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**Datasheet for the decision  
of 8 January 2016**

**Case Number:** T 1598/13 - 3.3.06

**Application Number:** 05025877.1

**Publication Number:** 1661978

**IPC:** C11D3/386, C11D3/50, C11D17/00

**Language of the proceedings:** EN

**Title of invention:**  
Detergent compositions

**Patent Proprietor:**  
The Procter & Gamble Company

**Opponents:**  
UNILEVER PLC / UNILEVER NV  
Henkel AG & Co. KGaA

**Headword:**  
Lipase containing detergent compositions/P&G

**Relevant legal provisions:**  
EPC Art. 123(2), 84, 111(1)

**Keyword:**  
Amendments - added subject-matter (no) - clarity (yes)  
Remittal (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

European Patent  
Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89  
2399-4465

Case Number: T 1598/13 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 8 January 2016**

**Appellant:** The Procter & Gamble Company  
(Patent Proprietor) One Procter & Gamble Plaza  
Cincinnati, OH 45202 (US)

**Representative:** Samuels, Lucy Alice  
Gill Jennings & Every LLP  
The Broadgate Tower  
20 Primrose Street  
London  
EC2A 2ES (GB)

**Respondent I:** UNILEVER PLC / UNILEVER NV  
(Opponent 1) Unilever House, 100 Victoria Embankment /  
Weena 455  
GB-London EC4Y 0DY / NL-3013 AL Rotterdam (GB)

**Representative:** Webster, Jeremy Mark  
Mewburn Ellis LLP  
City Tower  
40 Basinghall Street  
London EC2V 5DE (GB)

**Respondent II:** Henkel AG & Co. KGaA  
(Opponent 2) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Henkel AG & Co. KGaA  
FJP / Patente  
40191 Düsseldorf (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 8 May 2013  
revoking European patent No. 1661978 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman**            B. Czech  
**Members:**            E. Bendl  
                              S. Fernández de Córdoba

## Summary of Facts and Submissions

- I. The appeal lies from the decision of the opposition division to revoke the European Patent No 1 661 978.
- II. The patent as granted relates
- to a detergent composition (see claim 1) comprising
    - 1) a "*lipase which is a polypeptide having an amino acid sequence which ...*" and meets some further specifications indicated in the claim and
    - 2) an "*encapsulated perfume particle*" defined in terms of its components, as well as
  - to a washing process (claim 10) making use of said detergent composition.
- III. The patent in suit had been opposed on the grounds of Articles 100(a), (b) and (c) EPC.
- In the appealed decision the opposition division concluded that the respective claims 1 of all of the then pending claim requests were objectionable
- under Article 123(2) EPC because the respective definitions of the amino acid sequence were not disclosed in the application as filed (main request and auxiliary requests 1 to 5 and 8 to 10),
  - under Article 84 EPC, because said definition was amended by an inserted reference to the trademark "*LIPEX*", rendering the claims unclear (auxiliary requests 6 and 7).
- IV. In its statement of grounds, the appellant (patent proprietor) submitted that the decision of the

opposition division was wrong since the claims dealt with in the decision were clear and met the requirements of Article 123(2) EPC. In this connection, it referred *inter alia* to document D4 (WO 00/60063 A1) mentioned in the application as filed.

Together with the statement of grounds, the appellant re-submitted as main request and auxiliary requests 1 to 5 and 9 to 13 the claim requests that had been pending before the opposition division. However, it also filed three new amended sets of claims intercalated as new auxiliary requests 6 to 8.

Moreover, it also filed a statement by Mr N. Lant according to which the trade name LIPEX was unequivocally associated with an enzyme having the primary amino acid sequence of positions 1-269 of SEQ ID NO:2 of US 5869438, with **only** the mutations T231R and N233R. A signed copy of the statement was filed with a further letter.

The appellant furthermore requested remittal to the opposition division for consideration of the other issues raised in the first instance proceedings.

- V. In its reply, respondent I (opponent 1) objected to the total number of (thirteen) auxiliary requests, which it considered to be excessive. It submitted that the claims according to the appellant's requests were all objectionable under Article 123(2) EPC and/or for lack of clarity (Article 84 EPC).
  
- VI. Respondent II (opponent 2) also replied arguing that none of said requests met the requirements of Article 123(2) EPC. Moreover, it also maintained objections under Article 84 EPC against some of the claims

referring to the trade name LIPEX (auxiliary requests 9 and 10) and raised an Article 123(3) objection (auxiliary requests 2 and 3).

- VII. In its communication annexed to the summons to oral proceedings the board addressed several issues including claim construction and compliance of the claim requests on file with Articles 84, 123(2) and 123(3) EPC.

The board also indicated that it intended to remit the case to the opposition division if one of the claim requests on file were found to meet the requirements of these Articles.

- VIII. By a further letter the appellant withdrew its pending main and second auxiliary claim requests and maintained that the remaining requests on file all met the requirements of Articles 123(2) and 84 EPC. In this connection referred to two further documents (labelled D23 and D24) regarding the meaning to be given to the term "*LIPEX*".

- IX. In its reply thereto, respondent II maintained its objections, referring also to three further items of evidence (Anlagen 1 - 3) supposed to show that a reference to "*LIPEX*" could not be considered as an unambiguous disclosure of the primary sequence of the lipase enzyme contained in products commercialised under this trade name.

- X. With another letter of 4 January 2016, the appellant filed renumbered versions of its twelve remaining claim requests.

Amended independent claim 1 of the renumbered auxiliary

request 5 differs from claim 1 as granted in terms of the definition of the lipase. It reads as follows (amended features highlighted by the board):

*"1. A detergent composition comprising:*

*1. a lipase which is a polypeptide having **the** amino acid sequence **of positions 1 - 269 of SEQ. ID. No: 2 of US 5 869 438 with the mutations T231R and N233R with reference to said SEQ. ID. No: 2;** and*

*2. an encapsulated perfume article comprising (a) an at least partially water-soluble solid matrix comprising one or more water-soluble hydroxylic compounds, preferably starch; and (b) a perfume oil encapsulated by the solid matrix."*

Dependent claims 2 to 8 are directed to more specific embodiments of said detergent composition.

Claims 9 and 10 relate to a washing process involving such detergent compositions.

XI. Oral proceedings were held on 8 January 2016.

The debate focused on the compliance of the claims with the requirements of Articles 123(2) and 84 EPC.

In the course of the debate the appellant withdrew its pending main request and auxiliary requests 1 to 4, and turned its then pending auxiliary request 5 (X, *supra*) into its new main request ("main request" hereinafter). No objections were raised under Article 123(3) EPC with regard to this (new) main request.



XII. Requests

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained on the basis of the claims according to one of the main request (filed as auxiliary request 5 with letter of 4 January 2016) or auxiliary requests 1 to 6 (filed as auxiliary requests 6 to 11 with letter of 4 January 2016).

Respondents I and II (opponents 1 and 2) requested that the appeal be dismissed.

XIII. The arguments of the appellant concerning the main request and being of relevance here can be summarised as follows:

*Article 123(2) EPC*

- The feature of claim 1 "*with the mutations T231R and N233R*", objected by the respondents, found basis on page 3, last paragraph and page 4, first paragraph of the application as filed.

*Article 84 EPC*

- The wording "*with the mutations*", used in claim 1, was identical to the wording on page 4, first paragraph and its meaning was clear to the skilled person.

The counter-arguments of the respondents can be summarised as follows:

*Article 123(2) EPC*

- The claimed combination of the specific lipase with the encapsulated perfume particles, both as defined

in claim 1, was not derivable from the application as filed.

- In particular, the passage of the application as filed (page 4, first paragraph) invoked by the appellant, where the mutations at positions 231 and 233 were expressly mentioned, only referred to the commercial enzyme LIPEX (tradename).
- As commercial enzyme products were defined by more characteristics than only the amino acid sequence, e.g. the glycosylation pattern and/or further mutations, the mere reference to a specific amino acid sequence encompassed more enzymes than just the LIPEX product mentioned in the description.
- The subject-matter of claim 1 was thus the result of an intermediate generalisation objectionable under Article 123(2) EPC.

#### *Article 84 EPC*

- Due to the use of the expression "**with the mutations**" (emphasis added) in claim 1 it was not clear to the skilled person whether the lipase concerned contained only the two mutations at positions 231 and 233 or whether it could also comprise further mutations.

## **Reasons for the Decision**

### *Main request - Admissibility of the request*

1. The set of claims at issue was only filed (as seventh auxiliary request) under cover of the appellant's statement of grounds of appeal, as one of three new claims requests.

- 1.1 The board does not consider that filing three auxiliary claims requests in addition to the ones that had already been pending in the opposition proceedings is *a priori* excessive and objectionable in the present case. The board accepts that the filing of these amended sets of claims, including the one at issue, can be considered to represent a legitimate attempt to react to and overcome objections under Article 123 EPC discussed at the first instance oral proceedings and dealt with in detail in the decision under appeal. This was also not disputed by the respondents.
  
- 1.2 The board thus decided to admit the main claim request at issue into the proceedings despite its late filing (Article 12(4) RPBA).

*Main request - Allowability of the amendments*

2. The requirements of Article 123(2) EPC
  
- 2.1 Claim 1 at issue (*supra*) differs from claim 1 as granted in that the definition of the lipase component 1 was amended to read **"a lipase which is a polypeptide having the amino acid sequence 1 - 269 of SEQ. ID. No: 2 of US 5869438 with the mutations T231R and N233R with reference to the said SEQ. ID. No: 2"**.

The respondents considered that this amendment was objectionable under Article 123(2) EPC.

- 2.2 The board notes that this specification of the lipase finds basis in the application as filed on page 3, last paragraph, and page 4, first paragraph. These relevant passages of the description read as follows (emphasis added):

"The preferred lipases suitable for use in the present invention are described in [document D4] with reference to a lipase that is the wild-type lipase derived from *Humicola Lanuginosa* strain DSM 4109 (reference lipase). The reference lipase is also referred to as Lipolase (registered trade name of Novozymes). It is described in ... and has the amino acid sequence shown in positions 1 - 269 of SEQ ID No 2 of US 5869438.

The most preferred first wash lipase for use in the present invention is available under the tradename LIPEX (registered tradename of Novozymes), a variant of the *Humicola lanuginosa* (*Thermomyces lanuginosus*) lipase (Lipolase registered tradename of Novozymes) with the mutations T231R and N233R."

- 2.3 The first of the paragraphs cited *supra* refers to **preferred** lipase enzymes for use in the patent in suit. The reference common to all of these preferred lipases is the "wild-type lipase **derived from** *Humicola Lanuginosa*" with the "amino acid sequence shown in positions 1 - 269 of SEQ ID No 2 of US 5869438", also referred to as "Lipolase".
  - 2.3.1 For the board, the wording "derived from" implies that the enzyme is defined by the amino acid sequence indicated, but leaves it open whether the enzyme was actually expressed by *H. lanuginosa* or another host organism.
  - 2.3.2 At the oral proceedings, the appellant argued that the Lipolase enzyme could be produced by different host organisms. Since this was not disputed by the respondents, the board takes the view that the reference to Lipolase does not imply further implicit enzyme properties which would depend on the host organism that

actually expressed the enzyme, as argued by the respondents.

2.3.3 The board thus holds that within the context of the application the reference lipase ("*Lipolase*") is not characterised by mandatory features other than the amino acid sequence "*shown in positions 1 - 269 of SEQ ID No 2 of US 5869438*".

2.4 Hence, the board holds that that the person skilled in the art the following would gather the following from the second paragraph quoted under 2.2, *supra*:

(a) A "*variant*" of Lipolase is the most preferred first wash enzyme. Based on the considerations under 2.3.3, *supra*, this variant of Lipolase is not defined by parameters other than

- the amino acid sequence "*shown at 1 to 269 of SEQ ID No 2*" described in the cited US patent,
- but modified by the two specific mutations T231R and N233R.

(b) One such variant of Lipolase is commercially available under the tradename LIPEX.

2.5 The respondents argued that the mutations T231R and N233R were, according to the application as filed, only disclosed in connection with and, hence, inextricably linked to the commercial product LIPEX, which had further implicit properties like a specific glycosylation pattern and/or could also comprise further mutations besides T231R and N233R, and that the definition of the lipase in claim 1 at issue thus resulted from an intermediate generalisation.

2.6 The board holds however, that the person skilled in the art unambiguously derives from the description of the application as filed that all lipases characterised by the same specific primary amino acid sequence as Lipolase, i.e. the "*amino acid sequence of positions 1 - 269 of SEQ. ID. No: 2 of US 5 869 438*", but modified only by mutations T231R and N233R, are lipases preferred for being used according to the invention.

In view of this finding, and considering that the term "LIPEX" does not appear in the claims according to the request at issue, the documents filed by the parties in support of the controversial view on the possible meaning to be given to "LIPEX" need not be dealt with here.

2.7 For the board, the replacement of the lipase definition of claim 1 as granted by the more limiting and precise features incorporated into claim 1 and defining the lipase in terms of the specific amino acid sequence indicated does not, therefore, generate subject-matter which is not disclosed in the application as filed. A detergent composition comprising such a lipase and encapsulated perfume particles as defined in claim 1 also forms part of the direct and unambiguous disclosure of the application as filed.

2.8 Merely for the sake of completeness the board acknowledges the undisputed fact that the SEQ ID referred to in claim 1 is given in columns 49 and 50 of document US 5 869 438 A and notes that the *de facto* incorporation by reference of the SEQ ID is unambiguous and was not objected to by the respondents.

2.9 Claims 2 to 9 are identical to granted claims 2 to 9 and were not objected to as such under Article 123(2) EPC.

2.10 In the board's judgement, the claims according to the appellant's main request are thus not objectionable under Article 123(2) EPC.

3. The requirements of Article 123(3) EPC

The board is also satisfied that, compared to claim 1 as granted, the protection conferred by claim 1 at issue is not extended. Since the respondents did not raise objections under Article 123(3) EPC with regard to the claim request at issue, detailed reasons need not be given here.

4. The requirement of clarity - Article 84 EPC

4.1 Respondent I objected to the clarity of the wording "**with** the mutations T231R and N233R" used in claim 1 at issue, comparing it to the wording "**comprises** the mutations T231R and N233R" present in claim 1 as granted. It argued that it would not be unambiguously clear whether in the context of claim 1 at issue "with" meant "comprising" or "having only".

4.2 In this connection it referred to page 4, first paragraph, of the application as filed, where it was stated that the most preferred enzyme LIPEX was a variant of Lipolase with the mutations T231R and N233R, and that the person skilled in the art would understand this to mean that LIPEX comprised **only** those two mutations as compared to the reference lipase.

4.3 The board holds that for the skilled person, the wording used in claim 1 (emphasis added) "*a lipase **which is** a polypeptide **having** the amino acid sequence ... **with the mutations** T231R and N233R*" unambiguously expresses that said amino acid sequence 1 - 269 must be present and

must contain **only** the two specific mutations T231R and N233R, further mutations at other positions of said sequence thus being excluded.

- 4.4 For the sake of completeness, the board notes that this reading of claim 1 is fully in line with the passage bridging pages 3 and 4 of the application as filed, where it is expressly indicated that preferred lipases for use according to the invention are described in D4. D4 describes variants of the very same reference lipase as the patent in suit, including the variant comprising only the two mutations T321R and N233R, (D4: page 4, first entry in table).

Whether or not commercial "*LIPEX*" products contain or contained variants with other or more mutations is thus not of relevance in the assessment of the clarity of claim 1 at issue.

- 4.5 Hence, in the board's judgement, no lack of clarity arises from the amendments made to the claims as granted. The claims according to the main request at issue are thus not objectionable under Article 84 EPC.

#### *Remittal*

5. The appealed decision of the opposition division dealt exclusively with the requirements of Articles 123(2) and 84 EPC.

- 5.1 The respondents did not call into question the board's intention to remit the case to the opposition division if one of the pending requests were found to meet the requirements of Articles 123 and 84 EPC.



5.2 Under the given circumstances, the board finds it appropriate to remit the case to the opposition division pursuant to Article 111(1) EPC, for consideration of the other issues raised in the first instance proceedings, in accordance with the appellant's request to this end.

## 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:



D. Magliano

B. Czech

Decision electronically authenticated