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**Datasheet for the decision
of 14 June 2024**

Case Number: T 0252/22 - 3.3.03

Application Number: 07700205.3

Publication Number: 1971633

IPC: C08G65/08, C11D17/04

Language of the proceedings: EN

Title of invention:

WRAPPED DETERGENT COMPOSITIONS AND MANUFACTURE PROCESS

Patent Proprietor:

Dalli-Werke GmbH & Co. KG

Opponents:

MonoSol, LLC

Relevant legal provisions:

EPC Art. 54, 123(2), 83, 111
RPBA 2020 Art. 12(4), 11

Keyword:

Novelty - Main request (no) - (yes)
Amendment to case - Auxiliary request 1 admitted (yes)
Amendments - selection from two or more lists (no)
Sufficiency of disclosure - (yes)
Remittal - (yes)

Decisions cited:

G 0003/14



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Case Number: T 0252/22 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 14 June 2024

Appellant: Dalli-Werke GmbH & Co. KG
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 January 2022
revoking European patent No. 1971633 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Barrère
Members: D. Marquis
A. Bacchin

Summary of Facts and Submissions

I. The appeal lies against the decision of the opposition division concerning the revocation of the European patent No. 1 971 633.

II. The decision under appeal was based *inter alia* on the following documents:

D1: EP 1 512 701 A1

D2: EP 0 291 198 A2

D6: WO 02/16205 A1

D10: WO 02/16222 A1

D11: US 2005/0003982 A1

D12: JPH06240091

D12a: English translation of D12

D14: WO 02/058910 A1

D15: WO 01/79417 A1

D16: US 2004/0072709 A1

D17: EP 1 155 804 A1

D18: US 4,115,292

D19: US 4,119,604

D23: Affirmation in lieu of oath from Mr David M. Lee dated 21 October 2014

D24: EP 1 418 196 A1

D32: WO 02/42408 A2

D35: Affirmation in lieu of oath from Mr Thomas J. Yogan, dated 1 February 2020

D35': Supplemented affirmation in lieu of oath from Mr Thomas J. Yogan, dated 21 July 2021

D35f: Annex 6 of D35

D37: Hans-Georg Elias: An Introduction to Polymer Science, pages 12-15, 1st edition 1997

D41: Römpp-Lexikon Chemie, 10th Edition, Vol. 2, 1997, page 1401 , keyword "Folien"

III. The decision under appeal was based on the claims as granted (main request) as well as auxiliary request 1 submitted with the reply to the notice of opposition, auxiliary requests 1a, 1b, 1c, 1d filed at the oral proceedings before the opposition division and auxiliary requests 2 to 9 submitted with the reply to the notice of opposition.

IV. Granted claims 1, 20 and 21 read as follows:

"1. A unit packaged dish washing composition wrapped in a foil comprising a water soluble material having a water content of below 7.5% comprising a water soluble copolymer, wherein the copolymer is a random or a block copolymer and wherein the copolymer comprises a copolymer of a polyvinylalcohol".

"20. Use of a foil comprising a water soluble material having a water content of below 7.5% comprising the water soluble copolymer according to any of the preceding claims for wrapping a dish washing composition".

"21. A process of manufacturing the packaged dish washing composition of claims 1 to 19 using a foil comprising a water soluble material having a water content of below 7.5% comprising a water soluble copolymer according to any of claims 1 to 19".

V. According to the reasons of the contested decision, which are pertinent for the appeal proceedings:

- Granted claim 1 found a basis in the application as originally filed. Granted claim 1 was also

sufficiently disclosed. Granted claim 1 lacked novelty in view of D10, D11 and D2.

- The auxiliary requests were admitted into the proceedings.
- Claim 1 of auxiliary request 1 lacked novelty over D10, D11 and D2. Claim 1 of auxiliary request 1a lacked novelty over D2. Auxiliary requests 1b and 1c contravened Rule 80 EPC and lacked clarity. Claim 3 of auxiliary request 1d did not meet the requirements of Article 123(2) EPC. Claim 20 of auxiliary request 2 lacked novelty over D11. Claims 1 of auxiliary requests 3 to 5 lacked novelty over D2. Claims 1 of auxiliary requests 6 and 7 lacked novelty over D11. Claims 1 of auxiliary requests 8 and 9 lacked novelty over D2.

VI. The patent proprietor lodged an appeal against the decision of the opposition division. The appellant filed auxiliary requests 1-12 with the statement of grounds of appeal and later filed replacement auxiliary requests 3, 10 and 12 to 25 on 28 April 2023.

VII. With letter of 27 February 2023 opponent 1/respondent 1 withdrew their opposition and thus ceased to be a party to the present appeal proceedings.

VIII. Oral proceedings before the Board were held on 14 June 2024.

IX. The final requests of the parties were as follows:

- The appellant (patent proprietor) requested that the decision under appeal be set aside and that the case be remitted to the opposition division for

further prosecution on the basis of the claims as granted (main request), or on the basis of the claims of any of auxiliary requests 1, 2, 4-9 and 11 filed with the statement of grounds of appeal, or auxiliary requests 3, 10 and 12 to 25 filed with submissions dated 27 April 2023.

- The respondent (opponent 2) requested that the appeal be dismissed.

X. Claims 1, 19 and 20 of auxiliary request 1 corresponded to claims 1, 20 and 21 of the main request with the further limitation of the water content to the range of "5% or less".

"1. A unit packaged dish washing composition wrapped in a foil comprising a water soluble material having a water content of 5% or less, comprising a water soluble copolymer, wherein the copolymer is a random or a block copolymer and wherein the copolymer comprises a copolymer of a polyvinylalcohol".

"19. Use of a foil comprising a water soluble material having a water content of 5% or less comprising the water soluble copolymer according to any of the preceding claims for wrapping a dish washing composition".

"20. A process of manufacturing the packaged dish washing composition of claims 1 to 18 using a foil comprising a water soluble material having a water content of 5% or less comprising a water soluble copolymer according to any of claims 1 to 18".

XI. The parties' submissions, in so far as they are pertinent, may be derived from the reasons for the

decision below. The disputed points concerned the interpretation of granted claim 1 and the novelty of that claim over the documents D11, D10, D2, D1, D14, D17, D18 and D19. The admittance of auxiliary request 1 was discussed as well as the amendments introduced in that request, its sufficiency of disclosure and its novelty. The remittal of the case to the opposition division was addressed.

Reasons for the Decision

Main request (granted claims)

1. Interpretation of granted claim 1
 - 1.1 Granted claim 1 concerns a unit packaged dish washing composition defined in that it is wrapped in a foil comprising a water soluble material having a water content of below 7.5%. The opposition division considered that based on the disclosure at paragraph 13 of the patent in suit the water content of the water soluble material did not constitute a limitation of operative claim 1 over the prior art (passage bridging pages 19 and 20 of the decision under appeal). In particular the opposition division found that paragraph 13 showed that the water content defined in granted claim 1 only characterized the foil prior to the manufacture of the unit packaged dish washing composition and that as such the water content did not characterize the claimed package itself.
 - 1.2 The respondent agreed with that interpretation of granted claim 1 (rejoinder, sections 114 and 123). The appellant however contested that interpretation and argued that the film had to have the claimed water content both at the time of packaging and also after packaging the dish washing composition. The packaging process itself, it was argued, had no direct influence on the water content of the water-soluble material (statement of grounds of appeal, section III.1).
 - 1.3 Operative claim 1 concerns a unit packaged dish washing composition wrapped in a foil comprising a water

soluble material having a water content of below 7.5% comprising a water soluble copolymer, wherein the copolymer is a random or a block copolymer and wherein the copolymer comprises a copolymer of a polyvinyl alcohol. Granted claim 1 therefore defines the water content of the water soluble material contained in the foil that is wrapping the unit packaged dish washing composition. The Board finds that the wording of operative claim 1 is therefore clear in itself, and as such, there is no need in the first place to turn to paragraph 13 of the patent in suit to interpret the claim. Moreover, paragraph 13 teaches that the stiffness of the water soluble material in the foil must be high enough for its processing and indicates one way (can be obtained for example) of achieving a preferred stiffness by way of controlling the water content in the material. None of these requirements are part of the definition in granted claim 1 or imply a feature, such as a product-by-process feature, that could be seen as limiting for that claim.

- 1.4 The Board does also not see in the use of the adjective "wrapped" in granted claim 1 a product-by-process feature that would invalidate the definition of the water soluble material by its water content as part of the unit packaged dish washing composition once it is produced. In this respect, the question of whether the water soluble material of the foil of the produced unit package dish washing composition may absorb water from the atmosphere, as it was suggested by the respondent relying on D10 (page 9, first paragraph) or absorbs water from the contents of the package (as implied by the decision under appeal, page 20, first paragraph) is also not of relevance to granted claim 1.

1.5 The respondent also made the argument that the water content defined in claim 1 concerned a water soluble material that is comprised in the foil and not the water content of the foil itself (rejoinder, sections 131-137). The respondent therefore argued that since the amount of water soluble material is not limited in the claim, the water content is not a limiting feature of claim 1. The Board finds that the open wording of claim 1 is unambiguous as it sets out that the foil comprises a water soluble material and that the water soluble material has a water content of below 7.5%. The open wording in claim 1 however does not necessarily imply that the water content of the water soluble material is not a limitation of the claimed subject-matter when assessing novelty of claim 1 in view of the prior art, especially when the prior art discloses a foil made of only one material. The consideration of whether the water content of the water soluble material is limiting for claim 1 will therefore have to be considered in view of the disclosures of the prior art.

1.6 The Board therefore finds that the water content of the water soluble material of the foil is a feature that cannot be disregarded when assessing novelty of the claims in view of the prior art.

2. Novelty of the main request (claims as granted)

2.1 Novelty over D11

2.1.1 The decision under appeal concluded that operative claims 1, 20 and 21 lacked novelty over examples 1-3 of D11 (point 3.2.2). That conclusion was contested by the appellant on the grounds that the films disclosed in examples 1-3 of D11 would not have a water content of below 7.5% (statement of grounds of appeal, section

III.4). The opposition division also concluded in their decision that the film Monosol M8630 used in examples 1-3 of D11 was a random block copolymer (page 21, third paragraph). Although the appellant initially disputed that conclusion in their letter of 27 April 2023 (passage bridging pages 8 and 9), they acknowledged at the oral proceedings before the Board that the film Monosol M8630 was indeed based on a random copolymer, in accordance with the declarations D35 (Table) and D35' (point 2) which were part of the proceedings. The request by the respondent to hear Mr. Yogan as a witness on that point (rejoinder, section 297) was therefore withdrawn (page 3 of the minutes, second and third paragraph). The question of novelty of granted claims 1, 20 and 21 over D11 therefore revolved around the water content of the film M8630 used in examples 1-3 of D11.

2.1.2 Examples 1-3 of D11 disclose the preparation of pouches made of a Monosol M8630 film (paragraph 67). The water content of the material of the film is disclosed in the same paragraph as being 7.5% by weight after equilibrating the film at 40% relative humidity and 21.1°C for 12 hours. A pouch containing a liquid composition is also said to have been prepared from said film according to the method of paragraphs 53 and 54 of D11 and the last line of paragraph 67 discloses that the water content of the film in the pouch after equilibration averaged about 7% by weight. It was not disputed that the water content of the equilibrated film in the pouch fell under the range defined in operative claim 1, as established by the opposition division (page 21, fourth paragraph). The appellant however argued at the oral proceedings before the Board that in order to be relevant, since claim 1 comprised features of a product-by-process claim, the water

content of the film Monosol M86330 also had to be in the range defined in granted claim 1 *before, during and after* the preparation of the pouch.

2.1.3 Granted claim 1 however only limits the water content of the water soluble material comprised in the foil wrapping the unit packaged dish washing composition. The wording of granted claim 1 does not entail any element of the process for the preparation of the unit packaged dish washing composition and as such it cannot be concluded that granted claim 1 also limits the water content of the water soluble material in the range of below 7.5% at any point in time *prior to* the obtention of the unit packaged dish washing composition. The disclosure of examples 1-3 of D11 precisely discloses that the water content of the film can be adjusted by equilibration once the liquid containing pouch is produced. In this respect, the pouch containing the liquid composition based on a film of Monosol M8630 which is disclosed to have a water content averaging about 7% after equilibration in examples 1-3 of D11 is novelty destroying for the subject matter of granted claim 1.

2.2 The respondent also objected to the novelty of granted claim 1 in view of D10, D2, D1, D14, D17, D18 and D19 in appeal (rejoinder, section XI). At the oral proceedings before the Board the respondent relied on their arguments presented in writing in appeal. These objections are addressed hereafter:

2.3 Novelty over D10

2.3.1 The decision under appeal concluded that claim 1 of the main request lacked novelty over example 1 of D10. That

conclusion was contested by the appellant in appeal.

- 2.3.2 Example 1 of D10 discloses the preparation of a thermoformed pocket made of a polyvinyl alcohol (PVOH) film (Monosol M8534) having a degree of hydrolysis of 88% and a thickness of 100 μm that was filled with a dishwashing composition before being sealed. None of the documents concerning Monosol M8534 cited in appeal however (D16, D23, D14, D15 and D32) establish the water content of the film in the thermoformed pockets of example 1 of D10. The Board therefore does not find evidence that the water content defined in operative claim 1 (below 7.5 %) is met by the Monosol M8534 film used in example 1 of D10.
- 2.3.3 The respondent however argued (rejoinder, item 353) that the passage of page 8, lines 20-25 of D10 taught that the films of D10 had a water content below 7.5%. That passage however gives a broad definition of the PVOH films used in D10 as the passage discloses that the films may contain water and that all commercially available PVOH films contain about 6 to 14% water. The range of water content of the PVOH film in that passage overlaps with that defined in granted claim 1 (below 7.5%) but it cannot be inferred therefrom that the specific film Monosol M8534 used in example 1 would necessarily have a water content in the lower part of the general range disclosed on page 8 that is also according to granted claim 1 (from 6% to below 7.5%). The passage on page 8 contains further preferred ranges of water content that are even below the range of 6-14% ("Desirably the film has a water content of less than 3 wt%, 2 wt% or even 1 wt%" in line 25). These ranges however, even if they are disclosed as being preferred ranges according to D10, were also not shown to apply

to the specific film Monosol 8534 of example 1.

- 2.3.4 The Board concludes that it has not been established that the film M8534 used in example 1 of D10 contained a water soluble material having a water content of below 7.5%. Claim 1 of the main request therefore is novel over D10. The same conclusion applies to granted claims 20 and 21 which concern the use of a foil for wrapping a dish washing composition and the process of manufacturing the packaged dish washing composition defined in granted claim 1.

- 2.4 Novelty over D2
 - 2.4.1 The opposition division concluded that claim 1 of the main request lacked novelty over the packaged dish washing compositions wrapped with the films C and D disclosed in table 1 of D2. The appellant contested that conclusion on the grounds that D2 disclosed that the films had a water content of 8.2% which was outside the range of granted claim 1.

 - 2.4.2 Table 1 of D2 discloses the composition and the properties of the films C and D considered to be the most relevant to granted claim 1. Table 1 discloses the resin viscosity and the comonomer content of the copolymer of the films as well as their solubility in water at 21°C after 300 seconds. It is apparent that the water content of the specific films C and D is not disclosed in Table 1 nor in the whole of D2.

 - 2.4.3 The passage on page 7, line 30 of D2 discloses a water content of 8.2% for a different film (film A). Even if one were to consider that the water contents of films C and D were the same as that disclosed for film A, it would still be outside the range defined in granted

claim 1 (below 7.5%).

2.4.4 The Board therefore concludes that it has not been shown that the films C and D of D2 were according to the definition of granted claim 1. Granted claim 1 therefore is novel over D2. The same conclusion applies to granted claims 20 and 21.

2.5 Novelty over D1, D14, D17, D18 and D19

2.5.1 Novelty objections over D1, D14, D17, D18 and D19, which were not addressed in the contested decision, were also raised in the appeal proceedings. It is however apparent from the minutes of the oral proceedings before the opposition division that the parties' submissions were directed to the objections raised in view of D2, D10 and D11 only (pages 2 and 3). Since the objections over D1, D14, D17, D18 and D19 were addressed by the parties in appeal and were maintained by the respondent, the Board found it appropriate for reasons of procedural economy to address these objections.

2.5.2 Examples 1-3 of D1 were considered to be relevant to the question of novelty of granted claim 1 by the respondent (rejoinder, page 50). Examples 1-3 disclose the preparation of copolymers of vinyl alcohol and methyl methacrylate (examples 1 and 3) and itaconic acid (example 2). The copolymers obtained are formed into films by solution casting and the films of examples 1 and 3 are explicitly disclosed as having a water content of about 7% which falls under the range defined in granted claim 1 (below 7.5%). There is however no explicit disclosure of a unit packaged dish washing composition in the examples 1-3 of D1 since these examples only disclose the preparation of films.

The respondent pointed at one embodiment in the description of D1 (paragraph 21) concerning the preparation of water-soluble pouches that could be used with liquid detergents for the cleaning of dishes. Paragraph 21 of D1 however is a generic passage referring to the preparation of water soluble pouches containing a liquid with active ingredients suitable for various applications. The water soluble pouches are not further defined in that paragraph so it is not derivable from D1 whether the films of examples 1-3, with their water content of about 7%, were used in combination with liquid detergents for dish washing (line 54) mentioned as one of a long list of very different applications in D1 (agrochemicals, industrial chemicals, chemicals for treating water, health and beauty care products, domestic and consumer products in lines 49 to 54). In this respect the Board finds that granted claim 1 is novel over D1. The same conclusion applies to granted claims 20 and 21.

2.5.3 Example 2 of D14 was considered to be novelty destroying for claim 1 of the main request by the respondent (page 66 of the rejoinder). That example discloses the preparation of pockets filled with dishwashing gel compositions. The film used for the pockets is said to be a cast film of Monosol M8534 copolymer. The water content of Monosol M8534 is not disclosed in D14 nor in any of the documents already considered for the novelty objection starting from D10. In this respect granted claim 1 is novel over D14. The same conclusion applies to granted claims 20 and 21.

2.5.4 D17 was considered to be novelty destroying for claim 1 of the main request by the respondent (page 69 of the rejoinder). Claim 1 of D17 concerns a method for producing an embossed poly(vinyl alcohol) film, which

comprises embossing a poly(vinyl alcohol) film such that the crystallinity index of the emboss top is 0.50-0.90. There is no disclosure of the film being used for dish washing compositions, no disclosure of a specific water soluble material in that context with a water content below 7.5% and no disclosure of a water soluble copolymer being a random or a block copolymer alone or in combination with one another. It is also apparent that the objection in view of D17 was based on a combination of multiple passages of D17 (claim 1, paragraphs 10, 23, 49 and 51) which was not shown to refer to a specific disclosure of D17 falling under the scope of granted claim 1. In this respect the Board concludes that granted claim 1 is novel over D17. The same conclusion applies to granted claims 20 and 21.

2.5.5 D18 was also considered by the respondent to be novelty destroying for claim 1 of the main request (rejoinder, page 72). The appellant contested the conclusion of the respondent on the grounds that D18 would not disclose the use of a polyvinyl alcohol copolymer (letter of 28 April 2023, page 10). By contrast, the respondent considered that the polyvinyl alcohols Gelvatol 20-30 and Gelvatol 30-30 were copolymers (rejoinder, paragraph 419) but no evidence was provided to confirm that assertion. The Board also found no evidence that these polymers were random or block copolymers and raised that question in their communication under Article 15(1) RPBA (section 12.9). The respondent did not address that point any further in appeal. In view of this the Board finds that it has not been established that the polyvinyl alcohols Gelvatol 20-30 and Gelvatol 30-30 of D18 were copolymers and, as a result, it has not been shown that granted claim 1 lacked novelty over D18. The same conclusion applies to

granted claims 20 and 21.

- 2.5.6 D19 was considered by the respondent to be novelty destroying for claim 1 of the main request (rejoinder, section XI.1.8, page 79). D19 relates to novel compositions for use in the preparation of cold water-soluble films (claim 1). The compositions of D19 consist essentially of (i) a resin mixture containing a low molecular weight polyvinyl alcohol and a medium molecular weight polyvinyl alcohol, and optionally, a copolymer of vinyl alcohol and an ethylenically unsaturated ester, and (ii) a polyethylene glycol as a plasticizer. The respondent argued that the degree of hydrolysis in the range of between 85 and 90 mol percent disclosed in claim 1 of D19 for the mixture of polyvinyl alcohols meant that the polyvinyl alcohols were copolymers in the sense of granted claim 1. Granted claim 1, however, requires the copolymer to be a random or a block copolymer, but the respondent did not show that claim 1 of D19 disclosed such copolymers.
- 2.5.7 The respondent also argued that the films prepared from the compositions of D19 were preferably rapidly and completely soluble in cold water, that they could be used to package pulverulent materials (column 1, lines 41-43) such as caustic cleaners (column 1, lines 51-53) which the respondent considered to be equivalent to a dish washing composition (rejoinder, section 453). The respondent also argued that D19 taught a preferred dry basis moisture content of the film before slitting of 4-5% and that 5-7% was preferred for the finished film for packaging, and 7-8% was preferred for film comprising the final water-soluble package (column 7, lines 14-18). It is apparent from the arguments submitted by the respondent that multiple passages of D19 concerning optional and preferred embodiments had

to be combined with one another in order to arrive at the subject matter of granted claim 1. It was however not shown by the respondent that these distinct passages of D19 could be read in combination with one another, resulting in a mosaic-like combination within D19 which is not permissible to assess novelty of a claim in view of a document (Case Law of the Boards of Appeal, 10th Edition 2022, I.C.4.2). In view of this the Board comes to the conclusion that granted claim 1 is novel over D19. The same conclusion applies to granted claims 20 and 21.

Auxiliary request 1

3. Admittance

3.1 Claims 1, 19 and 20 of auxiliary request 1 correspond to granted claims 1, 20 and 21 wherein the water content of the water soluble material is further limited to the range of "5% or less". The appellant pointed out that auxiliary request 1 filed with the statement of grounds of appeal corresponded to auxiliary request 1 of the opposition proceedings with amendments made in claims 19 and 20 to bring the wording of these claims in line with the wording of claim 1 and to comply with the requirements of Article 123(2) EPC. For these reasons, the appellant considered that auxiliary request 1 should be admitted into the proceedings.

3.2 The respondent argued that auxiliary request 1 could and should have been filed before the opposition division, that there was no reason to amend claims 19 and 20 in auxiliary request 1 and that the amendments introduced new issues under Article 123(2) EPC so that, also for reasons of procedural economy, auxiliary

request 1 should not be admitted into the proceedings (rejoinder, section V.2).

- 3.3 Auxiliary request 1 was submitted by the appellant for the first time with their statement of grounds of appeal. It was not disputed that auxiliary request 1 was not a request according to Article 12(2) RPBA and that as such auxiliary request 1 constituted an amendment under Article 12(4) RPBA, the admittance of which was subject to the discretion of the Board.
- 3.4 Claim 1 of the present auxiliary request 1 is indeed identical to claim 1 of auxiliary request 1 upon which the decision under appeal is based (decision under appeal, section 5). The amendment performed in claims 19 and 20 of auxiliary request 1, the change of the formulation of the limitation of the water content from "below 5%" in auxiliary request 1 filed before the opposition division to "5% or less" is clearly identifiable from these claims and the appellant pointed at granted claim 2 as a basis for the amendment in line with the requirements of Article 12(4) RPBA.
- 3.5 Under Article 12(4) RPBA the Board shall exercise its discretion to admit or reject an amendment to a party's case in view of, *inter alia*, the complexity of the amendment, the suitability of the amendment to address the issues which led to the decision under appeal, and the need for procedural economy.
- 3.6 In the present case the Board finds that the amendment performed in claims 19 and 20 is not complex since it is the mere limitation of the range of the water content defining the water soluble material which was also already present in claim 1 of the same request.

3.7 The respondent argued at the oral proceedings before the Board that the amendment performed in claims 19 and 20 rendered the case more complex and was against the principle of procedural economy. It is however apparent from the argumentation provided by the respondent in appeal (rejoinder, section VIII.2) that the objection of lack of support of that amendment in the application as filed (Article 123(2) EPC) is identical to the argument raised for claim 1 of auxiliary request 1 which already contained the limitation of the range of water content of the water soluble material to the range of 5% or less (rejoinder, section 172). In this respect the Board does not find that the amendment in claims 19 and 20 of auxiliary request 1 adds more complexity to the case that would go against the principle of procedural economy. The Board also finds that, since the question of novelty, especially that relating to D11, hinged on the definition of the level of water content of the water soluble material as defined in claim 1, it is reasonable from the side of the appellant to bring the wording of the water content mentioned in claims 19 and 20 in line with the wording already chosen for claim 1 of auxiliary request 1. The resubmission of auxiliary request 1 filed before the opposition division as auxiliary request 13 in appeal is not of relevance to the admittance of auxiliary request 1 filed with the statement of grounds of appeal. The Board therefore finds it appropriate in the present case to exercise its discretion under Article 12(4) RPBA by admitting auxiliary request 1 filed with the statement of grounds of appeal into the proceedings.

4. Amendments

- 4.1 The opposition division concluded that claim 1 of the main request found a basis in claims 1, 4, 5, 7, 23 and 25 of the application as originally filed (section 3.1.1, page 17). It is also implied on page 23 (second paragraph) of the decision under appeal that the amendment of the water content in claim 1 of auxiliary request 1 also found a basis in the application as originally filed. The respondent contested these conclusions in appeal (rejoinder, section VIII).
- 4.2 The respondent considered in their rejoinder that multiple selections had to be made in the application as originally filed to arrive at the subject matter of operative claim 1 (paragraphs 147 to 152 of the rejoinder). For that argumentation however the respondent relied on selections that would have had to be made in the claims as originally filed, in the description of the original application and even in the prior art documents D16, D19, D24 and D37. Thus, in paragraph 148 the respondent considered the choice of a random or block copolymer to be a selection within the known types of copolymers disclosed in D37. In paragraph 150 the respondent considered D41 and in paragraph 151, D16, D24 and D19. These references however are neither relevant to the reasoning of the opposition division, which correctly found a basis in the claims as originally filed only, nor capable of reversing the opposition division's findings.
- 4.3 The Board concurs with the opposition division that claim 1 of auxiliary request 1 finds a basis in the claims of the application as originally filed. Claim 25 by reference to claim 23 from which it depends concerns a unit packaged detergent composition that is defined as a dish washing composition. According to claim 23 the detergent composition is wrapped in the water

soluble material or the foil according to any of the claims 1 to 21. The foil referred to in claim 23 is defined in its most generic way in claim 12 as originally filed (from which claim 23 depends) as comprising the material according to any of the preceding claims.

- 4.4 The material referred to in claim 12 is defined in claims 1-7 in that it comprises a copolymer of polyvinyl alcohol (claim 7) and the material has a water content of below 7.5% (claim 1). There is therefore in the line of dependency of the claims of the application as originally filed a direct link between claims 25, 23, 12, 7 and 1. In order to arrive at the subject matter of claim 1 of auxiliary request 1, the Board finds that an additional combination of features is needed in claim 5 (the polymer is a random or a block copolymer) and claim 2 (the water content of the water soluble material is 5% or less). The subject matter of claims 2 and 5 is however disclosed in combination through the dependency of claims 5, 4 and 2. The Board finds that the combination of the water content of 5% as the preferred embodiment of claim 2 with the copolymer being random or block copolymer from claim 5 remains generic in nature and since the combination was generally disclosed in the claims of the application as originally filed, the Board finds that the subject matter of claim 1 of auxiliary request 1 does not infringe on Article 123(2) EPC. Therefore the respondent's arguments on multiple selections are not applicable in the present case. The same conclusion applies to claims 19 and 20 of auxiliary request 1 which are based on claims 22 and 24 of the application as originally filed by reference to the same dependent claims relating to the unit packaged dish washing

composition.

5. Sufficiency of disclosure

5.1 The decision under appeal concluded that the objection of lack of sufficiency against granted claim 1 was not to be followed (decision under appeal, section 3.1.2). The respondent contested that conclusion in appeal and argued that the claims of the main request were not sufficiently disclosed on the grounds that the water content of the water soluble material was an unusual parameter (rejoinder, section X.2). The respondent in particular considered that the water content was unusual because the water soluble material comprised a water soluble copolymer (copolyvinyl alcohol) comprising groups which could react with each other by forming intra- or intermolecular linkages and release additional water molecules (rejoinder, paragraph 253). The respondent also considered that there was no definition of the water content of polyvinyl alcohols in the literature (rejoinder, paragraph 254).

5.2 The water content is however a widely known parameter used for the characterization of polyvinyl alcohols in the prior art, some of them being defined as copolymers, such as in D1 (examples), D2 (example A), D6 (page 6, claim 1), D10 (pages 8 and 9), D11 (paragraph 10, examples 1-3) and D12a (paragraphs 28 and 29). In addition, paragraph 10 of D11 discloses a method for the determination of the water content in films that already had been applied to polyvinyl alcohols of the type Monosol 8630 found to be relevant to the novelty of granted claim 1 at the priority date of the patent in suit. In this respect, the Board finds that the definition of the water content in operative

claim 1 is not an unusual parameter.

5.3 The respondent also argued that the lack of a definition and measurement method of the water content in granted claim 1 caused a non-compliance with the requirements of sufficiency of disclosure (rejoinder, paragraphs 257-259, 268), especially because the parameter was important in achieving the advantages of the invention (rejoinder, paragraph 265). The respondent argued that the lack of definition of the water content of the water-soluble material raised serious doubts as to whether the claimed advantages of the invention could be achieved (rejoinder, paragraph 266). The respondent cited D12 and D35f to show that the film water content of polyvinyl alcohol films depended on the conditions used for measuring said film water content (rejoinder, paragraph 270).

5.4 Operative claim 1 however is not defined by any advantage or effect linked to the combination of features in the claim or to the water content of the water soluble material. The question of whether any advantage or effect not defined in the claim could be obtained or not depending on the water content of the water soluble material is therefore not a question of lack of sufficiency of the claims. The question of sufficiency of disclosure, in the present case, is rather whether the skilled person could obtain units packaged dish washing compositions wrapped in a foil comprising a water soluble material having a water content of below 7.5% as defined in operative claim 1. According to established case law of the boards of appeal, a successful objection of insufficient disclosure presupposes that there are serious doubts, substantiated by verifiable facts that the claimed subject matter could not be produced. In *inter partes*

proceedings, the burden of proof initially lies with the opponent, who must establish, on the balance of probabilities, that a skilled person reading the patent, using common general knowledge, would be unable to carry out the invention (Case Law of the Boards of Appeal, 10th Edition 2022, II.C.9.1). The respondent has however not established how the characterisation of the water content as set out in granted claim 1 would have prevented a skilled person from obtaining the claimed unit packaged dish washing composition.

5.5 Furthermore, the alleged ambiguity resulting from a lack of a measurement method for the water content of the water soluble material of granted claim 1, as argued by the respondent on the basis of D12 and D35f (rejoinder, sections 270 and 271) could have been seen as an issue of sufficiency if it had been shown that the ambiguity in the determination of the water content would have prevented the skilled person from performing the invention as claimed (Case Law of the Boards of Appeal, 10th Edition 2022, II.C.5.5.1c). That, however, has not been shown by the respondent as it was merely alleged that the lack of a definition of a measurement method for the water content would cause the skilled person to be unable to determine what the necessary measures are to achieve the advantages of the invention (rejoinder, sections 259, 262 and 266) without explaining why the accurate determination of the water content of the water soluble material was paramount to prepare the unit packaged dish washing compositions according to granted claim 1. In this respect, the Board finds that any lack of accuracy in the determination of the water content of the water soluble material as defined in claim 1 is a question of clarity which is not open to discussion in opposition proceedings with respect to a feature present in

granted claim 1 (see G 3/14, Reasons 81).

6. Novelty

6.1 The respondent maintained their objections of lack of novelty of granted claim 1 in view of auxiliary request 1. At the oral proceedings before the Board the parties relied on their arguments submitted for the granted claims for the discussion of novelty of the claims of auxiliary request 1.

6.2 Claim 1 of auxiliary request 1 corresponds to granted claim 1 in which the range defining the water content of the water soluble material was further limited to "5% or less".

6.2.1 The conclusion of novelty of granted claim 1 over D1 based on the lack of disclosure of a unit packaged dish washing composition also applies to claim 1 of auxiliary request 1.

6.2.2 The conclusion of novelty of granted claim 1 over D10, D2, D14 and D17 which is based on a lack of disclosure of the water content of the water soluble material in these documents, applies equally to claim 1 of auxiliary request 1.

6.2.3 The conclusion of novelty of granted claim 1 over D18 based on the lack of disclosure of a polyvinyl alcohol being a copolymer in D18 also applies to claim 1 of auxiliary request 1.

6.2.4 Novelty of granted claim 1 over D19 was acknowledged on the grounds that it had not been shown that the polyvinyl alcohol copolymers of D19 were random or block copolymers and that multiple combinations were

needed in D19 that were not shown to be disclosed together. That conclusion also applies to claim 1 of auxiliary request 1 which is defined by the use of a random or block copolymer of polyvinyl alcohol.

6.2.5 The Board came to the conclusion that granted claim 1 lacked novelty over examples 1-3 of D11. D11 in particular disclosed in paragraph 67 an average water content of about 7% for the equilibrated liquid containing pouch based on the film Monosol M8630. That value of the water content does not fall in the range defined in claim 1 of auxiliary request 1 (5% or less). The respondent argued that D11 also disclosed preferred water contents of the film in the range of from about 4 to about 15%, preferably from about 5 to about 9% by weight (rejoinder, section 357). It is however apparent that these ranges that are disclosed in paragraph 8 of D11 are preferred ranges of water content that are supposed to apply to the broad class of polymer films used to prepare the single or multi-compartment detergent pouch of D11. These films are disclosed in paragraphs 28 to 38 of D11 and can contain many types of polymers (paragraph 32). While polyvinyl alcohols are listed among these polymers (last line of paragraph 32) and those known under the trade name Monosol M8630 in examples 1-3 are the most preferred (paragraph 35), there is no explicit disclosure in D11 of films made of Monosol M8630 having a water content in the range of overlap between D11 (from about 4% to about 15%) and claim 1 of auxiliary request 1 (5% or less). In this respect the Board comes to the conclusion that claim 1 of auxiliary request 1 is novel over examples 1-3 of D11.

6.2.6 Claim 19 of auxiliary request 1 concerns the use of a foil comprising a water soluble material having a water

content of 5% or less comprising the water soluble copolymer according to any of the preceding claims for wrapping a dish washing composition. Claim 20 of auxiliary request 1 concerns a process of manufacturing the packaged dish washing composition of claims 1 to 18 using a foil comprising a water soluble material having a water content of 5% or less comprising a water soluble copolymer according to any of claims 1 to 18. Claims 19 and 20 are therefore defined by the water soluble material according to claim 1 of auxiliary request 1. The conclusion on novelty of claim 1 of auxiliary request 1 therefore also applies to claims 19 and 20 of auxiliary request 1.

7. Remittal

7.1 The appellant requested that, should novelty of any of the requests be acknowledged, the case be remitted to the department of first instance for the discussion of inventive step. While the respondent initially contested the remittal of the case to the department of first instance in their rejoinder (section XII.1, page 92), that request was not pursued at the oral proceedings before the Board (page 5, third full paragraph of the minutes of the oral proceedings).

7.2 According to Article 11 RPBA the Board shall not remit the case to the department whose decision was appealed for further prosecution unless special reasons present themselves for doing so. In the present case, the decision under appeal only pertains to the requirements of sufficiency of disclosure, Article 123(2) EPC and Article 54 EPC in view of documents D10, D11 and D2. Inventive step objections were however raised in view of documents D2, D3, D10, D11, D14, D17, D18 and D19 by the then opponents in their respective notices of

opposition and the patent proprietor saw D7/D21 as the closest prior art (reply to the notices of opposition, section VI.1). It is also apparent from the discussion of inventive step of the claims in the rejoinder (section XII.3, paragraph 520) that documents of the prior art that have not been addressed in the decision under appeal and not discussed under the novelty objections in appeal could be seen as relevant starting points for separate objections of lack of inventive step.

- 7.3 Considering that it must be assessed whether the requirements of inventive step are met in view of documents which may not have been discussed in the decision under appeal and in view of the request for remittal of the appellant, the Board finds that special reasons are present and considers it appropriate to remit the case to the opposition division for further prosecution according to Article 111(1) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution on the basis of the set of claims of auxiliary request 1 as filed with the statement of grounds of appeal.

The Registrar:

The Chairman:



A. Pinna

M. Barrère

Decision electronically authenticated