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**Datasheet for the decision
of 27 November 2023**

Case Number: T 3224/19 - 3.3.10

Application Number: 10754689.7

Publication Number: 2547315

IPC: A61K8/41, A61Q5/10

Language of the proceedings: EN

Title of invention:

COLOURING COMPOSITION FOR KERATIN FIBRES

Patent Proprietor:

Kao Germany GmbH

Opponent:

Henkel AG & Co. KGaA

Headword:

Relevant legal provisions:

EPC Art. 56

RPBA 2020 Art. 12(6), 12(3)

Keyword:

Late-filed evidence - should have been submitted in first-instance proceedings (yes) - circumstances of appeal case justify admittance (no)

Statement of grounds of appeal - main request, auxiliary requests 1, 4 and 5 - reasons set out clearly and concisely (no)

Late-filed request - auxiliary requests 2 and 4 - admitted (no)

Inventive step - auxiliary request 3 - obvious alternative

Decisions cited:

Catchword:



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Case Number: T 3224/19 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 27 November 2023

Appellant: Kao Germany GmbH
(Patent Proprietor) Pfungstädterstrasse 92-100
64297 Darmstadt (DE)

Respondent: Henkel AG & Co. KGaA
(Opponent) Henkelstrasse 67
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 October 2019
revoking European patent No. 2547315 pursuant to
Article 101(3)(b) EPC.**

Composition of the Board:

Chairman P. Gryczka
Members: A. Zellner
T. Bokor

Summary of Facts and Submissions

- I. The patent proprietor (appellant) lodged an appeal against the decision of the opposition division to revoke the European patent No. 2 547 315 under Article 101(3)(b) EPC.
- II. Notice of opposition has been filed on the grounds of lack of novelty and lack of inventive step (Articles 100(a), 54 and 56 EPC), as well as added subject-matter (Article 100(c) EPC).
- III. Reference is made to the following documents:
- D2: WO 98/19659
 - D5: EP 1 820 488 A2
 - D11: EP 1 707 242 A1
 - D12: experimental data submitted by the appellant during opposition proceedings on 8 December 2016
 - D13: experimental data submitted by the appellant during opposition proceedings on 3 July 2019
 - D15: Comparative test report, experimental data submitted by the appellant with the grounds of appeal dated 20 February 2020
- IV. In its decision, the opposition division concluded that:
- (a) the main request, in particular claims 1 and 12 to 14 thereof, contained added subject-matter and was therefore not allowable under Article 123(2) EPC,
 - (b) the main request did not comply with the requirements of Article 54(2) EPC, because the claimed subject-matter was not novel with respect to the disclosure of documents D2, D4 and D5,

- (c) auxiliary request 1 met the requirements of Articles 123(2) and (3) EPC, but the colouring composition according to claim 1 was not novel in view of documents D2, D4 and D5 (Article 54 EPC),
- (d) auxiliary request 2 met the requirements of Articles 123(2) EPC, but the colouring composition according to claim 1 was not novel in view of the disclosure of document D5 (Article 54 EPC),
- (e) auxiliary request 3 met the requirements of Articles 123(2) and (3) EPC and the colouring composition according to claim 1 was novel in view of the disclosure of documents D2, D4 and D5 (Article 54 EPC), but it was not based on an inventive step considering the disclosure of document D2 as closest prior art (Article 56 EPC),
- (f) auxiliary requests 4 and 5 were not allowable, because the provision of the claimed colouring compositions was not based on an inventive step for the same reasons as claim 1 of auxiliary request 3 (Article 56 EPC).

V. The appellant contested each of the findings of the opposition division and argued that the decision was erroneous, because the claimed subject-matter was novel and was based on an inventive step, and all requests met the requirements of Article 123(2) and (3) EPC.

VI. The opponent withdrew its opposition on 1 March 2021.

VII. In a communication under Article 15(1) RPBA the board stated its preliminary opinion on the factual and legal issues and that the appeal was likely to be dismissed.

VIII. The appellant informed the board on 25 September 2023 that it will not attend the scheduled oral proceedings. Thereafter the board cancelled the oral proceedings.

IX. Claim 1 of the main request and auxiliary requests 1 to 6 read as follows:

Main request (patent as granted):

"1. Colouring composition for keratin fibres especially human hair characterised in that it comprises, in a cosmetically acceptable medium, at least one oxidative dyestuff precursor, 1,3-bis(2,4-diaminophenoxy)propane and/or its respective salts as a coupling agent and at least one direct dye, selected from dyes having a λ_{\max} between 400 and 460 nm measured in ethanol-water mixture 50/50, and free from mono cyclic m-phenylenediamines."

Auxiliary request 1:

"1. Colouring composition for keratin fibres especially human hair characterised in that it comprises, in a cosmetically acceptable medium, at least one oxidative dyestuff precursor, 1,3-bis(2,4-diaminophenoxy) propane and/or its respective salts as a coupling agent and at least one direct dye, selected from dyes having a λ_{\max} between 400 and 460 nm measured in ethanol-water mixture 50/50, by weight and selected from Basic Orange 31, Basic Yellow 57 and Basic Yellow 87, anionic dyes such as Acid Yellow 1, Acid Yellow 23, Acid Yellow 3, D&C Orange No. 4, and Disperse Black 9 and nitro dyes such as HC Orange No.1, HC Orange No.2, Yellow No.2, HC Yellow No.4, HC Yellow No.7, HC Yellow No.9, HC Yellow No.10, HC Yellow No.13, picramic acid, 3-nitro-4-aminophenol, 2-hydroxyethylpicramic acid, 3-methylamino-4-nitrophenoxyethanol, 2-nitro-5-glycerylmethylaniline, 4-nitrophenyl aminoethylurea, hydroxy-2-nitro-p-toluidine, and their respective salts, and free from mono cyclic m-phenylenediamines."

Auxiliary request 2:

"1. Colouring composition for keratin fibres especially human hair characterised in that it comprises, in a cosmetically acceptable medium, at least one oxidative dyestuff precursor, 1,3-bis(2,4-diaminophenoxy) propane and/or its respective salts as a coupling agent and at least one direct dye, selected from dyes having a λ_{\max} between 400 and 460 nm measured in ethanol-water mixture 50/50, by weight and selected from Basic Orange 31, Basic Yellow 57 and Basic Yellow 87, anionic dyes such as Acid Yellow 1, Acid Yellow 23, Acid Yellow 3, D&C Orange No. 4, and Disperse Black 9 and nitro dyes such as HC Orange No.1, HC Orange No.2, Yellow No.2, HC Yellow No.4, HC Yellow No.7, HC Yellow No.9, HC Yellow No.10, HC Yellow No.13, picramic acid, 3-nitro-4-aminophenol, 2-hydroxyethylpicramic acid, 3-methylamino-4-nitrophenoxyethanol, 2-nitro-5-glycerylmethylaniline, 4-nitrophenyl aminoethylurea, hydroxy-2-nitro-p-toluidine, and their respective salts, whereby the direct dye is not 2-chloro-6-ethylamino-4-nitrophenol and/or 2-amino-6-chloro-4-nitrophenol and free from mono cyclic m-phenylenediamine."

Auxiliary request 3:

"1. Colouring composition for keratin fibres especially human hair characterised in that it comprises, in a cosmetically acceptable medium, at least one oxidative dyestuff precursor, 1,3-bis(2,4-diaminophenoxy) propane and/or its respective salts as a coupling agent and at least one direct dye, selected from dyes having a λ_{\max} between 400 and 460 nm measured in ethanol-water mixture 50/50, by weight and selected from Basic Orange

31, Basic Yellow 57 and Basic Yellow 87, anionic dyes such as Acid Yellow 1, Acid Yellow 23, Acid Yellow 3, D&C Orange No. 4, and Disperse Black 9; and HC Orange No.1, HC Orange No.2, Yellow No.2, HC Yellow No.4, HC Yellow No.7, HC Yellow No.9, HC Yellow No.10, HC Yellow No.13, picramic acid, 3-nitro-4-aminophenol, 2-hydroxyethylpicramic acid, 3-methylamino-4-nitrophenoxyethanol, 2-nitro-5-glycerylmethylaniline, 4-nitrophenyl aminoethylurea, hydroxy-2-nitro-p-toluidine, and their respective salts, and free from mono cyclic m-phenylenediamines."

Auxiliary request 4:

"1. Colouring composition for keratin fibres especially human hair characterised in that it comprises, in a cosmetically acceptable medium, at least one oxidative dyestuff precursor, 1,3-bis(2,4-diaminophenoxy) propane and/or its respective salts as a coupling agent and at least one direct dye, selected from dyes having a λ_{max} between 400 and 460 nm measured in ethanol-water mixture 50/50, by weight and selected from Basic Orange 31, Basic Yellow 57 and Basic Yellow 87, anionic dyes such as Acid Yellow 1, Acid Yellow 23, Acid Yellow 3, D&C Orange No. 4, and Disperse Black 9 and nitro dyes such as HC Orange No.1, HC Orange No.2, Yellow No.2, HC Yellow No.4, HC Yellow No.7, HC Yellow No.9, HC Yellow No.10, HC Yellow No.13, picramic acid, 3-aminophenol, 2-hydroxyethylpicramic acid, 3-methylamino-4-nitrophenoxyethanol, 2-nitro-5-glycerylmethylaniline, 4-nitrophenyl aminoethylurea, hydroxy-2-nitro-p-toluidine, and their respective salts, and free from mono cyclic m-phenylenediamines, 2-chloro-ethylamino-4-nitrophenol and 2-amino-6-chloro-4-nitrophenol"

Auxiliary request 5:

"1. Colouring composition for keratin fibres especially human hair characterised in that it comprises, in a cosmetically acceptable medium, at least one oxidative dyestuff precursor, 1,3-bis(2,4-diaminophenoxy) propane and/or its respective salts as a coupling agent and at least one direct dye, selected from dyes having a λ_{\max} between 400 and 460 nm measured in ethanol-water mixture 50/50, by weight and selected from Basic Orange 31, Basic Yellow 57 and Basic Yellow 87, Acid Yellow 1, Acid Yellow 23, Acid Yellow 3, D&C Orange No. 4, Disperse Black 9, HC Orange No.1, HC Orange No.2, Yellow No.2, HC Yellow No.4, HC Yellow No.7, HC Yellow No.9, HC Yellow No.10, HC Yellow No.13, picramic acid, 3-nitro-4-aminophenol, 2-hydroxyethylpicramic acid, 3-methylamino-4-nitrophenoxyethanol, 2-nitro-5-glycerylmethylaniline, 4-nitrophenyl aminoethylurea, hydroxy-2-nitro-p-toluidine, and their respective salts, and free from mono cyclic m-phenylenediamines."

Auxiliary request 6:

"1. Colouring composition for keratin fibres especially human hair characterised in that it comprises, in a cosmetically acceptable medium, at least one oxidative dyestuff precursor, 1,3-bis(2,4-diaminophenoxy) propane and/or its respective salts as a coupling agent and at least one direct dye, selected from dyes having a λ_{\max} between 400 and 460 nm measured in ethanol-water mixture 50/50, by weight and selected from HC Orange No.1, HC Orange No.2, Yellow No.2, HC Yellow No.4, HC Yellow No.7, HC Yellow No.9, HC Yellow No.10, HC Yellow No.13, picramic acid, 3-Nitro-4-aminophenol, 2-hydroxyethylpicramic acid, 3-Methylamino-4-nitrophenoxyethanol, 2-Nitro-5-glycerylmethylaniline,

4-Nitrophenyl aminoethylurea, Hydroxy-2-nitro-p-toluidine, and their respective salts, and free from mono cyclic m-phenylenediamines."

The auxiliary request 1, 3, 5 and 6 are identical to auxiliary requests 1, 3, 4 and 5, respectively, filed during the opposition proceedings on 3 July 2019.

- X. For the main request and auxiliary requests 1, 5 and 6 the appellant did not provide any argument relevant to the present decision. The appellant's arguments for the other requests, as far as they are relevant for this decision, can be summarised as follows:

Auxiliary requests 2 and 4, filed with the statement setting out the grounds of appeal, should be admitted into the proceedings. Their respective claims 1 had been amended in order to overcome an objection of lack of novelty raised for the first time during the oral proceedings before the opposition division.

The provision of colouring compositions according to claim 1 of auxiliary request 3 was based on an inventive step starting from the disclosure of example 2 of document D2. The differing feature was the nature of the yellow dye component of the composition. Documents D13 and D15 disclosed that replacing a yellow dye as disclosed in D2 with a yellow dye according to claim 1 of this request led to an unexpected improvement in colour stability of hair treated with the claimed composition. Document D15 should be admitted into the proceedings, since it was a direct response to an argument brought forward during the oral proceedings before the opposition division.

- XI. The appellant requests to set aside the impugned decision and to maintain the patent as granted (main request). As an auxiliary measure, it is requested to maintain the patent on the basis of the auxiliary requests 1 to 6 as filed with the statement setting out the grounds of appeal.

Reasons for the Decision

1. The appeal is admissible.

Decision without conduct of oral proceedings

2. The appellant is the only party to the proceedings. It requested oral proceedings under Article 116(1) EPC. With submission of 25 September 2023 the appellant informed however the board that it will not attend oral proceedings scheduled for 5 October 2023. According to settled case law this is to be considered as a withdrawal of the request for oral proceedings (CLBA 10th Edition 2022, Chapter III.C.4.3.2). The oral proceedings were thus cancelled.

I. Main request (patent as granted)

3. At no point of time in the proceedings the appellant gave a reasoning why it considered the decision of the opposition division to be erroneous in relation with the main request. According to Article 12(3) RPBA, the statements setting out the grounds of appeal shall set out clearly and concisely why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the facts, objections, arguments and evidence relied on. The mere statement of the appellant that the contested decision is erroneous is not sufficient in this respect. The board, for its

part, does not see any reason to deviate from the opposition division's reasoning regarding lack of novelty (Article 100(a) and 54 EPC) and added subject-matter of the main request (Article 100(c) EPC).

Therefore the main request is not allowable.

II. Auxiliary requests 1, 5 and 6 (identical to auxiliary requests 1, 4 and 5 of the contested decision)

4. The opposition division considered the colouring composition according to claim 1 of auxiliary request 1 not novel in view of the disclosure of documents D2, D4 and D5 (Article 54 EPC, see point 3.2.3 of the impugned decision). The appellant did not provide any arguments why the opposition division's conclusions in this respect were incorrect, as required by Article 12(3) RPBA. The board does not see any reason to deviate from the opposition division's conclusion that the claimed subject-matter is not novel.

Therefore auxiliary request 1 is not allowable.

5. Auxiliary requests 5 and 6 are identical to auxiliary requests 4 and 5 before the opposition division, respectively. The opposition division concluded in its decision that the provision of colouring compositions according to claim 1 of these requests were not based on an inventive step (Article 56 EPC, see points 6.2 and 7.1 of the impugned decision). The appellant did not provide any arguments why the opposition division's conclusions in this respect were incorrect, as required by Article 12(3) RPBA. The board does not see any reason to deviate from the opposition division's conclusion on lack of inventive step.

Auxiliary requests 5 and 6 are thus not allowable.

III. Auxiliary requests 2 and 4: admittance into the appeal proceedings

6. Auxiliary request 2 was filed with the appellant's statement setting out the grounds of appeal. The appellant submitted that claim 1 of this request differed from claim 1 of auxiliary request 1 in that the disclaimer "... whereby the direct dye is not 2-chloro-6-ethylamino-4-nitrophenol and/or 2-amino-6-chloro-4-nitrophenol ..." had been added. The board accepts that this represents the amendment.
7. According to the appellant, a new objection was raised for the first time during the oral proceedings before the opposition division. The objection concerned an alleged lack of novelty of claim 1 of the main request and the first auxiliary request in view of example 12 of document D5. The appellant submitted, that it was not able to react to this new objection during the opposition proceedings. Auxiliary request 2 was thus filed at the earliest opportunity, *i.e.* with the statement setting out the grounds of appeal. In order to overcome the objection, claim 1 was amended and now excluded colouring composition comprising the compound "*2- amino-6-chloro-4-nitrophenol*". The claimed composition was thus novel in view of example 12 of document D5.
8. The appellant's reasoning is not convincing.
 - 8.1 According to Article 12(6) RPBA, second sentence, the board shall not admit requests, facts, objections or evidence which should have been submitted, or which

were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.

8.2 A lack of novelty objection of claim 1 of the patent as granted, based on example 12 of document D5, was already raised in the notice of opposition (see point 6.5 on pages 7 to 8), and the objection was considered on its merits by the opposition division in their communication attached to the summons to attend oral proceedings before the opposition division (see point 5.2.1 of the communication of 16 November 2018). The objection referred to by the appellant was thus not raised for the first time during the oral proceedings before the opposition division.

8.3 Filing of auxiliary request 2 with the statement setting out the grounds of appeal can thus not be a timely reaction to a late filed objection raised during the oral proceedings in opposition proceedings. Auxiliary request 2 - as a reply to the objection of lack of novelty in view of the disclosure of example 12 of document D5 - could and should have been filed earlier during the opposition proceedings, *i.e.* in reply to the notice of opposition of 27 March 2018.

8.4 Also, the board does not see any circumstances of the appeal case which could justify the admittance of auxiliary request 2 into the appeal proceedings. The board notes that the appellant did not provide any reasons in this regard either.

9. Auxiliary request 4 was also filed with the appellant's statement setting out the grounds of appeal. Claim 1 of this request, as claim 1 of auxiliary request 2, has been amended by the addition of a feature disclaiming

colouring compositions comprising the compound "2-amino-6-chloro-4-nitrophenol" in an attempt to establish novelty with respect to example 12 of document D5. Concerning admissibility of auxiliary request 4, the appellant relies on the same arguments brought forward for auxiliary request 2. This reasoning, however, is not convincing for the same reasons given in point 8.1 to 8.4 above.

10. The board therefore does not admit auxiliary requests 2 and 4 into the proceedings (Article 12(6), second sentence, RPBA).

IV. Auxiliary request 3 (identical to auxiliary request 3 of the impugned decision)

Inventive step (Article 56 EPC)

11. The opposition division concluded that auxiliary request 3 was not allowable because the claimed subject-matter was not based on an inventive step (Article 100(a) and 56 EPC). The opposition division considered the disclosure of document D2 (in particular example 2) to be closest prior art. The opposition division argued why example 1 of document D2 was less suitable as closest prior art.
12. The opposition division saw a differing feature between the claimed composition and the composition of example 2 of D2 in the nature of the direct dye.
13. The opposition division did not recognise a technical effect based on this differing feature. It acknowledged that a technical effect in terms of superior colour stability against washing was shown by the comparative data according to document D12. This effect, however,

was only shown for compositions according to claim 1 (*i.e.* compositions containing Basic Yellow 87, HC Yellow 2 and Acid Yellow 1) when compared to a composition containing a blue dye. No comparison was made between a composition as claimed and a composition comprising a yellow dye according to example 2 of document D2, *i.e.* a composition comprising the direct nitro dye 2-chloro-6-ethylamino-4-nitrophenol.

14. The opposition division was not convinced by the data provided in document D13 either, because D13 neither disclosed any details of the test protocol, nor did it contain any indication of the significance of the value ΔE , and the orange nitro dye used in D13 was different from the corresponding dye in example 2 of D2.
15. The objective technical problem was seen in the provision of an alternative hair colouring composition containing yellow or orange direct dyes.
16. The solution provided according to claim 1 of auxiliary request 3 was seen to be obvious in the light of document D11, in particular claims 1 and 5 thereof.
17. The appellant contested the opposition division's reasoning. The appellant considered the differing technical feature, *i.e.* the presence of at least one direct dye - selected from the list according to claim 1 of auxiliary request 3 - in the colouring composition, to lead to a particular technical effect. According to the appellant, this was supported by the experimental data of documents D13 and D15. These documents disclosed that compositions comprising a yellow dye according to claim 1 of auxiliary request 3 had a higher colour stability (lower ΔE) than compositions comprising a compound of formula (I)

according to claim 1 of document D2, such as 2-amino-6-chloro-4-nitrophenol (example 1 of document D2) or 2-ethylamino-6-chloro-4-nitrophenol (example 2 of document D2).

Since the prior art did not provide any information that a higher colour stability could be achieved by changing the yellow dye components, inventive step had to be acknowledged.

18. The board comes to the following conclusion:

Closest prior art

18.1 The opposition division as well as the appellant considered document D2 to be closest prior art. The board sees no reason to differ. The board also concurs with the opposition division's reasoning in that example 1 of document D2 is less suitable as closest prior art than example 2. Example 1 contains the compound 2-amino-6-chloro-4-nitrophenol, which is excluded from claim 1 of auxiliary request 1. It also does not contain 1,3-bis(2,4-diaminophenoxy)propane, which is a component required in a composition according to claim 1 of auxiliary request 3.

Differing feature

18.2 The board also concurs with the assessment that the claimed composition differs from the composition according to example 2 of D2 in that it comprises a different yellow dye, *i.e.* a dye selected from the list according to claim 1 rather than 2-chloro-6-ethylamino-4-nitrophenol according to example 2 of D2.

Technical problem

- 18.3 The objective technical problem solved by the invention is the provision of an alternative colouring composition for keratin fibers. The reasons are as follows:

Document D13 (comparative data filed by the appellant before the opposition division)

- 18.4 Document D13 presents a comparison of four compositions I to IV. Each of compositions II, III and IV contains one dye selected from the list according to claim 1 of auxiliary request 3 (Basic Yellow 87, HC Yellow 2, Acid Yellow 1, respectively). Composition I of D13 contains 2-chloro-6-amino-4-nitrophenol instead. Composition I is thus not covered by claim 1 of auxiliary request 3.

However, composition I is also not a composition according to the closest prior art, example 2 of D2, which comprises 2-chloro-6-**ethyl**amino-4-nitrophenol.

- 18.5 Therefore, the results shown in document D13 can not demonstrate a technical effect caused by the differing technical feature. The fact that the compound 2-chloro-6-amino-4-nitrophenol also falls within the general formula (I) of document D2 does not change this conclusion.

Document D15 (comparative data filed by the appellant in appeal proceedings)

- 18.6 The appellant submitted document D15 with its statement setting out the grounds of appeal and requested to admit the document into the proceedings. The appellant argued that filing of the document at this stage of the

proceedings was justified, because of a completely new line of argumentation brought forward during the oral proceedings before the opposition division.

19. The document contains, in addition to the data disclosed in document D13, colour stability data for a composition containing the dye 2-chloro-6-**ethyl**amino-4-nitrophenol instead of 2-chloro-6-amino-4-nitrophenol. According to the appellant, the data showed that compositions containing a dye according to claim 1 of auxiliary request 3 show an improved colour stability compared to the composition according to example 2 of document D2, *i.e.* the closest prior art.

20. The board comes to the conclusion that that document D15 should have been submitted during the opposition proceedings. The reasons are as follows:
 - 20.1 The opposition division informed the parties on 16 November 2018 with its communication attached to the summons to attend oral proceedings that the composition according to claim 1 of the main request (patent as granted) was *i.a.* not novel in view of the disclosure of example 2 of document D2 (see point 5.2.1). The same objection had been raised in the opponent's notice of opposition (see point 6.1). This example disclosed a colouring composition containing the nitro dye 2-chloro-6-**ethyl**amino-4-nitrophenol. The opposition division further informed the parties that, should novelty be established, the distinguishing feature in view of D2 would possibly be the nature of the yellow direct dye. The nature of this dye was also identified to be the difference between the compositions according to claim 1 of auxiliary request 3 and example 2 of D2 (see points 6.2.3 and 5.2.1 of the communication). The opposition division also indicated in its communication

that document D12 did not provide evidence for a technical effect caused by a different yellow dye (see the first lines on page 5 of the communication).

20.2 In response to the opposition division's communication, the appellant submitted auxiliary request 3 (identical to auxiliary request 3 of the appeal proceedings) on 3 July 2019. Auxiliary request 3 limited the subject-matter of claim 1 to compositions including at least one direct dye contained in a list of specific compounds. This list did not contain the compound 2-chloro-6-ethylamino-4-nitrophenol of example 2 of D2. At the same time, the appellant submitted document D13 in support of the patentability of its requests.

20.3 Since the opposition division, as well as the opponent, explicitly only referred to example 2 of D2 when discussing lack of novelty, and the opposition division furthermore mentioned in the context of inventive step the potential differing feature with respect to D2 to be the nature of the yellow direct dye, the appellant should have expected that example 2 of D2 was of utmost importance for the evaluation of inventive step. All the more so, since only this example was referred to by the opponent and the opposition division, and since it is the only example in D2 from which the claimed composition differs in a single technical feature, *i.e.* the nature of the yellow direct dye. In contrast, the composition according to example 1 of D2 contains a different coupling agent (agent 2-(2,4-diaminophenoxy)ethanol-dihydrochlorid as opposed to 1,3-bis(2,4-diaminophenoxy)propane according to claim 1 of auxiliary request 3). The composition according to example 1 of D2 furthermore also contains a monocyclic *m*-phenylenediamine, which is explicitly excluded from the compositions according to claim 1 of auxiliary

request 3.

20.4 The appellant thus cannot have been surprised by the course of the oral proceedings before the opposition division and the negative decision taken with respect to inventive step in view of the disclosure of example 2 of D2. Document D15 should therefore have been filed already during the opposition proceedings.

20.5 The appellant did also not provide any reasons during the appeal proceedings why, in response to the opposition division's communication and in preparation for the oral proceedings before the opposition division, experimental data with respect to compositions according to example 1, rather than example 2, of document D2 have been provided.

21. The board does therefore not admit document D15 into the proceedings (Article 12(6) RPBA).

22. In conclusion, no technical effect has been shown related to the feature which distinguishes the claimed compositions from the closest prior art. The objective technical problem can thus, in line with the impugned decision, only be seen in the provision of alternative colouring compositions for keratin fibers.

Solution to the technical problem

23. According to claim 1 of auxiliary request 3, a colouring composition for keratin fibres is provided, which comprises "... at least one direct dye selected from dyes having a λ_{max} between 400 and 460 nm measured in ethanol-water mixture 50/50, by weight and selected from Basic Orange 31, Basic Yellow 57 and Basic Yellow 87, anionic dyes such as Acid Yellow 1, Acid Yellow 23,

Acid Yellow 3, D&C Orange No. 4, and Disperse Black 9 and nitro dyes such as HC Orange No.1, HC Orange No.2, Yellow No.2, HC Yellow No.4, HC Yellow No.7, HC Yellow No.9, HC Yellow No.10, HC Yellow No.13, picramic acid, 3-nitro-4-aminophenol, 2-hydroxyethylpicramic acid, 3-methylamino-4-nitrophenoxyethanol, 2-nitro-5-glycerylmethylaniline, 4-nitrophenyl aminoethylurea, hydroxy-2-nitro-p-toluidine, and their respective salts, and free from mono cyclic m-phenylenediamines, 2-chloro-ethylamino-4-nitrophenol and 2-amino-6-chloro-4-nitrophenol"

24. The board is satisfied that the claimed solution solves the technical problem of providing alternative colouring compositions for keratin fibers.

Obviousness of the claimed solution

25. Document D11 is directed to hair colouring compositions comprising similar or identical components (see claims 1 and 5). D11 is also concerned with colour stability against washing (see paragraph [0008]). It discloses in claim 5 compositions comprising several yellow dye components. These include HC Yellow 4, HC Orange 1 and 4-amino-3-nitrophenol, *i.e.* yellow dye components according to claim 1 of auxiliary request 3. Claim 5 of D11 also includes 2-chloro-6-ethylamino-4-nitrophenol according to example 2 of document D2.
26. The skilled person would thus, in order to solve the technical problem of providing an alternative to the composition disclosed in example 2 of document D2, provide compositions which comprise the yellow dyes HC Yellow 4, HC Orange 1 and 4-amino-3-nitrophenol according to claim 1 of auxiliary request 3, since these compounds are disclosed as alternatives to 2-

chloro-6-ethylamino-4-nitrophenol in claim 5 of D11.

27. The provision of a colouring composition according to claim 1 of auxiliary request 3 does therefore not involve an inventive step
28. Auxiliary request 3 is not allowable (Article 56 EPC).
29. Since none of the requests is both admissible and allowable, the appeal against the impugned decision to revoke the patent is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated