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**Datasheet for the decision  
of 1 March 2019**

**Case Number:** T 0351/17 - 3.3.06  
**Application Number:** 04704608.1  
**Publication Number:** 1590426  
**IPC:** C11D3/37, C11D3/22, C11D1/02,  
C11D1/22  
**Language of the proceedings:** EN

**Title of invention:**

LAUNDRY CLEANSING AND CONDITIONING COMPOSITIONS

**Patent Proprietor:**

Unilever PLC  
Unilever N.V.

**Opponents:**

Henkel AG & Co. KGaA  
Reckitt Benckiser (Brands) Limited  
THE PROCTER & GAMBLE COMPANY

**Headword:**

LAUNDRY CLEANSING AND CONDITIONING COMPOSITION/UNILEVER

**Relevant legal provisions:**

EPC Art. 123(2)

**Keyword:**

Amendments (all requests) - added subject-matter (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 0351/17 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 1 March 2019**

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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 23 November  
2016 revoking European patent No. 1590426  
pursuant to Article 101(3)(b) EPC.**

**Composition of the Board:**

**Chairman** J.-M. Schwaller  
**Members:** P. Ammendola  
C. Heath

## Summary of Facts and Submissions

- I. The appeal was filed by the patent proprietors (from now the "appellants") against the decision of the opposition division to revoke European patent Nr. 1590426, because claim 1 of the Main and of the First Auxiliary Request (both dated 16 December 2015) was not allowable in view of Article 123(2) EPC.
- II. With its grounds of appeal the appellants filed two sets of claims identical to those underlying the contested decision.
- III. In a communication the board expressed the preliminary opinion that both versions of claim 1 on file contravened Article 123(2) EPC for substantially the same reasons indicated by the opposition division.
- IV. With letter of 27 April 2019 the appellants filed an amended set of claims as Auxiliary Request 2.
- V. At the oral proceedings the parties discussed, *inter alia*, the combination of features of claim 1 of the Main Request. After having been informed that the board had come to the conclusion that said claim 1 contravened Article 123(2) EPC and that the same reasons appeared to apply to claim 1 of both auxiliary requests, regardless of their admissibility, the appellants stated to have no further comments.
- VI. The parties final requests were as follows:

The appellants requested that the decision under appeal be set aside and the patent be maintained based on the Main Request, or on Auxiliary Request 1, both filed

with the grounds of appeal, or on Auxiliary Request 2 filed with letter dated 27 February 2019.

Respondents I to III request that the appeal be dismissed.

VII. Claim 1 of the **Main Request** reads:

*"1. A laundry composition comprising one or more cationic polymers which is hydroxyethyl cellulose derivatised with trimethyl ammonium substituted epoxide, and more than 5% of one or more anionic surfactants having an HLB of greater than about 4, wherein the composition additionally comprises non-ionic surfactant, and wherein the ratios of cationic polymer:total surfactant, cationic polymer:anionic surfactant, and cationic polymer:non ionic surfactant are less than 1:10, and wherein the non-ionic surfactant comprises a fatty alcohol ethoxylate of formula:  $R'O(EO)_n$  wherein  $R'$  represents an alkyl chain of between 10 and 18 carbon atoms,  $(EO)$  represents one unit of ethylene oxide monomer and  $n$  has an average value between 5 and 12."*

Claim 1 of the **Auxiliary Request 1** as well as claim 1 of the **Auxiliary Request 2** also defined laundry detergent compositions mandatorily comprising, *inter alia*, "hydroxyethyl cellulose derivatised with trimethyl ammonium substituted epoxide" and a "non-ionic surfactant" that "comprises a fatty alcohol ethoxylate of formula:  $R'O(EO)_n$  wherein  $R'$  represents an alkyl chain of between 10 and 18 carbon atoms,  $(EO)$  represents one unit of ethylene oxide monomer and  $n$  has an average value between 5 and 12".

## Reasons for the Decision

### *Main Request*

1. Added subject-matter (Article 123(2) EPC) of claim 1
- 1.1 It has been established (cf. decision G 2/10, OJ EPO 2012, 376) that the "gold standard" for assessing compliance with Article 123(2) EPC is that any amendment to the parts of a European patent relating to the disclosure (the description, claims and drawings) can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed.

Further, according to the established jurisprudence of the BoA, subject-matter resulting from a multiple selection within two or more lists of alternative ingredients given in a patent application generates a particular combination that, in the absence of any pointer to that particular combination, a skilled person would not derive directly and unambiguously from the content of the application.

- 1.2 In the present case it is common ground among the parties that claim 1 under consideration results from several modifications of claim 6 of the application as filed directed to a laundry detergent composition that comprises, *inter alia*, a cationic polymer. In particular, two of these amendments consist in specifying that:
  - (a) the cationic polymer is a "*hydroxyethyl cellulose derivatised with trimethyl ammonium substituted epoxide*" and

(b) the laundry detergent composition must additionally comprise a *"non-ionic surfactant wherein the non ionic surfactant comprises a fatty alcohol ethoxylate of formula: R'O(EO)<sub>n</sub> wherein R' represents an alkyl chain of between 10 and 18 carbon atoms, (EO) represents one unit of ethylene oxide monomer and n has an average value between 5 and 12"*.

1.3 The appellants rebutted the finding of the opposition division that the application as filed did not disclose the combination of these two amendments by submitting that:

1.3.1 Amendment (a) was based on original claim 7 which disclosed "**hydroxyethyl cellulose derivatised with trimethyl ammonium substituted epoxide**" (hereinafter referred to as the specified group of **D-HE celluloses**) as a preferred cationic polymer. The skilled reader of the original application would understand that the specified group of D-HE celluloses recited in original claim 7 was the most preferred (group of) cationic polymer(s), as seen from the examples on Table 9 (pages 57 to 59 of the original application), where it was reported as the best performing in terms of Softening Parameter.

1.3.2 Amendment (b) would also be apparent to the skilled reader of the original application because the non-ionic surfactant was disclosed as a particularly preferred ingredient. This was confirmed by the presence of a non-ionic surfactant in most of the invention examples. The limitation to a specific class of non-ionic surfactants would instead be based on pages 33 to 34 of the original application, wherein the fatty alcohol ethoxylate of the given general formula



(hereinafter **the specified group of FA ethoxylates**) was the only non-ionic surfactant described as "*highly preferred*" (see page 34, second paragraph). It was also of relevance that this original description disclosed the specified group of FA ethoxylates as "*highly preferred*" in view of the same advantageous properties mentioned on page 33, lines 6 to 9, for the non-ionic surfactant ingredient in general, thereby confirming that the specified group of FA ethoxylates was the most preferred non-ionic surfactant ingredient.

Since amendments (a) and (b) were both implicitly disclosed in the application as filed among the most preferred features of the invention, their combination did not contravene Article 123(2) EPC.

- 1.4 As to amendment (a), the board notes that in the application as filed claim 7 discloses nine equally preferred alternatives for the cationic polymer ingredient, one of these alternatives being the specified group of D-HE celluloses. Table 9 compares the levels of softening (measured as values of a "*Softening Parameter*") of nineteen formulations, of which each of formulations 8 to 19 contains one specific cationic polymer explicitly indicated to belong to one of the nine groups of chemical compounds listed in claim 7, with formulation 19 being the sole in which the cationic polymer (identified by the trade name "*Polymer JR 30M*") is explicitly indicated to belong to the specified group of D-HE celluloses. The results in Table 9 are commented by the sentence in the middle of page 59 ending with: "[s]pecifically, the cationic polymers used in experimental formulations 8-19 were deemed to be superior". This original disclosure, however, does not contain any direct and unambiguous disclosure that the specified group of D-HE

celluloses is the most preferred cationic polymer (i.e. "more" preferred than the other groups of preferred cationic polymers listed in claim 7).

- 1.4.1 As to the possibility that such disclosure would be implicit by the fact the "*Softening Parameter*" value reported in Table 9 for formulation 19 is the highest one, the board finds that this single result (based on a single example of cationic polymer belonging to the specified group of D-HE celluloses) does not manifestly imply that also all the other cationic polymers that belong to the same group of D-HE celluloses might be expected to produce "*Softening Parameter*" values superior to those obtainable by the other groups of cationic polymer listed in claim 7. The board notes further the undisputed fact that the patent explicitly underlines that the actual softening performance of each suggested cationic polymer (and thus also of those belonging to specified group of D-HE celluloses) also depends e.g. on the cationic polymer's molecular weight (compare page 28, lines 23 to 29, with Table 32 on page 83 and the first paragraph on page 84).
- 1.4.2 Hence, the board finds that the skilled reader of Table 9 may as well attribute the high "*Softening Parameter*" value reported for formulation 19, rather than exclusively to the nature of the used "*Polymer JR 30M*" (i.e. to the fact that it belongs to the specified group of D-HE celluloses, as submitted by the appellants), to e.g. the combination of such nature with a certain molecular weight. Hence, the skilled reader of Table 9 cannot plausibly deduce therefrom, for instance, that also all the other cationic polymers (different from "*Polymer JR 30M*") that belong to the specified group of D-HE celluloses would (independently on their molecular weights) necessarily produce

"Softening Parameter" values that were superior to those obtainable by all the other cationic polymers (also of possibly very different molecular weights) embraced by the other groups of preferred cationic polymers listed in claim 7.

1.4.3 Accordingly, in the board's conclusion, the skilled reader of Table 9 does not necessarily derive therefrom that the (whole) specified group of D-HE celluloses represents the most preferred cationic polymer ingredient for the claimed detergent composition. In other words, the result reported in Table 9 for this one single example of the specified group of D-HE celluloses does not necessarily represent a pointer also to the rest of the specified group of D-HE celluloses, vis-à-vis all the other possible cationic polymers also listed in claim 7.

1.4.4 Hence, an arbitrary selection has to be made among the equally preferred alternatives disclosed in original claim 7, in order to arrive at amendment (a).

1.5 In the appellant's line of reasoning in respect of amendment (b) partially resumed above, the description of the non-ionic surfactant ingredient (from page 33, line 18 to page 35 line 26 of the original application) and in particular the second paragraph on page 34 provides a basis for the disclosure of the specified group of FA ethoxylates as most preferred non-ionic surfactant.

1.5.1 It is undisputed that the description of the non-ionic surfactant ingredient discloses several preferred alternatives for such ingredient (as introduced by the sentence at line 14 to 16 of page 33 reading "[a]ny type of nonionic surfactant may be used, although

preferred materials are further discussed below", emphasis added by the board), namely:

- a first group identified as "*Fatty Alcohol Ethoxylated*" having a specific general formula (see page 33, lines 18 to 24) that is broader than that of the specified group of FA ethoxylates (the description of such group of preferred non-ionic surfactant ends with the disclosure of the specified group of FA ethoxylates as "*highly preferred*", in the second paragraph of page 34);
- other two groups of compounds that are disclosed into some detail, namely "*Alkylphenol Ethoxylates*" and "*Ethylene Oxide/Propylene Oxide Block Copolymers*", on pages 34 and 35) and
- a final list of possibly less preferred non-ionic surfactants in the last paragraph on page 35.

The board notes that the disclosure of the specified group of FA ethoxylates as "*highly preferred*", in the second paragraph of page 34 is unclear: it could mean that this group of FA ethoxylates is the most preferred class of non-ionic surfactants (as argued by the appellants) but it could also mean that it is the most preferred only among all the other fatty alcohol ethoxylates (i.e. the most preferred sub-group among all the "*Fatty Alcohol Ethoxylates*" according to the broader formula of page 33).

This ambiguity cannot be resolved by considering the fact, stressed by the appellants, that the second paragraph of page 34 discloses the specified group of FA ethoxylates as being "*highly preferred*" by making reference to, *inter alia*, the same cleaning and stability advantages that the more general description of the non-ionic surfactant (in the second paragraph of page 33) attributes to such ingredient; also this does

not allow to exclude the possibility that the second paragraph on page 34 only attempted to describe that the specified group of FA ethoxylates provided cleaning and stability advantages that were superior to those provided by all other possible "*Fatty Alcohol Ethoxylates*" according to the broader formula of page 33.

Rather, the further vague statement on page 34, lines 23 to 25, that non-ionic surfactants belonging to the other preferred class of "*Alkylphenol Ethoxylates*" of a given formula "*are somewhat interchangeable with alcohol ethoxylates, and serve as much the same function*" could at least in theory imply that some of the defined alkylphenol ethoxylates might provide cleaning and stability results comparable to those provided by the specified group of FA ethoxylates.

Finally, the ambiguity of the second paragraph on page 34 cannot even be solved by looking at the examples of the patent, because the presence in many examples of a non-ionic surfactant which is a not further specified "alcohol ethoxylate" does not allow any conclusion as to whether the compound(s) used in the examples is(are) of the specified group of FA ethoxylates, or not. The board considers it also relevant that in some of the formulations in example 3 (see Tables 11, 13 and 14) the non-ionic ingredient is even more vaguely indicated as "*ethoxylated nonionics*", thereby leaving open the possibility that the actual ingredients corresponding to such vague expression might as well be alkylphenol ethoxylates.

Accordingly, in the board's conclusion, the skilled reader of the second paragraph of page 34 in the context of the whole patent application, does not

necessarily derive therefrom that the specified group of FA ethoxylates represents the most preferred non-ionic surfactant ingredient for the laundry detergent composition of the invention (i.e. is "more" preferred than the other non-ionic surfactants also disclosed as preferred on pages 33 to 35). Thus, the skilled reader of pages 33 to 35 of the application as filed finds therein no clear pointer to the specified group of FA ethoxylates.

1.5.2 In view of the above the boards finds it unnecessary to decide whether, as also alleged by the appellants, the original patent application discloses the non-ionic surfactants as particularly preferred ingredients. As a matter of fact, even assuming, for the sake of an argument in favour of the appellants, that the skilled reader of the application as filed would conclude that the non-ionic surfactant is a particularly preferred ingredient of the laundry detergent composition of the invention, still at least one arbitrary selection has to be made among the apparently equally preferred non-ionic surfactants listed in page 33 to 35 of the original application, in order to arrive at the specified group of FA ethoxylates and, thus, to amendment (b).

1.6 For the above reasons the board comes to the conclusion that at least the modifications (a) and (b) require the combination of two selections among equally suitable alternatives listed in the application as filed for respectively the cationic surfactant and the non-ionic surfactant ingredient. The board finds that, if only for this reason, a skilled person cannot derive directly and unambiguously from the whole of the application as filed, the combination of features now recited in claim 1 of the Main Request. Thus, this

claim is found to contravene Article 123(2) EPC and the Main Request cannot be allowed.

*Auxiliary Request 1 and 2*

2. It is undisputed that the same reasoning given above applies identically to claim 1 of the Auxiliary Request 1 and to claim 1 of the Auxiliary Request 2, both of which comprise the feature that derive from amendments (a) and (b) of claim 6 as originally filed, discussed above. Hence, also these other two versions of claim 1 contravene Article 123(2) EPC and none of the Auxiliary Requests 1 and 2 can be allowable either.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



D. Magliano

J.-M. Schwaller

Decision electronically authenticated