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Datasheet for the decision of 19 June 2009

Case Number: T 0992/06 - 3.3.01

Application Number: 01900393.8

Publication Number: 1248520

IPC: A01N 37/44

Language of the proceedings: EN

Title of invention:
Anti-microbial compositions

Patentee:
Unilever PLC, et al

Opponent:
L'OREAL

Headword:
Anti-microbial compositions/UNILEVER PLC.

Relevant legal provisions:
EPC Art. 123(2)(3), 111(1), 100(a)
EPC R. 115(2)

Relevant legal provisions (EPC 1973):
EPC Art.-

Keyword:
"Main request and first-, second and third auxiliary - inventive step (no) - obvious solution."
"Fourth auxiliary - inventive step (yes) - non obvious solution - remittal for adaptation of the description"

Decisions cited:
T 0181/82

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0992/06 - 3.3.01

D E C I S I O N
of the Technical Board of Appeal 3.3.01
of 19 June 2009

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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 28 April 2006 rejecting the opposition filed against European patent No. 1248520 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman: P. Ranguis
Members: J.-B. Ousset
C.-P. Brandt

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division to reject the opposition and thus maintain patent EP-B-1 248 520 as granted.

II. Claim 1 of the main request (granted version) read as follows:

"1. An anti-microbial composition comprising:
(i) a C_1 to C_4 monohydric alcohol carrier fluid, present at a level greater than 50% by weight of the total composition (excluding any volatile propellant present);
(ii) an iron (III) chelator having an iron (III) binding constant of 10^{26} or greater;
(iii) a solubility promoter selected from the group consisting of:
(a) water;
(b) an organic amine;
(c) a polyhydric alcohol or derivative thereof;
(d) a volatile propellant having fluorine-carbon or oxygen-carbon bonds;
(e) any combination of (a) to (d)."

III. The opposition sought revocation of the patent in suit in its entirety for lack of novelty or inventive step pursuant to Article 100(a) EPC. Novelty was not disputed during the opposition proceedings.

IV. In the opposition proceedings inter alia the following documents were cited:

(1) GB-A-1 420 946
(2) US-A-4 356 190
(3) WO-A-97 44 006
(4) "Antiperspirants and Deodorants", Harry's Cosmeticology, seventh edition (1982), Chapter ten, pages 131-133 and 141.
(7) "The evaluation of underarm deodorants" P.M. Baxter and J.V Reed, International Journal of Cosmetic Science, pages 85-95 (1983).
(8) Spray technology and Marketing, May 1999, pages 34-40
(10) "Chelating agents as preservatives potentiators" J. Hart, Cosmetic and Drug Preservation Principles and Practice (1984), pages 323 to 337.
(11) Gleams and Notions, H. M. Fishman, happi/September, pages 18 and 118 (1992).
(13) "Antiperspirants and Deodorants", Second Edition, Cosmetic Science and Technology Series/Volume 20, edited by Karl Laden, page 266 (1999).

The opposition division came to the conclusion that document (7) was to be regarded as representing the closest prior art, since compared to the teaching of document (1), it related to the field of deodorancy and in particular to prolonged activity of antimicrobials in alcohol based deodorant compositions. From document (7), the problem underlying the patent in suit was to be seen in the provision of alternative alcohol based deodorant compositions with prolonged activity. The cited prior art did not contain any hint leading the person skilled in the art to replace triclosan,

chlorhexidine or aluminiun chlorhydrate by the specific chelating agents mentioned in claim 1 for prolonging the antimicrobial effect of the active compounds in an environment wherein microbes are permanently present.

V. The appellant submitted in his statement of grounds of appeal the following arguments:

Document (1) should be considered as representing the closest prior art, because it related to antimicrobial compositions and aimed at improving the antimicrobial activity as in the patent in suit. The compositions described in document (1) were also used as deodorant compositions and example 8 described an ethanol based composition containing a propellant. The only difference between the claimed subject-matter in the patent in suit and document (1) lay in the use of another chelating agent.

Since table 4 of the patent in suit showed that EDTA exhibits the same anti-microbial effects as the chelating agents defined in Claim 1, the technical problem could only be seen in the provision of an alternative anti-microbial composition.

Document (10) classified DTPA having an iron (III) binding constant of $10^{28.6}$ on the same level as EDTA for its anti-microbial properties. Document (11) described the use of EDTA or DTPA as an antioxidant agent to prevent rancidity of fats and esters (producing bad odours) along with an anti-microbial agent. Document (3) disclosed the anti-microbial properties of various chelating agents. Furthermore, the anti-microbial effect of ethanol was well known in view of document

(4). It derived therefrom that it would have been obvious for the person skilled in the art to replace in an anti-microbial composition as disclosed in document (1) EDTA by other chelating agents described in documents (2), (10) or (11).

VI. In response to the statement of grounds of appeal, the respondent, in addition to the main request (patent as granted), relied on the five auxiliary requests filed before the opposition division on 3 February 2006, the fourth auxiliary request being abandoned during oral proceedings before the board and replaced by an amended fourth auxiliary request.

Claim 1 of the first auxiliary request read as follows:

"1. An anti-microbial aerosol composition comprising:
(i) a C_1 to C_4 monohydric alcohol carrier fluid, present at a level greater than 50% by weight of the total composition (excluding the volatile propellant present);
(ii) an iron (III) chelator having an iron (III) binding constant of 10^{26} or greater;
(iii) a solubility promoter selected from the group consisting of:
(a) water;
(b) an organic amine;
(c) a polyhydric alcohol or derivative thereof;
(d) a volatile propellant having fluorine-carbon or oxygen-carbon bonds;
(e) any combination of (a) to (d).
(iv) a volatile propellant at from 30 to 99% by weight of the aerosol composition."

Claim 1 of the second auxiliary request read as follows:

"1. An anti-microbial aerosol composition comprising:
(i) a C_1 to C_4 monohydric alcohol carrier fluid, present at a level greater than 50% by weight of the total composition (excluding the volatile propellant present);
(ii) an iron (III) chelator having an iron (III) binding constant of 10^{26} or greater;
(iii) a solubility promoter selected from the group consisting of:
(a) water;
(b) an organic amine;
(c) a polyhydric alcohol or derivative thereof;
(d) a volatile propellant having fluorine-carbon or oxygen-carbon bonds selected from dimethylether, 1,1-difluroethane, 1-trifluoro-2-fluoroethane, carbon dioxide, or mixtures thereof;
(e) any combination of (a) to (d).
(iv) a volatile propellant at from 30 to 99% by weight of the aerosol composition."

Claim 1 of the third auxiliary request read as follows:

"1. An anti-microbial aerosol composition comprising:
(i) a C_1 to C_4 monohydric alcohol carrier fluid, present at a level greater than 50% by weight of the total composition (excluding the volatile propellant present);
(ii) an iron (III) chelator having an iron (III) binding constant of 10^{26} or greater;
(iii) a solubility promoter selected from the group consisting of:

(a) water;
(b) an organic amine selected from isopropanolamine, 2-amino-2-ethyl-1,3-propanediol, 2-(N,N-dimethylamino)-2-methyl-1-propanol (DMAMP), N,N-dimethylaminoethanol, 2-amino-2-methyl-1-propanol (AMP), diisopropanolamine, 2-aminobutan-1-ol, cyclohexylamine, and mixtures thereof;
(c) a polyhydric alcohol or derivative thereof;
(d) a volatile propellant having fluorine-carbon or oxygen-carbon bonds selected from dimethylether, 1,1-difluroethane, 1-trifluoro-2-fluoroethane, carbon dioxide, or mixtures thereof;
(e) any combination of (a) to (d).
(iv) a volatile propellant at from 30 to 99% by weight of the aerosol composition."

Independent claims 1, 16, 17 and 18 of the amended fourth auxiliary request, submitted during oral proceedings before the board of appeal, read as follows:

"1. An anti-microbial aerosol composition comprising:
(i) a C_1 to C_4 monohydric alcohol carrier fluid, present at a level greater than 50% by weight of the total composition (excluding the volatile propellant present);
(ii) an iron (III) chelator having an iron (III) binding constant of 10^{26} or greater;
(iii) a solubility promoter that is an organic amine selected from the group 2-amino-2-methyl-1-propanol (AMP), diisopropanolamine, 2-aminobutan-1-ol, cyclohexylamine, and mixtures thereof and the group isopropanolamine, 2-amino-2-ethyl-1,3-propanediol, 2-

(N,N-dimethylamino)-2-methyl-1-propanol (DMAMP) and N,N-dimethylaminoethanol; and
(iv) a volatile propellant at from 30 to 99% by weight of the aerosol composition."

"16. A method of controlling microbial numbers, said method comprising the application to a substrate of an anti-microbial composition according to any of the preceding claims."

"17. A cosmetic method of inhibiting the generation of malodour comprising the topical application to the human body or to apparel worn in close proximity thereto of a composition according to any one of claims 2 to 15."

"18. A cosmetic method of delivering enhanced fragrance intensity comprising the topical application to the human body or to apparel worn in close proximity thereto of a composition according any one of claims 2 to 15 that also comprise a fragrance material."

VII. By fax of 20 May 2009, the appellant announced that it would not be represented at the oral proceedings scheduled on 19 June 2009 but maintained its requests, namely the setting aside of the decision of the opposition division and the revocation of the patent in suit. The proceedings were thus continued in the absence of the duly summoned appellant in accordance with Rule 115(2) EPC.

VIII. The respondent (patentee), although not considering document (1) as representing the closest prior art, argued that if EDTA and DTPA had good performances in a specific test, it could not be inferred that this was also valid for other tests (e.g. other formulations specified in claim 1). Moreover, chelators having an iron (III) binding constant of more than 10^{26} were mentioned in the application as filed.

IX. With the response to the statement of grounds of appeal, the following document was submitted:

(14) "Iron sequestration on skin: a new route to improved deodorancy", A.S. Landa and S.A. Makin, *International Journal of Cosmetic Science*, 2003, **25**, 127-135.

This document of the inventors showed the long-lasting deodorant properties of compositions containing DPTA compared to EDTA. The technical problem to be solved in view of document (1) could, therefore, be seen in the provision of an improved antimicrobial composition having a better deodorant efficacy.
If an improvement could not be acknowledged, the claimed invention was nevertheless not obvious in view of the cited prior art for the following reasons:

- Dichlorophen, mentioned in the composition of example 8 of document (1), is not to be regarded as a polyhydric alcohol or derivative thereof, in the meaning of the present invention.

- Document (1) does not suggest that the chelating agent has an anti-bacterial effect by itself. In

this document, EDTA is only used to potentiate the effect of the anti-bacterial compound of formula I (see page 1, lines 28 to 31), whereas the claimed compositions do not require that, in addition to the chelating agent, an anti-bacterial compound be present.

- The person skilled in the art would not select specifically DTPA in document (10), because the antimicrobial property of this chelating agent is worse than that of EDTA.

X. The appellant requested that the decision under appeal be set aside and the patent be revoked.

XI. The respondent requested that the appeal be dismissed, or that the decision under appeal be set aside and the patent be maintained on the basis of one of the auxiliary requests 1 to 3 filed with the response to the statement of grounds of appeal, or on the basis of the amended fourth auxiliary request filed during the oral proceedings, or on the basis of the fifth auxiliary request filed with the response to the statement of grounds of appeal.

XII. At the end of the oral proceedings, the decision of the board was announced.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. Inventive step

2.1 Closest prior art

2.1.1 The closest prior art for assessing inventive step is normally a prior art document disclosing subject-matter conceived for the same purpose or aimed at the same objective as the claimed invention and having the most relevant technical features in common with it, i.e. requiring the minimum of structural modifications.

2.1.2 Document (7) discloses antimicrobial compositions having also deodorant properties (see "Synopsis", last paragraph). These compositions contain an antimicrobial agent (e.g. Triclosan, Ciba Geigy) (see page 85, "Résumé") and ethanol. Keeping in mind that ethanol contains water, unless otherwise specifically mentioned, that it is anhydrous, water is also present. However, document (7) does not mention the presence of any chelating agent.

2.1.3 Document (1) discloses antibacterial compositions containing an antimicrobial agent such as Triclosan and a chelating agent such as EDTA with an enhanced activity of the said antimicrobial agent, in particular against Pseudomonas spp (see page 1, line 28 to page 2 line 27). This composition can also contain carriers such as deodorant creams or sticks (see page 2,

lines 50 to 52) or perfumes (see page 4, line 44) and can also be under the form of an aerosol formulation (see example 8). Furthermore, example 8 of this document (see page 9) mentions, in addition to the presence of ethanol and thus water (see paragraph above), the presence of EDTA, which is a chelating agent, Dichlorophen or 4,4'-dichloro-2,2'-methylenediphenol, which is a polyhydric alcohol and a propellant.

In view thereof, document (1) is the closest prior art, since it differs from the claimed subject-matter only in that the chelating agent EDTA has a constant of $10^{25.1}$ whereas the chelating agents of the present invention have a constant of 10^{26} or greater. Document (7), which does not disclose any chelating agent at all, is thus less relevant than document (1).

2.2 Technical problem to be solved

2.2.1 Thus, for defining the objective technical problem to be solved in view of document (1), the technical results or effects successfully achieved by the claimed subject-matter need to be determined.

2.2.2 Figure 2 on page 132 of document (14) shows the link between the iron-stability constant of some transition-metal chelators and the inhibition of *in vitro* bacterial-growth-inhibitory activity. In view of this Figure 2, the respondent inferred that starting from the binding constant of 10^{26}, the inhibition is high and that this could not be predicted from the teaching of document (1). Moreover, Figure 4 on the same page of the same document shows a longer deodorant efficacy

when DTPA, having a binding constant greater than 10^{26}, is used instead of EDTA as a chelator. The respondent concluded that the long-lasting effect of the claimed compositions was shown and was not derivable from the disclosure of document (1) and thus justifies the presence of an inventive step.

2.2.3 The board is not convinced by the respondent's argument for the following reasons:

- Figure 2 of document (14) shows nine plots on the graph and none of them is specifically attributed to a specific chelating agent. Moreover, the text below this graph mentions only four chelating agents, namely CDTA, EDDHA, EDTA and TTHA. Hence, a conclusion concerning a better bacterial-growth-inhibition of TTHA, CDTA or EDDHA compared to EDTA cannot be drawn, since the plots are not attributed to a specific chelating agent. This graph is therefore not conclusive.

- The results displayed in Figure 4 of document (14), although showing the effect of an ethanolic aerosol containing DTPA is greater compared to the same ethanolic aerosol containing EDTA, do not represent the closest approximation of the closest prior art, since in the patent in suit (see table 4 on page 11) DTPA has a binding constant of $10^{28.6}$ whereas TTHA, which also falls within the requirement set out for the binding constant in claim 1, has a binding constant of $10^{26.8}$. TTHA should have been used as the closest approximation of EDTA (see T 181/82, OJ EPO 1984, 401, point 5). Therefore, these data do not show convincingly the

presence of an improved effect across all of the claimed compositions.

2.2.4 In the absence of any proven advantages provided by the claimed process vis-à-vis the compositions disclosed in document (1), the problem underlying the patent in suit can be seen in the provision of alternative aerosol compositions having anti-bacterial properties.

2.2.5 As a solution, the patent in suit proposes antimicrobial compositions as defined in the set of claims of the granted version.

2.2.6 In view of the examples set out in the patent in suit, the board finds it plausible that the problem has been solved.

2.3 Obviousness of the solution

2.3.1 It is thus necessary to investigate whether the person skilled in the art would consider the claimed solution obvious in the light of the cited prior art.

2.3.2 Example 8 on page 9 of document (1) discloses the following aerosol anti-bacterial composition:

2,4,4^1-trichloro-2^1-hydroxydiphenyl ether	0.08%
EDTA (di-sodium salt)	0.08%
Dichlorophen	0.25%
Perfume	1.25%
Alcohol denaturant	0.01%
Diethylphthalate	1.39%
Propellant	10.00%
Ethanol to	100%

Propellant which may be used include trichloromonofluoromethane, dichlorofluoromethane and dichlorotetrafluoroethane.

The board considers in this respect that ethanol always contains water unless specifically mentioned, that it is anhydrous. Hence water (see feature (iii) (a) of claim 1) is also present in the composition of example 8 of document (1).

According to the description EDTA enhances the activity of the anti-microbial agent, here 2,4,4^{1}-trichloro-2^{1}-hydroxydiphenyl ether or Triclosan.

2.3.3 The only differences between one of the claimed alternative compositions, namely (iii) (a) (see point II above) and the one described in example 8 of document (1) lie in the nature of the chelating agent and its alleged function.

2.3.4 The first question to be examined is whether or not the person skilled in the art reading document (1) would understand that EDTA is only used as an enhancer without any anti-microbial activity *per se*.

Document (11) explains that EDTA can be used in cosmetic creams and lotions and that either alone, or as a booster in combination with other commonly used preservatives such as the parabens, imidazolidinyl urea and quaternary ammonium compounds, can function as an antimicrobial agent. It is most effective against gram negative organisms such as *Pseudomonas aeruginosa* and *Escherichia coli* (see page 18, right-hand column). Furthermore, document (10), which mentions on page 324,

third paragraph from the bottom, that EDTA can be used in toiletry and cosmetics formulations, also mentions that EDTA is a chelating agent active against *Pseudomonas aeruginosa* (see page 331, Table 4).

In view of the above, the person skilled in the art would understand that EDTA in document (1), in particular example 8, acts also as an anti-microbial agent.

2.3.5 It remains to be examined which alternative composition the person skilled in the art, knowing that EDTA also acts as an anti-microbial agent in document (1), would have envisaged in order to solve the technical problem defined above (see point 2.2.4).

Document (10), Table 4 shows the anti-microbial activity against *P. aeruginas* in decreasing order for four chelating agents, namely CDTA > EDTA > DTPA > HEEDTA.

Hence, the person skilled in the art seeking to solve the problem as mentioned in point 2.2.4 would have concluded that the replacement of EDTA with CDTA in Example 8 would have resulted in a further aerosol composition.

2.3.6 Hence, the person skilled in the art, seeking to solve the problem as mentioned in point 2.2.4 above, would replace the chelating agent (EDTA) of example 8 of document (1) by the other chelating agent (CDTA) mentioned in document (10) to arrive at one alternative of the claimed invention, namely (i)+(ii)+(iii) (a) (water), without any inventive skill.

2.3.7 The board observes in this respect that the discussion about Dichlorophen is of no relevance, since the conclusion of the board is based on the claimed alternative (i)+(ii)+(iii) (a) (water) and not on the alternative (i)+(ii)+(iii) (c) (polyhydric alcohol or derivative thereof).

2.4 In view thereof, the subject-matter of claim 1 does not involve an inventive step in the sense of Article 56 EPC and since the board can only decide on a request as a whole, the present request is to be rejected.

First auxiliary request

3. Amendments

3.1 Claim 1 contains the feature "(iv) a volatile propellant at from 30 to 99% by weight of the aerosol composition." This amendment finds a basis in the application as originally filed (see page 18, lines 5 to 8). It represents a restriction of the scope of the granted patent.

3.2 There is no objection under Article 123(2),(3) EPC.

4. Inventive step

4.1 The subject-matter of the first auxiliary request differs from that of the main request in that it mentions the range of propellant present in the aerosol (see feature (iv)).

4.2 Document (1) remains the closest prior art, because example 8 of this document also mentions the presence of a propellant, but in an amount of 10% (see point 2.3.2 above).

4.3 Although the respondent argued that the claimed composition performs well with a high efficacy, this allegation has not been substantiated by any comparative data. Therefore, in the absence of any data, the problem underlying the patent in suit is identical to the one mentioned in point 2.2.4 above, that is to say, the provision of alternative aerosol compositions having anti-bacterial properties.

4.4 In view of the examples set out in the patent in suit, the board finds it plausible that the problem has been solved.

4.5 It is thus necessary to investigate whether the person skilled in the art would consider the claimed solution obvious in the light of the cited prior art.
In assessing inventive step of claim 1 of the main request, the board has decided that it would have been obvious for the person skilled in the art to replace in example 8 of document (1) EDTA by CDTA and to arrive thus, without inventive ingenuity, at one of the alternatives of the claimed invention, namely (i)+(ii)+(iii)(a) (water).

Documents (8) and (13) both relate to aerosol compositions containing an anti-bacterial compound. Document (8) discloses an aerosol personal deodorant containing from 24 to 60% of propellant (see Tables 1, 3 and 6). Document (13) also relates to an aerosol

composition containing 40% of propellant. In view of these two documents, it appears that the amount of propellant can range up to over 60% without impairing the anti-bacterial properties of the aerosol compositions. Thus, one of the obvious alternatives offered to the person skilled in the art, starting from example 8 of document (1) and seeking to make another aerosol composition having anti-bacterial properties, would have been to replace EDTA with CDTA and to increase the amount of propellant as mentioned in document (8) and/or document (13), that is up to 60%. Such an alternative falls within the claimed invention, namely (i)+(ii)+(iii)(a)+(iv), and it results therefrom that the subject-matter of claim 1 does not involve an inventive step.

4.6 Since the board can only decide on a request as a whole, the first auxiliary request is rejected.

Second and third auxiliary requests

5. Claim 1 of both the second and the third auxiliary requests contains the same alternative as that of Claim 1 of the first auxiliary request, namely (i) + (ii) + (iii)(a) + (iv).

For this alternative, the board has come to the conclusion that it does not involve an inventive step (see point 4.5 above).

For the same reasons, claim 1 of both the second and the third auxiliary requests do not involve an inventive step.

5.1 These requests do not fulfil the requirements of Article 56 EPC.

Fourth auxiliary request

6. Amendments

6.1 The solubility promoter under point (iii) in claim 1 has now been limited to organic amines. Such a limitation to one of the different possible options for a feature does not contravene Article 123(2) EPC, as long as it is directly and unambiguously derivable from the application as originally filed.

6.1.1 In originally filed claim 18, dependent from claim 1 as originally filed, five options were disclosed for the type of solubility promoter to be present in the claimed compositions (see (iii)). An organic amine was clearly mentioned. Therefore, the combination of the features (i) to (iv) now mentioned in claim 1 of the fourth auxiliary request is one of the five originally disclosed combinations. It is thus clearly and unambiguously derivable from the application as originally filed.

6.2 Furthermore, the organic amine (solubility promoter) has been limited to a list of specific amines. This list of specific amines is disclosed in the description as originally filed (see page 15, lines 1 to 7). Hence, this limitation does not amount to the introduction of a new teaching and is thus in agreement with the requirements of Article 123(2) EPC.

Moreover, these amendments amount to a limitation of the claimed scope and are thus allowable under Article 123(3) EPC.

7. Inventive step

7.1 Document (1) remains the closest prior art and its content differs from the subject-matter of claim 1 not only in the nature of the chelating agent used in the claimed compositions but also in the compulsory presence of specific amines or mixtures thereof.

7.2 As already explained in point 2.2.4 above, due to the absence of any relevant comparative experiments, the problem underlying the patent in suit can only be seen in the provision of alternative aerosol compositions having anti-bacterial effects.

7.3 In view of example 2 in Table 2 and examples 4 to 7 in Table 5, the board is satisfied that this problem was solved.

7.4 It must now be assessed whether the person skilled in the art would consider this solution as obvious in view of the prior art.

7.4.1 The board notes that the appellant did not submit any facts and/or arguments against this request. Nor can the board find in the cited prior art a hint leading the person skilled in the art to the claimed subject-matter. Indeed, no mention can be found in example 8 of document (1) or in the whole teaching of this document or in the other cited documents (see point IV above) of the presence of an organic amine in an aerosol

composition. The person skilled in the art would not find either in any other documents cited an incentive to add an organic amine to the aerosol compositions described in document (1) to arrive at the claimed aerosol compositions which still retain the anti-bacterial properties.

7.5 Claim 1 thus meets the requirement of Article 56 EPC. The same conclusion applies to claims 2 to 15, which represent particular embodiments of the subject-matter of claim 1.

Each of the claims 16 to 18 (see point VI above) involving a composition according to claim 1 is based on the same inventive concept and derives its patentability on the same basis as does claim 1.

7.6 In conclusion, the amended fourth request before the board complies with the requirements of the EPC.

7.7 Since this request fulfils the requirements of the EPC, it is not necessary for the board to examine the remaining fifth auxiliary request.

8. Article 111(1) EPC - Remittal to the first instance

Although the board has come to the conclusion that the amended fourth auxiliary request was to be allowed, it was noted that the description had still to be brought into conformity with the claims of the present request. Therefore, having regard to the fact that the function of the boards of appeal is primarily to give a judicial decision upon the correctness of the earlier decision taken by the first instance, the board exercises its

discretion under Article 111(1) EPC to remit the case to the first instance in order for the description to be adapted to the allowable claimed subject-matter according to the amended fourth auxiliary request submitted before the board at the oral proceedings.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance with the order to maintain the patent on the basis of the amended fourth auxiliary request (claims 1 to 18) filed during oral proceedings and after any necessary consequential amendment of the description.

The Registrar The Chairman

M. Schalow P. Ranguis