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**Datasheet for the decision  
of 1 April 2014**

**Case Number:** T 1038/11 - 3.3.06

**Application Number:** 04714709.5

**Publication Number:** 1604000

**IPC:** C11D3/50, C11D3/02, C11D3/12

**Language of the proceedings:** EN

**Title of invention:**  
Fragrance delivery

**Patent Proprietor:**  
Givaudan SA

**Opponent:**  
Henkel AG & Co. KGaA

**Headword:**  
Fragrance delivery / GIVAUDAN

**Relevant legal provisions:**  
EPC Art. 108  
EPC R. 99(2)

**Keyword:**  
Admissibility of appeal - (no)

**Decisions cited:**  
T 2532/11

**Catchword:**



**Beschwerdekammern  
Boards of Appeal  
Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 1038/11 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 1 April 2014**

**Appellant:** Givaudan SA  
(Patent Proprietor) Chemin de la Parfumerie 5  
1214 Vernier-Genève (CH)

**Representative:** Givaudan Patents  
Ueberlandstrasse 138  
8600 Dubendorf (CH)

**Respondent:** Henkel AG & Co. KGaA  
(Opponent) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Henkel AG & Co. KGaA  
Intellectual Property (FJI)  
40191 Düsseldorf (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 24 March 2011  
revoking European patent No. 1604000 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman:** B. Czech  
**Members:** P. Ammendola  
J. Geschwind

## Summary of Facts and Submissions

I. This appeal of the Patent Proprietor is from the decision of the Opposition Division to revoke European Patent No. 1 604 000.

II. During the oral proceedings held before the Opposition Division the Opponent had raised for the first time a ground for opposition according to Article 100(c) EPC. More particularly, the Opponent had identified several amendments made to claim 1 as filed which made claim 1 as granted objectionable under Article 123(2) EPC.

More particularly, claim 1 of the application as originally filed, directed to a method of preparation of a fragrance-providing composition encompassing the addition of a fragrance to a particulate carrier material, had been amended by the incorporation of, *inter alia*, the features "*addition of the liquid fragrance **with** stirring*" (emphasis added by the Board). The Opponent had stressed, *inter alia*, that the only mention of a "*stirring*" step in the patent application as originally filed was that provided in a passage of the description reading: "*adding the liquid fragrance **and** stirring*" (emphasis added by the Board).

III. The course of action at the oral proceedings before the Opposition Division of relevance here is detailed as follows in the minutes (emphasis added by the Board):  
"After the break, the Chairman announced that the Opposition Division came to the conclusion that the new ground for opposition has to be admitted and that Articles 100(c) and 123(2) EPC will have to be discussed.  
He asked the Patentee how he wanted to proceed, whether a break e.g. would suffice.

The Patentee submitted that he needed much more longer, that he could not asked now the inventor in the USA, and that the only solution was to revoke the patent and he would make an appeal.

The Chairman asked the Patentee if he did not wish an interruption or a postponement of the o.p. The Patentee's answer was no.

The Chairman asked the Opponent if he had anything to add about this issue of Article 123(2) EPC. The Opponent had nothing to add and suggested that the problem could be solved by the provision of an auxiliary request.

The Chairman asked the Patentee if he had any other requests. The Patentee had no new arguments and no new requests.

The o.p were interrupted from 9:31 to 9:40.

The Chairman announced that, after having considered the Opponent's arguments, the Opposition Division agreed that "with stirring" does not have exactly the same meaning that "and stirring": "with stirring" is actually broader than "and stirring".

The Chairman asked once again if the Patentee had any new request. The Patentee insisted that he was unprepared and that he had nothing to say.

The Chairman announced that, under these circumstances, the Opposition Division could only come to the decision: the patent is revoked."

- IV. In the reasons for revocation of the patent given in the decision under appeal the Opposition Division indicated that the feature "*addition of the liquid fragrance **with** stirring*" that had been incorporated into claim 1, did not find a sufficient basis in the application as filed which merely disclosed "**and stirring**" in the invoked description passage. In the given context, the term "*with*" was found to be broader

than the term "*and*". Consequently, claim 1 as granted did not fulfill Article 123(2) EPC. Therefore, the patent was revoked.

- V. With its statement of grounds of appeal the Appellant (Patent Proprietor) filed a set of amended claims labelled "Main Request". Claim 1 thereof differs from claim 1 as granted only in that the disputed expression "*with stirring*" was replaced by "*and stirring*".

The statement of grounds of appeal contains, *inter alia*, the following passages:

"The Opponent raised a new objection relating to Article 123(2) EPC on the day of the Opposition oral proceedings, the Opposition Division admitted it, and the patent was revoked because of the inability of the Appellant to respond.

The Appellant was caught completely unprepared and with no way to respond on the day....".

"The Appellant does not question either the right of the Opponent to raise the objections that it did on the day, or of the Opposition Division's decision to admit them into the proceedings...";

"The amended claim was an inadvertent error on the part of the professional representative handling the application, and not an intentional change in the scope of the application. It is clearly contrary to the description and thus contravenes Article 123(2) EPC...."; and

"The present Main request corrects this error....The claims no longer contravene Article 123(2) EPC)."

VI. In its reply, the Respondent (Opponent) *inter alia* called into question the admissibility of the appeal considering that the Appellant in its statement of grounds of appeal had acknowledged that the finding of the Opposition Division was correct.

VII. At the oral proceedings before the Board on 1 April 2014, the Appellant expressly confirmed again the correctness of the finding in the decision under appeal that the feature "*with stirring*" in claim 1 of the granted patent was objectionable under Article 123(2) EPC.

Prompted by the Board to indicate those passages in the statement of grounds of appeal to be considered as a substantiation of reasons for setting aside the impugned decision, the Appellant only referred to the "inadvertent error" that had occurred during the drafting of claim 1 before the grant of the patent in suit and that was mentioned in the above-cited passage of the statement of grounds of appeal (see Section V *supra*).

VIII. The **Appellant** requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the set of claims filed with the statement of grounds of appeal.

The **Respondent** requested that the appeal be rejected as inadmissible (main request) or, in the alternative,  
- that the appeal be dismissed (first auxiliary request),  
or  
- that the case be remitted to the department of first instance for further prosecution (second auxiliary request).

## **Reasons for the Decision**

### *Non-admissibility of the appeal*

1. According to Article 108, third sentence, and Rule 99(2) EPC in combination, the Appellant shall, in its statement of grounds of appeal third sentence, "indicate the reasons for setting aside the decision impugned or the extent to which it is to be amended, and the facts and evidence on which the appeal is based".
2. In the present case, the Appellant has expressly confirmed at the oral proceedings that the finding of the opposition concerning the non-compliance of claim 1 as granted with the requirements of Article 123(2) EPC was correct. Considering the sole request of the Proprietor (now Appellant) then on file, the revocation of the patent was inevitable.
3. The correctness of the minutes of the oral proceedings before the opposition division was never challenged and the statement of grounds of appeal does not contain any objection that the decision of the opposition division under appeal was to be considered flawed due to a procedural violation. The reference to the "inability of the Appellant to respond on the day" cannot as such be equated to the raising of such an objection. Nor has the Appellant made any statement at the oral proceedings before the Board that a procedural violation was at least implicitly referred to in some passages of the statement of grounds of appeal. On the contrary, at the oral proceedings, the Appellant acknowledged that the Chairman of the opposition

division had obviously tried to be helpful.

4. At the oral proceedings, prompted by the Board, the Appellant only stated that the grounds of appeal were substantiated in the passage of the statement of grounds of appeal relating to the allegedly "inadvertent error" on the part of the professional representative handling the patent application. Said error had resulted in the presence in granted claim 1 of the expression "**with stirring**" (see above Sections II, IV and V of the Facts and Submissions).
  
5. As regards said allegedly inadvertent error, the following is observed:
  - The alleged error invoked occurred in amending the claims during the substantive examination of the application, i.e. **before the grant** of the patent in suit and the subsequent opposition proceedings.
  
  - The argument of the Appellant implies that the text of the granted patent including the allegedly erroneous wording of claim 1 had been approved by the Applicant (now Appellant) before the decision to grant the patent was taken (see Article 97(1) and Rule 71(3)(4) and (5) EPC).
  
  - The responsibility for the wording of granted claim 1, and in particular for the allegedly erroneous incorporation of the expression "*with stirring*" in replacement of the expression "*and stirring*" lies entirely with the Appellant itself.
  
6. From the above, the Board concludes that the appeal by the Appellant amounts to an attempt to correct an (alleged) error that occurred in the pre-grant



proceedings and does admittedly not even aim at contesting the decision taken by the opposition division.

6.1 Considering that the very purpose of appeal proceedings before the Board is to give a party the opportunity to impugn a first instance decision, the Appellant cannot escape its obligation to explain why the decision under appeal is erroneous, see e.g. decision T 2532/11 of 14 October 2013 (points 2.2.1 to 2.2.6 and 2.6.2 of the Reasons). The Board, however, sees no direct link between the decision under appeal and the parts of the statement of grounds of appeal relied upon by the Appellant in order to substantiate the appeal.

6.2 In the Board's judgement, the Appellant's statement of grounds of appeal does not even implicitly indicate any reason that could potentially justify setting aside the impugned decision. Instead, the filing of said statement of grounds of appeal, together with a set of amended claims supposed to correct said alleged error, amounts to the building of a new case.

Hence, the submissions made in the statement of grounds of appeal cannot be regarded as grounds for appeal in the sense of Article 108, third sentence, and Rule 99(2) EPC. Consequently, the appeal does not comply with the requirements of said provisions.

**Order**

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

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated