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D E C I S I O N
of 14 October 2004

Case Number: T 0405/00 - 3.3.6

Application Number: 91309597.2

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IPC: C11D 17/00

Language of the proceedings: EN

Title of invention:

Detergent compositions in tablet form

Patentee:

UNILEVER PLC, et al

Opponent:

Benckiser N.V.
Henkel Kommanditgesellschaft auf Aktien
The Procter & Gamble Company

Headword:

Bleaching tablet/UNILEVER

Relevant legal provisions:

EPC Art. 84, 123(2), 123(3)

Keyword:

"Main and first auxiliary request (no): amendment in the claim extending protection"

"Second auxiliary request - (yes): amendments in the claims extending protection (no) - introducing unclarity (no) supported by the original disclosure (yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 0405/00 - 3.3.6

D E C I S I O N
of the Technical Board of Appeal 3.3.6
of 14 October 2004

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(Proprietors of the
patent)

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 7 February 2000
revoking European patent No. 0481792 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Krasa
Members: P. Ammendola
M.-B. Tardo-Dino

Summary of Facts and Submissions

I. This appeal is from the decision of the Opposition Division revoking European patent No. 0 481 792 concerning a detergent composition in tablet form.

In the corresponding European patent application as filed claim 1 read:

"1. *A tablet of compressed particulate bleaching composition comprising a persalt and a bleach activator, optionally a detergent-active compound, a detergent builder and other detergent ingredients, characterised in that it contains a bleach activator having an observed pseudo-first order perhydrolysis rate constant (K_{obs}) of from 1.5×10^{-4} to $350 \times 10^{-4} \text{ sec}^{-1}$; with the proviso that if the persalt is sodium perborate and the bleach activator is a N-diacylated or N,N'-polyacylated amine, the persalt is segregated from the bleach activator.*"

In the followings the feature defined in the portion of such claim starting at "with the proviso that..." is indicated as "proviso I".

Claims 2 to 10 defined preferred embodiments of the tablet of claim 1. In particular, claims 2, 3 and 4 read:

"2. *A tablet as claimed in claim 1 characterised in that it comprises a detergent-active compound and a detergency builder.*"

- "3. A tablet as claimed in claim 1 or claim 2, characterised in that the persalt is sodium percarbonate."
- "4. A tablet as claimed in claim 3, characterised in that the sodium percarbonate is separated from any ingredient of the composition detrimental to its stability by segregation in a discrete region of the tablet."

II. In the patent as granted claim 1 reads:

- "1. A tablet consisting of a compressed particulate mixture which is a bleaching composition comprising a persalt and a bleach activator, optionally a detergent-active compound, a detergent builder and other detergent ingredients, characterised in that it contains a bleach activator having an observed pseudo-first order perhydrolysis rate constant (K_{obs}) of from 1.5×10^{-4} to $350 \times 10^{-4} \text{ sec}^{-1}$; **with the proviso that if the persalt is sodium perborate the bleach activator is selected from glycerol triacetate, glucose pentaacetate, xylose tetraacetate, sodium benzyloxybenzene sulphonate, 1-O-acyl-2,3,4,6,-tetra-O-acetylglucose in which the acyl group is octanoyl, nonanoyl, decanoyl, undecanoyl, dodecanoyl, 10-undecanoyl, 3,5,5-trimethylhexanoyl, or 2-ethylhexanoyl, or an N-diacylated or N,N'-polyacylated amine, and the further proviso that if the persalt is sodium perborate and the bleach activator is a N-diacylated or N,N'-polyacylated amine, the persalt is segregated from the bleach activator.**" (emphasis added by the Board).

The first proviso mentioned in this claim (i.e. that defined in the emphasized portion of this claim) is hereafter indicated as "proviso II".

The dependent claims 2 to 10 of the patent as granted are identical to the corresponding claims of the patent application.

III. The Opponents I to III based their oppositions on lack of novelty and of inventive step (Article 100(a) in combination with Articles 52(1), 54 and 56 EPC), and insufficiency of disclosure (Article 100(b) EPC).

In the opposition proceedings the Patent Proprietors pursued only the maintenance of the patent in amended form. They informed the Opposition Division of the existence of

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a prior national right under Article 139 EPC, and filed sets of amended claims for all designated states except Germany as well as sets of amended claims for Germany only (under the provisions of Rule 87 EPC).

IV. In the decision under appeal the Opposition Division considered that at least one of the two provisos I and II, both present in claim 1 as granted, was absent from claim 1 of all the then pending requests and concluded that all these requests did not comply with the requirements of Article 123(3) EPC.

- V. The Patent Proprietors (hereafter the Appellants) appealed against this decision.
- VI. The Board informed the parties with a communication enclosed to the summons to oral proceedings that only the admissibility of the Appellants' requests under the provisions of Rule 57(a) and Articles 84 and 123(2) and (3) EPC was going to be discussed at the hearing.
- VII. On 14 October 2004, the oral proceedings took place in the absence of Opponent I (hereafter Respondent I), as announced in its letter of 21 September 2004. At the hearing the Appellants filed sets of amended claims labelled as main request and 1st to 5th auxiliary requests.
- VIII. The Board needed to consider only the main request and the 1st and 2nd auxiliary requests. The main request and the 2nd auxiliary request comprise each two sets of claims, one for all designated states except Germany and one for Germany. The 1st auxiliary request comprises instead only one set of amended claims for all designated states (i.e. including Germany).

Claim 1 of the **main request for all designated states except Germany** reads:

"1. A tablet consisting of a compressed particulate mixture which is a bleaching, detergent composition comprising a persalt which is sodium percarbonate and a bleach activator, a detergent-active compound, a detergency builder and optionally other detergent ingredients, characterised in that it contains a bleach

activator having an observed pseudo-first order perhydrolysis rate constant (K_{obs}) of from 1.5×10^{-4} to $350 \times 10^{-4} \text{ sec}^{-1}$ and which is selected from: tetraacetylenehydramine, glycerol triacetate, sodium benzoyloxybenzene sulphonate, glucose pentaacetate, xylose tetraacetate."

Claim 1 of the **main request for Germany** differs from that for all other designated states only in that it ends with the additional feature:

"and further characterised in that the sodium percarbonate is separated from any ingredient of the composition detrimental to its stability by segregation in a discrete region of the tablet".

Claim 1 of the **1st auxiliary request for all designated states** (i.e. including Germany) is identical to that of the main request for all designated countries except Germany.

Claim 1 of the **2nd auxiliary request for all designated states except Germany** and that of the **2nd auxiliary request for Germany** differ from the corresponding claim 1 of the main request only in that the term

"tetraacetate"

has been replaced by the expression

"tetraacetate, with the proviso that if the composition comprises sodium perborate persalt and the bleach activator is an N-diacylated or N,N' -

polyacylated amine, the sodium perborate persalt is segregated from the bleach activator".

In the 2nd auxiliary request the remaining claims 2 to 5 of the set for all designated states except Germany and claims 2 to 4 for Germany are all dependent and correspond to substantially identical claims already contained in the European patent application as well as in the granted European patent.

IX. The Appellants argued in writing and orally substantially as follows.

In respect of Article 123(3) EPC they maintained that it was justified to omit the provisos I and II from claim 1 of both sets of amended claims according to the main request and from that of the only set according to first auxiliary request, wherein sodium percarbonate persalt is mandatory, because they could not result in any further limitation of the subject-matter of these claims. In support of this argument the Appellants initially submitted that the expression "*composition comprising a persalt*" in claim 1 according to all relevant requests (see above item VIII), as well as in claim 1 of the patent as granted, would indicate that **only one** persalt should be present in the composition. They then conceded at the oral proceedings before the Board that this expression would normally define the mandatory presence of **at least one** persalt, leaving it open to the possible presence of further persalt(s), but argued that the narrow interpretation of the above cited expression, i.e. as indicating the presence of only one persalt, would be supported by the portions of

the patent specification defining such ingredient (see page 3, lines 13 to 28).

The Appellants maintained additionally that the two provisos in granted claim 1 (see "*composition comprising a persalt...with the proviso that if **the persalt is** sodium perborate...and with the further proviso that if **the persalt is** perborate...*", see above item II, emphasis added by the Board) would identify compositions wherein sodium perborate is the only persalt possibly present. Similarly, the wording "*...composition comprising a persalt **which is** sodium percarbonate...*" in claim 1 according to all relevant requests (see above item VIII, emphasis added by the Board) would identify compositions necessarily comprising sodium percarbonate as the only persalt.

The Appellants considered finally that provisos I and II excluded subject-matter and, therefore, should be interpreted narrowly, i.e. as referring merely to tablets wherein sodium perborate would be the only persalt.

In view of Articles 84 and 123(2) EPC, the Appellants submitted that the initial expression in claim 1 of both sets forming the 2nd auxiliary request (i.e. "*A tablet consisting of a compressed particulate mixture...*") defined the tablet structure. This structure could be homogeneous as well as inhomogeneous and corresponded to that defined by the expression "*A tablet of compressed particulate*" as used in claim 1 of the original patent application, in particular when read in combination with claim 2 thereof. Moreover, this expression would not be open to objections under

Article 84 EPC, since it was already present in claim 1 as granted and not affected by the amendments made to the other portions of the claims.

- X. Respondent I did not provide during the appeal proceedings any comment in writing to any of the Appellants' requests.

Respondents II and III refuted the Appellants' submissions in respect of Article 123(3) for the main request and for the 1st auxiliary requests. They maintained that the verb "*comprising*" in claim 1 of all relevant requests, as well as in claim 1 as granted, allowed for more than one of the several ingredients listed thereafter, i.e. also for more than one persalt.

The Respondents II and III considered that claim 1 of both sets forming the 2nd auxiliary request was unallowable either under the provisions of Article 84 or under those of Article 123(2) EPC. Claim 1 as originally filed defined in general "*A tablet of a compressed particulate...*" and the description of the patent application described a multilayer tablet (see in particular in the published patent application, page 7, lines 10 to 22) as the only form for the detergent compositions containing both bleaching and detergent compounds (hereafter the term "fully formulated" is used to indicate the simultaneous presence in the tablet of both kinds of ingredients). On the contrary, the wording "*A tablet consisting of a compressed particulate mixture*" in claim 1 of both sets of the 2nd auxiliary request defined a previously undisclosed fully formulated tablet obtained by compressing a single mixture of all ingredients, thereby necessarily

excluding a multilayer structure, i.e. the only originally disclosed form for the fully formulated tablets.

Moreover, in claim 1 of both sets of the 2nd auxiliary request (as well as in the corresponding portion of claim 1 as granted) it was not clear if the bleach activator mentioned in proviso I corresponded to the first or the second mentioned mandatory bleach activator defined in the preceding portion of those claims. Finally, these claims contained a new version of the proviso I wherein, contrary to the definition of the same proviso in claim 1 as originally filed, not the whole persalt but only the sodium perborate was required to be segregated.

XI. The Appellants requested that the decision under appeal be set aside and that the case be remitted to the first instance for further prosecution on the basis of the main request or alternatively on the basis of one of the 1st to 5th auxiliary requests, all requests submitted during the oral proceedings.

Respondent I, which did not attend the oral proceedings, had no expressly declared request.

Respondents II and III requested that the appeal be dismissed.

Reasons for the Decision

1. Admissibility of the Appellants' main request and of the 1st and 2nd auxiliary requests in view of their late filing.

These requests have been filed by the Appellants at the oral proceedings before the Board in order to overcome formal objections raised and discussed at the hearing. They substantially correspond to combinations of (some of) the sets of amended claims which had already been considered in the decision under appeal and which formed the initial Appellants' requests in the present appeal proceedings.

Respondents II and III did not object to their late filing and Respondent I had the possibility to comment to their substance in writing.

Therefore, the Board decides to admit them in the proceedings.

Main request

2. Claim 1 of the main request for all designated states except Germany: Article 123(3) EPC
 - 2.1 This claim results from the combination of granted claims 1, 2 and 3 (see above items II and VIII), wherein the bleach activator is further required to be selected from a list of five specific bleach activators. It does not comprise, however, any of provisos I and II defined in granted claim 1.
 - 2.2 The Board considers that, according to the language conventional for patent claims in the field of

chemistry, the wordings in present claim 1 "*composition comprising a persalt*" defines exclusively the mandatory presence of **at least one** of the specific chemical compounds belonging to the group of persalts, i.e. the conventional meaning of "*comprising a persalt*" is *comprising at least one persalt*. Of course the same applies to: "*composition comprising...a bleach activator*", "*composition comprising...a detergent-active compound*" and "*composition comprising...a detergency builder*". Accordingly, the claimed subject-matter is completely open to further component(s), i.e. also in respect of the possible presence of further compound(s) belonging to any of those groups.

Hence, the Board concurs with the Respondents and the decision under appeal that claim 1 under consideration encompasses also tablets wherein sodium perborate is possibly present (in addition to the necessarily present sodium percarbonate). The same applies of course also to claim 1 as granted (or as originally filed).

Proviso I in granted claim 1 requires that if N-diacylated or N,N'-polyacylated amine bleach activator and sodium perborate persalt are both present in the tablet, then these ingredients must be segregated from each other (see above item II). Because of the omission of this proviso in present claim 1 the claimed subject-matter now encompasses also tablets containing tetraacetylenediamine (or another N-diacylated or N,N'-polyacylated amine bleach activator) and sodium perborate persalt not segregated from each other. Therefore, this omission results in an extension of

protection in respect of granted claim 1, prohibited under Article 123(3) EPC.

- 2.3 The Appellants have instead maintained that the tablet defined in present claim 1, as well as that defined in granted claim 1, may comprise only one persalt. Therefore, the two provisos of granted claim 1 (both referring to the presence of sodium perborate as the only persalt) could not possibly influence the subject-matter of the claims under consideration, since they were limited to tablets wherein the only persalt is sodium percarbonate.

This interpretation of present claim 1 and of claim 1 as granted is found not justified for the following reasons.

- 2.3.1 In the initial Appellants' view, the expression *comprising a persalt* in present claim 1, as well as in granted claim 1, would mean *comprising only one persalt* (hereafter this meaning is referred to as "narrower interpretation"). However, after having noted that even the description of the patent in suit explicitly indicates that the tablet of the invention (which according to granted claim 2 "*comprises a detergent composition and a detergency builder*") may contain "**at least one detergent active compound, at least one detergency builder**" (see page 4, lines 9 to 10, emphasis added by the Board), they conceded that the conventional meaning of the expression *comprising a persalt* corresponds to *comprising at least one persalt* (see item 2.2).

2.3.2 The Appellants argued however that a narrower interpretation of this expression would be suggested to the skilled reader of the patent in suit by the portions of the description defining the persalt ingredient (see page 3, lines 13 to 28), wherein e.g. no reference is made to *persalts* or to *at least one persalt*, but only to *a persalt* and to *the persalt*.

However, the Board notes that the simple fact that the patent description comprises only these singular terms does not amount to the unambiguous disclosure of the exclusive presence of only one persalt. Therefore, the conventional interpretation of the above-identified expression in the claims under consideration is not in contradiction with the patent specification and, thus, the skilled reader of these claims has no reason to consider plausible another interpretation thereof.

2.3.3 The Appellants submitted additionally that, even if the wording *comprising a persalt* did not exclude the presence of further compounds of this class, still the whole expression "...*composition comprising a persalt which is sodium percarbonate...*" in the claims under consideration (see above item VIII, emphasis added by the Board) would define sodium percarbonate as the only one of such compounds possibly present in the claimed tablet.

The Board observes however that the emphasized terms "*which is*" in the just-cited portion of present claim 1 refer, according to their clear and unambiguous meaning, merely to the previously mentioned persalt that, as already discussed above at item 2.2, is exclusively the *at least one persalt* mandatory in the claimed tablet.

Therefore, the just-cited portion of present claim 1 cannot possibly have any bearing on the nature of the other components of the tablet and, in particular exclude further persalt(s) (in other words, the cited portion of present claim 1 is to be equated to e.g.: *...composition comprising at least one persalt which is sodium percarbonate...*).

- 2.4 Finally, the Appellants have maintained that at least the two provisos of the granted claim 1 (see "*...with the proviso that if **the persalt is sodium perborate...and with the further proviso that if **the persalt is perborate...**, **the persalt is segregated...*****", see above item II, emphasis added by the Board) would merely refer to tablets wherein sodium perborate is the only persalt. They also added that, in case of doubts, a limiting feature excluding claimed subject-matter, such as these provisos, is to be interpreted narrowly.

The Board finds also these arguments not convincing for the following reasons.

- 2.4.1 Similarly to the above consideration at item 2.3.3, also the emphasized wordings in the just cited portion of granted claim 1 refer, according to their clear and unambiguous meaning, merely to the previously mentioned persalt that, as already discussed above at item 2.2, is the *at least one persalt* mandatory in the claimed tablet. Therefore, the portions of the two provisos in granted claim 1 cited at item 2.4 are to be equated to e.g.: *...With the proviso that if the above mentioned at least one persalt is sodium perborate...and with the further proviso that if the above mentioned at least one persalt is perborate..., the above mentioned at*

least one persalt which is perborate is segregated....
Accordingly, the Board finds that the person skilled in the art would interpret the wording of the provisos I and II of claim 1 as granted as requiring, **regardless of the presence of further persalt(s)** (such as e.g. sodium percarbonate), that when some sodium perborate is comprised in the tablet, then the latter must also comprise at least one bleach activator according to the definitions given in proviso II, whereby if at least one bleach activator is in particular an amine of the two groups defined in both provisos, then the **sodium perborate persalt** must additionally be segregated from **such amine** bleach activator. Hence, the Board finds, contrary to the Appellants' submissions that the provisos I and II in granted claim 1 apply not only to tablets containing only sodium perborate persalt but also to tablets additionally containing further persalt.

2.4.2 As conceded by the Appellants' too, the consideration that provisos, being excluding features, should be interpreted narrowly might be relevant only in case of doubt, e.g. to discriminate between two equally plausible interpretations.

In the present case instead, the provisos I and II are found to allow only one plausible interpretation (that indicated above at item 2.4.1) in view of their clear and unambiguous meaning and of the conventional interpretation of "*comprising a*" in the language of patents directed to chemical compositions. Hence, it would not be justified to interpret them differently simply because a more narrow interpretation of excluding features would increase the amount of claimed subject-matter.

2.5 Therefore, claim 1 of the main request for all designated states except Germany is found not to comply with the requirements of Article 123(3) EPC. Already for this reason the Appellants' main request is not allowable.

1st auxiliary request

3. Since claim 1 of this request is identical to that of the main request for all designated states except Germany, this request clearly fails for the same reasons already given above in respect of that claim (see above item 2.2).

2nd auxiliary request

4. Claim 1 of both sets of amended claims forming the 2nd auxiliary request: Article 123(3) and Rule 57(a) EPC

4.1 Claim 1 of each of the two sets of amended claims forming this request comprises, in addition to the features which were already present in the corresponding claim 1 of the two sets forming the main request, a slightly reworded definition of the proviso I already present in claim 1 as granted (see above items II and VIII). The Board finds that the meaning of this slightly reworded definition is clearly equivalent to that of the proviso I in the granted claim (see item 2.4.1). Therefore, the reasons given above (see item 2.2) in respect of the infringement of Article 123(3) EPC by the independent claims of the main request do not apply to the claims now under consideration.

- 4.2 No objection has been raised by the Respondents in respect of the absence of proviso II (see above item II) in the claims under consideration.

The Board finds, at variance with the reasons given in the decision under appeal in respect to identically worded claims (see in particular item 3 of the decision under appeal), that the presence of the proviso II is not necessary in order for the present claims to comply with the requirements of Article 123(3) EPC.

The proviso II is rendered redundant in the claims under consideration by the fact that these require the mandatory presence of at least one of the five specific chemical compounds defined therein. Since each of these five chemical compounds belongs to one of the groups of bleach activators listed in proviso II, all tablets defined in the claims under consideration and which comprise some sodium perborate are inevitably satisfying also the proviso II of claim 1 as granted.

The subject-matter of claim 1 of both sets of amended claims forming the present request is therefore found clearly narrower than that of the granted claim 1 and, hence, to comply with Article 123(3) and Rule 57(a) EPC.

5. The Board is satisfied that also all the other claims of the two sets forming this request, each being dependent on the respective claim 1, and identical to the corresponding claims in the patent as granted, also comply with Article 123(3) and Rule 57(a) EPC.

Since the Respondents have not raised any objection in these respects no reasons need to be given.

6. Claim 1 of both sets of amended claims forming the 2nd auxiliary request: Articles 84 and 123(2) EPC.

6.1 The Board finds that claim 1 of the 2nd auxiliary request for all designated states except Germany (see above item VIII) is clear and substantially corresponds to the combination of the originally filed claims 1 to 3 (see above item I), with the further limitation that the mandatory bleach activator with the required "*K_{obs}*" is further specified to be at least one of the five chemical compounds listed in the claim, each of them being disclosed in the published patent application as generally preferred bleach activator (see the published patent application page 3, lines 44, 47, 49 and 51, as well as claims 6, 7 and 9).

The same finding applies of course to claim 1 of the 2nd auxiliary request for Germany (see above item VIII), which, however, comprises also the features of originally filed claim 4 (see above item I).

6.2 The Respondents have instead argued that both these claims should fail either for lack of clarity or for added subject-matter for the following reasons.

(i) The starting expression "*A tablet consisting of a compressed particulate mixture which is a bleaching, detergent composition comprising a persalt...and a bleach activator, a detergent-active compound, a detergency builder and optionally other detergent ingredients...*" would be different from that resulting from combining the corresponding wording of claims 1 and 2 of the application as originally filed (see above

item I). These original claims did not mention any "mixture" of compressed particulate, i.e. the original wording disclosed simply the presence in the tablet of certain ingredients. Instead the present claims would define a previously undisclosed fully formulated tablet made from a single mixture of these components. Moreover, the present claims would exclude in particular the multilayer tablet that was explicitly disclosed in the patent specification as the only form of fully formulated tablet. The Respondents have maintained that if the claims under consideration were intended instead to encompass also the multilayer tablet, then the wording "*consisting of a compressed particulate mixture*" should be considered unclear.

(ii) In claim 1 of both sets of this request the term "*bleaching activator*" preceded by the indefinite article "a" appears twice (see above item VIII), suggesting that two different bleach activators were meant and, consequently, it would be unclear to which of these two the subsequent expressions "*the bleach activator*" referred.

(iii) The wordings used in defining the "*proviso*" in the claims under consideration specify that only the sodium perborate salt is to be segregated, although e.g. the original claim 1 as filed the proviso I required that *the persalt* (i.e. possibly any persalt) was to be separated from the bleach activator.

6.3 None of these arguments is found convincing by the Board for the following reasons.

(i) The expression "*A tablet consisting of a compressed particulate mixture*" is already present in claim 1 of the granted patent and, by virtue of their dependency on claim 1, also in granted claims 2, 3 and 4 (see above items I and II). Considering that claim 1 of both sets of the 2nd auxiliary request amount to combinations of granted claims 1-3 or 1-4 with the further restriction as to presence of one of the five specifically described bleach activators and the omission of the redundant proviso II (see above items VIII and 5.2), it is apparent that the above identified expression must now necessarily have substantially the same meaning as in the granted patent claims. Hence, this expression is not open to objection under Article 84 EPC (which is not a ground of opposition).

In respect of the relevance of this expression in view of the requirements of Article 123(2) EPC, the Board observes that as long as a tablet made of a "*compressed particulate mixture*" is any tablet comprising at least two different kinds of compressed particles. Therefore, this expression, according to its clear and unambiguous meaning, does not require that the tablet be formed by compressing a single particulate mixture, i.e. that the different compressed particles be homogeneously distributed along the tablet. Hence, the Board finds, contrary to the Respondents' allegations, that the claims under consideration encompass multilayer tablets too.

On the other hand, it is evident from the whole disclosure of the original patent application - and undisputed by the Respondents - that the fully formulated tablets of the invention are preferably made

from **different** particles (see e.g. page 4, lines 27 to 30, page 5, lines 28 to 30, page 7, lines 14 to 20, and the examples in the published patent application).

The Board observes also that, even though the multilayer tablet is described in the original patent application as **preferred** form for the fully formulated composition (see the published patent application page 4, line 23 "...it is preferably separated..." and line 31 "A preferred embodiment...", page 5, lines 16 and 28 "...are preferably concentrated...", etc.), the disclosure of this preferred embodiment does not justify disregarding the following teachings also contained in the original disclosure.

(a) Fully formulated single tablets are defined in general, without making any reference to mandatory presence of multilayer segregation (see in the published patent application e.g. page 4, lines 14 to 15, and claim 2).

(b) The whole portion of the patent application describing in general the possible detergent-active compounds (see page 5 lines 1 to 37, and in particular lines 28 to 30) discloses their segregation "*in specific domains*" as a preferred embodiment only in respect of anionic or non-ionic detergents, but is silent in respect of cationic, zwitterionic or amphoteric detergent-active materials also mentioned therein (see page 5, lines 4 to 6). Moreover, the description of the published patent application referring to nonionic surfactants discloses explicitly at page 5, lines 28 to 30, that segregation may be obtained by adsorbing these ingredients onto solid

carriers and further specifies at lines 34 to 36 how to prevent release of the nonionic surfactants from the carrier. This disclosure provides, therefore, the skilled person with an implicit instruction as to how to obtain a fully formulated tablet in which segregation is obtained despite the fact that detergent-containing particles and persalt-containing particles are in contact.

(c) The detergency builders, such as sodium carbonate or certain polymers, which are explicitly disclosed also as possible diluents of the persalt side (see in the published patent application page 4, lines 36 to 50, and page 6, lines 2 to 7 and 11 to 23) clearly represent no problem in respect of the formation of a single layer tablet.

(d) Even in the definitions of the "*preferred tablet forms*" - disclosed to be "*of particular relevance for tablets of fully formulated detergent compositions*" - two alternatives are given by using the wording "*The tablet.....or a discrete region thereof...*" which clearly indicates that also tablets made from a single (more or less homogenous) mixture of particles have been considered (see in the published patent application page 7, lines 22 to 33, and in particular lines 28 and 35).

Therefore, the Board concludes that the patent application describes in general the possibility of forming fully formulated tablets out of more than one kind of particulate, and identifies, in addition to the preferred tablet wherein the segregation of the persalt and of certain surfactants in the separate domains is

achieved by forming distinct layers therein, also the possibility of tablets with no segregation at all, as well as other means for producing segregation without necessarily creating separated layers. Hence, the skilled reader of the patent application as whole would consider that the wording used in claim 2 as originally filed identifies in general any fully formulated tablet structure also encompassed by the definition "A *tablet consisting of a compressed particulate mixture*" in claim 1 of both sets of amended claims forming the present request.

(ii) Similarly to the above observation in respect of Article 84 EPC at the beginning of section "(i)" of this item, also the portions of the claims under considerations which contain the expression "*a bleach activator*" are substantially the same already present in claim 1 of the granted patent and, by virtue of their dependency on claim 1, also in granted claims 2, 3 and 4 (see above items I and II). Hence, also these expressions are *per se* not open to objection under Article 84 EPC.

Moreover, their meaning is not changed by the amendments distinguishing the claims under consideration from claim 1 of the patent in suit. The Board observes that even though all these claims define tablets that might comprise more than one bleach activator (due to the wording "*comprising...a bleach activator*"), still it is apparent to their reader that the second-appearing expression "*a bleach activator*" can only refer to the mandatory first-mentioned bleach activator of the initial portion of the claims. To do the contrary, i.e. to assume that any of these claims

implicitly defined the mandatory presence of at least two bleach activators, whereby the first one was not further specified, while the second was required to have a certain perhydrolysis constant, lacks any plausibility. (Nor is such interpretation supported in other portions of the patent in suit.) Therefore, even though claim 1 as granted and the claims under consideration comprise twice the wording "a *bleach activator*", it is found that in all these claims these two expressions refer to the (same) **at least one bleach activator** that is mandatory in the claimed tablet.

Accordingly, claim 1 of both sets forming the 2nd auxiliary request differ from the granted claims 1 to 3 or 1 to 4 only because the former do not contain the proviso II and specify further the (same) **at least one bleach activator** that is mandatory in the tablet (by indicating that it must be any of the listed five specific chemical compounds). It is apparent that none of these amendments implies the mandatory presence of two different bleach activators. Hence, no ambiguity is found to derive from the amendments introduced in the claims under consideration.

(iii) The Respondents' final arguments that in claim 1 of the original patent application the proviso I required **any** persalt possibly present to be confined in a discrete region of the tablet, is not convincing because it is clearly contrary to the only plausible interpretation of this proviso, for the reasons already explained above at item 2.4.1. In particular, the expression "*the persalt is segregated from the bleach activator*" in claim 1 as originally filed can only implicitly refer (in view of the fact that it is

preceded by a conditional sentence starting with "*if the persalt is sodium perborate and bleach activator is N-diacylated of N,N'-polyacylated amine*") to the immediately preceding persalt and to the immediately preceding bleaching agent, i.e. the sodium perborate persalt and the N-diacylated of N,N'-polyacylated amine bleach activator. Therefore, the amended wording used for reintroducing the proviso I in the claims under consideration, wording which explicitly specifies that only the sodium perborate is to be separated, corresponds exactly to the meaning of the wording defining proviso I in claim 1 as originally filed and in claim 1 as granted. Therefore, also this objection of the Respondents under Article 84 or 123(2) EPC is found not convincing.

7. The Board is satisfied that claims 2 to 5 for all designated states except Germany and claims 2 to 4 for Germany according to the 2nd auxiliary request comply with Articles 84 and 123(2) EPC.
Since the Respondents have raised no objection in these respects, no reasons need to be given.

8. For all the above reasons the 2nd auxiliary request of the Appellants is found admissible in view of Articles 84, 123(2) and (3) and of Rule 57(a) EPC.

Since, however, the Opposition Division has not yet decided on sufficiency of disclosure, on novelty and on inventive step, the Board exercises its discretion under Article 111(1) EPC and remits the case to the first instance for further prosecution.

Under these circumstances it is not necessary to deal with the Appellants' 3rd to 5th auxiliary requests.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of the claims of the 2nd auxiliary request filed during the oral proceedings.

The Registrar:

The Chairman:

G. Rauh

P. Krasa