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**Datasheet for the decision  
of 15 September 2022**

**Case Number:** T 2564/19 - 3.3.06

**Application Number:** 05757643.1

**Publication Number:** 1763573

**IPC:** C11D3/33, C11D3/37

**Language of the proceedings:** EN

**Title of invention:**

Particulate

**Patent Proprietor:**

Reckitt Benckiser Finish B.V.

**Opponents:**

Henkel AG & Co. KGaA  
The Procter & Gamble Company

**Headword:**

MGDA containing particulate/RECKITT BENCKISER

**Relevant legal provisions:**

EPC Art. 54, 100(a)  
RPBA Art. 12(2), 12(4)  
RPBA 2020 Art. 25(2)

**Keyword:**

Novelty (Main request) - (no)

Admissibility of auxiliary requests - (no) - no arguments  
submitted with the reply to the appeal

**Decisions cited:**

T 0048/17, T 1792/17, T 2477/17, T 2117/18, T 2196/19

**Catchword:**



**Beschwerdekammern**

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Case Number: T 2564/19 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 15 September 2022**

**Appellant:** Henkel AG & Co. KGaA  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 17 July 2019  
rejecting the opposition filed against European  
patent No. 1763573 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman**            J.-M. Schwaller  
**Members:**            L. Li Voti  
                             R. Cramer

## Summary of Facts and Submissions

I. The appeal of opponent 1 is against the decision of the opposition division to reject the oppositions against European patent no. 1763573, claim 1 thereof reading:

*"1. A process for preparing a detergent composition comprising an MGDA containing particulate material wherein the particulate is at least partially coated with a coating of a water soluble/dispersible material having a melting point of less than 100°C, the coating (sic) material exhibits a pH of greater than or equal to 7 in an aqueous medium, the coating material comprising a water soluble/dispersible polymer and/or a surfactant, wherein the coating is applied and the coated MGDA is incorporated into the detergent formulation."*

II. With grounds of appeal, the appellant filed documents **D6** (U. Schöffling, *Arzneiformenlehre*, 2009, Chapter 7: Granulate), **D7** (Versuchsbericht pH-Werte dated 19.11.19) and **D8** (Product Range, Home Care and I&I Solutions Europe, *Enabling Choices: Nonionic Surfactants, Alcohol Ethoxylates*, by BASF) and maintained *inter alia* that the subject-matter of above claim 1 lacked novelty over **D2** (EP 0 882 786 A1).

III. With its reply, the patent proprietor (also respondent) filed three sets of amended claims as auxiliary requests 1 to 3 and defended the patent as granted.

IV. In response to the board's preliminary opinion both parties submitted further arguments, and opponent 2 (also party as of right) informed the board that it would not be present at the oral proceedings.

V. At the oral proceedings held on 15 September 2022 the parties' final requests were the following:

The appellant requested that the decision under appeal be set aside and the patent be revoked. Further it requested that none of the auxiliary requests be admitted into the proceedings.

The respondent requested that the appeal be dismissed, or, alternatively, that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 3 filed with the reply to the grounds of appeal. Further it requested that documents D6 to D8 not be admitted into the appeal proceedings.

### **Reasons for the Decision**

1. Admittance of documents D6 to D8
  - 1.1 The grounds of appeal having been filed on 26 November 2019, i.e. before the entry into force of the RPBA 2020, the provisions of Article 12(6) RPBA 2020 invoked by the respondent do not apply in the present case (see Article 25(2) RPBA 2020). The admittance into the appeal proceedings of D6 to D8 is thus subject to the discretionary power of the board according to the provisions of Article 12(4) RPBA 2007.
  - 1.2 The board, considering appellant's argument that D6 to D8 were filed in response to the reasoning in the decision regarding novelty over D2 and that these documents support arguments submitted already during opposition proceedings, held these documents prima facie relevant to the present case and decided not to disregard them under Article 12(4) RPBA 2007.

2. Main request (patent as granted) - Novelty

- 2.1 Claim 1 at issue concerns a process for preparing a detergent composition comprising an MGDA-containing particulate material, i.e. a particulate material which comprises MGDA and possibly further components.

According to claim 1 said particulate is at least partially coated with a water soluble/dispersible material having a melting point of less than 100°C and comprising a water soluble/dispersible polymer and/or a surfactant and exhibiting a pH of greater than or equal to 7 in an aqueous medium, and the coated MGDA is incorporated into a detergent formulation.

The thus coated MGDA so corresponds to the "at least partially coated MGDA particulate" recited above, which thus may comprise further components.

- 2.2 Specifically, example 1 of document D2 discloses the preparation of a detergent composition wherein in a first step an aqueous slurry of MGDA, crystalline aluminosilicate, polysodium acrylate and sodium carbonate is spray-dried. The resulting spray-dried powder thus includes a particulate comprising MGDA and further components. Even if, as submitted by the respondent, the resulting particulate would present a coating of polysodium acrylate - like the particulate prepared in the example of D5 (DE 199 37 345 A1) - it still represents a particulate comprising MGDA as recited in claim 1 at issue, since it is not excluded that the particulate of departure already contains further components as a coating.

In said example 1, the spray-dried powder is then added to a mixer with other solid components and a liquid

mixture of 2 kg polyoxyethylene dodecyl ether non-ionic surfactant having an HLB of 13.1 and 0.1 kg PEG 7000 prepared at 70°C (thus being a water soluble/dispersible material having a melting point of less than 100°C as required in claim 1 at issue) is dropped into the solid mixture of all components, which mixture is then granulated. The resulting product is thus an agglomerate of various solid particles including the MGDA particulate which are bound together by the added liquid components, as shown e.g. in D6 (page 176, figure 7.2 and page 182, figure 7.8), which represents common general knowledge concerning the preparation of granulated products.

In the board's view, in such a granulated product the spray-dried particles containing MGDA and other solid particles are necessarily at least partially bound together and thus coated by the liquid components added to their mixture. The spray-dried particles containing MGDA are thereby incorporated into a detergent formulation including the other granulated solid components.

After this step a further granulation step is carried out with an additional aluminosilicate to produce the final detergent composition. In this respect it is to be noted that claim 1 at issue does not require that the coating step is carried out necessarily before incorporating the MGDA-containing particulate into a detergent formulation but these two steps can also occur simultaneously, and that further steps for obtaining the final detergent composition are not excluded.

2.3 D2 however does not disclose the pH of the nonionic surfactant/PEG mixture (polyoxyethylene dodecyl ether



with HLB 13.1/PEG 7000) used as a binder/coating in example 1. It has thus to be assessed whether or not the pH of this mixture in an aqueous medium is greater or equal to 7.

- 2.3.1 In this respect, the board notes that the surfactants and PEGs able to provide the required pH are described in the patent (paragraphs [0019] and [0036]), and these manifestly encompass the nonionic surfactant and PEG used in example 1 of D2.
- 2.3.2 Document D7 further shows the pH in aqueous medium of the nonionic surfactants Lutensol T08, Dehydol LT7 and Lutensol AO3 and of PEG 6000, as well as of mixtures of PEG 6000 and Lutensol T08, with the HLB of the tested nonionic surfactants being disclosed in D8. It is observed that all these compounds/mixtures show a pH above 7. These results were not contested by the respondent nor did it file counter-experiments.
- 2.3.3 The board accepts that PEG 6000 is not directly comparable with PEG 7000 used in D2 because of its shorter ethylenoxy chain, however Lutensol T08, an ethoxylated C<sub>13</sub> alkyl oxo-alcohol with an HLB of about 13, is very similar to the nonionic surfactant used in D2 since it has only a slightly shorter alkyl chain (C<sub>13</sub> vs C<sub>12</sub>) and about the same HLB value (13 vs 13.1), thus implying a similar structure. Since the pH of Lutensol T08 is clearly above 7 (7.89), the pH of the surfactant used in D2 is thus with certainty also above 7. Moreover, because of the extremely greater amount (2 kg to 0.1 kg) of nonionic surfactant used in the mixture with PEG 7000 in D2, the pH of the mixture used in D2 must be necessarily very close to that of Lutensol T08, as shown in D7 for different mixtures of PEG 6000 and Lutensol T08.

2.3.4 The respondent contested this conclusion arguing that the tested surfactant and PEG were not identical to those used in example 1 of D2, and that there existed other nonionic surfactants listed in D8 having an HLB close to 13 and thus similar to the nonionic surfactant of the cited example of D2, which had however a pH below 7. The respondent did however not provide any evidence for this allegation.

2.3.5 Therefore and in the absence of evidence to the contrary, the board is convinced that D7 - even though the surfactants and PEG tested are not identical to those used in the cited example - shows credibly that this type of surfactants in combination with this type of PEG implicitly have the required pH, which conclusion is by the way supported by the teaching of the patent itself which, as indicated above, explicitly describes the products used in D2 as suitable for the claimed composition.

Therefore, in the board's view, the mixture of nonionic surfactant and PEG 7000 used in example 1 of D2 must have a pH greater than 7.

2.4 The board therefore concludes that example 1 of D2 discloses a process comprising all the steps of claim 1 at issue, with the consequence that the subject-matter of claim 1 is no longer novel, so that the ground for opposition under Article 100(a) in combination with Article 54 EPC prejudices the maintenance of the patent as granted.

3. Auxiliary requests 1 to 3 - Admissibility

3.1 The respondent, which filed these requests with its reply to the grounds of appeal, only stated that they

were based on those requests already filed during opposition and that they contained some corrections of obvious errors. The respondent however did not explain why such amended requests should comply with all the requirements of the EPC and which objections were therewith deemed to be overcome. Moreover it did not even indicate why and which corrections were made.

3.2 The board notes that, according to Article 12(4) RPBA 2007, everything presented by the parties under Article 12(1) shall be taken into account if and to the extent it relates to the case under appeal and meets the requirements in Article 12(2) RPBA 2007, namely that the statement of grounds of appeal and the reply shall contain a party's complete case and shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, thereby specifying expressly all the facts, arguments and evidence relied on.

3.3 In the case at issue, the respondent submitted the arguments explaining the reasons for filing the auxiliary requests only with letter dated 29 July 2022, i.e. well after the board's communication of 26 January 2022. As the reasons given, the respondent submitted that the arguments were the same as those filed during opposition and that it would have been already implicit in its reply to the appeal that they also applied to the auxiliary requests thus filed.

3.4 The board notes that, according to the jurisprudence, a reference to submissions made in the first instance does not meet the requirements of Article 12(2) RPBA 2007 (see e.g. T 48/17, Reasons 4.3; T 1792/17, Reasons 3.2.7; T 2196/19, Reasons 2; and T 2117/18, Reasons 2 February 2013; furthermore, the fact that the

auxiliary requests filed in appeal correspond to those filed before the opposition division does not mean that a substantiation in appeal can be dispensed with (T 2477/17, Reasons 3.2 and T 2196/19, Reasons 5).

Thus, in the absence of any substantive argument explaining the reasons for the filing of these requests, neither the appellant nor the board were in a position to evaluate fully whether the submitted amendments were apt to overcome all objections raised in the statement of grounds of appeal.

- 3.5 It follows from the above that the respondent's reply does not comply with the requirements of Article 12(2) RPBA 2007.
- 3.6 Regarding the respondent's submissions with the letter of 29 July 2022, these constitute an amendment within the meaning of Article 13(2) RPBA 2020, but since there were no exceptional circumstances for the late filing of such an amendment, the board has decided not to take them into account (Article 12(4) RPBA 2007 in combination with Article 12(2) RPBA 2007), with the consequence that the late-filed auxiliary requests 1 to 3 are not admitted into the appeal proceedings.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Hampe

J.-M. Schwaller

Decision electronically authenticated