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**Datasheet for the decision  
of 13 July 2011**

**Case Number:** T 2076/08 - 3.3.10

**Application Number:** 00978359.8

**Publication Number:** 1328247

**IPC:** A61K 7/46

**Language of the proceedings:** EN

**Title of invention:**  
Fragrance compositions

**Applicant:**  
THE PROCTER & GAMBLE COMPANY

**Opponent:**  
-

**Headword:**  
Fragrance compositions/PROCTER & GAMBLE

**Relevant legal provisions:**  
EPC Art. 123(2)

**Keyword:**  
"Main and auxiliary request: added subject-matter (yes)"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 2076/08 - 3.3.10

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.10  
of 13 July 2011

**Appellant:**

THE PROCTER & GAMBLE COMPANY  
One Procter & Gamble Plaza  
Cincinnati  
Ohio 45202 (US)

**Representative:**

Wilding, Richard Alan  
Procter & Gamble  
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Rusham Park  
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**Decision under appeal:**

Decision of the Examining Division of the  
European Patent Office posted 13 May 2008  
refusing European application No. 00978359.8  
pursuant to Article 97(2) EPC.

**Composition of the Board:**

**Chairman:** P. Gryczka  
**Members:** J. Mercey  
D. S. Rogers

## Summary of Facts and Submissions

I. The present appeal lies from the decision of the Examining Division refusing European patent application No. 00 978 359.8. Claim 1 of the set of claims underlying the contested decision read as follows:

"A composition comprising:

(a) a fragrance oil wherein the fragrance oil comprises:

(i) greater than 50%, by weight of the fragrance oil, of perfume raw materials with high odour impact perfume raw materials which have an odour detection threshold as determined by the methodology referred to in the references on page 10 of the description of less than, or equal to, 50 parts per billion;

(ii) less than 5%, by weight of the fragrance oil, of top note perfume raw materials wherein the top note perfume raw materials have a boiling point of less than 250°C at 1 atmosphere pressure

(b) an entrapment material which is selected from cyclic oligosaccharides

(c) a volatile solvent."

II. The Examining Division held that the patent application did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 83 EPC). In addition, it held that claim 1 contained subject-matter which extended beyond the content of the application as filed, more particularly the description at page 10 did not

disclose any methodology to determine the odour detection threshold, such that the reference in claim 1 to such a methodology contravened the provisions of Article 123(2) EPC.

III. With the Statement of Grounds of Appeal, the Appellant (Applicant) submitted an auxiliary request, claim 1 of which read:

"A composition comprising:

(a) a fragrance oil wherein the fragrance oil comprises:

(i) a perfume raw material selected from ethyl methyl phenyl glycidate, ethyl vanillin, heliotropin, indol, methyl anthranilate, vanillin, amyl salicylate and coumarin;

(ii) less than 5%, by weight of the fragrance oil, of top note perfume raw materials wherein the top note perfume raw materials have a boiling point of less than 250°C at 1 atmosphere pressure;

(b) an entrapment material which is selected from cyclic oligosaccharides.

(c) a volatile solvent."

The Appellant argued that the invention was both sufficiently disclosed and that the amendments to claim 1 of the request underlying the decision under appeal found support in the application as filed. More particularly, methods for measuring an odour detection threshold were well known to the skilled person and were indeed to be found in the references cited on page 10 of the description of the patent application, such

that both the requirements of Article 83 and 123(2) EPC were met. It also submitted that the list of materials in feature (a)(i) of the auxiliary request found a basis on page 12 of the application as filed.

- IV. In a communication annexed to the summons to oral proceedings, the Board indicated that with regard to the main request, it saw no reason for departing from the conclusions of the first instance, and with regard to the auxiliary request, there would appear to be no disclosure in the application as filed (Article 123(2) EPC) for the perfume raw material of feature (a)(i) in claim 1 being present in **any** amount.
- V. The Appellant informed the Board that it would not attend oral proceedings and requested a decision based upon the written submissions. The Appellant did not comment on the communication of the Board.
- VI. The Appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of the claims of the main request underlying the appealed decision or, subsidiarily, on the basis of the claims of the auxiliary request, filed with letter dated 19 September 2008.
- VII. At the oral proceedings held on 13 July 2011 in the absence of the Appellant, the Board gave its decision.

### **Reasons for the Decision**

1. The appeal is admissible.

2. *Amendments (Article 123(2) EPC)*

*Main request*

2.1 In the decision under appeal, the Examining Division found that the amendment to claim 1 by incorporation of the feature "as determined by the methodology referred to in the references on page 10 of the description" was not disclosed in the application as filed. Thus, this feature will hereinafter be examined for its basis in the application as filed.

2.2 Said added feature is intended to define how to determine the odour detection threshold of less than, or equal to, 50 parts per billion of the perfume raw materials (i) in the fragrance oil (a) indicated in claim 1. However, the passage on page 10 of the application as filed, wherein the odour detection threshold is discussed, namely paragraph (ii), does not refer to the methodology for determining said threshold, but merely states that the odour detection threshold and some odour detection values are discussed in two publications. No indication is given that these references include **any** methodology for determining the threshold, let alone that the odour detection threshold according to the invention should be determined by a methodology described therein. Whether in fact these references do indeed include a method for determining the odour detection threshold is thus irrelevant, since the application as filed does not indicate that the odour detection threshold should be determined by a method described therein. Thus, page 10 of the application as filed cannot provide a basis for the methodology of determining the odour detection

threshold of the perfume raw materials (i) in the fragrance oil (a) of the composition of claim 1.

- 2.3 The amendment made to claim 1, having no basis in the application as filed, results in subject-matter extending beyond the application as filed, contrary to the requirements of Article 123(2) EPC, with the consequence that the main request is not allowable.

*Auxiliary request*

- 2.4 Claim 1 of the auxiliary request has been amended *vis-à-vis* claim 1 as originally filed *inter alia* in that component (i) of the fragrance oil (a) has been restricted to a perfume raw material selected from ethyl methyl phenyl glycidate, ethyl vanillin, heliotropin, indol, methyl anthranilate, vanillin, amyl salicylate and coumarin, and by deletion of the specification that the fragrance oil comprises greater than 50% by weight of said perfume raw material.
- 2.5 However, only compositions comprising a fragrance oil (a) comprising a component (i) in amounts greater than 50%, or in an amount greater than 40% to 50%, by weight of the fragrance oil are disclosed in the application as filed (see claims 1, 3, 21 and 22 and page 6, lines 22 to 25, page 7, lines 10 to 13 and page 11, lines 10 to 17). The application as filed gives no basis for a composition comprising this component in the fragrance oil in any amount, this being a feature of claim 1 of the auxiliary request. In the passage cited by the Appellant as the basis for the list of materials in feature (a)(i), namely page 12, lines 11 to 12 of the application as filed, these materials are

merely given as examples of perfume raw materials according to the invention, but there is no disclosure that they may be present in the fragrance oil in any amount.

- 2.6 There is thus no disclosure in the application as filed for a composition comprising the component (i) without the minimum weight percent of this component in the fragrance oil (a) being specified, such that subject-matter has been added which extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC, with the consequence that the auxiliary request is also not allowable.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

C. Rodríguez Rodríguez

P. Gryczka