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Datasheet for the decision of 29 May 2018

Case Number: T 0994/14 - 3.2.06

Application Number: 07112436.6

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Language of the proceedings: EN

Title of invention:
Dosing and dispensing device

Patent Proprietor:
The Procter & Gamble Company

Opponent:
Henkel AG & Co. KGaA

Relevant legal provisions:
EPC Art. 100(a), 54, 56, 123(2), 84
RPBA Art. 13(1)

Keyword:
Grounds for opposition - Novelty (no)
Inventive step - auxiliary requests 1-4 (no)
Amendments - added subject-matter - auxiliary request 5 (yes)
Claims - clarity - auxiliary request 6 (no)
Late-filed auxiliary requests 7, 8 - admitted (no)

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Case Number: T 0994/14 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 29 May 2018

Appellant: (Patent Proprietor)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, OH 45202 (US)
Representative:	Herzog, Fiesser & Partner Patentanwälte PartGmbB Isartorplatz 1 80331 München (DE)
Respondent: (Opponent)	Henkel AG & Co. KGaA Henkelstraße 67 40589 Düsseldorf (DE)
Representative:	Henkel AG & Co. KGaA CLI Patents Z01 40191 Düsseldorf (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 6 March 2014 revoking European patent No. 2014817 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairwoman	G. de Crignis
Members:	T. Rosenblatt
	W. Ungler

Summary of Facts and Submissions

I. The appellant (patent proprietor) filed an appeal against the revocation of European Patent No. 2 014 817 by the opposition division.

The opposition division had concluded, *inter alia*, that the subject-matter of the granted claim 1 lacked novelty in view of

D5: EP-A-0 230 079,

and that the subject-matter of amended claims 1 of auxiliary requests 1 to 4 did not involve an inventive step, considering not only D5 but also the state of the art known from, *inter alia*, the following documents:

D1: WO-A-93/21372,
D2: WO-A-92/09736,
D3: WO-A-00/24957,
D8: WO-A-00/20676,
D10: DE-A-35 12 050.

II. Together with the appeal grounds the appellant defended all its requests underlying the impugned decision and submitted two further auxiliary requests 5 and 6.

III. The parties were summoned to oral proceedings before the Board.

IV. In a communication sent in preparation for the oral proceedings, the Board informed the parties of its preliminary opinion on the case.

V. With its letter of 23 April 2018 the appellant submitted further arguments and auxiliary requests 7

and 8.

VI. Oral proceedings were held on 29 May 2018.

VII. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent maintained as granted (main request), auxiliarily that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 6 filed with the statement of grounds of appeal dated 26 June 2014, or on the basis of one of auxiliary requests 7 and 8 filed with letter dated 23 April 2018.

VIII. The respondent (opponent) requested that the appeal be dismissed. Furthermore, it requested that auxiliary requests 7 and 8 not be admitted into the proceedings.

IX. Claim 1 of the patent as granted reads:

"A dosing and dispensing device (1) comprising a double wall structure having an inner wall (10) and an outer wall (20), wherein the inner wall (10) defines a dosing chamber (12) with an opening (14) for filling and dispensing, and the outer wall (20) circumscribes the inner wall (10) at a line of intersection (30) so that an upper part of the dosing chamber lies on one side of the line of intersection (30), within the outer wall (20), and a lower part of the dosing chamber lies on the other side of the line of intersection (30), outside of the outer wall (20)."

Claim 1 of auxiliary request 1 comprises the following feature added at the end of claim 1 as granted:

"and wherein the free edge (22) of the outer wall (24)

defines an elliptical or oval shape."

In claim 1 of auxiliary request 2 the feature added in auxiliary request 1 is replaced by the following feature:

"and wherein at least part of the lower part of the dosing chamber is transparent or translucent."

In claim 1 of auxiliary request 3 the feature added before is again replaced by the following feature:

"and wherein the free edge (22) of the outer wall (24) is adapted to releasably connect with a product container by means of snap beads."

In claim 1 of auxiliary request 4 again the previously added feature is replaced by the features added in auxiliary request 1 ("elliptical or oval shape") and auxiliary request 2 ("transparent or translucent").

Claim 1 of auxiliary request 5 reads (here and in the following emphasis is added by the Board to highlight the amendments relative to granted claim 1):

"A dosing and dispensing device (1) comprising a double wall structure having an inner wall (10) and an outer wall (20), wherein the inner wall (10) defines a dosing chamber (12) with an opening (14) for filling and dispensing, and the outer wall (20) circumscribes the inner wall (10) at a line of intersection (30) so that **the line of intersection divides the dosing chamber into a dosing chamber upper part and a dosing chamber lower part, wherein the** upper part of the dosing chamber lies on one side of the line of intersection (30), within the outer wall (20), a lower part of the

dosing chamber lies on the other side of the line of intersection (30), outside of the outer wall (20), **and the volume between the dosing chamber and the outer wall defines a spill chamber (24), and wherein the free edge (22) of the outer wall is elliptical.**"

Claim 1 of auxiliary request 6 reads:

"A dosing and dispensing device (1) **for dosing and dispensing of viscous liquid products or gels** comprising a double wall structure having an inner wall (10) and an outer wall (20), wherein the inner wall (10) defines a dosing chamber (12) with an opening (14) for filling and dispensing, and the outer wall (20) circumscribes the inner wall (10) at a line of intersection (30) so an upper part of the dosing chamber lies on one side of the line of intersection (30), within the outer wall (20), and a lower part of the dosing chamber lies on the other side of the line of intersection (30), outside of the outer wall (20), **wherein the volume between the outer wall (20) and the upper part of the dosing chamber (12) defines a spill chamber (24) which retains any product overflow from the dosing chamber (12),**
and wherein the liquid products or gels have a neat viscosity, V_n, of from 1,000 mPas to 10,000 mPas as measured at 20 s^{-1}, and a diluted viscosity, V_d, that is less than or equal to 0.5 V_n as measured at 20 s^{-1}."

Claim 1 of auxiliary request 7 reads:

" A dosing and dispensing device (1) comprising a double wall structure having an inner wall (10) and an outer wall (20), wherein the inner wall (10) defines a dosing chamber (12) with an opening (14) for filling and dispensing, and the outer wall (20) circumscribes

the inner wall (10) at a line of intersection (30) so that **a line of intersection (30) divides the dosing chamber (12) into a dosing chamber upper part and a dosing chamber lower part, wherein the** upper part of the dosing chamber **(12)** lies on one side of the line of intersection (30), within the outer wall (20), and **the** lower part of the dosing chamber **(12)** lies on the other side of the line of intersection (30), outside of the outer wall (20), **wherein the free edge (22) of the outer wall (24) is elliptical, wherein the volume between the outer wall (20) and the upper part of the dosing chamber (12) defines a spill chamber (24), and wherein the lower part of the dosing chamber (12) is flexible, resilient and translucent.**"

Claim 1 of auxiliary request 8 reads:

"A dosing and dispensing device (1) comprising a double wall structure having an inner wall (10) and an outer wall (20), wherein the inner wall (10) defines a dosing chamber (12) with an opening (14) for filling and dispensing, and the outer wall (20) circumscribes the inner wall (10) at a line of intersection (30) so that **a line of intersection (30) divides the dosing chamber (12) into a dosing chamber upper part and a dosing chamber lower part, wherein the** upper part of the dosing chamber **(12)** lies on one side of the line of intersection (30), within the outer wall (20) **from the side view and the top view,** and the lower part of the dosing chamber **(12)** lies on the other side of the line of intersection (30), outside of the outer wall (20), **wherein the free edge (22) of the outer wall (24) is elliptical from a top view,**
wherein the free edge (22) of the outer wall (24) is perpendicular relative to a cross-section through the major axis and the minor axis of the dosing and

dispensing device (1),
wherein the volume between the outer wall (20) and the upper part of the dosing chamber (12) defines a spill chamber (24), and
wherein the lower part of the dosing chamber (12) is flexible, resilient and translucent."

X. The patent as granted and all of the auxiliary requests comprise a second independent claim, directed to a method of dosing and dispensing a laundry product, which is defined, *inter alia*, by the step of providing a device comprising the features of the respective device claim. Since the Board's decision on the present appeal can be taken only on the basis of the objections relating to the independent device claim, there is no need to reproduce the wording of the respective method claims here.

XI. The arguments of the appellant may be summarised as follows:

Main request

The expression "within the outer wall" meant that the dosing chamber was excluded to project axially beyond the free edge of the outer wall. This was the only possible interpretation, based on a consideration of the wording by a skilled person with a mind willing to understand, not desirous of misunderstanding (see T 1771/06), and according to the whole content of the patent (see T 1321/04). It was clear from the meaning of the term "within" itself, which described enclosure or containment and thus meant that the dosing chamber had to lie completely in the interior of the outer wall. Claim 1 related to a perspective image of the claimed device in side view in that it specified that

the upper and lower parts of the dosing chamber lay, respectively, to one and the other side of the line of intersection. In such a side view, the claimed condition of a dosing chamber lying within the outer wall could only be met if its upper rim did not project beyond the free edge of the outer wall. Moreover, since the line of intersection divided the dosing chamber into exactly two parts, no further part or portions of it could project beyond the outer wall. Such an understanding would require the presence of a further, intermediate part or portion, which was not defined and thus not included in the scope of claim 1. The description and the drawings, which were consistent with the claim wording, disclosed that the entire upper part of the dosing chamber lay completely within the outer wall. Any diverging interpretation of the claim would not be supported by the wording of the claim and introduce additional embodiments.

Based on this understanding the subject-matter of claim 1 was new over, *inter alia*, D5. The device of D5 had a dosing chamber extending beyond the free edge of the outer wall, rather than lying "within" it.

Auxiliary request 1

The feature added to claim 1 solved the objective problem of improving the handling of the device. Neither D5 on its own nor D2, D3 or D8 would have led the skilled person to make the outer wall of the device of D5 elliptical or oval in shape. Such modification would have compromised the function of the threads arranged on the interior face of its outer wall. Moreover, the other documents disclosed different features to improve the handling of their respective devices (see D2 or D3) or disclosed a rudimentary

elliptical shape for a different purpose (see D8).

Auxiliary request 2

According to paragraph 11 of the patent in suit a transparent wall helped with dosing accuracy. Although D10 disclosed transparent walls as a means of helping the user to see when the dosing chamber was close to overflowing, it would not have been obvious for the skilled person to make the device of D5 of transparent material in order to solve the problem of improving dosing accuracy. This problem was solved according to D10 only by the provision of appropriate markings.

Auxiliary request 3

In writing the appellant had argued that D5 did not suggest any other fastening means other than threads, and that also D8 would not have prompted the skilled person to adapt the free edge of the outer wall by means of snap beads, since it also considered other types of locks. No further comments in reply to the Board's preliminary opinion were submitted during the oral proceedings.

Auxiliary request 4

The two features added to claim 1 contributed to solving a single or common problem since an improved handling of the device also helped to improve dosing accuracy. For this reason the assessment of the inventive step of the subject-matter of claim 1 could not be based on a treatment of those features as dealing with partial problems.

Auxiliary request 5

A literal basis for the amendments to claim 1 was to be found in paragraphs 27 and 28 of the description. Other features mentioned in these paragraphs or shown in the figures did not need to be defined. The volume of the spill chamber was clearly independent of the further features added to claim 1. Moreover this volume was implicitly defined in the claim, at least by the implicit relative heights of the outer and inner walls. The shape of the line of intersection was irrelevant and did not need to be further defined, as the skilled person would have realised that it could have other shapes.

Auxiliary request 6

The feature added to claim 1 served to more clearly distinguish its subject-matter from the device disclosed in D5 in view of the products to be dispensed by it.

Auxiliary requests 7 and 8

The requests were submitted in view of a new objection first raised by the Board in the communication setting out its preliminary opinion.

The amendments to claim 1 of auxiliary request 7 were based on paragraphs 27 and 28. All features mentioned therein and illustrated in Figures 1, 2a, 2b had been added to claim 1.

In auxiliary request 8, the respective perspectives had been specified in addition to the above amendments such that the elliptic shape was more precisely defined, as

was the difference in height between the inner dosing chamber and the outer wall. The shape of the line of intersection was irrelevant, as already submitted for claim 1 of auxiliary request 5.

XII. The respondent's arguments may be summarised as follows:

Main request

The common meaning of the term "within" did not exclude an extension of the dosing chamber in axial direction beyond the free edge of the outer wall. The appellant's narrow interpretation was not disclosed or suggested in the patent; nor was it required in order to meet the purpose to be achieved by the device of the patent, i.e. to avoid spillage of laundry product.

Auxiliary request 1

The technical effect achieved by an elliptically shaped free edge of the outer wall remained unclear and, for that reason alone, could not be considered to involve an inventive step. The effects mentioned in the patent were rather speculative in nature and appeared to rely on other technical features or on a specific way of using the device. In any case, elliptically shaped dosing devices were well-known in the prior art as a means of improving the handling, as evidenced by D2, D3 and D8. The presence of additional features in the respective devices to further assist their handling would not compromise the generally known use of an elliptic shape.

Auxiliary request 2

Transparent walls, such as those suggested in, for example, D10, were a common feature employed to facilitate the dosing of products. Transparency did not exclude the provision of additional measuring marks.

Auxiliary request 3

A releasable fastening means using a snap connection was already suggested by D5 and also known from D8. The subject-matter of claim 1 was therefore not new; nor could it be considered to involve an inventive step.

Auxiliary request 4

The two features added to claim 1 solved two separate partial problems, namely, the problem of improving the handling of the device and the independent problem of facilitating the dosing of a laundry product. The solutions to both problems were obvious for the skilled person, as already argued in regard to the first and second auxiliary requests.

Auxiliary request 5

Paragraphs 27 and 28 of the description, to which the appellant had referred as a basis for the amendments in claim 1, related to the device disclosed in Figures 1 and 2 of the patent. This device comprised additional features which had not been included in the subject-matter of claim 1. The appellant had arbitrarily selected features from the disclosed device, resulting in subject-matter which, contrary to the requirement of Article 123(2) EPC, had not been disclosed in this particular combination in the patent in suit.

Auxiliary request 6

The features added to claim 1 related to the viscosity of the product to be dosed and dispensed by the claimed device and were therefore not suitable to structurally limit its subject-matter. Accordingly, the requirements of Article 84 EPC were not met.

Auxiliary requests 7 and 8

These requests should not be admitted because they amounted to a change in the subject-matter of the proceedings.

Moreover, the amendments to claim 1 of both requests did not overcome the objection under Article 123(2) EPC raised against the subject-matter of auxiliary request 5. For example, the specific line of intersection was not defined in any of the amended claims; nor was the spill chamber's volume or the difference in axial extension of the outer wall and the inner dosing chamber defined. Additionally, the geometrical definitions in claim 1 of auxiliary request 8 lacked clarity (Article 84 EPC).

Reasons for the Decision

Main request

1. The appellant contested the conclusion reached by the opposition division in the impugned decision that the subject-matter of claim 1 of the patent in suit lacked novelty (Article 54(1) and (2) EPC) in view of the

device disclosed in Figures 2 and 4 of document D5. In particular the appellant disputed that the known dosing and dispensing device comprised a dosing chamber having an upper part which lay "within the outer wall" of the device.

2. The appellant did not argue that any of the other features defined in claim 1 was not disclosed by D5. Nor could the Board find anything to suggest that this might be the case.

3. Therefore the only issue to be decided in regard to the main request is whether the feature in question, i.e. the feature "[... and the outer wall circumscribes the inner wall at a line of intersection so that] an upper part of the dosing chamber lies on one side of the line of intersection, within the outer wall, [and a lower part...]", is anticipated by the dosing and dispensing device of D5.

4. The device known from D5 comprises a double wall structure having inner and outer (cylindrical) walls. The inner wall defines a dosing chamber. It is undisputed that the outer wall circumscribes the inner wall at a line of intersection. The dosing chamber's upper part, lying on one side of the line of intersection of the two walls, extends axially beyond the plane defined by the free edge of the upper wall (see Figure 4 of D5).

5. In contrast, according to the single embodiment of the patent in suit, as shown in its sole three drawings, Figures 1, 2a and 2b, and, in particular, in the cross-sectional views of Figures 2a and 2b, the upper part of the dosing chamber terminates below the plane defined by the outer wall's free edge. The dosing chamber's

upper part thus lies completely within a three-dimensional space delimited by the outer wall and the plane defined by the outer wall's free edge. The appellant argued that only this specific arrangement corresponded to the true meaning of the expression "lies..., within the outer wall" in claim 1. A correct interpretation should result from a proper construction of the claim by a mind willing to understand, when taking into account the whole content of the patent.

6. The Board cannot concur with this narrow interpretation of the claim for the following reasons.

6.1 Although the Board agrees with the appellant that the claim should be understood by the skilled person with a mind willing to understand, it cannot find that a broader, technically meaningful interpretation of the crucial expression, as suggested by the respondent, acknowledged by the opposition division and finally confirmed here by the Board, could only be based on a desire of misunderstanding.

6.2 In fact, taking the wording of the claim alone, which is clear - at least in regard to the crucial expression (the respondent objected to the clarity of other wording in the claim in the context of an objection irrelevant for the decision to be taken here) - it is specified that "... the outer wall circumscribes the inner wall at a line of intersection so that an upper part of the dosing chamber lies on one side of the line of intersection, within the outer wall, ...". As understood by the skilled person, the normal, straightforward technical meaning of the crucial feature therein is that it limits the location of the dosing chamber's upper part, defined by the inner wall, to lie within the circumference of the outer wall. This

is implied by the wording "the outer wall circumscribes the inner wall ... so that an upper part ... lies ... within the outer wall".

Although it is clear to the skilled person that the inner wall and the outer wall have a finite axial extension, a structural limitation on their relative axial extensions is not implied by these terms, contrary to the appellant's submissions.

Nor does the definition of exactly two parts as constituting the dosing chamber according to claim 1 imply an axial extension limited to beneath the plane defined by the outer wall's free edge. Contrary to the appellant's contention, the very general expression "an upper part" does not in fact exclude that a feature identified as representing such "upper part" may generally be considered to have different sections or portions itself, such as, in the present case, a section or portion close to the line of intersection and an opposite (open) end section or portion, without necessarily thereby conflicting with the requirement of only two "parts". Such end section or portion could then lie on either side of the plane.

The Board also cannot see anything in the claim's wording which would limit the interpretation of its features to a description of the device in a side view.

The wording of claim 1 "upper part ... lies ..., within the outer wall, ..." therefore does not exclude an extension of the upper part of the dosing chamber axially beyond the plane defined by the free edge of the outer wall and thus encompasses any embodiment in which the dosing chamber's upper part is circumscribed by the outer wall, irrespective of the relative

extensions.

6.3 Moreover, as set out already in the Board's communication containing its preliminary opinion on the case and as also argued by the respondent, the wording of claim 1 should be interpreted broadly, rather than narrowly in the light of the description and the figures of the patent in suit. In particular, it cannot be understood to be limited in the present case to a meaning which might arise from some feature appearing only in the figures of a single specific embodiment, without being mentioned elsewhere.

The only wording used in the whole description in regard to the relevant expression does not differ from that in the claim. It does not contain any further information in regard to the relative extensions of the dosing chamber and the circumscribing outer wall either, let alone a definition of the expression "within the outer wall" or any other explicit statement giving it the sense suggested by appellant. In any event, the appellant has not indicated any basis for such definition and the Board was likewise unable to find one on its own motion.

The meaning suggested by the appellant could, if at all, only find some support in the figures of the patent in suit, in particular Figures 2a and 2b. However, as noted before, there is nothing in the claim or in the description which would lead the skilled person in the present case to diverge from the common meaning of the clear wording of the claim and come to a narrower understanding in the light of these figures.

Finally noted, as also argued by the respondent and not contested by the appellant, the Board observes that

this broader interpretation also does not compromise the achievement of the purposes of the device underlying the impugned patent. The broad interpretation therefore cannot be found to be contrary to an interpretation taking into account the whole content of patent in suit.

6.4 The fact that the broader interpretation of the claim encompasses embodiments which are not as such disclosed in the patent in suit is a normal consequence of claim drafting, which is commonly intended to define the subject-matter for which protection is sought in broader terms so as to obtain protection not only for the specific embodiment(s) disclosed.

7. Since the corresponding "upper part" of the dosing chamber in the device of D5 is circumscribed by the corresponding outer wall, it therefore lies "within the outer wall", according to the legitimate broad meaning given above.

As a consequence, the Board concludes that all features of claim 1 are known from the device of D5.

The subject-matter of claim 1 of the granted patent indeed lacks novelty, as rightly found by the opposition division.

The ground of opposition under Article 100(a) EPC thus prejudices the maintenance of the patent in view of the requirement of Article 54 EPC.

Auxiliary request 1

8. The feature "the free edge (22) of the outer wall (24) defines an elliptical or oval shape" added to claim 1

of auxiliary request 1 is not known from D5. Nor did the respondent argue that claim 1 lacked novelty in view of any other state of the art on file.

9. The appellant disputed in its appeal grounds that D5 was the closest prior art to the subject-matter of claim 1, submitting that D1 should be considered as the closest prior art instead.

In the communication setting out its preliminary opinion on the case, the Board provisionally concurred with the respondent's contrary view. Indeed, D5 specifically addresses the intention to provide a device for dispensing and diffusing, inherently also for dosing (see column 2, lines 8-13), which is easy to grip and manipulate (see column 2, lines 36-39) and which may be placed in the drum and recovered from it after washing (see col. 2, lines 43-53). Moreover, the device shown in Figure 4 of D5 has more technical features in common with the subject-matter of claim 1 (of all requests) than D1, since it presents, *inter alia,* the double walled structure consisting of an outer wall circumscribing the inner wall defining the dosing chamber.

The appellant did not put forward any additional counter-argument to refute the Board's provisional opinion. The Board therefore sees no reason to deviate from that opinion and therefore confirms it. D5 can thus be considered to represent the closest prior art to the subject-matter of claim 1.

10. It can remain undecided whether the added feature provides for any particular technical effect at all or whether, as the opposition division also wondered, it is merely an alternative configuration of the outer

wall's free edge to the circular free edge of the device known from D5. Because, even if it is conceded here, in the appellant's favour, that an elliptical or oval shape of the free edge of the outer wall (not even of the entire wall) improves the handling of the device, the combination of the features of claim 1 is obvious to the skilled person.

Elliptically or ovally shaped dosing and dispensing devices are generally known to be advantageous in view of their ergonomics. This is highlighted by their use in the devices of D2 (see page 7, line 1-4 or page 16, lines 5-9) or D3 (see page 4, line 1) and D8 (see figures). It would therefore have been obvious to the skilled person to consider these shapes for the purpose of improving the handling of the known device of D5, at least in those portions of it which do not compromise the function of the threads provided at some other portion of the device of D5. The outer wall's free edge is such a portion since it does not interfere with the function of the threads in D5.

The provision of other features for improving ergonomics and handling in the prior art devices of D2, D3 or D8 does not preclude the skilled person from employing these well-known shapes for this purpose.

The Board therefore comes to the same conclusion as reached in the impugned decision that the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC).

Auxiliary request 2

11. In claim 1 of auxiliary request 2, the feature undisputedly distinguishing the subject-matter of claim

1 from the closest prior-art device of D5 is that "at least part of the lower part of the dosing chamber is transparent or translucent".

12. The parties agreed that this feature provided for the technical effect of helping the user with dosing accuracy, as also mentioned in paragraph 11 of the patent in suit.

13. As already noted in the Board's provisional opinion, D10 envisaged, on page 8, lines 1 to 6, forming the entire dosing and dispensing device disclosed therein of a transparent material.

The appellant disputed that the skilled person, faced with the problem of helping the user with accurate dosing of laundry product, would have considered applying this feature to the device of D5 and thereby arrived in an obvious manner at the claimed combination of features. According to the appellant, dosing accuracy was achieved in D10 only by the provision of dosing markings (page 8, lines 8-13), whereas the use of transparent material mentioned in the preceding paragraph (lines 1-6) was disclosed only in relation to controlling the level of the laundry product in the device during filling in order to avoid unintentional overflow and spilling. The Board is not convinced by this argument.

In the same way as in D10, in the patent in suit too, accurate dosing of the liquid or gel to be applied is not achieved by a transparent (or translucent) material of the dosing chamber alone, but rather requires additional indicators (see last sentence of paragraph 10 of the patent). In any case, transparency is generally known, as exemplified here by D10, to assist

accurate dosing. It would thus have been obvious for the skilled person to employ this feature also in the device known from D5 and thereby arrive at the subject-matter of claim 1.

The Board therefore concludes that the subject-matter of claim 1 of auxiliary request 2 does not involve an inventive step (Article 56 EPC).

Auxiliary request 3

14. In claim 1 of auxiliary request 3, the only feature undisputedly distinguishing the subject-matter of claim 1 from the closest prior-art device of D5 is that "the free edge (22) of the outer wall (24) is adapted to releasably connect with a product container by means of snap beads."

15. As provisionally opined by the Board in its communication, D5 suggested using clipping means instead of threads for the same purpose as defined in claim 1 (see column 2, lines 28-33). Moreover, as it also considered in its provisional opinion, there is no apparent difference between "snap beads" and the protrusions or snaps suggested in D8, page 11, lines 16 to 17 and shown in Figure 6 by reference number 40 on device 10.

The appellant did not submit any further argument in reply to the Board's doubts, resulting from these considerations, that claim 1 of auxiliary request 3 could meet the requirement of Article 56 EPC.

The Board therefore sees no reason to deviate from the conclusion reached in the impugned decision. Indeed, starting from the device of D5, an objective problem

can be seen in providing a simple releasable connection between the dosing and dispensing device and the product container. At least D8 would prompt the skilled person to replace the threads in the device of D5 with the snap fastening and connection means disclosed therein. In the absence of any argument by the appellant to the contrary, the protrusions or snaps of D8 cannot be considered to be different from snap beads according to claim 1. The skilled person would thus arrive obviously, without the need for inventive skill, at the subject-matter of claim 1.

Claim 1 of auxiliary request 3 therefore also does not meet the requirement of Article 56 EPC.

Auxiliary request 4

16. Claim 1 of auxiliary request 4 combines the features of granted claim 1 and the two features added to it in auxiliary requests 1 and 2.

17. In essence, the appellant contested the reasoning of the opposition division that the two features did not contribute to the solution of a single technical problem and should therefore be considered to solve separate partial problems. The appellant argued that the specific combination of features, all working together without conflicting with each other, in order to solve all problems underlying the patent made the subject-matter inventive. In particular, it considered that achieving the improved handling properties, by way of an elliptical or oval shape of the outer wall's free edge, facilitated also accurate dosing.

The Board is not convinced by these arguments. In regard to the contention that this specific

combination solves all problems addressed in the patent in suit, this is not supported anywhere in the patent itself. On the contrary, the effects attributed to the two added features in the patent (col. 3, lines 9-11; and lines 16/17), in so far as they can be regarded as mentioned at all (see also point 10 above), are specifically considered in isolation from each other. There is no mention of any mutual influence, in particular not in regard to the impact of an elliptical or oval edge in view of dosing accuracy. The Board also considers that the shape of the upper wall does not have a plausible technical effect on the dosing accuracy and that the transparency or translucency of the lower part of the dosing chamber does not plausibly affect the handling properties of the entire device.

18. The opposition division was therefore justified in assessing the requirement of Article 56 EPC on the basis of partial problems. Since the solutions to both partial problems are considered to be obvious to the skilled person (see points 9, 10 and 12, 13 above), the subject-matter of claim 1 of auxiliary request 4 also does not involve an inventive step.

Auxiliary request 5

19. Compared with the granted version, claim 1 of auxiliary request 5 defines, *inter alia*, the following additional features "and the volume between the dosing chamber and the outer wall defines a spill chamber (24), and wherein the free edge (22) of the outer wall is elliptical".

Since this amendment is based on features taken from the description the Board has to decide whether the

requirement of Article 123(2) EPC is met.

20. According to the appellant literal support for the amendment could be found in paragraphs 27 and 28 of the description of the application as filed. Other features disclosed in these paragraphs would be recognised by the skilled person to be either inherent or unrelated to the claimed subject-matter.

21. The Board notes that claim 1 largely recites the wording of paragraphs 27 and 28 (reference is made to the published version of the application as filed). Paragraphs 27 and 28, however, relate to the specific dosing and dispensing device of the invention illustrated in Figures 1 and 2 (see also paragraphs 7 and 26 and the first sentence of paragraph 27). This device comprises a number of further features, which are not defined in claim 1. While these features have not been literally mentioned in the description, they are nevertheless functionally and structurally linked to the other features of this specific embodiment. For example, the line of intersection has a particular undulated shape along its circumference. Linked to this particular shape of the line of intersection is also the specific spill chamber. This has two bigger voluminous compartments which are formed along the major axis of the elliptically shaped and tapered outer wall and which are suitable to receive a considerable amount of product overflow from the dosing chamber. The spill chamber added to claim 1, in contrast, is only generally defined and remains undefined in regard to its volume (apart from the fact that it has a volume).

It is neither explicitly mentioned anywhere nor is it directly and unambiguously derivable from the application as a whole that the particular features

selected from the embodiment in combination with the features of granted claim 1 could constitute subject-matter of a separate invention.

It is also worthwhile noting that original and granted claim 2, which has been deleted in auxiliary request 5, defined the spill chamber in very similar wording to that added to claim 1, although it also defined a requirement in relation to its volume ("which retains any product overflow from the dosing chamber").

Contrary to the appellant's argument, the Board thus considers that the volume of the spill chamber, as disclosed in relation to the preferred embodiment or as defined by granted claim 2, is not specifically defined by related features in the claim. That the skilled person might also have considered any other shape of the line of intersection to be possible is also not convincing in view of the specific other features linked to this specific shape, as explained above.

The other feature added to claim 1, concerning the division of the dosing chamber in an upper and a lower part by the line of intersection, is irrelevant in this context. It has also not been argued that this feature makes any difference to the above considerations.

The Board thus concludes that the combination of features according to claim 1 of auxiliary request 5, omitting the above exemplified features of the specific embodiment, constitutes subject-matter which extends beyond the content of the application as filed, contrary to the requirement of Article 123(2) EPC.

Auxiliary request 6

22. In regard to the amendments introduced in claim 1 of auxiliary request 6, the Board had stated in the communication setting out its preliminary opinion that they appeared not to meet the requirement of Article 84 EPC.

Especially in regard to the features introduced at the end of claim 1, defining viscosity ranges of the product to be dosed and dispensed with the claimed device, it appeared unclear what structural limitation was defined for the device by these properties.

The appellant did not refute this objection, arguing only that the amendment had been introduced in view of the products to be dispensed with the device of D5.

The Board therefore has no reason to deviate from its preliminary opinion, which is hereby confirmed.

Auxiliary requests 7 and 8

23. Auxiliary requests 7 and 8 were submitted after the time limit for filing the appeal grounds (Article 12(1) and (2) RPBA) and therefore constitute an amendment to the appellant's case. According to Article 13(1) RPBA, any amendment to a party's case may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. In order to be in line with the requirement of procedural economy, amendments should be *prima facie* allowable in the sense that they at least overcome the objections raised against previous requests without

giving rise to any new ones.

24. The appellant justified the submission of these two auxiliary requests as an appropriate and necessary reaction to an objection allegedly raised for the first time by the Board in its preliminary opinion on the case. Indeed a new objection raised for the first time by the Board may in principle justify a further opportunity to react to such objection by submitting an appropriate amendment. However, that does not mean such an amendment will automatically be admitted into the proceedings; rather its admittance depends on the criteria set out in Article 13(1) RPBA (see above).

25. The subject-matter of claim 1 of auxiliary request 7 is similar to that of claim 1 of auxiliary request 5. Besides some other minor modifications which are irrelevant for the issue to be decided here, it additionally defines the feature "the lower part of the dosing chamber (12) is flexible, resilient and translucent."

As pointed out by the appellant, the added features find literal support in paragraph 28. The appellant was of the opinion that the inclusion of these features meant that all features of the device disclosed in paragraphs 27 and 28 and in the related figures had been defined in claim 1, so that the requirement of Article 123(2) EPC had been complied with.

The Board, however, cannot find that the objection raised and discussed above in regard to auxiliary request 5 has been overcome. As also argued by the respondent, features relating to the course of the line of intersection, the shape and volume of the spill chamber etc. have still not been defined in the claim.

The amendments to claim 1 of auxiliary request 7 are therefore at least not *prima facie* allowable in the sense mentioned above (see point 23).

The Board therefore exercised its discretion under Article 13(1) RPBA not to admit auxiliary request 7 into the proceedings.

26. In regard to auxiliary request 8, the Board exercised its discretion in the same way for similar reasons and did not admit it into the proceedings (Article 13(1) RPBA).

Irrespective of the clarity objection (Article 84 EPC) raised by the respondent in regard to the amendments concerning the geometrical definitions in claim 1 of this auxiliary request, which did not appear to be without merit and therefore could have been sufficient to conclude that the amendments are not *prima facie* allowable in the above sense (see point 23), the Board is still not convinced that the amendments overcome the outstanding objection under Article 123(2) EPC.

For example, in view of the particular shape of the line of intersection, the appellant further maintained its opinion that, contrary to the Board's above conclusion in regard to auxiliary request 5, it did not need to be defined. Since the amendments introduced in claim 1 still do not define, for example, this line to the level of detail disclosed, which has not even been argued by the appellant, the outstanding objection under Article 123(2) EPC cannot be considered to have been overcome.

27. In the absence of any request comprising claims which meet the requirements of the EPC, the impugned decision cannot be set aside.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairwoman:

M. H. A. Patin G. de Crignis

Decision electronically authenticated