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**Datasheet for the decision
of 16 May 2008**

Case Number: T 0908/07 - 3.2.04

Application Number: 98935396.6

Publication Number: 0996331

IPC: A01J 7/02

Language of the proceedings: EN

Title of invention:

Device for preparing cleaning liquid for a milking device, and a cleaning agent, for example for use in the device

Patentee:

PROLION B.V.

Opponent:

Octrooibureau Van der Lely N.V.

Headword:

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Relevant legal provisions:

EPC Art. 52(1), 54, 56, 123(2), 111(1)

Relevant legal provisions (EPC 1973):

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Keyword:

"Late filed request"

"Remittal in the case of a late filed request"

"Novelty (main request: no)"

"Added subject-matter (first, fourth auxiliary request: yes)"

"Inventive step (2nd auxiliary request: no)"

"Remittal (3rd auxiliary request: yes)"

Decisions cited:

T 0284/94, T 1070/96, T 1067/97

Headnote:

"A late filed claim admitted in the exercise of the Board's discretion mainly because the Board and the opponent can be clearly expected to deal with the issues raised without adjournment of the oral proceedings, should not normally be remitted to the first instance for examination in regard of the grounds for opposition on which the first instance decision is based" (points 5.1.1 to 5.1.8 of the reasons).



Case Number: T 0908/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 16 May 2008

Appellant:
(Opponent)

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Representative:

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(Patent Proprietor)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 12 April 2007
rejecting the opposition filed against European
patent No. 0996331 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: A. de Vries
T. Bokor

Summary of Facts and Submissions

- I. The Appellant (Opponent) lodged an appeal, received 4 June 2007, against the decision of the Opposition Division posted 12 April 2007 to reject the opposition, and simultaneously paid the appeal fee. The statement setting out the grounds was received 10 August 2007.
- II. Opposition was filed against granted claims 1 to 10 and based on Article 100(a) EPC 1973 together with Articles 52(1), 54 and 56 EPC 1973 for lack of novelty and inventive step. Remaining claims 11 to 13 were unopposed.

The Opposition Division held that the grounds for opposition under Article 100 EPC 1973 did not prejudice the maintenance of the patent as granted having regard in particular to the following document:

D1: US-A-5 405 452

- III. The Appellant (Opponent) requests that the decision under appeal be set aside and that the patent be revoked. In the statement of the grounds of appeal he cites the following further documents among others:

D4: US-A-4 463 582

D5: US-A-4 830 509

D6: US-A-5 167 350

D7: US-A-3 178 915

D8: FR-72992

The Respondent (Proprietor) requests that the appeal be dismissed. Alternatively he requests that the patent be maintained in amended form on the basis of the claims

according to one of first to eighth auxiliary requests filed with the letter of 16 April 2008. He further requests that documents D4 to D8 not be admitted into the procedure. Should they be admitted, he requests remittal of the case back to the first instance.

Both parties request oral proceedings.

- IV. Oral proceedings were duly held before this Board on 16 May 2008.
- V. The wording of claim 1 (the sole independent claim) of the requests is as follows :

Main Request (as granted)

"Device for preparing a cleaning liquid for a milking device (17), comprising a buffer vessel (16) for cleaning liquid, a metering system (5,6,7,9) for a cleaning agent (3), a water feed (12) and a mixing vessel (8) for mixing the cleaning agent with the water supplied, which mixing vessel is provided with an outlet (14) to the buffer vessel and may optionally form part of the buffer vessel, characterized in that the metering system comprises a chamber (2) for storing dry cleaning agent (3), as well as metering means (6,7,9), which are connected to the chamber, for metering an adjustable quantity of dry cleaning agent into the mixing vessel."

First Auxiliary Request

Claim 1 is as claim 1 in its granted form but for the following changes:

- The claim is now directed to a "milking device provided with a control system for an automatically operating cleaning system in combination with a device for preparing a cleaning liquid for the milking device ...";
- immediately preceding "characterized in that" addition of "wherein the buffer vessel is connected to the milking device,".

Second Auxiliary Request

Claim 1 is as in the first auxiliary request but for the addition immediately preceding "characterized in that" of "and the metering system and the water feed are provided with operating means coupled to the control system of the cleaning system for automatically metering cleaning agent and water respectively into the mixing vessel"

Third Auxiliary Request

Claim 1 is as granted but for the following amendments to the characterizing part of the claim:

- chamber (2) is "for storing *tablets (3) of dry cleaning agent*"
- the metering means are "for metering an adjustable *number of tablets* into the mixing vessel"

Emphasis is added by the Board to indicate what has been amended.

Fourth Auxiliary Request

Claims 1 is as in the first auxiliary request but for the following amendments to the characterizing part of the claim:

- chamber (2) is "for storing *tablets (3) of dry cleaning agent*"
- the metering means are "for metering an adjustable *number of tablets* into the mixing vessel"

Fifth Auxiliary Request

Claim 1 is as in the second auxiliary request but for the following amendments to the characterizing part of the claim:

- chamber (2) is "for storing *tablets (3) of dry cleaning agent*"
- the metering means are "for metering an adjustable *number of tablets ...*".

Sixth Auxiliary Request

Claim 1 is as in the fifth auxiliary request but for the characterizing feature of the chamber, which now reads "a chamber (2) for storing tablets (3) of dry cleaning agent *that is provided with sealing means for sealing off the chamber from vapour*"

Seventh Auxiliary Request

Claim 1 is as in the sixth auxiliary request but for the characterizing feature of the chamber which now reads "a chamber (2) for storing tablets (3) of dry cleaning agent formed by a casing *which is closed at*

the top and is positioned in a sealing ring (1) and is provided with ..."

Eighth Auxiliary Request

Granted claims 1 to 10 are deleted and the remaining claims 11 to 13 renumbered as 1 to 3.

VI. The Appellant argued as follows:

Documents D4 to D8 are cited in response to a central point in the opposition division's decision by which they were taken by surprise. The documents proved that dry detergent dispensing means was very well-known; they were thus highly relevant and should be admitted into the procedure. Had they been available to the opposition division it is clear from the decision how it would have decided and remittal was therefore unnecessary.

The respondent's auxiliary requests are wholly unsubstantiated and late filed and should not be admitted.

D1 and D4 in particular are prejudicial to novelty of claim 1 as granted. In D1 metering means are implicit in the addition of measured amounts of detergent according to a predetermined routine.

Claim 1 of auxiliary requests 1 and 4 incompletely reflected the passages on page 2 and 6 cited as basis and thus added subject-matter.

D1 already suggested automation of the cleaning process, so that further automation of the metering must be considered obvious. The skilled person would therefore look towards the automatic metering of D5 which moreover specifically addresses the same problems associated with liquid detergent as the patent. Claim 1 of the 2nd auxiliary request thus lacked inventive step.

VII. The Respondent argued as follows:

D4 to D8 concern a clearly distinctive feature of granted claim 1 over D1 and should have been filed during the opposition period. Moreover, they lie in unrelated fields, while their devices are clearly unsuitable for the aggressive detergents commonly used to clean milking devices. If they were to be admitted, the case should be remitted for a full two instance consideration of what would be a new instance of novelty.

The auxiliary requests were filed in response to the Board's communication. Their substantiation lies in that given for the main request.

D1 does not show metering means. The automation referred to in column 7 is limited; intervention of an attendant is still required for metering the detergent. In D4, on the other hand, a liquid pumping mixture of water and detergent, not dry detergent, is metered. The hopper 13 does not serve to actively mix. Finally, D4 relates to washing laundry, and is thus not suitable for use with the aggressive cleaning media used in a milking environment. The device of granted claim 1 is thus novel.

The passage on page 2 refers to optional features of a further improvement in automation of the cleaning system in a milking device. Moreover, the buffer vessel must evidently connect to the milking device for it to be cleaned.

Their unsuitability for cleaning milking devices would also prevent the skilled person from considering D4 or D5 if he were to look for automatic metering arrangements when so prompted by D1. These known devices could also not be easily incorporated in the D1 system. The device of claim 1 of the second auxiliary request was thus inventive.

Reasons for the Decision

1. The appeal is admissible.
2. *Admissibility of Documents D4 to D8*

Documents D4 to D8 cited by the Appellant with the grounds for appeal are said to be in response to a central finding in the decision under appeal. After concluding that D1 did not disclose metering means for metering adjustable quantities of dry detergent (reasons 2, final paragraph), the division in its decision found that "no proof had been provided that such a metering system had been available at the priority date" and that "the mere hint to facts ... without any printed proof is not sufficient to doubt the existence of inventive step" (reasons 3.2). Inspection of the file (cf. the annex to the summons

and the minutes of the oral proceedings) shows that the division first identified the feature of the detergent metering means as pivotal at the oral proceedings. D4 to D8 in fact show examples of dry detergent metering mechanisms. The Board is therefore satisfied that they are cited as a genuine reaction to a finding made at a stage in the first instance proceedings where the Appellant was no longer in a position to provide counter evidence (cf. Case Law of the Boards of Appeal of the EPO, 5th edition, 2006, VI.F.3.1.5). That D4 to D6 are then used to attack novelty is immaterial. Such an attack, resulting from a new reading of claim 1, does not detract from the main purpose of these documents (and of further D7 and D8), namely to provide the missing documentary proof of the existence of dry detergent measuring means. In conclusion, the Board therefore admits these documents into the procedure.

3. *Admissibility of Auxiliary Requests 1, 2, 4-7*

- 3.1 New requests 1, 2 and 4 to 7 filed by the Respondent with the letter of 16 April 2008 (exactly one month prior to the oral proceedings) are said to be in response to the Board's provisional observations as expressed in the annex to the summons, and in anticipation to the fact that documents D4 to D8 might be admitted into the procedure, as indeed was the case. However, the accompanying letter provides only a summary indication of their basis in the original disclosure but gives no indication how these requests might address the various issues mentioned in the annex. Moreover, in that they focus on the invention's intended application in a milking device they represent a shift to matter that has hitherto not been at the

forefront of the proceedings. The admission of the documents D4 to D8 could also not have been a surprise to the Respondent, as these documents were mentioned already in the grounds of appeal. Under such circumstances the Respondent is expected to file - and indeed could very well have filed in the present case - its defence position against these documents together with its response to the grounds of appeal.

- 3.2 On the other hand, the board notes that the intended application in a milking device as mentioned above was clear from the outset and in the different requests is combined with subject-matter of granted dependent claims. This shift cannot therefore be said to be entirely unexpected. Moreover the claims of these requests do not raise new issues, and can be dealt with without adjournment of the scheduled oral proceedings. Very exceptionally therefore, the Board, for reasons of equitability, exercises its discretion under Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA) entered into force on 13 December 2007 and set out in the OJ EPO 2007, 537, and admits these requests into the procedure, in spite of their very late submission after the Respondent had already had an opportunity to state his complete case (Article 12(1)(b) RPBA) and after oral proceedings were arranged (Article 13(3) RPBA).

4. *Main Request (claims as granted)*

4.1 Remittal

- 4.1.1 The Respondent has submitted that a remittal would be appropriate if documents D4 to D8 are to be admitted

into the procedure. Following established jurisprudence (see e.g. the Case Law of the Boards of Appeal, 5th edition, 2006 - CLBA hereinafter -, sections VI.F.7.3 and VII.D.14.4) the Boards will normally exercise their discretion under Article 111(1) to remit if the submission of new facts and evidence or substantial amendment of the claims alters the legal and factual framework significantly, and a "fresh case" results. However, if it can be deduced from the reasoning of the decision under appeal how the opposition division would have decided had it known the new document, remittal is not considered appropriate, see T 1070/96 mentioned in CLBA, VI.F.7.1.

- 4.1.2 The decision under appeal in reasons 3.2 concludes that "without any printed proof" of "metering systems for metering adjustable quantities of dry detergent" inventive step of claim 1 as granted cannot be called into question. D4 to D6, showing such metering systems, provide the missing proof. Had they been available to the division at the time it took its decision, it appears highly likely to the board that it would have decided against inventive step. That these documents are in fact cited as prejudicial to novelty is of no consequence: the end result (revocation) would have been the same. In line with T 1070/96 the Board therefore does not consider a remittal on the basis of this request appropriate.

4.2 *Novelty*

- 4.2.1 Document D4 discloses, with reference to the sole figure and column 3, lines 3 to 55 in particular, a *device for preparing a cleaning liquid*, or in the words

of D4, column 3, line 34 to 36, a "pumpable mixture" of detergent and water. It comprises a *buffer vessel*, in the form of a flushing hopper 13, which also serves as a *mixing vessel, which thus forms part of buffer vessel and has an outlet therein*, into which cleaning agent or detergent is metered and *mixed* with water supplied from a water feed or supply 14, see column 3, lines 32 to 34. That the two are indeed mixed follows directly from the indication that "detergent trickles ... into a flushing hopper 13, where it is transformed to a ... *mixture* by the addition of water"(emphasis added by the board). Whether such mixing is active or not is of no import, as this is not specified in the claim.

- 4.2.2 Metering is effected by a *metering system* which comprises a *chamber* - storage bin 9 - where *dry cleaning agent* in the form of powdered or granular detergent, see column 3, line 3 and lines 22 to 30, is stored, in connection with an implicit opening in the bin 9 from which the detergent trickles onto a rotating sprinkling disk 12, *connected with the chamber*. Disk 12 and the trickle opening thus act to meter *an adjustable quantity of dry cleaning agent into the mixing vessel* from the chamber. This follows from the main purpose of the metering device 7 formed by disk 12, bin 9 and hopper 13: metering so as to maintain detergent concentration at output at a preset level as described in column 3, lines 38 to 55, necessarily means also regulating the flow of detergent into the hopper. This is why the sprinkling disk is itself also controlled, see column 3, lines 49 to 52, in the feedback control scheme.

4.2.3 This known device is suitable for preparing cleaning liquid for a milking device. The main application of the D4 device is described as being a laundry washing machine, see column 1, lines 9 to 16. However, this is qualified in immediately following lines 17 to 20, of D4, which indicate a much wider field of application to "rinsing and cleaning machines" in general. The Board has no reason to believe that this would not also encompass rinsing and cleaning arrangements used in the dairy industry, e.g. for cleaning milking devices. The Respondent's contention that the aggressive cleaning media, in particular caustic soda, used for cleaning milking devices would preclude such a use of the D4 device is unconvincing. Firstly, no proof is provided that, and in what measure such agents are indeed exclusively or commonly used for cleaning in the dairy industry. Moreover, even if this were so, there is no indication that the D4 arrangement is somehow unable to handle such media. Thus, the plastic coating of the fiber mat mentioned in column 3, lines 5 to 7, as material for the delivery container 2 for supplying the detergent, must have a protective function, most likely due to the media stored in the container.

4.2.4 All features of claim 1 as granted are thus disclosed in D4. The device of claim 1 thus lacks novelty, contrary to the requirements of Article 52(1) in combination with Article 54 EPC.

5. *First, fourth auxiliary requests*

5.1 *Remittal*

- 5.1.1 As set out below the first auxiliary request, and, for the same reasons, the fourth auxiliary request are not allowable as the amendments to claim 1 contravene Article 123(2) EPC. In this case the Board considers remittal inappropriate. In its view the purpose of a remittal is to allow the first instance to reconsider *the grounds raised in opposition*, as noted earlier, either in the light of new prejudicial evidence (where there previously was none) or for consideration of undecided issues not yet taken up by the first instance department. Such a consideration should normally not include requests that are prima facie unallowable for reasons that arise solely from the amendments per se, such as for example added subject-matter, and which are unrelated to the grounds raised in opposition.
- 5.1.2 Quite apart from the above, there are further reasons which effectively preclude a remittal. The first and fourth auxiliary requests were submitted once the oral proceedings before the Board had been arranged. As stated above at point 3.2, in the examination of the admissibility of this request, the Board has established that both the Board and the opponent can be expected to deal with the request, so that Article 13(3) RPBA is complied with. It is perceived by the board that a possible remittal would contradict this finding.
- 5.1.3 The source of this contradiction may not be immediately apparent. Article 13(3) RPBA does not *per se* exclude the possibility that "dealing" with the amendment is done by way of a remittal. It is also true that such a remitting decision could be made without a formal adjournment of the oral proceedings.

5.1.4 However, even if a remittal might correspond to the letter of Article 13(3) RPBA, it does not correspond to its spirit. This article aims at preventing the protraction of the proceedings. There can also be no doubt that for the majority of cases, the term "to deal with" in Article 13(3) RPBA means a decision of the board on the substance of the amendment. Expanding this notion to include remittals would achieve the opposite of the intended aim, namely the protraction of the proceedings instead of keeping them short.

5.1.5 Firstly, a late-filed substantive request tied to the procedural request of a remittal would always pass the hurdle of Article 13(3) RPBA, namely the ability "to deal with" the raised issues. Generally, a board can be expected to decide any time whether a case can be remitted or not, this being a rather simple procedural decision, essentially involving legal issues only, or at most a comparison of the "old" and "new" subject-matter. Normally, also the opposing party can be expected to take a position on such purely procedural issues.

5.1.6 Secondly, remitting the case for examination of the amendment would nevertheless have the same effect as an adjournment, or effectively worse. This would bring the parties into the procedural position where they were before the filing of the appeal, at least with respect to the subject-matter of the amendment and the issues raised against this subject matter. This illustrates that a remitting decision would hardly achieve the aim and purpose of Article 13(3) RPBA. Given this in combination with the fact that a request for remittal could be difficult to refuse, as explained in

point 5.1.5, we would thus arrive at a recipe for circumventing Article 13(3) RPBA.

5.1.7 From the above it follows that Article 13(3) RPBA essentially requires that a board must be able to decide, and indeed decides on the **substance** of a late request - more precisely on the substance of the request as it may emerge belatedly -, once this latter has been admitted. In contrast, the very content of a remitting decision is the statement that the board does **not** decide on the subject-matter and the substantive issue for which the case is remitted. Thus, since in the present case the issues raised by the amended claim 1 can be dealt with by the Board and the opponent without adjourning the oral proceedings, the Board finds itself barred from exercising its discretion under Article 111(1) EPC 1973. On the contrary, once having established that the late-filed requests are admissible, the Board is compelled to decide in the same breath at the oral proceedings *not* to remit the case to the department of first instance for examination of the amended claim 1 in regard of the grounds for opposition on which the decision of the first instance is based.

5.1.8 This does not mean that a late-filed request, when admitted, should systematically not be referred back to the department of first instance. This depends on the nature of the substantive issue to be decided on. The above reasoning only applies to substantive issues already treated by the first instance decision, but not for substantive issues which were not covered. For example, where the raised ground of inventive step has not yet been considered by the first instance, it may

be appropriate and desirable for the Board to remit the case for examination of this remaining issue, after having decided on all formal and other raised substantive issues.

5.2 *Added subject-matter*

5.2.1 A contextual reading of page 2, lines 27 to 29, said to form the basis for directing claim 1 of the first auxiliary request to the milking device with a control system for an automatically operating cleaning system, shows that such automatic operation is linked to the use of operating means coupled to the control system, see the immediately following lines 30 to 33. The immediately preceding paragraph introduces the operating means as being provided on the metering means and the water feed to automatically feed cleaning agent and water. These passages are reflected in claim 7 dependent on claim 6 as filed. These sole passages in the original disclosure concerning automatic operation of a cleaning device within a milking device firmly tie automatic operation and the operating means together. In accordance with established jurisprudence, see Case Law of the Boards of Appeal, 5th edition, 2006, III.A.1.1, pp.238 and 240, and T 284/94 (OJ 1994, 464) or T 1067/97 cited therein, thus extracting isolated features from a set of features, with which they are functionally and structurally linked, results in an unallowable generalization beyond the original disclosure and thus contravenes Article 123(2) EPC.

5.2.2 Claim 1 of the fourth auxiliary request, which also includes the same features isolated from their

originally disclosed context, fails to meet the requirements of Article 123(2) EPC for the same reasons.

6. *Second Auxiliary Request*

6.1 *Remittal*

6.2 Claim 1 is effectively directed at the subject-matter defined, albeit in unclear terms, in granted claims 6 and 7, which were also subject of the original opposition. Lack of inventive step of this subject-matter can moreover be assessed in the light of the evidence on which the opposition was originally based. The legal and factual framework within which this request is to be considered is thus unchanged, and there is consequently no "fresh case".

6.2.1 In the present case the Board, in exercising its discretion, has, exceptionally, decided to admit the late-filed second auxiliary request into the proceedings. As explained above, this is mainly because the issues raised are such that the Board and the opponent can clearly be expected to deal with them without adjourning the oral proceedings (adjournment having the sole purpose of observing the opponent's right to be heard by affording him an opportunity to procure and submit new evidence). Claim 1 of this request, namely, in essence combines granted claims.

6.2.2 The second auxiliary request was also submitted once the oral proceedings before the Board had been arranged. Remittal can not be ordered for the same reasons as explained above in points 5.1.2 to 5.1.7., i.e. the

admission of this late-filed request precludes its remittal.

6.3 *Inventive Step*

6.3.1 It is common ground that D1 discloses the closest prior art. It is the only citation specifically concerning a *milking device*, shown generally at 10, 12, 14, 18, 20, 23, 25 and 27 in figure 1, and includes a *cleaning system* - shown between port 32 and sink 30 - with a *cleaning liquid preparing device* detailed in column 5, lines 7 to 27, and column 6, lines 3 to 25. The paragraph bridging columns 6 and 7 indicates that the cleaning system is operated *automatically* under the control of a control panel 69. The cleaning liquid preparing device itself includes a *mixing vessel* (storage tank 49) where cleaning agent is mixed with water from a water feed (implicit) and which outputs the resultant cleaning liquid into a *buffer vessel* (sink 30) via an outlet (at on/off valve 47). The buffer vessel is connected (at 12, bottom left hand corner of figure 1) to the milking device (10,12,14) The cleaning agent is *metered in adjustable quantities* from a *chamber* (detergent box 63; column 6, lines 19-21 : "addition ... of a predetermined quantity") as part of an implicit *metering system*. The Board reads "metering in adjustable quantities" in the sense of the main embodiment of the patent, see filed description page 5, final paragraph, where dosage is via one or more tablets, as nothing more than dosage of a set amount any number of times.

From the use of the term "box" for the storage of the detergent combined with the fact that the amount of

detergent required is expressed in "kilograms per hundred liters" of water, and the additional amounts in grams, the Board infers that the detergent is in *dry* form. Term and unit are each normally used in association with solid (countable and discrete) materials, and are highly unusual in the context of liquids; in the mind of the skilled person, who attempts to read D4 with a reasonable mind, their combined use can only reasonably mean solid, i.e. dry detergent.

6.3.2 D1 leaves the exact nature of the metering means open, and does therefore not directly and unambiguously disclose a metering means connected to the chamber, much less automatic metering as required by the claim and involving operating means coupled to the control system. D1 clearly contemplates an automated system, see column 7, lines 3 to 4, but the level of automation is unclear. It may include the system running through its washing cycle (with rinsing, detergent wash, and neutralizing stages) automatically, but still requiring an attendant to add detergent before each complete cycle.

6.3.3 Automating the metering, by using metering means connected to the chamber, and operating means to control metering and water supply relieves the attendant of a menial task, and thus eliminates a human intermediary as an important source of error. These advantages in fact derive from the manifest benefits of automation per se.

6.3.4 Considering that D1 itself already contemplates the concept of automation of the cleaning system,

increasing the level of automation by automating the preparation of the liquid cleaning, with a view to rendering overall operation more reliable, in the Board's view represents an obvious, if not inevitable further refinement. Any such automation of the metering and water supply must involve, as follows from straightforward considerations a metering means connected in some way (functionally if not also structurally) to the chamber from which the detergent is to be metered without human intervention. It will equally need to include some functionality - operation means - coupled to the machine control (from whence control commands are issued) on the one hand and to the metering means and water supply on the other, which allows these to be operated in accordance with the initial setup and the predetermined metering scheme or routine of column 6, lines 3 to 5 and 19 to 21 respectively. The resulting milking device with fully automated cleaning liquid preparation and cleaning corresponds to that of claim 1 of this request. It therefore lacks inventive step in the light of D1 and common general knowledge.

7. *Third Auxiliary Request*

7.1 *Remittal*

7.1.1 The third auxiliary request corresponds substantially to the first auxiliary request filed with the Respondent's reply to the Appellant's statement of grounds and is identical to the auxiliary request filed before the first instance. This request is thus does not fall within the proviso's of Article 13 RPBA and the arguments concerning interaction of Article 13(1)

RPBA and remittal as explained above at points 5.1.2-5.1.7 are not applicable to this request.

7.1.2 This request is directed at the use of detergent in tablet form, with the metering means being for metering an adjustable number of tablets into the mixing vessel. Whereas previously, in the first instance proceedings, such tablet metering means were not in evidence in the cited prior art, newly cited documents D6, D7 and D8 do show such systems. What is more, the combination of a tablet metering means, a dry-detergent-based cleaning system and milking system was not examined by the first instance, with or without supporting evidence for the tablet metering means. Thus the circumstances which allowed the board to decide on the main request without remittal (see points 4.1.1-4.1.2) do not exist for the third auxiliary request.

7.1.3 Without wishing to prejudice the outcome of an assessment as to novelty and inventive step, the Board holds these documents to be pertinent to both issues. These documents are deemed to alter significantly the legal and factual framework of the opposition for this request. The Board, not wishing to deprive the parties of a first instance consideration of this request, therefore exercises its discretion under Article 111(1) EPC 1973, and remits the case to the department of first instance for further examination of the relevant grounds of opposition in regard of this request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar

The Chairman

G. Magouliotis

M. Ceyte