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**Datasheet for the decision  
of 30 June 2016**

**Case Number:** T 0475/14 - 3.3.07

**Application Number:** 03257403.0

**Publication Number:** 1428521

**IPC:** A61K8/92, A61K8/34, A61K8/04,  
A61K8/37, A61Q15/00

**Language of the proceedings:** EN

**Title of invention:**  
Antiperspirant or deodorant composition

**Patent Proprietor:**  
Unilever PLC  
Unilever N.V.

**Opponents:**  
Colgate-Palmolive Company  
Beiersdorf AG

**Headword:**  
Antiperspirant or deodorant composition/Unilever PLC, Unilever  
N.V.

**Relevant legal provisions:**  
RPBA Art. 13  
EPC Art. 123(2), 123(3), 56

**Keyword:**

Main request - Amendments (no)

Auxiliary request 1 - Amendments (no)

Auxiliary request 2 - Amendments (no)

Auxiliary requests 3 and 4 - Admission into the proceedings  
(no)

Auxiliary request 5 -Inventive step (no)

Auxiliary request 6 - Amendments and inventive step (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 0475/14 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 30 June 2016**

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**Decision under appeal:**      **Decision of the Opposition Division of the  
European Patent Office posted on 3 January 2014  
revoking European patent No. 1428521 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman**                    J. Riolo  
**Members:**                  D. Boulois  
                                    D. T. Keeling

## Summary of Facts and Submissions

- I. European patent No. 1 428 521 was granted on the basis of a set of 38 claims.

Independent claim 1 as granted read as follows:

"1. An antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit which comprises:-

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) a natural oil that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms

c) glycerol

constituents b) and c) being selected in a weight ratio of from 4:1 to 1:4 and together constituting 1.5 to 15% by weight of the composition and

d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight."

- II. The patent was opposed under Article 100(a) EPC, on the grounds that its subject-matter lacked novelty and inventive step.

- III. The appeal by the patent proprietors lies from the decision of the opposition division to revoke the patent (Art. 101(2) and 101(3)(b) EPC). The decision was based on 3 sets of claims filed with telefax of 8 April 2013 as main request and auxiliary request 1, and during the oral proceedings before the opposition division as auxiliary request 2.

Claim 1 of said requests reads as follows, the difference with respect to claim 1 as granted being indicated by bold (addition) or strike through (deletion)::

(a) Independent claim 1 of the main request has the following added feature:

**"wherein the glyceride in the natural oil comprises a carboxylic acid residue from a unsaturated carboxylic acid containing 1, 2 or 3 olefinic bonds and the natural oil comprises at least one oil selected from coriander seed oil, borage seed oil, evening primrose oil, maize corn oil, sunflower oil and safflower oil."**

(b) Independent claim 1 of auxiliary request 1 differed from claim 1 of the main request in the restriction of the natural oil, namely **"the natural oil comprises** ~~at least one oil selected from coriander seed oil, borage seed oil, evening primrose oil, maize corn oil,~~ **sunflower oil and safflower oil."**

(c) Independent claim 1 of auxiliary request 2 was reformulated as a method claim, namely:

**"1. A cosmetic method for aiding the recovery of human skin from side effects of hair removal whilst controlling perspiration or conditioning the skin to ameliorate such side effect comprising**  
**a) applying topically to the skin a composition before and/or after hair removal from the skin, which is an**

antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit which comprises:-

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) a natural oil that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms  
c) glycerol  
constituents b) and c) being selected in a weight ratio of from 4:1 to 1:4 and together constituting 1.5 to 15% by weight of the composition and  
d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight".

- IV. The documents cited during the opposition proceedings included *inter alia* the following:  
D1: EP 1 080 712 A2  
D26: WO03/030852  
D33: Experimental report from Beiersdorf dated 7 October 2013
- V. According to the decision under appeal, document D1 was considered as closest prior art for the subject-matter of the main request. The difference between the subject-matter of claim 1 and the the composition disclosed in example 11 of D1 was the nature of the cosmetic oil used. The alleged effect of improvement of skin hydration had not been demonstrated by technical evidence, in particular by example 9 of the contested patent and by the additional experimental data provided by the proprietor.  
On the other hand, D33 showed the replacement of castor oil with any the natural oils of claim 1 was not linked with any particular effect of improvement of skin hydration or conditioning. Moreover, sunflower oil and glycerol were known to have hydrating and humectant properties. Claim 1 of the main request covered thus a large number of compositions for which no particular technical effect had been made plausible or

demonstrated. The only technical effect which could be formulated was the provision of a further antiperspirant or deodorant composition suitable for topical skin application having dermatological compatibility and providing skin-care benefits. The skin conditioning and moisturizing properties of the claimed oils were known from numerous documents of the prior art, which taught the use of natural oils such as sunflower oil in antiperspirant compositions. The addition of one of the claimed natural oil was therefore obvious and the main request was not inventive.

As regards claim 1 of auxiliary request 1, the formulation of the problem and the obviousness remained the same as for the main request.

Auxiliary request 2 was admitted into the proceedings and related to a cosmetic method. The difference between this claimed subject-matter and the disclosure of D1 was the application of known deodorant composition in a cosmetic method involving a step of hair removal from skin, with the purpose of aiding recovery of human skin from side effects of said hair removal. The opposed patent did not contain any evidence of achieving some specific recovery effect on the skin by applying the composition, but merely demonstrated that the inherent skin conditioning/hydrating effect of deodorant compositions of the prior art comprising glycerol and a natural oil, such as in example 11 of D1 was also beneficial in the context of a cosmetic method involving shaving or hair removal from skin. The effect demonstrated in the patent was thus not different from the conditioning and hydrating effect provide by the compositions of D1. Thus, the technical problem was the provision of a new use of the



deodorant composition of D1 resulting in a new activity, but only the indication of a specific context of circumstances for the previously known use of the composition for controlling perspiration. A context of use of the deodorant composition of D1 at some unspecified time before and/or after hair removal from the underarm would arise obviously and unavoidably at some time during the toilet due to a coincidence of circumstances and site of application. This point rendered the claimed subject-matter obvious.

- VI. The proprietors (appellant) filed an appeal against that decision.
  
- VII. With the statement setting out the grounds of appeal the appellant submitted a main request and auxiliary requests 1-5 and the following pieces of evidence:  
D34: experimental report  
D35: experimental report
  
- VIII. With a letter dated 26 June 2014, the appellant submitted the following item of evidence:  
D34a: corrected experimental report
  
- IX. With a letter dated 22 September 2014, opponent 01 (hereinafter called respondent 01) submitted arguments and contested the admissibility of D35.
  
- X. With a letter dated 25 September 2015, respondent 01 informed the Board and the parties that it would not attend the oral proceedings. It stated that none of the requests met the requirements of Article 123(2) EPC.
  
- XI. In a communication sent in preparation of oral proceedings dated 13 June 2016, the board gave its preliminary opinion.

XII. With a letter dated 17 June 2016, the appellant submitted a new main request and auxiliary requests 1-6.

Claim 1 of said requests read as follows, the difference with respect to claim 1 as granted being indicated by bold (addition) or strike through (deletion):

a) Main request

"1. An antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit which comprises:-

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) **from 0.3 to 10% by weight in the composition excluding any propellant of sunflower oil**

c) glycerol

constituents b) and c) being selected in a weight ratio of from ~~4:1 to 1:4~~ **2:1 to 1:2** and together constituting 1.5 to 15% by weight of the composition and

d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight,

**wherein if the composition comprises, in addition to said sunflower oil, any further natural oil(s) that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms, then the weight ratio of the total amount of natural oil, including any sunflower oil, to glycerol is from 4:1 to 1:4; and the weight level of the total amount of natural oil, including any sunflower oil, plus glycerol constitutes from 1.5 to 15% by weight of the composition."**

b) Auxiliary request 1

"1. **Use of an antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit to assist skin to recover better or faster after hair removal whilst simultaneously still controlling or preventing the appearance of sweat and/or generation of odour, wherein the composition comprises:-**

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) **from 0.3 to 10% by weight in the composition excluding any propellant of sunflower oil**

c) glycerol

constituents b) and c) being selected in a weight ratio of from ~~4:1 to 1:4~~ **2:1 to 1:2** and together constituting 1.5 to 15% by weight of the composition and

d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight,

**wherein if the composition comprises, in addition to said sunflower oil, any further natural oil(s) that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms, then the weight ratio of the total amount of natural oil, including any sunflower oil, to glycerol is from 4:1 to 1:4; and the weight level of the total amount of natural oil, including any sunflower oil, plus glycerol constitutes from 1.5 to 15% by weight of the composition."**

c) Auxiliary request 2

"1. **A cosmetic method for aiding recovery of human skin side effects of hair removal whilst controlling perspiration or conditioning the skin to ameliorate such side effect comprising:-**

**i) applying topically to the skin** an antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit which comprises:-

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) **from 0.3 to 10% by weight in the composition excluding any propellant of sunflower oil**

c) glycerol

constituents b) and c) being selected in a weight ratio of from ~~4:1 to 1:4~~ **2:1 to 1:2** and together constituting 1.5 to 15% by weight of the composition and

d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight,

**wherein if the composition comprises, in addition to said sunflower oil, any further natural oil(s) that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms, then the weight ratio of the total amount of natural oil, including any sunflower oil, to glycerol is from 4:1 to 1:4; and the weight level of the total amount of natural oil, including any sunflower oil, plus glycerol constitutes from 1.5 to 15% by weight of the composition; before and/or after hair removal."**

d) Auxiliary request 3

"1. An antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit which comprises:-

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) **from 0.3 to 10% by weight in the composition excluding any propellant of sunflower oil**

c) glycerol

constituents b) and c) being selected in a weight ratio of from ~~4:1 to 1:4~~ **2:1 to 1:2** and together constituting 1.5 to 15% by weight of the composition and

d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight."

e) Auxiliary request 4

**"1. A cosmetic method for aiding recovery of human skin side effects of hair removal whilst controlling perspiration or conditioning the skin to ameliorate such side effect comprising:-**

**i) applying topically to the skin** an antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit which comprises:-

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) **from 0.3 to 10% by weight in the composition excluding any propellant of sunflower oil**

c) glycerol

constituents b) and c) being selected in a weight ratio of from ~~4:1 to 1:4~~ **2:1 to 1:2** and together constituting 1.5 to 15% by weight of the composition and

d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight,

**before and/or after hair removal."**

f) Auxiliary request 5

"1. An antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit which comprises:-

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) **0.3 to 10% by weight** of a natural oil **comprising sunflower oil** that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms, **in the composition excluding any propellant;**

c) glycerol

constituents b) and c) being selected in a weight ratio of from ~~4:1 to 1:4~~ **2:1 to 1:2** and together constituting 1.5 to 15% by weight of the composition and

d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight."

g) Auxiliary request 6

**"1. A cosmetic method for aiding recovery of human skin side effects of hair removal whilst controlling perspiration or conditioning the skin to ameliorate such side effect comprising:-**

**i) applying topically to the skin an antiperspirant or deodorant composition suitable for topical application to skin and providing a skin-care benefit which comprises:-**

a) an antiperspirant active in an amount of from 1 to 50 by weight,

b) **0.3 to 10% by weight** of a natural oil **comprising sunflower oil** that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms, **in the composition excluding any propellant;**

c) glycerol

constituents b) and c) being selected in a weight ratio of from ~~4:1 to 1:4~~ **2:1 to 1:2** and together constituting 1.5 to 15% by weight of the composition and

d) a carrier fluid for the antiperspirant active other than constituents b) and c) which is free from a low

molecular weight aliphatic monohydric alcohol in an amount of from 30 to 93% by weight,  
**before and/or after hair removal."**

XIII. With a letter dated 27 June 2016, the respondent 02 contested the admission of auxiliary requests 3-6 into the proceedings.

XIV. Oral proceedings took place on 30 June 2016.

XV. The arguments of the appellant may be summarized as follows:

Main request and auxiliary requests 1 and 2 -  
Amendments

A basis for the claimed ratio of oil/glycerol could be found in original claims 14 and 15 and specifically in the description on page 11, lines 3-11, and for the claimed oil amounts in original claim 9.

Admission of auxiliary requests 3 to 6 into the  
procedure

All the features which were mentioned as violating article 123(2) EPC by the Board in its preliminary opinion had been deleted.

Admission of D35 into the proceedings

These tests showed an effect and were relevant for the discussion on inventive step, which was the subject of the decision of the opposition division.

Auxiliary request 5 - Inventive step

The closest prior art was document D1, which did not disclose sunflower oil in a composition, and the problem to be solved was the improvement of skin hydration and elasticity after hair removal. This problem was not mentioned in D1. Document D35 showed an effect, as well as D34a. In particular, examples G and I of D34a showed an effect for the claimed oil/glycerol weight ratios. Examples D and C showed that the amounts of hydrating agents was not the main factor responsible for the effect, but rather that it was the weight ratio between glycerol and oil.

None of the cited documents cited sunflower oil for improving skin recovery after shaving, and thus claim 1 was inventive.

Auxiliary request 6 - Inventive step

There was no implicit disclosure in D1 to use the disclosed composition in the claimed method. This document did not give any reference to shaving and paragraph [0022] of D1 mentioned the skin sensitivity but did not suggest any use after hair removal.

XVI. The arguments of the respondents may be summarized as follows:

Main request and auxiliary requests 1 and 2 -  
Amendments

According to respondent 01, there was no basis for a specific mixture of sunflower oil and another oil at the respective claimed weight ratios to glycerol of 2:1 to 1:1 and 4:1 to 4:1 in any filed request.

According to respondent 02, the introduction of the feature "sunflower oil" in claim 1 of the main request



instead the term "a natural oil that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms" was a violation of Article 123(2) EPC, since there could be sunflower oils with a different fatty acid composition , not necessarily containing C18 carbon atoms.

Admission of auxiliary requests 3 to 6 into the procedure

According to respondent 02, auxiliary requests 3 to 6 should not have been admitted into the proceedings, since they related to an object which has not been claimed so far, and because they have been filed very late. They were *prima facie* not allowable, since the weight ratio of 2:1 to 1:1 was still present in said request. Moreover, auxiliary requests 3 and 4 did not meet the requirements of Article 123(3) EPC in view of the restriction to a specific oil.

Admission of D35 into the proceedings

D35 should not be admitted into the proceedings since its results were not credible and thus the document was not relevant. Moreover, it was late-filed in the appeal procedure, since it could have been filed during the opposition proceedings.

Auxiliary request 5 - Inventive step

According to the written arguments of respondent 01, D1 or D26 could be seen as closest prior art.

According to respondent 02, none of the tests D34a or D35 were relevant, since the subject-matter of claim 1 was much broader, and was not restricted to sunflower

oil, but to a natural oil comprising sunflower oil. The problem was the provision of an alternative composition and the solution, incorporating sunflower oil was obvious, since it was a known hydrating component.

Auxiliary request 6

The claimed use was implicit, since it was known to combine hair removal and the use of an antiperspirant.

#### XVII. Requests

The appellant requested that the decision under appeal be set aside and the patent maintained on the basis of the claims according to the Main Request or according to one of Auxiliary Requests 1 to 6, as filed by letter of 17 June 2016.

The respondent 02 requested that the appeal be dismissed and that Auxiliary Requests 3 to 6 and document D35 not be admitted into the proceedings.

The respondent 01 had requested, in the written proceedings, that the appeal be dismissed.

#### **Reasons for the Decision**

1. Main request - Amendments
- 1.2 Claim 1 of the main request relates to compositions comprising inter alia the following features:
  - "b) from 0.3 to 10% by weight in the composition excluding any propellant of **sunflower oil**
  - c) **glycerol**

constituents b) and c) being selected in a weight ratio of from **2:1 to 1:2** and together constituting 1.5 to 15% by weight of the composition and

...

wherein if the composition comprises, in addition to said sunflower oil, **any further natural oil(s)** that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms, **then the weight ratio of the total amount of natural oil, including any sunflower oil, to glycerol is from 4:1 to 1:4**; and the weight level of the total amount of natural oil, including any sunflower oil, plus glycerol constitutes from 1.5 to 15% by weight of the composition."

- 1.3 A basis for the term "*sunflower oil*" is to be found in original claim 6 and in the description on page 9, lines 11-28 and a basis for the term "*from 0.3 to 10% by weight in the composition excluding any propellant of sunflower oil*" is to be found in claims 6 and 9 as originally filed.

As to the argument of the respondent that the replacement of the original term in claim 1 "*a natural oil that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms*" by the term "*sunflower oil*" went beyond the content of the application, since sunflower oil does not necessarily contain C18 carbon atom glyceride, this unsubstantiated argument goes against general common knowledge and is technically not credible.

- 1.4 The subject-matter of claim 1 includes explicitly a composition comprising specifically a combination of sunflower oil, glycerol and a further oil, with a sunflower oil/glycerol weight ratio of 2:1 to 1:1 and a total oil/glycerol weight ratio of 4:1 to 1:4.

Such composition comprising sunflower oil and glycerol in a weight ratio of 2:1 to 1:2 together in combination with a further natural oil in a total ratio of 4:1 to 1:4 to glycerol is however not derivable directly and unambiguously from any part of the application as originally filed. Although it is clear from the description of the original application that the natural oil might be a mixture of oils, there is no specification of a composition comprising an oil mixture with specified amounts of different oils or specified ratios of said oils to glycerol in the case of a mixture (see page 10, lines 2-6).

The application as originally filed indeed constantly refers to a composition comprising a natural oil or a mixture of natural oils that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms, sunflower oil being explicitly disclosed as the preferred natural oil, combined with glycerol in a weight ratio of 4:1 to 1:4 (see original claims 1 and 6; description page 4, lines 5-11, page 5, lines 17-23; page 10, lines 2-6). All the examples 1-9 of the application comprise only one natural oil, namely sunflower oil, combined with glycerol. As to the weight ratio of 2:1 to 1:1, a basis is to be found only in reference to the natural oil as such, namely by disclosing a natural oil/glycerol weight ratio of 1:1 and in claim 15 disclosing a natural oil/glycerol ratio of 2:1.

As to the passage of the description mentioned by the appellant on page 11, lines 3 to 11 as a basis for this specific composition, this passage reads:

*"Indeed, a particular desirable ratio of such preferred combined proportions is often from 2:1 to 1:2. The*

*weight ratio of the glyceride oil to the glycerol is often selected in the range of at least 1:2, and particularly at least 1:1 or in the region of 1:1. In many desirable embodiments the weight ratio of oil to glycerol is not greater than 2:1.*". While this passage constitutes a basis for a restriction to the claimed sunflower oil/glycerol weight ratio of 2:1 to 1:1, but the disclosure of a specific combination of sunflower oil with another oil in the claimed weight ratios is not derivable therefrom.

1.5 Consequently, the main request does not meet the requirements of Article 123(2) EPC.

2. Auxiliary request 1 - Amendments

Claim 1 of auxiliary request 1 has been reformulated as a use claim, but has kept the same composition features as claim 1 of the main request. As for the main request, the use of a composition comprising sunflower oil and glycerol in a weight ratio of 2:1 to 1:2 together in combination with a further natural oil in a total ratio of 4:1 to 1:4 to glycerol is not derivable directly and unambiguously from any part of the application as originally filed.

Consequently, auxiliary request 1 does not meet the requirements of Article 123(2) EPC.

3. Auxiliary request 2 - Amendments

Claim 1 of auxiliary request 2 has been reformulated as a method claim, but has kept all composition features of claim 1 of the main request. The conclusions reached for the main request, or similarly for auxiliary

request 2, thus apply *mutatis mutandis* also for auxiliary request 2.

Consequently, auxiliary request 2 does not meet the requirements of Article 123(2) EPC.

4. Admission of D35 into the proceedings

This document has been filed with the statement of ground of appeal and makes a comparison between the composition of example 11 of D1 and a composition according to the invention and is therefore relevant for the case, even more since during the opposition procedure the previous experimental data provided by the appellant had not been considered to be relevant. It is therefore an important document as regards the discussion on inventive step, which was the subject of the decision of the opposition division.

D35 is therefore admitted into the proceedings (Article 13 RPBA).

5. Auxiliary request 3 - Admission into the proceedings

This auxiliary request was filed with a letter dated 17 June 2016 after the issue of the Board's preliminary opinion, at a late stage of the proceedings, and does not correspond to any request filed earlier with the statement of grounds of appeal.

The subject-matter of claim 1 has been restricted to sunflower oil in a specific amount, namely **"from 0.3 to 10% by weight in the composition excluding any propellant of sunflower oil"** and in a narrower oil/glycerol weight ratio, namely **"2:1 to 1:2"**.

A new request at this late stage would be considered admissible, if the claims it encompasses solve all previous issues raised by the Board or in the impugned decision and do not give rise to any new objection. This is not the case, since it appears *prima facie* that the subject-matter of claim 1 of auxiliary request 3 extends the protection conferred by the patent, contrary to the requirements of Article 123(3) EPC, through the restriction to a specific natural oil, namely sunflower oil (see T1360/11, point 3.1). The amendments made to claim 1 are thus not of a clear and simple nature and open a new discussion.

Moreover, the Board's communication cannot be taken as a justification for submitting new requests that a party could have filed earlier, since it is intended as guidance for the oral proceedings and is not an invitation or an instruction from the Board to file new submissions.

Thus, the Board considers that it is appropriate to exercise its discretionary power not to admit auxiliary request 3 into the proceedings in accordance with Article 13 of the Rules of Procedure of the Boards of Appeal.

6. Auxiliary request 4 - Admission into the proceedings

This auxiliary request was filed together with a letter dated 17 June 2016 after the issue of the Board's preliminary opinion, at a late stage of the proceedings, and does not correspond to any request filed earlier with the statement of grounds of appeal.

The subject-matter of claim 1 of auxiliary request 4 has been reformulated as a method claim and includes all composition features present in claim 1 of auxiliary request 3. This request thus raises *prima facie* the same new questions under Article 123(3) EPC as auxiliary request 3.

Thus, the Board decides to not admit this request into the proceedings in accordance with Article 13 of the Rules of Procedure of the Boards of Appeal.

## 7. Auxiliary request 5

### 7.1 Admission into the proceedings

The subject-matter of claim 1 of this request corresponds to the subject-matter of claim 1 of auxiliary request 1 filed with the statement of grounds of appeal, with the suppression of all features which were mentioned as infringing the requirements of Article 123(2) EPC by the board in its preliminary opinion; the amendments also do not give *prima facie* rise to any new objection. The amendments made to claim 1 are thus of a clear and simple nature and do not open a new discussion.

Auxiliary request 5 is therefore admitted into the proceedings (Article 13 RPBA).

### 7.2 Inventive step

#### 7.2.1 The invention relates to particular to antiperspirant or deodorant compositions formulations and to cosmetic methods of controlling perspiration from localised areas of the body, such as from the underarm in conjunction with a method for localised hair removal (see the specification EP 1 428 521, par. [0001]).



Antiperspirant formulations of the present invention can assist skin to recover better or faster after hair removal or at least ameliorate any pain or discomfort from the beauty and odour treatment regime, or to reduce the impact of subsequent hair removal, whilst simultaneously still controlling or preventing the appearance of sweat and/or generation of odour (see par. [0003]-[0004]). It is thus possible to accelerate the recovery of human skin from the unwanted, deleterious side-effects of hair removal or to condition the skin to resist such side effects, whilst at the same time retaining the benefit of controlling sweating.

7.2.2 D1 was considered as closest prior art by the parties and by the opposition division in its decision. D1 discloses in example 11 a deodorant stick comprising 5% by weight of glycerol and 8,5% by weight of castor oil, thus at a ratio oil/glycerol of 1,7:1. This document does not disclose a composition with sunflower oil, but instead with castor oil.

Respondent 01 also considered D26 as potential closest prior art. This document was however published on 17 April 2003, thus after the priority date of the contested patent and as such is not relevant for the discussion on inventive step.

7.2.3 According to the appellant, the problem is the provision of a composition providing an improved skin hydration and elasticity.

7.2.4 As a solution, claim 1 of auxiliary request 5 proposes an antiperspirant or deodorant composition comprising in particular 0.3 to 10% by weight of a natural oil comprising sunflower oil, said natural oil being

present in a weight ratio of 2:1 to 1:2 to glycerol in said composition.

7.2.5 It has to be investigated whether there is sufficient evidence supporting the alleged effect. Documents D33, D34a and D35 have been filed by respondent 02 and by the appellant in this regard:

(a) D33 has been cited by the respondent 02 to show the absence of any effect due to the use of sunflower oil. It shows a comparison between 8 deodorant stick preparations comprising inter alia castor oil or sunflower oil (compositions 44817-10, 44817-20 44817-70 and 44817- 80), and the results do not show any significant differences on the skin hydration with the respective compositions. This document fails however to disclose the precise compositions of the 8 deodorant sticks, in particular as regards the amounts of oil present in the compositions. It is also unclear whether the composition comprise glycerol, and what is the oil:glycerol weight ratio in this case. Consequently, the experiments of document D33 cannot represent a comparison between the claimed invention and compositions according to D1, and are not relevant to show the absence of a synergistic effect between glycerol and sunflower oil. The results of the experiments D33 are thus not exploitable.

(b) D35 has been filed by the appellant to show the existence of an effect. It makes a comparison between the composition of example 11 of D1 comprising 8.5% by weight of castor oil and 5% by weight of glycerol versus the same composition with 8.5% by weight of sunflower oil. The results show an improved skin hydration and elasticity with the

composition corresponding to the claimed invention. D35 thus shows without a doubt an improvement at the specific sunflower oil/glycerol weight ratio of 1,7:1 and at the specific total amounts of glycerol and oil 13.5% by weight.

- (c) D34a has been filed by the appellant and compares the skin hydration level of several compositions comprising sunflower oil and/or glycerol at different concentrations and ratios, in comparison to control compositions without sunflower oil and/or glycerol. Compositions F, G, H and I comprise thus sunflower oil and glycerol at the respective weight ratios of 1:2, 2:1, 1:4 and 1:1 and respective total oil and glycerol amounts of 3%, 6%, 5% and 8% by weight of the composition. Said compositions G and I with a sunflower oil/glycerol weight ratio of 2:1 and 1:1 show an improvement in the skin hydration, confirming the results of D35, while compositions F and H with a weight ratio of 1:2 and 1:4 do not show any improvement. Said compositions F and H tested in D34a fall however also under the claimed compositions of claim 1 of auxiliary request 5. The claimed compositions relate indeed to compositions comprising 0.3 to 10% by weight of **total** natural oil comprising sunflower oil, said **total** natural oil being present in a in a weight ratio of 2:1 to 1:1 to glycerol in said composition. This does not exclude that sunflower oil is indeed present in the compositions at a weight ratio to glycerol of 1:4 or 1:2. Accordingly, the experiments of D34a explicitly demonstrates that not all of the claimed compositions can achieve the alleged technical effect of providing an improved skin hydration and elasticity. Accordingly, D34a shows that the

technical problem is not solved over the whole scope of claim 1 of auxiliary request 5.

It is thus not possible to establish the existence of an improvement over the prior art, since the presence of an improvement in the skin hydration and elasticity of the claimed compositions over the composition of document D1 has not been credibly demonstrated. The technical problem must be reformulated as the provision of an alternative antiperspirant or deodorant composition.

In view of the information found in the examples of the contested patent, in particular in example 1, the board is convinced that the problem has been plausibly solved.

7.2.6 Since the problem consists in the provision of an alternative antiperspirant or deodorant composition, it belongs to the normal activity of the skilled person to accomplish routine modifications, such as choosing a known alternative oil for making an antiperspirant or deodorant composition.

The use of sunflower oil is commonly known by the skilled person and can only be seen as an arbitrary choice that would be made as a matter of routine by a skilled person.

Consequently, the the subject-matter of claim 1 of auxiliary request 5 is not inventive and this request does not meet the requirements of Article 56 EPC.

8. Auxiliary request 6

8.1 Admission into the proceedings

The subject-matter of claim 1 of auxiliary request 6 relates to a "cosmetic method" referring to the application of a antiperspirant or deodorant composition similar to the composition claimed in claim 1 of auxiliary request 5. This request corresponds to auxiliary request 3 as filed with the statement of grounds of appeal with modifications made taking in account the preliminary opinion of the Board regarding the allowability of some amendments. Said amendments do not give *prima facie* rise to any new objection and are of a clear and simple nature and do not open a new discussion.

Auxiliary request 6 is therefore admitted into the proceedings (Article 13 RPBA).

## 8.2 Amendments

The amendments originate from original claims 6, 9, 14 and 15, and thus the requirements of Article 123(2) EPC are met.

The replacement of the feature "a natural oil that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms" in granted claim 1 by the term "a natural oil comprising sunflower oil that comprises a glyceride of an unsaturated carboxylic acid containing 18 carbon atoms" does not extend the scope of protection, as did *prima facie* the subject-matter of claim 1 of auxiliary requests 3 and 4, and thus meets the requirements of Article 123(3) EPC.

## 8.3 Inventive step

- 8.3.1 The claimed invention relates to a cosmetic method for aiding the recovery of human skin from side effects of hair removal.
- 8.3.2 The closest prior art remains D1; this was not contested by the respondents. This document does not disclose a composition with sunflower oil, but instead with castor oil, and does not mention the use of such composition for aiding the recovery of human skin from side effects of hair removal.
- 8.3.3 According to the appellant, the problem is how to improve the skin recovery after hair removal, namely shaving.
- 8.3.4 The solution is the use of the claimed composition comprising in particular sunflower oil.
- 8.3.5 The tests D35 show an improvement in skin barrier integrity when a composition according to the invention is applied to compromised skin sites during the recovery period. The skin barrier recovers significantly better and the skin sites treated with the sunflower oil and glycerol deodorant show significantly better skin elasticity with a composition comprising sunflower oil and glycerol than when treated with a composition comprising castor oil and glycerol as disclosed in D1.

In view of the information found in document D35, there is no reason to doubt that the problem has been plausibly solved.

- 8.3.6 As to the obviousness of the solution, D1 does not envisage the method for using the deodorant compositions in skin recovery after or before hair

removal and does not suggest that its compositions may have an effect on aiding recovery of human skin side effects of hair removal. Contrary to respondent's 02 statement, the skilled person therefore would not envisage an undisclosed method, even less an undisclosed purpose. In this respect, the first instance decision does not hold, since it did not take in account the claimed method and its purpose, or all the method steps claimed.

Accordingly, the subject-matter of claim 1 of auxiliary request 6 is inventive, and this request meets the requirements of Article 56 EPC.

## **Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division with the order to maintain the patent on the basis of the claims of Auxiliary Request 6, filed by letter of 17 June 2016, and a description to be adapted.

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated