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**Datasheet for the decision
of 23 January 2023**

Case Number: T 0169/20 - 3.3.06

Application Number: 13750929.5

Publication Number: 2892992

IPC: C11D17/04

Language of the proceedings: EN

Title of invention:
PACKAGED DETERGENT COMPOSITION

Patent Proprietor:
Reckitt Benckiser Vanish B.V.

Opponent:
Henkel AG & Co. KGaA

Headword:
Pouch with inner container/Reckitt

Relevant legal provisions:
EPC Art. 84, 69(1), 56
EPC R. 42(1)(c), 43(1), 43(6)
EPC Prot. Interpretation Article 69

Keyword:

Claimed invention and support by the description - Legal basis for claim interpretation

Inventive step - (no)

Claims - clarity after amendment (no)

Decisions cited:

G 0002/98, G 0003/14, T 0016/87, T 0311/93, T 0303/94,
T 0523/00, T 1018/02, T 0056/04, T 1321/04, T 1408/04,
T 0197/10, T 1646/12, T 1845/14, T 1844/15, T 2365/15,
T 1902/16, T 1127/16, T 1473/19, T 0470/21

Catchword:

1. The provisions in Article 84 EPC and Rules 42 and 43 EPC provide an adequate legal basis for claim interpretation when assessing patentability. In particular, the requirement that the claims shall be "supported by the description" in Article 84 EPC, 2nd sentence, indicates that the description may be relied upon as an aid or support for understanding the subject-matter of the claims.

2. However, as implicitly derivable from this provision, the support of the description for interpreting the claims should only be resorted to in the exceptional cases where the subject-matter of the invention and/or its technical context needs to be clarified, and may only be applicable when the invention in the description corresponds to the invention as claimed.

3. The support of the description should, in any case, not be used for restricting or modifying the subject-matter of the invention beyond what a person skilled in the art would understand when reading the wording of the claims within the relevant technical context.



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Boards of Appeal

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Case Number: T 0169/20 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 23 January 2023

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 22 November
2019 rejecting the opposition filed against
European patent No. 2892992 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman

J.-M. Schwaller

Members:

S. Arrojo

C. Brandt

Summary of Facts and Submissions

- I. The opponent filed an appeal against **the decision of the opposition division to reject the opposition against European patent No. 2 892 992**, with claim 1 as granted (**main request**) reading as follows:

"1. A packaged detergent composition comprising a container that at least partly disintegrates in an aqueous environment, the container having at least one compartment, the detergent composition having a fluid phase and containing a second container that at least partly disintegrates in an aqueous environment, characterised in that the second container comprises a gas present in an amount of between 10-50% of its internal volume."

- II. In its statement of grounds of appeal, the appellant requested to set aside the above decision and to revoke the patent in its entirety, arguing that its claim 1 was not novel in view of **D1** (EP 0 132 726 A2), **D2** (US 2003/087783 A1) or **D3** (WO 2004/08 1 162 A1), and not inventive in view of D1 combined with any one of D1, D2, D3, **D4** (WO 01/04255 A1) or **D5** (US 5,222,595), or in view of D2 combined with D1, D3 or D5.
- III. In its reply, the patent proprietor and respondent requested to dismiss the appeal and to maintain the patent as granted or, as an auxiliary measure, to maintain the patent in amended form on the basis of one of auxiliary requests 1 to 4 filed therewith, and corresponding to the 4 auxiliary requests submitted during first instance proceedings.

Claim 1 of **auxiliary request 1** corresponds to that of the main request, with the additional feature: *"wherein the second container has a lower overall density than the fluid phase"*.

Claim 1 of **auxiliary request 2** corresponds to that of the main request, with the additional feature: *"wherein the contents of the second container are in a different physical format and/or incompatible with a component of the fluid phase"*.

Claim 1 of **auxiliary request 3** corresponds to that of the main request, with the additional feature: *"wherein only one discrete second container is within a single container"*.

Claim 1 of **auxiliary request 4** corresponds to that of the main request, with the additional feature: *"wherein the thickness of the film comprising the second container is less than the thickness of the film making up the first compartment of the container"*.

IV. The board issued a preliminary opinion indicating that the subject-matter of claim 1 of the main and first auxiliary requests appeared to be anticipated by document D2 and to be obvious in view of D1 taken alone or in combination with D2; furthermore, the subject-matter of claim 1 of auxiliary request 2 was unclear and that of the respective claim 1 of auxiliary requests 3 and 4 was obvious in view of D1 alone.

V. With a letter dated 22 December 2022, the respondent contested the interpretation of claim 1 followed in the board's preliminary opinion.

VI. At the oral proceedings, which took place on 23 January 2023, the parties maintained their original requests, namely:

The opponent-appellant requested that the decision under appeal be set aside and the patent be revoked in its entirety.

The proprietor-respondent requested that the appeal be dismissed and the patent be maintained as granted or, as an auxiliary measure, on the basis of one of auxiliary requests 1 to 4 filed with the reply on 29 July 2020.

Reasons for the Decision

1. Claim interpretation

1.1 Regarding claim 1 as granted, both the proprietor and the opposition division considered that the wording "*...the detergent composition having a fluid phase and containing a second container...*" implied that:

- i) the second container was contained within the fluid phase of the detergent composition, **and** that
- ii) the fluid phase of the detergent composition was contained in the at least one compartment of the (first) container.

1.1.1 In its preliminary opinion, the board argued that the subject-matter of claim 1 encompassed embodiments going beyond the above interpretation, because while the expression "*the detergent composition having a fluid phase and containing a second container*" defined that the detergent composition included a fluid phase, it did not specify that the second container had to be

contained within this fluid phase. The wording of the claim thus encompassed embodiments in which the second container was contained in a different phase of the detergent composition (e.g. a powder phase or a solid phase), which also implied that the fluid phase of the detergent composition could be contained in the second container.

- 1.1.2 In its letter dated 22 December 2022 and at the oral proceedings, the proprietor argued that if a claim was ambiguous and there were doubts as to how it should be interpreted, the description should be consulted to resolve the ambiguity in order to assess patentability. It cited decision T 16/87 (Reasons 6), according to which patentability should be assessed on the basis of the subject-matter of the claims interpreted in the light of the description and the drawings, in line with the provision of Article 69(1) EPC. It further referred to decision T 303/94 (Reasons 4.3 and 4.4), which concluded that when the scope of a granted claim could not be exactly established as a result of an ambiguity, the description had to be relied upon to interpret the claims.

The proprietor also indicated that there seemed to be contradictory approaches in the jurisprudence of the Boards of Appeal in the question of when and how the claims should be interpreted in the light of the description.

- 1.1.3 To clarify this issue, the board will hereinafter provide a detailed discussion on this matter.
- 1.2 Legal provisions underpinning claim interpretation

1.2.1 In decision T 16/87, the board concluded (see headnote) that the provision of Article 69(1) EPC was applicable to the interpretation of the claims for the assessment of patentability. A similar conclusion was reached in recent decision T 1473/19 (Reasons 3.11.3), which held that Article 69(1) EPC, in conjunction with Article 1 of the protocol of interpretation, was applicable to the interpretation of claimed features when assessing Articles 54, 56, 83 and 123(2) EPC. More specifically, decision T 1473/19 concluded (Reasons 3.8 and 3.9) that the only provisions in the EPC for interpreting the claims were provided by Article 69 EPC. The purpose of Article 84 EPC was to enable a clear delimitation of the scope of protection in order to ensure that the extent of protection of the patent could be determined under Article 69 EPC. Article 84 EPC was included in part III of the EPC on the European Patent Application and, as indicated in G 3/14 (Reasons 55), it played no role for the examination of granted claims in opposition proceedings, so its provisions could not constitute an applicable legal basis for the interpretation of patent claims in opposition or opposition-appeal proceedings.

1.2.2 The board disagrees with the findings in the above decisions for the following reasons:

In the board's view, the fact that the provisions under Article 84 EPC are not a ground for opposition does not detract from their validity as a legal basis for the development of arguments in opposition or opposition-appeal proceedings. This issue is addressed in G 3/14 (Reasons 55), which states that even though Article 84 EPC cannot be invoked to object granted claims, it "may still be highly relevant in opposition proceedings in that it can influence the decisions under Article 100

EPC", including those relating to patentability. The same applies to other provisions in part III of the EPC, such as Articles 80, 85 or 87 EPC, which are not examined under Article 101 EPC and yet include legal provisions which might be relevant to elucidate questions of law in opposition and opposition-appeal proceedings. As a further example, in G 2/98 (Reasons 6.2) the wording of Article 84 EPC was relied upon as a legal basis for deducing how the term "invention" should be construed in Article 87(1) EPC and in other provisions of the EPC.

The board does also not agree in that Article 69 EPC provides the only guideline for interpretation of the claims in the EPC and, as explained in the next paragraphs, considers that the provisions in Article 84 and Rules 42 and 43 EPC set out the structure of the information in the patent or patent application to elucidate the subject-matter of the invention and thus provide guidance on how to interpret the claims for the purpose of assessing patentability.

- 1.2.3 The present board finds itself in agreement with the reasoning in T 1646/12 (Reasons 2.1) that the provisions of Article 69(1) EPC do not apply to the interpretation of the claims for the purpose of assessing patentability but, in view of its explicit wording, to the determination of the "extent of the protection" of the patent or patent application, i.e. the object to be examined under Article 123(3) EPC or in infringement proceedings. By contrast, the wording of Articles 54 and 56 EPC expressly states that the object to be examined for assessing novelty or inventive step is the "invention". The basis for the interpretation of the claims for the evaluation of patentability must therefore be sought in those

provisions of the EPC relating to the concept "invention".

- 1.2.4 According to Article 84 EPC, the claims shall define the matter for which protection is sought, which in view of Rule 43(1) EPC corresponds to the technical features of the "invention". It is thus apparent that the object to be assessed under patentability corresponds to the technical features in the claims. Also according to Article 84 EPC, 2nd sentence, the claims should be supported by the description, whose role is *inter alia* (see Rule 42(1)(c) EPC) to disclose the invention as claimed in such terms that the technical context can be understood.
- 1.2.5 In the board's view, the requirement in Article 84 EPC, 2nd sentence that the claims shall be "supported by the description", as well as the corresponding expressions in the other official languages ("[Die Patentansprüche müssen] von der Beschreibung gestützt werden" in German or "[les revendications doivent] se fonder sur la description" in French), provides a direct and unambiguous indication of the description's function as a support for understanding the subject-matter of the claims. While this provision is primarily applied to require that the claims be brought in line with the technical teachings of the description (i.e. due to an essential feature missing from the claim), or that the description be adapted to disclose the same invention as the claims, these issues ultimately seek to eliminate inconsistencies in order to enable the supporting function of the description as an aid for understanding the claims.

If the wording of a claim is unclear for a person skilled in the art, the description may fulfil its

supporting function by illustrating the meaning of the unclear feature/s. Conversely, when the wording of a claim is clear for the skilled person, the supporting role from the description is neither necessary nor justified. In addition, if the invention according to the description is narrower or different from that in the claim, the supporting role of the description under Article 84 EPC cannot be fulfilled, since an interpretation on this basis would not represent an illustration of the subject-matter of the claim with the aid or support of the description but a restriction or modification of the scope of the invention.

The board thus considers that the condition "supported by the description" in Article 84 EPC provides a legal basis for determining how and when claims should be interpreted in the light of the description. In particular, the wording of this provision explicitly limits the role of the description to an aid for understanding the subject-matter to be assessed under patentability, while implicitly confining this role to the exceptional cases where such support is both necessary and possible. The support of the description should be resorted to only in case of need, since it is the wording of the claims which defines the matter for which protection is sought (i.e. the invention) and it would not be justified to seek help in understanding a subject-matter which is in itself clear. Moreover, this support is only possible to the extent that there is a correspondence between the description and the subject matter of the claimed invention, so that the technical explanations in the description can serve to illustrate the meaning of the claimed features and not to limit or modify their scope with respect to what a person skilled in the art would understand when reading them.

1.2.6 The board notes that similar conclusions on the limits of claim interpretation may be drawn from the meaning of the concept "invention" (i.e. the object to be assessed under patentability). In particular, according to Rule 43(1) EPC and as concluded in G 2/98 (Reasons 2 and 9), the term "invention" in the EPC should be narrowly construed as the combination of technical features in the claims. As stated in T 1845/14 (Reasons 9.6), this construction of the term "invention" implies that the subject-matter to be assessed under Articles 83, 87, 54 or 56 EPC should not be interpreted restrictively or differently from what a skilled person would understand when reading the claims on the basis of technical aspects which are part of the description but not implicitly or explicitly defined in the claims.

1.2.7 Based on the above, the board concludes that the provisions in Article 84 EPC and Rules 42 and 43 EPC provide an adequate legal basis for claim interpretation when assessing the patentability of an invention.

1.3 Case law concerning claim interpretation

1.3.1 Despite the above discussed discrepancies regarding the relevant legal provisions to be applied for interpreting the claims, the present board considers that the established practices of the Boards in deciding when and how the claims should be interpreted in the light of the specification are reasonably homogeneous. Such practices validate, in the present board's view, the legal framework proposed in the preceding paragraphs.

1.3.2 In a number of decisions the Boards have concluded that the specification may be used to interpret ambiguous or

unclear features or to confirm the most obvious interpretation of the claims (see CLBA, 10th Ed., II.A. 6.3.3). Decision T 56/04 (Reasons 2.10) stated that an interpretation of the claims in the light of the description should only be contemplated if the following criteria are fulfilled: i) such interpretation must be necessary to understand the claim, for example because the claim is unclear and cannot be objected under Article 84 EPC, or because including the definition of the unclear feature would prejudice the readability of the claim (note here the analogy with Rule 43(6) EPC), and ii) the definition of the unclear feature should be readily recognisable in the specification. The board notes that these conditions essentially correspond to those derived from the legal framework based on the provision "supported by the description" in Article 84 EPC (see last paragraph of 1.2.5 above).

The specification has also been relied upon by the Boards to determine the underlying technical context of the invention (see for example T 1844/15, Reasons 3.3; T 2365/15, Reasons 4.3.1; T 1646/12, Reasons 2.1). Under this approach, the true meaning of the features is illustrated in the light of the relevant technical context of the invention, rather than being interpreted literally and in isolation. In other words, the technical information in the specification is used to discard alternatives which, while formally encompassed by the literal wording of the claim, would be incompatible with the technical framework of the invention. This way of interpreting the claims reflects the well-established principle that patent claims should be read and interpreted through the eyes of a person skilled in the art, and is also coherent with

the supporting role of the description under Article 84 EPC.

- 1.3.3 On the other hand, there is also a broad consensus in the Boards that the specification should not be used to read restrictive features not suggested by the wording of the claims (see CLBA, 10th Ed., II.A.6.3.4), or to give a different meaning to a claim feature which in itself imparts a clear and credible technical teaching to the skilled reader (see T 1018/02, Catchword and T 197/10, Catchword). For example, if a claim is defined broadly, it should be construed as covering all technically logical interpretations thereof (see T 1408/04, Reasons 1), even if the specification explicitly instructs the reader to interpret the features more narrowly than justified by the wording of the claim (see T 1902/16, Reasons 2.2).

Moreover, as concluded in some decisions (see e.g. T 1127/16, Reasons 2.6.1 or T 470/21, Reasons 2.1), if a claim is ambiguous and can be interpreted in more than one technically reasonable way (none of them being more obvious or apparent than the rest), it would not be permissible to restrict its meaning in view of the description by discarding one of the technically reasonable interpretations, as this would be tantamount to rewarding the applicant or patent proprietor for an unclear drafting of the claims by allowing him/her to resort at will to more restrictive interpretations of the features on the basis of the description.

The board notes that these practices are also in line with the legal framework proposed in the present decision (see in particular points 1.2.5 and 1.2.6 above).

1.3.4 Lastly, the board will briefly address two well-known legal expressions which have been cited in a number of decisions (see for example T 311/93, Reasons 2.4; T 523/00, Reasons 2; T 1321/04, Catchword) as a guideline to address the question of claim interpretation: "the patent is its own dictionary" and "the terms used in patent documents should be given their normal meaning in the relevant art, unless the description gives the term a special meaning".

In the present board's view, the above expressions have been a major source of confusion in the debate on claim interpretation, as they seem to indicate that it would be permissible to rely on the definition of a feature given in the description to modify its meaning in the claim, even if the claim wording is as such clear and technically reasonable and/or if the meaning assigned in the description deviates from the conventional meaning of the feature within the relevant technical context. Such approach would not only be contrary to the legal framework proposed by the present board (as well as that based on Article 69(1) EPC) but would also be at odds with the well-established principle of the primacy of the claims. It is however noted that a closer reading of some decisions citing these expressions reveals that the actual practice in many of these cases did not follow them to the letter, but instead construed them, in line with point 1.3.2, 2nd paragraph above, as a way to express that the features in a claim should be interpreted within the specific technical context of the invention as provided in the specification (see for example T 311/93, Reasons 2.4 and 2.7 and T 1844/15, Reasons 3.3-3.5).

1.4 Conclusions on claim interpretation

The approach followed by the present board, which is based on the legal framework presented in points 1.2.3 to 1.2.7 above and aligns with the well-established practices described in points 1.3.2 to 1.3.4 above, can be summarised as follows:

The object to be assessed under patentability is the "invention", which according to Article 84 EPC and Rule 43(1) EPC corresponds to the combination of the technical features in the claims. It is thus the wording of the claims which primarily determines the subject-matter of the invention, and the sole function of the description in this respect, pursuant to Article 84 and Rule 42(1)(c) EPC, is to assist or support in understanding the meaning of these features in those exceptional cases where this aid is both necessary and possible.

On the other hand, if the wording of a claim is clear and technically reasonable in itself, it is neither necessary nor justified to interpret it in the light of the description. In particular, the support of the description should not be used for restricting or modifying the subject-matter of the invention beyond what a skilled person would understand when reading the wording of the claims, for example by excluding interpretations which are both reasonable and technically sensible within the relevant technical context.

1.5 In the present case, the board has concluded that the wording of claim 1 at issue is clear and technically meaningful taking into account the technical context of the invention presented in the description. Thus, in line with the conclusions in the 1st paragraph of point

1.3.3 above, there is no reason to interpret it in light of the description.

The conclusion that the claim is not restricted to a configuration in which the first container contains both the fluid phase and the second container (i.e. that the second container floats in the fluid phase) is not based on a linguistic ambiguity but on the fact that the claim omits any indication in this respect. In particular, as explained in the preliminary opinion and in point 1.1.1 above, the expression "*the detergent composition having a fluid phase and containing a second container*" in claim 1 simply states that the detergent composition includes a fluid phase and that the second container is contained in the detergent composition (in general), because the conjunction "and" clearly links the requirement "containing a second container" to the detergent composition and not to the fluid phase. There is thus no indication in the claim (also not an ambiguous one) that the second container should be contained in the liquid phase of the detergent composition (rather than in any of the other phases of the detergent), or that the liquid phase should be arranged in the first container.

In fact, even if the proprietor's argument was followed and claim 1 was considered to be ambiguous and to have two different meanings (namely the one proposed by the board and the one suggested by the proprietor, wherein the second container is contained in the fluid phase of the detergent), this would still fall within the situation described in the 2nd paragraph of point 1.3.3 above, because both ways of resolving the ambiguity would be equally reasonable within the technical context of the invention. The outcome would therefore not change, since discarding one of these reasonable

interpretations in the light of the description would represent an inadmissible restriction of the subject-matter of the invention rather than an interpretation of its meaning with the support of the description.

- 1.6 The subject-matter of claim 1 is thus understood as defining a packaged or pouched detergent composition having a first and a second container, wherein the detergent composition includes at least a fluid phase and wherein the second container is contained in the detergent composition. The detergent composition can thus include different phases and the second container can be contained in any of them. The board therefore sees no reason to conclude that the wording of claim 1 excludes embodiments in which the second container contains the fluid phase of the detergent composition while being contained in a different phase (e.g. powder, gel, a second fluid phase, etc.) of this composition.

2. Main request - Inventive Step

The board has concluded that the opposition ground under Article 100(a) EPC in relation to Article 56 EPC prejudices the maintenance of the patent as granted for the following reasons:

2.1 Closest prior art

- 2.1.1 Document D1 discloses (page 2, lines 16-22; figures 1 and 2) a packaged detergent composition formed by an outer and an inner container, wherein the outer container is made of a permeable material or a water soluble material (page 5, lines 28-30) and the inner container is made of a water soluble material. The containers can be completely or partially filled (see

page 4, lines 19-21; figure 1) such that a certain portion of the outer and the inner containers is filled with air. The detergent composition can include different cleaning substances and phases, with a powder filling the outer container and a powder, a tablet, a paste or a fluid filling the inner container (see page 4, lines 14-18).

This document represents a suitable starting point because of its similarities to the underlying invention both in structural and in functional terms.

2.1.2 The proprietor argued that document D1 did not disclose a first container that at least partially disintegrates in an aqueous environment. While this document indicated (page 5, lines 28-30) that the outer container could be made of water soluble material, it subsequently taught (page 5, line 31- page 6, line 11) that it was preferred to use a water permeable material such as porous polyurethane. Document D1 did also not disclose a second container contained in the fluid phase of the detergent composition, because the fluid phase was contained in this second container and not in the first outer container. Finally, document D1 did not disclose that the gas bubble in the second container was present in an amount of 10-50% of its internal volume.

2.1.3 The board first notes that document D1 clearly discloses an outer container made of a water soluble material (see page 5, lines 28-30). The fact that this document subsequently discloses a further preferred alternative in which the outer container is made of a water permeable material does not detract from the direct and unambiguous disclosure of the first

alternative including an outer container comprising a water soluble film.

The presence of the fluid phase in the first container, and the second container being contained in this fluid phase, cannot be considered as differentiating features with respect to D1 because in view of the above interpretation of claim 1, the invention is considered to encompass a configuration as shown in D1, i.e. with the second container containing the fluid phase and being contained in a powder phase of the detergent composition.

2.1.4 It follows that the subject-matter of claim 1 differs from the disclosure of D1 in that the gas bubble in the second container occupies 10 to 50% of its internal volume.

2.2 Problem solved according to the patent

According to the opposed patent (par. [0008]-[0009]), the object of the invention is to prevent certain physical interactions between the containers (e.g. caused by the inner container moving within the outer container), in particular those leading to undesirable effects such as the damaging of the walls of the containers.

2.3 Reformulation of the technical problem

2.3.1 While it is plausible that the presence of a gas bubble in the second container would increase the buoyancy of the second container and thus reduce the tendency of this container to sink to the bottom of the first container, thereby limiting the physical interactions between the containers, this effect would only apply to

configurations in which the second container is a discrete container (separate from the first container) floating in a fluid phase in the first container. Since this configuration is not defined in claim 1 at issue, the above technical effect cannot be considered to take place.

2.3.2 In any case, it should be kept in mind that D1 anticipates the partial filling of the inner container with a gas and there is no indication, let alone evidence, that the proposed range of 10 to 50% of volume occupied by the gas would provide any specific technical effect with respect to the partial filling of the second container as proposed in D1.

2.3.3 The problem solved by the invention must therefore be reformulated less ambitiously as the provision of an alternative packaged detergent composition.

2.4 Obviousness of the solution

2.4.1 The proprietor argued that there was no indication in D1 to fill the second container with an amount of 10 to 50% of its internal volume with a gas. The description did not provide any hint as to the amount of gas in the second container, and drawings could not be relied upon to make any estimation in this respect, because it was a well-established practice that schematic drawings did not provide a reliable source of information for dimensions or volumes. Even if the drawings were taken as an indication of the amount of gas in the second container, this would not serve to estimate the volume distribution of fluid and gas because the drawings were in 2D. The subject-matter of claim 1 was therefore not obvious even if the only problem solved was that of

providing an alternative and if the drawings of D1 were taken into account.

- 2.4.2 The board disagrees with this argumentation and considers that figures 1 and 2 of D1 provide a clear hint to fill the containers to a point which would fall within the claimed range. While it is true that the drawings do not provide a direct and unambiguous disclosure of the volume distribution, this does not imply that they convey no information in this respect. In particular, it is apparent from the drawings that more than half of the container should be filled with the cleaning composition (i.e. the gas clearly occupies less than 50% of the volume) while still leaving a fair proportion of the container empty or with gas, an estimation which leads to the broad range of 10 to 50% defined in claim 1 in a nearly one way street situation.

The fact that the drawings are in 2D and not in 3D is not relevant for the purpose of estimating the volumetric distribution of the phases, as the containers appear to have a pill- or a capsule-form. However, even if this were not the case, the only situation in which the estimations in view of the drawings could be hindered would be if the containers had a very irregular form, such that the portion occupied with the gas had a depth significantly different from the portion occupied with the other phase, which is highly unlikely. In any case, since the proposed range is broad and not associated with any unexpected technical effect, it is considered to be based on an arbitrary selection, so it cannot be associated with an inventive contribution.

2.4.3 The subject-matter of claim 1 at issue is thus obvious in view of D1 alone, and so lacks inventive step within the meaning of Article 56 EPC.

3. Auxiliary request 1 - Inventive step

3.1 Claim 1 at issue corresponds to that of the main request with the additional feature that "*the second container has a lower overall density than the fluid phase*".

3.2 Closest prior art and problem solved

3.2.1 Document D1 is considered to represent the closest prior art.

3.2.2 The proprietor argued that the reduced density would contribute to the buoyancy of the second container in the fluid phase, thereby reinforcing the argument that the invention solved the problem of preventing the physical interactions between the containers.

3.2.3 The board notes that claim 1 at issue fails to indicate that the second container is a discrete separate container floating in the fluid phase contained in the first container, so that the buoyancy effect alleged in the patent does not apply.

3.2.4 Moreover, the board notes that since document D1 discloses a second container partially filled with a fluid and including an air bubble, the overall density of this container must be lower than that of the fluid contained therein as a result of the partial filling of the container with a gas having a lower density than the fluid. The additional feature is therefore anticipated in document D1. The problem solved by the

invention is thus the same as in the main request, namely the provision of an alternative packaged detergent.

3.3 Obviousness

3.3.1 The proprietor argued that the solution proposed in D1 (passage bridging pages 5 and 6) was to use a water permeable external wall, so this document taught away from the solution proposed in claim 1.

3.3.2 The board disagrees therewith because as indicated in the discussion of the main request, the alternative configuration in which the external wall comprises a water soluble material is considered to represent the closest prior art. In any case, as concluded in point 3.2.4, claim 1 at issue anticipates the newly added feature, so the invention does not include any further differentiating feature with respect to D1. Consequently, the same arguments and conclusions presented for the main request apply to this request, which is thus not considered to be inventive in view of D1.

3.4 The request does therefore not comply with the requirement of inventive step pursuant to Article 56 EPC.

4. Auxiliary request 2 - Clarity

4.1 Claim 1 at issue corresponds to that of the main request, with the additional feature that *"the contents of the second container are in a different physical format and/or incompatible with a component of the fluid phase"*.

4.2 In the board's view, the term "*incompatible*" in claim 1 is unclear, because it is relative and diffuse. In particular, it is not clear which specific properties should be determined to distinguish "compatible" from "incompatible" substances (e.g. does this feature involve long term chemical interactions or only short term?, if so under which conditions?, do physical interactions such as miscibility imply "incompatibility"?, if an interaction affects the appearance but not the function of the substances are these considered "incompatible"?, etc).

This term therefore gives rise to a diffuse scope of protection, so the subject-matter of claim 1 does not meet the requirements of Article 84 EPC.

5. Auxiliary request 3 - Inventive step

5.1 Claim 1 at issue corresponds to that of the main request, with the additional feature that "*only one discrete second container is within a single container*".

5.2 For the board it is apparent that the two containers configuration of D1 (see figures 1 and 2) falls within the scope of one discrete second container within a single container. Consequently, the same arguments and conclusions presented for the main request apply to this request, which is therefore not considered to be inventive in view of D1.

5.3 The request does therefore not comply with the requirement of inventive step pursuant to Article 56 EPC.

6. Auxiliary request 4 - Inventive Step

6.1 Claim 1 at issue corresponds to that of the main request, with the additional feature that "*the thickness of the film comprising the second container is less than the thickness of the film making up the first compartment of the container*".

6.2 Problem solved

6.2.1 The proprietor argued that having containers with different thicknesses provided a way to control the timing for the release of the different portions of the detergent.

6.2.2 The board disagrees that this would be the effect of the invention. In the configuration with an inner and an outer container, the inner one will only dissolve once the outer container has already disintegrated and the cleaning substance therein has been released. Using a smaller thickness for the inner container could imply that the second one should dissolve more quickly than the first, but this would anyway happen in the above sequence, and since the materials of each container are not defined, this effect will not occur throughout the entire scope of the claim. The only effect which can plausibly be associated with the use of a thicker wall for the outer container is to ensure that the pouches are more resistant. The board therefore concludes that the problem solved by the invention is to provide an alternative packaged detergent with an adequate resistance.

6.3 Obviousness

- 6.3.1 The proprietor argued that the preferred outer wall in D1 was made of a water permeable material, so there would be no incentive to select a thick material as this would reduce the permeability.
- 6.3.2 The board disagrees therewith, because as indicated in the discussion of the main request, the alternative configuration in which the external wall comprises a water soluble material is considered to represent the closest prior art. For the board it is apparent that in a packaged detergent configuration having an outer and an inner container such as in D1, the walls of the outer container have to withstand higher stress and shear forces both internally and externally during storage and usage. Moreover, the inner pouch in D1 is protected by the detergent composition, so its wall only serves the purpose of keeping its content separate from the detergent in the outer container and of ensuring that the container dissolves in the washing liquid to release its content during the cleaning process. Therefore, selecting a thicker wall for the outer container than for the inner container in document D1 would represent an obvious consideration for a person skilled in the art, as it would be a technical nonsense to configure pouches that could easily break during storage and/or to select a thicker wall for the inner container that is not exposed to the same level of stress as the outer one.
- 6.4 The subject-matter of claim 1 is therefore obvious in view of D1, so the request does not comply with the requirement of inventive step pursuant to Article 56 EPC.

7. Since none of the requests presented by the proprietor fulfill the requirements of the EPC, there is no basis for maintaining the patent in any form.

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:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated