-fat content of up to 45% by weight, the solids-non-fat comprising at least 70% by weight protein, the protein comprising at least 65% by weight casein".
- 1.6.5 The point of dispute between the parties was whether examples 5, 6 or 15 of D2 unambiguously disclosed the claimed ranges a) to c) of claim 1 directed to the total content of divalent cations and monovalent cations and the total cation content in an implicit manner.
- 1.6.6 In this context, the respondent was of the opinion that the subject-matter of claim 1 differed from the mozzarella cheeses in examples 5, 6 and 15 of D2 on account of all three claimed ranges a) to c), i.e. on account of:
- a) a total divalent cation content of 25 to 50 mMol of divalent cations/100 g casein (hereinafter "claimed range a)"),
- b) a total monovalent cation content of 100 to 250 mMol monovalent cations/100 g casein (hereinafter "claimed range b)"), and
- c) a total cation content of 150 to 300 mMol total cations/100 g casein (hereinafter "claimed range c)").
- 1.6.7 With respect to the differences compared with D2, the board makes the following comments.

1.6.8 Examples 5, 6 and 15 of D2 do not explicitly mention the total divalent cation content, the total monovalent cation content and the total cation content. These examples only mention the calcium level of the mozzarella based on 1 kg cheese (93 mmol/kg cheese in example 5, 92 mmol/kg cheese in example 6, and 92 mmol/kg cheese in example 15), i.e. the level of the main divalent cation typically present in mozzarella. Accordingly, the question arises of whether or not the claimed ranges a) to c) are implicitly disclosed in these examples. To be in a position to determine the features in question, the amount of monovalent cations, divalent cations and the total cations in examples 5, 6 and 15 of D2 needs to be determined and these contents are to be based on 100 g casein (as in the claimed ranges a) to c)).

1.6.9 As evidence that the claimed ranges a) to c) are implicitly disclosed in examples 5, 6 and 15 of D2, the appellant submitted document D16, setting out calculations for determining the content of monovalent cations, divalent cations and the total cation content. In the calculations in D16, some assumptions were made and the protein content of the cheese was determined as follows:

protein content of mozzarella (%) = 100% - [fat content (%) + moisture content (%) + salt content (%) + carbohydrate content (%)].

The appellant's assumptions made in D16 were as follows:

- The protein content can be calculated using the above formula; the remaining components present in mozzarella are only present in traces or in such

minor amounts that they do not significantly influence the final result, in particular with respect to determining monovalent cations and the total cation content.

- The casein content in the total protein is considered to be 95% or 98%; these values are representative of typical mozzarella, as also concluded by the opposition division in the decision.
- The salt added in examples 5, 6 and 15 of D2 is sodium chloride, and the amount of salt mentioned for the final mozzarella cheeses is also sodium chloride.
- Divalent cations other than calcium, such as magnesium and zinc, do not significantly change the total content of divalent cations.
- The content of monovalent cations other than sodium does not significantly change the total content of monovalent cations.

1.6.10 The respondent filed D19, a declaration by Mr Gillies (who was present at the oral proceedings), in which the validity of the appellant's assumptions made in D16 was questioned. The respondent requested that Mr Gillies be allowed to comment on the calculations based on D16 and D19 during the oral proceedings. Neither the appellant nor the board had concerns in this respect. As outlined below, Mr Gillies actively participated in the oral proceedings and commented in particular on the assumptions made by the appellant in its calculations in D16.

The following criticism was raised against the appellant's assumptions made in D16:

- In D19 Mr Gillies considered the assumption regarding the carbohydrate level questionable since the carbohydrate level results in significant propagating errors. Lactose as the main carbohydrate may vary in pasta filata cheese, including mozzarella, from trace amounts to levels above 4%.
- There are other components present in mozzarella in addition to carbohydrate (plus water, fat, salt, protein), e.g. organic components other than protein such as organic acids, citrate, lactate, ash, etc.
- The use of the "by difference" method used by the appellant to calculate the protein content casts considerable doubt on the validity of D16. Determining protein by difference is not a standard or accredited method; the Kjeldahl method is an accredited method which is reliable for determining protein.

1.6.11 The board makes the following comments on D16 and D19.

- (a) The respondent submitted that the "by difference" method applied by the appellant to calculate the protein content of mozzarella cast doubt on the validity of the calculations in D16 and this method was not a standard method. The Kjeldahl method was the reliable method for determining protein; however, as can be understood from D15 and D16, the Kjeldahl method leads to a casein content in line with the appellant's assumptions that mozzarella has a casein content of 95% or more based on total protein. In this context, it is further noted that the respondent did not contest the opposition division's conclusion that "the amount of casein of the total protein content in the mozzarella cheese

is about 98% by weight" (see page 19, lines 4 and 5 of the decision). Under these circumstances, the board is of the opinion that the method for determining the protein content and casein content submitted by the appellant leads to credible results, in line with the Kjeldahl method. The mere fact that this method is not a standard method cannot disqualify it, with the consequence of simply setting all the calculations aside. It is correct that each party carries the burden of proof for the facts they assert. In this context, the board considers the assumption made by the appellant to be reasonable. The respondent did not demonstrate that this method leads to results that are so vague that they are not representative of mozzarella cheese. As outlined below, this is particularly important for assessing the question of whether the claimed ranges b) and c) are implicitly disclosed in D2.

- (b) The respondent submitted that the lactose content of mozzarella may vary from trace amounts to above 4%, with lactose being the main carbohydrate. The board shares the respondent's view that lactose is the predominant carbohydrate in mozzarella, and other carbohydrates are present in insignificant amounts. The board also shares the respondent's opinion that mozzarella may have a lactose content from traces to up to possibly greater than 2%; however, the appellant's assumption that mozzarella typically contains no more than 2% of carbohydrates is considered reasonable and representative of typical mozzarella. In this context, it is important to note that the appellant not only considered a carbohydrate content of 2% in its calculation (as in D16), but also 1% and 3% (see

points 5.24 to 5.32 of the statement setting out the grounds of appeal), i.e. also greater than the assumption made in D16.

As can be understood from the table on page 22 of the grounds of appeal, the sodium content in all the calculations was squarely within the claimed range of monovalent cations (claimed range b)); the total monovalent cation content in the claimed range b) is defined as 100 to 250 mMol monovalent cations/100 g casein and the appellant's calculations are all between 116.6 and 133.9 mMol Na/100 g casein. Even considering that some further monovalent cations, in particular potassium, are present (originating from the skimmed milk or the high fat cream), it is not conceivable that when taking them into account a total monovalent cation content outside the claimed range b) could result. At best the total monovalent cation content in the appellant's calculations could underestimate the total content of monovalent cations, but not the other way around. Taking these further monovalent cations into account only leads to a slight increase in the total monovalent cation content, with the claimed range b) still being satisfied. In this context, it is noted that the washing step in examples 5, 6 and 15 of D2 removes a large amount of milk mineral before the addition of salt and high fat cream. The expert Mr Gillies was asked about this by the board; however, he did not give an explanation that could raise doubts that the appellant's assumptions were so speculative and vague that a total monovalent cation content outside the claimed range b) of claim 1 could result. Varying the carbohydrate content to higher reasonable values in mozzarella, considering other

materials than water, fat, protein or salt in reasonable amounts, or considering additional monovalent cations originating from skimmed milk or high fat cream could not result in a content outside the claimed total monovalent cation content. The rather general criticism in D19 that there are significant propagating errors cannot call the appellant's calculations of the total monovalent cation content into question.

As can be taken from the table on page 21 of the grounds of appeal, the calculated calcium content in all but one calculation was in the claimed range of total divalent cations of 25 to 50 mMol of divalent cations/100 g casein (claimed range a)); in one calculation a value slightly above the upper limit of the claimed range a) (50.3 mMol Ca/100 g casein) was obtained. For this reason alone, it cannot be unambiguously derived from examples 5, 6 and 15 of D2 that the claimed range a) is unambiguously disclosed in D2. In addition, magnesium (another divalent cation present in milk) was not considered in these calculations. As can be derived from D14, the magnesium content in cow's milk is up to about 10% with respect to the content of calcium (see Table 1 of D14). While it is unclear how much magnesium is present in the mozzarella cheeses in examples 5, 6 and 15 of D2 after the washing step, it is present at least to some extent, but it cannot be more than what originates from the skimmed milk or the high fat cream. Although almost all the calculations in the table on page 21 of the grounds of appeal lead to values falling within the claimed range a) when adding about 5 to 10% magnesium to the calculated calcium level, it cannot be derived from this table

that the level of calcium plus magnesium plus minor amounts of other divalent cations is unambiguously within the claimed range a). Accordingly, the board concludes that it cannot be decided with the necessary degree of certainty that examples 5, 6 and 15 of D2 unambiguously disclose the feature "a) a total divalent cation content of 25 to 50 mMol of divalent cations/100 g casein" of claim 1 (claimed range a)).

As outlined above, the total monovalent cation content in examples 5, 6 and 15 of D2 is squarely within the claimed range of total monovalent cations (claimed range b)). In view of the breadth of the claimed range c), which requires a total cation content of 150 to 300 mMol per 100 g casein, it is concluded that examples 5, 6 and 15 of D2 also implicitly satisfy the claimed range c). In this respect, too, the expert Mr Gillies was asked which of the appellant's assumptions were so speculative and vague that they might possibly lead to values outside the total cation content, i.e. the claimed range b), but he did not identify any. For similar reasons, as outlined above for the total monovalent cation content, even considering some additional cations does not lead to values outside the claimed range c).

- (c) With respect to the respondent's argument that there are other components present in mozzarella in addition to carbohydrate, water, fat, protein and salt, such as organic components other than protein like organic acids, citrate or lactate, the board notes that these components are considered to be present in insignificant amounts. Even if they are considered to have an influence on the appellant's

calculations, this cannot lead to values outside the claimed ranges b) and c). In this context too, the respondent did not raise doubts that these components might be present in such high amounts in mozzarella that it might lead to values outside the claimed ranges b) and c).

With respect to the respondent's argument that ash values may vary significantly and alter the calculated values, the board shares the appellant's opinion that ash is not a component of cheese, but a residual substance that remains following a combustion analysis (see point 5.18 of the grounds of appeal). The board is of the opinion that this criticism cannot call the appellant's calculations into question.

- 1.6.12 In view of the above, the board came to the conclusion that the claimed pasta filata cheese differs from the mozzarella cheeses disclosed in examples 5, 6 and 15 of D2 only on account of the feature "a) a total divalent cation content of 25 to 50 mMol of divalent cations/100 g casein" (claimed range a)).
- 1.6.13 With respect to the question of whether there is an improvement over D2, the board is of the opinion that there is no evidence that the only difference over examples 5, 6 or 15 of D2 (the total divalent cation content) is associated with a technical effect that goes beyond the teaching of D2. In the absence of a representative comparison with examples 5, 6 and 15 of D2, improved shreddability, meltability or other improvements cannot be acknowledged over D2; however, in view of the experimental data in the patent demonstrating that the claimed pasta filata cheese fulfilling the claimed ranges a) to c) has good

functional properties, the objective technical problem is considered to be that of providing an alternative high-moisture mozzarella with good functional properties. This is the problem to be solved as proposed by the respondent.

- 1.6.14 With respect to the question of obviousness, the board reaches the following conclusion.

The mozzarella cheeses in examples 5, 6 and 15 of D2 have a high moisture content in the claimed range and good functional properties. This can be understood from example 5, for instance, which explicitly mentions that the mozzarella exhibited similar functional properties in terms of blister size, coverage and colour, background colour, melt appearance, oil off, stretch characteristics and in-mouth tenderness to conventionally made mozzarella cheese. In view of these advantageous properties and in the absence of a representative comparison with examples 5, 6 and 15 of D2, it is concluded that these examples of D2 also have good functional properties.

The respondent repeatedly argued that D2 failed to teach the claimed adjusted mineral content, i.e. the claimed ranges a) to c); however, as outlined above, the total content of monovalent cations and the total cation content are disclosed in an implicit manner in examples 5, 6 and 15 of D2, and so only the total content of divalent cations is considered a difference over D2.

Furthermore, D2 explicitly mentions that mineral adjustment, and particularly calcium adjustment, is a critical step in the cheese-making process as the calcium content of the final cheese product affects its

functionality and compositional characteristics (see page 9, lines 5 to 7, of D2); the pH of the acidulent, the pH target of the acidulated enzyme treated mixture, the cooking temperature and the pH of the wash water are all points in this process at which calcium solubilisation can be controlled (see page 9, lines 7 to 10 of D2). In addition, D2 explicitly teaches that a cheese may be produced to have a significantly lower calcium content than can be achieved using a traditional cheese-making process (see page 9, lines 10 to 12 of D2).

Accordingly, even if it cannot be decided with the necessary degree of certainty that the total divalent cation content in the examples 5, 6 of 15 of D2 is in the claimed range a), a skilled person is clearly taught by D2 to lower the calcium content in the cheese compared with traditionally produced cheese, thereby achieving good functional properties. Moreover, D2 explicitly teaches the measures for doing this on page 9 and in examples 5, 6 and 15 of D2.

In this context, the respondent argued that D2 fails to mention a target range for the total divalent cation content, but merely mentions that a lower calcium content could be achieved compared with a traditionally produced cheese.

The board is not convinced by this line of argument. First, page 9 of D2 explicitly mentions that calcium adjustment is critical to obtain good functionality and compositional characteristics (i.e. good functional properties); this calcium adjustment is also carried out in examples 5, 6 and 15 of D2 by way of a specific washing step with acidified water, 8.3 L water, pH 2.6, dilute sulphuric acid/1 kg curd. Second, it is noted

that the specific washing step applied in examples 5, 6 and 15 of D2, i.e. washing with acidified water, 8.3 L water, pH 2.6, dilute sulphuric acid/1 kg curd, is identical to that used in the examples of the patent (see paragraphs [0170] to [0174] of the patent).

Accordingly, there is clear teaching in D2 to lower the calcium content of the cheese. Calcium is by far the most abundant divalent cation in mozzarella; magnesium amounts to at most 10%, if at all, and other divalent cations are only present in traces. Even if the total divalent cation content in these examples of D2 were not implicitly satisfied, a skilled person would be guided by the teaching of D2 to further decrease the content of calcium, thereby arriving at an amount falling within the claimed range of total divalent cations (claimed range a)) in an obvious manner. A lower content of calcium is taught as being advantageous in terms of functionality and compositional characteristics of the mozzarella cheese. Moreover, as submitted by the respondent, the lactose content of mozzarella can vary from traces to levels greater than 2%. When adjusting the carbohydrate levels to trace amounts, which is an obvious modification for the skilled person in this technical field, the resulting divalent cation content based on 100 g casein decreases. For these reasons, the board is of the opinion that a skilled person would be guided by the teaching of D2 to the claimed divalent cation content required in claim 1.

A skilled person seeking a solution to the posed problem would arrive at the pasta filata cheese of claim 1 having the claimed range of total divalent cations and the claimed ranges of total monovalent cations and total cations without exercising inventive skill.

In view of the above, the subject-matter of claim 1 of the main request does not involve an inventive step in view of D2 as the closest prior art.

AUXILIARY REQUESTS 1-4

2. For the same reasons as outlined above for claim 1 of the main request, the subject-matter of claim 1 of these auxiliary requests does not involve an inventive step over D2 as the closest prior art.

Claim 1 of auxiliary requests 1 and 4 is identical to claim 1 of the main request, and so the same reasoning as given for claim 1 of the main request applies.

The fat content and the solids-non-fat content defined in claim 1 of auxiliary requests 2 and 3 is also disclosed in D2 (see e.g. examples 5, 6 and 15 of D2), so there is no further difference over D2. Accordingly, the same reasoning as given for claim 1 of the main request also applies to claim 1 of auxiliary requests 2 and 3.

AUXILIARY REQUEST 5

3. Admittance of auxiliary request 5
- 3.1 During the oral proceedings the respondent filed auxiliary request 5, which differs from the main request in that all the product claims have been deleted. The main process claim 1 of auxiliary request 5 includes the features characterising the pasta filata cheese from claim 1 of the main request.

- 3.2 The respondent requested that auxiliary request 5 be admitted into the appeal proceedings. In its opinion, deleting the product claims was not an amendment to the respondent's appeal case. The subject-matter of claim 1 of auxiliary request 5 was based on a combination of claims 1 and 5 of the main request, so this process claim had been on file since the beginning of the appeal proceedings. In addition, the respondent submitted that process claim 5 of the main request was mentioned in the reply to the grounds of appeal. Regarding inventive step, it explained that D2 did not teach the claimed adjusted mineral content, i.e. the claimed ranges a) to c).
- 3.3 The appellant requested that this claim request not be admitted into the appeal proceedings.
- 3.4 As outlined below, the board came to the conclusion that auxiliary request 5 was not to be admitted into the appeal proceedings.
- 3.4.1 First, it is noted that filing auxiliary request 5 is an amendment to the respondent's appeal case. As mentioned in the Case Law of the Boards of Appeal, 11th edition, 2025, V.A.4.5.4j), it is widely accepted that under Article 13 RPBA, even an uncomplicated amendment to a set of claims, for example deleting an entire claim category, constitutes an amendment to the appeal case, regardless of whether this alters the factual or legal framework of the proceedings and thus leads to a "fresh case".
- 3.4.2 Second, it is noted that the question of admittance of auxiliary request 5, filed during the oral proceedings before the Board, is to be dealt with under Article 13(2) RPBA. As stipulated in Article 13(2)

RPBA, any amendment to a party's appeal case made after notification of a communication under Article 15(1) RPBA shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 3.4.3 As outlined below, there are no exceptional circumstances which could justify admitting auxiliary request 5 into the appeal proceedings.
- 3.4.4 It is noted that the respondent did not file a claim request exclusively containing process claims either in the opposition proceedings or at any point in the written appeal proceedings.
- 3.4.5 The board issued a communication pursuant to Article 15(1) RPBA in which it gave the preliminary opinion that the pasta filata cheese in claim 1 of all the claim requests on file did not appear to involve an inventive step e.g. in view of D2 as the closest prior art. In response to this communication the respondent filed a comprehensive reply explaining why, in its opinion, the claimed pasta filata cheese involved an inventive step over the closest prior art. In this submission, too, no arguments have been directed to process claim 5 of the main request, although this claim has already been objected to by the appellant in its grounds of appeal. In addition, the respondent did not file an auxiliary request containing only process claims at this late stage of the appeal proceedings.
- 3.4.6 Although the appellant raised an inventive-step objection against process claim 5 of the main request (see points 5.82 to 5.88 of the statement setting out the grounds of appeal), the respondent did not provide

any specific counter-arguments to this inventive-step objection. In its reply to the grounds of appeal the respondent argued that D2 failed to disclose the claimed adjusted mineral content (i.e. the claimed ranges a) to c) of claim 1 of the main request) and explained why it was not obvious for a skilled person to arrive at the claimed pasta filata cheese. Although the respondent argued that, in its opinion, D2 did not disclose or teach the claimed adjusted mineral content, it never explicitly addressed process claim 5 of the main request in its line of argument and it did not argue that the process of the patent differed from that applied in D2 on account of specific process steps. In the context of inventive step process claim 5 of the main request was only mentioned once in relation to D3 as the closest prior art (see page 24, lines 5 to 7 of the reply to the grounds of appeal); however, in this passage it was only argued that the mozzarella cheeses in D3 did not directly and unambiguously disclose the adjusted mineral content recited in claims 1 and 5. There was no argument that a specific process step defined in claim 5 of the main request might not be disclosed in D2 or D3. Under these circumstances and in the absence of a line of argument in favour of inventive step of the process claim, it cannot be understood why deleting all the product claims, as was done in auxiliary request 5, could lead to a clearly allowable request.

- 3.4.7 Furthermore, had auxiliary request 5 been admitted into the appeal proceedings, this would have meant that the respondent would have made its submission on the specific process features of the process claim for the first time during the oral proceedings. This not only runs counter to the principle of procedural economy, but more importantly would have taken the appellant by

surprise. For the reason of fairness towards the appellant, too, auxiliary request 5 could not be admitted into the appeal proceedings.

Under the specific circumstances of the case in hand, the board decided not to admit auxiliary request 5 into the appeal proceedings (Article 13(2) RPBA).

4. Objection under Rule 106 EPC

4.1 After the chair announced the board's decision not to admit auxiliary request 5 into the appeal proceedings, the respondent raised an objection in accordance with Rule 106 EPC. It argued that its right to be heard was infringed (Article 113 EPC). In its opinion, the board denied its right to be heard on subject-matter that has been in the proceedings in unamended form since the start of the appeal. With the exception of auxiliary request 4, all the sets of claims included the process claim in question. As far as Article 112a(2)(d) EPC was concerned, the Rules of Procedure of the Boards of Appeal were misapplied by the board because the respondent did not amend its case.

4.2 For the following reasons, the board dismissed this objection under Rule 106 EPC.

4.2.1 As outlined under point 3.4.1 above, the board considered deleting the product claims, as was done in auxiliary request 5, to be an amendment to the respondent's appeal case. The admittance of auxiliary request 5 is thus at the discretion of the board. The board is unable to identify that the Rules of Procedure of the Boards of Appeal have been misapplied, as alleged by the respondent.

4.2.2 The parties, including the respondent, were given the opportunity to comment on the question of the admittance of auxiliary request 5, which exclusively contains process claims. As outlined under point 3.4.5 above, the appellant raised an inventive-step objection against process claim 5 of the main request in its statement setting out the grounds of appeal, but the respondent did not provide any counter-arguments to this objection in the written appeal proceedings. The respondent did not file a claim request containing only process claims with the reply to the grounds of appeal, either. Even after having received the board's preliminary opinion (see the communication pursuant to Article 15(1) RPBA), no such claim request was filed. Under these circumstances, the board is unable to see that the respondent's right to be heard was violated. The respondent did not file a claim request only containing process claims at any point in the written appeal proceedings.

For the above reasons, the board dismissed the respondent's objection under Rule 106 EPC.

Order

For these reasons it is decided that:

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

The Registrar:

The Chair:



K. Götz-Wein

A. Jimenez

Decision electronically authenticated