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Datasheet for the decision of 28 March 2025

Case Number: T 1935/22 - 3.3.06

Application Number: 16802071.7

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IPC: C11D1/62, C11D3/00, C11D3/22, C11D3/37, C11D3/50, C11D11/00, C11D17/00

Language of the proceedings: EN

Title of invention:
FABRIC CONDITIONING COMPOSITION

Patent Proprietors:
1. Unilever IP Holdings B.V.
2. Unilever Global IP Limited

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

Headword:
Unilever/Fabric conditioning

Relevant legal provisions:
EPC Art. 56, 123(3)
RPBA 2020 Art. 12(4), 12(6)

Keyword:
Inventive step - main request (no) - auxiliary request (no) - auxiliary request (yes)
Amendments - allowable (yes)
Late-filed evidence - should have been submitted in first-instance proceedings (no) - admitted (yes)
Late-filed request - circumstances of appeal case justify admittance (yes)

Decisions cited:
T 2017/07

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

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Case Number: T 1935/22 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 28 March 2025

Appellant: (Patent Proprietor 1)	Unilever IP Holdings B.V. Weena 455 3013 AL Rotterdam (NL)
Appellant: (Patent Proprietor 2)	Unilever Global IP Limited Port Sunlight Wirral, Merseyside CH62 4ZD (GB)
Representative:	Corsten, Michael Allan Unilever Patent Group Bronland 14 6708 WH Wageningen (NL)
Appellant: (Opponent 1)	Henkel AG & Co. KGaA Henkelstrasse 67 40589 Düsseldorf (DE)
Representative:	dompatent von Kreisler Selting Werner - Partnerschaft von Patent- und Rechtsanwälten mbB Deichmannhaus am Dom Bahnhofsvorplatz 1 50667 Köln (DE)
Party as of right: (Opponent 2)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, Ohio 45202 (US)
Representative:	Gill Jennings & Every LLP The Broadgate Tower 20 Primrose Street London EC2A 2ES (GB)

Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted on 14 June 2022 concerning maintenance of the European Patent No. 3390601 in amended form.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: S. Arrojo
O. Loizou

Summary of Facts and Submissions

I. Appeals were filed by the patent proprietor and by opponent 1 against the decision of the opposition division to maintain European patent No. 3 390 601 in amended form on the basis of the claims according to auxiliary request 2 dated 22 December 2021.

II. In its grounds of appeal, the patent proprietor requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request filed therewith (corresponding to auxiliary request 1 in the decision under appeal). In its notice of appeal, the main request was to maintain the patent as granted.

III. In its grounds of appeal, opponent 1 argued that the claims as granted and those according to auxiliary request 1 were not inventive in view of **D1 (WO 2013/040115 A1)** alone or combined with **D2 (WO 2005/103215 A1)**, or not inventive in view of **D8 (WO 2006/018694 A1)** combined with D2. Further, it filed a new experimental report **D10** to demonstrate that the invention did not successfully achieve the technical effect alleged in the patent, and that claim 1 of the request as upheld by the opposition division was thus also not inventive in view of D1 alone or combined with D2, or D8 combined with D2.

IV. In its reply, the proprietor confirmed that its main request was that the patent be maintained on the basis of the claims according to the auxiliary request 1 filed during first instance proceedings. As an auxiliary measure, it requested that the patent be maintained on the basis of one of auxiliary requests 1

to 3 filed therewith, wherein auxiliary request 1 corresponds to the request upheld by the opposition division and auxiliary requests 2 and 3 were filed in response to the newly filed test report D10. The proprietor also requested that D10 not be admitted in the appeal proceedings.

V. Claim 1 according to the **main request** reads as follows:

"1. A fabric conditioning composition comprising;
a. 0.5 to 20 wt. % of a fabric softening active, which is a quaternary ammonium compound;
b. 0.01 to 2 wt % cationic polysaccharide;
c. 0.01 to 2 wt % non-ionic polysaccharide;
d. a plurality of anionic microcapsules encapsulating a benefit agent;
e. 0.001 to 0.5 wt % cross linked, water swellable cationic co-polymer of at least one cationic monomer and optionally other non-ionic and/or anionic monomers; and
f. water
wherein the weight ratio of cationic polysaccharide in the composition to non-ionic polysaccharide in the composition is 1:10 to 3:1."

VI. With letter dated 22 September 2023, opponent 1 requested that auxiliary requests 2 and 3 not be admitted in the appeal proceedings. Furthermore, it argued that auxiliary request 2 did not meet the requirements of Article 123(3) EPC and was not inventive in view of D1 combined with D10 or in view of D8. Auxiliary request 3 did also not meet the requirements of Article 123(3) EPC and was not inventive in view of D8 or in view of the combination of D1 and D8.

VII. In its preliminary opinion, the board concluded that claim 1 of the main and first auxiliary requests lacked an inventive step when starting from D1 as the closest prior art. While the board provided some preliminary ideas on inventive step for auxiliary requests 2 and 3, no specific conclusion was reached in this respect.

VIII. In response to the preliminary opinion, opponent 1 filed on 26 February 2025 additional arguments against the admittance and the allowability of auxiliary requests 2 and 3 under Articles 123(3) and 56 EPC.

IX. In a submission dated 4 March 2025, the proprietor withdrew the request to oral proceedings and announced that it would not be represented at the hearing.

X. Oral proceedings took place on 28 March 2025 in the presence of opponents 1 and 2. The final requests of the parties were the following:

The patent proprietor requested in writing that the decision under appeal be set aside and the patent be maintained on the basis of the main request filed with its statement of grounds of appeal or, in the alternative, that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 3 filed with the reply to the opponent's appeal, wherein auxiliary request 1 corresponds to the request upheld by the opposition division.

Opponent 1 requested that the decision of the opposition division be set aside and the patent be revoked in its entirety.

Opponent 2 requested that the patent proprietor's appeal be dismissed.

Reasons for the Decision

1. Admittance of the test report D10 and of auxiliary requests 2 and 3

1.1 D10 and auxiliary requests 2 and 3 were submitted for the first time at the appeal stage, and so their admittance is governed by Articles 12(4) and (6) RPBA.

1.2 During the opposition proceedings, opponent 2 filed experimental report D9 to support the argument that the alleged technical effect was not achieved across the entire scope of protection. In response, and shortly before the oral proceedings, the proprietor submitted auxiliary requests 6 and 7, which defined a more restricted range for the ratio of cationic to non-ionic polysaccharides. The main request and auxiliary request 1 currently at issue correspond to these auxiliary requests.

1.3 The proprietor contended that opponent 2 had filed D9 several months after the opposition division's preliminary opinion and two years after the notice of opposition, despite the fact that the contested technical effect was already described in the opposed patent. This late submission of D9 justified the filing of auxiliary requests 6 and 7 shortly before the oral proceedings before the opposition division. If opponent 1 had required additional time to prepare further data in response to the new claims, it should have requested a postponement of the oral proceedings. The belated filing of D9 by opponent 2, combined with the subsequent inaction from opponent 1, did not justify the admission of new data, such as D10, at this stage of the proceedings.

1.4 The board notes that the tests in D9 were conducted using cationic to non-ionic polysaccharide ratios of 1:9, 1:1, and 9:1 to demonstrate that the most preferred embodiments - i.e. those with a 1:1 ratio, as in the exemplary composition of the patent - did not achieve the desired technical effect. In response, the proprietor submitted auxiliary request 7 defining the sub-range 1:10 to 1:3, based on selecting the lower limit from the broader range (1:10 to 10:1) and the upper limit from the more preferred range (1:3 to 3:1). These amendments result in a less preferred range and are not based on the granted claims, but on the description page 15, lines 18-20, as filed.

The board has concluded that the opponents had no reason to anticipate that the invention would be amended to define a less preferred sub-range by combining end values from different ranges in the description. Nor can it be concluded that opponent 1 should have requested an adjournment of the oral proceedings in response to the filing of auxiliary requests 6 and 7, as it was uncertain at that stage whether these requests would be admitted, whether additional data would be relevant, or whether new data would affect the outcome of the proceedings. Thus, the board is not persuaded that D10 should have been submitted during the opposition proceedings (Article 12(6) RPBA).

1.5 In view of the above considerations, and since D10 directly addresses the issues that led to the decision under appeal, is *prima facie* relevant and not complex, the board exercised its discretion to admit it into the appeal proceedings under Article 12(4) RPBA.

1.6 Since D10 is now part of the proceedings, auxiliary requests 2 and 3 are considered a timely and legitimate response to the data presented in this document, as these requests specifically aim to establish an inventive step by defining subject-matter that more closely aligns with the examples disclosed in the patent, while further distinguishing the invention from the compositions tested in D9 and D10.

1.7 Opponent 1 further argued that auxiliary request 3 should not be admitted because the cationic to non-ionic polysaccharide ratio was broader than in auxiliary requests 1 and 2. Admitting this request would thus be contrary to the principle of convergence. Moreover, the request had not been sufficiently substantiated by the proprietor.

1.8 The board does not agree with these arguments for the following reasons:

The broader cationic to non-ionic polysaccharide ratio now claimed is regarded as a legitimate response to the objection that the sole example in the patent did not fall within the scope of the claims of the previous auxiliary requests. Furthermore, the request is considered to be sufficiently substantiated, because the proprietor's reply (see page 5) clearly indicates that the intention is to align the subject-matter of the claim more closely with the example in the patent and to further distinguish it from the cited prior art (e.g. D8). The amendments are thus filed to ensure that the claimed invention achieves the desired technical effect and establishes a non-obvious distinction over the cited prior art.

1.9 Accordingly, the board exercised its discretion under Article 12(4) RPBA to admit auxiliary requests 2 and 3 into the appeal proceedings.

2. Main request - Inventive step

The subject-matter of claim 1 of this request does not satisfy the requirements of inventive step for the following reasons:

2.1 D1 (see abstract) relates to fabric softening compositions with external structurants to stabilise performance ingredients such as perfume microcapsules. In particular, D1 (see claims 1, 6 and 7; examples B to D and G to J on pages 47-49) discloses compositions comprising 5 to 25 wt.% of a fabric softening active, preferably a quaternary ammonium compound, 0.5 to 2 wt.% of starch (a cationic polysaccharide) and 0.2 to 2 wt.% of perfume microcapsules.

2.2 Although the examples in D1 do not specify whether the microcapsules used are charged, D1 explicitly teaches (see claim 7 and page 8, lines 13-17) that they may include a cationic, non-ionic, or anionic deposition aid. Based on this, the board concludes that D1 discloses all three alternatives and thus anticipates embodiments with anionic microcapsules. Although the opposition division pointed out that cationic polymers are the most preferred option (see claim 7), this is not relevant, as selecting anionic polymers requires only a single selection from an explicitly disclosed list of alternatives. Furthermore, the patent itself states (see paragraph [0010]) that the term 'anionic microcapsule' refers to the charge of the microcapsule prior to its addition to the fabric conditioning composition. This raises uncertainty as to whether the

'anionic' charge remains a defining characteristic once the microcapsules are incorporated into the final composition, as required by claim 1. In any case, the board finds that D1 directly and unambiguously discloses embodiments in which the microcapsules are anionic.

2.3 In view of the above, the composition according to claim 1 differs from those in D1 in that:
i) it contains 0.01 to 2 wt.% non-ionic polysaccharide;
ii) the ratio of cationic to non-ionic polysaccharides is 1:10 to 3:1; and
iii) it contains 0.001 to 0.5 wt.% cross-linked, water swellable cationic co-polymer of at least one cationic monomer.

2.4 Problem solved by the invention

2.4.1 According to the patent (par. [0002]), incorporating microcapsules into fabric conditioning compositions often results in particle aggregation and flocculation. The object of the opposed patent (see par. [0005]) is to provide compositions where the microcapsules remain well dispersed without the need for premixing with the aqueous phase. Therefore, the alleged invention seeks to solve the problem of formulating a fabric conditioning composition that includes microcapsules while maintaining a homogeneous, well-dispersed visual appearance.

2.4.2 The patent discloses a single exemplary fabric conditioning composition with a cationic to non-ionic polysaccharide ratio of 1. Compositions not including the polysaccharides (see compositions C and D in par. [0144]) only form a homogeneous dispersion when the encapsulated perfume is pre-dispersed in a water phase.

2.4.3 Document D10 is an experimental report including tests with compositions comprising amounts of quaternary ammonium compounds, free perfume, encapsulated perfume, cross-linked cationic co-polymers and dyes according to the invention. Despite the addition of cationic and non-ionic polysaccharides in ratios of 1:10 and 1:3 as defined in claim 1 at issue, the microcapsules did not disperse, but flocculated and formed an heterogeneous mixture. Document D10 therefore provides evidence that the invention does not successfully achieve the technical effect of providing well dispersed compositions throughout the entire scope of the claims.

2.4.4 The problem solved by the invention is thus to provide an alternative fabric conditioning composition.

2.5 Obviousness of the solution

2.5.1 The proprietor argued that even if this was the only problem solved by the invention, the subject-matter of claim 1 was still a non-obvious alternative, as there were several differentiating features with respect to D1. In particular, to arrive at the feature '0.01 to 2 wt.% non-ionic polysaccharide', the skilled person would require several selections: first, the polymeric structuring agents in the 2nd paragraph on page 18 would need to be selected, then the non-ionic charge would have to be considered without any teaching in this respect, and finally the amount of this substance, which would require considering the range 0.01 to 5 wt. % to then select the lower values. In fact, if 0.01 wt. % were selected and combined with example B of D1, the ratio of cationic to non-ionic polysaccharide would be 147:1, i.e. much higher than the top value of 3:1 defined in claim 1 at issue. The skilled person would therefore not arrive at the subject-matter of claim 1

in an obvious way when starting from D1 as the closest prior art.

2.5.2 The board notes that D1 teaches (see page 17, lines 4-7) that adding a secondary external structurant in an amount of 0.01 to 5 wt.% provides an improved control of the time-dependent gelling. Among the different possible secondary external structurants, D1 cites several non-ionic polysaccharides such as pectin or alginate. Even though the proprietor is right in that several selections would need to be made (namely the polymeric structuring agents, the non-ionic polysaccharides on page 18, line 17 and the amounts within the range 0.01 to 5 wt.% falling within claim 1 and leading to a ratio of 1:10 to 3:1) in order to arrive at the features defined in claim 1, it is clear that D1 teaches embodiments including non-ionic polysaccharides in amounts falling within the scope of claim 1. Since the only problem solved by the invention is to provide an alternative composition, the presence in D1 of alternatives anticipating non-ionic polysaccharides in amounts falling within the scope of the invention is sufficient to render these features obvious. In other words, since the selection of features made to arrive at the subject-matter of claim 1 at issue does not lead to any specific technical effect, it is sufficient to show that the skilled person would arrive at the invention by simply working within the scope of the alternatives known from the closest prior art.

2.5.3 The only feature not taught in D1 is the presence of 0.001 to 0.5 wt.% of a cross-linked, water-swellable cationic copolymer of at least one cationic monomer. However, as concluded by the opposition division, this feature is obvious from D2, which teaches (see claim 1

and page 6, lines 5-8) that the presence of a cross-linked cationic polymer in an amount of at least 0.001 wt.% is advantageous as a delivery vehicle for compositions with microcapsules as well as to provide thickening and stability benefits. The board thus agrees that incorporating this substance into the composition of D1 would be an obvious consideration for the skilled person.

2.6 In view of the above discussion, the board concludes that the subject-matter of claim 1 according to the main request does not involve an inventive step in view of D1 combined with the teachings of D2.

3. Auxiliary request 1 - Inventive step

3.1 Claim 1 at issue corresponds to that of the main request, wherein the top value of the non-ionic to cationic polysaccharide ratio range is 1:3 (instead of 3:1).

3.2 Since the data in D10 still apply to this range, the invention is considered not to succeed in providing well dispersed compositions. Consequently, the same arguments and conclusions presented for the main request apply in the present case.

3.3 The request does therefore not meet the requirements of Article 56 EPC.

4. Auxiliary request 2 - Inventive step

4.1 Claim 1 of this request corresponds to that of auxiliary request 1, wherein the non-ionic polysaccharide is further restricted to "non-ionic guar".

4.2 While the polysaccharides used in the test reports D9 or D10 no longer fall within the scope of claim 1, the only exemplary composition in the patent does also not fall within the scope of claim 1 at issue, because the range of cationic to non-ionic polysaccharides is 1:1, i.e. outside the range 1:10 to 1:3 defined in claim 1.

4.3 In the absence of any evidence indicating that the compositions according to the alleged invention would indeed achieve the effect of improving the dispersion of the microcapsules, the board concludes that the only problem solved is, as in the previous requests, to provide an alternative fabric conditioning composition.

4.4 As argued in relation to the main request, insofar as the added features are considered to be arbitrary selections, their incorporation into the alleged invention is deemed obvious, provided they represent known alternatives within the relevant technical context.

4.5 Since, as argued by the opponents, document D8 teaches that non-ionic guar are typically used as non-ionic polymers in compositions containing encapsulated perfumes (see page 8, line 10), the additional feature is considered to be suggested as an additional component in the compositions known from D1 and D2.

4.6 The subject-matter of claim 1 according to auxiliary request 2 is therefore obvious in view of D1 combined with the teachings of D2 and D8.

5. Auxiliary request 3 - Article 123(3) EPC

5.1 Claim 1 at issue corresponds to that of the main request, wherein the non-ionic polysaccharide is

further specified to be 'non-ionic guar' and the cationic polysaccharide is restricted to 'cationic guar'.

5.2 Opponent 1 argued that the amendments were not allowable under Article 123(3) EPC, because while claim 1 as granted restricted the total amounts of cationic and non-ionic polysaccharides (in general) in the composition, claim 1 at issue only restricted the amounts of specific non-ionic and cationic polysaccharides (i.e. of non-ionic guar and cationic guar). Consequently, the new request encompassed embodiments in which the total amount of cationic and/or non-ionic polysaccharides as a whole were higher than 2 wt.%, a possibility which was not covered by the scope of the granted claims. To support this argument, opponent 1 referred to decision T 2017/07.

5.3 The board disagrees therewith for the following reasons:

The argument put forward by opponent 1 might have been persuasive had the amendment consisted in replacing the requirement of '0.01 to 2 wt% cationic/non-ionic polysaccharide' in claim 1 as granted with '0.01 to 2 wt% non-ionic guar/cationic guar', as it could then be argued that narrowing the scope of a restriction effectively resulted in an extension of the scope of the claim. This is, in fact, what occurred in decision T 2017/07, where claim 1 as granted restricted the amount of a broader group of 'alkylene carbonates having 3–5 carbon atoms', whereas the contested claim limited only the amount of propylene carbonate, thereby effectively extending the scope of protection beyond that of the granted claim.

This is not the case for claim 1 at issue, which sets out the same broad quantitative restrictions as claim 1 as granted — namely that the composition comprises '0.01 to 2 wt% cationic polysaccharide' and '0.01 to 2 wt% non-ionic polysaccharide'. The subsequent specification that the cationic and non-ionic polysaccharides are, respectively, cationic and non-ionic guars is to be regarded as a further limitation of the extent of protection conferred by the granted claims, as claim 1 at issue now defines not only the permitted amounts of polysaccharides in general but also their specific nature.

5.4 The Board therefore concludes that the requirements of Article 123(3) EPC are met.

6. Auxiliary request 3 - Inventive step

The requirements of Article 56 EPC are met for the following reasons:

6.1 Problem solved by the alleged invention

6.1.1 Claim 1 at issue now specifies the nature of the non-ionic and cationic polysaccharides — namely non-ionic guar and cationic guar — such that none of the tests submitted by the opponents in D9 or D10 fall within the scope of the claim. Consequently, there is no evidence on file demonstrating that the invention as defined in claim 1 at issue fails to achieve the purported effect of improving the dispersion of microcapsules. Moreover, since the cationic to non-ionic polysaccharide ratio defined in claim 1 at issue now encompasses that of the example in the patent, and since this example also uses non-ionic and cationic guars, there is now evidence on file that the claimed invention would successfully

achieve the effect of improving the dispersion of the microcapsules.

6.1.2 The opponents argued that the experiments in the patent did not prove that the effect of an improved dispersion would be achieved with the claimed invention, because according to the results in the patent, there was no problem of flocculation at all with the microcapsules as long as no cationic copolymer was used (see composition A). Since, according to these results, the addressed problem would not even occur in D1, there was no basis to conclude that the claimed invention would solve this problem, and so the only problem solved by the invention was to provide an alternative composition.

6.1.3 Although the opponents are correct in observing that, based on the results presented in the patent, the issue of flocculation arises specifically in compositions containing a water-swellable cationic copolymer, this does not mean that the only problem addressed is the provision of an alternative composition. In light of the evidence on file, the claimed invention does not constitute an arbitrary selection, but rather provides a targeted solution for achieving effective dispersion in compositions comprising both microcapsules and water-swellable cationic polymers. Accordingly, the problem solved by the invention is to provide a fabric conditioning composition that includes a water-swellable cationic polymer and microcapsules encapsulating a benefit agent, while maintaining good dispersion.

6.2 Non-obviousness of the solution

6.2.1 The opponents argued that since auxiliary request 2 had been considered to be rendered obvious by the cited prior art (i.e. D1 combined with D2 and D8), the only feature which could provide an inventive contribution was the cationic guar. Moreover, there was no need to rely on the teachings of D2, because D1 on page 39 already anticipated the use of cationic swellable co-polymers. In any case, both the use of cationic guar and its combination with non-ionic guar were known from D8 (see page 8 and page 9, line 4).

6.2.2 The board notes that the argument of the opponents ignores the fact that, as discussed above, due to the additional restriction, the claimed invention is now considered to solve the problem of providing a fabric conditioning composition that includes a water-swellable cationic polymer and microcapsules encapsulating a benefit agent, while maintaining good dispersion. This implies that unlike in the previous requests, it is not enough to simply argue that the differentiating features are known from the cited prior art. In this respect, the board notes that when selecting the nature of the non-ionic and cationic polysaccharides, there are a number of known alternatives both in the cited prior art in general and in D8 in particular. There is however no indication either in D8 or in any other prior art document that would lead the skilled person to select non-ionic guar and cationic guar in particular, let alone in amounts leading to a ratio falling within the scope of claim 1 at issue, for the purpose of maintaining a good dispersion. The board thus concludes that the subject-matter of claim 1 is not rendered obvious by the cited prior art, and so involves an inventive step within the meaning of Article 56 EPC.

7. Remittal

The board rejected the request of opponent 1 to adapt the description before the board and decided, exercising its discretion, to remit the case to the department of first instance for the adaptation of the description following the common practice of the Boards of Appeal (see Case Law of the boards of Appeal V.A. 99.9).

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 in amended form with the set of claims of auxiliary request 3 filed with the reply of 1 March 2023, and a description to be adapted.

The Registrar: The Chairman:

A. Wille J.-M. Schwaller

Decision electronically authenticated