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**Datasheet for the decision  
of 23 January 2009**

**Case Number:** T 0483/06 - 3.3.06

**Application Number:** 98910946.7

**Publication Number:** 0975724

**IPC:** C11D 3/00

**Language of the proceedings:** EN

**Title of invention:**

Effervescent compositions and dry effervescent granules

**Patentee:**

THE PROCTER & GAMBLE COMPANY

**Opponent:**

Henkel AG & Co. KGaA

**Headword:**

Effervescent Laundry Composition/PROCTER

**Relevant legal provisions:**

EPC Art. 123(3)

**Relevant legal provisions (EPC 1973):**

EPC Art. 56

**Keyword:**

"Inventive step - yes: prior art leads away from the invention"

**Decisions cited:**

G 0009/92, G 0004/93

**Catchword:**

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Case Number: T 0483/06 - 3.3.06

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.06  
of 23 January 2009

**Appellant:** Henkel AG & Co. KGaA  
(Opponent) VTP Patente  
D-40191 Düsseldorf (DE)

**Representative:** -

**Respondent:** THE PROCTER & GAMBLE COMPANY  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
7 February 2006 concerning maintenance of  
European patent No. 0975724 in amended form.

**Composition of the Board:**

**Chairman:** P.-P. Bracke  
**Members:** P. Ammendola  
A. Pignatelli

## Summary of Facts and Submissions

I. This appeal is from the interlocutory decision of the Opposition Division concerning the maintenance in amended form of European patent No. 0 975 724.

II. Claims 1 and 12 of the patent as granted read:

"1. A dry effervescent granule consisting of an acid, a carbonate source, preferably carbonate and/or bicarbonate, and optionally a binder, wherein said acid, carbonate source and optionally binder are in close physical proximity, such that the acid and the carbonate are in an intimate admixture in the effervescent granule and are not separated by anything else other than the optional binder, and wherein no water has been added or present other than the moisture of the raw materials themselves, and the level of water is below 5% by weight of the total granule."

"12. A granular composition comprising effervescence granules according to any of claims 1 to 8, characterised in that the Effervescence Index (EI) is at least 10, the Effervescence Index (EI) being

$$EI = \frac{(L \times S \times 100)}{M} \times (NC_{inter} + NC_{intra})$$

wherein  $L$  is the number of acidic groups of the acid having a  $pK_a$  of less or equal to 6,  $S$  is  $\sqrt[3]{}$  (solubility in water of the acid in g/litre, at 25°C),  $M$  is the molecular weight of the acid,  $NC_{inter}$  is the density of contact points between the carbonate source and acid which are separated

*present in the composition per mm<sup>3</sup>, and  $NC_{intra}$  is (the weight fraction of the acid in said granule) x (the weight fraction of the carbonate source in said granule) x 12."*

III. The Opponent had sought revocation of the granted patent for lack of novelty and inventive step (Article 100(a) EPC in combination with Articles 52(1) and (2), 54(1) and (2) and 56 EPC).

During the opposition proceedings the parties had made reference, *inter alia*, to the following documents:

- (1) US-A-5 114 647,
- (2) WO 97/02014,
- (3) US-A-3 772 431,
- (4) US-A-3 888 976,
- (5) EP-B-0 110 588
- (6) Chemical Abstract HCA accession number 109:197094,
- (7) Chemical Abstract HCA accession number 107:205152,
- (8) Chemical Abstract HCA accession number 109:27576,
- (9) Chemical Abstract HCA accession number 109:134941,
- (14) English translation of JP-A-62 62899

and

(15) EP-A-0 534 525.

IV. The Opposition Division found that the amended claims according to the then pending main request complied with the EPC, *inter alia*, because the claimed laundry washing compositions could not possibly be considered to embrace the sanitising tablets disclosed in document (1) due to the presence in these latter of a chlorine-generating ingredient. Moreover, the claimed subject-matter represented a non-obvious alternative to the prior art laundry compositions of document (14) or (15).

V. The Opponent (hereinafter the Appellant) lodged an appeal against this decision. In the grounds of appeal it raised objections in view of Articles 123(3), 54 and 56 EPC and made reference to the documents (1) to (9) already considered by the Opposition Division. It additionally filed the documents

(16) DE-A-33 39 050

and

(18) US-A-2005/0153859.

VI. The Patent Proprietor (hereinafter the Respondent) replied to the grounds of appeal thereby filing, *inter alia*, document

(17) GB-A-2 133 813

equivalent of the previously cited document (16), as well as five sets of amended claims respectively labelled as first to fifth auxiliary requests.

- VII. At the oral proceedings before the Board the Respondent filed a set of 13 amended claims labelled as "replacement main request" (hereinafter main request). It also filed an amended page 2 for the set of claims forming the fifth auxiliary request.

During the hearing the Appellant argued that the claimed subject-matter was obvious also when starting from the prior art presented in document (14) or (15). The Respondent considered these citations inadmissible because they had not been previously mentioned by the Appellant in the appeal proceedings and, thus, the Respondent was not prepared to discuss them.

- VIII. Claim 1 according to the Respondent's **main request** filed during the oral proceedings reads:

"1. *A laundry detergent composition which is in the form of granules, tablets, bars, flakes or extrudates and which comprises detergent ingredients comprising builder and 5 to 50% (by weight of the composition) surfactant comprising anionic surfactant and 3% - 25% (by weight of the total composition) dry effervescent granules are incorporated in this composition, characterised in that the dry effervescent granules consist of an acid, a carbonate source, preferably carbonate and/or bicarbonate, and optionally a binder, wherein said acid, carbonate source and optionally binder are in close physical proximity, such that*

*the acid and the carbonate are in an intimate admixture in the effervescent granule and are not separated by anything else other than the optional binder, and wherein no water has been added or present other than the moisture of the raw materials themselves, and the level of water is below 5% by weight of the total effervescent granules, in which from 15% - 60% by weight of the effervescent granules is the acid or a mixture thereof, with the proviso that when citric acid is present its level is preferably below 20% by weight of the total granule, and in which from 30% - 80% by weight of the effervescent granules is carbonate and/or bicarbonate."*

Claims 2 to 10 of the same request define preferred embodiments of the composition of claim 1. The remaining claims 11 to 13 define a process for manufacturing a composition according to any of the preceding claims.

IX. The written and oral submissions of the Appellant that are relevant for the Respondent's main request may be summarised as follows.

The documents (14) and (15) which were discussed in the decision under appeal, were present since the outset of the appeal proceedings.

The requirements of Article 123(3) EPC would be violated by claim 1 of the main request because the protection conferred by such claim would be broader than that conferred by the corresponding granted claim 12.

Documents (16) and (18) would prove that there existed no generally accepted technical prejudice against the possibility of using large amounts of chlorine-generating ingredients in laundry detergent compositions. On the contrary the application of sanitising compositions would be required when washing soiled white cloths such as those e.g. collected from hospitals. Hence, the claimed subject-matter would be anticipated by the sanitising tablets of e.g. example (5) of document (1), wherein the builder function would be provided by the starch and/or the polycarboxylic acid ingredients and whose content in anionic surfactant could, as stated in column 3, lines 37 to 39, of the same document, be increased up to 10% or 20% by weight of the tablet.

Also the laundry detergent compositions disclosed in examples 37 and 38 of document (5) would be novelty destroying. In this respect the Appellant stressed that claim 1 of the Respondent's main request would not require the surfactant ingredient to be present in portions of the claimed compositions different from the effervescent granules. On the contrary the patent itself in paragraph [0038] explicitly indicated some anionic surfactants among the binders possibly present in these granules.

In respect of the issue of inventive step, the Appellant considered that claim 1 of the main request did not specify any minimum speed at which the composition should dissolve. Moreover, the breadth of this claim was manifestly excessive because the minimum amount of carbonate ingredient possibly present in the



claimed composition was much smaller than the minimum carbonate amount required for the fast-dissolving compositions of documents (14) or (15). Hence, not all claimed compositions possessed the effervescence required for laundry washing applications.

Therefore, the sole problem plausibly solved by the claimed subject-matter was that of providing a further composition with some detergent properties and, thus, the skilled person could have started from any of documents (1) to (9). The claimed subject-matter would then result from the obvious combination of the effervescent granules of document (1) with the laundry detergent compositions of any of documents (5), (14) or (15), as well as from the obvious combination of the effervescent granulates of documents (2) to (4) or (6) to (9) with whatever conventional detergent composition.

The Appellant conceded that in case all claimed compositions were considered enough effervescent to be suitable for laundry washing, then the inventive step assessment was reasonably to be made only starting from the known effervescent laundry detergent compositions of the prior art, such as those disclosed in documents (14) or (15). However, in the absence of any experimental evidence supporting the advantageous technical effects alleged in the patent in suit, the claimed subject-matter could at most be presumed to have solved vis-à-vis this prior art the technical problem of providing an alternative thereto. Moreover, in the Appellant's opinion, the person skilled in the art of formulating laundry detergent compositions would either be the same formulating sanitising tablets or at least be aware that the technical problem of rapidly

disintegrating and dissolving into water solid compositions has already been solved in the neighbouring technical field of sanitising compositions. Accordingly, the skilled person searching for an alternative to the laundry detergent compositions of e.g. documents (14) or (15) would have considered document (1) and expected that the same effervescent granules that had already been described in this latter citation as particularly effective in promoting the dissolution and dispensing of sanitising tablets into water would also provide such effect to the laundry detergent compositions of the prior art.

- X. The Respondent disputed this reasoning by arguing in essence as follows.

Since the documents (14) and (15) had not been mentioned in the grounds of appeal, these citations were not in the appeal proceedings. This fact had already been stressed in the Respondent's letter dated 19 September 2006 replying to the grounds of appeal. Nevertheless, at the oral proceedings before the Board the Appellant had referred for the first time in these appeal proceedings to such citations, thereby taking by surprise the Respondent. Hence, the documents (14) and (15) were not admissible at such late stage of the appeal proceedings. In support of this reasoning the Respondent referred to the decisions G 9/92 (OJ EPO 1994, 875) and G 4/93 (OJ EPO 1994, 875) of the Enlarged Board of Appeal.

The subject-matter of claim 1 of the main request fell already under the absolute product protection conferred

by claim 1 as granted and, thus, did not violate Article 123(3) EPC.

The sanitising tablet of example 5 of document (1) did not anticipate the subject-matter of claim 1 of the main request because the former contained only 3% by weight surfactant and no builder. Moreover, the skilled person would consider sanitising tablets, such as those disclosed in this citation, as clearly distinct from laundry washing compositions, because of the high amount of chlorine-generating ingredients contained in such tablets. The documents (17) and (18) were unsuitable and in any case insufficient for proving the contrary.

Examples 37 and 38 of document (5) were instead deprived of the specific structure of the claimed detergent composition, i.e. that resulting from the incorporation of effervescent granules - obtained by dry compaction of exclusively the carbonate and the acid source ingredients (hereinafter these two ingredients are also indicated altogether as the effervescent ingredients) and, possibly, a binder - into a detergent composition, comprising a builder and an anionic surfactant.

The inventive concept of the claimed laundry compositions would consist in the close physical proximity of both effervescent ingredients in the effervescent granules. This feature would not only avoid the possibly unstable intimate admixture between the effervescent ingredients and the reactive compounds usually present in detergent compositions, but, as indicated in paragraph [0014] of the patent in suit,

would also allow to maximize the efficacy of the generated carbon dioxide in disrupting the compacted form of the detergent composition.

Hence, and in the absence of any evidence supporting the Appellant's allegation to the contrary, the skilled person would consider plausible that substantially all the claimed laundry detergent compositions solved the technical problem mentioned in the patent in suit, i.e. that of rendering available laundry detergent compositions with improved dissolution and dispensing characteristics that are stable upon storage.

The skilled person considering such a problem would not have started from documents (1) to (4) and (6) to (9) that did not even mention laundry washing and, in any case, did not disclose technical information specifically relevant to the dissolution of laundry detergent compositions.

Nor would the skilled person have started from the laundry compositions of document (5), since this citation did not describe the speed of disintegration and dissolution of the compositions disclosed therein and required the wet-compounding of the acid and of the carbonate source, thereby at least reducing - if not completely preventing - the effervescence of such composition.

The skilled person could instead have started from the effervescent laundry detergent compositions of documents (14) or (15) which, however, suggested a totally different direction for forming stable and fast-dissolving laundry compositions: i.e. that of

physically separating the acid source from the rest of the composition and, thus, also from the carbonate source. Moreover, in the hypothetical event that a skilled formulator of laundry detergent compositions would have considered document (1), the slow dissolution times reported in this citation would suggest that the addition of the effervescent granules of document (1) in e.g. the fast-dissolving laundry detergent compositions of documents (14) or (15) could appreciably worsen the dissolution and dispensing characteristics of these latter, thereby leading the skilled person away from the present invention.

- XI. The Appellant requested that the decision under appeal be set aside and the patent be revoked.

The Respondent requested that the patent be maintained on the basis of the claims 1 to 13 according to the main request as filed during the oral proceedings or of any of the first to fifth auxiliary requests filed with the letter dated 29 September 2006, whereby page 2 of the fifth auxiliary request was replaced during the oral proceedings.

## **Reasons for the decision**

### Procedural issues

1. Admissibility of documents (14) and (15) in the proceedings.

The Board cannot share the opinion of the Respondent that documents (14) and (15) could not be admitted in

appeal proceedings because the Appellant had not discussed them in its statement setting out the grounds of appeal.

The Respondent based its arguments on decisions G 9/92 and G 4/93 where it is stated that the extent of the appeal is determined by the appeal. These decisions meant that the power of examination of the Board of appeal is limited to the requests filed and the grounds of opposition raised by the Appellant. However, these decisions do not contain any statement as to the admissibility of facts and evidence or arguments.

In the present case, the Appellant has contested the decision of the first instance on inventive step. Documents (14) and (15) have been dealt with by the Opposition Division in the decision when examining inventive step. Thus, the documents were already in the proceedings in the frame of the same ground for opposition.

The Appellant simply based a new argument on these documents. This is a perfectly legitimate way of action even in oral proceedings.

The Respondent cannot be taken by surprise by this behaviour especially because the Respondent itself has dealt with these documents in its reply to the statement of grounds of appeal.

The documents are therefore admitted in the proceedings.

*Respondent's main request*

2. Extension of protection (Article 123(3) EPC)

The Appellant has complained that a composition according to claim 1 of the main request (see above section VIII of the Facts and Submissions) would not be within the scope of protection of the patent as granted because the presently claimed subject-matter would not be limited to granular laundry detergent compositions with the specific Effervescence Index required in claim 12 as granted (see above section II of the Facts and Submissions). Moreover, none of the granted claims would indicate that the protected compositions may have the non-granular form of bars and flakes.

This objection is exclusively based upon the consideration of the initial protection conferred by those granted claims that are directed to granular compositions (i.e. from granted claim 12 onwards). However, as correctly observed by the Respondent, granted claim 1 already conferred absolute protection upon the dry effervescent granules, i.e. already covered any compositions of matter comprising these granules, independently of the use or the form of such compositions (see above section II of the Facts and Submissions).

Accordingly, the presently claimed subject-matter was already within the protection conferred by the granted patent and, thus, the Board finds that the Respondent's main request does not violate Article 123(3) EPC.

3. Novelty of the subject-matter of all claims of the main request (Articles 54(1) and (2) EPC 1973)

3.1 Claim 1 defines a laundry detergent composition containing a builder, from 5% to 50% by weight of surfactant and 3% to 25% by weight of dry effervescent granules, whereby these granules consist of from 30% to 80% by weight of carbonate or bicarbonate, from 15% to 60% by weight of an acid source and optionally a binder (see above section VIII of the Facts and Submissions).

3.2 The Appellant has disputed the novelty of this claim in view of the sanitising tablet of example 5 of document (1) - i.e. the sole example in this citation containing a surfactant as well as a granulate comprising both effervescent ingredients - and in view of column 3, lines 27 to 40, of the same document, disclosing in general the possible presence in the sanitising composition of e.g. 10% or even 20% by weight of surfactant.

It has also referred to documents (16) and (18) in order to prove that the skilled person would consider possible for laundry detergent compositions (such as the claimed ones) to comprise large amounts of chlorine-generating compounds (such as those present in the tablets of document (1)).

Moreover, the claimed subject-matter would also be anticipated in document (5) (in particular, examples 37 and 38 and page 2, lines 34 to 40).

3.3 The Board finds however that, regardless of any consideration as to whether the chlorine-generating



tablets of document (1) may or not be considered as laundry detergent compositions (and thus also regardless of the possible meaning or relevance of documents (16) to (18)), this citation does not provide any direct and unambiguous disclosure of the subject-matter of claim 1 already because

a. in example 5 the amount of surfactant is less than 5% by weight and the amount of effervescent granules is above 25% by weight

and

b. neither column 3, lines 27 to 40, nor any other portion of document (1) disclose directly or indirectly (e.g. by means of a generally valid instruction on how to modify the examples and, thus, also example 5) tablets comprising an amount of anionic surfactant of from 5% to 50% by weight **in combination with** an amount of 3% to 25% by weight of effervescent granules containing both effervescent ingredients.

3.4 The Board also finds that document (5) does not anticipate the subject-matter of claim 1, *inter alia*, because this citation manifestly does not disclose any composition of matter containing not more than 25% by weight of granules comprising both effervescent ingredients.

3.5 Hence, the subject-matter of claim 1 of the Respondent's main request complies with the requirements of Article 54(1) and (2) EPC 1973.

3.6 Since claims 2 to 10 of this request define preferred embodiments of the composition of claim 1 on which they depend, the Board finds that their subject-matter is also novel. The same applies to the remaining claims 11 to 13 of the main request that define the process for manufacturing a composition according to any of the claims 1 to 10.

4. Inventive step for the subject-matter of claim 1 (Article 56 EPC 1973).

4.1 According to the established jurisprudence of the Boards of appeal of the EPO, the appropriate starting point for the inventive step assessment is to be identified within the same technical field of the claimed subject-matter by taking into account the specific technical problem mentioned in the application.

The patent in suit (compare the problems mentioned in paragraphs [0002] to [0004] and [0012] and [0013] with the definitions of the objects of the invention in paragraphs [0014] to [0017]) clearly focuses on laundry detergent compositions and mentions the well-known technical problem of rendering available laundry detergent compositions that achieve and retain upon storage a fast dissolution and dispensability from e.g. the washing machine drawer, without impairing the washing results.

4.2 The Appellant has stressed that claim 1 of the main request does not specify any minimum speed with which the composition must disintegrate and dissolve, and submitted that no effervescence can reasonably be expected when contacting with water those claimed

compositions that contain very limited amounts of, for instance, the carbonate source ingredient (in the claimed composition this compound may represent as low as 0.9% by weight thereof). This would be evident when considering that a much larger minimum amount (i.e. at least 5% by weight of the composition) is instead required for such ingredient in the effervescent laundry detergent compositions of documents (14) or (15).

Hence, the sole technical problem possibly solved over the whole ambit of the claim would neither be the ambitious ones mentioned in the patent in suit, nor that of providing further laundry detergent compositions with disintegration and dissolution properties acceptable for machine washing, but just the provision of a further composition possessing some cleaning ability. Therefore, the technical problems mentioned in the patent in suit could be ignored and the inventive step assessment could start from any of documents (1) to (9), (14) or (15).

- 4.3 The Board notes however that present claim 1 requires not only the presence of specific amounts of the effervescent ingredients, but imposes that these latter must be simultaneously present in close physical proximity in the same effervescent granules. On the contrary, in documents (14) or (15) the acid source and the carbonate source are separately distributed in two distinct sorts of granules. Therefore, no sound prediction as to the speed of disintegration and dissolution of the detergent composition seems derivable simply from the difference between the minimum amounts of the effervescent ingredients

required in claim 1 and in these citations. Indeed, the Board has no reason for excluding that already an amount of e.g. 0.9% by weight of carbonate might be sufficient, when the composition of the patent in suit is contacted with water, for producing **at least locally** appreciable effervescence, possibly favouring the breaking apart of the compacted form of the composition and, thus, its dissolution.

- 4.3.1 Hence, the Board concludes that, in the absence of any experimental evidence supporting the Appellant's allegation, the skilled reader of the patent in suit has no reason for doubting that substantially all the claimed compositions would produce enough effervescence for rapidly dissolving under laundry washing conditions. Accordingly, it is credible that the claimed subject-matter aimed at solving the technical problem mentioned in the patent in suit and, therefore, such problem must be taken into consideration for identifying a reasonable starting point for the assessment of inventive step.

This reasonable starting point is manifestly represented by the compositions disclosed in documents (14) or (15), which are not only effervescent, but also explicitly qualified as suitable for laundry washing and rapidly dissolving.

- 4.3.2 The Appellant has conceded that, in case the Board considered credible that substantially all the claimed compositions would be at least suitable for laundry washing, the compositions disclosed e.g. in the examples of documents (14) or (15) represent a

reasonable starting point for the inventive step assessment.

In its opinion, however, in the absence of any experimental comparison with this prior art supporting the improved dissolution and stability properties alleged in the patent in suit, the claimed subject-matter could at most be presumed to solve the technical problem of providing an alternative to the laundry detergent compositions of documents (14) or (15), i.e. the technical problem of providing **further** detergent compositions suitable for laundry washing.

The Appellant has submitted that the skilled formulator of detergent compositions searching for new variants of the prior art would also have consulted document (1) and would have concluded that the same effervescent granules that are described therein as effective in promoting the dissolution and dispensing characteristics of the effervescent sanitising tablets in water would also provide such effect in the effervescent laundry detergent compositions of documents (14) or (15). Thereby, the skilled person would have arrived at the claimed subject-matter without exercising any inventive ingenuity.

4.3.3 However, in the Board's opinion, even if one assumes for the sake of an argument in favour of the Appellant

- that the sole technical problem credibly solved vis-à-vis the laundry detergent compositions of the prior art is just the provision of an alternative thereto

and

- that a skilled formulator of laundry detergent compositions would consult document (1) in searching for such alternative,

still such skilled person would notice upon reading such document that the surfactant-containing tablets disclosed therein dissolve too slowly for laundry applications. As a matter of fact, document (1), after having explicitly acknowledged at column 3, lines 40 to 42, that in general the incorporation of surfactant increases the dissolution time, discloses specifically that all the examples containing also a surfactant (i.e. examples 2 to 5) require from about 4 to about 7 minutes for dissolving in tap water at 5°C, despite the fact that the surfactant amounts range from about 3 to about 9% by weight only. Instead, the test used in document (14) for verifying the achievement of sufficient speed of dissolution of the laundry detergent compositions requires complete dissolution within 3 minutes in tap water at 10°C, even for the effervescent detergent powders containing about 30% by weight of more of surfactant (see tables 2 and 4). Similarly, in document (15) the compositions disclosed therein are tested for substantial dissolution within 1 minute, although in water at 20°C, even though they contain about 15% by weight of surfactant (see tables 1 and 2).

Hence, the Board concludes that the skilled formulator of laundry detergent compositions that reads document (1), expects that whatever modifications of the laundry washing compositions of any of documents (14) or (15)

that renders these latter more similar to the sanitising tablet of document (1) is likely to result in a **substantial worsening** of the dissolution and dispensing characteristics. Therefore, also the combination suggested by the Appellant of the compositions of documents (14) or (15) with the effervescent granules disclosed in document (1) is expected to result in compositions that are **less suitable** for laundry washing than the laundry detergent compositions of the prior art.

In view of this conclusion, it has been unnecessary for the Board to establish if the technical problem credibly solved by the claimed subject-matter vis-à-vis the laundry detergent compositions of the prior art was that of providing improved laundry detergent compositions (as mentioned in the patent in suit and maintained by the Respondent) or just the simple provision of an alternative to the prior art (as argued by the Appellant) because the combination of prior art cited by this latter is found to teach in any case away from the claimed laundry detergent compositions. Accordingly, the subject-matter of claim 1 of the Respondent's main request is found to comply with the requirements of Article 56 EPC 1973.

5. Inventive step (Article 56 EPC 1973) for the subject-matter of claims 2 to 13.

The claims 2 to 10 of the Respondent's main request refer to preferred embodiments of the detergent composition of claim 1 on which they depend and, hence, the Board finds that the Appellant's objections as to the absence of an inventive step fail for the same

reasons indicated above for claim 1. The same reasoning applies as well to the remaining claims 11 to 13 that define the process for manufacturing a composition according to any of the claims 1 to 10.

## **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 with the order to maintain the patent with the claims according to the main request filed during the oral proceedings before the Board and a description to be adapted.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke