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**Datasheet for the decision
of 27 March 2015**

Case Number: T 0617/11 - 3.2.07
Application Number: 05748171.5
Publication Number: 1753671
IPC: B65D77/02, B65D75/38, B65D65/20
Language of the proceedings: EN

Title of invention:
UNIT DOSE PACKAGING

Patent Proprietors:
Unilever PLC
Unilever N.V.

Opponents:
HENKEL AG & CO. KGaA
Reckitt Benckiser (UK) Limited

Headword:

Relevant legal provisions:
EPC Art. 52(2)(b), 52(2)(d), 56, 83
RPBA Art. 12(4)

Keyword:
Late-filed evidence DI-8 and DI-9 - not admitted -
correct exercise discretion
Patentable invention - (yes)
Sufficiency of disclosure - (yes)
Inventive step - (yes)

Decisions cited:

G 0007/93, G 0007/95, T 0119/88, G 0001/03, T 0154/04

Catchword:



**Beschwerdekammern
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Chambres de recours**

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Case Number: T 0617/11 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 27 March 2015

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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 11 February 2011 rejecting the opposition filed against European patent No. 1753671 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman H. Meinders
Members: G. Patton
 I. Beckedorf

Summary of Facts and Submissions

- I. Appellants I and II (Opponents 1 and 2, respectively) lodged an appeal against the decision of the Opposition Division to reject the oppositions and maintain European patent No. 1 753 671 as granted.

The oppositions were based on Article 100(a) EPC (exclusion from patentability; inventive step) and Article 100(b) EPC (sufficiency of disclosure).

The Opposition Division held that these grounds did not prejudice the maintenance of the patent as granted.

- II. The respondents (patent proprietors) replied to the appeals requesting that they be dismissed.

The Board provided the parties with its preliminary non-binding opinion annexed to the summons for oral proceedings that, taking into consideration all objections raised by the appellants, it appeared that the appeals would have to be dismissed.

- III. Oral proceedings, which were requested by all parties, took place on 27 March 2015 in absence of appellant II and the respondents, as announced. For the course of the oral proceedings reference is made to the minutes.

Appellant I stated at the start of the oral proceedings that it wished to limit its oral submissions to the grounds for opposition according to Article 100(b) EPC and to Article 100(a) EPC, the latter in respect of inventive step and documents DI-1 and DI-2, taking into account the common general technical knowledge of the person skilled in the art.

The following aspects were then discussed:

- sufficiency of disclosure of the invention as claimed in the patent as granted;
- inventive step of the subject-matter of claim 1 of the patent as granted in view of documents DI-1 and DI-2, each of them in combination with the common general technical knowledge and practice of the person skilled in the art, and in view of a combination of documents DI-1 and DI-2.

Appellant I withdrew its request, submitted in writing, for reimbursement of the appeal fee due to a substantial procedural violation.

The present decision was announced at the end of the oral proceedings.

- IV. Appellants I and II request that the decision under appeal be set aside and that the European patent No. 1 753 671 be revoked.
- V. The respondents request that the appeals be dismissed.
- VI. Claim 1 of the main request (patent as granted) reads as follows:

"A container containing a plurality of laundry or automatic dishwasher tablets wrapped in an inner package or packages, said inner package/s including one or more viewing regions having light transmissivity in the range 70% to 99% through which at least a portion of the tablet/s is/are visible, wherein the container comprises at least one portion having light transmissivity in the range 70% to 95% and which

absorbs a frequency or range of frequencies of visible light corresponding with the frequency or range of frequencies absorbed by at least a part of the visible portion of the tablet."

VII. The documents of the opposition proceedings which are of relevance for the present decision are the following:

- DI-1: US-A-6 024 219
- DI-2: DE-A-198 52 936
- DI-3: US-A-2 418 818
- DI-4: DE-A-100 05 783
- DI-5: WO-A-97/26315
- DI-8*: Picture of a "Calgonit" product, publication date **unknown**; date of availability of the product to the public **unknown**
- DI-9*: Picture of a "Persil" product, publication date **unknown**; date of availability of the product to the public **unknown**
- DII-3: GB-A-1 099 499

* Not admitted into the proceedings by the Opposition Division

VIII. Appellant I argued essentially as follows

Admission of documents DI-8 and DI-9

DI-8 and DI-9 were to be found only in databases the access to which was subject to payment. In view of this difficulty to find them, they should be admitted into the proceedings.

They are further *prima facie* highly relevant for assessing inventive step of the claimed subject-matter,

insufficiency of disclosure and the common general knowledge of the skilled person.

Aesthetic creation / Presentation of information

All features of claim 1 relate to non-technical effects of colours and shapes and the claimed subject-matter is therefore an aesthetic creation. Hence, the claimed container should not be regarded as being a patentable invention.

Insufficiency of disclosure

The essential feature that at least two portions of different colours of the tablets have to be viewed is missing in claim 1.

Further, claim 1 covers configurations for which the tablets cannot be visible from outside the container.

The light transmissivity ranges of claim 1 are arbitrarily selected and do not lead to any specific technical effect(s). Configurations with overlapping absorbed frequencies in accordance with claim 1 cannot provide the effects as stated in the contested patent of enhancing the colour.

The contested patent would therefore not sufficiently disclose the invention for the skilled person to enable him to obtain the desired effect over the complete scope of claim 1.

In addition, the skilled person would have no indication on which method to use for measuring the light transmissivity and whether the measurements are

to be performed on a coloured or uncoloured, transparent, container.

Inventive step

Starting from DI-2 as closest prior art, the features relating to the ranges of light transmissivity for one or more viewing regions of the inner package/s (feature a)), for at least one portion of the container (feature b)) and the feature that a portion of the container absorbs a frequency or range of frequencies of visible light corresponding with the frequency or range of frequencies absorbed by at least a part of the visible portion of the tablet (feature c)) are at least implicitly disclosed in DI-2. In any case, since they are not of a technical nature, they should not be taken into account for assessing novelty and/or inventive step.

The skilled person will in any case immediately come to the claimed ranges of light transmissivity in order to render the tablets visible from outside. Feature c) relates to an aesthetic issue so that it cannot be linked to any technical problem. As a result, starting from DI-2, the skilled person using his common general knowledge would arrive at the claimed subject-matter in an obvious manner.

An arrangement with white tablets is encompassed by claim 1 for which the problem defined in the contested patent of improving the visual appearance of the tablets is not solved.

The only objective technical problem which could be derivable would be to enable to store tablets with coloured portions in a more stable manner.

DI-3 discloses features a), b) and c) so that the skilled person applying its teaching to the container of DI-2 would immediately arrive at the claimed subject-matter.

DI-4 deals with the problem of storing the wrapped product in a more stable manner. Since it provides the solution, i.e. feature c), the skilled person applying its teaching to the container of DI-2 would immediately arrive at this claimed subject-matter.

The same applies similarly to the application of the teaching of DI-5 to the container of DI-2.

Starting from either DI-1 or DI-3 as closest prior art, the only distinguishing feature of claim 1 would be the presence of a plurality of laundry or automatic dishwashing tablets (feature d)) so that the skilled person applying the teaching of DI-2 or using his common general knowledge would also arrive at the claimed subject-matter in an obvious manner.

Starting from DI-8 as closest prior art, the skilled person applying the teaching of DI-4 would also arrive at the claimed subject-matter in an obvious manner.

IX. Appellant II argued essentially as follows

Aesthetic creation / Presentation of information

The aim of the invention is to improve the aesthetic appearance of the tablet products. Since this does not concern a technical effect, claim 1 should not be regarded as relating to a patentable invention.

Novelty

Document DII-3 discloses all the features of claim 1 apart from feature c). Since this feature relates to the appearance of the tablets, it is not technical, therefore should be disregarded for assessing novelty. The subject-matter of claim 1 therefore lacks novelty.

Inventive step

Starting from DII-3 as closest prior art, the only distinguishing feature of claim 1 would be feature c).

Since colour matching to achieve an aesthetically pleasing effect is well known to designers, it cannot justify inventive step.

A further "positive" aesthetic effect has not been demonstrated across the scope of the claim since only two-tone tablets are exemplified in the contested patent.

X. The respondents argued essentially as follows

Admission of documents DI-8 and DI-9

The difficulty to find DI-8 and DI-9 in commercial databases is not convincing, especially in view of the nine month period available for filing an opposition.

Neither the publication date of documents DI-8 and DI-9 nor the date of the availability to the public of the corresponding products are clearly established. Therefore, the findings of the Opposition Division to not admit these late-filed documents should be confirmed.

Aesthetic creation / Presentation of information

The features of claim 1 are unambiguously technical so that its subject-matter should be considered as relating to a patentable invention.

Novelty

Since DII-3 does not disclose features a), b) and c), which are of a technical nature, novelty should be acknowledged.

Inventive step

In view of the reasons given in the impugned decision, there are no further arguments to add with respect to the objections of lack of inventive step based on DI-1, DI-2, DI-3 and/or DI-4.

Additionally to feature c), DII-3 does not disclose features a) and b), contrary to appellant II's submissions. Therefore, since the objection of lack of inventive step starting from DII-3 as closest prior art is based on feature c) as the only distinguishing feature, it cannot hold.

Reasons for the Decision

1. *Documents DI-8 and DI-9*
 - 1.1 In its written submissions appellant I contests the findings of the Opposition Division to not admit documents DI-8 and DI-9 in the proceedings (impugned decision, point II.5.1).

1.2 Documents DI-8 and DI-9 were filed by appellant I per telefax on 24 January 2011, three days before the oral proceedings before the Opposition Division, i.e. very late in the opposition proceedings.

The Board cannot see any good reason which could have justified the late filing, such as a change in the case during the opposition proceedings, e.g. a patent proprietor's new request.

As argued by the respondents, the appellant I's argument that DI-8 and DI-9 were difficult to find because they were to be found only in databases the access to which was subject to payment cannot be regarded as being a valid reason.

1.3 Furthermore, the Board considers that the Opposition Division applied the correct criteria of *prima facie* relevance in a reasonable manner when exercising its discretionary power (G 7/93, OJ EPO 1994, 775, point 2.6 of the reasons). Consequently, the Board does not see any reason for finding that it exercised its discretion wrongly.

1.4 Further, as argued by the respondents, the publication date of these documents (records of the databases) or the date of the availability to the public of the corresponding products (public prior uses), does not appear to be clearly established. The dates appearing on DI-8 and DI-9, "valid from" or "valid until", cannot be equated to publication dates as their meaning is not provided.

1.5 The Board further concurs with appellant I's statement of grounds, page 17, that DI-8 does not disclose the following features of claim 1:

wherein the container comprises at least one portion having light transmissivity in the range 70% to 95% and which absorbs a frequency or range of frequencies of visible light corresponding with the frequency or range of frequencies absorbed by at least a part of the visible portion of the tablet.

The Board further considers that the following feature of claim 1 is also not unambiguously and directly derivable from DI-8:

- the viewing regions have light transmissivity in the range 70% to 99%.

Therefore, DI-8 appears to be not more relevant than DI-2 which is discussed under point 5.2 below. The same applies to document DI-9.

As a result, the above cannot lead to the Board exceptionally admitting these prior art documents in the appeal proceedings.

- 1.6 The above equates with the preliminary opinion of the Board as provided in the annex to the summons for oral proceedings, which was subsequently not contested, neither in writing nor during the oral proceedings.
2. *Aesthetic creation / Presentation of information (Articles 52(2)(b) and (d) EPC)*
- 2.1 Appellant I considers that there is no objective technical problem to be solved since the alleged obtained effects relate to aesthetic effects (contested patent, [0002]). It argues that features cannot be regarded as being technical and justifying

patentability if their effects relate to the subjective senses of the viewer (T 119/88, OJ EPO 1990, 395, reasons 4).

Appellant I then concludes that, since **all** features of claim 1 relate to non-technical effects of colours and shapes, the claimed container cannot be regarded as being a patentable invention (Articles 52(b) and (d) EPC).

Similarly, appellant II puts forward that the aim of the invention is to improve the aesthetic appearance of the tablet products by matching the colour of at least a portion of the tablets to the colour of at least a translucent portion of the container. The tablets have to be seen from outside the container. This simple arrangement, which is described in claim 1 in a "quasi-technical" language, cannot lead to patentable subject-matter since an object providing an aesthetic effect, i.e. related to the colour as in the present case, has no technical effect and is excluded from patentability (T 119/88, *supra*).

- 2.2 The Board cannot follow the appellants' views for the reason that claim 1 as such unambiguously comprises **technical** features (such as a container, tablets, viewing regions with a specific light transmissivity), as argued by the respondents. This already provides "technicality" to the invention and makes it comply with Articles 52(2)(b) and (d) EPC.

The Case Law of the Boards of Appeal in relation to such technicality of inventions and the exclusions of patentability as provided in Article 52(2) EPC is summarized in T 154/04 (OJ EPO 2008, 46; point 5 of the reasons), for inventions like the present, which have a

mix of technical and non-technical features. The fact that the non-technical features provide the only contribution over the known prior art and thus lead to the conclusion of non-patentability under Article 52(2) EPC, as held in T 119/88 (*supra*), has clearly been overruled by the large body of jurisprudence on this issue, as summarized in T 154/04 (*supra*) and as established by the decisions citing T 154/04 for this aspect.

Hence, the Board cannot find fault in the reasoning and the findings of the Opposition Division (impugned decision, point II.3).

2.3 The above equates with the preliminary opinion of the Board as provided in the annex to the summons for oral proceedings, which was subsequently not contested, neither in writing nor during the oral proceedings.

3. *Insufficiency of disclosure (Article 83 EPC)*

3.1 Appellant I argues that claim 1 does not comprise the essential feature that at least two portions of different colours of the tablets have to be viewed, e.g. blue/white, in order to obtain the desired effect of enhancing the (blue) colour (contested patent, paragraphs [0002], [0005] and [0008]). However, in case the viewed portion of the tablet is completely blue, the enhancing effect cannot be established.

Appellant I further considers that the tablets cannot be visible in every location of the inner package/s, a *fortiori* from all locations of the container. In case the viewing region is located at the top side of the container and the tablets are at the bottom, it will not be possible to view the tablets. The same applies

to inner packages of which the viewing region faces downwardly and the container has a top viewing region.

For appellant I, as argued during the oral proceedings, the light transmissivity ranges of claim 1 are arbitrarily selected and do not lead to any specific technical effect(s). Appellant I describes experiments with a yellow-white tablet covered by a yellow film, i.e. overlapping frequencies in accordance with claim 1, for which the effect of enhancing the colour as stated in the contested patent, [0008], is not obtained since the yellow film makes it impossible to distinguish between white and yellow. Similarly, an uncoloured or coloured, frozen film with a blue/white tablet results in an obvious deterioration of the view of the tablet and in an impossible distinction as well. Appellant I thus concludes that claim 1 covers configurations which cannot provide the expected effects of enhancing the colour.

The contested patent would therefore not disclose the invention sufficiently to the skilled person so as to be able to obtain the desired effect, i.e. to perform the invention, over the complete scope of claim 1 (Article 83 EPC).

If the invention is to work, essential features are missing in claim 1.

- 3.2 The Board cannot share appellant I's view for the reason that the features of claim 1 are in any case **technical features** and that the contested patent provides ways of implementing these features, [0020]-[0023]. The skilled person, using the technical information available in the contested patent as well as his common general knowledge, will know where to

locate the viewing regions and how to select materials fulfilling the claimed parameters (light transmissivity and frequency absorption of visible light) so as to achieve this effect. In executing the invention, the skilled person will not have the wish to make the invention **not** work, i.e. he will **not** locate the viewing region in the container at a position where the tablets cannot be seen; he will **not** choose light transmissivity materials which will **not** have the desired effects.

In any case, the question of whether the effect of enhancing the visual appearance is obtained or not, only plays a role when assessing sufficiency of disclosure, if the expected effect is indeed **present in claim 1** (see G 1/03, OJ EPO 2004, 413, reasons 2.5.2). That is presently not the case.

3.3 Appellant I puts forward that claim 1 does not specify the measuring method for the light transmissivity. The norm ASTM D1003 mentioned in the contested patent, [0024], comprises two methods (hazemeter or spectrophotometer) leading to different results. Therefore, the skilled person would not be able to perform the invention since he would have no indication of which method to use. In addition, it is not specified whether the measurements are to be performed on a coloured or uncoloured, transparent, container.

3.4 The Board cannot share appellant I's view for the reason that the skilled person knows how to measure light transmissivity. This is acknowledged in the contested patent, [0024], where the norm ASTM D1003 is explicitly cited. He might indeed get slightly different results by applying the two different methods (see impugned decision, point II.4.3). This, however, relates more to claim 1 covering both methods, rather

than the skilled person being unable to perform the invention (Case Law of the Boards of Appeal, 7th Edition 2013, II.C.5.6.8).

4. *Novelty (Article 54 EPC)*

- 4.1 Appellant II considers that the subject-matter of claim 1 lacks novelty over the disclosure of DII-3.

For appellant II, document DII-3 discloses all the features of claim 1 apart from a portion of the container absorbing a frequency or range of frequencies of visible light corresponding with the frequency or range of frequencies absorbed by at least a part of the visible portion of the tablet. However, since this feature relates to the visual appearance of the tablet, which is of a mere aesthetic character, it should be disregarded for novelty.

- 4.2 The Board considers that this amounts, however, to raise a fresh ground for opposition since novelty was not challenged with the oppositions (see also impugned decision, point II.5.2). Such a fresh ground can be introduced in the appeal proceedings only with the agreement of the respondents (G 7/95, OJ EPO 1996, 626, see Headnote). Since such agreement is not available, the ground cannot be admitted in the proceedings.

5. *Inventive step (Article 56 EPC)*

Appellant I contests that the subject-matter of claim 1 involves inventive step in view of:

- the combination of the teaching of **DI-2**, taken as closest prior art, with either the teaching of one of

the documents DI-3, DI-4 or DI-5 or with the common general knowledge of the skilled person; or

- the combination of the teaching of **DI-1**, taken as closest prior art, with either the teaching of DI-2 or with the common general knowledge of the skilled person; or
- the combination of the teaching of **DI-3**, taken as closest prior art, with either the teaching of DI-2 or with the common general knowledge of the skilled person; or
- the combination of the teaching of **DI-8**, taken as closest prior art, with the teaching of DI-4.

Appellant II contests that the subject-matter of claim 1 involves inventive step in view of the combination of the teaching of **DII-3** with the common general knowledge of the skilled person.

- 5.1 Since document **DI-8** is not admitted in the proceedings (see point 1 above), the objection using this document need not be further discussed.
- 5.2 **DI-2** taken as closest prior art
 - 5.2.1 The Board is of the opinion that among the documents cited by the appellants DI-2 is the closest prior art for the subject-matter of claim 1, since it is the only document which relates, like claim 1, to a container for laundry or automatic dishwasher tablets comprising an inner package and an outer container. The other documents DI-1, DI-3 and DII-3 used as starting point for inventive step by the appellants will be discussed in points 5.4.1, 5.7.1 and 5.11.2 below.
 - 5.2.2 DI-2 discloses a container ("Verpackung"; "Umverpackung" 2) containing a plurality of laundry or

automatic dishwasher tablets ("Wasch- und/oder Reinigungsmitteltabletten" 6), such as two tablets (figure 3), said tablets (6) being wrapped in an inner package/s ("Folienbeutel" 3) including one or more viewing regions (see figures 1 and 2) through which at least a portion of the tablet/s is visible (column 2, line 53 to 66; claim 1; figures 1-3).

5.2.3 As a result, DI-2 does not disclose the following features of claim 1:

a) - the one or more viewing regions of the inner package/s have light transmissivity in the range 70% to 99%;

b) - the container comprises at least one portion having light transmissivity in the range 70% to 95%;
and

c) - said at least one portion of the container absorbs a frequency or range of frequencies of visible light corresponding with the frequency or range of frequencies absorbed by at least a part of the visible portion of the tablet.

5.2.4 As argued during the oral proceedings, appellant I considers that features a) and b) are disclosed in DI-2, if not explicitly at least implicitly in view of the required transparency to see the wrapped tablets from outside the container.

The Board, however, cannot share this view. As a matter of fact, DI-2 is totally silent on any light transmissivity of the inner package and the outer container.

Further, although it can be accepted that the tablets can be seen in the container of DI-2 through the inner package (3) (cf. figures 1 and 2), DI-2 still does not hint anywhere at setting the light transmissivity. Transparency can indeed be provided by light transmissivity values outside the claimed ranges. This also applies to the outer container (2) which is not further described for figures 1 and 2. Therefore, features a) and b) are not unambiguously and directly derivable by the skilled person from the disclosure of DI-2.

5.2.5 Similarly, contrary to appellant I's allegations put forward during the oral proceedings, feature c) cannot be regarded as being explicitly or implicitly disclosed in DI-2. As a matter of fact, DI-2 is completely silent on any absorption of visible light frequencies by the tablets and the outer container.

5.2.6 As further put forward during the oral proceedings, appellant I is of the opinion that features a), b) and c) are not technical features so that they should not be taken into account for assessing inventive step.

The Board cannot share this view since features a) and b) are unambiguously technical. They can be directly measured on the claimed product and their technical effect is to have the wrapped tablets visible (cf. contested patent, [0023]).

The same applies for feature c) as the absorption of visible light frequencies by a material can also be measured. The technical effect is to enhance the colour difference between two colours of the tablets (cf. contested patent, [0008]).

5.2.7 Appellant I considers that the problem to be solved, as specified in the contested patent, paragraph [0005], of enhancing the visual appearance of the tablets is neither technical nor objective since it relates to an aesthetic appreciation. Should above features a), b) and c) be regarded as distinguishing features of claim 1 over DI-2, the only derivable objective technical problem, more particularly in view of feature c), would then be to enable to store tablets with coloured portions in a more stable manner.

5.2.8 The Board cannot share appellant I's view taking into consideration the synergetic technical effects resulting from the features a), b) and c) as shown in the contested patent, [0008], [0020]-[0023], namely to accentuate the colour difference between two colors of the tablets when viewed from outside.

The problem to be solved is hence to modify the container of DI-2 in order to accentuate the colour difference between two colors of the tablets when viewed from outside.

5.2.9 Since, as further discussed below, none of the cited documents discloses or renders obvious the distinguishing features a), b) and c), which further are not the result of the application of the common general knowledge of the skilled person, so that the problem is solved, the subject-matter of claim 1 involves inventive step (Article 56 EPC).

5.3 Combination of the teaching of **DI-2**, taken as closest prior art, with the **common general knowledge** of the skilled person.

As argued during the oral proceedings, appellant I holds the view that the ranges of light transmissivity specified in features a) and b) could not be regarded as being an inventive selection since the skilled person would immediately arrive at them in order to render the tablets better visible from outside.

Still according to appellant I, since feature c) relates to an aesthetic effect, no technical problem can be derived. Hence, it cannot justify inventive step.

As a result, starting from DI-2 the skilled person using his common general knowledge would arrive at the claimed subject-matter in an obvious manner.

Further, the problem defined in the contested patent relating to improving the visual appearance of the tablets is not solved for an arrangement, encompassed by claim 1, which comprises white tablets wrapped in a transparent inner package and outer container.

The Board cannot share appellant I's view since its arguments are merely based on allegations. There is indeed nothing in the cited prior that would prompt the skilled person to come to the claimed ranges for light transmissivity even on the premise that DI-2 shows the package and the container as transparent. As already mentioned above, transparency is not restricted to the claimed ranges. DI-3, for instance, mentions a light transmissivity lower than 10% for a transparent color screen (column 3, lines 51-69; column 4, lines 39-50).

In addition, as already discussed under point 5.2.8 above, in view of the disclosure of the contested patent, distinguishing features a), b) and c) have

combined technical effects solving an objective technical problem.

Finally, an arrangement of white tablets does not fall within claim 1, since, as claimed, a portion of the tablets has to absorb a frequency or range of frequencies of visible light, i.e. the tablets are coloured (see also appellant I's statement of grounds of appeal, page 4, comments about feature number 9).

5.4 Combination of the teaching of **DI-2**, taken as closest prior art, with the teaching of **DI-3**, or vice versa.

5.4.1 DI-3 relates to packaging material acting as colour screen for shielding a commodity (column 1, lines 1-7). DI-3 (column 3, lines 19-24; column 3, lines 51-56; column 4, lines 51-63; claim 1) discloses a product being wrapped in package/s ("bottles, cartons, boxes"), said package/s including one or more viewing regions having light transmissivity **lower than 10%**, preferably less than 5%.

Indeed, DI-3 explicitly discloses that the light transmission is not greater than 10% in the regions of absorption (column 4, lines 39-73). The passage of DI-3 appellant I refers to in order to allege that the container is transparent and has light transmissivity implicitly falling within the claimed range, column 4, lines 51-63, concerns materials usually comprised in the color screen, not the colour screen itself.

In DI-3, the colour screen comprises at least one portion which absorbs frequencies of visible light, ultra-violet, violet and blue as well as the light in the region delimited by 6300 to 6700 ångström units, corresponding to the frequency or range of frequencies

absorbed by at least a part of the visible portion of the wrapped product.

- 5.4.2 As put forward by appellant I, DI-3 does not relate to a container containing a plurality of laundry or dishwashing tablets (2 or more) (feature d)), so that it is not clear to the Board for which reason the skilled person would turn to DI-3 and why he would apply that teaching (statement of grounds of appeal, page 22, first paragraph).

Feature d) is, however, not the only distinguishing feature of claim 1 over DI-3. As a matter of fact, DI-3 does not relate to a container comprising inner packages. Therefore, should the skilled person intend to apply the teaching of DI-3 to the container and packages of DI-2, he would have no hint as to applying its teaching to the inner package or to a portion of the container of DI-2. In any case, he would end up with a transmissivity of less than 10%. Inventive step is therefore given over the combination of teachings of DI-2 and DI-3.

- 5.4.3 Further, as discussed under point 5.4.1 above and contrary to appellant I's allegations, the following features of claim 1 are not disclosed in DI-3:

a) - said inner package/s including one or more viewing regions having light transmissivity in the range of 70% to 99%; and

b) - wherein the container comprises at least one portion having light transmissivity in the range 70% to 95%.

The teaching of DI-3 is that a light transmissivity of less than 10% is important. The Board cannot see why the skilled person would now wish to increase this to the claimed level. DI-3 is therefore disqualified as closest prior art.

5.5 Combination of the teaching of **DI-2**, taken as closest prior art, with the teaching of **DI-4** (see impugned decision, point II.5.3.1)

5.5.1 Appellant I argues that, since DI-4 deals with the problem, as defined by appellant I, of storing the wrapped product in a more stable manner (see point 5.2.7 above) and provides the solution that at least one portion of the container absorbs a frequency or range of frequencies of visible light corresponding with the frequency or range of frequencies absorbed by at least a part of the visible portion of the tablet (page 2, lines 39-44; page 2, lines 54-55; page 2, line 66 to page 3, line 6), the skilled person would apply the teaching of DI-4 to the container of DI-2 and so arrive at the claimed subject-matter.

5.5.2 The Board cannot find in appellant I's arguments any reason why the skilled person would consider DI-4 aiming at packaging food, cosmetics and pharmaceuticals, i.e. products different from laundry or dishwashing tablets as in DI-2, nor any reason why he would arrive at the claimed subject-matter and not to the one discussed in the impugned decision (point II.5.3.1). As a matter of fact, the Board concurs with the impugned decision that the skilled person, when applying the teaching of DI-4 to the inner package/s of DI-2, would not arrive at an outer container with the distinguishing features b) and c)

given under point 5.2.3 above. DI-4 is indeed silent on an outer container.

DI-4 is further silent on the additional distinguishing feature of claim 1 over DI-2 relating to the light transmissivity of the one or more viewing regions of the inner package/s (feature a)).

5.6 Combination of the teaching of **DI-2**, taken as closest prior art, with the teaching of **DI-5**

As already pointed out by the Board in the annex to the summons for oral proceedings, the objections of lack of inventive step raised by appellant I in this respect cannot be followed since it is not clear what is meant by a "similar manner" and to which part(s) of the "previous argumentation" of the statement of grounds of appeal it is referred to. This lack of argumentation was not completed during the oral proceedings before the Board.

5.7 **DI-1** taken as closest prior art

As already mentioned under point 5.2.1 above, DI-2 is regarded by the Board as representing the closest prior art for claim 1. It has been shown above for which reasons the subject-matter of claim 1 involves inventive step starting from DI-2. As a result, it is sufficient to show in the following why the objections of lack of inventive step raised by appellant I starting from DI-1 are not convincing.

5.7.1 DI-1 (abstract; column 2, line 56 to column 3, line 33; claim 1; figures 1-7) discloses a container ("outer container" 11) containing a plurality of products, said products being wrapped in an inner package or packages

("inner products"; "inner containers" 12) wherein the container (11) comprises at least one portion transmitting light (column 2, lines 64-66; "transparent").

5.7.2 Appellant I considers that the only distinguishing feature of claim 1 over DI-1 would then be that the container contains (statement of grounds of appeal, page 18, antepenultimate paragraph):

d) - a plurality of laundry or automatic dishwash tablets

5.7.3 However, contrary to appellant I's view, the Board cannot find in DI-1 the following further features of claim 1:

a) - the one or more viewing regions of inner package/s have light transmissivity in the range 70% to 99% through which at least a portion of the tablet/s is/are visible;

b) - the container comprises at least one portion having light transmissivity in the range 70% to 95%;

c) - said at least one portion of the container absorbs a frequency or range of frequencies of visible light corresponding with the frequency or range of frequencies absorbed by at least a part of the visible portion of the tablet; and

e) - the inner package/s include/s one or more viewing regions.

5.8 Combination of the teaching of **DI-1**, taken as closest prior art, with the teaching of **DI-2** (see impugned decision, point II.5.3.1)

As a consequence of these further distinguishing features, the Board cannot follow appellant I's objection of lack of inventive step in view of DI-1 and DI-2 based on only the distinguishing feature d).

5.8.1 The Board notes that in DI-1 the product itself, inside the inner container (12) is not visible, said product further being different from the claimed laundry or dishwasher tablets.

5.8.2 The Board agrees with the findings of the impugned decision that even when considering the combination of the teachings of DI-1 and DI-2, which is already questionable since the documents aim at packaging different products, there would appear to be no reason for the outer container to have a "corresponding frequency absorption" as defined in claim 1 (impugned decision, point II.5.3.1).

5.9 Combination of the teaching of **DI-1**, taken as closest prior art, with the **common general knowledge** of the skilled person

The conclusions arrived at in point 5.8 above apply also in this constellation.

5.10 Appellant I holds the view in its statement of grounds of appeal (page 22, third paragraph) that the skilled person starting from **DI-3** and using his **common general knowledge** would arrive at the claimed subject-matter in an obvious manner.

The Board, however, cannot share this view since, as already pointed out in the annex to the summons for oral proceedings, this argumentation lacks a discussion about the further distinguishing features pointed out

under point 5.4.3 above. This lack of argumentation was not completed during the oral proceedings before the Board.

- 5.11 Combination of the teaching of **DII-3**, taken as closest prior art, with the **common general knowledge** of the skilled person

As already mentioned under point 5.2.1 above, DI-2 is regarded by the Board as representing the closest prior art for claim 1. It has then been shown for which reasons the subject-matter of claim 1 involves inventive step starting from DI-2. As a result, it is sufficient to show in the following why the objections of lack of inventive step raised by appellant II starting from DII-3 are not convincing.

- 5.11.1 Claim analysis

Appellant II holds the view that claim 1 of the contested patent covers an arrangement of white tablets with a colourless (clear translucent) container since their absorbances correspond when both the white tablets and the colourless container do not absorb any portion of the visible light.

The Board cannot share this view since it is explicitly specified in claim 1 that both the tablets and the outer container have to absorb a frequency or range or frequencies of visible light. Hence, the argumentation that they do not absorb visible light cannot hold.

- 5.11.2 DII-3 (page 2, line 94 to page 3, line 3; figures 1-8) discloses a container containing a plurality of tablets (2) wrapped in an inner package or packages ("film" 3), said inner package/s including one or more viewing

regions through which at least a portion of the tablet/s is/are visible ("transparent"), wherein the container ("base" 1; "lid" 5) comprises at least one portion having light transmissivity ("visible through the cover 5 without opening the package").

5.11.3 Appellant II considers that the only distinguishing feature of claim 1 over the disclosure of DII-3 is that:

c) said at least one portion of the container absorbs a frequency or range of frequencies of visible light corresponding with the frequency or range of frequencies absorbed by at least a part of the visible portion of the tablet.

It argues that, since feature c) is not technical, novelty cannot be acknowledged.

Further, colour coordination or matching to achieve the aesthetical pleasing subjective effect is well known to designers so that it cannot justify inventive step. The use of colouring in packaging to improve aesthetics of commercial products is a routine practice, so that the skilled person will arrive at the claimed solution (colour matching) in an obvious manner. As DII-3 teaches to view the tablet without opening the package, this would be already an incentive to improve the aesthetic appearance of the tablets.

In addition, a further "positive" aesthetic effect has not been demonstrated across the scope of the claim since only two-tone tablets are exemplified in the contested patent.

5.11.4 The Board cannot share this view since, contrary to the appellant's allegations, DII-3 does not disclose the following additional distinguishing features either:

d) - a container containing a plurality of laundry or automatic dishwash tablets (2);

and as put forward by the respondents:

a) - inner package/s including one or more viewing regions having light transmissivity in the range 70% to 99%; and

b) - the container comprises at least one portion having light transmissivity in the range 70% to 95%.

As already mentioned above, the fact that the tablets are visible through the container of DII-3 does not necessarily imply that the claimed ranges of light transmissivity are fulfilled.

As a consequence, novelty is in any case given. Further, because of the additional distinguishing features the Board cannot follow appellant II's objection of lack of inventive step in view of DII-3 and the common general knowledge of the skilled person based on only distinguishing feature c).

DII-3 is indeed further remote from the claimed subject-matter than DI-2, so that the reasons given above for DI-2 apply *a fortiori* in view of DII-3 (see point 5.3 above).

5.11.5 The above equates with the preliminary opinion of the Board provided in the annex to the summons for oral

proceedings, which was subsequently not contested,
neither in writing nor during the oral proceedings.

Order

For these reasons it is decided that:

The appeals are dismissed

The Registrar:

The Chairman:



C. Spira

H. Meinders

Decision electronically authenticated