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**Datasheet for the decision
of 7 May 2014**

Case Number: T 0881/11 - 3.3.06

Application Number: 04798005.7

Publication Number: 1689843

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C11D3/20, C11D3/28, C11D3/34,
C11D3/37

Language of the proceedings: EN

Title of invention:
LIQUID DETERGENT COMPOSITION

Patent Proprietors
Unilever N.V.
Unilever PLC

Opponents:
The Procter & Gamble Company
Henkel AG & Co. KGaA

Headword:
Liquid composition with antioxidant/ UNILEVER

Relevant legal provisions:
EPC Art. 123(3)

Keyword:
Amendments - broadening of claim 1 (all requests): yes

Decisions cited:
T 2017/07

Catchword:



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Boards of Appeal
Chambres de recours**

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Case Number: T 0881/11 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 7 May 2014

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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
28 February 2011 concerning maintenance of the
European Patent No. 1689843 in amended form.

Composition of the Board:

Chairman: B. Czech
Members: P. Ammendola
U. Lokys

Summary of Facts and Submissions

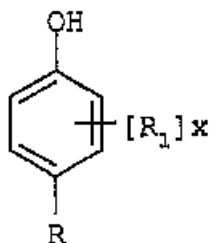
I. This appeal of Opponent 2 is from the interlocutory decision of the Opposition Division concerning maintenance of European patent No. 1 689 843 in amended form.

II. Claim 1 and 2 as granted read as follows:

- "1. A liquid laundry detergent composition comprising:
- (a) from 5% to 70% by weight of surfactant material other than fatty acid soap;
 - (b) from 1% to 20% by weight of a fatty acid soap having from 12 to 20 C atoms, wherein at least 1% by weight based on the liquid composition of the fatty acid soap is unsaturated;
 - (c) from 0.01% to 3% by weight of a perfume composition;
 - (d) an effective amount of a water soluble dye material;
 - (e) an effective amount of an enzyme; and
 - (f) from 0.001% to 2% by weight of an antioxidant selected from the group consisting of an alkylated phenol, α -, β -, γ -, δ -tocopherol, ethoxyquine, 2,2,4-trimethyl-1,2-dihydroquinoline, 2,6-di-tert-butyl hydroquinone, tert-butyl-hydroxy anisole, lignosulphonic acid and salts thereof, 6-hydroxy-2,5,7,8-tetra-methylchroman-2-carboxylic acid (TroloxTM), 1,2-benzisothiazoline-3-one (Proxel GXLTM), a benzofuran or benzopyran derivative, tocopherol sorbate, butylated hydroxy benzoic acid and its salts, gallic acid and its alkyl esters, uric acid and its salts

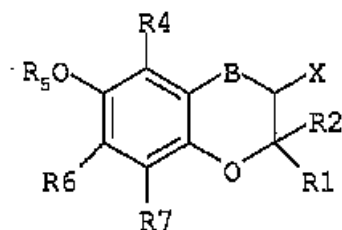
and alkyl esters, sorbic acid and its salts, dihydroxy fumaric acid and its salts, and mixtures thereof,

wherein the alkylated phenol has the general formula:



wherein R is C_1 - C_{22} linear or branched alkyl, preferably methyl or branched C_3 - C_6 alkyl ; C_3 - C_6 alkoxy, preferably methoxy; R_1 is a C_3 - C_6 branched alkyl, preferably tert-butyl ; x is 1 or 2,

and wherein the benzofuran or benzopyran derivative has the formula:



wherein R_1 and R_2 are each independently alkyl or R_1 and R_2 can be taken together to form a C_5 - C_6 cyclic hydrocarbyl moiety ; B is absent or CH_2 ; R_4 is C_1 - C_6 alkyl; R_5 is hydrogen or $-C(O)R_3$ wherein R_3 is hydrogen or C_1 - C_{19} alkyl; R_6 is C_1 - C_6 alkyl; R_7 is hydrogen or C_1 - C_6 alkyl; X is $-CH_2OH$, or $-CH_2A$ wherein A is a nitrogen comprising unit, phenyl, or substituted phenyl."

"2. A liquid composition according to claim 1, wherein the antioxidant is selected from 2,6-di-tert-butyl-hydroxy-toluene (BHT), α -, β -, γ -, δ -tocopherol, 1,2-benzisothiazoline-3-one (Proxel GXLTM) and mixtures thereof."

III. The patent in suit had been opposed on the grounds of Article 100(a) and (b) EPC.

IV. During the opposition proceedings the Patent Proprietors filed as Auxiliary Request 1 an amended version of the patent in suit, wherein claim 1 differs from claim 1 as granted in that the definitions of features (b), (d) and (f) have been amended to read (emphasis added by the Board):

"(b) from **2%** to **10%** by weight ... " ;

"(d) an effective amount of a water soluble dye material **selected from acid blue 80, brilliant blue and patent blue**"

and

"(f) from **0.001%** to **2%** by weight of an antioxidant **consisting of α -, β -, γ -, δ -tocopherol and mixtures thereof.**"

V. The Opposition Division found that the amended version of the patent in suit according to said Auxiliary Request 1 complied with the requirements of the EPC, despite on objection under *inter alia* Article 123(3) EPC of opponent 1 (see minutes of the oral proceedings, point 7). According to the reasons given under point 8 of the decision, the fact that the antioxidant

component "(f)" according to claim 1 of this request (below **maintained claim 1**) had been restricted to " α -, β -, γ -, δ -tocopherol and mixtures thereof" (below **tocopherols**) met the requirements of Articles 123(2) and (3) EPC. More particularly, the opposition held in this respect that:

"Restricting claim 1 so that the composition contains 0.001-2 wt.% antioxidant consisting of one or more of the α -, β -, γ - and δ -isomers of tocopherol does not preclude the presence of other antioxidant compounds, since the amount of components (a)-(f) in the composition is 7.011 - 85 wt.%. However, since claim 1 as originally granted does not exclude the presence of antioxidant compounds for the purpose of providing a different, non-antioxidant effect, the scope of the granted patent has not been extended, therefore the requirements of Article 123(3) EPC are met."

VI. In its statement setting out the grounds of appeal, the appellant (opponent 2) disputed, *inter alia*, the compliance of said claim 1 with the requirements of Article 123(2) EPC. This objection was based on the consideration that the wording used allowed for the presence, in addition to the 0.001% to 2% by weight of tocopherols, of further antioxidants such as, for instance, 1,2-benzisothiazolinone. The relevant part of the statement of grounds of appeal (page 2, fourth from last, third from last and penultimate paragraphs) reads:

"Die Patentinhaberin hat bei der Auflistung der geeigneten Antioxidationsmittel, die in Mengen von 0,001 bis 2 Gew.-% vorhanden sein müssen (Merkmal f) alle Antioxidationsmittel mit Ausnahme von α -, β -, γ - und δ -Tocopherol und deren Gemischen gestrichen.

Aufgrund der Formulierung in Anspruch 1 "Flüssige Waschmittelzusammensetzung, umfassend:" ist die in Anspruch I enthaltene Auflistung der Inhaltsstoffe (Merkmale a bis f) nicht abschließend, sondern es können weitere Inhaltsstoffe enthalten sein.

Allerdings enthält das gesamte Streitpatent keinerlei Hinweis oder Offenbarung, dass die vormals in Merkmal f) enthaltenen und jetzt gestrichenen Antioxidationsmittel, prinzipiell als Inhaltsstoffe ausgeschlossen sind.

Aufgrund der Formulierung "Flüssige Waschmittelzusammensetzung, umfassend" kann das Waschmittel neben den 0,001 bis 2 Gew.-% der beanspruchten Antioxidationsmitteln prinzipiell auch weitere Antioxidationsmittel wie beispielsweise 1,2-Benzisothiazolinon enthalten. Dies ist aber von der ursprünglichen Offenbarung nicht gedeckt und somit verstößt der geändert aufrecht erhaltenen Anspruch 1 gegen Art. 123(2) EPÜ."

- VII. In their reply, the Respondents (Patent Proprietors) merely commented the Appellant's objection under Article 123(2) EPC as follows: "The Art 123(2) argument is not clear. The appellant's arguments do not establish the addition of new subject matter".
- VIII. In a subsequent letter, the Party as of Right to these appeal proceedings (Opponent 1), taking note of the submissions made by the Appellant, merely agreed that the appeal should be allowed and that the patent should be revoked.

IX. The parties were summoned to oral proceedings to be held on 7 May 2014. The Board issued a communication in preparation for the hearing. Under point 3 thereof, the Board expressed the following provisional opinion regarding the Appellant's above-mentioned objection under Article 123(2) EPC against maintained claim 1:

"3. The Board is of the preliminary opinion that the interpretation of this claim made by the Appellant in discussing this objection (i.e. the interpretation that this claim allowed for e.g. 1,2-benzisothiazoline-3-one in addition to from 0.001 to 2% by weight of the claimed tocopherol(s), see the grounds of appeal page 2, penultimate paragraph) appears to imply also an objection under Article 123(3) EPC, when comparing the scope of protection of this amended claim 1 with that of claim 1 as granted."

X. By letter of 2 April 2014 the Respondents informed the Board that they were not going to be represented at the oral proceedings. Under cover of the same letter they also filed two sets of amended claims respectively labelled "First Auxiliary Request" and "Second Auxiliary Request", supposed to address "implicit" issues under Article 123(2) EPC and Article 123(3) EPC, respectively.

Claim 1 of said **First Auxiliary Request** only differs from maintained claim 1 in that

- in the definition of component (d), a semicolon was inserted between "...*dye material*" and "*selected from ...*" and another semicolon was added after "*patent blue*",

and

- the definition of component (f) was amended to read (emphasis added)

"(f) from 0.001% to 2% by weight of an antioxidant **wherein the antioxidant is selected from 2,6-di-tert-butyl-hydroxy-toluene (BHT), α -, β -, γ -, δ -tocopherol, 1,2-benzisothiazoline-3-one (Proxel GXLTM) and mixtures thereof and the antioxidant consists of α -, β -, γ -, δ -tocopherol.**"

Claim 1 of the **Second Auxiliary Request** only differs from claim 1 of the First Auxiliary Request in that the definition of component (d) was amended to read

"(d) an effective amount of a water soluble dye material **wherein the dye material is selected from anthraquinone-based dyes, azo-based dyes and triarylmethane-based dyes and wherein the dye material is selected from acid blue 80, brilliant blue and patent blue;**".

XI. The oral proceedings before the Board took place as scheduled, in the announced absence of the duly summoned Respondents. The debate at the hearing focused on the question whether or not the respective claims 1 according to all pending request of the Respondents met the requirements of Article 123(3) EPC.

XII. The Appellant requested that the decision under appeal be set aside and the patent be revoked.

The Respondents, in the final sentence of their letter of 2 April 2014, requested that the appeal be dismissed or, alternatively, that the patent be maintained on the basis of the claims according to one of these First or

Second Auxiliary Requests submitted under cover of said letter.

XIII. The Parties' submissions of relevance here may be summarized as follows.

The Appellant stressed that claim 1 as granted required that all the antioxidants listed under "f)" taken together constituted no more than "2% by weight" of the claimed composition. It considered incorrect the interpretation of this claim given at point 8 of the reasons of the decision under appeal (see V *supra*). Referring also to decision T 2017/07 of 26 November 2009, it argued that this interpretation amounted to ignoring the imposed upper limit for the amounts of the listed antioxidants in claim 1 as granted, i.e. deprived the the "2% by weight" limit of any sense.

It submitted that, on the contrary, maintained claim 1, due to the use of the word "*comprising*" preceding the list of ingredients "a)" to "f)", allowed for the additional presence of other antioxidants, including those listed in granted claim 1 but no longer listed in maintained claim 1 such as, for instance, "1,2-benzisothiazoline-3-one (Proxel GXLTM)" (below **Proxel GXLTM**).

Hence, as also stressed by the Party as of right, maintained claim 1 allowed for the simultaneous presence in the claimed compositions of, for instance, 1.5% by weight of tocopherol and 1.5% by weight of Proxel GXLTM, i.e. allowed for compositions which were excluded from the scope of protection of claim 1 as granted since they contained more than 2% by weight in total of the antioxidants listed in claim 1 as granted.

Accordingly, the scope of maintained claim 1 was broadened with respect to the scope of granted claim 1 and, contrary to the requirements of Article 123(3) EPC.

At the hearing, the Appellant argued that the wording of the amended definition of ingredient "f)", which was identical in both versions of claim 1 according to the First and Second Auxiliary Requests, was ambiguous as to the antioxidant compounds that may be present and, hence, unclear. However, even when taking the view that this definition was meant to also express a limitation as to the amount of the antioxidants also explicitly mentioned in granted claim 2 - i.e. "*2,6-di-tert-butyl-hydroxy-toluene (BHT)*" (below **BHT**), tocopherols, Proxel GXLTM and their mixtures -, these versions of claim 1 still certainly did not set any limit to the amount of any other antioxidant.

Thus, the definition of ingredient "f)" in both versions of claim 1 according to the First and Second Auxiliary Requests, similarly to the definition of ingredient "(f)" in maintained claim 1, certainly did not limit the amount for any of the other antioxidants listed in granted claim 1 in addition to BHT, tocopherols, Proxel GXLTM and their mixtures, i.e. certainly did not limit the amount of e.g. "*2,2,4-trimethyl-1,2-dihydroquinoline*", "*2,6-di-tert-butyl hydroquinone*", "*lignosulphonic acid*", etc. for which granted claim 1 also imposed the 2% by weight upper limit.

Thus, as also stressed by the Party as of right, the definition of component "f)" allowed for the simultaneous presence in the claimed compositions, for instance, of 1.5% by weight of tocopherol(s) and 1.5% by weight of "*2,2,4-trimethyl-1,2-dihydroquinoline*", or

of "2,6-di-tert-butyl hydroquinone", or of "lignosulphonic acid", etc., i.e. allowed for compositions which were excluded from the scope of protection of claim 1 as granted.

Accordingly, claim 1 of the First Auxiliary Request and that of the Second Auxiliary Requests contravened Article 123(3) EPC for reasons similar to those indicated for maintained claim 1.

The **Respondents**, in their reply of 2 April 2014, stated the following in respect of the requirements Article 123 EPC:

"... We maintain our previously advised Main Request and request a decision on it based on point 8 of the Interlocutory Decision.

In response to the recent communication from the Board announcing the implicit Art 123(3) ground, two Auxiliary Requests are filed herewith.

The First Auxiliary Request arises from combining claim 2 as filed and as granted with claim 1 and then further specifying the vitamin E antioxidant as implicitly most preferred due to its use in the example. It is common general knowledge that Vitamin E comprises the claimed tocopherols. This overcomes the implicit Art 123(3) objection raised. The combination of claims 1 and 2 has always been present so there can be no extension of protection, arising from it.

The Second Auxiliary request complied with Rule 80 since it addressed an implicit 123(2) issue ..."

Reasons for the Decision

Procedural issues

1. Admissibility of late-filed Auxiliary Requests 1 and 2
 - 1.1 These requests were filed by the Respondents after the issuance of the summons to oral proceedings, but about one month before the date of said oral proceedings.
 - 1.2 The Board is satisfied that the filing of these requests constitutes an attempt to overcome, by way of amendments to the claims, pending objections under Article 123(2) and (3) EPC addressed in the Board's communication.
 - 1.3 The adverse parties did not dispute the admissibility into the proceedings of these two late-filed Auxiliary Requests.
 - 1.4 Hence, the Board, in the exercise of its discretion under the provisions of Article 114(2) EPC and Article 13(3) RPBA, decided to admit the Respondents' Auxiliary Requests 1 and 2 into the proceedings.

Respondents' Main Request (Patent in the version held allowable by the Opposition Division)

2. Extension of protection - Art. 123(3) EPC - Claim 1
 - 2.1 Claim 1 at issue (i.e. maintained claim 1; see Section II and IV of the Facts and Submissions) defines a liquid laundry detergent composition "*comprising*" *inter alia* the antioxidant ingredient "*(f)*" in an amount which is defined by a numerical range: "*(f) from 0,001% to 2% by weight of an antioxidant...*". The definition

of this antioxidant ingredient "f" further requires it to be "*consisting of*" tocopherols.

2.2 The wording "*(f) from 0,001% to 2% by weight of an antioxidant*" is also present in claim 1 as granted. However, according to the latter, the antioxidant is further required to be "*selected from*" a much larger group of chemical compounds including (beside the tocopherols), for instance, "*Proxel GXLTM*", "*2,2,4-trimethyl-1,2-dihydroquinoline*", "*2,6-di-tert-butyl hydroquinone*", "*lignosulphonic acid*".

2.3 The Opposition Division considered that this difference in wording between the definitions of component "f" did not extend the protection conferred by claim 1 as granted, because this latter already allowed for additional amounts also of the same chemical compounds that were listed in the definition of ingredient "f)".

In the opinion of the Opposition Division these compounds could additionally be present in the compositions according to granted claim 1 "for the purpose of providing a different, non-antioxidant effect" (see above Section V of the Facts and Submissions).

2.3.1 The Board notes that the Opposition Division has not indicated any element in the patent in suit or some common general knowledge possibly justifying such interpretation of the ambit of claim 1 as granted.

Thus, the Board sees no reason not to follow also in the present case the logical interpretation of claims directed to compositions in which one or more ingredient/s is/are required to be comprised in the composition in an amount which is defined by a

numerical range. For the Board, a characterizing feature of this type not only requires the presence of the ingredient/s in a (total) amount within that range, but simultaneously implies that the presence of that ingredient in an amount outside of said range is excluded (see e.g. T 2017/07, point 2.2.1 of the reasons).

- 2.3.2 Hence, in the Board's judgment, the definition of ingredient "(f)" in claim 1 as granted excludes the presence in the claimed composition of one or more of the chemical compounds listed under "(f)" in a total amount of more than 2% by weight.
- 2.4 Already in the statement of grounds of appeal (see Section VI of the Facts and Submissions; in particular the cited passage "kann das Waschmittel neben den 0,001 bis 2 Gew.-% der beanspruchten Antioxidationsmitteln prinzipiell auch **weitere Antioxidationsmittel wie beispielsweise** 1,2-Benzisothiazolinon enthalten" (emphasis added by the Board), the Appellant argued that claim 1 as maintained allows for the presence of further antioxidants (in addition to the tocopherols) such as, for instance, Proxel GXLTM.
- 2.5 The Respondents were informed by the Board's communication that the Appellant's interpretation of maintained claim 1 "that this claim allowed for e.g. 1,2-benzisothiazoline-3-one in addition to from 0.001 to 2% by weight of the claimed tocopherol(s) ... appears to imply also an objection under Article 123(3) EPC, when comparing the scope of protection of this amended claim 1 with that of claim 1 as granted."

Thus also in this communication it was indicated that Proxel GXLTM represented just an example of the

compounds that may be present in the composition according to claim 1 at issue, when adopting the Appellant's interpretation of said claim.

- 2.6 The Respondents reacted by filing amended sets of claims as First and Second Auxiliary Requests.

As to the objection under Article 123(3) EPC against claim 1 at issue addressed in the Board's communication, the Respondents only argued that claim 1 of the First Auxiliary Request corresponded to the combination of claims 1 and 2 as granted and thus could not possibly be objectionable under Article 123(3) EPC.

- 2.7 The Board thus notes that the Appellant's argument that claim 1 at issue allows for the presence of further anti-oxidants (in addition to the tocopherols) **such as, for example,** Proxel GXLTM was not, or at least not expressly, rebutted by the Respondents. Nor did the Board find any indication in the patent in suit that suggested to the skilled person either that no other antioxidant, specifically none of the other antioxidants mentioned in claim 1 as granted, may be present in addition to the tocopherols defined as ingredient "(f)" in claim 1 at issue. Finally, the Appellant's interpretation of the ambit of claim 1 is also consistent with the jurisprudence, see e.g. decision T 2017/07 (see points 2.2.2 and 2.2.3 of the reasons).

- 2.8 For the Board, a comparison of claim 1 as granted with claim 1 at issue, construed as set out in T 2017/07, shows that

- whereas claim 1 as granted sets a limit of 2% by weight to the total amount of **all** antioxidants listed

under "(f)"

- claim 1 at issue **only** sets that limit **for** the amount of **tocopherols**.

Accordingly, the simultaneous presence of, **for instance**, 1.5% by weight of tocopherols and 1.5% by weight of Proxel GXLTM, or of **any** of the **other** antioxidants listed under "(f)" in granted claim 1,

- is excluded in claim 1 as granted (via the proviso that the total amount of **all** the antioxidants listed under "(f)" in granted claim 1 cannot be more than "2% by weight"),

- but is **not** excluded in claim 1 at issue.

2.9 In the Board's judgement, the protection conferred by claim 1 at issue is thus extended compared to the protection conferred by claim 1 as granted.

Hence, claim 1 at issue does not meet the requirements of Article 123(3) EPC.

3. Consequently, the Respondents' Main Request is not allowable.

Respondents' First Auxiliary Request

4. Extension of protection - Art. 123(3) EPC - Claim 1

4.1 The wording of claim 1 at issue (see Section X of the Facts and Submissions) differs from claim 1 according to the main request in essence in that the definition of ingredient "(f)" was amended to read:

"(f) from 0.001% to 2% by weight of an antioxidant wherein the antioxidant is selected from 2,6-di-tert-butyl-hydroxy-toluene (BHT), α -, β -, γ -, δ -tocopherol, 1,2-benzisothiazoline-3-one (Proxel GXLTM) and mixtures thereof and the antioxidant consists of α -, β -, γ -, δ -tocopherol."

- 4.2 Claim 1 at issue is manifestly **not** a mere literal combination of claims 1 and 2 as granted, as suggested by the Respondents, and is thus open to objections under Article 123(3) EPC.
- 4.3 The Appellant disputed the clarity (Article 84 EPC) of this amended definition of ingredient "(f)", but argued that even when taking the view that this definition was meant to express a limitation as to the (total) amount of tocopherols **and** of any of the other antioxidants explicitly listed in claim 1 at issue (and which were also explicitly listed in claim 2 as granted, as apparently implied by the Respondents' comments accompanying the filing of the Auxiliary Requests: see Section XIII of the Facts and Submissions), the wording used certainly did **not** express all the other limitations implied by the fact that claim 2 as granted was directed to a liquid composition "according to claim 1" as granted.
- 4.4 Also for the Board, regardless of any ambiguity possibly present in the definition of ingredient "(f)" in claim 1 at issue, it is immediately apparent that this definition can at most imply a limitation for the total amount of those antioxidants (BHT, tocopherols, Proxel GXLTM and their mixtures) which are mentioned in such definition, i.e. can at most imply a limitation for the amount of the antioxidants that were also explicitly listed in claim 2 as granted.

- 4.5 Thus, whereas claim 1 as granted sets a limit to the amount of **all antioxidants defined in "(f)"** of that claim, including *inter alia* "2,2,4-trimethyl-1,2-dihydroquinoline", "2,6-di-tert-butyl hydroquinone", "lignosulphonic acid", claim 1 at issue only sets a limit, if at all, for the total amount of the antioxidants mentioned under "(f)" in that claim, i.e. only for the tocopherols, BHT and Proxel GXLTM.
- 4.6 Accordingly, a similar objection as raised in the statement of grounds of appeal against the maintained claim 1 (current main request) applies also to claim 1 of the First Auxiliary Request. Indeed, the simultaneous presence in the claimed composition of, **for instance**, 1.5% by weight of tocopherols and 1.5% by weight of "2,2,4-trimethyl-1,2-dihydroquinoline", or of **any another** of the antioxidants listed under "(f)" in granted claim 1, but not explicitly mentioned in granted claim 2, is excluded by the wording of claim 1 as granted but is not excluded by the wording of claim 1 at issue.
- 4.7 The Board concludes, therefore, that claim 1 at issue also extends the protection conferred compared to claim 1 as granted, contrary to the requirements Article 123(3) EPC.
5. Thus, the Respondent's First Auxiliary Request is not allowable.

Respondents' Second Auxiliary Request

6. Extension of protection - Art. 123(3) EPC - Claim 1
- 6.1 Claim 1 at issue (see Section X of the Facts and Submissions) contains the same definition of ingredient

"(f)" as claim 1 according to the First Auxiliary Request.

6.2 The considerations under under points 4.1 to 4.6 above thus apply *mutatis mutandis* to claim 1 at issue. The further amendments to claim 1, relating to the definition of the dye material comprised in the composition, have no bearing on said considerations.

6.3 Hence, the Board concludes that claim 1 at issue does not meet the requirements of Article 123(3) EPC either.

6.4 Thus, the Second Auxiliary Request of the Respondents is not allowable either.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The patent is revoked.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated