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**D E C I S I O N**  
**of 23 March 2006**

**Case Number:** T 0945/02 - 3.3.07

**Application Number:** 97929186.1

**Publication Number:** 0910334

**IPC:** A61K 7/32

**Language of the proceedings:** EN

**Title of invention:**

Cosmetic composition containing an antiperspirant or deodorant and a moisturising cream

**Applicant:**

UNILEVER PLC, et al

**Opponent:**

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**Headword:**

-

**Relevant legal provisions:**

EPC Art. 123(2)

**Keyword:**

"Amendments - added subject-matter (yes)"

**Decisions cited:**

-

**Catchword:**

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Case Number: T 0945/02 - 3.3.07

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.07  
of 23 March 2006

**Appellant:**

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**Decision under appeal:**

Decision of the Examining Division of the  
European Patent Office posted 28 March 2002  
refusing European application No. 97929186.1  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** S. Perryman  
**Members:** B. Struif  
B. ter Laan

## Summary of Facts and Submissions

I. European patent application No. 97 929 186.1 originating from international application PCT/EP97/03109, having an international filing date of 12 June 1997 and claiming priorities of 20 June 1996 (GB 9612945.7), 23 December 1996 (GB 9626794.3) and 23 December 1996 (GB 9626793.5) was published on 24 December 1997 as WO 97/48373. The application as filed comprised eighteen claims. Independent claims 1 and 15 read as follows.

"1. An antiperspirant or deodorant cosmetic composition suitable for topical application to the human skin, comprising:

- i. an antiperspirant or deodorant active;
- ii. a moisturising cream; and optionally
- iii. a carrier for the antiperspirant or deodorant active."

"15. An antiperspirant or deodorant composition suitable for topical application to the human skin, comprising:

- i. 1-25% by weight of the total composition of an antiperspirant or deodorant active;
- ii. 1 to 90% by weight of the total composition of water; and
- iii. 0.1 to 95% by weight of a moisturising cream."

II. In its decision of 28 March 2002, the examining division refused the application in suit. That decision was based on a set of 13 claims as the main request and on three auxiliary requests.

Claim 1 of the main request read as follows:

"1. An antiperspirant cosmetic composition, in the form of a cream or roll-on, suitable for topical application to the human skin, comprising:

- i. 10-25% by weight of an antiperspirant active;
  - ii. a moisturising cream; and optionally
  - iii. a carrier for the antiperspirant active
- characterised in that the moisturising cream comprises glycerol as an humectant and is capable of increasing both the elasticity of the skin and the moisture content of the stratum corneum by a significant amount and wherein the composition contains a surfactant in an amount of less than 8% by weight consisting of non-ionic surfactant."

Claim 1 of all three auxiliary requests also comprised the feature "...the moisturising cream is capable of increasing both the elasticity of the skin and the moisture content of the stratum corneum by a significant amount ...".

III. The examining division held that:

- (a) The definition of the moisturising cream was not clear as it did not describe the precise components necessary to increase both the elasticity of the skin and the moisture content of the stratum corneum by a significant amount. The presence of glycerol only had been admitted as being insufficient. Although test methods were described in the application as filed, the desired results could not be obtained without undue experimentation. Therefore, the skilled person did

not know what was intended by the wording of the claims.

- (b) A functional definition in claims was only justified in so far as it could not be defined more precisely by other technical features and if the subject-matter comprised by the wording of the claim was sufficiently clear to the skilled person to reduce it to practice without undue burden. Since the claimed subject-matter only specified the result to be achieved without giving clear information about the subject-matter actually being claimed, the applicant sought protection for an idea but left the realization to the skilled person. Even if the whole disclosure was considered, the scope of the claims remained vague and necessitated more or less that the invention be made by the skilled person.

The unclear scope of the claims caused problems with the substantive examination, since it was not possible to establish the properties of similar creams of the prior art and their effects on elasticity and moisture of the skin, apart from the unclear meaning of the word "significant".

- (c) Since the moisturising cream in each independent claim 1 of auxiliary requests 1 to 3 had essentially been defined in the same way as in claim 1 of the main request, the arguments given above applied *mutatis mutandis* to the claims of the auxiliary requests.

IV. On 22 Mai 2002, the applicant (appellant) filed a notice of appeal against the above decision. With the statement setting out the grounds of appeal filed on 29 July 2002, the appellant submitted a new set of 13 claims (main request) as well as two further sets of claims as auxiliary requests.

V. By letter dated 16 March 2006, in reply to a communication of the board of 7 February 2006, the appellant submitted a set of 11 claims as the new main request and six sets of claims as auxiliary requests 1 to 6.

Claim 1 of the main request reads as follows:

"1. An antiperspirant cosmetic composition, in the form of a roll-on, suitable for topical application to the human skin, comprising the following components:

- i. 10-25% of an antiperspirant active and
- ii. a carrier for the antiperspirant active characterised in that the antiperspirant active is selected from activated alumionium chlorohydrate, aluminium chlorohydrate, aluminium pentachlorate aluminium zirconium chlorohydrate, activated aluminium zirconium glycine and zirconium aluminium glycine and the composition is free from ethanol and comprises a further component, at least 15% of a moisturising cream comprising 1 to 30% of a humectant, in which glycerol is present as humectant and less than 8% of a non-ionic surfactant, %s being by weight of the total composition."

Claim 1 of the first auxiliary request reads as follows:

"1. An antiperspirant cosmetic composition, in the form of a roll-on, suitable for topical application to the human skin, comprising the following components:

- i. 10-25% of an antiperspirant active and
- ii. a carrier for the antiperspirant active characterised in that the antiperspirant active is selected from activated aluminium chlorohydrate, aluminium chlorohydrate, aluminium pentachlorate aluminium zirconium chlorohydrate, activated aluminium zirconium glycine and zirconium aluminium glycine and the composition is free from ethanol and comprises a further component, at least 15% of a moisturising cream comprising 1.5 to 10% of a humectant, in which glycerol is present as humectant, at least 40% of water, and less than 8% of a non-ionic surfactant, %s being by weight of the total composition."

Claim 1 of the second auxiliary request reads as follows:

"1. An antiperspirant composition in the form of a roll-on comprising an antiperspirant salt, water and a surfactant characterised in that

- i. the antiperspirant salt is aluminium chlorohydrate in an amount of 10-25%;
- ii. the composition contains at least 15% of moisturising cream comprising glycerol as an humectant in an amount of 0.1 to 30%;
- iii. the composition contains at least 40% of water and
- iv. the surfactant is a non-ionic surfactant in an amount of less than 8% by weight

v. the composition is free from ethanol  
%s being by weight of the total composition"

Claim 1 of the third auxiliary request reads as follows:

"1. An antiperspirant composition in the form of a roll-on comprising an antiperspirant salt, water and a surfactant characterised in that

- i. the antiperspirant salt is aluminium chlorohydrate in an amount of 10-25%;
- ii. the composition contains at least 15% of moisturising cream comprising glycerol as an humectant in an amount of 1.5 to 10%;
- iii. the composition contains at least 40% of water and
- iv. the surfactant is a non-ionic surfactant in an amount of less than 8% by weight
- v. the composition is free from ethanol %s being by weight of the total composition"

Claim 1 of the fourth auxiliary request reads as follows:

"1. An antiperspirant cosmetic composition, in the form of a roll-on, suitable for topical application to the human skin, comprising the following components:

- i. 10-25% of an antiperspirant active and
- ii. a carrier for the antiperspirant active characterised in that the antiperspirant active is selected from activated aluminium chlorohydrate, aluminium chlorohydrate, aluminium pentachlorate, aluminium zirconium chlorohydrate, activated aluminium zirconium glycine and zirconium aluminium glycine and the composition comprises a further component, at least



15% of a moisturising cream comprising 1 to 30% of a humectant, in which glycerol is present as humectant and less than 8% by weight based on the composition of a non-ionic surfactant and excludes ethanol, %s being by weight of the total composition, which moisturising cream is capable of increasing both the elasticity of the skin and the moisture content of the stratum corneum by a significant amount."

Claim 1 of the fifth auxiliary requests reads as follows:

"1. An antiperspirant composition in the form of a cream or roll-on comprising an antiperspirant salt, water and a surfactant characterised in that

- i. the antiperspirant salt is aluminium chlorohydrate in an amount of 10-25%;
- ii. the composition contains at least 15% of moisturising cream comprising glycerol as an humectant in an amount of 0.1 to 30%;
- iii. the composition contains at least 40% of water and
- iv. the surfactant is a non-ionic surfactant in an amount of less than 8% by weight %s being by weight of the total composition and further characterised in that the moisturising cream is capable of increasing both the elasticity of the skin and the moisture content of the stratum corneum by a significant amount."

Claim 1 of the sixth auxiliary requests reads as follows:

"1. An antiperspirant composition in the form of a cream or roll-on comprising an antiperspirant salt, water and a surfactant characterised in that

- i. the antiperspirant salt is aluminium chlorohydrate in an amount of 10-25%;
- ii. the composition contains at least 15% of moisturising cream comprising glycerol as a humectant in an amount of 1.5 to 10%;
- iii. the composition contains at least 40% of water and
- iv. the surfactant is a non-ionic surfactant in an amount of less than 8% by weight

%s being by weight of the total composition and further characterised in that the moisturising cream is capable of increasing both the elasticity of the skin and the moisture content of the stratum corneum by a significant amount."

VI. The appellant argued in substance as follows:

(a) The invention was about selecting a combination of ingredients in order to reduce the negative effects of the antiperspirant, such as irritation of the skin, and to increase the positive effects of the humectant, such as moisturising the skin. The claimed subject-matter related to a roll-on composition comprising the features as specified in claim 1 of each of the requests, including glycerol as a humectant. The basis for the amendments to claim 1 of all requests could be found in the following passages:

The amount of antiperspirant active in the compositions in general was mentioned on page 7, line 21. The roll-on formulation of example 6 contained an antiperspirant active in the form of a solution, which normally comprised 50% of the active substance. Thus, the composition of example 6 included  $35\% : 2 = 17.5\%$  by weight of the antiperspirant active, which was within the range now being claimed. The percentage of the antiperspirant active in the roll-on lotion composition of original claim 17 (30 to 40%) also referred to an antiperspirant solution and not to the antiperspirant active as such, so that its amount was in fact 15 to 20%. Claim 17 referred back to the preceding claims, including claims 7 to 9 which disclosed glycerol as a humectant. Furthermore, glycerol was specifically mentioned on page 4, line 17. The amount of the humectant was disclosed on page 4, lines 1 and 2. According to page 9, last paragraph, the composition could be used in any application and glycerol was furthermore mentioned as an ingredient for a pump spray. As there was hardly any difference between pump spray and roll-on compositions, the ingredients of pump spray compositions could be used for roll-on compositions as well, which was known to the skilled person. This was also true for glycerol.

- VII. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 11 as the main request, or, alternatively, on the basis of one of the six sets of

claims forming auxiliary requests 1 to 6 all submitted with letter dated 16 March 2006.

## **Reasons for the Decision**

1. The appeal is admissible.

*Amendments to the claims (Article 123(2) EPC)*

*Main request*

2. The subject-matter of claim 1 of the main request is directed to a roll-on composition that comprises among others the following mandatory components: an antiperspirant active selected from specific components in an amount of 10 to 25% by weight and at least 15% by weight of a moisturizing cream comprising 1 to 30% by weight of an humectant, in which glycerol is present as an humectant.

- 2.1 Roll-on lotion compositions are disclosed in original claim 17. They comprise 30-40% antiperspirant active, 2-8% emulsifier, 0.5-5% emollient and 50-60% water. Compared to present claim 1, the amount of antiperspirant active is different and no moisturising cream, nor an humectant including glycerol are mentioned.

- 2.1.1 The appellant argued that the amount of antiperspirant active in present claim 1 (10 to 25%) was not contradictory to the amounts mentioned in original claim 17 (30 to 40%) as the latter referred to a

- solution, in particular to a 50% solution, of the antiperspirant active, such as mentioned in example 6.
- 2.1.2 Example 6 discloses a roll-on formulation that comprises 35% by weight of an antiperspirant active solution. In addition, the composition contains a moisturising cream in an amount of 25% by weight, a thickener, an emulsifier mixture, emollient oil preservative, perfume and water. Although the roll-on formulation of example 6 (table page 18) mentions a solution of antiperspirant active, it does not mention its concentration in the solution. On the contrary, on page 18, below the table, a preferred roll-on lotion composition is disclosed in which no reference is made to a solution; instead, an amount of 30 to 40% antiperspirant active, as in original claim 17, is indicated, in combination with 60 to 80 % water; this suggests that the 30 to 40% refer to the antiperspirant active as such, not to a solution.
- 2.1.3 A further roll-on composition is described in example 1, containing, among other components, aluminium chlorohydrate and water. The percentage of aluminium chlorohydrate is indicated as being 50% active and 34.5% w/w. No mention is made what the percentages refer to.
- 2.1.4 From the compositions of Examples 6 and 1 it cannot be concluded that original claim 17 refers to a solution of the antiperspirant active and not to the active as such, and even less that such a solution would contain 50 percent of the active, whatever the reference might be. If such an interpretation were accepted, it would cast doubt on the meaning of all the other percentages

of the antiperspirant active mentioned in the claims and description. In fact, the appellant never argued that the percentage of 10 to 25% by weight of the antiperspirant active according to claim 1 of the main request would refer to a solution and not to the active as such. Consequently, the roll-on composition of claim 17 does not provide any basis for the amounts of antiperspirant active in claim 1 of the main request.

2.1.5 According to the description (page 3, lines 21 to 30), "in a preferred embodiment, in particular for cream, roll-on or pump spray product forms, the invention provides an antiperspirant or deodorant composition" comprising, among other ingredients, 1 to 25% by weight of the total composition of an antiperspirant or deodorant active. Therefore, this passage cannot serve as a disclosure for the present range either.

2.1.6 On page 7, lines 16 to 22, it is said that "the amount of antiperspirant active present in the composition according to the invention may be from 5-50% by weight of the composition, preferably from 10-40% by weight, more preferably 20-35% by weight of the composition. Alternatively the antiperspirant active may be present from 1.0 to 35%, preferably 5 to 30%, most preferably 10 to 25% of the total composition." Thus, two alternative amounts of antiperspirant are given, the second one being mentioned in present claim 1.

Since the roll-on compositions according to original claim 17 contain 30 to 40% by weight of the antiperspirant only covered by the first alternative, it is probable that the amounts of antiperspirant of the first alternative relate to roll-on compositions.

Anyway, there is no disclosure that the amount of antiperspirant of the second alternative, disclosing the range of 10 to 25% by weight now being claimed, would be connected to the specific use in roll-on compositions, to which claim 1 is now directed.

2.2 As regards the mandatory presence of a moisturising cream comprising 1 to 30% of a humectant, in which glycerol is present as humectant in the composition of present claim 1, original claim 17 refers to "any of the preceding claims", which would include original claims 7 to 9. According to original claim 7, a moisturizing cream comprising an humectant is present in the composition of original claim 1. According to original claim 9, the humectant may be sorbitol, glycerol, ethylene glycol, propylene glycol or mixtures thereof. However, the composition according to original claim 17 does not mention any moisturizing cream, nor any humectant, so that there is a discrepancy between that claim and original claims 7 to 9. Therefore, those claims cannot be simply combined with original claim 17.

2.2.1 Example 12 discloses an antiperspirant composition suitable for a roll-on applicator that contains 25 % of a moisturising cream containing cetearath-20, cetyl alcohol, glyceryl stearate, decyl oleate and water (page 25, line 28 to page 26, line 21). However, no glycerol is mentioned.

2.2.2 According to the description, the antiperspirant or deodorant composition comprises 0.1 to 95% by weight of a moisturising cream (page 4, lines 21 to 30). Advantageously the moisturising cream comprises a humectant, in particular polyols and alcohols such as

sorbitol, glycerol, ethylene glycol, propylene glycol or mixtures thereof. Preferably, the humectant contains a hydroxyl group (page 4, lines 10 to 19). On page 9, lines 33 to 35 it is stated that an important ingredient of the cosmetic compositions in the form of pump-spray, stick and cream is a humectant such as glycerol and sorbitol. Whilst glycerol is mentioned as a humectant, that passage does not refer to roll-on compositions. In example 11, the addition of glycerol to an antiperspirant cream formulation is said to be important for providing the cream's moisturizing properties (page 25, lines 19 to 24). However, there is no mention of the specific use of glycerol in roll-on compositions.

2.2.3 Therefore, although the use of a moisturising cream containing glycerol is mentioned in general, there is no disclosure for the specific use of a moisturising cream containing glycerol as an humectant in roll-on compositions.

2.3 The appellant argued that the use of a moisturising cream containing glycerol had been originally disclosed for pump sprays and that, as there was hardly any difference between pump spray and roll-on compositions, the disclosure for the pump spray composition was also applicable to the roll-on composition.

2.3.1 The application as filed mentions four types of compositions which differ significantly from one another by their components and the amounts thereof:

- roll-on composition (claim 17 and examples 1, 6 and 12);
- pump spray composition (claim 16 and example 5);



- cream composition (claim 18 and examples 7 and 11)
- stick formulation (example 8).

2.3.2 Original claim 16 describes a pump spray composition comprising 3-7% surfactant, 8-15% emollient oils, 5-15% antiperspirant active and 60-80% water. Compared to the roll-on composition as specified in original claim 17, the percentage of the antiperspirant active (30 to 40%) is much lower, the percentage of emollient oils (0.5 to 5%) is much higher and the amount of water (50 to 60%) is also higher. Thus, the compositions of pump spray and roll-on applications as claimed in the original application differ considerably from one another so that there is no basis in the disclosure for the application of pump spray compositions as roll-on compositions.

2.3.3 Furthermore, the composition according to original claim 16 does not contain a moisturising cream as a mandatory component. Example 5 mentions the presence of an unspecified humectant, but not a moisturising cream containing glycerol. Therefore, even a transfer of the disclosure for pump spray compositions to roll-on compositions would not lead to the disclosure of the presence of such moisturising cream containing glycerol, in a roll-on composition.

2.3.4 Hence, the appellant's arguments in that respect cannot be accepted.

3. In view of the above, there is no basis in the application as filed for a roll-on composition containing the combined features of 10 to 25% by weight of an antiperspirant active and a moisturising cream

comprising 1 to 30% of a humectant, in which glycerol is present as humectant. In order to arrive at the subject-matter now being claimed, it is necessary to single out and combine specific features from a number of possibilities, i.e. the type and the amount of antiperspirant active as well as the type of humectant and the use in a selected type of antiperspirant composition. Apart from that, there are further differences between the subject-matter of present claim 1 and the original disclosure for roll-on compositions regarding the presence of an emollient and a carrier for the antiperspirant active. Thus, the claimed subject-matter cannot directly and unambiguously be derived from the application as filed, which therefore contravenes Article 123(2) EPC. Consequently, the main request is not allowable.

In view of the above conclusion it is not necessary to go into more details regarding further deficiencies that are present in claim 1.

#### *Auxiliary Requests*

4. The claims 1 of all the auxiliary requests relate to roll-on compositions that include, in combination, 10 to 25% of an antiperspirant active and the mandatory presence of a moisturising cream containing a specific amount of humectant, as well as glycerol. Those features are the same as those defined in claim 1 according to the main request and discussed above (points 2 and 3 above). Consequently, the arguments indicated for the main request apply *mutatis mutandis* to the auxiliary requests. Hence, the amendments to the

auxiliary requests are also not allowable having regard to Article 123(2) EPC.

**Order**

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

The appeal is dismissed

The Registrar

The Chairman

C. Eickhoff

S. Perryman