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**Datasheet for the decision
of 29 March 2011**

Case Number: T 0267/09 - 3.2.07

Application Number: 00978985.0

Publication Number: 1232100

IPC: B65D 65/46

Language of the proceedings: EN

Title of invention:

Injection-moulded water-soluble container

Patent Proprietor:

Reckitt Benckiser (UK) Limited

Opponents:

Unilever PLC
Henkel AG & Co. KGaA

Headword:

-

Relevant legal provisions:

EPC Art. 56
RPBA Art. 13(1),(3)

Keyword:

"Main request and first and second auxiliary requests -
inventive step (no)"
"Late requests 3 to 5: not admitted - shift from product to
method claims (point 4)"

Decisions cited:

T 0026/98, T 0021/81, T 0231/97

Catchword:

-



Case Number: T 0267/09 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 29 March 2011

Appellant: Reckitt Benckiser (UK) Limited
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Representative: -

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 27 November 2008
revoking European patent No. 1232100 pursuant
to Article 101(3)(b) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
E. DufRASne

Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division revoking the European patent No. 1 232 100.
- II. Two oppositions had been filed against the patent as a whole based on Article 100(a) EPC on the grounds of lack of novelty (Article 54 EPC) and of lack of inventive step (Article 56 EPC).
- III. The Opposition Division found that the subject-matter of amended claim 1 according to one of the main and first to fourth auxiliary requests lacks inventive step.
- IV. The following documents of the opposition proceedings are mentioned in the present decision:
- D10: FR-A-2 724 388
D14: WO-A-97/35955
D15: EP-A-0 593 952.
- V. Oral proceedings before the Board took place on 29 March 2011. Although having been duly summoned, the respondent I (opponent I) did not attend the oral proceedings. According to Rule 115(2) EPC and Article 15(3) RPBA, the proceedings were continued without that party.
- (a) The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or of one of the first to fifth auxiliary requests filed during the oral proceedings.

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

VI. Independent claims 1 according to the main and to the first to fifth auxiliary requests read as follows:

Main request

"A rigid, water-soluble container made of an injection moulded poly(vinyl alcohol), which container has two or more compartments (24, 26) and encases a dishwashing composition having a mass of from 15 to 40g".

First auxiliary request

"A capsule comprising a self-supporting receptacle part (2) and a closure part, the receptacle part (2) and the closure part together enclosing a dishwashing composition, the receptacle part (2) defining two or more compartments (24, 26) which contain different products and being formed of a water-soluble polymer, and the closure part being formed of a water-soluble polymer, wherein, in use, the closure part dissolves before the receptacle part (2) and wherein the receptacle part (2) has side walls (4) which terminate at their upper end in an outward flange (6) to which the closure part is sealingly secured".

Second auxiliary request

"A capsule comprising a self-supporting receptacle part (2) and a closure part, the receptacle part (2) and the closure part together enclosing a dishwashing

composition, the receptacle part (2) comprising an upstanding wall (18, 22) which separates and defines two or more compartments (24, 26) which contain different products and being formed of a water-soluble polymer, and the closure part being formed of a water-soluble polymer, wherein, in use, the closure part dissolves before the receptacle part (2) and wherein the receptacle part (2) has side walls (4) which terminate at their upper end in an outward flange (6) to which the closure part is sealingly secured".

Third auxiliary request

"A method of dish washing, comprising use of a rigid, water-soluble container made of an injection moulded poly(vinyl alcohol), which container has two or more compartments (24, 26) and encases a dishwashing composition having a mass of from 15 to 40g, the method entailing introducing the container into a dish washing machine prior to commencement of the washing process, the container being entirely consumed during the washing process".

Fourth auxiliary request

"A method of dish washing, comprising use of a capsule comprising a self-supporting receptacle part (2) and a closure part, the receptacle part (2) and the closure part together enclosing a dishwashing composition, the receptacle part (2) defining two or more compartments (24, 26) which contain different products and being formed of a water-soluble polymer, and the closure part being formed of a water-soluble polymer, wherein, in use, the closure part dissolves before the receptacle

part (2) and wherein the receptacle part (2) has side walls (4) which terminate at their upper end in an outward flange (6) to which the closure part is sealingly secured, the method entailing introducing the capsule into a dish washing machine prior to commencement of the washing process, the capsule being entirely consumed during the washing process".

Fifth auxiliary request

"A method of dish washing, comprising use of a capsule comprising a self-supporting receptacle part (2) and a closure part, the receptacle part (2) and the closure part together enclosing a dishwashing composition, the receptacle part comprising an upstanding wall (18, 22) which separates and defines two or more compartments (24, 26) which contain different products and being formed of a water-soluble polymer, and the closure part being formed of a water-soluble polymer, wherein, in use, the closure part dissolves before the receptacle part (2) and wherein the receptacle part (2) has side walls (4) which terminate at their upper end in an outward flange (6) to which the closure part is sealingly secured, the method entailing introducing the capsule into a dish washing machine prior to commencement of the washing process, the capsule being entirely consumed during the washing process".

VII. The appellant argued essentially as follows:

Claim 1 according to the main request - Article 56 EPC

The container according to claim 1 differs from the one known from D15 in that the container is rigid and is

produced by injection moulding. The effect of this is that the container is more attractive, uniform in appearance and form-stable. Furthermore, the container can be produced easily and at a fast rate.

The skilled person starting from D15 and trying to provide a container having the advantages mentioned above would search in the same technical field of the subject-matter of claim 1, i.e. in the field of dishwashing. D10 does not refer to dishwashing.

There is a single reference to detergents on page 5, line 12 of D10. However, this is not in the context of the packaging of detergent products, which may or may not be used in a domestic environment, rather it is simply the nature of the phytopathological compositions which is stated to be in the form of granules, detergents, disinfectants and oils. Thus, D10 is in fact concerned with an entirely different field, namely the packaging of phytopathological products, which may simply be in the normal forms for such products. One of these forms is as a detergent which is merely used, for instance, to assist with the dissolution of the product in water. Bearing in mind the field of agriculture in which the containers are intended to be used, clearly the aesthetics of the container are irrelevant. Additionally, such products are not manufactured in the huge quantities in which domestic cleaning compositions are made, so the question of speed of manufacture does not arise.

Consequently, the person skilled in the art would not be motivated to look at D10 for a solution providing the effects discussed above. Even if he did, it would

not provide any assistance since there is no disclosure in D10 that the whole container, while containing the toxic product, can simply be added to water.

The attractive appearance is an intrinsic feature of the container according to claim 1 due to the fact that it is rigid.

*Claim 1 according to the first auxiliary request -
Article 56 EPC*

Claim 1 according to the first auxiliary request differs from claim 1 according to the main request in that it is directed to a capsule comprising a self-supporting receptacle part and a closure part wherein, in use, the closure part dissolves before the receptacle part and wherein the receptacle part has side walls which terminate at their upper end in an outward flange to which the closure part is sealingly secured.

This particular arrangement allows the receptacle part to be sealed easily with a sealing film, leading thereby to ease and speed of manufacture and to an appropriate dissolution profile for the container and its content. It provides also a container having an aesthetic appearance.

D14 is concerned with cleaning concentrates and it does not contain any reference to the particular arrangement of claim 1. On page 5, lines 16 to 20 of D14 there is reference to the provision of film made by deep-drawing. It does not refer to a self-supporting receptacle part having walls as claimed in claim 1.

D15 fails also to disclose the feature that the closure part dissolves before the receptacle part.

*Claim 1 according to the second auxiliary request -
Article 56 EPC*

Claim 1 according to the second auxiliary request further encompasses that the receptacle part of the capsule comprises an upstanding wall separating its compartments.

It is difficult to create a vertical wall in the middle of a depression of a deep-drawn film and this especially when the wall has to be of significant height.

D15 only refers to two compartments. It does not refer to a wall and moreover it does not refer to an upstanding wall.

Admissibility of the third to fifth auxiliary requests

The appellant considered one day before the oral proceedings the Board's comment under point 2.6 of its communication attached to the summons to oral proceedings and realised that in claim 1 it was not mentioned that the container is added to water. For this reason it filed the third to fifth auxiliary requests for the first time during the oral proceedings. These requests are directed to method claims disclosing implicitly the step of adding the container to water.

Claim 1 according to the third auxiliary request is identical with claim 20 of the main request, claim 1 according to the fourth auxiliary request is identical with claim 16 of the first auxiliary request and claim 1 according to the fifth auxiliary request is identical with claim 15 of the second auxiliary request. Accordingly, said claims do not add anything to the sets of claims filed in due time.

The admission of said requests into the proceedings would not lengthen the present proceedings.

VIII. The respondent II argued essentially as follows:

Claim 1 according to the main request - Article 56 EPC

The person skilled in the art in the present case is an engineer specialised in the packaging of chemical compositions, i.e. *inter alia* detergents, which are of hazardous and irritant nature for the human skin and the human respiratory system, see paragraphs [0001], [0002] and [0004] of the patent in suit, but also D10, page 1, lines 23 to 31 and page 5, lines 10 to 15, and D15, page 2, lines 20 to 24 and 26 to 29.

This skilled person trying to make the container known from D15 form-stable would produce said container via injection moulding as proposed in D10 and would arrive at the subject-matter of claim 1 without exercising an inventive activity.

*Claim 1 according to the first auxiliary request -
Article 56 EPC*

In the present case the terms "capsule" and "container" have the same meaning, see paragraph [0019] of the patent in suit. It is well known to the person skilled in the art that often two or more dishwashing components have to be used within the same dishwashing sequence, see for example D15, claim 2 and page 5, lines 1 to 17. Applying this teaching of D15 to the container known from D14 the skilled person would provide the receptacle part of said container with two compartments containing different products without exercising any inventive activity. The provision of an intermediate wall in a deep-drawn-film-cavity as known from D14 is for the person skilled in the art not associated with any kind of technical obstacles.

D15 teaches the person skilled in the art that it can control the dissolving rate of the detergents disclosed in the pouch by using films with different water-dissolving-rate for the walls of the different compartments of the pouch, see page 5, lines 11 to 16. It follows inevitably for the person skilled in the art that the receptacle part and the cover part do not need to have the same water-dissolving-rate and that there is no need to have the same material for the receptacle part and the cover part. The receptacle part needing a higher dimensional stability than the cover part clearly dissolves in water slower than the cover part.

*Claim 1 according to the second auxiliary request -
Article 56 EPC*

A film according to D14 may have a thickness of up to 2mm. The deep-drawing process can be controlled so that a sufficiently stable intermediate wall may be produced. The production of such a wall does not pose any technical obstacles to the person skilled in the art.

Admissibility of the third to fifth auxiliary requests

The appellant had decided not to file any request based on method claims during the opposition proceedings. Moreover, neither together with the grounds of appeal nor with its fax reacting to the Board's communication the appellant filed any request based on method claims. The third to fifth auxiliary requests filed for the first time during the oral proceedings are therefore late filed requests. Furthermore, they are directed to method claims and they constitute a fresh case since instead at the claims to the container unexpectedly it is now directed at claims to a method of dishwashing using a container or capsule which constitutes the invention. Respondent II being confronted for the first time in the oral proceedings with said fresh case was not prepared to argue during the oral proceedings on the inventiveness of such method claims. Since no exceptional circumstances were put forward by the appellant excusing the late filing of these requests, admission of these requests would run counter to the principle of procedural fairness.

- IX. The respondent I did not provide any argument in the appeal proceedings.

Reasons for the Decision

1. *Claim 1 according to the main request - Article 56 EPC*
- 1.1 The container according to claim 1 differs from the one known from D15 in that the container is rigid and produced by injection moulding.
- 1.2 It was also not disputed by the parties that one technical effect achieved by these differentiating features is that the container is form-stable, so that it maintains its form during transport and storage.
- 1.3 The objective problem defined on the basis of said technical effect is the further development of the container known from D15 so that it becomes form-stable.
- 1.4 According to the case law of the boards of appeal the skilled person can be expected to look for suggestions in a more general technical field if he is aware of such a field, see T 26/98 (point 6.3 of the reasons, not published in OJ EPO). In paragraph [0001] of the published patent in suit is mentioned that the present invention relates to a water-soluble **container** which may be utilised for the delivery into an aqueous environment of substances such as detergents, pesticides, biocides, deodorants, dyes and pigments, and water-treatment chemicals. The majority of said substances has as common characteristic that they are of hazardous and irritant nature for the human skin and the human respiratory system, see paragraphs [0002] and [0004] of the published patent in suit. Accordingly,

the Board concurs with the argument of respondent II that the skilled person in the present case is an engineer specialised in the field of packaging such substances. Dishwashing compositions as claimed in claim 1 are such irritant detergents and therefore, the skilled person as defined above is also the specialist on this technical field.

The technical field of the skilled person mentioned above is not only the general technical field for the invention described in D15, being directed to the packaging of detergents, i.e. cleaning compositions for laundry and dishwashing, said compositions being of hazardous nature for the human skin and respiratory system, see page 2, lines 23 to 24 and 26 to 29. It is also the general technical field for the invention defined in D10, said last document referring to the packaging of noxious, toxic and/or dangerous substances, see page 1, last paragraph and page 5, first complete paragraph. The fact that claim 1 has been restricted only during the opposition/appeal-proceedings to the packaging of dishwashing compositions does not mean that such packaging now is excluded from the above mentioned general technical field of packaging chemical compositions of hazardous nature for the human skin and respiratory system.

- 1.5 The skilled person as defined under point 1.4 above starting from the container of D15 and trying to provide it with the advantages discussed under point 1.2 above would therefore search in the above mentioned more general technical field, namely in the field of packaging of chemical compositions which may

be hazardous or irritant for the human skin and respiratory system and would find D10.

1.6 By turning to D10, page 1, lines 10 to 22 the skilled person would find the information that polyvinyl alcohols films are used for producing water-soluble containers in the form of bags or pouches and that such containers have the disadvantage of low mechanical strength, the result of it being that they can be easily torn, which makes them practically unusable as packages of noxious, toxic and/or dangerous compositions. On page 1, lines 23 to 25 of D10 it is further noted that the object of the therein described invention is to overcome this drawback and to provide a water-soluble container, such as a bottle, flacon, can, etc. which is mechanically strong enough, i.e. rigid enough to allow it to hold a toxic, harmful and/or dangerous chemical composition without the possibility of tearing or bursting. An injection moulded container made according to the method described on page 2, lines 1 to 33 of D10 is a crash resistant container having high mechanical strength, see page 2, line 34 to page 3, line 5. Such container is also designed in any case for containing among other substances also detergents, see page 5, lines 10 to 15.

1.7 Thus, the person skilled in the art confronted with the problem of the low mechanical strength, i.e. low form-stability of the container known from D15 would take into consideration D10 which relates to a container made of polyvinyl alcohol. He would extract from the above mentioned passages of D10 the information that the form-stability problems of containers made of poly(vinyl alcohol)-films designed for containing toxic

compositions, i.e. *inter alia* detergents, can be overcome by producing said containers through injection moulding and that such containers automatically have high mechanical strength, while rigid.

1.8 It follows from the above that the person skilled in the art trying to overcome the above mentioned problem would, based on the above-mentioned information derivable from D10, produce the container known from D15 via injection moulding and would thus arrive at a container according to claim 1 without exercising an inventive activity.

1.9 The appellant argued that since claim 1 is directed to a dishwashing composition the person skilled in the art in the present case is one working in the field of dishwashing compositions. Since D10 is mainly concerned with the packaging of phytopathological compositions he would not take this document into consideration.

The Board does not agree with the appellant for the following reasons:

D10 is concerned with the packaging of toxic, harmful and/or dangerous chemical compositions in general, see page 1, last paragraph. The fact that in a specific example the packaging of phytopathological compositions is mentioned does not alter the situation that D10 is also related to the above mentioned general technical field of packaging chemical compositions of hazardous nature for the human skin and respiratory system and that therefore the skilled person in the present case, even if one only concerned with dishwashing

compositions, would take into consideration D10 in order to solve the above-mentioned problem.

- 1.10 The appellant argued further that an attractive and uniform appearance of the container, the speed of manufacturing it and the simplicity of filling the compartments of the container were neither addressed as objects in D10 nor can they be achieved by the container of D10. Therefore, another reason for the skilled person starting from D15 to not take into consideration D10.

The Board comments to that as follows:

As it is stated under point 1.7 above the skilled person would take D10 anyway into consideration, in order to solve the problem mentioned under point 1.3 above. Furthermore, in claim 1 there is no specific feature present which is explicitly directed to the above mentioned quality/appearance-characteristics. The appellant argued on this point that these characteristics are inherently present in the container known from claim 1 due to the fact that said container is rigid. The Board notes that since a rigid container according to claim 1 is the result from the non-inventive combination of the teachings of D15 and D10 by the skilled person in his attempt to provide a form-stable container, this container would, following the appellant's argument, intrinsically present the above-mentioned quality/appearance-characteristics. The presence of such extra quality/appearance-characteristics is to be considered as a bonus-effect obtained at the same time with the form-stability which does not imply the presence of an inventive step, see T 21/81, OJ EPO 1983, 15, point 6 of the reasons and

T 231/97, point 5.7.5.2 of the reasons, not published in OJ EPO.

- 1.11 In an additional argument the appellant stated that the skilled person starting from D15 defining a container which in use has to be directly positioned into a dishwashing machine, would not take into consideration D10, since the latter is only concerned with containers which in their normal use have first to be emptied and then dissolved in water.

The Board comments to that as follows:

The container according to D10 when encasing phytopathological compositions, detergents, disinfectants and oils, see page 5, lines 10 to 15, is used so that it is firstly emptied and then dissolved in water. This fact does not preclude that in case the container is used together with a different content, for example a water-soluble detergent, the container first has to be dissolved in water, before its content, such as when such a container is directly positioned into a dishwashing machine. Furthermore, claim 1 is a product claim without any reference to the dissolving process, so that the dissolving sequence for the container and its content in use are of no relevance for such a product claim.

- 1.12 For the reasons mentioned above the subject-matter of claim 1 according to the main request does not involve an inventive step and it does not meet the requirements of Article 56 EPC.

2. *Claim 1 according to the first auxiliary request -
Article 56 EPC*

2.1 The Board notes that according to paragraph [0019] of the patent in suit the term "capsule" defines a "container". This was not disputed by the appellant.

2.2 The combination of claims 7 and 8 of D14 defines a container ("Umhüllung") comprising a self-supporting receptacle part ("formstabile Folie mit einer Vertiefung") and a closure part ("Deckelfolie"), the receptacle part and the closure part together enclosing a cleaning concentrate used for producing usable aqueous cleaning solutions in cleaning agent storage tanks of cleaning machines, the receptacle part and the closure part being formed of a water-soluble polymer ("wasserlöslichem PVA"), wherein the receptacle part has side walls which terminate at their upper end in an outward flange to which the closure part is sealingly secured ("verschweißbar"). On page 10, last complete paragraph of D14 it is stated further that an array of such containers is produced by deep-drawing a base-film into depressions, filling these depressions with a cleaning composition and subsequently sealingly securing a cover-film to said base-film. The parts of the base-film between the depressions define outward flanges.

2.3 Thus, the capsule according to claim 1 differs from the container known from D14 in that
a) a dishwashing composition is enclosed in the capsule,
b) the receptacle part of the capsule contains two or more compartments which contain different products, and

- c) in use, the closure part dissolves before the receptacle part.
- 2.4 The problem to be solved by the feature a) is to adapt the capsule known from D14 so that it is appropriate for dishwashing.
- 2.5 As it is stated under point 2.2 above the cleaning concentrate within the container known from D14 is used for producing usable aqueous cleaning solutions in cleaning agent storage tanks of cleaning machines. A dishwashing machine is a cleaning machine. Providing the container known from D14 with a cleaning concentrate used for producing usable aqueous cleaning solutions within a dishwashing machines, i.e. providing said container with a dishwashing composition does not require from the person skilled in the art the exercise of an inventive activity. Thus, the addition of feature a) does not involve an inventive step.
- 2.6 The problem to be solved by the feature b) is a different one, to adapt the container known from D14 so that it is capable for enclosing and releasing in use at least two different (dishwashing) components.
- 2.7 It is well known to the person skilled in the art that often two or more dishwashing components have to be used in one and the same dishwashing sequence. For this purpose D15 proposes the use of a container in the form of a pouch having two different water-soluble compartments which contain different products, see claim 2 and page 5, lines 1 to 17 of D15. Applying this teaching of D15 to the self-supporting blister-pack type depressions used as receptacle parts in D14 brings

with it that each depression would be separated into two parts providing thereby two different compartments capable of containing different dishwashing products. The Board concludes therefore from the above that the person skilled in the art seeking to solve the problem mentioned under point 2.6 above would apply the above-mentioned teaching of D15 to the container known from D14 and would arrive at a capsule having a receptacle part with two compartments without exercising any inventive activity.

- 2.8 The problem to be solved by feature c) is yet a different one, to find an appropriate dissolution profile for the water-soluble PVA of the container.
- 2.9 Concerning feature c) the Board notes that when forming a water-soluble container which is designed to dissolve in water in order to set free its content, said container consisting of a receptacle part and a closure part, the skilled person has only the following three, non-inventive options concerning the dissolving sequence of the different parts of the container. The closure part dissolves before the receptacle part (feature c)), or the receptacle part dissolves before the closure part, or both parts dissolve at the same time. Claim 1 gives preference to the first one of these three possibilities, whereby said possibility, however does not provide any surprising technical effect. Presence of a surprising technical effect was also not argued by the appellant. Thus, feature c) is to be considered as an arbitrary selection out of three equivalent, non-inventive possibilities which the skilled person would obviously try out where circumstances make it desirable. In any case, since it

is the receptacle part which has to be self-supporting providing thereby the container's stability, it is obvious to the skilled person that the closure part does not need to be as thick as the walls of the receptacle part and that therefore the closure part, being thinner than the walls of the receptacle part, would evidently be the container's part which dissolves first.

2.10 Accordingly, the provision of the differentiating features a), b) and c) does not demand from the person skilled in the art to exercise an inventive activity.

2.11 The appellant argued that in a deep-drawn-film as the one mentioned on page 10, last complete paragraph of D14 it is difficult to provide an additional intermediate wall within its cavity, since due to the deep-drawing such an intermediate wall would be thinner than the side walls.

The appellant presented no evidence to support this allegation. The Board considers therefore this argument unsubstantiated, which does not need to be taken into consideration for the assessment of inventive step. Respondent II confirmed moreover that no technical obstacles exist for the production of such an intermediate wall. Furthermore, there is no reference in claim 1 to any wall thickness, so that also the appellant's argument concerning the production of a too thin intermediate wall is not relevant for the present claim.

2.12 For the above mentioned reasons the subject-matter of claim 1 according to the first auxiliary request does

not involve an inventive step and the requirements of Article 56 EPC are not met.

3. *Claim 1 according to the second auxiliary request - Article 56 EPC*

3.1 The subject-matter of claim 1 according to the second auxiliary request differs from the subject-matter of claim 1 according to the first auxiliary request in that the receptacle part comprises an upstanding wall which separates and defines the two compartments.

3.2 As it is stated under point 2.7 above the provision of the container known from D14 with a receptacle part comprising two compartments does not involve an inventive step.

3.3 The question at stake is therefore whether the fact that this separation is made by an upstanding wall involves an inventive step.

3.4 The two main options for dividing a receptacle into two compartments is either via a vertical wall or via a horizontal wall. Given the fact that the receptacle part known from D14 is made by deep-drawing a film into a depression which is then filled with two detergent compositions from above (as is normal), it is obvious to the person skilled in the art that the separation of the receptacle part into two compartments has to be done via a vertical wall in order not to obstruct or render impossible the filling of said compartments from above. This does not demand from the person skilled in the art to exercise an inventive activity.

3.5 For its argument that in a deep-drawn-film, as it is the case in D14, it is difficult to create a vertical wall in the middle of a depression and this especially when the wall has significant height, the appellant was not able to present any evidence in support. The Board considers therefore this argument as unsubstantiated, which does not need to be taken into consideration in the assessment of inventive step. Furthermore, there is no reference in claim 1 to a specific wall height at all, so that also the argument concerning the production of an intermediate wall having significant height is not relevant for the present claim.

3.6 Therefore, the subject-matter of claim 1 according to the second auxiliary request does not involve an inventive step and it does not meet the requirements of Article 56 EPC.

4. *Admissibility of the third to fifth auxiliary requests*

4.1 According to Article 13(1) RPBA, "[a]ny amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of inter alia the complexity of the new subject matter submitted, the current state of the proceedings and the need for procedural economy".

4.2 In the present case, the main request and the first auxiliary request had been filed together with the grounds of appeal as the then third and fourth auxiliary requests. In the Board's communication with the Board's preliminary opinion a time limit of up to one month before the oral proceedings was set for the

parties to file their requests. With its fax of 26 January 2011 the appellant reacted by filing the then "fifth auxiliary request" which was resubmitted and discussed during the oral proceedings as "second auxiliary request". Claim 1 of each one of said requests was a product claim directed to a container or a capsule.

- 4.3 These requests were considered by the Board as being filed in due time and were discussed with the parties during the oral proceedings.

Only at the oral proceedings the appellant filed for the first time the third to fifth auxiliary requests, now in the main claims directed to a dishwashing method using the container.

The appellant admitted that these requests were late filed but it requested at the same time their admittance into the proceedings arguing as follows:

a) it realised just one day before the oral proceedings that there may be a hint in point 2.6 of the Board's communication to the filing of an auxiliary request restricted to a method claim 1, and so the filing of the auxiliary requests during the oral proceedings was its immediate reaction to this,

b) claims 1 of the third to fifth auxiliary requests were already present in the main, first and second auxiliary requests as claims 20, 16 and 15 respectively. Since the main, first and second auxiliary requests had been admitted into the proceedings the new requests

limiting themselves to these claims should also be admitted into the proceedings,

c) the admittance of said requests into the proceedings would not result in a lengthening of the proceedings.

4.4 The Board cannot follow the appellant's arguments for the following reasons:

a) The Board cannot see any hint or direction in its communication to the filing of an auxiliary request concentrating on a method claim and even if, the appellant should have filed an appropriate reaction to that prior to the final date specified in said communication, i.e. one month before the oral proceedings. That it was capable to do so shows the then "fifth auxiliary request". Realising a possible hint or misinterpreting one as such until only one day before the oral proceedings is no relevant excuse for the lateness and is no sign of a proper, timely preparation for the oral proceedings.

b) While the whole discussion in the opposition proceedings, including the decision, and in the appeal proceedings up to and including the oral proceedings before the Board was focused only on the independent product claims directed to a container or a capsule, independent claim 1 of the third to fifth auxiliary requests is a method claim concerning a "method of dish washing, comprising use of" a container or capsule. With this change in the category of claim 1 the appellant shifts its case in an unexpected manner in an entirely different direction and in fact creates another case.

Admitting these requests into the proceedings, taking the respondent II and the Board by surprise, would run counter to the need for procedural economy and to the principle of procedural fairness.

c) The Board has understanding for the statement of respondent II that it was not prepared to discuss such auxiliary requests at this advanced stage of the proceedings with claims belonging to an entirely different category than the category of the claims discussed up to the day of the oral proceedings. Accordingly, the Board can only conclude that the admittance of the third to fifth auxiliary requests into the proceedings would have resulted in a postponement of the oral proceedings and thus a lengthening of the proceedings (Rule 13(3) RPBA).

4.5 Taking this into consideration the Board exercising its discretion under Article 13(1) RPBA does not admit the third to fifth auxiliary requests into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders