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**Datasheet for the decision  
of 6 October 2022**

**Case Number:** T 0892/21 - 3.3.06

**Application Number:** 11773710.6

**Publication Number:** 2614133

**IPC:** C11D1/835, C11D3/00

**Language of the proceedings:** EN

**Title of invention:**

IMPROVEMENTS RELATING TO FABRIC CONDITIONERS

**Patent Proprietors:**

Unilever IP Holdings B.V.  
Unilever Global IP Limited

**Opponent:**

The Procter & Gamble Company

**Headword:**

CONDITIONER/Unilever

**Relevant legal provisions:**

RPBA 2020 Art. 12(6) sentence 2, 13(2)  
EPC Art. 56

**Keyword:**

Late-filed evidence - should have been submitted in first-instance proceedings (yes)

Amendment after summons - exceptional circumstances (no)

Inventive step (all requests) - obvious alternative

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

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**Chambres de recours**

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Case Number: T 0892/21 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 6 October 2022**

**Appellants:**

(Patent Proprietors )

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**Representative:**

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**Respondent:**

(Opponent)

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**Representative:**

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 8 April 2021  
revoking European patent No. 2614133 pursuant to  
Article 101(3)(b) EPC.**

**Composition of the Board:**

**Chairman** J.-M. Schwaller

**Members:** P. Ammendola

J. Hoppe

## Summary of Facts and Submissions

- I. The patent proprietors (**appellants**) appealed the decision of the opposition division to revoke European patent No. 2 614 133, claim 1 of which reads:

*"1. A liquid rinse added fabric treatment composition comprising*

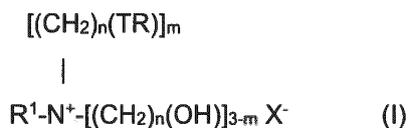
*(a) a fabric treatment active in an amount of from 5 to 50 wt%, based on the total weight of the composition,*

*(b) an antifoam in an amount of from 0.025 to 0.45 wt%, by weight of the total composition and 100% antifoam activity, and*

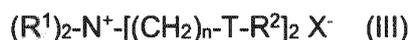
*(c) an antifreeze active wherein, the antifreeze active is an alkoxyated non-ionic surfactant having an average alkoxylation value of from 4 to 22 and a ClogP of from 3 to 6."*

- II. The sets of claims pending before the opposition division included eight auxiliary requests, with claim 1 of auxiliary request 1 differing from the granted one for the appended wording: *"... and wherein the alkoxyated non-ionic surfactant is present in an amount of from 1.2 to 4.5 % by weight of the total composition"*.

Claim 1 of the auxiliary request 2 differed from that of auxiliary request 1 for the further appended wording: *"... wherein the fabric treatment composition is a rinse added fabric softening composition and wherein the fabric treatment active is an ester-linked quaternary ammonium active compound selected from those represented by formula (I):*



wherein each  $R$  is independently selected from a  $C_{5-35}$  alkyl or alkenyl group;  $R^1$  represents a  $C_{1-4}$  alkyl,  $C_{2-4}$  alkenyl or a  $C_{1-4}$  hydroxyalkyl group;  $T$  is generally  $O-CO$  (i.e. an ester group bound to  $R$  via its carbon atom), but may alternatively be  $CO-O$  (i.e. an ester group bound to  $R$  via its oxygen atom);  $n$  is a number selected from 1 to 4;  $m$  is a number selected from 1, 2, or 3; and  $X^-$  is an anionic counter-ion, such as a halide or alkyl sulphate, e.g. chloride or methylsulphate; and those represented by formula (III):



wherein each  $R^1$  group is independently selected from  $C_{1-4}$  alkyl, or  $C_{2-4}$  alkenyl groups; and wherein each  $R^2$  group is independently selected from  $C_{8-28}$  alkyl or alkenyl groups; and  $n$ ,  $T$ , and  $X^-$  are as defined above".

Claim 1 of auxiliary request 3 differed from that of auxiliary request 1 for the following amendment (made apparent): "(a) a fabric treatment active in an amount of from ~~5~~6 to 50 wt%, based on the total weight of the composition".

Claim 1 of auxiliary request 4 differed from the granted one for the following amendment (made apparent): "(b) an antifoam in an amount of from ~~0.025 to 0.45~~0.05 to 0.35 wt%, by weight of the total composition and 100 % antifoam activity, and"

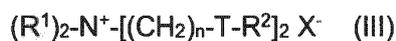
Claim 1 of auxiliary request 5 differed from the granted one for the following amendments (made apparent): "and a ClogP of from ~~3~~3.5 to 6, and wherein the alkoxyated non-ionic surfactant is present in an

amount of from 0.6 to 4.5 % by weight of the total composition".

Claim 1 of auxiliary request 6 differed from the granted one for the following amendment (made apparent): "(a) a fabric treatment active in an amount of from 58 to 50 wt%, based on the total weight of the composition".

Claim 1 of auxiliary request 7 differed from that of auxiliary request 6 for the following amendment (made apparent): "and a ClogP of from 3.5 to 6, and wherein the alkoxyated non-ionic surfactant is present in an amount of from 1.2 to 4.5 % by weight of the total composition".

Claim 1 of auxiliary request 8 differed from that of auxiliary request 2 in that the feature "; and those represented by formula (III):



wherein each  $R^1$  group is independently selected from  $C_{1-4}$  alkyl, or  $C_{2-4}$  alkenyl groups; and wherein each  $R^2$  group is independently selected from  $C_{8-28}$  alkyl or alkenyl groups; and  $n$ ,  $T$ , and  $X^-$  are as defined above" is not present in claim 1 of auxiliary request 8.

III. In the appealed decision the opposition division found that claim 1 as granted was not novel and that each version of claim 1 according to auxiliary requests 1 to 8 was not based on an inventive step vis-à-vis the compositions exemplified in **D4** (EP 0922755 A1).

IV. With the statement of grounds of appeal, the appellants disputed the above findings and filed **D22** (experimental data) as well as nine sets of amended claims respectively labelled as auxiliary requests 1 to 9.

Claim 1 of auxiliary request 1 differs from the granted one for the appended wording: "... and wherein the alkoxyated non-ionic surfactant is present in an amount of from 0.6 to 4.5 % by weight of the total composition".

Auxiliary requests 2, 3, 4, 5, 6, 7, 8 and 9 are respectively identical to auxiliary requests 5, 1, 2, 3, 4, 6, 7 and 8 pending before the opposition division.

- V. With its reply the opponent (hereinafter **respondent**) disputed the admittance of auxiliary request 1 and of D22, and maintained that granted claim 1 and each version of claim 1 of auxiliary requests 1 to 9 lacked inventive step in view of D4.
- VI. With letter of 2 August 2022 the appellants submitted further experimental data as **D23**.
- VII. The respondent in a letter of 28 September 2022 argued against the admittance of D23.
- VIII. At the oral proceedings held on 6 October 2022 the parties first debated the compliance of claim 1 of auxiliary request 8 with Article 56 EPC and then referred to their written submissions as to the higher ranking requests.

The compliance of claim 1 of auxiliary request 9 with Article 56 EPC was also discussed. The respondent argued that, when considering appellant's reasons given in the grounds of appeal, it was apparent that this request did not fulfill the requirements of Article 12(3) RPBA 2020 and that it should not be admitted under Article 12(5) RPBA 2020.

IX. The appellants/proprietors requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, as an auxiliary measure, that the patent be maintained in amended form on the basis of the claims according to any of auxiliary requests 1 to 9 filed with the statement of grounds of appeal.

The respondent/opponent requested that the appeal be dismissed.

### **Reasons for the Decision**

1. Admittance of D22 and D23

1.1 The appellants argued that the filing of experimental data D22 with the statement of grounds of appeal had occurred to address a reason given in view of Article 56 EPC in page 10 of the appealed decision, namely the lack of evidence proving a technical effect of the superior amounts of components (b) and (c) (as defined in claim 1 of the then pending auxiliary requests) vis-à-vis the corresponding amounts in the prior art of departure disclosed in D4. The appellants additionally argued that the admittance into the appeal proceedings of the experimental data D22 would be justified by the *prima facie* relevance of the data.

1.2 The board notes that the opposition division already pointed to the absence of this experimental evidence in point 5.1 of its preliminary opinion dated 16 June 2020 (in particular the second paragraph on page 10) and, as stressed by the respondent, even the wording used in this passage is substantially equivalent to that used in the fourth paragraph on page 10 of the decision under appeal. Hence, the board finds that well before

the oral proceedings that concluded the opposition, the appellants were already aware of the possible relevance of the lack of any evidence apt at proving the technical effect of superior amounts of components (b) and (c) vis-à-vis D4.

The fact that the appellants had decided to react to the opposition division's preliminary opinion (see appellants' letter dated 15 December 2021, last paragraph, page 5 to the fifth paragraph, page 6) by reaffirming that the experimental data in the patent were sufficient to demonstrate the technical advantage over the prior art, is no justification for only submitting at the appeal stage the evidence that the opposition division already identified as missing.

Hence the filing of D22 could and should have occurred during the opposition proceedings.

1.3 The board considers it appropriate to additionally stress that a further circumstance speaking against the admittance of D22 is that this belated submission relates to (new) experimental data and, in particular, to data whose technical meaningfulness, and thus relevance, has been disputed by the respondent (reply to appeal, page 5, last paragraph). Hence, the admission of this unjustifiably late filed document also appears to render the case substantially more complex.

1.4 Accordingly the board, exercising its power of discretion under Article 12(4) RPBA 2020 and also considering the prescriptions of Article 12(6) RPBA 2020, decided not to admit D22.

1.5 D23 (additional experimental data) was filed by the appellants with letter of 2 August 2022 (i.e. after notification of the summons to oral proceedings), admittedly for the case that the board would share the respondent's doubts as to the relevance of the data in D22.

However, as D22 is not admitted the board has no necessity to come to a conclusion on this issue. Nor sees the board any exceptional circumstances that would justify the admittance of D23 at such a late stage of the appeal proceedings.

Accordingly, the board exercised its power of discretion under Article 13(2) RPBA 2020 not to take into account D23.

2. *Auxiliary request 8 - inventive step*

Claim 1 of this request is directed to a **liquid rinse added fabric treatment** composition (hereinafter "**LRAFT composition**") comprising the three ingredients (a), (b) and (c) in the specifically mentioned amounts.

2.1 It is apparent from the decision under appeal and undisputed by the appellants that a suitable starting point for the assessment of inventive step is represented by any of the prior art liquid fabric softening compositions of examples A to E of D4, whose ingredients are listed in the table in paragraph [0096] of D4. It is also undisputed that the claimed LRAFT composition differs therefrom in that each of the ingredients (a), (b) and (c) are present in higher amounts than the amounts of the corresponding ingredient in D4. In this context the appellants also contested that it was possible to derive from D4 the

amount of antifoam (i.e. of ingredient (b)) used in the composition based on 100% antifoam activity.

The board considers it appropriate to consider at this point the appellants' argument (contrary to the corresponding construction of the prior art made by the opposition division and the respondent) that the wt.% given for the (not further specified) "silicone antifoam" ingredient of the examples in the table in paragraph [0096] of D4 would possibly refer to the amount of a mixture of which only a fraction would be the actual compound with "antifoam activity" (compare with the definition of "(b)" in claim 1 under dispute). However, in the absence of teachings in D4 that could justify a different reading of the numerical amount values given for the ingredient labelled as "silicone antifoam" in the table of D4, the board sees no reason rendering plausible that this ingredient also encompassed substantial amounts of other ingredients (different from the actual "antifoam"). Hence, this argument appears a mere speculation, unsupported by any evidence and is therefore disregarded.

## 2.2 The technical problem addressed in the patent

It is undisputed that the patent as granted addresses the technical problem identified in paragraph [0011], namely that there is a need for easy rinse fabric conditioners having acceptable freeze-thaw recovery properties as well as excellent foam quenching and rinse clarity performance, and that in paragraph [0012] it identifies the technical advantages of the patented compositions. In particular, the appellants identified as particularly relevant the improved lathering and dispersability properties, also referred to in the examples as improved "*lather kill*" and "*recovery*" of

dispersability after freeze/thaw cycles; tables 3 to 5 and 7 to 9 of the patent were also referred to.

2.2.1 However, in the decision under appeal the opposition division concluded that the features distinguishing from the prior art of departure the subject-matter of claim 1 of the then pending auxiliary request 7 (corresponding to claim 1 of present auxiliary request 8) had not been shown to be responsible for any of the alleged technical advantages.

2.2.2 The appellants submitted that in the absence of evidence to the contrary the opposition erred in disregarding the statements in paragraph [0012] of the patent as to the improved lathering and dispersability properties of the LRAFT composition of the invention.

The board notes however that the above-identified reasons of the opposition division imply that the only difference between the claimed LRAFT composition and (one or more of) the examples of D4 lies in the higher amounts of the active ingredients (and thus for instance not necessarily in their relative ratios) in the former, so that it would be sufficient to concentrate (one or more of) the examples of D4 to arrive at the claimed subject-matter.

In the board's view, it is already the nature of such difference that suffices, even in the absence of experimental data, to jeopardise the plausibility *per se* of the allegations in paragraph [0012] of the patent in suit as to the improved lathering and dispersability of the LRAFT composition of the invention.

2.2.3 The appellants also submitted that in particular comparative example X, whose composition is described

in table 1 of the patent in suit, would possess substantially the same composition as example E of D4. Hence, the experimental results in tables 4 and 5 of the patent proved the superior lathering and dispersability of "*composition 1*" according to the invention vis-à-vis those of the prior art in D4.

It is however undisputable that, as also reasoned in the appealed decision, the inventive "*composition 1*" differs from that of comparative example "X" also the in type - and not only amount - of ingredients (b) and (c). The board further notes that, as stressed by the respondent, compositions 1 and X also differ in the type and amount of ingredient (a) and for the presence of other ingredients (see table 1 of the patent). Hence, the observed different properties reported in tables 4 and 5 of the patent might as well be due to one or more of these other differences, rather than necessarily be the consequence of the higher amounts of ingredients (a), (b) and (c) used in composition 1.

Thus, the board concludes that the experimental data in the patent are insufficient to prove that the distinguishing features of the claimed LRAFT composition are responsible for any particular technical advantage over the prior art.

2.2.4 In view of the above, the board finds that the claimed subject-matter can neither be presumed nor has been proved to solve any aspect of the technical problem addressed in the patent in suit.

2.3 The technical problem solved

It follows from the above considerations that the subject-matter of claim 1 under consideration only

solves the technical problem of providing further LRAFT compositions, i.e. an alternative to the prior art.

#### 2.4 The solution and its obviousness

The solution to this technical problem offered in claim 1 at issue is a LRAFT composition containing the three ingredients (a), (b) and (c) in the specified amounts.

2.4.1 It is apparent to the board (and undisputed by the appellants) that by proportionally increasing the concentrations of each of the active ingredients (i.e. all the ingredients different from the water solvent) in the examples of D4 the resulting "concentrated modification"s of the prior art of departure would be in accordance with the definition of claim 1 under consideration. For instance, by increasing about 10 times the concentrations of all active ingredients in examples D and E of D4, the resulting "concentrated modification"s of these prior art compositions would comprise:

- about 41 or 45 wt.% of component (a),
- about 0.05 or 0.1 wt.% of component (b) and
- about 3.5 or 2.5 wt.% of component (c).

Similarly, by increasing just below 10 times (e.g. multiplying by 9.8) the concentrations of all active ingredients in example B of D4, the resulting "concentrated modification" of this prior art composition would comprise:

- about 50 wt.% of component (a),
- about 0.05 wt.% of component (b) and
- about 2.5 wt.% of component (c).

2.4.2 Hence, in the present case the assessment of inventive step boils down to the question whether a skilled person, aiming at solving the posed technical problem,

would or not consider obvious to prepare "concentrated modification"s of the prior art of departure, thereby arriving at the subject-matter of claim 1 under consideration.

- 2.4.3 The board notes in this respect that D4 mentions concentrates in paragraph [0074] and contemplates amounts of fabric softener - i.e. component (a) of claim 1 under dispute - of up to 80 wt.% (see D4 paragraph [0036]), as well as amounts of nonionic alkoxyated surfactants - i.e. component (c) of claim 1 under dispute - of up to 5 wt.% (see D4 paragraph [0030] and claim 5). Moreover, in paragraph [0067] of D4, "antifoam agents" are listed among the (optional) components of this prior art whose typical amount could in general go up to 15 wt.%. Hence, it is apparent that the disclosure of D4 encompasses clear teachings as to the possibility of preparing LRAFT compositions substantially more concentrated than those of the examples A to E of paragraph [0096].
- 2.4.4 The board finds convincing the finding of the opposition division that these clear teachings in D4 constitute "enough motivation and incentive" to (proportionally) increase the amounts of all components in any of the compositions exemplified in D4, i.e. also to conceive any of the "concentrated modification"s of the prior art exemplified above.
- 2.4.5 The appellants objected that this conclusion would not take into account the fact that the preparation of LRAFT in concentrated form represents a difficult task as it may require substantial "adjustments" to stabilise the concentrated composition, as also apparent from the section devoted to "concentration aids" (paragraph [0074]) of D4, which begins with the

sentence: "*[c]oncentrated compositions of the present invention may require organic and/or inorganic concentration aids to go to even higher concentrations and/or to meet higher stability standards depending on the other ingredients*".

- 2.4.6 The board notes that the appellants did not dispute that LRAFT compositions much more concentrated than those exemplified in D4 were already known to the skilled reader of D4. Nor did they provide any other evidence of the "adjustments" required for the preparations of concentrated LRAFT compositions.

The board notes further that paragraph [0074] of D4, after the initial passage recited above, does contain in the subsequent sentences several instructions as to the components that could be used for preparing concentrated compositions. In particular, the last sentence in paragraph [0074] and the disclosure in paragraph [0075] teach the addition of specific alkylene polyammonium salts to stabilise (the viscosity) of the concentrated compositions.

In any case the overall content of paragraph [0074] of D4 suggests the previous existence of abundant common general knowledge as to the preparation of concentrated LRAFT compositions and, in particular, as to when and which concentration aids should be added.

Hence, even assuming in favour of the appellants, that in order to concentrate the compositions defined in the examples of D4 (in particular for arriving at "concentrated modification"s as those exemplified above) it would be necessary, in addition to the use of less water solvent, to carry out further "adjustments" (such as e.g. the addition of

concentration aids), still the board sees no reason to doubt that the skilled reader of D4 would be able to identify any further conventional "adjustments" of the prior art examples necessary to their preparations.

Therefore, the board rebuts as unconvincing the appellants' objection reported above.

2.4.7 The board additionally observes that, as also stressed by the respondent, the existence of abundant common general knowledge on the preparation of concentrated LRAFT compositions is necessarily implied by the patent in suit as well. In fact, all the patent examples comprise amounts of water of above 80 wt.%. Hence, the undisputable absence of any instruction in the patent in suit as to which "adjustments" would be required for preparing any embodiments of the composition of the invention substantially more concentrated than the patent examples, suggests that the drafter of the patent in suit might have considered unnecessary to give details on the preparation of more concentrated LRAFT compositions.

Hence, the appellants' allegation that the instruction provided in D4 would not be sufficient to prepare e.g. "concentrated modification"s of the examples of this prior art, would also be at odds with the existence of abundant common general knowledge that the patent in suit also implies.

2.4.8 Accordingly, the board concludes that already D4 *per se* renders obvious to solve the posed technical problem by preparing any "concentrated modification"s of any of the examples of D4 (and, thus, also any of the specific "concentrated modification"s of some of the examples of D4 described in 2.4.1 above).

2.5 Hence, the board finds correct the conclusion of the opposition division that the subject-matter of claim 1 under consideration was obvious in view of the prior art.

Thus, the subject-matter of auxiliary request 8 is found not to fulfill the requirement of Article 56 EPC, and thus cannot be allowed.

3. *Main request (granted patent) and auxiliary requests 1 to 7 - inventive step*

The board stresses that (each of) the specific "concentrated modification"s of examples of D4 described in 2.4.1 above fall under the scope of granted claim 1 as well as under each version of claim 1 in any of the auxiliary requests 1 to 7.

Moreover, it is undisputed between the parties that the same reasons given above as to the non-compliance with Article 56 EPC of auxiliary request 8, necessarily renders the granted patent objectionable under the grounds for opposition of Article 100(a) EPC in combination with Article 56 EPC, as well as contrary to Article 56 EPC each of the auxiliary requests 1 to 7.

Hence, the main and auxiliary requests 1 to 7 are not allowable either.

As auxiliary request 1, submitted for the first time in the appeal proceedings, is unallowable for the above reasons, there is no need to decide on its admittance.

4. *Auxiliary request 9* - inventive step (Article 56 EPC)

4.1 The appellants only argued that the limitation introduced in this claim as to the nature of component (c) (now limited to the compounds of formula (I)) justified the difference in terms of type of this ingredient between "*composition 1*" according to the invention and comparative example "X" (allegedly corresponding to example E of D4).

The board notes that the appellants did not dispute that the compounds of formula "(I)" are conventional alternatives for the nonionic alkoxyated surfactants used in the examples of D4 (i.e. the ingredients of the prior art corresponding to component (c) of claim 1 under dispute).

4.2 However, even assuming in favour of the appellants that this additional feature now distinguishing the subject-matter of claim 1 from example E of D4 would also justify the difference in type of component (c) between "*composition 1*" and the comparative example "X", still the two latter compositions (used for the experimental data reported in the patent in suit) would remain different in many other aspects, in addition to those distinguishing the subject-matter of claim 1 from example E of D4. Hence, the appellants' sole argument given above does not render the reasoning given above in point 2.2.3 not applicable to the subject-matter of claim 1 of auxiliary request 9. Hence, the board finds that the experimental data in the patent also is manifestly insufficient to prove that the distinguishing features of the LRAFT composition defined in claim 1 of auxiliary request 9 are responsible for any of the alleged technical advantage over the prior art of departure.

4.3 Hence, also the subject-matter of claim 1 under consideration is found to only provide, vis-à-vis the prior art of D4, an obvious solution to the technical problem of providing further LRAFT composition, for substantially the same reasons given above for the other versions of claim 1 and because the compounds of formula (I) are conventional alternatives for the nonionic alkoxyated surfactants used in the examples of D4.

Hence, auxiliary request 9 is also found not allowable in view of Article 56 EPC.

4.4 As auxiliary request 9 is unallowable for the above reasons, there is no need to decide on its admittance according to Article 12(3) and (5) RPBA 2020.

## Order

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

**The appeal is dismissed.**

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated