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**Datasheet for the decision  
of 22 March 2022**

**Case Number:** T 2990/18 - 3.2.07

**Application Number:** 11164746.7

**Publication Number:** 2345599

**IPC:** B65D65/46, B65D81/32, C11D17/04

**Language of the proceedings:** EN

**Title of invention:**  
Water-soluble pouch

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

**Opponent:**  
Henkel AG & Co. KGaA

**Headword:**

**Relevant legal provisions:**  
EPC Art. 76(1), 100(c)  
RPBA Art. 12(4)  
RPBA 2020 Art. 12(2), 13(1), 15(1)

**Keyword:**

Amendments - added subject-matter (yes)  
Late-filed auxiliary requests - admitted (no)  
Late-filed document - admitted (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

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Case Number: T 2990/18 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 22 March 2022**

**Appellant:** The Procter & Gamble Company  
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**Appellant:** Henkel AG & Co. KGaA  
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**Representative:** HENKEL AG & CO. KGAA  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
26 October 2018 concerning maintenance of the  
European Patent No. 2345599 in amended form.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** V. Bevilacqua  
A. Cano Palmero

## **Summary of Facts and Submissions**

- I. Appeals were lodged by the opponent and the patent proprietor against the decision of the opposition division maintaining European patent number 2 345 599 in amended form on the basis of the then auxiliary request 6.
- II. The opposition was directed against the patent in its entirety and was based on all grounds for opposition pursuant to Article 100(a) to (c) EPC.
- III. The present decision is based on the following document, which is the parent application from which the patent in suit was derived as a divisional application:

D3: WO 2009/098660 A1.

The following additional documents were mentioned in the statement setting out the grounds of appeal of the opponent:

D9: Tergitol 15-S-9, technical data sheet  
D10: Tetronic 1307, technical data sheet  
D11: Tetronic 1107, technical data sheet.

The following additional documents were mentioned in the reply of the patent proprietor to the statement setting out the grounds of appeal of the opponent in reaction to documents D9 to D11 should those documents be admitted into the appeal proceedings:

D12: Tetronic 701, technical data sheet  
D13: Tetronic 90R4, technical data sheet.

- IV. The opposition division found that the then main request and auxiliary requests 1 to 5 contained subject-matter which extended beyond the content of D3, and were therefore not in compliance with the requirements of Article 76(1) EPC, whereas the set of claims according to then auxiliary request 6 fulfilled the requirements of the EPC.
- V. In preparation for oral proceedings, scheduled at the parties' requests, the Board gave its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020. The Board indicated that the appeal of the patent proprietor was likely to be dismissed, whereby the opponent's appeal was likely to be allowed.
- VI. Neither party filed a substantive response to this communication.
- VII. Oral proceedings before the Board took place on 22 March 2022. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.
- VIII. The final requests of the parties are as follows:
- for the opponent
- that the decision under appeal be set aside and  
that the patent be revoked;
- for the patent proprietor
- that the decision under appeal be set aside and

that the patent be maintained as granted (main request), or, in the alternative, that, when setting aside the decision under appeal, the patent be maintained in amended form according to one of auxiliary requests 1 to 4 and 6 to 8 filed with letter of 7 November 2019 and auxiliary request 5 found by the opposition division to meet the requirements of the EPC (then auxiliary request 6).

IX. Independent claim 1 of the patent as granted (main request) reads as follows:

"A laundry detergent multi-compartment pouch having a plurality of water-soluble films forming a plurality of compartments, the pouch comprising two side-by-side compartments superposed onto a compartment wherein at least two different compartments contain two different compositions, characterised in that the side by side compartments are superposed onto a single compartment wherein the two side-by-side compartments contain liquid compositions and wherein the single compartment contains a liquid composition; wherein at least one liquid composition comprises a non-ionic surfactant having a cloud point above 60°C."

X. Independent claim 1 of auxiliary request 5, corresponding to the patent as maintained according to the appealed decision (then auxiliary request 6), reads as follows (the features added with respect to claim 1 of the main request are in bold, emphasis added by the Board):

"A laundry detergent multi-compartment pouch having a plurality of water-soluble films forming a plurality of compartments the pouch comprising two side-by-side

compartments superposed onto a compartment wherein at least two different compartments contain two different compositions, characterised in that the side by side compartments are superposed onto a single compartment wherein the two side-by-side compartments contain liquid compositions and wherein the single compartment contains a liquid composition; wherein at least one liquid composition comprises an **anti-redeposition** non-ionic surfactant having a cloud point above 60°C."

- XI. Auxiliary requests 1 to 4 and 6 to 8 were filed by the patent proprietor with letter of 7 November 2019 and replaced auxiliary requests 1 to 4 and 6 to 8 filed together with the patent proprietor's reply of 17 July 2019 to the opponent's statement of grounds of appeal. The dependent claim 3 of each of these new auxiliary requests was amended in that certain features present in the earlier sets of claims were removed (shown in strikethrough):

"A laundry detergent pouch according to any preceding claim wherein the pouch has a volume of from about 10 ml to about 30 ml, ~~and preferably the weight of the solid composition is from about 10 to about 26 g and the weight of the liquid composition is from about 0.5 to about 4 grams.~~"

- XII. The lines of argument of the parties are dealt with in detail in the reasons for the decision.

## **Reasons for the Decision**

1. *Revised Rules of Procedure of the Boards of Appeal (RPBA 2020) - transitional provisions*

The present proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Article 12(4) to (6) RPBA 2020 instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

2. Admittance of late filed documents

- 2.1 *Admittance of documents D9 to D11*

- 2.1.1 The opponent requested admittance into the appeal proceedings of documents D9 to D11, filed for the first time with its statement of grounds of appeal.

The opponent refers to these documents in the context of the discussion of novelty (see page 10 of the statement setting out the grounds for appeal and page 4 of the reply letter of 5 July 2019) and in the context of the discussion of inventive step (see pages 11 and 17 of the statement setting out the grounds for appeal), to show that surfactants mentioned in D1 (Tergitol 15-S-9) and in D2 (Tetronic) have cloud points above 60°C.

During oral proceedings the opponent also argues that D9 is *prima facie* relevant because in this document a cloud point of 60°C is mentioned, and requests that



because of this *prima facie* relevance D9 be admitted into appeal proceedings at least.

The opponent, however, fails to provide any explanation on why these data sheets have only been submitted for the first time in appeal.

- 2.1.2 The above arguments of the opponent are not considered convincing, and the Board decides to follow the request of the patent proprietor (see point 1.2 of the reply to the statement of grounds of appeal of the opponent) not to admit documents D9 to D11.

This is because, as noted by the patent proprietor, D9 to D11 relate to compounds mentioned in D1 and D2, and as such these documents could and should have been filed before the opposition division, when the issues of patentability over the multi-compartment pouches disclosed in documents D1 and D2 were discussed (see points 15.1 and 16.1 of the decision).

In the absence of any argument of the opponent explaining why documents D9 to D11 have been filed only in appeal (see point 2.1.1 above), it is not apparent to the Board how such a late filing, made to complement and support the content of the disclosure of prior art documents D1 and D2 which were already object of the discussion during opposition, could be regarded as being timely and appropriate.

Based on the above, the Board agrees with the patent proprietor, that the opponent could and should have filed these documents during opposition proceedings when its patentability objections based on D1 and D2 were raised and discussed.

As laid out in Article 12(2) RPBA 2020, the primary object appeal proceedings is to review the decision under appeal in a judicial manner, a party's appeal case must be directed to facts, objections, arguments and evidence on which the contested decision was based.

According to Article 12(4) RPBA 2007 the Board has the power to hold inadmissible evidence which, irrespective of an alleged *prima facie* relevance thereof, could have been presented during the opposition proceedings.

Therefore, the Board decides, using its discretion pursuant to Article 12(4) RPBA 2007, to hold D9, D10 and D11 inadmissible.

## 2.2 *Admittance of documents D12, D13*

The patent proprietor requested admittance into the appeal proceedings of documents D12 and D13 (see point 2 of the reply to the opponent's appeal) in case that documents D9 to D11 be admitted into the proceedings.

As however the Board decided not to admit D9 to D11 (see point 2.1.2 above), the above request of the patent proprietor is not procedurally active, and no discussion thereof is necessary for taking the present decision.

## 3. *Main Request - Extension of subject-matter (Articles 100(c) and 76(1) EPC)*

### 3.1 Claim 1 of the main request was found not to be in compliance with the requirements of Article 76(1) EPC (see points 11.1 to 11.6 of the reasons of the appealed decision).

3.2 The patent proprietor argued that, as claim 7 of D3 was clearly related to a liquid composition comprising a non-ionic surfactant having a cloud point above 60°C, without mentioning anti-redeposition properties thereof, the reasoning of the opposition division for not allowing the main request (see in particular point 11.4 thereof) was not to be followed (see the statement setting out the grounds for appeal of the patent proprietor, point 2).

3.3 The opponent objected thereto (see the last two paragraphs at page 2 of the statement setting out the grounds for appeal, as well as the bridging paragraph between pages 3 and 4) by re-submitting an objection already raised in opposition (see the fourth paragraph at page 2 of the minutes) according to which granted claim 1 was not originally disclosed in D3, **also because** being broadly formulated, it encompassed also embodiments having more than two side-by-side compartments superposed onto a single compartment, whereby such embodiments were not derivable from D3.

3.4 The patent proprietor disagreed. According to the third sentence at page 4 of the statement setting out the grounds of appeal the opposition division correctly identified as the basis for the amended claim 1 the sentence starting from page 4, line 25, of D3 (appealed decision, point 11.3). This sentence reads as follows:

*"Especially preferred are pouches having two side-by-side compartments containing two liquid compositions superposed onto a single compartment containing either a liquid or a solid composition."*

During oral proceedings the patent proprietor further argued that the objection of the opponent was based on

an excessively restrictive interpretation of the above mentioned passage of D3, and by additionally referring to the "multi-compartment pouch" mentioned in D3, page 4, lines 16 and 17, which "has at least three compartments", and also to claim 1 of D3, argued that the term "having" in line 25 means "comprising".

Based on the above, the term "having" was to be interpreted, in the context of document D3, as a synonymous of "comprising", and therefore as introducing a non-exhaustive list of components.

3.5 The Board follows the arguments of the opponent and considers those of the patent proprietor not convincing for the following reasons.

3.5.1 The patent proprietor has not contested that granted claim 1, because of the feature "the pouch comprising two side-by-side compartments", is to be read as a non-exhaustive list and therefore extends also to pouches having more than two side-by-side compartments superposed onto a single compartment.

3.5.2 The Board decides not to follow the argument of the patent proprietor that the sentence starting from page 4, lines 24 to 27, of D3 mentioning "*pouches having two side-by-side compartments*" provides a basis for claiming a "pouch comprising two side-by-side compartments".

This is because the above mentioned passage describes specific embodiments.

The feature "*having two side-by-side compartments*" as used therein is clear in the eyes of a skilled reader

who understands therefrom that these pouches have exactly two side-by-side compartments.

That, contrary to what has been argued by the patent proprietor, the feature "having two side-by-side compartments" is not to be understood as "comprising two side-by-side compartments" is also particularly evident from a comparison with the language used on the same page at lines 16 to 19 where no specific embodiment is addressed and the pouches are described in general terms.

In this general description the verb "to have" is not used alone, as in lines 24 to 27, but in combination with adverbs to clarify that a non-exhaustive list of pouch components is meant (*"has at least three compartments", "can have more than three compartments"*).

As a consequence of the above, the Board concludes that, in applying the "gold standard" (see the Case Law of the Boards of Appeal [CLB], 9th edition 2019, II.E. 1.3.1), lines 24 to 27 of page 4 of D3, to which the patent proprietor refers as a basis, do not disclose the claimed pouches comprising (and therefore eventually having more than) two side-by-side compartments.

The Board therefore concludes, following the argument of the opponent, that the feature "comprising two side-by-side compartments" extends beyond the content of the disclosure of D3, and that for this reason there is a lack of compliance with the requirements of Article 76(1) EPC.

As a consequence of the above, the main request is not allowed.

4. Auxiliary request 5 - Article 76(1) EPC
- 4.1 Claim 1 of auxiliary request 5 corresponds to claim 1 as maintained according to the appealed decision (then auxiliary request 6). The opposition division decided that this claim complies with the requirements of Article 76(1) EPC because it comprises the feature "anti-redeposition" (see points 11 and 12 of the appealed decision, see point IX above).
- 4.2 Both parties confirmed, during oral proceedings, that the objection to claim 1 of the patent as granted, as discussed above (see points 3.3 to 3.6), equally applies to claim 1 of auxiliary request 5. The patent proprietor stated, also during oral proceedings, that it had no further arguments to submit, in relation to the above objection and in defense of claim 1 of auxiliary request 5, other than those already submitted in defense of granted claim 1.
- 4.3 As no additional arguments were submitted by the parties, the Board decides that claim 1 of auxiliary request 5 is not allowable because the requirements of Article 76(1) EPC are not complied with, for the same reasons already discussed above (see point 3.5) in relation to the main request.
5. Auxiliary requests 1 to 4 and 6 to 8
- 5.1 Auxiliary requests 1 to 4 and 6 to 8 were submitted with letter dated 7 November 2019 replacing auxiliary requests 1 to 4 and 6 to 8 filed with the reply to the statement setting out the grounds for appeal of the opponent.

5.2 The patent proprietor puts forward, in relation to these auxiliary requests, that the filing was prompted by an obvious error by mistakenly including certain features in claim 3 of its previous auxiliary requests 1 to 4 and 6 to 8 of 17 July 2019 and, therefore, limited to a mere correction of that error.

The presence of an obvious error was evident from the fact that the features removed ("and preferably the weight of the solid composition is from about 10 to about 26 g and the weight of the liquid composition is from about 0.5 to about 4 grams") were not present in claim 3 of the granted patent.

The presence of an obvious error was also evident because these features were not addressed to in the letter of 17 July 2019, as it is particularly evident from the table at pages 3 and 4 thereof, making clear that it was not in the intention of the patent proprietor to change the subject-matter of claim 3 of these auxiliary requests.

5.3 The Board is not convinced by the above arguments of the patent proprietor.

5.3.1 Following the principle that the patent proprietor always bears the responsibility of formulating its own requests, the mere fact that an amendment is not mentioned in the written submissions of this party cannot be seen as evidence proving that the amendment is the result of an obvious error, because it was not intentional.

This principle applies also to the table at pages 3 and 4 of the letter dated 17 July 2019, because the explanations and information given therein do not

relate to claim 3 of auxiliary requests 1 to 4 and 6 to 8, such that it is not possible to clearly conclude that any change made thereto was unintentional and done by mistake.

Removing the feature "and preferably the weight of the solid composition is from about 10 to about 26 g and the weight of the liquid composition is from about 0.5 to about 4 grams" is therefore considered by the Board as an amendment, and not as the correction of an obvious error, possible under the provision of Rule 139 EPC.

This is because the patent proprietor has not credibly established that it is obvious that an error is present in claim 3 of auxiliary requests 1 to 4 and 6 to 8 filed with the reply to the statement setting out the grounds of appeal of the opponent, the incorrect information being objectively recognisable by the skilled person (see the CLB, *supra*, II.E.4.2).

- 5.3.2 Article 13(1) RPBA 2020 states that admission of any amendment to a party's appeal case after it has filed its grounds of appeal or reply is subject to the party's justification therefor and is at the discretion of the Board.

As the justification submitted by the patent proprietor discussed above (see point 5.3.1) is not convincing, the Board decides not to admit auxiliary requests 1 to 4 and 6 to 8 into appeal proceedings.

## 6. Conclusion

In the absence of any admissible and allowable set of claims to support the patent proprietor's appeal and to



counter the opponent's appeal based on the convincing objection to the amended patent held by the opposition division to meet the requirements of the decision under appeal, the decision under appeal is to be set aside, the patent proprietor's appeal is to be dismissed whereas the opponent's appeal is to be allowed.

## Order

**For these reasons it is decided that:**

- 1. The appeal of the patent proprietor is dismissed.**
- 2. The decision under appeal is set aside.**
- 3. The patent is revoked.**

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated