

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 27 June 2019**

**Case Number:** T 1926/14 - 3.3.10

**Application Number:** 05857846.9

**Publication Number:** 1809234

**IPC:** A61K8/03, A61K8/04, A61Q5/06,  
A61K8/34, A61K8/60

**Language of the proceedings:** EN

**Title of invention:**  
CLEAR, TOW-PHASE, FOAM-FORMING AEROSOL HAIRSTYLING PRODUCT

**Patent Proprietor:**  
The Procter & Gamble Company

**Opponents:**  
Henkel AG & Co. KGaA  
Kao Germany GmbH

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(a), 56

**Keyword:**  
Grounds for opposition - lack of patentability (no)

**Decisions cited:**

T 0020/81

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 1926/14 - 3.3.10

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.10**  
**of 27 June 2019**

**Appellant:** Henkel AG & Co. KGaA  
(Opponent 1) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** LKGLOBAL  
Lorenz & Kopf PartG mbB Patentanwälte  
Brienner Straße 11  
80333 München (DE)

**Appellant:** Kao Germany GmbH  
(Opponent 2) Pfungstädter Strasse 92-100  
64297 Darmstadt (DE)

**Representative:** Grit, Mustafa  
Kao Germany GmbH  
Pfungstädterstraße 92-100  
64297 Darmstadt (DE)

**Respondent:** The Procter & Gamble Company  
(Patent Proprietor) One Procter & Gamble Plaza  
Cincinnati, OH 45202 (US)

**Representative:** Simpson, Tobias Rutger  
Mathys & Squire LLP  
The Shard  
32 London Bridge Street  
London SE1 9SG (GB)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 22 July 2014  
rejecting the opposition filed against European  
patent No. 1809234 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairwoman**            C. Komenda  
**Members:**             R. Pérez Carlón  
                              T. Bokor

## Summary of Facts and Submissions

I. The appellant (opponent 1) lodged an appeal against the decision of the opposition division rejecting the oppositions against European patent No 1 809 234.

II. The wording of claim 1 as granted is as follows:

*"Hair care product consisting of transparent, pressure-resistant aerosol packaging, a device for foaming a composition contained in the aerosol packaging and a foaming composition of at least two clear liquid phases separated from each other, wherein the composition contains*

*(A) water;*

*(B) at least 15 wt%, based on the composition without propellant, of a water-soluble liquid alcohol;*

*(C) at least one polymer selected from the hair-conditioning polymers, the hair-setting polymers, and the film-forming polymers;*

*(D) at least one hair-conditioning cationic surfactant;*

*(E) at least one foam-forming or foam-stabilizing surfactant, selected from the group consisting of nonionic surfactants, with an HLB of at least 10 and zwitterionic surfactants;*

*(F) at least one water-insoluble propellant that is liquified under the pressure conditions in the aerosol packaging."*

III. Two notices of opposition had been filed on the ground of lack of novelty and inventive step (Article 100(a) EPC).

IV. The documents filed during these proceedings include the following:

D1 EP 1 437 119 A1  
D3 EP 1 169 998 A2  
D4 JP-A-200126526, translated into English as D4b  
D6 EP 1 205 174 A1  
D7 WO 00/06092  
D10 Vergleichversuche in Anlehnung an D3  
D12 US 2,697,695

V. The opposition division concluded *inter alia* that example 34 of document D1 did not disclose either a composition comprising a surfactant of type (E), or a transparent aerosol packaging, or a device for foaming a composition, or a composition having clear phases, separated from each other. The claimed hair care product was thus novel.

Example 3 of document D3 was the closest prior art. The problem underlying the claimed invention was to provide an alternative clear, two-phases foam-forming aerosol hairstyling product having a distinct phase separation of the phases. The solution, which was characterised by the amount of alcohol (B) and the presence of foam-forming or foam-stabilising surfactants (E) required by claim 1 was not obvious having regard to the prior art.

VI. The main arguments of the appellant were as follows:

Example 34 of document D1 disclosed a composition comprising components (A) to (F) required by claim 1 in a PET pressure can. The hair care product of claim 1 was for that reason not novel.

The embodiment disclosed by the combination of

paragraphs [0043] and [0010] of document D3 was the closest prior art. The problem solved by the claimed invention was merely to provide a further hair care product. If the problem were nevertheless to be regarded as to provide a composition having good foam quality and phase separation, the claimed solution, characterised by the type of surfactants (E), would have been obvious having regard to D4. For this reason, the claimed hair product was not inventive.

VII. The respondent (patent proprietor) filed auxiliary requests 1 to 8 with its response to the grounds of appeal. The main arguments of the respondent (patent proprietor) were as follows:

Example 34 failed to disclose either a transparent packing, or a composition having two phases, or that said phases were clear. The claimed hair care product was thus novel.

Regardless of which embodiment of D3 were the closest prior art, the problem underlying the claimed invention was to provide a hair care product having, like that of D3, good foaming and phase separation properties. Even if that problem were not considered solved and needed to be reformulated, it should be as how to provide a hair care product having good foaming and phase separation properties. The examples of the patent in suit proved that the claimed solution, characterised at least by surfactant (E), credibly solved that problem. Even if the skilled person were to combine the teaching of D3 with that of D4, they would not have arrived at the claimed invention, as the surfactants of the latter were not foam-forming or foam-stabilising. The claimed solution was thus inventive.

VIII. Opponent 2 withdrew its appeal and is party as of right to these proceedings. It has not made any substantive submission and informed the board that it would not be attending the oral proceedings, which took place on 27 June 2019.

IX. The final requests of the parties were as follows:

- The appellant requested that the decision under appeal be set aside and the patent be revoked.
- The respondent requested that the appeal be dismissed and the opposition be rejected or, alternatively the decision under appeal be set aside and the patent be maintained in an amended form on the basis of any of the auxiliary requests 1 to 8, all filed with the response to the grounds of appeal dated 15 June 2015.

X. At the end of the oral proceedings before the board, the decision was announced.

### **Reasons for the Decision**

1. The appeal is admissible.

*Main request*

*Novelty*

2. Claim 1 relates to a hair care product consisting of a transparent packaging, a device for foaming a composition, and a foaming composition having at least two clear liquid phases separated from each other and comprising components (A) to (F).



3. Example 34 of document D1 discloses a PET pressure can containing a composition comprising components (A) to (F).

In the decision under appeal, the opposition division concluded that PET was not necessarily transparent, and that example 34 failed to disclose either that two phases were formed or that said phases were clear.

The board has established that appellant has not addressed in its notice of appeal any of the features not disclosed in example 34 of D1 according to the opposition division's decision. The appellant has also not provided any further arguments in the oral proceedings. It is also not immediately apparent to the board why the opposition division could have been wrong in this respect.

As example 34 does not disclose either a transparent packaging or a composition having two separate, clear phases, the board sees no reason to reverse the opposition division's conclusion that the claimed subject-matter is novel.

*Inventive step*

4. Claim 1 relates to a hair care product consisting of a packaging, a device for foaming a composition contained in the packaging, and a foaming composition. The required packaging is a transparent, pressure-resistant aerosol packaging. The composition in the packaging contains components (A) to (F) and has at least two clear liquid phases separated from each other.
5. The opposition division and the parties considered that document D3 was the closest prior art. The board has no

reason to differ.

Example 3 of document D3 discloses a hair care product having a composition packed in a transparent PET container with a foaming head. Said composition contains less alcohol than the limit set by feature (B) of claim 1, and lacks a foam-forming or foam-stabilising surfactant (E).

According to the appellant the embodiment on paragraph [0043] of D3, in combination with the specific relative amount of alcohol disclosed in paragraph [0010], disclosed the amount of alcohol required by feature (B) of claim 1.

In favour of the appellant, the board will examine below whether the claimed subject-matter would be inventive if it only differed from that of the closest prior art by virtue of the surfactants (E).

6. The respondent defined the technical problem underlying the claimed invention as to provide a hair care product having foam quality and phase separation comparable to that achieved by D3.
7. The claimed solution to this technical problem is the hair care product of claim 1, characterised in that it contains (E) a foam-forming or foam-stabilising surfactant selected from the group consisting of nonionic surfactants with an HLB of at least 10 and zwitterionic surfactants.
8. There is no direct comparison on file with the hair care product of the closest prior art D3, let alone reflecting solely the effect of the distinguishing feature(s) of the claimed invention. The examples of

the patent in suit achieve good foam properties and phase separation, but do not allow to determine whether these properties are as good as that of the product of D3.

It is thus not proven that the problem as defined above in point 6. is solved by the hair care product of claim 1.

9. According to the case law, alleged but unsupported advantages cannot be taken into consideration in determining the problem underlying the invention (see e.g. decision T 20/81, OJ EPO 1982, 217, Reasons 3, last paragraph). As the alleged performance in terms of foam quality and phase separation comparable to that achieved by D3 lacks the required supporting evidence, the technical problem needs to be reformulated in a less ambitious manner.

The objective technical problem underlying the claimed invention is considered to be the provision of an alternative hair care product having good foaming properties and good phase separation.

10. The appellant argued that even the problem as reformulated had not been credibly solved, and relied in this respect on the experimental evidence filed as D10. Composition SP2 of D10, despite having components (A) to (F) required by claim 1, did not form two clear separated phases.

However, it cannot be argued that the part of the problem relating to providing clear, separated phases has not been solved by the claimed hair care product, as these are features of claim 1. Composition SP2 of D10, lacking separated phases, does not fall within the

scope of claim 1.

- 10.1 The hair care products of the examples of the patent in suit are stated to form a soft, microporous foam which remains compact for about two minutes and show a clear phase separation both in a non-shaken condition as well as 24 hours after shaking [0051]. There is no evidence on file which could show that this disclosure is not correct, or any reason to cast doubts on it having regard to the common technical knowledge of the skilled person.

It is thus concluded that the problem as formulated in paragraph 9. above has been credibly solved by the claimed hair care product.

11. It thus remains to be decided whether the proposed solution to the objective problem defined above would have been obvious for the skilled person in view of the prior art.

- 11.1 The appellant argued that document D4 hinted at the claimed solution. D4 related to a foamable aerosol-type transparent hair cosmetic having a propellant and a stock solution comprising a polyoxyethylene sorbitol fatty acid ester (claim 1).

The skilled person, trying to obtain a further hair care product having good foaming properties and good phase separation, would have considered the teaching of D4 and thus would have added a polyoxyethylene sorbitol fatty acid ester to the composition of D3.

By doing so, they would inevitably have arrived at the claimed invention. Polyoxyethylene sorbitol fatty acid esters were nonionic surfactants, had the required HLB

value and must necessarily be foam-forming or foam-stabilising as they were the sole surfactants in the styling foam compositions of the examples of D4, and D6 disclosed ethoxylated C8 to C18 fatty acid alcohols as nonionic foam-forming surfactants [0016]. Apart from that, foam-forming or foam-stabilising were relative terms which lacked a definition in the description of the patent in suit.

- 11.2 The appellant has, however, not provided any evidence that polyoxyethylene sorbitol fatty acid esters are foam-forming or foam-stabilising surfactants.

The surfactants of document D6 are ethoxylated C8 to C18 fatty acid alcohols, whereas those of D4 are ethoxylated sorbitol fatty acid esters. As they are chemically different, the properties of the former do not necessarily have to be shared by the latter.

Document D7 discloses that polymers can also be responsible for foam generation (page 16, lines 15-19). For this reason, the argument that the surfactants of D4 must necessarily be foam-forming or foam-stabilising as they were the sole surfactants in the foaming compositions of D4 cannot be followed.

Furthermore, D7 discloses foaming as the result of using a mechanical device (page 16, lines 23-31), i.e. the compositions of D7 are not necessarily foam-forming in the absence of that mechanical step. The appellant's argument that ethoxylated sorbitol fatty acid esters must inevitably have been foam-forming or foam-stabilising in the context of the compositions of D4 is thus not convincing.

Lastly, document D12 discloses polyoxyethylene sorbitol fatty acid esters, commonly named as Tween (D9), as "foam depressing detergents" (D12, column 2, lines 64-68), thus teaching the opposite behaviour of that alleged by the appellant.

- 11.3 The appellant argued that the compositions of D12, which related to dishwasher detergents, were very different from those in present claim 1. The same surfactant could behave as foam-forming or foam-depressing depending on the composition considered.

There is however no evidence on file which could show that the surfactants of D4 are foam-forming or foam-stabilising in any type of composition.

- 11.4 The appellant also argued that a surfactant would inevitably be foam-forming or foam-stabilising as long as it was nonionic and had the HLB required by claim 1, as, according to the patent in suit, these were the sole requirements linked to the foaming behaviour of a surfactant.

However, this line of argument cannot be followed. Claim 1 requires surfactants (E) having three features, namely being nonionic, having a HLB of at least 10 and being foam-forming or foam-stabilising. There is no disclosure in the patent which could have taught the skilled reader, as argued by the appellant, that the latter requirement was the inevitable consequence of the two preceding ones.

- 11.5 As there is no evidence on file which could show that the surfactants of D4 are foam-forming or foam-stabilising in any field of application, let alone in the context of two-phases styling foams, even if the

skilled person were to combine the teaching of documents D3 and D4, they would not have arrived at the claimed invention.

12. Therefore, the board concludes that the claimed hair care products are inventive, as required by Article 56 EPC. The ground of opposition under Article 100(a) EPC does not preclude the maintenance of the patent as granted.

### **Order**

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

The appeal is dismissed.

The Registrar:

The Chairwoman:



G. Rauh

C. Komenda

Decision electronically authenticated