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**Datasheet for the decision  
of 23 November 2020**

**Case Number:** T 2447/18 - 3.3.06

**Application Number:** 13716273.1

**Publication Number:** 2838982

**IPC:** C11D1/62, C11D3/00, C11D3/50,  
C11D3/48

**Language of the proceedings:** EN

**Title of invention:**  
Improvements relating to fabric conditioners

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

**Opponents:**  
Henkel AG & Co. KGaA  
BASF SE

**Headword:**  
Non-ionic antimicrobial active / UNILEVER

**Relevant legal provisions:**  
EPC Art. 123(2), 54, 56

**Keyword:**

Added matter (main request and auxiliary requests 1 to 9) :  
yes - mixture of a class of compounds comprising a specific  
concentration of a single component of this class not disclosed  
in the application as filed

Novelty (auxiliary request 10) : yes

Inventive step (auxiliary request 10 to 15) : no - obvious  
alternative

**Decisions cited:**

T 0287/11, T 0052/13, T 0306/14

**Catchword:**



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

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Case Number: T 2447/18 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 23 November 2020**

**Appellant:**  
(Opponent 2)

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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
20 July 2018 concerning maintenance of the  
European Patent No. 2838982 in amended form.

**Composition of the Board:**

**Chairman** J.-M. Schwaller  
**Members:** L. Li Voti  
C. Brandt

## Summary of Facts and Submissions

- I. The appeal of opponent 2 (the **appellant**) is against the decision of the opposition division to maintain European patent no. 2 838 982 in amended form on the basis of the claims according to the fifth auxiliary request filed on 5 April 2018.
- II. With its statement of grounds the appellant inter alia raised objections under articles 123(2), 54 and 56 EPC. In particular it submitted that the claimed subject-matter lacked novelty over **F2** (WO 2013/124784 A1) and inventive step over document **F16** (JP 2001-336065A) taken in combination with **F7** (US 2020/0227790 A1) or **F9** (JP 2002-327375A). In the following, reference is made to the English translations of F16 (numbered **F16a**) and of F9 (numbered **F9b**) and its English abstract (**F9a**).
- III. In its reply the respondent (also patent proprietors) filed nine sets of amended claims as auxiliary requests 1 to 9. Moreover it referred inter alia to the experimental report (in the following **EXP2018**) filed during opposition with a letter dated 5 April 2018.
- IV. Following the board's preliminary opinion the respondent filed amended sets of claims dated 16 April 2020 as auxiliary requests 10 to 15. Opponent 1 (party as of right) declared not willing to attend oral proceedings.
- V. During the oral proceedings it was in particular discussed whether claim 1 of the main and auxiliary requests 1 to 9 complied with the requirements of article 123(2) EPC, claim 1 of auxiliary request 10 was novel over F2, claim 1 of auxiliary requests 10 to 15

involved inventive step starting from document F16a as closest prior art.

VI. The final requests of the parties were the following:

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

The respondent requested that the appeal be dismissed or, auxiliarily, that the patent be maintained on the basis of any one of auxiliary requests 1 to 9 filed with the letter of 12 April 2019, or of auxiliary requests 10 to 15 filed with letter dated 16 April 2020.

VII. Claim 1 according to the main request (features in bold added with respect to claim 1 as granted) reads as follows:

*"1. An aqueous fabric conditioner composition comprising:*

*(a) from 0.5 to 35%, by weight of the total composition, of a fabric softening active, wherein the fabric softening active comprises an ester-linked triethanolamine quaternary ammonium compound, and,*

*(b) from 0.002% to 0.4%, by weight of the total composition, of a non-ionic antimicrobial active, which is not a perfume component, **wherein the composition comprises 0.002% to 0.4% of 4,4' dichloro-2-hydroxy diphenyl ether** and,*

*(c) from 0.01 to 10%, by weight of the total composition, of a perfume."*

The claims 1 of auxiliary requests 1 to 3 differ from claim 1 of the main request in that the amounts of non-ionic antimicrobial active and 4,4' dichloro-2-hydroxy

diphenyl ether have been amended to "**0.025%** to 0.4%", "**0.05%** to 0.4%" and "**0.025%** to **0.1%**", respectively.

The claims 1 of auxiliary requests 4 and 5 differ from claim 1 of the main request in that it further requires that the composition has "**a pH of 3.0 or lower**" and "**a pH in the range of 2.5 to 3.0**", respectively,

The claims 1 of auxiliary requests 6 to 9 correspond to claim 1 of the main and of auxiliary requests 1 to 3 with the amount of 4,4'-dichloro-2-hydroxy diphenyl being specified to be "**by weight of the total composition**".

Claim 1 of auxiliary request 10 reads as follows:

*"1. An aqueous fabric conditioner composition comprising:*

- (a) from 0.5 to 35%, by weight of the total composition, of a fabric softening active, wherein the fabric softening active comprises an ester-linked triethanolamine quaternary ammonium compound, and,*
- (b) from 0.002% to 0.4%, by weight of the total composition, of a non-ionic antimicrobial active, which is not a perfume component, **wherein 4,4' dichloro-2-hydroxy diphenyl ether is present as the sole non-ionic antimicrobial active in the composition** and,*
- (c) from 0.01 to 10%, by weight of the total composition, of a perfume."*

Claim 1 of auxiliary requests 11 and 12 differs from claim 1 of auxiliary request 10 in that it requires that the composition has "**a pH of 3.0 or lower**" and "**a pH in the range of 2.5 to 3.0**", respectively.

Claim 1 of auxiliary request 13 reads as follows:

*"1. An aqueous fabric conditioner composition comprising:*

*(a) from 0.5 to 35%, by weight of the total composition, of a fabric softening active, wherein the fabric softening active comprises an ester-linked triethanolamine quaternary ammonium compound, and,*

*(b) from 0.002% to 0.4%, by weight of the total composition, of a non-ionic antimicrobial active, which is not a perfume component, **wherein the non-ionic antimicrobial active comprises 4,4' dichloro-2-hydroxy diphenyl ether** and,*

*(c) from 0.01 to 10%, by weight of the total composition, of a perfume."*

Claim 1 of auxiliary requests 14 and 15 differs from claim 1 of auxiliary request 13 in that it further requires that the composition has **"a pH of 3.0 or lower"** and **"a pH in the range of 2.5 to 3.0", respectively.**

## **Reasons for the Decision**

1. Main Request - Compliance with the requirements of Article 123(2) EPC
  - 1.1 According to the wording of claim 1 of this request the claimed composition is defined as comprising "(b) 0.002% to 0.4%, by weight of the total composition, of a non-ionic antimicrobial active, which is not a perfume component, wherein the composition comprises 0.002% to 0.4% of 4,4'dichloro-2-hydroxy diphenyl ether" (emphasis added by the board).



1.2 According to one interpretation of this wording the claim requires that 4,4' dichloro-2-hydroxy diphenyl ether (in the following **Diclosan**) - which belongs to the class of components defined as "non-ionic antimicrobial active, which is not a perfume component" (in the following the **non-ionic microbicide**) - be comprised in the composition at a concentration range of 0.002% to 0.4% (all percentages referred to being **by weight of the total composition**), i.e. the same concentration range also specified for the generic class of non-ionic microbicides. Thus claim 1 relates to compositions which may comprise either Diclosan as the sole non-ionic microbicide or mixtures of non-ionic microbicides with Diclosan being in an amount of at least 0.002%.

1.2.1 Claim 6 of the application as filed (in its published version WO 2013/156371 A1) discloses - when read in combination with claim 1 - compositions comprising 0.001% to 2% of a non-ionic microbicide comprising Diclosan. It does not, however, disclose mixtures of non-ionic microbicides comprising Diclosan in an amount of 0.002%.

The passage on page 7, lines 26-27 of the original description discloses that Diclosan is a preferred non-ionic microbicide which can be used in admixture with (DBNPA), another non-ionic microbicide; this passage however does not specify at which concentration it might be contained in such a mixture. Also the examples relate to compositions not comprising mixtures of non-ionic microbicides, but comprising Diclosan as the only non-ionic microbicide.

Even though the passage on page 8, lines 2-3, discloses that the non-ionic microbicide is more preferably

contained at an amount of from 0.002% to 0.4% and the passage following at page 8, lines 6-7 identifies Diclosan as a suitable non-ionic microbicide, the entire application does not contain any direct and unambiguous disclosure of a mixture of non-ionic microbicides containing 0.002% of Diclosan as explicitly encompassed by the wording of claim 1 at issue.

1.3 The respondent, referring to decisions T 0287/11, T 0052/13 and T 0306/14, argued that the case law would support a wording as in present claim 1, which therefore does not contravene article 123(2) EPC.

1.3.1 The board notes that in case **T 0287/11**, claim 1 concerned a composition comprising a specific concentration range of a class of water-soluble polyalkylene glycol of defined formula. This claim was amended by additionally specifying that the concentration range of the generic class of water-soluble polyalkylene glycols, to which the one of defined formula belonged, was the same as that indicated for the restricted class of components of defined formula. The board notes that such a claim wording is similar to that of claim 1 at issue but it concerns a combination of a generic class of components with a subclass thereof, not a combination of a generic class of components with a single component of this class as in the present case.

The board decided in that case that amended claim 1 complied with the requirements of articles 123(2) and (3) EPC, noting however (point 4 of the reasons) that article 100(c) had not been raised as a ground for opposition. The board further specified that basis for amended claim 1 was claim 1 as granted (which recited

only the amounts of the generic class of water-soluble polyalkylene glycol components (point 2.3 of the reasons) and that the specific formula of the restricted class of polyalkylene glycols was disclosed in the description of the application as filed. The board finally noted that the respondent (opponent) had not raised any objection under article 123(2) EPC against the amended claim ("*The claims thus comply with the requirements of Article 123(2) EPC, **the Respondent having no objections** under this Article to the amended claims.*").

Thus, as regards compliance with the requirements of article 123(2) EPC, the board in that case did not investigate (of its own motion) whether mixtures of polyalkylene glycols containing an amount of polyalkylene glycols of the defined formula corresponding to the lower limit of the claimed concentration range were directly and unambiguously disclosed in the application as filed.

This means that the issue at stake in the present decision was not considered in that prior decision.

- 1.3.2 Decision **T 0052/13** concerned a claim directed to a composition comprising a specific concentration range of a defined class of hydrolysed reactive dyes, which was amended by adding a proviso that the composition did not contain a concentration of generic hydrolysed reactive dyes greater than the upper limit indicated for the defined class.

The board notes that such a claim wording is not similar to that of claim 1 at issue since it contains a proviso and not a specific concentration range of the more generic class of components and does not concern

the combination of a generic class of components with a single component thereof.

Moreover, also in this case the board did not investigate by its own motion whether mixtures of hydrolysed reactive dyes containing an amount of the defined subclass corresponding to the lower limit of the specified concentration range were directly and unambiguously disclosed in the application as filed. In fact, the board merely considered the issue under article 123(2) EPC raised by the appellant (opponent) that the application as filed referred only to "one hydrolysed dye being present" and not to mixtures (point 7.1.1 of the reasons), and it observed that the appellant's line of argument contradicted the latter's understanding of the terms of claim 1 of the main request (point 7.1.2), finding that there was no justification for the appellant's change of view on the objection to be discussed and that the insertion of a "cap" for the total amount of hydrolysed reactive dyes had per se no bearing on the nature and number of such dyes that may be present (point 7.1.3), and eventually it decided that the addition of the proviso did not amount to adding subject-matter undisclosed in the application as filed (point 7.1.4).

Therefore, also this case concerns a different issue as the one at stake in the present decision.

- 1.3.3 Decision **T 0306/14** concerns the compliance of an amended claim with article 123(3) EPC (points 1.2 and 3 of the reasons) and **not** with article 123(2) EPC. Therefore, it is not relevant for the present case, which concerns article 123(2) EPC.

- 1.3.4 Thus, in the board's view, the cited decisions concern different issues and wordings and cannot support the respondent's case.
- 1.4 The board thus concludes - for the reasons exposed above - that claim 1 of the **main request** contravenes the requirements of article 123(2) EPC.
- 1.5 The board further notes, as discussed during oral proceedings, that the wording of claim 1 at issue could also be interpreted to include compositions comprising two different components, namely 0.002% to 0.4% of a non-ionic microbicide **and additionally** 0.002% to 0.4% of Diclosan.

Such compositions containing two different components in the specified amounts being indeed not disclosed in the original application, claim 1 would contravene the requirements of article 123(2) EPC also if interpreted in this way.

2. Auxiliary requests 1 to 9 - Compliance with the requirements of Article 123(2) EPC
- 2.1 Since each claim 1 of these **requests** concerns - similarly to claim 1 of the main request - compositions which encompass mixtures of non-ionic microbicides comprising Diclosan at an amount corresponding to the lower limit of the non-ionic microbicides concentration range, in particular 0.002% (auxiliary requests 4 to 6), 0.025% (auxiliary requests 1, 3, 7 and 9) or 0.05% (auxiliary requests 2 and 8), and since the application as filed does not contain any direct and unambiguous disclosure of a mixture of non-ionic microbicides containing such an amount of Diclosan, all these claims contravene the requirements of article 123(2) EPC for

the same reasons as those exposed with respect to the main request.

3. Auxiliary request 10 - Novelty (Article 54 EPC)

3.1 In the board's view, the claimed subject-matter is novel over document F2 (prior art under Articles 54(3) and 153(5) EPC) for the reasons exposed in its preliminary opinion.

In particular, the cited tables (VII) and (XII) of F2 disclose only fabric softening compositions comprising "perfume and preservative" in sufficient quantity (qs) but do not explicitly disclose an amount of perfume from 0.01 to 10% as required in claim 1 at issue.

Moreover, the description of F2 does not contain any disclosure as regards the amount of perfume to be used and the appellant has not filed any evidence - excepted some patents which according to the case law do not belong to common general knowledge - that an amount as claimed belonged to common general knowledge.

3.2 Since as exposed in the following this request also fails for lack of inventive step there is no need to discuss this issue in more detail.

4. Auxiliary request 10 - Inventive step (Article 56 EPC)

4.1 Claim 1 relates to aqueous fabric conditioner compositions containing ester-linked triethanolamine quaternary ammonium compounds (in the following **TEA ester quat**), non-ionic microbicides and perfume.

- 4.2 All parties agreed during oral proceedings that F16a, in particular its example 1, represents the closest prior art.

In fact, F16a (see page 1 [Object] and [Solution] as well as paragraphs [0003], [0004], [0024], [0025], [0029], [0031] and [0032]) concerns an aqueous fabric conditioner composition containing a TEA ester quat which exhibits high softening and antimicrobial effects and which is stable upon storage and delivers also perfume benefits, and thus F16a follows a similar goal as the patent in suit (paragraphs [0001] and [0006]).

The board having no reason to take a different stance, the closest prior art is thus represented by the composition of example 1 of F16a, which differs from the subject-matter of claim 1 at issue in that it comprises only **Triclosan** (2,4,4'-trichloro-2'-hydroxy diphenyl ether) as non-ionic microbicide.

- 4.3 As regards the technical problem underlying the alleged invention, the respondent stated during oral proceedings that it had to be formulated as suggested in the patent (paragraphs [0001], [0006] and [0009]), namely as the provision of an alternative aqueous fabric conditioner composition containing a TEA ester quat and an antimicrobial active, which is stable upon storage, shows an acceptable viscosity stability, delivers both perfume and antimicrobial benefits and wherein the TEA and the antimicrobial active act synergistically to kill microbes.

- 4.3.1 The board notes, however, that the alleged synergism has not been adequately proven and has not been made credible as required by established jurisprudence of

the boards of appeal (see Case Law, 9th edition 2019, I.D.9.1.5).

In fact, the test (example 5) provided in the patent for showing such a synergistic effect compares the number of bacteria on fabrics washed with a Persil powder, then rinsed with a composition of the invention and line-dried (example 5.1), with that of fabrics just wetted with a Diclosan solution and evaporated to dryness (examples 5.C to 5.G), with no composition similar to the TEA base composition being used, furthermore the fabric was not washed with Persil as in the previous case. Therefore, the two treatments are in the board's view so different that no conclusion on any possible interaction of the Diclosan with the TEA ester quat can be derived therefrom.

Moreover, as submitted by the appellant during oral proceedings, example 5 does not enable to recognise if the alleged synergism, if any, derives from the combination of Diclosan with TEA ester quat or with other components of the TEA ester quat base used (see paragraph [0162]) which are not even specified in claim 1 at issue. Furthermore, such a limited example directed to only one composition of claim 1 cannot be considered to be evidence of an alleged synergism across the entire scope of the claim.

- 4.3.2 In the board's view the alleged synergism has therefore to be disregarded in the formulation of the technical problem which is thus reformulated as the provision of an alternative aqueous fabric conditioner composition containing a TEA ester quat and an antimicrobial active which is stable upon storage, shows an acceptable viscosity stability and delivers both perfume and antimicrobial benefits.



For the sake of argument in the respondent's favour, it is accepted in the following that this technical problem has been solved by means of a composition according to claim 1 at issue.

4.4 In the absence of any comparison between a composition as defined in claim 1 at issue - comprising Diclosan - and the closest prior art composition comprising Triclosan, it remains to be decided whether it was obvious for the skilled person, at the priority date of the patent, to replace the Triclosan of the closest prior art with Diclosan in order to provide a further TEA ester quat based aqueous fabric conditioner composition having similar properties.

4.4.1 In the board's view, it was obvious for the skilled person faced with the above technical problem to try in the composition of F16a/example 1 alternative non-ionic microbicides, known as equivalent at the priority date of the patent to Triclosan.

F16a itself (paragraph [0015]) does not disclose Diclosan as a suitable non-ionic microbicide. It is noted that the latter was not commercially available at the publication date of F16. It is however directly apparent from document F7 (paragraphs [0002], [0009], [0034] and [0058] to [0062]), which alike F16a, concerns a stable textile treatment composition comprising a microbicide and perfume and optionally a TEA ester quat softener, that at the priority date of the patent Diclosan was known and considered to be an equally suitable non-ionic microbicide as Triclosan for application in this kind of composition.

4.4.2 The fact that the goal of F7 is different (paragraphs [0008] and [0009]), namely to solve stability problems

arising from the addition of perfumes to mask the odor of the microbicide, or the fact that example E5 of F7 is the only one comprising an ester quat (but contains a quaternary microbicide instead of a non-ionic one), is not in the board's view a reason for the skilled person to disregard the clear technical teaching of this document concerning the possible use of Diclosan in softening compositions.

- 4.4.3 Therefore, in view of the above considerations, it was obvious at the priority date of the patent for the skilled person faced with above technical problem to consider the technical information contained in F7 and to try Diclosan as an alternative to Triclosan, since this is the non-ionic microbicide most structurally similar to Triclosan, as it differs therefrom only in that it contains one chlorine atom less in the aromatic ring.
- 4.4.4 Even accepting, for the sake of argument in the respondent's favour, that small changes in the formulation can have consequences on the stability of a composition based on TEA ester quats (as stated at paragraph [0004] of the patent and allegedly shown in example 1), the board remarks that paragraph [0004] of the patent just addresses a variation of stability in function of the type of active softening component used and example 1 shows, if any, a loss of stability by replacing Diclosan with a structurally different quaternary microbicide but it does not show the behaviour of compositions comprising TEA ester quat and other non-ionic microbicides, like Triclosan used in the closest prior art. In fact, the respondent has neither submitted any evidence for its allegation nor has it shown that there existed in the art a founded concern against the replacement of Triclosan with a

similar non-ionic microbicide in a stabilised composition like that of document F16a.

Indeed, there is no indication in the prior art that the skilled person could have expected a dramatic modification of the composition properties by such a replacement since, not only Diclosan is structurally very similar to Triclosan, but F16a (see paragraphs [0024], [0025], [0029] and [0031]) further requires the presence of other components for assuring stability; in the closest prior art example 1 these components are referred (d-1), (e-1) and (f-1).

- 4.4.5 Therefore, in the board's view, the skilled person would not have expected the replacement of Triclosan with Diclosan to affect the stability of the TEA ester quat composition of F16a (since other components are described therein as the effective composition stabilisers) and it was thus obvious for him to try Diclosan instead of Triclosan also in the closest prior art composition of example 1 of F16a.
  
- 4.5 Therefore the board concludes that the subject-matter of claim 1 of auxiliary request 10 lacks inventive step within the meaning of Article 56 EPC.
  
- 5. Auxiliary requests 11 and 12 - Inventive step (Article 56 EPC)
  - 5.1 Claim 1 of these requests differs further from example 1 of F16a, in which the pH of the composition is 3.5, in that the pH is "3.0 or lower" or "in the range of 2.5 to 3.0".
    - 5.1.1 The respondent argued that this additional feature provided improved stability. The board notes however,

as noted by the appellant, that the patent does not contain any teaching about any technical improvement provided by a particular acidic pH.

- 5.1.2 The appellant referred in this respect to **EXP2018**, filed by the patent proprietor during opposition in order to show a reduced degradation of the TEA ester quat in function of a lowering of the composition pH.

However, EXP2018 does not specify the formulations of the three compositions LH1443-LH1445 tested, which have a pH of 2.67, 2.51 and 2.16 respectively; this document just states that the formulations contain other ingredients in addition to the TEA ester quat and hydrochloric acid, but they **do not contain** free fatty acid or Diclosan, with LH1443 being however similar to that of example 1.1 of the patent.

For the board, it is not clear from this report if three similar compositions have been tested. Moreover, it is unclear if the trend shown in this test can be extrapolated up to a pH of 3.0, which is the upper limit of claim 1. This report is thus not apt to show any effect linked to the reduction of the composition pH.

- 5.1.3 The technical problem posed thus remains the same as for the previous requests (point 4.3.2).
- 5.2 It remains thus to be decided if it was obvious for the skilled person, at the priority date of the patent, to reduce the pH of the closest prior art example from 3.5 to 3.0 or lower.
- 5.3 As stated in the patent, acidic pHs were common for conditioner compositions (see paragraph [0031] reading

"If the latter is used the pH of the composition needs to be in the acidic range where DPBNPA is stable. This presents **no difficulty with rinse conditioner compositions as they are usually formulated in that range.**"). This is also confirmed for example by the disclosure of F9a and F9b (claim 1 and page 59, lines 4-7) concerning a rinse softener composition having a pH of 1.5 to 5.5.

- 5.3.1 Moreover, the skilled person would not have expected any dramatic modification of the composition properties by simply slightly reducing the pH of the composition. Therefore, it was obvious for the skilled person to slightly adjust the pH of the closest prior art, e.g. from 3.5 to a value of 3.0, in order to provide an alternative composition having similar properties.
- 5.4 Claim 1 of auxiliary requests 11 and 12 lacks thus inventive step either.
6. Auxiliary requests 13 to 15 - Inventive step (Article 56 EPC)
  - 6.1 Each claim 1 of these requests differs from the respective claim 1 of auxiliary requests 10 to 12 in that Diclosan is not the sole non-ionic antimicrobial active.
  - 6.2 Since these claims are broader in scope than claim 1 of auxiliary requests 10 to 12, they manifestly lack inventive step for the same reasons exposed above.
7. The board thus concludes that none of the requests on file comply with all the requirements of the EPC, so that there is no basis for maintaining the patent upheld by the opposition division.

**Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated