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**Datasheet for the decision  
of 9 September 2021**

**Case Number:** T 0299/19 - 3.3.06

**Application Number:** 12722479.8

**Publication Number:** 2707473

**IPC:** C11D3/37, C11D3/30, C11D3/00,  
C11D11/00, C11D17/04

**Language of the proceedings:** EN

**Title of invention:**  
IMPROVED COMPOSITION

**Patent Proprietor:**  
Reckitt Benckiser Finish B.V.

**Opponents:**  
BASF SE  
Henkel AG & Co. KGaA

**Headword:**  
AUTOMATIC DISHWASHING COMPOSITION/Reckitt

**Relevant legal provisions:**  
EPC Art. 56  
RPBA Art. 12(4), 13(2)

**Keyword:**  
Inventive step (no) - obvious alternative

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0299/19 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 9 September 2021**

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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
3 December 2018 concerning maintenance of the  
European Patent No. 2707473 in amended form.**

**Composition of the Board:**

**Chairman**            J.-M. Schwaller  
**Members:**            P. Ammendola  
                             R. Cramer

## Summary of Facts and Submissions

I. Both opponents and the patent proprietor appealed the interlocutory decision of the opposition division to maintain European patent No. 2 707 473 in amended form on the basis of the first auxiliary request filed during the oral proceedings of 5 October 2018, claim 1 of which (hereinafter "maintained claim 1") reads:

*"1. An automatic dishwashing detergent composition, which comprises:*

- a polyalkyleneimine and/or a salt or derivative thereof, wherein the polyalkyleneimine comprises a polyethyleneimine; and*
- at least one amphoteric polymer, wherein the at least one amphoteric polymer is a hydrophilic polymer, wherein the hydrophilic polymer is an aqueous based acrylic acid amine-functional polymer,*

*wherein the composition comprises the polyalkyleneimine in an amount of 0.001 wt% to 5 wt% of the composition and the amphoteric polymer in an amount of 0.01 wt% to 10 wt% of the composition."*

II. In the decision under appeal the subject-matter of this claim was, *inter alia*, found not obvious (Article 56 EPC) in view of the prior art disclosed in D4 (WO 2010/020765 A1) in combination with D6 (US 6 569 261 B1).

III. With their respective grounds of appeal the opponents contested this finding and opponent 2 filed an experimental report labelled D9 to further support its objection of lack of inventive step.

- IV. With its reply the patent proprietor, *inter alia*, requested the board not to admit D9 into the appeal proceedings.
- V. In its reply dated 5 August 2021 to the board's preliminary opinion the patent proprietor *inter alia* filed three sets of amended claims labelled as second to fourth auxiliary requests, all identical to those filed during the oral proceedings of 5 October 2018.
- VI. At the oral proceedings held on 9 September 2021 in the announced absence of opponent 2, opponent 1 objected, *inter alia*, to the admission into the appeal proceedings of the new auxiliary requests filed with letter of 5 August 2021, and the patent proprietor withdrew its appeal. The parties' final requests were as follows:

The opponents (appellants) requested that the decision under appeal be set aside and the patent be revoked.

The patent proprietor (now respondent) requested that the appeals of the opponents be dismissed (main request) or, alternatively, that the patent be maintained on the basis of the claims of any of the second to fourth auxiliary requests filed with letter of 5 August 2021.

### **Reasons for the Decision**

1. Inventive step of maintained claim 1 (Article 56 EPC) - main request
  - 1.1 The board notes that this claim in fact defines an automatic dishwashing detergent composition comprising 0.001 to 5 wt% of a polyalkyleneimine comprising a

polyethyleneimine (hereinafter "PEI") and 0.01 to 10 wt.% of an amphoteric hydrophilic polymer that comprises an aqueous based acrylic acid amine-functional polymer (hereinafter "AA-AF polymer").

1.2 It is undisputed that none of the available documents mentions the technical problem identified in the patent in suit (paragraph [0013]), namely to prevent the spotting of the washed items allegedly caused by automatic dishwashing compositions which comprise PEI for prevention of corrosion of glasses. Hence, and also considering that the patent in suit in paragraph [0011] does not even state whether the alleged existence of such problem was generally recognised, rendered public or just observed by the inventors of the patent in suit, the board sees no reason to deviate from the finding of the opposition division, undisputed by the patent proprietor, that the closest prior art is represented by automatic dishwashing compositions with anti-corrosion properties disclosed in D4 (that can comprise 0.0001 wt% to 50 wt% PEI, see claims 1 to 5), as embodied e.g. in Example 2 which comprises 0.5 wt% PEI (see p. 21, lines 4 to 6).

1.2.1 Accordingly, the subject-matter of claim 1 as maintained only differs from the composition of example 2 of D4 by the additional presence of 0.01 to 10 wt% of the specified amphoteric polymer.

1.3 As regards the problem to be solved, opponent 2 has filed the experimental data D9 to demonstrate that the presence of (0.4 wt%) AA-AF polymer worsens rather than improves the level of spotting in comparison to compositions that, similarly to those of the prior art of departure, do contain (4.5 wt%) PEI but no AA-AF polymer.

- 1.3.1 The patent proprietor did not dispute the plausibility or the relevance of the experimental results in D9, but argued that they had been unjustifiably late filed. Further it stressed that opponent 2 in its notice of opposition had also attacked granted claim 2, which already recited amount ranges for PEI and AA-AF polymer. Thus, opponent 2 should have submitted D9 already with its notice of opposition, as the latter was also directed against granted claim 2. The belated D9 should therefore not be admitted into the appeal proceedings.
- 1.3.2 The board notes that D9 has been filed with the grounds of appeal of opponent 2 and, thus, could only be disregarded by the board under the provisions of Article 12(4) RPBA 2007.
- 1.3.3 In this respect, the board finds that the submission of these experimental data with the grounds of appeal is justified by the fact that the patent proprietor had only filed at the hearing of 5 October 2018 an amended version of claim 1 (here maintained claim 1) reciting the relevant amount ranges of the two additives. Hence, the filing of D9 with the grounds of appeal can be considered to be a reasonable reaction to the filing of maintained claim 1 in the opposition oral proceedings.
- 1.3.4 The board also notes that the ranges recited in granted claim 2 were "0.0001 wt% to 50 wt%" for both the PEI and the AA-AF polymer, and so much broader than those recited in maintained claim 1 which were only present in the description of the opposed patent. Moreover, it is apparent (see e.g. point 36 of the decision under appeal) that during the opposition proceedings the presence of an inventive step had been disputed for the patented compositions containing e.g. 50 wt% PEI and



only 0.0001 wt% AA-AF polymer, which also fall under the scope of granted claim 2. The board finds therefore that opponent 2 had no necessity to submit D9 in order to substantiate its attack to granted claim 2, nor does it see any other apparent compelling reason for filing D9 before being confronted with the amended version of claim 1 that was finally maintained at the oral proceedings before the opposition division. The board sees therefore no reason to disregard D9 under the provisions of Article 12(4) RPBA 2007.

- 1.3.5 Hence, as also set out in its communication of 11 June 2021, the board finds that D9 renders it plausible that the technical problem addressed in the patent (more precisely reformulated by the opposition division in point 46 of the decision under appeal as the provision of automatic dishwashing compositions conferring glass corrosion inhibition and spotting inhibition on treated glassware) is not solved across the whole scope of maintained claim 1.
- 1.3.6 Therefore, the technical problem actually solved vis-à-vis the prior art disclosed in D4, across the whole scope of maintained claim 1, must be reformulated in the mere provision of a further detergent composition for automatic dishwashing providing (some) corrosion inhibition.
- 1.4 As regards the obviousness of the solution proposed, in the board's view, a skilled person starting from a composition with substantial anti-corrosion performance according to e.g. Example 2 of D4, would consider it obvious to solve this problem by adding therein any other known ingredient of the automatic dishwashing detergent compositions of the prior art that was

already known to prevent (or even just not to favour) the corrosion of glasses.

1.4.1 Thus, the skilled person would search and find (possibly together with other similarly relevant documents) D6, which also concerns glass corrosion during repeated washing operations in an automatic dishwasher (see D6, col.1, 1.5-47). This citation suggests that this problem can be solved by adding to automatic dishwashing compositions 0.001-10 wt% of a water soluble or water dispersible polymer that can comprise hydrophilic monomer units "(b)" carrying acidic groups and amine functional monomers "(a)" (see D6, col.19, 1.33-38, and claim 19, which describe the use for washing dishes in an automatic dishwasher of a composition comprising this sort of polymer). Such polymer is further exemplified in D6 e.g. as "polymer 3" in col.20, lines 20 to 22, which comprises acrylic acid units and is used in amounts of e.g. 1 or 2 wt% in the specific detergent formulations of Examples 12-14 and 22-25. It is thus apparent and undisputed that "polymer 3" of D6 is in accordance with the definition of the AA-AF polymer in maintained claim 1.

1.5 Hence, in the board's view, to arrive at solving the posed technical problem by adding to the prior art of departure e.g. 1 or 2 wt% of the same "polymer 3" that provides anticorrosion performance to the automatic dishwashing detergent compositions of the examples of D6 - and, thus, to arrive at the subject-matter of claim 1 under consideration - requires at most an arbitrary selection, deprived of inventive merits, among the ingredients of the automatic dishwashing detergent compositions of the prior art which are already known to promote (or at least not to impair) the resistance of glasses to corrosion.

1.6 Accordingly, and in the absence of any contesting by the patent proprietor of the reasoning in above point 1.3.1, the board concludes that the subject-matter of claim 1 as maintained is obvious in view of the combination of D4 with D6 and, thus, that the patent in the amended form that the opposition division had found to comply with the EPC, contravenes Articles 52(1) and 56 EPC and cannot be allowed.

2. Second to fourth auxiliary requests - admissibility

2.1 The board notes that the patent proprietor mentioned these requests already submitted during the oral proceedings before the opposition division (upon whose admittance into the proceedings the opposition division had taken no decision) neither in its statement of grounds nor in its reply to the opponents' appeals.

Only with its letter of 5 August 2021 this party filed these three sets of amended claims, allegedly in reaction to the board's communication of 11 June 2021.

2.2 The board stresses however that according to its preliminary opinion, the subject-matter of maintained claim 1 was found to lack an inventive step and that this preliminary conclusion was based on the facts and arguments already mentioned in the preceding opponent 2's written submissions, namely the submissions of this party as to the meaning and the non-lateness of D9, the necessity to reformulate the technical problem solved in a less ambitious manner, and the solution to which was obvious in view of the combination of D4 and D6.

Hence, the board's preliminary opinion cannot represent an exceptional circumstance that could justify the filing of the second to fourth auxiliary requests for

the first time in the appeal proceedings with the patent proprietor's letter of 5 August 2021, i.e after the parties had been summoned to oral proceedings. Thus, these auxiliary requests are found to be an amendment to the patent proprietor's appeal case that contravenes Article 13(2) RPBA 2020, and the board exercised its power of discretion not to admit them into the appeal proceedings.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Hampe

J.-M. Schwaller

Decision electronically authenticated