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**Datasheet for the decision
of 27 May 2025**

Case Number: T 0341/24 - 3.2.07

Application Number: 19203544.2

Publication Number: 3686118

IPC: B65D1/32, B65D47/20, B65D51/24

Language of the proceedings: EN

Title of invention:
NON-DRIP UPSIDE DOWN BOTTLES

Patent Proprietor:
The Procter & Gamble Company

Opponents:
Henkel AG & Co. KGaA
Jones, Bruce

Relevant legal provisions:
EPC Art. 100(b), 83, 100(a), 54, 56
RPBA 2020 Art. 12(3), 12(5)

Keyword:

Grounds for opposition - insufficiency of disclosure (no) -
lack of patentability (no)
Novelty - public prior use (yes) - prior disclosure - implicit
features (no)
Reply to statement of grounds of appeal - reasons set out
clearly and concisely (no)
Discretion not to admit submission - requirements of Art.
12(3) RPBA 2020 met (no) - submission admitted (no)
Inventive step - (yes)

Decisions cited:

G 0003/14, T 0019/90, T 0182/89, T 0131/03



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0341/24 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 27 May 2025

Appellant:

(Patent Proprietor)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
2 January 2024 concerning maintenance of the
European Patent No. 3686118 in amended form.**

Composition of the Board:

Chairman G. Patton

Members: A. Cano Palmero

 S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The patent proprietor and opponent 1 (appellants) lodged appeals within the prescribed period and in the prescribed form against the decision of the opposition division to maintain European patent No. 3 686 118 in amended form on the basis of the then auxiliary request 1.
- II. Two oppositions were filed against the patent in its entirety on the grounds for opposition pursuant to Article 100(a) (novelty and inventive step), 100(b) (sufficiency of disclosure) and 100(c) (added subject-matter) EPC. The ground for opposition under Article 100(c) EPC was withdrawn during opposition proceedings.
- III. In order to prepare the oral proceedings scheduled upon the parties' requests, the board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA. Opponent 2 (party as of right and respondent to the patent proprietor's appeal case) gave a substantive response to the board's communication with letter dated 1 May 2025.
- IV. Oral proceedings before the board took place on 27 May 2025. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.
- V. The final requests of the parties are as follows:

for the patent proprietor

that the decision under appeal be set aside

and
that the patent be maintained as granted (main request),
or, in the alternative,
according to any of auxiliary requests 1 to 7 which correspond to auxiliary requests 1 to 6 and 8 filed on 6 October 2023 during opposition proceedings,
or, in the alternative,
that the appeal of opponent 1 be dismissed, *i.e.*
that the patent be maintained in the form held by the opposition division to meet the requirements of the EPC according to the then auxiliary request 1 filed as auxiliary request 7 on 6 October 2023 (now auxiliary request 8 in appeal proceedings);

for opponent 1

that the decision under appeal be set aside
and
that the European patent be revoked;

for opponent 2

that the appeal of the patent proprietor be dismissed.

VI. The following documents, which were part of the opposition proceedings, are referred to in this decision:

- D1: Henkel, "Record ID 63429 in the mintel GNPD database of a dishwashing product ("Pril Kraft-Gel")", Host: Mintel June 1998;
- D3: Pictures of model P98;
- D4: Henkel, "internal project name "Jonas", Mark name "Pril Kraft-Gel"", Host: Internal 1998-1999;

D5: Transcript and screenshots of a video YouTube film <https://www.youtube.com/watch?v=tLYrzm27J-I>;
D21: Our Daily Ideas, "Fit-it Cap System", using "The Wayback Machine";
D34: US 4,728,006.

VII. The relevant lines of arguments of the parties are dealt with in detail in the reasons for the decision.

VIII. Independent claim 1 according to the patent as granted (main request) reads as follows:

"A bottom dispensing package (1) for a liquid composition comprising:

a. a resiliently squeezable container (10) for housing a fluid, the resiliently squeezable container comprising a wall (11), wherein the resiliently squeezable container (10) is an injection stretch-blow moulded container (ISBM), wherein the resiliently squeezable container (10) is made from a resin material selected from the group consisting of: polyethylene terephthalate (PET), polypropylene (PP), and mixtures thereof, and the resiliently squeezable container (10) comprises:

i. a non-circular cross-section wherein the non-circular cross-section of the resiliently squeezable container (10) has a maximum ratio of the cross-sectional width (16) to the cross-sectional depth (17) which is greater than 1.25, wherein the cross-sectional width and depth are measured at the same height in the resiliently squeezable container (10); and/or

ii. at least one panel (13) wherein the at least one panel (13) forms at least 40% of the outer-surface (12) of the wall (11);

b. a base (20) operably connected to said container (10), wherein the base comprises an orifice (30), wherein the orifice (30) comprises a slit-valve (40);

characterized in that the resiliently squeezable container (10) has an elasticity index of greater than 0.65% to 2.0%, as measured using the elasticity index method described herein, wherein the bottom dispensing package (1) comprises a liquid detergent composition, the liquid detergent composition having viscosity of from 100 mPa·s to 3,000 mPa·s measured at a *[sic]* shear rate of 10 s⁻¹."

IX. Since the wording of the auxiliary requests is not relevant for the present decision, there is no need to reproduce it here.

Reasons for the Decision

1. *Patent as granted (main request) - Sufficiency of disclosure, Articles 100(b) and 83 EPC*

1.1 The opponents contested the reasoned finding of the opposition division of point 14 of the reasons for the decision under appeal that the invention according to the patent in suit is sufficiently disclosed.

1.1.1 Opponent 1 argued that in the absence of any particular temperature indication in the claims, the feature

"wherein the bottom dispensing package (1) comprises a liquid detergent composition, the liquid detergent composition having viscosity of from 100 mPa·s to 3 000 mPa·s measured at a shear rate of 10 s⁻¹" (feature 1i)) could not be carried out. In particular, the skilled person would not have a clear indication to necessarily take a room temperature of 20 or 25°C as a reference temperature for the viscosity measurement, since in view of the problem to be solved, the container should avoid leakage when exposed to sunlight, *i.e.* at a peak pressure measured at 40°C (see paragraphs [0025], [0078] and [0080] of the patent in suit).

- 1.1.2 Opponent 2 argued that the invention was not sufficiently disclosed in the sense that it could not be performed over the full breadth of the claim. In particular, the elasticity index parameter of the feature *"the resiliently squeezable container has an elasticity index of greater than 0.65% to 2%"* (feature 1h)), which was measured according to the method described in paragraphs [0072] to [0076], was either meaningless or impossible to carry out. Indeed, if a container had no neck or no "stiffest part" to be manipulated, a measurement of the "elasticity index" was not possible. In addition, the defined "elasticity index" parameter and how it was to be measured could not be relied upon at all to define or predict how a given slit-valve might behave and thus whether it led to a solution of the stated problem of avoiding leakage of product from the filled container. In addition, the features relating to the slit-valve and to the viscosity of the composition were also so broad and undefined that the skilled person would face an undue burden in providing such a squeezable container solving the problem of avoiding leakage. In sum, the patent in suit provided no meaningful information or guidance to

the skilled person in order to carry out "from the scratch" a container according to the patent. The result of this lack of guidance is that the skilled person would have to carry out a whole research project, beyond a reasonable amount of trial and error, in order to provide a squeezable container in accordance with the patent in suit.

- 1.2 The board is not persuaded by the opponents' arguments and concurs with the findings of the opposition division, that the invention is sufficiently disclosed. As correctly indicated by the patent proprietor, it is established jurisprudence of the Boards of Appeal that an objection of lack of disclosure presupposes that there are serious doubts substantiated by verifiable facts. **The burden of proof is upon the opponent(s)** to establish on the balance of probabilities that a person skilled in the art, using their common general knowledge, would be unable to carry out the invention (see the Case Law of the Boards of Appeal of the European Patent Office, 10th Edition, 2022, II.C.9, first two paragraphs, in particular in relation to T 19/90 and T 182/89).
- 1.2.1 In the case at hand, no verifiable facts substantiating serious doubts that the invention can be carried out have been presented by the opponents. In addition, the board is of the view that the figures and the description of the patent in suit, see in particular, paragraphs [0034] to [0038] for *inter alia* the choice of the material and the wall thicknesses, gives sufficient information to the skilled person on "how to start" in an attempt to produce a bottom dispensing package in accordance with claim 1, and also on how to define and measure the elasticity index of such package (see paragraphs [0072] to [0076] of the patent in

suit). As correctly argued by the patent proprietor, in the theoretical case that an elasticity index could not be evaluated due to the specificities of a particular package, then the skilled person would rule this package out as not forming part of the scope of the claim. In addition, as also put forward by the proprietor at the oral proceedings, opponent 2 has only criticised the disclosed measuring method and has not filed any evidence showing that it could not perform the measurement, whereas opponent 1 was able to perform it (see last sentence of point 15.1 of the decision under appeal).

- 1.2.2 With regard to the viscosity and the temperature at which it should be measured, the board agrees with the opposition division and with the patent proprietor that the lack of indication of a specific temperature to perform the measurements does not amount to an impossibility of carrying out the invention but rather to the fact that the claim can be seen as broad. The board follows however the proprietor's view that the skilled person would regard as inherent to consider that the temperature for the measurement of the viscosity is the filling temperature of the claimed packages, *i.e.* room temperature *e.g.* 20°C (see for instance paragraphs [0043], [0044] and [0072] of the contested patent), and not a hypothetical temperature the container might theoretically reach in use later on. It is to be noted that the opponents have not contested that detergents exist with the claimed viscosity at 20°C or 40°C.

The board concurs with the proprietor's view put forward at the oral proceedings that the objection relates in fact to a lack of clarity objection, which

cannot be examined as the present claims are the claims of the patent as granted (G 3/14).

1.2.3 Finally, the question whether the technical problem set in the contested patent, paragraph [0025], might be solved over the whole breadth of the claim (*i.e.* for any combination of slit valve, viscosity and/or elasticity index values) could possibly be relevant for inventive step, but not for the question of sufficiency of disclosure, which rather focuses on the question whether the invention is disclosed in a manner for it to be carried out by the skilled person. This is all the more true since said technical problem is not specified in the claim. Furthermore, as already put forward above, the contested patent provides sufficient indications to the skilled person on how to make the claimed product, in particular for the choice of the material and the wall thicknesses, paragraphs [0034] to [0038], as well as for the form of the container, including the slit valve, as shown in figures 1 to 7 and described in paragraphs [0042] and [0043] of the contested patent.

1.3 In sum, the board is of the view that the opponents have not convincingly demonstrated the incorrectness of the decision under appeal, that the invention according to claim 1 as granted is sufficiently disclosed.

2. *Patent as granted (main request) - Novelty of the subject-matter of claim 1 in view of the public prior use "Pril Kraft Gel"*

2.1 The patent proprietor contested the finding of the opposition division (see point 15 of the reasons for the decision under appeal) that the subject-matter of claim 1 as granted lacked novelty over the prior use

"Pril Kraft Gel" illustrated by documents D1, D3, D4 and D5.

- 2.2 It is undisputed that a bottom squeezable container as detailed in D1 was put on the market and was publicly available before the priority date of the patent in suit.
- 2.3 The patent proprietor however argued that it was not proven beyond any reasonable doubt that the product of D1 showed all the features of the claim, including in particular the presence of a slit valve, the viscosity range and the elasticity index range. In particular, the patent proprietor argued that there was no clear link between document D1, on the one hand, and documents D3 and D4, on the other hand. The video of D5 did not disclose the alleged distinguishing features.
- 2.4 The board does not agree with the patent proprietor that D1 and D4 are not linked. Indeed, the viscosity values of the "Pril-Kraft-Gel" on page 10 of D4 bear a date of 23 July 1998. A comparison of different slit valves of the upside-down Pril-Kraft-Gel, including the bottle "currently in the market" of the type "4,5 mm Y-Schnitt" on page 19 of D4 was made on 8 February 1999. The dates of D4 are therefore consistent with the date of D1, which certifies that the Pril-Kraft-Gel bottle was available in the market on June 1998, and with the advertisement video of D5 (1998). The board is thus of the view that a Pril-Kraft-Gel bottle with a slit valve was available to the public as from June 1998, furthermore comprising a liquid detergent composition between 2100 and 2030 mPa·s measured at a shear rate of 10 s^{-1} (page 10 of D4 for 25°C).

2.5 With regard to the elasticity index (identified by the parties as feature 1h)), opponent 1 indicated that measurements according to the instructions provided in paragraphs [0072] to [0076] of the patent in suit, were made on 15 May 2022 on a physical model according to D1 (P98, with photos of D3). The model P98 was available at the archive premises of opponent 1 and the elasticity index results were 0.871% with an attached label and 1.070% without an attached label, therefore anticipating feature 1h).

2.5.1 In any case, both opponents indicated that the patent itself in paragraph [0080] disclosed that different Fairy bottles also anticipated the elasticity index according to feature 1h), so that it could be assumed that containers with the claimed elasticity index were common in the market.

2.5.2 Taking into account that the elasticity index was to be considered as an unusual parameter in the art and the measurements of opponent 1 and paragraph [0080] of the patent in suit, the opponents argued that there was a strong presumption that the Pril-Kraft-Gel bottle of D1 inherently anticipated feature 1h). According to decision T 131/03, the patent proprietor could not claim the benefit of the doubt in these cases and should rather bear the burden of proof to demonstrate that this feature was not present in the prior art.

2.5.3 In consequence, the opponents were of the view that the finding of the opposition division of point 15.3 of the reasons for the decision under appeal that "*[n]ot only the measurement provided by opponent 1, but also the table in paragraph [0080] of the patent, show that this bottle [of D1] has the elasticity index of feature 1h*" was to be upheld.

- 2.5.4 The board disagrees with the opponents for the following reasons. Although it was not disputed by the patent proprietor that the elasticity index could be regarded as an unusual parameter, the board cannot establish in the present case that there is a strong presumption that D1 inherently anticipated feature 1h).
- 2.5.5 Firstly, the board is not convinced that it has been proven beyond any reasonable doubt by opponent 1 that the alleged model of P98 with pictures of D3, corresponded to the container of D1. Indeed, there is no clear link between D1 and the model P98/D3, apart from opponent 1's allegations. The board is thus of the view that, especially in the absence of any kind of test report, the mere statement of opponent 1 that the container had a certain elasticity index cannot amount to a sufficient evidence that the product of the prior use according to D1 did indeed present feature 1h).
- 2.5.6 Secondly, paragraph [0080] of the patent in suit does not show any elasticity index value of the public prior use D1. The fact that there were other (top dispensing) detergent containers available in the market showing the claimed elasticity index does not amount in the board's view to a strong presumption that the bottom dispensing container according to D1 inherently presented feature 1h) as well.
- 2.5.7 In sum, in the absence of a strong presumption according to the headnote of T 131/03 and in the absence of any other convincing evidence, the board concludes that the public prior use according to the Pril-Kraft-Gel bottle of D1 does not directly and unambiguously anticipate at least the elasticity index according to feature 1h), contrary to the opposition

division's findings. In the further absence of any other novelty objection, the subject-matter of claim 1 as granted is therefore considered novel.

3. *Patent as granted (main request) - Inventive step, Articles 100(a) and 56 EPC*

3.1 With its reply to the patent proprietor's statement setting out the grounds of appeal, point IV thereof, opponent 1 referred to its written submissions presented during opposition proceedings for the attacks of lack of inventive step. During the oral proceedings before the board, for the issue of admittance, opponent 1 by referring to its written submissions for the attacks of lack of inventive step starting from the model P18 (corresponding to the Fairy Platinum Washing Up Liquid (UK, 2018) of paragraph [0080] of the patent in suit) or from document D21 as closest prior art in combination with common general knowledge, considered that such attacks could not be surprising since they dealt with products originating from the patent proprietor and should be admitted, as formulated in the notice of opposition as from page 18.

3.1.1 The board notes that it is established case law that the mere reference to submissions in opposition proceedings does not render the appeal case of a party substantiated in the sense of Article 12(3) RPBA (see the explanatory remarks to Article 12(5) RPBA 2020, Supplementary publication 2 - OJ EPO 2020, page 57). In this respect the board notes that the proprietor dealt with the objection starting from model P18 in opposition proceedings, see letter dated 21 December 2023, point 6.3 without any further reactions from opponent 1 thereafter. Opponent 1 was therefore expected to provide with its reply in appeal

proceedings arguments taking into account these further arguments of the patent proprietor in addition to a complete line of an inventive step objection in order to fulfil the requirements of Article 12(3) RPBA, which it failed to do. The board also notes that an inventive step objection starting from document D21 as closest prior art in combination with common general knowledge could not be found in opponent 1's notice of opposition or later in the opposition proceedings. Thus, also for this objection the requirements of Article 12(3) RPBA are not fulfilled. In view of these considerations, the board, exercising its discretion pursuant to Article 12(5) RPBA, does not admit the attacks starting from P18 or D21 as closest prior art into the proceedings.

3.2 Opponents 1 and 2 further argued that the subject-matter of claim 1 according to the patent as granted lacked inventive step starting from the prior use of D1 as closest prior art in combination with common general knowledge taking into account the prior art of the patent.

3.2.1 Opponent 1 argued that the elasticity index was strongly dependent on the form of the container. If an elasticity index in the range of 0.65% to 2.0% could not be directly derived from the prior use of D1, then the skilled person would arrive at the subject-matter of claim 1 according to the patent as granted simply by increasing or reducing the volume of the container, for instance by changing its height and/or width, in order to solve the problem of reducing or increasing the resilience of the container and/or of adapting the container volume depending on the market's needs.

Alternatively, if the elasticity index of D1 was lower than 0.65%, the skilled person would use less PET or

alternative materials in order to solve the problem of reducing the PET use and/or reducing the force required for a proper dosage, thereby arriving at a container with thinner and/or more flexible sidewalls and therefore with an increased elasticity index.

- 3.2.2 Opponent 2 argued that the claimed range for the elasticity index was not a purposive selection. Indeed, according to the measurements provided by the patent proprietor on 7 January 2021 during examination proceedings made on prior art containers of the patent (see page 1, sixth paragraph), a container with an elasticity index of 0.62% (*i.e.* just 0.03% below the claimed range, see "Calve Mayonnaise (BE, 2020) in the table on page 2") did not provide the alleged desired technical effect, so that there was no reason to believe that a container with an elasticity index of 0.65% would meet the technical requirements of the invention. With regard to the upper limit of 2%, opponent 2 indicated that the patent proprietor had only shown that containers with an elasticity index up to 1.32% delivered the technical effect, but there was no proof that containers between 1.32% and 2% as claimed would also do so. The end limits of the claimed range were thus arbitrary and there was no technical explanation as to why all containers within the broad claimed range of 0.65% to 2% would solve the alleged problem of the invention, especially having in mind the numerous parameters influencing leakage, as explained in the patent itself, paragraphs [0034] and [0042] (see patent proprietor's letter dated 7 January 2021, page 1, fourth paragraph).

In addition, opponent 2 argued that the elasticity index was an unusual parameter that could not be relied upon since the elastic deformation varied through the

whole lifetime of the product and depended on the temperature.

In sum, since it was not proven by the patent proprietor that the claimed elasticity index range solved a technical problem, this feature could not justify the presence of an inventive step starting from D1 as closest prior art.

- 3.2.3 The board is not persuaded by the opponents' arguments and rather concurs with the patent proprietor for the following reasons.

The board agrees with the patent proprietor that starting from D1 as closest prior art, the claimed elasticity index has the technical effect of making the bottom dispensing package more resilient which therefore reduces leakage, especially by reducing the peak pressure at 40°C. This is apparent from the experiments provided in the contested patent, paragraph [0080] as well as those in the letter dated 7 January 2021. Opponent 2's argument that the value for Calve Mayonnaise (BE, 2020) in the table of this letter shows that there would not be any technical effect within the claimed elasticity index range is a mere speculation. The problem to be solved is to be seen as providing a bottom dispensing container conveniently squeezable by a user with a reduced tendency to leakage, as it is described in paragraphs [0002] to [0005], [0014] and [0015] of the patent in suit and formulated by the proprietor.

Starting from D1 as closest prior art, the board agrees with the patent proprietor that the skilled person, faced with the problem of reducing leakage, would not be restricted to seeking solutions only on the

container but would rather focus on the opening and the slit valve of D1. There is indeed no hint in D1 or in any of the available prior art, nor does it belong to the skilled person's common general knowledge, that the elasticity of the container would be relevant to leakage. Therefore, for this reason alone, the skilled person **could** modify the elasticity index of the prior use of D1, but there is no reason why they **would** do it, especially in order to arrive within the claimed range.

There is no indication about the elasticity index of the prior use of D1, so that the skilled person, even if they were aware of the measures proposed by opponent 1 to modify the elasticity index, would not know what steps to take, *i.e.* increase or decrease the elasticity index, so as to arrive within the claimed range.

In any case, the board notes that, while the skilled person could theoretically adopt different measures to modify the container of D1 as argued by opponent 1, none of them would be directed to solve the objective technical problem of reducing leakage, so that it is questionable whether the skilled person **would** indeed apply those specific measures and arrive at the claimed range in an obvious manner.

In consequence, the board is of the view that starting from D1 as closest prior art the skilled person would only arrive at the subject-matter of claim 1 of the patent as granted as the result of an *ex post facto* analysis.

With regard to opponent 2's arguments, the board concurs with the patent proprietor that it is generally for the opponents to demonstrate that a container with the features of the claim does not lead to the desired

technical effect. In the absence of such evidence from the opponents and in view of the results provided by the patent proprietor (see paragraph [0080] of the contested patent), the board does not see the limits of the claimed range for the elasticity index as arbitrary or not purposive to solve the problem posed. In this respect, as already discussed above, the board notes that the data provided with letter dated 7 January 2021 show that containers with elasticity index values below 0.65% present a relatively high peak pressure compared with the containers having an elasticity index within the claimed range. An increase of the elasticity index correlates with a decrease of the peak pressure at 40°C and, as put forward by the patent proprietor at the oral proceedings, there is no reason to believe that this effect would also not be achieved for a container with an elasticity index of 0.65% in comparison with the container Calve Mayonnaise (BE, 2020) with an elasticity index of 0.62%. The board is also satisfied with the patent proprietor's argument that an upper limit of 2% is justified in view ensuring an appropriate squeeziness and resilience of the container in order to deliver the fundamental dosage function of the bottom dispensing package.

- 3.3 In sum, the board considers that the subject-matter of claim 1 according to the patent as granted is inventive.

4. *Conclusions*

- 4.1 In view of the above considerations the board concludes that the patent proprietor has convincingly demonstrated the incorrectness of the decision under appeal that the subject-matter of claim 1 as granted lacked novelty.

- 4.2 In addition, the board concludes that the opponents have not admissibly and convincingly demonstrated that the subject-matter of claim 1 as granted is not inventive. The decision under appeal is thus to be set aside and the patent is to be maintained as granted.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



S. Lichtenvort

G. Patton

Decision electronically authenticated