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**Datasheet for the decision
of 17 July 2019**

Case Number: T 2119/15 - 3.2.07

Application Number: 10164907.7

Publication Number: 2392520

IPC: B65D41/26, B65D51/24

Language of the proceedings: EN

Title of invention:

Packaging assembly

Patent Proprietor:

The Procter & Gamble Company

Opponent:

Henkel AG & Co. KGaA

Headword:

Relevant legal provisions:

EPC Art. 100(a), 54(2), 56, 123(2), 111(1)
RPBA Art. 12(4), 13(3)

Keyword:

Admissibility of late-filed auxiliary requests - (yes)
Admissibility of late-filed documents - (yes)
Late-filed document - remittal to the department of first instance - (no)
Main request and auxiliary requests 2, 3, 5 and 6 - novelty or inventive step (no)
Auxiliary requests 1, 4, 7 and 8 - amendments - added subject-matter (yes)
Auxiliary request 9 - inventive step (yes)

Decisions cited:

Catchword:



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Case Number: T 2119/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 17 July 2019

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
14 September 2015 concerning maintenance of the
European Patent No. 2392520 in amended form.**

Composition of the Board:

Chairman I. Beckedorf
Members: A. Beckman
K. Poalas

Summary of Facts and Submissions

- I. The patent proprietor and the opponent both filed appeals in due time and form against the decision of the opposition division maintaining the European patent No. 2 392 520 in amended form.
- II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step).

The opposition division held

- that the ground for opposition according to Article 100(a) EPC prejudiced the maintenance of the patent as granted, since the subject-matter of claim 1 as granted was not novel over the disclosure of D7, and
- that the subject-matter of claim 1 of the then auxiliary requests 1 and 2 was not novel over the disclosure of D7.

The patent was then maintained in amended form on the basis of the then auxiliary request 3.

- III. The following documents of the opposition proceedings are referred to in the present decision:

D3: WO 96/11855 A1,

D7: WO 98/55368,

D11: Wikipedia PDF about Lego Duplo[®],

D12: Richard Goldfinger's Lego Page,

D13: DE 1 154 761,

D14: EP 0 647 197 B1.

The following documents are cited in the opponent's statement setting out the grounds of appeal:

D15: JP 59-16860 U and English translation thereof,
D16: Publication of the International industrial design registered with International Registration Number DM/069 020,
D17: Publication of the Czech industrial design registered with registration number 30776,
D18 Publication of the Benelux (BX) industrial design registered with number 31033,
D19: US RE38 816 E.

IV. The Board issued a communication pursuant to Article 15(1) RPBA with its preliminary opinion on both appeals.

In response to said communication, the patent proprietor filed with letter dated 14 June 2019 two new auxiliary requests 1 and 7 and submitted the present auxiliary requests on file renumbered accordingly.

V. The appellant-patent proprietor requested

that the decision under appeal be set aside and
that the patent be maintained as granted (main request), or, in the alternative,
that the patent be maintained in amended form on the basis of one of the sets of claims filed as auxiliary requests 1 to 12 with letter dated 14 June 2019,
of which the main request and auxiliary requests 2 and 9 were decided upon in the decision under appeal (then auxiliary requests 1 and 3) and wherein auxiliary request 9 corresponds to the

version of the patent, which the opposition division held to meet the requirements of the EPC ("maintained version"),
and
in the event that document D15 be admitted into the proceedings, that the case be remitted to the opposition division for further prosecution.

The appellant-opponent requested

that the decision under appeal be set aside
and
that the European patent No. 2 392 520 be revoked
and in addition
that none of the auxiliary requests other than those decided upon by the opposition division in the decision under appeal be admitted into the proceedings.

VI. Oral proceedings before the Board took place on 17 July 2019 during which the factual and legal situation was discussed with the parties.

For the course of the oral proceedings, reference is made to the minutes thereof.

The decision was given at the end of the oral proceedings.

VII. **Claim 1 of the main request**, i.e. according to the patent as granted, reads as follows:

"A packaging assembly comprising
a. a container (1) having an orifice; and
b. a cap (2), designed to cover said orifice,
comprising a top (4) and bottom (5) face and a side

wall (6), said top face (4) comprising the first part of an attachment system; and
c. a further and separable packaging component (3) comprising an outer (8) an inner (9) face [sic] and a side wall (10), said packaging component (3) being a dosing container, configured as a cup with sides sufficiently tall so as to hold a sufficient quantity of product,
characterized in that said inner face (9) inner face [sic] comprises the second part of the attachment system (11), such that said second part of the attachment system on the dosing container is located on the inside of the cup, wherein said attachment system comprises a cooperating protrusion (11) and channel (7)."

In claims 1 of all auxiliary requests the obvious errors "inner face (9) inner face" and "outer (8) an inner (9) face" have been corrected.

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the following structural features have been added:

"wherein the channel comprises two concentric walls, an inner wall and an outer wall."

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the following structural features have been added:

"wherein the cap (2) and the dosing container (3) are made using plastic materials."

Claim 1 of auxiliary request 3 differs from claim 1 of the main request in that the following structural features have been added:

"and wherein the cap (2) and the dosing container (3) are made using plastic materials selected from polyethylene, polypropylene, polyurethane, thermoplastic elastomer and mixtures thereof."

Claim 1 of auxiliary request 4 reads as follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request; emphasis added by the Board):

"A **laundry detergent** packaging assembly comprising
a. a container (1) having an orifice; and
b. a cap (2), designed to cover said orifice, comprising a top (4) and bottom (5) face and a side wall (6), said top face (4) comprising the first part of an attachment system; and
c. a further and separable packaging component (3) comprising an outer (8) **and** an inner (9) face and a side wall (10), said packaging component (3) being a dosing container, configured as a cup with sides sufficiently tall so as to hold a sufficient quantity of product, characterized in that said inner face (9) ~~inner face~~ comprises the second part of the attachment system (11), such that said second part of the attachment system on the dosing container is located on the inside of the cup, wherein said attachment system comprises a cooperating protrusion (11) and channel (7)."

Claim 1 of auxiliary request 5 differs from claim 1 of the main request in that the following structural features have been added:

"and wherein the cap (2) comprises the channel (7) and the dosing container (3) comprises the protrusion (11)."

Claim 1 of auxiliary request 6 differs from claim 1 of the main request in that the following structural features have been added:

"and wherein the dosing container (3) comprises a contact edge and the contact edge is not employed in the connection of the dosing container (3) to the cap (2)."

Claim 1 of auxiliary request 7 additionally comprises the following features (see features of claim 1 of auxiliary request 1 above) added to the end of claim 1 of auxiliary request 4:

"wherein the channel comprises two concentric walls, an inner wall and an outer wall."

Claim 1 of auxiliary request 8 additionally comprises the following features (see features of claim 1 of auxiliary request 5 above) added to the end of claim 1 of auxiliary request 4:

"and wherein the cap (2) comprises the channel (7) and the dosing container (3) comprises the protrusion (11)."

Claim 1 of auxiliary request 9, i.e. according to the version of the patent which the opposition division held to meet the requirements of the EPC, reads as

follows (in bold the features introduced and in strike-through the features deleted with respect to claim 1 of the main request; emphasis added by the Board):

"A packaging assembly comprising

- a. a container (1) having an orifice; and
- b. a cap (2), designed to cover said orifice, comprising a top (4) and bottom (5) face and a side wall (6), said top face (4) comprising the first part of an attachment system; and
- c. a further and separable packaging component (3) comprising an outer (8) **and** an inner (9) face and a side wall (10), said packaging component (3) being a dosing container, configured as a cup with sides sufficiently tall so as to hold a sufficient quantity of product, characterized in that said inner face (9) ~~inner face~~ comprises the second part of the attachment system (11), such that said second part of the attachment system on the dosing container is located on the inside of the cup, wherein said attachment system comprises a cooperating protrusion (11) and channel (7), **and wherein the cap (2) is a flip top cap.**"

In view of the outcome of the present decision there is no need to give the wording of the independent claim 1 of auxiliary requests 10 to 12.

VIII. The patent proprietor's arguments in the appeal proceedings can be summarised as follows and are dealt with in more detail in the reasons for the decision:

Admittance into the proceedings of late-filed documents

Documents D15 to D19 are cited for the first time in appeal proceedings and, therefore, late-filed. These

documents should not be admitted into the proceedings, as being *prima facie* not relevant.

Main request (patent as granted)

The packaging assembly disclosed in document D7 does neither comprise a dosing container configured as a cup with sides sufficiently tall so as to hold a sufficient quantity of product nor a first part of the attachment means on a top face of the cap. Hence, novelty of the subject-matter of claim 1 over the disclosure of D7 should be acknowledged.

Auxiliary requests 1, 4, 7, 8 and 10

The subject-matter of claim 1 of auxiliary requests 1, 4, 7, 8 and 10 meets the requirements of Article 123(2) EPC.

Auxiliary requests 2 and 3

Document D7 does neither unambiguously disclose that the cap and the dosing container are made using plastic materials nor that the cap and the dosing container are made using plastic materials selected from polyethylene, polypropylene, polyurethane, thermoplastic elastomer and mixtures thereof. Hence, novelty should be acknowledged for the claimed subject-matter.

Since D7 is not directed to a similar purpose as the disputed patent, D7 should not be considered as a suitable starting point for the assessment of inventive step of the claimed subject-matter.

Document D15 is silent about plastic materials to be selected for the cap and the dosing container. In addition, D15 does not disclose or suggest a cooperating protrusion and channel.

Hence, neither the combination of the teaching of D7 nor of D15 with the common general technical knowledge, as known in particular from D19, would lead the skilled person to the subject-matter of claim 1 of auxiliary requests 2 and 3 in an obvious manner.

Auxiliary requests 5 and 6

Document D7 does not disclose the feature of claim 1 of auxiliary request 5 that the cap comprises the channel and the dosing container comprises the protrusion. Hence, the subject-matter of claim 1 of auxiliary request 5 is novel over the disclosure of D7 based on the attachment means.

Document D7 does not disclose the feature of claim 1 of auxiliary request 6 that the dosing container comprises a contact edge and the contact edge is not employed in the connection of the dosing container to the cap. Hence, the subject-matter of claim 1 of auxiliary request 6 is novel over the disclosure of D7.

Auxiliary request 9

The subject-matter of claim 1 of auxiliary request 9 involves an inventive step.

IX. The opponent's arguments in the appeal proceedings can be summarised as follows and are dealt with in more detail in the reasons for the decision:

Admittance into the proceedings of late-filed auxiliary requests

The auxiliary requests which were not decided upon by the opposition division in the decision under appeal are late-filed and should not be admitted into the proceedings.

Main request (patent as granted)

Document D7 discloses all the features of claim 1 of the main request. Thus, the subject-matter of claim 1 is not new in view of the disclosure of D7.

Auxiliary requests 1, 4, 7, 8 and 10

The subject-matter of claim 1 of auxiliary requests 1, 4, 7, 8 and 10 does not meet the requirements of Article 123(2) EPC.

Auxiliary requests 2 and 3

Document D7 discloses all the features of claim 1 of auxiliary requests 2 and 3. Hence, the subject-matter of claim 1 of auxiliary requests 2 and 3 lacks novelty over the disclosure of D7.

Even if novelty over D7 should be acknowledged, the subject-matter of claim 1 of auxiliary requests 2 and 3 lacks an inventive step starting either from D7 or from D15 as closest prior art in combination with the common

general technical knowledge of the person skilled in the art, in particular as known from D19.

Auxiliary requests 5 and 6

Document D7 discloses all the features of claim 1 of auxiliary requests 5 and 6. Hence, the subject-matter of claim 1 of auxiliary requests 5 and 6 lacks novelty over the disclosure of D7.

Auxiliary request 9

The subject-matter of claim 1 of auxiliary request 9 lacks an inventive step

- starting from D7 as closest prior art in combination with the common general technical knowledge,
- starting from D13 as closest prior art in combination with the teaching of D3 and the common general technical knowledge,
- starting from D13 as closest prior art in combination with the teaching of D3, D11 or D12 and the common general technical knowledge, and
- starting from D15 as closest prior art in combination with the common general technical knowledge,

wherein for the common general technical knowledge, the opponent relied upon D14 and D16 to D19.

Reasons for the Decision

1. *Admittance into the proceedings of late-filed auxiliary requests and of late-filed documents*

1.1 Both parties amended their respective case with regard to their submissions during the opposition proceedings, *i.e.* the patent proprietor by filing new auxiliary requests 1, 3 to 8 and 10 to 12 and the opponent by filing new documents D15 to D19.

1.2 The opponent raises objections to the admissibility of the auxiliary requests 1, 3 to 8 and 10 to 12, which were not decided upon by the opposition division in the decision under appeal.

The patent proprietor requests not to admit D15 to D19 into the proceedings since these documents were late-filed and *prima facie* not relevant.

1.3 Whether or not the late-filed auxiliary requests 3 to 6, 8 and 10 to 12 as well as any of the late-filed documents D15 to D19 should be admitted into the appeal proceedings and taken into consideration by the Board in the examination of both parties' appeals is subject to the Board's discretion under Articles 12(4) RPBA.

When exercising the discretion under Article 12(4) RPBA, the Board *inter alia* balances the mutual interests of the parties to the adversary proceedings before the Board.

1.4 As to the relevance of D15, the opponent submits that this document most obviously shows all features of the

claimed subject-matter apart from the "flip top", which the opponent considers a mere technical alternative to the teaching of D15.

D16 to D19 were filed to provide in addition to D14 further evidence of the common general technical knowledge of the skilled person concerning "flip-top caps".

- 1.5 In its communication according to Article 15(1) RPBA, the Board preliminary indicated to acknowledge the *prima facie* relevance of D15 and to qualify D16 to D19 as further pieces of evidence of the common general technical knowledge of the person skilled in the art regarding flip-top caps and, therefore, to admit D15 to D19 into the proceedings.
- 1.6 In view of the Board's preliminary intention to admit documents D15 to D19 into the proceedings, the Board, balancing the mutual parties' interests, admits auxiliary requests 3 to 6, 8 and 10 to 12 into the proceedings for formal reasons.
- 1.7 Auxiliary requests 1 and 7 were submitted by the patent proprietor after oral proceedings had been arranged. Their admittance into the proceedings is therefore subject to Article 13(3) RPBA.

The Board considers that the amendments to the patent proprietor's case according to auxiliary requests 1 and 7 are neither complex nor raise any issues which the Board or the opponent cannot reasonably be expected to deal with without adjournment of the oral proceedings.

- 1.8 As a consequence, the Board decided to admit auxiliary requests 1, 3 to 8 and 10 to 12 as well as documents

D15 to D19 into the appeal proceedings pursuant to Articles 12(4) and 13(3) RPBA.

2. *Remittal to the opposition division*

2.1 The patent proprietor requests remittal of the case to the opposition division for further prosecution if D15 is admitted into the proceedings, arguing that D15 could and should have been filed earlier already in opposition proceedings, and in order not to deprive the patent proprietor of the opportunity to appeal on the basis of D15.

2.2 The opponent puts forward to remit the case to the opposition division if any of the late-filed auxiliary requests is admitted into the appeal proceedings in order not to deprive the opponent of the opportunity to subsequent review (see opponent's letter of reply dated 8 June 2016).

2.3 Under Article 111(1) EPC the Board may either decide on the appeal in exercising any power within the competence of the opposition division that issued the decision under appeal or remit the case to the opposition division for further prosecution. The appropriateness of remittal to the opposition division is a matter for discretionary decision by the Board which assesses each case on its own.

2.4 Since both parties provided substantive arguments and substantive replies in the discussion on inventive step based on D15 as well as on the late-filed auxiliary requests during the appeal proceedings, the Board considers that remittal of the case to the opposition division is not appropriate in the present case.

3. *Main request (patent as granted)*

3.1 The patent proprietor contests the finding of the impugned decision that the subject-matter of claim 1 of the main request is not novel over D7.

3.2 Disclosure of D7

Document D7 (see figure 9b; page 2, lines 1-11)

discloses a packaging assembly comprising

a. a container having an orifice; and

b. a cap 12, designed to cover said orifice, comprising a top and bottom face and a side wall, said top face comprising the first part of an attachment system; and

c. a further and separable packaging component 16 comprising an outer and an inner face and a side wall, said packaging component 16 being a dosing container, configured as a cup with sides sufficiently tall so as to hold a sufficient quantity of product, wherein said inner face comprises the second part of the attachment system, such that said second part of the attachment system on the dosing container is located on the inside of the cup, wherein said attachment system comprises a cooperating protrusion and channel.

3.3 The patent proprietor argues that the subject-matter of claim 1 differs from the disclosure of D7 firstly in the attachment means. D7 does not disclose a cap, where a first part of the attachment system is on the top face of this cap. In Fig. 9b of D7 the material above the groove 26 is not on the top surface of the tip 14 and the material goes around the side of the tip 14. Therefore, the attachment means is not on the top surface of the tip. This is further illustrated by the fact that the portion of the cover 16 above the connecting flange 60 goes round the side of the tip 14

and does not engage with the top surface of the tip. When reading the terms of claim 1 in context, it is evident that the attachment system of claim 1 must be made up of two parts (a cooperating protrusion and a channel) that actually function as the attachment means. Turning back to D7, it is not the entirety of the portion of the stem protruding from the tip that functions as a part of the attachment means. Rather, it is only the portion of the stem above groove 26 that functions as a part of the attachment means, as it is only this part that is inserted into the space above the flange 60. Indeed, it is only the portion of the stem above groove 26 that is a "cooperating protrusion", given that it is only this portion of the stem that is inserted into the "channel" above flange 60 and cooperates with this channel to function as the attachment means.

The Board cannot share the patent proprietor's view since, as identified in the impugned decision, point 3.3.2, according to figure 9b of D7, the connecting flange 60 on the cover 16 forms a channel and the part of the stem 18 protruding from the top surface face of the tip 14 is a cooperating protrusion located on the top face of the cap.

Alternatively, the Board considers that according to D7 the groove 26 forms a channel which is located on a top face (tip 14) of the cap 12 and which cooperates with the connecting flange 60 as the protrusion located on the inside of the cover 16.

Thus, according to D7 the attachment system comprises cooperating protrusion and channel.

3.4 Secondly, the patent proprietor argues that claim 1 is also novel over D7 as cover 16 is not a dosing container, and does not have sides sufficiently tall so as to hold a sufficient quantity of product. Thus, the dust cover 16 according to D7 cannot be construed as a dosing container configured as a cup with sides sufficiently tall so as to hold a sufficient quantity of product. In view of the product in question for D7 being a sports drink, the skilled person would never construe the sides of the cover 16 to be sufficiently tall so as to hold a sufficient quantity of product. The terms "sufficiently" and "sufficient" are relative, but they cannot be disregarded completely, and the skilled person would understand that a receptacle with much taller sides than those of cover 16 would be needed to hold a sufficient quantity of product in the context of D7.

The Board disagrees, since the cover 16 has indeed a form and dimension which is in fact suitable for the stated use and is configured as a cup with sides sufficiently tall so as to hold a sufficient, even if a small one, quantity of product, thus depriving claim 1 of novelty.

3.5 As a consequence, D7 discloses all the features of claim 1 of the main request so that its subject-matter lacks novelty over the disclosure of D7.

4. *Auxiliary requests 1, 4, 7 and 8 - Amendments, Article 123(2) EPC*

4.1 *Auxiliary request 1*

4.1.1 With regard to claim 1 of the main request, claim 1 of auxiliary request 1 additionally comprises the feature

that the channel comprises two concentric walls, an inner wall and an outer wall.

4.1.2 The patent proprietor argues that basis for the added feature in claim 1 of auxiliary request 1 that the channel comprises two concentric walls, an inner wall and an outer wall, can be found in the application as filed (see column 3, lines 48 to 49; references to the published A-specification), wherein the added feature is disclosed independently from other features.

4.1.3 Contrary to the patent proprietor's view, the Board notes that the added feature in claim 1 is obviously extracted in isolation from an originally disclosed combination of features defining a particular embodiment of the attachment system which is disclosed in column 3, lines 37 to 51, of the published A-specification. According to this particular embodiment the **size and shape** of the channel and protrusion are to be coordinated to achieve the best fit and connection (column 3, lines 38 to 39, of the published A-specification).

As a matter of fact, the basis provided by the patent proprietor in the particular embodiment defines that the "channel **therefore** comprises 2 concentric walls; an inner and an outer wall" (column 3, lines 48 to 49, of the published A-specification; emphasis added by the Board), wherein the term "therefore" clearly indicates that the feature of two concentric walls refers to and is linked to the previously mentioned features of the particular embodiment, *i.e.* to the previously given dimensions for the channel and the protrusion, such that the size and shape of the channel and protrusion are to be coordinated.

This conclusion is further supported by the fact that the "attachment system can function merely on the existence of friction between the channel walls and the protrusion" (column 3, lines 49 to 51 of the published A-specification). Since both, the specific form of the channel as well as the dimensions of the channel and of the protrusion directly affect the amount of **friction** between the channel walls and the protrusion, the Board considers that the feature that the channel comprises two concentric walls, defining the specific **form**, is functional and structural related to the other features of the **dimensions** of the channel and protrusion given in this particular embodiment of the attachment system in order to establish friction between the channel walls and the protrusion.

Hence, since the claimed feature that the channel comprising two concentric walls, an inner wall and an outer wall, is disclosed in the application as filed only in combination with the particular dimensions for the channel and protrusion according to the particular embodiment disclosed in column 3, lines 37 to 51, of the published A-specification, which dimensions are not present in claim 1, the amendments made constitute an inadmissible intermediate generalisation of the originally disclosed technical information and thereby introduce subject-matter extending beyond the content of the application as filed.

4.2 *Auxiliary request 4*

- 4.2.1 With regard to claim 1 of the main request, claim 1 of auxiliary request 4 further specifies that the packaging assembly is a laundry detergent packaging assembly.

4.2.2 The opponent argues that claim 1 of auxiliary request 4 is directed to a laundry detergent packaging assembly, wherein basis for this amendment can be found in paragraphs [0002] and [0003] of the published A-specification. It is clear that the disclosure relates to a laundry detergent packaging assembly as paragraph [0003] refers to adding a detergent product into the drum, rather than being dispensed through the drawer. It is clear that the skilled person would understand that the disclosure relates to a laundry detergent packaging assembly, wherein paragraph [0003] relates to intended purpose of the invention.

4.2.3 The Board cannot share this view, since paragraphs [0002] and [0003] of the published A-specification relate to the background of the invention (see heading before paragraphs [0002]).

According to established jurisprudence of the Boards of Appeal, a feature taken from the background art cannot serve as basis for an amendment of the claimed invention (see Case Law of the Boards of Appeal, 9th edition 2019, II.E.1.11.3).

As the passage cited by the patent proprietor as basis for the feature "laundry detergent" clearly refers to the description of the prior art, which does not form part of the teaching in relation to the invention, it cannot provide basis for the amendment made in claim 1.

As a consequence, the Board considers that the subject-matter of claim 1 of auxiliary request 4 extends beyond the content of the application as filed and, thus, does not meet the requirements of Article 123(2) EPC.

4.3 *Auxiliary request 7*

Since claim 1 of auxiliary request 7 comprises the same feature as claim 1 of auxiliary request 1 that the channel comprises two concentric walls, an inner wall and an outer wall, as well as the same feature "laundry detergent" as claim 1 of auxiliary request 4, as acknowledged by the patent proprietor, the arguments and conclusions drawn under points 4.1.3 and 4.2.3 above apply *mutatis mutandis* to claim 1 of auxiliary request 7, *i.e.* the subject-matter claimed extends beyond the content of the application as filed, and thus contravenes the requirements of Article 123(2) EPC.

4.4 *Auxiliary request 8*

Since claim 1 of auxiliary request 8 comprises the same feature "laundry detergent" as claim 1 of auxiliary request 4, as acknowledged by the patent proprietor, the arguments and conclusions drawn under point 4.2.3 above apply *mutatis mutandis* to claim 1 of auxiliary request 8, *i.e.* the subject-matter claimed extends beyond the content of the application as filed, and thus contravenes the requirements of Article 123(2) EPC.

5. *Auxiliary requests 2 and 3*

5.1 *Auxiliary request 2 - Novelty, Article 54(1) EPC*

5.1.1 With regard to claim 1 of the main request, claim 1 of auxiliary request 2 further comprises the features that the cap and the dosing container are made using plastic materials.

5.1.2 The opponent argues that although the material of the cap and the dosing container are not explicitly mentioned in D7, it is implicit to the skilled person in the light of the entire disclosure of D7 that the cap and the dosing container are made using plastic materials, thus taking away the novelty of the subject-matter claimed.

5.1.3 The Board cannot share the opponent's view and considers that the feature that the cap and the dosing container are made using plastic materials is not directly and unambiguously derivable from D7.

It is undisputed that plastic is a possible material for the cap and the cover in D7. However, following the patent proprietor's view, it cannot be concluded unambiguously that plastic is the only option for the cap and cover, since also other known materials could be used, such as aluminium.

5.1.4 As a consequence, D7 discloses all the features of claim 1 (see point 3.2 to 3.4 and 5.1.1 above) except that

the cap and the dosing container are made using plastic materials

and novelty is acknowledged for the subject-matter of claim 1 of auxiliary request 2.

5.2 *Auxiliary request 3 - Novelty, Article 54(1) EPC*

5.2.1 With regard to claim 1 of the main request, claim 1 of auxiliary request 3 further comprises the features that the cap and the dosing container are made using plastic materials selected from polyethylene, polypropylene,

polyurethane, thermoplastic elastomer and mixtures thereof.

5.2.2 The opponent argues that, since these features are common plastic materials which are used by the skilled person for manufacturing bottles, closure caps and dosing containers, these features are implicitly disclosed in D7.

5.2.3 The Board cannot share the opponent's view and considers that the features that the cap and the dosing container are made using plastic materials selected from polyethylene, polypropylene, polyurethane, thermoplastic elastomer and mixtures thereof are not directly and unambiguously disclosed in D7.

Following the patent proprietor's view, the list of specific plastic materials is non-exhaustive, and does not represent all possible options for plastics that could be used in the context of D7. It is therefore not possible to conclude unambiguously that the claimed selected plastic materials are implicitly disclosed in D7.

5.2.4 As a consequence, document D7 discloses all the features of claim 1 (see point 3.2 to 3.4 and 5.2.1 above) except that

the cap and the dosing container are made using plastic materials selected from polyethylene, polypropylene, polyurethane, thermoplastic elastomer and mixtures thereof

and novelty is acknowledged for the subject-matter of claim 1 of auxiliary request 3.

5.3 *Auxiliary requests 2 and 3 - Inventive step, Article 56 EPC*

Combination of the teaching of D7 and the common general technical knowledge

5.3.1 The patent proprietor puts forward that D7 is not directed to the similar purpose as the disputed patent, namely to improve the attachment system (see paragraph [0003] of the patent). Therefore, D7 could not be considered as a suitable starting point for the assessment of inventive step of the claimed subject-matter and would not lead the skilled person to the subject-matter of claim 1 in an obvious manner.

5.3.2 The Board disagrees and considers D7 as a promising starting point for a development leading to the subject-matter of claim 1, since D7 is directed to the same technical field of packaging assemblies as the claimed subject-matter.

5.3.3 For the reasons given above under point 5.1.3, D7 does not directly and unambiguously disclose the following features of claim 1 of auxiliary request 2:

- that the cap and the dosing container are made using plastic materials.

For the reasons given above under point 5.2.3, D7 does not directly and unambiguously disclose the following features of claim 1 of auxiliary request 3:

- that the cap and the dosing container are made using plastic materials selected from polyethylene, polypropylene, polyurethane, thermoplastic elastomer and mixtures thereof.

These features represent the distinguishing features of claim 1 of auxiliary requests 2 and 3 over the disclosure of D7.

- 5.3.4 The patent proprietor does not put forward any technical effect achieved by the distinguishing features of claim 1 of auxiliary requests 2 and 3, respectively.

Hence, the Board considers that the problem to be solved can then be seen as providing a suitable material for the cap and the dosing container.

Document D7 indicates on page 11, lines 15-17, that the cover can be made using suitably flexible plastic, and on page 5, lines 6 and 23, that the cap can be made by injection molding. Further, in view of Fig. 9a which shows a stop 28 and bead 50 the skilled person would understand that some elasticity is required and, thus, that a plastic material having inherent elasticity would be a suitable material. Thus, from the manufacturing method and from the construction of the cap in D7 the skilled person is prompted that plastic could be used for injection molding and that the cap is made of plastic. From the kind of push-pull type container closure shown in D7, which requires some inherent elasticity, the skilled person would immediately realise that the cap can be made of plastic.

The Board follows the opponent arguing that the skilled person seeking to provide a suitable material both for the cap and the dosing container would immediately realise on the basis of its common general technical knowledge that plastic, or even polypropylene

or polyethylene, is a suitable material not only for the dosing container but also for the cap of D7.

This common general technical knowledge is further illustrated for instance in D19 (see claim 2), which discloses that the material for the cap and the dosing container is chosen from the group consisting of polypropylenes and polyethylenes.

As a consequence, starting from D7 the skilled person using its common general knowledge, as shown for example in D19, would arrive at the subject-matter of claim 1 of auxiliary requests 2 and 3 in an obvious manner.

6. *Auxiliary request 5 - Novelty, Article 54(1) EPC*

6.1 With regard to claim 1 of the main request, claim 1 of auxiliary request 5 further comprises the features that the cap comprises the channel and that the dosing container comprises the protrusion.

6.2 The patent proprietor argues that if in figure 9b of D7 the groove 26 is considered to be a channel on the cap and the flange 60 is considered to be a protrusion on the dosing container, it can be seen that channel 26 runs around the outside of stem 18, and so it is located on the side and not on the top face of the cap as required by claim 1. Therefore this request is novel.

6.3 The Board cannot follow the patent proprietor's view, since figure 9b of D7 discloses that the cap (shell 12) **comprises** the channel (groove 26) and the dosing container (cover 16) **comprises** the protrusion (connecting flange 60), wherein the channel 26 is

located on a top face (tip 14 and upper part of the stem 18) of the cap 12, as required by claim 1 (see also point 3.3 above).

- 6.4 For the reasons given above under points 3.2 to 3.5, 6.1 and 6.3, document D7 discloses all the features of claim 1 of auxiliary request 5.

Hence, the subject-matter of claim 1 of auxiliary request 5 is not novel over the disclosure of D7.

7. *Auxiliary request 6 - Novelty, Article 54(1) EPC*

- 7.1 With regard to claim 1 of the main request, claim 1 of auxiliary request 6 additionally comprises the features that the dosing container comprises a contact edge and the contact edge is not employed in the connection of the dosing container to the cap.

- 7.2 The patent proprietor puts forward that claim 1 of auxiliary request 6 is novel over D7 for at least the reasons set out for the subject-matter of claim 1 of the main request.

- 7.3 Following the opponent's view, the Board considers that D7 discloses on page 12, lines 12 to 16, that the dosing container 16 comprises a contact edge and the contact edge is not employed in the connection of the dosing container 16 to the cap 12, since the contact edge is not employed if tamper-proof is foreseen.

- 7.4 For the reasons given above under points 3.2 to 3.5, 7.1 and 7.3, document D7 discloses all the features of claim 1 of auxiliary request 6.

Hence, the subject-matter of claim 1 of auxiliary request 6 is not novel over the disclosure of D7.

8. *Auxiliary request 9 (patent as maintained in opposition proceedings)- Inventive step, Article 56 EPC*

With regard to claim 1 of the main request, claim 1 of auxiliary request 9 additionally comprises the features that the cap is a flip top cap.

Novelty of claim 1 of auxiliary request 9 was not contested by the opponent.

8.1 *D7 as closest prior art*

8.1.1 The opponent puts forward that the subject-matter of claim 1 of auxiliary request 9 does not involve an inventive step starting from D7 as closest prior art in combination with the common general technical knowledge of the person skilled in the art, as known in particular from D14 or D18.

The opponent argues that D7 discloses a packaging assembly from which the subject-matter of claim 1 differs only in the feature that the cap is a flip top cap, which feature has no particular technical effect.

The technical problem could then be seen in providing an alternative cap to cover the orifice.

The skilled person would immediately recognize that an alternative cap is a flip top cap. This common knowledge is shown for instance in D14 or D18. Thus, the skilled person would have no difficulties in replacing the screw cap shown in figure 9b of D7 by a flip top cap without exercising an inventive activity.

When simply replacing the cap 12 of D7 by the known flip top cap, the skilled person would immediately recognize that the hinge of a flip top cap should then be arranged at the height of the sealing ring 36 shown in figure 9b of D7 (see below) without the need for any further modification of the disclosure of D7.

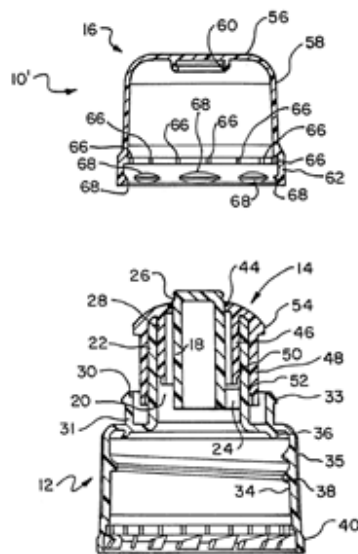


FIG. 9b

8.1.2 The Board cannot share the opponent's view for the following reasons.

It is undisputed that D7 does not disclose the feature of claim 1 that the cap is a flip top cap.

The Board considers that this distinguishing feature has a technical effect, contrary to the opponent's view, namely to allow quick and easy dispensing of the product.

The objective technical problem to be solved is then not to provide merely an alternative cap to cover the orifice, but can be seen in the improvement of the packaging assembly known from D7 so that it enables an easy, quick and convenient dispense of the disclosed product.

The primary mode of dispensing foreseen in D7 is provided by a push and pull cap which is **screwed** to the container, wherein a **sealing ring** is provided to seal against the container around the container opening when the cap is attached to the container.

Therefore, the skilled person seeking to replace the screw cap 12 of D7 by a flip top cap, would immediately recognise that the sealing at the sealing ring 36 would be compromised, when trying to arrange the hinge of the flip top cap at the height of the sealing ring 36, as put forward by the opponent.

Since the teaching of D7 would thus be compromised, D7 not only does not disclose any motivation for the skilled person to replace the existing cap in D7 by a known flip top cap, but it discloses a disincentive in D7 for such a replacement.

Even if, without hindsight of the claimed invention, the skilled person contemplated to replace the screw cap 12 of D7 by a flip top cap, it would immediately realize the incompatibility of such a modification. Such a replacement requires either to cut the cap 12 at the height of sealing ring 36, whereby the sealing would be compromised, or to provide a screw cap having a flip top whereby, however, the first part of the

attachment system would be missing. The skilled person would therefore refrain from such a replacement.

Accordingly, in the absence of any hint in D7 for a replacement of the screw cap with a flip top cap, the Board considers that the skilled person would not replace the screw cap with a flip top cap and would thus not arrive at the subject-matter of claim 1 of auxiliary request 9.

The subject-matter of claim 1 of auxiliary request 9 involves therefore an inventive step over the disclosure of D7 in combination with the common general technical knowledge, as known for instance from D14 or D18.

8.2 *D13 as closest prior art*

- 8.2.1 The opponent contests that the subject-matter of claim 1 of auxiliary request 9 involves an inventive step starting from D13 as closest prior art in combination with the teaching of any of the documents D3, D11 or D12 and the common general technical knowledge, as known for instance from D14.

Starting from D13 as closest prior art, the opponent considers that D13 discloses all the features of claim 1 except the type of attachment system of claim 1 between the cap and the dosing container and that the cap is a flip top cap. These two distinguishing features of claim 1 over the disclosure of D13 solve two independent partial problems. The Lego Duplo[®] type attachment systems of D11 or D12 or the snap fit connection of D3 provide a solution to the first partial problem concerning the way of attaching a cap to a dosing container. The flip top cap, as common

general knowledge, provides a solution to the second partial problem concerning the improvement of the packaging assembly known from D13 so that it enables an easy, quick and convenient dispense of the disclosed product. Since a synergy cannot be seen between the two distinguishing features, the combination of the teachings of D11, D12 or D3 and of the common general technical knowledge, as known for instance from D14, with the packaging assembly of D13 would lead the skilled person to the claimed subject-matter in an obvious manner.

8.2.2 The Board cannot share the opponent's view for the following reasons.

According to established jurisprudence, in selecting the closest prior art, a central consideration is that it must be directed to the same purpose or effect as the invention, otherwise it cannot lead the skilled person in an obvious manner to the claimed invention (see Case Law of the Boards of Appeal, 9th edition 2019, I.D.3.2).

As a matter of fact, D13 is directed to a different purpose or effect to that of the claimed invention. The present invention aims to provide an improved attachment between a dosing device and a container (see column 1, lines 25 to 28 of the patent specification). Meanwhile, D13 addresses problems that are specific to the components of the dosing device itself, and makes no mention of any problems with attaching the dosing device to the container.

This can be seen in D13 as follows. D13 provides a telescopic receptacle consisting of two intermateable cup components, A and B (column 1, lines 1-3). The

second cup component can telescopically be sealed onto the first cup component, forming a closed receptacle separate to the main container (as shown in figure 2). D13 specifically addresses the problem associated with the releasing of the sealed components, A and B, of the telescopic receptacle, once this receptacle is separate to the main container (column 4, lines 16-19). D13 makes no mention whatsoever to any problem associated with attaching the telescopic receptacle to the cap 3 of the main container (see figure 1), and so makes no reference of the purpose or effect of the present invention. As such, D13 does not disclose subject-matter conceived for the same purpose or aiming at the same objective and is, therefore, not considered as the closest prior art.

Since in view of the disclosure of D7 D13 cannot be considered as representing the closest prior art, its teaching cannot lead the skilled person in combination with the teaching of any of the documents D11, D12, D3, D14 or the common general technical knowledge to the subject-matter of claim 1 according to auxiliary request 9 in an obvious manner.

8.3 *D15 as closest prior art*

8.3.1 As far as the opponent argued in the written proceedings on lack of inventive step of the subject-matter of claim 1 of auxiliary request 9 starting from D15, the Board notes the following.

8.3.2 The opponent contests that the subject-matter of claim 1 of auxiliary request 9 involves an inventive step starting from D15 as closest prior art in combination with the common general technical knowledge of the

person skilled in the art, as known for instance from D14.

The opponent puts forward that D15 shows the claimed attachment system in that the measuring cap 3 comprises on its inner face a protrusion 34, 35 cooperating with an annular **channel being formed between engaging protrusions 24 and a cylindrical wall 23** on the top face of the sealing cap 2 (see the figures of D15).

Thus, D15 discloses a packaging assembly from which the subject-matter of claim 1 differs only in that the cap is a flip top cap.

As this distinguishing feature has no technical effect, the skilled person would have no difficulties, when looking for an alternative closure cap, to replace the screw cap 2 of D15 by a commonly known flip top cap (see e.g. D14) without exercising an inventive activity.

8.3.3 The Board cannot share the opponent's view for the following reasons.

According to D15 the "cylindrical wall 34 has a ring-shaped engaging protrusion 35 on the outer peripheral edge. The engaging protrusion 35 engages the engaging protrusion 24 on the sealing cap when the measuring cap 3 is inverted so that the quantification chamber is facing downwards and then secured to the sealing cap 2" (page 3, third paragraph of D15). Thus, the attachment system of D15 is made up of two pairs of engaging protrusions 35, 24, and it is the **cooperation between the engaging protrusions 35, 24** within each pair that results in attachment between the measuring cap 3 (dosing container) and the cap 2. Hence, contrary

to the opponent's view, in D15 the protrusion 24 and the cylindrical wall 23 do **not form and function as a channel which cooperates with protrusion 35** on the inner face of measuring cap 3.

As a consequence, the Board considers that D15 does not clearly and unambiguously disclose the attachment system comprising a cooperating protrusion and channel as defined in claim 1.

The subject-matter of claim 1, therefore, differs from D15 in that the attachment system comprises a cooperating protrusion and channel and in that the cap is a flip top cap.

The technical effect of this type of attachment system together with the flip top cap can be seen in improving the attachment between the dosing container and the cap, wherein design freedom of the packaging assembly can be enhanced.

The Board concurs with the patent proprietor that the increased design freedom due to the attachment system of claim 1 together with the flip top cap provides a synergetic technical effect, since the presence of a flip top cap would usually restrict design freedom and requires additional considerations when looking to improve its attachment to a dosing container. This is in part due to the presence of the hinge of a flip top cap, which introduces certain design constraints.

The problem is therefore how to achieve an improved attachment system of the dosing container to the cap, thereby providing increased design freedom.

The skilled person faced with this problem would not find the claimed solution on the basis of its common general knowledge, as known for instance from D14, for the following reasons.

The container of D15 is specifically designed to be opened by rotation of the cap 2. As such, replacing this screw top functionality of D15 with a flip top cap would be going against the technical teaching of D15. Further, introducing the flip top cap, together with its hinge, would disrupt the rotational attachment of the cap to cover the orifice of the container. Therefore, the skilled person would not be motivated to modify the packaging assembly of D15 in this manner.

D14 is regarded as a piece of evidence of the common general technical knowledge of the person skilled in the art with regard to flip top caps. However, D14 does not give any hint to arrange an attachment system between the flip top cap and a measuring cup.

Therefore, the skilled person faced with the underlying problem would not be prompted by the teaching of D14 or by its common general knowledge to provide an improved attachment system comprising a cooperating protrusion and channel and to swap the screw top cap of D15 for the flip top cap, and would consequently not arrive at the subject-matter of claim 1 in an obvious manner.

As a consequence, the subject-matter of claim 1 of auxiliary request 9 involves an inventive step over the disclosure of D15 in combination with the common general technical knowledge, as known for instance from D14.

8.4 For the above-mentioned reasons the subject-matter of claim 1 of the auxiliary request 9 involves an inventive step.

9. In view of the outcome of the present decision, there is no need to give a decision on auxiliary requests 10 to 12.

Order

For these reasons it is decided that:

The appeals of both the patent proprietor and the opponent are dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated