

**Internal distribution code:**

- (A) [ - ] Publication in OJ  
(B) [ - ] To Chairmen and Members  
(C) [ - ] To Chairmen  
(D) [ X ] No distribution

**Datasheet for the decision  
of 8 January 2014**

**Case Number:** T 2082/11 - 3.3.06  
**Application Number:** 05723647.3  
**Publication Number:** 1720969  
**IPC:** C11D17/06, C11D1/86, C11D3/00,  
C11D3/10, C11D3/34, C11D3/37  
**Language of the proceedings:** EN

**Title of invention:**

A granular laundry detergent composition comprising a ternary  
deterasive surfactant system and low levels of, or no, zeolite  
builders and phosphate builders

**Patent Proprietor:**

The Procter & Gamble Company

**Opponent**

UNILEVER N.V. / UNILEVER PLC

**Headword:**

Surfactant components in particulate form/PROCTER & GAMBLE

**Relevant legal provisions:**

EPC Art. 52(1), 56, 123(2)  
EPC R. 103(1)(a), 116

**Keyword:**

Admissibility of experimental evidence submitted with the Respondent's reply to the statement of the grounds of appeal: yes  
Inventive step (main request): no  
Added subject-matter (auxiliary requests 1, 3, 7, 9 and 10): yes  
Inventive step (auxiliary requests 2, 4, 5, 6 and 8): no  
Inventive step (auxiliary request 11): yes - optimization not suggested in the prior art  
Refund of the appeal fee: no - no procedural violation - admission of late-filed experimental report by the Opposition Division

**Decisions cited:**

G 0007/93, T 0741/91

**Catchword:**



**Beschwerdekammern  
Boards of Appeal  
Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 2082/11 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 8 January 2014**

**Appellant:** UNILEVER N.V.  
(Opponent) Weena 455  
3013 AL Rotterdam (NL)

**Representative:** Kan, Jacob Hendrik  
Unilever Patent Group  
Olivier van Noortlaan 120  
3133 AT Vlaardingen (NL)

**Respondent:** The Procter & Gamble Company  
(Patent Proprietor) One Procter & Gamble Plaza  
Cincinnati, OH 45202 (US)

**Representative:** Samuels, Lucy Alice  
Gill Jennings & Every LLP  
The Broadgate Tower  
20 Primrose Street  
London  
EC2A 2ES (GB)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
6 July 2011 concerning maintenance of the  
European Patent No. 1720969 in amended form.**

**Composition of the Board:**

**Chairman:** B. Czech  
**Members:** L. Li Voti  
U. Lokys

## Summary of Facts and Submissions

I. The present appeal is from the interlocutory decision of the Opposition Division concerning maintenance of the European patent no. 1 720 969 in amended form.

II. Claim 1 according to the set of claims (submitted as main request with telefax of 19 April 2011) held allowable by the Opposition Division reads as follows:

*"1. A granular laundry detergent composition comprising:*

*(i) from 5 wt% to 55 wt % anionic deterative surfactant; and*

*(ii) from 0.5 wt % to 10 wt % non-ionic deterative surfactant; and*

*(iii) from 0.5 wt % to 5 wt % cationic deterative surfactant; and*

*(iv) from 0 wt % to 4 wt % zeolite builder; and*

*(v) from 0 wt % to 4 wt % phosphate builder,*

*wherein the composition comprises:*

*(i) a first surfactant component in particulate form comprising an anionic deterative surfactant and comprising less than 10%, by weight of the first component, of a cationic deterative surfactant; and*

*(ii) a second surfactant component in particulate form comprising a cationic deterative surfactant, and comprising less than 10%, by weight of the second surfactant component, of an anionic deterative surfactant."*

III. In the notice of opposition the Opponent had sought the revocation of the patent on the ground of Article 100(a) EPC 1973, for lack of novelty and inventive step.

The objections raised were based *inter alia* on the disclosures of the following documents:

D1: WO 97/43366 A1 and

D4: WO 98/53037 A1.

IV. At the oral proceedings on 19 May 2011, the Opposition Division decided to admit a late filed experimental report D7. Concerning the admissibility of D7, the Opposition Division held in essence that:

- the evidence D7, submitted by the Patent Proprietor one day before the oral proceedings, had been filed as a reply to a clear request by the Opposition Division contained in the attachment to the summons for oral proceedings; therefore, the Opponent could not be considered to have been taken by surprise by the late introduction of said evidence;
- moreover, D7 was "relatively very simple to interpret" and "*prima facie* relevant".

As regards inventive step the Opposition Division found that

- the evidence D7 was not apt to show that the claimed subject-matter provided a surprising advantage over the compositions disclosed in document D1; however, it confirmed that the technical problem solved by the claimed invention consisted in the provision of an alternative granular laundry detergent composition having a good dissolution profile;
- since document D1 concerned the provision of a granular detergent composition having improved cleaning

and stain removal and did not contain any indication about the dissolution profile of the disclosed compositions, this document could only be considered to represent an incidental disclosure; the other cited documents did not address either the dissolution profile of the disclosed compositions;

- consequently, the skilled person would not have found any guidance in document D1 or in any other of the cited documents for modifying the composition of example 4M of D1 in order to arrive to an alternative granular laundry detergent composition having good dissolution profile and possessing the combination of features of claim 1 at issue;

- therefore, the amended claims according to the then pending main request complied with all the requirements of the EPC.

V. In its statement setting out the grounds of appeal, the Appellant submitted that the Opposition Division had committed a substantial procedural violation in admitting the experimental report D7, a copy of which was handed over to the representative at the oral proceedings. Moreover, it maintained that the claimed subject-matter lacked an inventive step.

VI. In its reply of 20 March 2012, the Respondent (Patent Proprietor) rebutted the objections raised. It defended the patent in the version held allowable by the Opposition Division but also filed fifteen sets of amended claims as auxiliary requests 1 to 15. It rebutted the allegation that a procedural violation had occurred in admitting D7, but also submitted a new experimental report D8.

Claim 1 according to auxiliary request 1 differs from claim 1 according to the main request insofar as it contains the following additional wording appended to it:

*"; and wherein the first surfactant component is:  
(a) in the form of an agglomerate or an extrudate and comprises from 20% to 65%, by weight of the first surfactant component, of an anionic detergent surfactant; or  
(b) in spray-dried form and comprises from 10% to 30 %, by weight of the first surfactant component, of anionic detergent surfactant;  
and the second surfactant component is in the form of an agglomerate and comprises from 5% to 50%, by weight of the second surfactant component, of cationic detergent surfactant."*

Claim 1 according to auxiliary request 2 differs from claim 1 according to the main request insofar as the *"first surfactant component in particulate form"* is additionally required to be *"free from cationic detergent surfactant"* and the *"second surfactant component in particulate form"* is required to be *"free from anionic detergent surfactant"*.

Claim 1 according to auxiliary request 3 differs from claim 1 according to auxiliary request 1 insofar as the *"second surfactant component in particulate form"* is required to be *"free from anionic detergent surfactant"*.

Claim 1 according to auxiliary request 4 differs from claim 1 according to the main request in that the respective upper limit of the ranges for the components (iv) zeolite builder and (v) phosphate builder is in

each case lowered to "**3 wt%**".

Claim 1 according to auxiliary request 5 differs from claim 1 according to the main request insofar as it requires additionally that "*the weight ratio of anionic deterative surfactant to non-ionic deterative surfactant is less than 8:1*".

Claim 1 according to auxiliary request 6 differs from claim 1 according to auxiliary request 5 insofar as the range specified for the relative amount of non-ionic deterative surfactant (ii) is narrowed to "*from 1 wt% to 7 wt%*" and the range specified for the relative amount of cationic deterative surfactant (iii) is narrowed to "*from 0.5 to 2 wt%*".

Claim 1 according to auxiliary request 7 differs from claim 1 according to auxiliary request 1 insofar as the respective upper limit of the ranges for the components zeolite builder (iv) and phosphate builder (v) is in each case lowered to "**3 wt%**".

Claim 1 according to auxiliary request 8 differs from claim 1 according to the main request in that the "*first surfactant component in particulate form*" is required to be "*free from cationic deterative surfactant*" and the "*second surfactant component in particulate form*" is required to be "*free from anionic deterative surfactant*" and in that the upper limit of the ranges for the components zeolite builder (iv) and phosphate builder (v) is in each case lowered to "**3 wt%**".

Claim 1 according to auxiliary request 9 differs from claim 1 according to auxiliary request 1 in that the "*second surfactant component in particulate form*" is



required to be "*free from anionic deterative surfactant*" and the respective upper limit of the ranges for the components zeolite builder (iv) and phosphate builder (v) is lowered to "**3 wt%**".

Claim 1 according to auxiliary request 10 differs from claim 1 according to auxiliary request 1 insofar as it requires additionally that "*the weight ratio of anionic deterative surfactant to non-ionic deterative surfactant is less than 8:1*".

Claim 1 according to auxiliary request 11 differs from claim 1 according to the main request in that the "*first surfactant component in particulate form*" is required to be "*free from cationic deterative surfactant*", in that the "*second surfactant component in particulate form*" is specified to be "*free from anionic deterative surfactant*", and in that "*the weight ratio of anionic deterative surfactant to non-ionic deterative surfactant is less than 8:1*".

Dependent claims 2 to 21 of auxiliary request 11 are directed to particular embodiments of the granular laundry detergent composition of claim 1.

VII. In a communication issued in preparation for the forthcoming oral proceedings, the Board informed the parties *inter alia* of its provisional opinion that:

- the admission of late filed evidence D7 was a matter of the discretionary power of the Opposition Division under Article 114(2) EPC; therefore, the Opposition Division had the power to decide whether or not to admit the evidence D7 into the proceedings; in the present case, it did not appear that the Opposition Division had exercised its discretion inappropriately,

e.g. by applying wrong criteria, and that in doing so it had gone beyond its discretionary remit;

- the Opponent had had the opportunity to challenge the admissibility of the evidence D7 at the oral proceedings of 19 May 2011 and there was no indication on file that the representative of the Opponent had not been given sufficient time to study the content of D7, or that he had identified specific technical questions arising from D7 that he could not have answered without calling on an expert of the Opponent; in fact, he did not request an adjournment of the oral proceedings; consequently, in the Board's view, the Opposition Division apparently had not committed a substantial procedural violation in admitting the experimental report D7 into the proceedings at the hearing;

- the new evidence D8, submitted by the Respondent in its reply to the statement of the grounds of appeal, could be considered to constitute a reply to the statement of the grounds of appeal and to address the criticism (concerning relevance) indicated in the decision under appeal as regards the experimental report D7; therefore, it appeared to be admissible;

- the Respondent had to be prepared to discuss at the oral proceedings also any possible issue arising with regard to the admissibility of the fifteen auxiliary requests submitted with letter of 20 March 2012, to their compliance with the requirements of Articles 84 and 123(2) EPC, and to the issue of inventive step.

VIII. In response, the Appellant maintained in its letter of 10 December 2013 that in admitting D7 to the proceedings the Opposition Division had committed a substantial procedural violation and requested that the

issue of admissibility of late filed evidence as in the present case be addressed in the decision. It also submitted that the new experimental report D8 was not to be admitted into the proceedings in view of its late filing. Moreover, it withdrew its request for oral proceedings, announced that it would not attend the oral proceedings and requested "a decision on the file as it stands".

- IX. Oral proceedings before the Board were held on 8 January 2014 in the absence of the Appellant.
  
- X. The Appellant requested in writing that the decision under appeal be set aside and the patent be revoked in its entirety for lack of inventive step. Furthermore, it requested the refund of the appeal fee pursuant to Rule 103(1)a) EPC.

The Respondent requested that the appeal be dismissed or, in the alternative, that the patent be maintained on the basis of the claims according to one of the auxiliary requests 1 to 15 submitted with the letter dated 20 March 2012.

- XI. The arguments of the parties of relevance here can be summarised as follows:

The **Appellant** submitted in writing that

- it had received the experimental report D7 only during the oral proceedings of 19 May 2011; this late filed evidence should not reasonably have been admitted by the Opposition Division since:

- in the summons to attend oral proceedings the Opposition Division had set the 19 April 2011 as

final date for filing a written submission;

- D7 had been filed too late without any valid excuse and was a blatant "ambushing" act;
- the evidence was not *prima facie* relevant;
- the filing of such evidence one day before oral proceedings was an abuse of procedure (reference was made in this respect to the decision T 741/91 of 22 September 1993);

- therefore, in deciding to admit the experimental report D7, the Opposition had committed a substantial procedural violation justifying the reimbursement of the appeal fee.

As regards the issue of inventive step with regard to the subject-matter of claim 1 according to the main request, the Appellant submitted that

- the experimental evidence D7 did not credibly show any technical advantage of the claimed subject-matter over the composition of example 4M of document D1 taken as closest prior art; the experimental evidence D8 was late filed and was not, therefore, to be admitted and considered;

- hence, the technical problem underlying the invention could only be seen in the provision of an alternative granular laundry detergent composition comprising anionic deterative surfactant and having a good fabric-cleaning performance, especially a good greasy stain cleaning performance, good whiteness maintenance, and very good dispensing and dissolution profiles;

- it would have then been obvious for the skilled person, faced with the above mentioned technical problem, to modify the composition of example 4M of document D1 by considering the other granular laundry detergent compositions and their preparation methods disclosed in the same document, for example that of example 3I, and/or the teaching of the other prior art documents, for example the teaching of document D4, such as to arrive at the subject-matter of claim 1 according to the Respondent's main request.

The Appellant did not submit any argument regarding substantive issues with respect to auxiliary requests 1 to 15.

The **Respondent** submitted that

- the experimental report D8 was filed as a reply to the decision of the Opposition Division in which the experimental report D7 had not been considered to be suitable for showing a surprising technical advantage over the composition 4M of document D1;

- in the light of the experimental results contained in D8 the invention could be considered to have solved the technical problem of improving the dissolution properties of a granular laundry detergent composition as disclosed in document D1;

- neither document D1 nor the other cited documents contained any teaching that would have prompted the skilled person to separate the cationic and anionic surfactants in different granules in order to improve the dissolution properties of the overall granular laundry detergent composition;

- therefore, the subject-matter of claim 1 according to the main request involved an inventive step.

As regards the observations of the Board concerning the lack of basis for the amendments contained in auxiliary requests 1, 3, 7, 9 and 10 and the fact that the experimental evidence D8 concerned granular detergent compositions wherein the anionic and cationic surfactants were only contained in separate granules, the Respondent submitted at the oral proceedings that

- said amendments were supported by the passages contained in pages 6 and 7 of the original description and by the examples;

- moreover, the results according to D8 demonstrated that a surprising technical advantage was achieved at least for those laundry detergent compositions which contained granules comprising cationic surfactants and no anionic surfactants and granules comprising anionic surfactants and no cationic surfactants (auxiliary requests 2, 8 and 11);

- moreover, the compositions with a weight ratio of anionic surfactants to non-ionic surfactants of less than 8:1 (auxiliary requests 5, 10 and 11), which ratio was different from that of the composition of example 4M of document D1, provided the additional technical benefit indicated in paragraph [0013] of the patent in suit, which benefit was not to be expected in the light of the teaching of the prior art.

In the Respondent's view, at least the subject-matter of claim 1 according to auxiliary request 11, which concerned compositions containing granules comprising cationic surfactants but no anionic surfactants and

granules comprising anionic surfactants but no cationic surfactants, also having a weight ratio of anionic surfactants to non-ionic surfactants of less than 8:1, and containing no zeolite and phosphate builders or only a limited content thereof, amounted to an optimization of the composition of example 4M of document D1 in terms of dispensing, dissolution and performing properties, which could not be considered to be obvious in the light of the teaching of the prior art.

## **Reasons for the Decision**

### *Admissibility of experimental evidence D8*

1. Experimental report D8 was submitted with the Respondent's reply to the statement of the grounds of appeal.
  - 1.1 The Appellant considered that D8 should not be admitted into the proceedings in view of its late filing, without providing further arguments in this respect.
  - 1.2 As explained in the Respondent's letter, experimental report D8 was filed because the significance of the data presented in D7 with respect to the question of inventive step had been called into question by the Opponent (minutes of the oral proceedings before the Opposition Division, page 2, 1st paragraph) and by the Opposition Division in the decision under appeal (reasons point 4.5). The experimental report D8 was filed in reaction thereto and to further corroborate the earlier statements of the Patent Proprietor concerning the effects achieved. It describes the testing of compositions which also include non-ionic

surfactant as required by claim 1 at issue and hence it contributes to the convergence of the debate on inventive step.

- 1.3 The Board, in the exercise of the discretionary power conferred on it by Articles 114(2) EPC and 12(4) RPBA, thus decided to admit D8 into the proceedings despite its late filing.

*Admissibility of the Respondent's auxiliary requests 1 to 11*

2. The auxiliary requests at issue were filed with the Respondent's reply to the statement of grounds of appeal.
  - 2.1 Their admissibility was not challenged by the Appellant.
  - 2.2 The Board considers their filing as a precautionary attempt to claim the concept of the invention in gradually narrower form, raising no unexpected issues of particular complexity.
  - 2.3 The Board thus decided to admit these requests into the proceedings despite their late filing (Articles 114(2) EPC and 12(4) RPBA)

*Respondent's main request*

3. Inventive step
  - 3.1 The invention
    - 3.1.1 The invention concerns a granular laundry detergent composition comprising anionic, cationic and non-ionic deterative surfactants and low levels, or no, zeolite



builders and phosphate builders (see paragraph [0001] and claim 1 of the patent in suit).

3.1.2 The aim of the invention as stated in the patent in suit (see paragraph [0005]) is to provide such compositions having *"a good fabric cleaning performance, especially a greasy stain cleaning performance, good whiteness maintenance, and very good dispensing and dissolution profiles"*.

3.2 Closest prior art

3.2.1 Both parties considered document D1 and, in particular, the composition of example 4M thereof, to represent the closest prior art.

Considering the similarities between the invention and D1 in terms of the compositions concerned and the issues addressed, the Board has no reason to take a different stance.

3.2.2 Indeed, the granular laundry composition according to example 4M comprises, by weight, 10% anionic deterative surfactants (i), 0.5% non-ionic deterative surfactants (ii) and 1.7% cationic deterative surfactants (iii) and it does not comprise zeolite builders (iv) and phosphate builders (v). Moreover, document D1 specifically relates (see page 2, lines 28 to 36) to compositions having

- improved dispensing properties which eliminate or reduce the problems of solid detergent particles remaining in the washing machines and on washed clothes and
- a more efficient overall performance in terms of improved cleaning, stain removal and soil suspending.

3.2.3 For the Board, the fact that it is indicated in D1 that the dispensing of these compositions into the wash water is improved, as shown by the reduction or elimination of solid detergent particles remaining in the washing machine or on washed clothes, necessarily implies also the improvement of the dissolution properties of such granular laundry detergent compositions. This is confirmed by the preceding discussion contained in D1 (page 1, lines 24 to 31) as regards the issue of poor dispensing and low rate of dissolution existing in such high density detergent products because of the formation of gels upon contact with water.

Therefore, the Board finds that document D1 addresses all the technical problems identified in paragraph [0005] of the patent in suit and does not represent an "incidental" disclosure as held by the Opposition Division .

### 3.3 Technical problem according to the Respondent

The Respondent submitted with reference to the patent in suit (see point 3.1.2 *supra*) that, in the light of the composition of example 4M of D1 taken as the closest prior art, the technical problem consisted in providing a granular composition having improved dissolution properties.

### 3.4 Solution

As a solution to this technical problem, the patent in suit proposes the granular laundry detergent composition according to claim 1 at issue, which is characterised in particular in that it comprises "*(i) a first surfactant component in particulate form*

*comprising an anionic detergent surfactant and comprising less than 10%, by weight of the first component, of a cationic detergent surfactant; and (ii) a second surfactant component in particulate form comprising a cationic detergent surfactant, and comprising less than 10%, by weight of the second surfactant component, of an anionic detergent surfactant."*

3.5 Alleged success of the solution

3.5.1 The Respondent held that the provision of the cationic and anionic surfactants in distinct particles as defined in claim 1, not disclosed by D1 (example 4M), led to a surprising improvement of the dissolution properties of the overall granular laundry detergent composition.

3.5.2 According to the Respondent, the alleged surprising improvement was evidenced by the experiments described in the new experimental report D8.

3.5.3 The Board accepts that experimental report D8 shows that a granular laundry detergent composition containing granules comprising cationic surfactant and no anionic surfactant and granules comprising anionic surfactant and no cationic surfactant (Testing Product 1) has better dissolution properties as expressed in terms of percent residue on the washed fabric than a similar composition containing both cationic and anionic surfactants in the same granules (Testing Product 2).

The Board has no reason to doubt the validity of these tests, which was also not contested by the Appellant.

3.5.4 However, the Board remarks that, according to the wording of claim 1 at issue, the "*first surfactant component in particulate form*" comprises an **unspecified** amount of anionic deterative surfactant and less than 10% by weight of a cationic deterative surfactant. It may, therefore, comprise less than 10% by weight of anionic surfactant, for instance similar amounts of anionic and cationic surfactants.

Likewise, the so-called "*second surfactant component in particulate form*" comprises an unspecified amount of cationic deterative surfactant and less than 10% by weight of an anionic deterative surfactant. Therefore, it may comprise also less than 10% by weight of cationic surfactant, for instance similar amounts of anionic and cationic surfactants. According to the wording of claim 1 at issue, both "*surfactant components in particulate form*" may thus even be identical.

3.5.5 Claim 1 thus encompasses granular laundry detergent compositions wherein the cationic and anionic surfactants are both comprised in the same particles and in similar amounts. Such compositions do not correspond at all to that of Testing Product 1 of evidence D8, but rather to the comparative Testing Product 2 of evidence D8, which is considered by the Respondent itself to be representative of a composition according to example 4M of document D1.

Consequently, the experiments contained in D8 cannot demonstrate the achievement of a surprising advantage over the closest prior art for all the compositions encompassed by the broad ambit of claim 1 at issue.

3.6 Reformulation of the technical problem

3.6.1 Under these circumstances, the technical problem in the light of example 4M of document D1 must be re-formulated in less ambitious way, i.e. in more generic terms.

3.6.2 It can thus be seen in the provision of an alternative granular laundry detergent composition having similar dispensing, dissolution and performance properties, as it was suggested by the Appellant in its statement of grounds of appeal.

3.7 Success of the solution

The Board has no reason to doubt that a composition with all the features of claim 1 at issue indeed solves this technical problem. This was not disputed.

3.8 Obviousness

3.8.1 It remains thus to be assessed whether or not it would have been obvious for a skilled person trying to solve the technical problem posed, to modify the composition of example 4M of document D1 in a manner leading to a composition falling within the terms of claim 1 at issue.

3.8.2 It is undisputed that the composition of example 4M of D1 comprises anionic deterative surfactants (i), non-ionic deterative surfactants (ii) and cationic deterative surfactants (iii) in amounts in accordance with the wording of claim 1 at issue and that it does not comprise zeolite builders (iv) and phosphate builders (v), as also encompassed by the wording of claim 1.

However, the description of document D1 does not specify how the granular composition of example 4M has been prepared. Therefore, it does not disclose that the cationic and anionic surfactants are contained at least partially in separate granules as required by claim 1 at issue or if they are both contained within the same granules.

The skilled person, faced with the above mentioned technical problem, would thus, when considering the whole content of D1, only have to look for a specific way of preparing said composition 4M. In doing so, he would, first of all, consider the preparation methods disclosed with respect to other examples of granular laundry detergent compositions described in the same document. For example, example 3I (pages 51 and 52 of D1) discloses a granular laundry detergent composition obtained by mixing a blown powder containing cationic surfactants but no anionic surfactants, an agglomerate containing anionic surfactants but no cationic surfactants as well as a spray-on and dry additives.

Therefore, in the Board's judgement, the most obvious thing the skilled person would try when putting into practice example 4M, notwithstanding compositional differences between the examples 4M and 3I (e.g. the different zeolite builder content of 13% in example 3I versus 0% in example 4M), is to apply the specific way of preparation of example 3I to the composition of example 4M, in order to provide an alternative granular laundry detergent composition having similar dispensing, dissolution and performance properties. Thereby, the skilled person would arrive at a composition falling within the terms of claim 1 at issue.

3.8.3 The Board thus concludes that the claimed subject-matter does not involve an inventive step (Articles 52(1) and 56 EPC).

3.9 Hence, the Respondent's main request is not allowable.

*Auxiliary requests 1, 3, 7, 9 and 10*

4. Each claim 1 according to the auxiliary requests 1, 3, 7, 9 and 10 differs from claim 1 according to the main request at least insofar as it contains the following additional wording appended to it:

*"and wherein the first surfactant component is  
(a) in the form of an agglomerate or an extrudate and comprises from 20% to 65%, by weight of the first surfactant component, of an anionic deterative surfactant; or  
(b) in spray-dried form and comprises from 10 % to 30 %, by weight of the first surfactant component, of anionic deterative surfactant;  
and the second surfactant component is in the form of an agglomerate and comprises from 5% to 50%, by weight of the second surfactant component, of cationic deterative surfactant."*

5. Allowability of the amendments - Article 123(2) EPC

5.1 In the Respondent's view this wording was supported by the passages on page 6, lines 22 to 27 and page 6, last line to page 7, line 2 of the originally application as published and concerned further preferred features of the claimed invention, which would be understood by the skilled person to be generically applicable to the claimed invention.

Furthermore, the examples of the original application also contained support for these more specific embodiments.

5.2 The Board remarks that claim 1 according to the main request is already based on the combination of claims 1 and 3 of the application as filed with some preferred features disclosed on page 6, lines 20 to 21 and 33 to 34 of the description of the application as filed (published as WO 2005/083049 A2). It remains thus to be evaluated if the above mentioned additional features can also be considered to be disclosed in the application as filed in combination with the other features already incorporated into claim 1.

5.2.1 The original description, by referring to the preferred first surfactant component in particulate form, specifies that it is preferably present in the form of a spray-dried powder, an agglomerate, an extrudate or a flake (page 6, lines 17 to 19). Moreover, it specifies that if it is in the form of an agglomerate or an extrudate, then preferably it comprises from 20% to 65%, by weight of the first surfactant component, of an anionic deterative surfactant, whilst if it is in spray-dried form, it comprises from 10% to 30%, by weight of the first surfactant component, of anionic deterative surfactant (page 6, lines 22 to 27). These last requirements were incorporated into the wording of claim 1. Therefore, the original description indicates a preference for specific forms of the first component as well as for specific concentrations of anionic surfactant but only with respect to some selected forms.

5.2.2 As regards the second surfactant component in particulate form, the original description specifies



that it is preferably present in the form of a spray-dried powder, a flash-dried powder, an agglomerate or an extrudate (page 6, lines 31 to 32). Moreover, it specifies that if it is in the form of an agglomerate, it preferably comprises from 5% to 50%, by weight of the second surfactant component, of cationic deterative surfactant (page 6, last line to page 7, line 2). Also in this case the original description indicates a preference for specific forms of the second component as well as for specific concentrations of cationic surfactant only with respect to one selected form.

These passages do not thus specifically disclose a preferred combination of specific forms of the first and second surfactant in particulate form. At the oral proceedings the Board pointed out the relevance of the fact that the specific particulate form chosen for a given surfactant component will necessarily affect the solubility of the overall granular laundry detergent composition since, for example, extrudates prepared by using compressing forces would have different dissolution properties than agglomerates or spray-dried powders having similar compositions.

Therefore, the claimed combination of a first surfactant in the form of an agglomerate or spray-dried particulate component with a second surfactant in the form of an agglomerate amounts to a specific selection which necessarily affects the properties of the claimed composition and is not disclosed as such in the passages mentioned by the Respondent, let alone in combination with the other preferred features referred to above and incorporated into claim 1 (see point 4 *supra*).

5.2.3 The Board concludes that such combination of features,

appearing in all the respective claims 1 at issue, is not directly and unambiguously derivable from the passages of the description indicated by the Respondent.

5.2.4 As regards the Respondent's argument that the examples of the original application supported the specific combination of features incorporated into the claims claims 1 at issue, the Board remarks that the granular laundry detergent compositions according to the examples concern

- the combination of a spray-dried powder containing a first surfactant (anionic) component with an agglomerated second surfactant (cationic) component and a further first surfactant (anionic) component in flake form (see example 1, pages 15 - 17) or
- the combination of a spray-dried second surfactant component with an agglomerated first surfactant component (see example 2, pages 18 - 20), or
- the combination of first surfactant components in spray-dried form and in flake form with an agglomerated second surfactant component (example 7, pages 21 - 23).

None of the examples discloses a combination of a first surfactant component in agglomerated form or in extrudate form with a second surfactant component in agglomerated form as required by the respective claims 1 at issue.

Consequently, even considering the examples of the application as filed, the claimed combinations of first and second surfactant components are not directly and unambiguously derivable therefrom.

5.2.5 The Board thus concludes that the respective amended claims 1 according to each of auxiliary requests 1, 3,

7, 9 and 10 do not meet the requirements of Article 123(2) EPC.

5.3 Hence, none of these auxiliary requests is allowable.

*Auxiliary request 2*

6. Claim 1 according to the second auxiliary request differs from claim 1 according to the main request in that the "*first surfactant component in particulate form*" is required to be "*free from cationic deterative surfactant*" and the "*second surfactant component in particulate form*" is required to be "*free from anionic deterative surfactant*".

7. Inventive step

7.1 As already indicated before, the Board accepts that experimental report D8 convincingly shows that a granular laundry detergent composition containing distinct types of granules, one comprising cationic surfactant but no anionic surfactant and the other comprising anionic surfactant but no cationic surfactant, has improved dissolution properties (expressed in terms of the percent residue on the washed fabric) compared to a similar composition containing both cationic and anionic surfactants within the same granules.

7.2 Since by virtue of its amended wording this concept is properly reflected in claim 1 at issue, the Board accepts that the subject-matter of claim 1 at issue convincingly solves, starting from the composition of example 4M of document D1, the more ambitious technical problem of providing a granular laundry detergent

composition having improved dissolution properties formulated by the Respondent (see point 3.3 *supra*).

7.3 As regards obviousness, it thus remains to be evaluated whether it would have been obvious for the skilled person to solve this technical problem by formulating the composition of example 4M of D1 such that it includes, on the one hand, granules comprising cationic surfactant and no anionic surfactant and, on the other hand, granules comprising anionic surfactant and no cationic surfactant, thereby arriving at a composition falling within the terms of claim 1.

7.3.1 As pointed out by the Respondent, document D1 does not contain any suggestion that the inclusion of the anionic and cationic surfactants in different granules, though specifically disclosed in example 3I, would provide any technical advantage in terms of dissolution properties.

7.3.2 However, as indicated by the Board during oral proceedings, it was already known from document D4 that cationic surfactants in powder form are sticky, and that the addition of such powders to a detergent matrix significantly impairs the dispensing properties of the product by forming sticky, viscous gels upon contact with water (see page 1, lines 15 to 21 of document D4). The skilled person would thus expect that the formation of such gels upon contact with water would negatively affect the dissolution of the overall granular composition, as acknowledged, for example, in document D1 (see point 3.2.3 above).

Document D4 teaches also how to provide spray-dried granules containing cationic surfactants (and no anionic surfactants), which are suitable as components

of a laundry product and have good dispensing properties (which necessarily includes also good dissolution properties (see D4, page 2, lines 4 to 13; paragraph bridging pages 6 and 7; examples 1 to 3)).

7.3.3 Therefore, the Board finds that it was obvious for the skilled person, in the light of the overall teaching of document D4, to prepare the composition of example 4M of document D1, not simply by adding a cationic surfactant to the other components of the composition, but by providing a separate spray-dried powder containing such a cationic surfactant and no anionic surfactant, as suggested in document D4, for example by following the teaching of example 3I of document D1 (relating to a composition containing spray-dried granules containing cationic surfactants and no anionic surfactants), and by providing agglomerate particles of anionic surfactants not containing any cationic surfactant as suggested by the same example 3I of D1, in order to provide a granular laundry detergent composition having improved solubility properties. By proceeding in this manner, the skilled person would thus arrive without the exercise of inventive ingenuity at a composition falling within the terms of claim 1 at issue.

7.3.4 Hence, in the Board's judgment, the subject-matter of claim 1 according to auxiliary request 2 does not involve an inventive step (Articles 52(1) and 56 EPC).

7.4 Auxiliary request 2 is thus not allowable either.

*Auxiliary requests 4 and 8*

8. Compared to the respective claims 1 according to the main request and auxiliary request 2, the respective

claims 1 according to auxiliary requests 4 and 8 are narrowed in scope by virtue of the lowered upper limit of the concentration range "0 wt.% to **3 wt.%**" (compared to "0 wt.% to **4 wt.%**") for the zeolite builder component (iv) and the phosphate builder component (v).

9. Inventive step

9.1 Since the closest prior art, i.e. composition 4M according to document D1, contains no zeolite builder (iv) and no phosphate builder (v), the amended features do not imply a further distinction of the claimed subject-matter over the closest prior art.

9.2 Therefore, the considerations of the Board regarding inventive step exposed with respect to the main request and to auxiliary request 2, respectively, apply *mutatis mutandis* to the auxiliary requests 4 and 8, respectively.

9.3 Therefore, the subject-matters of the respective claims 1 according to auxiliary requests 4 and 8 likewise do not involve an inventive step (Article 52(1) and 56 EPC).

9.4 Auxiliary requests 4 and 8 are thus not allowable either.

*Auxiliary request 5*

10. Claim 1 according to the auxiliary request 5 differs from claim 1 according to the main request insofar as the former additionally requires that the "weight ratio of anionic deterative surfactant to non-ionic deterative surfactant is less than 8:1".

11. Inventive step

11.1 As regards the effect allegedly achieved by the composition according to claim 1 at issue, the Respondent, referring to paragraph [0013] of the patent in suit, submitted that the claimed composition provided an increased anionic surfactant activity because of the selected weight ratio of anionic to non-ionic surfactant. Such an additional effect would be due to the fact that, with the selected ratio of anionic to non-ionic surfactants, the anionic surfactants would be less likely to precipitate out of solution in the presence of free calcium cations.

11.1.1 No corroborating evidence was, however, submitted for this effect. More particularly, experimental report D8 filed together with the request at issue, only describes (Testing product 2) the performance of a composition with a weight ratio of anionic to non-ionic of 15.7 : 0.9, which is far outside the claimed range of "*less than 8:1*".

11.1.2 In this respect the Board remarks that the claimed subject-matter, like that of claim 1 according to the main request, encompasses also granular laundry detergent compositions comprising particles containing cationic and anionic surfactants in similar amounts. Moreover, the claimed compositions may contain no zeolite or phosphate builders at all.

11.1.3 As acknowledged in the patent in suit, it was known in the art that anionic surfactants have the tendency to complex with free cations in the wash liquor and to precipitate especially in the absence of builders which have a high binding constant with cationic (see paragraphs [0003] and [0004]). However, for similar

reasons, the presence of cationic and anionic surfactants in the same particles increases the tendency of anionic surfactant to precipitate out of the solution (see paragraph [0017] of the patent in suit).

11.1.4 Therefore, in the Board's view, even accepting for the sake of argument that the selected weight ratio of anionic to non-ionic surfactants may provide the technical advantage mentioned in paragraph [0013] of the patent in suit in a granular laundry detergent composition wherein cationic and anionic surfactants are present in different particles, the Board is not convinced that this additional effect, attributable to the weight ratio of anionic to non-ionic surfactants in the claimed range, would actually be significant and compensate the drawback of anionic surfactant precipitation (paragraph [0017] of the patent) due to the unfavourable characteristics of some of the compositions encompassed by the wording of claim 1, i.e. those containing cationic and anionic surfactants in the same particles and in similar amounts.

11.1.5 As already mentioned above, no experimental evidence was submitted by the Respondent with respect to the alleged technical advantage mentioned in said paragraph [0013] of the patent in suit. Therefore, the Board concludes that said alleged additional technical advantage has not been convincingly established over the whole ambit of claim 1 at issue.

11.2 Hence, in the Board's judgement, starting from example 4M of document D1, the technical problem effectively solved by the compositions according to claim 1 at issue remains the one formulated in connection with the main request, i.e. the provision of an alternative



granular laundry detergent composition having similar dispensing, dissolution and performance properties.

11.3 Regarding obviousness, as already explained in point 3.8.2 above, it would have been obvious for the skilled person, to apply the specific way of preparation of example 3I to the composition of example 4M of D1 in order to provide an alternative granular detergent composition having similar dispensing, dissolution and performance properties. Therefore, it would have been obvious to provide as an alternative a composition containing at least part of the cationic and anionic surfactants in separate particles.

11.3.1 The composition of example 4M of D1 contains 10% by weight of anionic surfactants (LAS) and only 0.5% by weight of non-ionic surfactants (C25E5/C45E7), i.e. a weight ratio of anionic to non-ionic surfactants greater than 8:1. However, the skilled person trying to solve the stated technical problem would also consider the more generic teaching of with regard to the amount of anionic surfactants to be used as defined in claim 1 of document D1, i.e. 0.5% to 60% by weight of the detergent composition, and the disclosure of the other examples of D1, which describe compositions with various weight ratios of anionic to non-ionic surfactants, including ratios falling within the range according to claim 1 at issue (see e.g. example 4K).

11.3.2 Further modifying the composition of example 4M such as to bring the said ratio into the range of less than 8:1 was thus merely one out of several possible solutions readily available to the skilled person. Applying it to the composition of example 4M, and arriving, thereby, at a composition as defined in claim 1 at issue requires no inventive skills.

Therefore, the Board concludes that the skilled person, in order to arrive at a composition according to claim 1 at issue, merely had to follow the teaching of document D1.

11.3.3 Thus, the subject-matter of Claim 1 according to auxiliary request 5 does not involve an inventive step (Articles 52(1) and 56 EPC).

*Auxiliary request 6*

12. Claim 1 according to auxiliary request 6 differs from claim 1 according to auxiliary request 5 insofar as the range for the amount of non-ionic deterative surfactant (ii) was narrowed to "from **1** wt% to **7** wt%" and the range for the amount of cationic deterative surfactant (iii) was narrowed to "from 0.5 to **2** wt%".

13. Inventive step

13.1 Since it was not submitted that these additional characteristics would bring about any additional technical advantage with respect to the subject-matter of claim 1 according to auxiliary request 5, the convincingly solved technical problem underlying the claimed invention with respect to the closest prior art represented by example 4M of document D1 can again be formulated, in the Board's view, as the provision of an alternative granular laundry detergent composition having similar dispensing, dissolution and performance properties (see points 11.2 above).

13.1.1 The Board remarks that the composition of example 4M of document D1 contains 1.7% by weight of cationic surfactants and 0.5% by weight of non-ionic surfactants.

Therefore, the additional feature relating to an amount of cationic deterative surfactant (iii) of from 0.5 to 2 wt% was already complied with by the closest prior art represented by said example 4M of D1 and cannot support any alleged inventiveness of the claimed subject-matter.

13.1.2 As regards the amount of non-ionic surfactants, it would have been also obvious for the skilled person, faced with the above technical problem, to follow the teaching of D1 and to try amounts of such surfactants as used, for example, in other granular laundry detergent formulations contained in the same document. For example, it would be readily apparent to the skilled person that the composition of example 3I, already discussed previously in this decision, contains a total of 6% by weight of non-ionic surfactants (C45E7 + C25E3).

13.1.3 Therefore, it would have been a readily available and, hence, obvious option for the skilled person trying to solve the above mentioned technical problem, to choose, following the teaching of document D1, the combined amounts of cationic and non-ionic surfactants such as to arrive at a composition falling within the terms of claim 1 at issue.

As regards the other features of claim 1 at issue, the same arguments as exposed in points 11.3, 11.3.1 and 11.3.2 above with respect to auxiliary request 5 apply *mutatis mutandis* to this request.

13.1.4 Therefore, the Board concludes that the subject-matter of claim 1 at issue does not involve an inventive step (Articles 52(1) and 56 EPC).

13.2 Auxiliary request 6 is thus not allowable.

*Auxiliary request 11*

14. Claim 1 according to auxiliary request 11 differs from claim 1 according to the main request insofar as the so-called "*first surfactant component in particulate form*" is free from cationic deterative surfactant and the so-called "*second surfactant component in particulate form*" is free from anionic deterative surfactant, and in that it requires additionally that "*the weight ratio of anionic deterative surfactant to non-ionic deterative surfactant is less than 8:1*".

15. Allowability of the amendments

15.1 The wording of claim 1 a issue finds a fair basis in the application as filed, since it is based on a combination of claims 1, 2 and 3, and the sentences on page 6, lines 21 to 22 and lines 34 to 35 of the description.

By virtue of these amendments the scope of the claims is narrower than the one of the claims as granted.

15.2 Dependent claims 2 to 21, are identical in wording to claims 6 to 25 of the application as filed, apart from the necessary modifications of the back-references.

15.3 There are not apparent clarity issues arising from these amendments.

15.4 The Board thus is satisfied that the amended claims according to auxiliary request 11 comply with the requirements of Articles 84 and 123(2) and (3) EPC.

16. Novelty

Novelty of claimed subject-matter was not an issue in the appeal proceedings, not even in respect of the broader claims according to the main request, and the Board sees no reason for calling novelty into question.

17. Inventive step

17.1 As regards this request, the Respondent submitted that in the light of example 4M of document D1 as closest prior art, the technical problem consisted in the provision of an alternative granular laundry detergent composition having **optimized** dispensing, dissolution and performing properties.

17.2 As regards the success of the solution according to claim 1 at issue (see point 14 *supra*), it is noted that claim 1 now at issue requires explicitly that the claimed composition contains particles comprising cationic surfactants and no anionic surfactants, as well as particles comprising anionic surfactants and no cationic surfactants. Hence, the previously discussed drawback (precipitation of anionic surfactants due to the presence of anionic and cationic surfactants in the same granules: see points 11.1.3 and 11.1.4 above) is less likely to occur.

17.2.1 Therefore, in the absence of evidence to the contrary, the Board has no reason to doubt and accepts as plausible that the invoked additional technical advantage concerning the improvement of the anionic surfactant activity, mentioned in paragraph [0013] of the patent in suit and attributed to the selected weight ratio of anionic to non-ionic surfactant of less

than 8:1, is indeed achieved throughout the whole ambit of claim 1.

- 17.2.2 The experiments contained in evidence D8 have been carried out with compositions having a weight ratio of anionic to non-ionic surfactants outside the range according to claim 1 at issue. It is nevertheless readily apparent from a comparison of the experiments of D8 with those of D7 (carried out on similar compositions but without the non-ionic surfactants), that the presence of the non-ionic surfactants (as submitted by the Respondent in writing and during oral proceedings) has hardly any effect on the dissolution of the detergent compositions at a weight ratios outside the claimed range of less than 8:1.
- 17.2.3 It the light of evidence D8 the Board thus accepts that the compositions of claim 1 at issue, containing particles comprising cationic surfactants but no anionic surfactants, as well as particles comprising anionic surfactants but no cationic surfactants, have better dissolution properties than compositions containing cationic and anionic surfactant in the same particles, whilst their propensity to incur dissolution problems due to free cations is reduced by virtue of the claimed weight ratio of anionic to non-ionic surfactant.
- 17.2.4 Considering also that the the Appellant submitted no argument calling into question the patentability of the subject-matter of the claims at issue, the Board thus has no reason to doubt that the above features of claim 1 contribute all together to successfully solve the technical problem posed.
- 17.3 As regards obviousness, neither document D1 nor any of

the other prior art documents relied upon by the Appellant contains any suggestion for formulating a granular composition with all the combined features of claim 1 at issue in order to optimize the composition of example 4M of document D1 in terms of dispensing, dissolution and performing properties.

17.4 Therefore, the Board concludes that the subject-matter of claim 1 at issue involves an inventive step (Articles 52(1) and 56 EPC).

17.4.1 Consequently, the subject-matter of claims 2 to 22 dependent on claim 1 is also inventive.

*Request for reimbursement of the appeal fee*

18. The Appellant held that in deciding to admit into the proceedings experimental report D7, a copy of which it had only received at the oral proceedings of 19 May 2011, the Opposition Division had committed a procedural violation, which justified the reimbursement of the appeal fee in accordance with Rule 103(1)a EPC.

18.1 As pointed out by the Appellant, EPO Form 2310 of the summons to oral proceedings bears the indication "The final date for making written submissions and/or amendments (R. 116 EPC) is 19 April 2011".

18.1.1 Rule 116 EPC stipulates that a final date for making written submissions in preparation for the oral proceedings must be fixed upon issuance of the summons.

However, Rule 116 EPC, also indicates that "New facts and evidence presented after that date need not be considered...". This wording implies that facts and evidence presented after the "final date" indicated in

the summons to oral proceedings may still be admitted by the Opposition Division in the exercise of the discretionary power conferred to it by Article 114(2) EPC.

18.1.2 The Opposition Division thus had the power to decide whether to admit the late-filed evidence D7 into the proceedings or not. Hence, the mere fact that D7 was admitted although it was filed after the date set in EPO Form 2310 does not, as such, necessarily amount to a procedural violation.

18.2 As acknowledged by the Appellant in its reply to the summons, it is established case law of the Boards of Appeal of the EPO that a board of appeal should overrule the way in which a department of first instance department has exercised its discretion only if it concludes that it has not done so in accordance with the right principles or in an unreasonable way, and has thus exceeded the proper limits of its discretion (see e.g. decision G 0007/93, OJ 94, 775, reasons point 2.6).

18.2.1 It is thus not the task of the board of appeal to review all the facts and circumstances of the case as it were in the place of the department of first instance and to decide whether or not it would have exercised such discretion in the same way.

18.2.2 In the present case, the Opposition Division has, however, clearly indicated in its decision (point 2 of the reasons) why it has decided to admit evidence D7 (emphasis added by the Board):

"The 2 pages data of D7 **responded** to a clear **request** attached to the **summons** for oral proceedings **to support**



**inventive step**, the filing of such an experimental report was thus **foreseeable**, and these data is **relatively simple to interpret**. D7 has been considered furthermore to be **prima facie relevant because it seems to demonstrate the alleged technical effect of the distinguishing feature over D1**. Thus despite its late introduction, the Opponent has not been considered to be taken by surprise by said introduction and the late filed evidence is considered to be prima facie relevant."

18.2.3 For the Board, it emanates from these reasons that the Opposition Division has not exercised its discretion applying wrong criteria or in an unreasonable way.

18.2.4 The mere fact that D7, once admitted, turned out, in the course of the subsequent debate, to be unsuitable for demonstrating a **surprising** effect attributable to the feature distinguishing the claimed subject-matter over the closest prior art D1 (point 4.5 of the reasons of the decision under appeal), has no bearing on the above conclusion since, as also explicitly indicated in the decision under appeal, D7 was admitted because it was **prima facie** relevant and was actually considered to "indicate that there is good presumption that the purpose of the invention" (i.e. "good dissolution profiles") is achieved (points 4.2 and 4.5 of the reasons).

18.2.5 Moreover, the Board observes that there is also no evidence on file showing that the evidence D7 was submitted late on purpose, in an attempt to "ambush" the other party. In fact, the evidence was submitted in reply to the provisional opinion expressed by the Opposition Division in the communication annexed to the summons to oral proceedings, according to which "in the

absence of any experimental data" the subject-matter of the granted claims would appeared to be obvious. Having to provide comparative experimental data always takes a certain amount of time, as pointed out by the Patent Proprietor before the Opposition Division.

- 18.2.6 Hence the Board has no reason to consider that the Patent Proprietor committed an abuse of procedure in filing D7 at such a late stage of the proceedings.
  
- 18.3 Finally, for the sake of completeness, the Board remarks that the Opponent had the opportunity to challenge the admissibility of D7 in view of its late filing and was heard regarding this issue during the oral proceedings of 19 May 2011.
  - 18.3.1 In this respect there is no indication in the file that the representative of the Opponent was refused sufficient time to study the content of D7 on the day of the oral proceedings, or that he identified any specific technical questions arising from D7 that he could not answer without calling on a technical expert. It emanates from the minutes of said oral proceedings (page 2, top paragraph) that the Opponent were also heard concerning the relevance of D7 and, in this context, actually criticised specifically the absence of non-ionic deterative surfactant in the tested mixtures, which issue was then further debated.
  
  - 18.3.2 Faced with the Opposition Division's decision to admit D7 into the proceedings, the Opponent did **not** make use of the procedural possibility to react by requesting an adjournment of the oral proceedings and/or the continuation of the opposition proceedings in writing.
  
  - 18.3.3 The Board thus concludes that the Opponent's right to

be heard regarding the relevance of D7 concerning inventive step has also been respected by the Opposition Division.

18.4 In decision T 0741/91, cited by the Appellant, the Board entrusted with that case decided not to consider the experimental evidence filed by the Patent Proprietor only one day prior to the oral proceedings which had taken place before the Opposition Division (point 4.6 of the reasons), although, like in the present case, said experimental evidence had been admitted into the proceedings by the Opposition Division (see point III of the same decision) in support of inventive step.

18.4.1 As pointed out by the Appellant, the Board entrusted with said case found that "to file evidence at such a late date, which allows the other party only to consider and to respond to it only during the oral proceedings, is not an acceptable conduct by the submitting party and, therefore, the Opposition Division should have disregarded this evidence applying the discretion conferred upon it under Article 114(2) EPC."

18.4.2 The present Board observes, however, that in decision T 0741/91 some possibly relevant facts and circumstances of the case are not addressed, such as the technical complexity of the experimental report, the question of who or what triggered the late filing of said evidence and the question of whether the adverse party actually objected to the late filing of said evidence. Moreover, it is noted that in the case of T 0741/91, the Board concluded that the claimed subject-matter was inventive based on the data contained in the patent in suit alone. There was thus

apparently no particular need to consider the late filed experimental report.

18.4.3 Hence, it is not clearly apparent that the findings of this decision are directly applicable to the present case and its particularities.

18.5 Considering all the relevant facts and circumstances of the present case, the Board thus concludes that the Opposition Division did not commit any substantial procedural violation in admitting D7 into the proceedings and considering its contents in taking their decision.

18.6 Therefore, the Appellant's request for the refund of the appeal fee cannot be granted.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division with the order to maintain the patent on the basis of the claims according to the auxiliary request 11 submitted with the letter dated 20 March 2012 and a description to be adapted thereto where appropriate.
3. The request of the Appellant for refund of the appeal fee is dismissed.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated