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**Datasheet for the decision  
of 26 June 2025**

**Case Number:** T 2612/22 - 3.3.10

**Application Number:** 12815682.5

**Publication Number:** 2793817

**IPC:** A61Q5/08, A61K8/25, A61K8/34,  
A61K8/49, A61Q5/10, A61K8/02,  
A61K8/22, A61K8/23

**Language of the proceedings:** EN

**Title of invention:**  
BLEACHING AND COLOURING COMPOSITION FOR HAIR

**Patent Proprietor:**  
Kao Germany GmbH

**Opponents:**  
Henkel AG & Co. KGaA  
L'OREAL

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56

**Keyword:**  
Inventive step - (yes) - non-obvious alternative

**Decisions cited:**

**Catchword:**



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

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Case Number: T 2612/22 - 3.3.10

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.10**  
**of 26 June 2025**

**Appellant:** Kao Germany GmbH  
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**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**  
**12 October 2022 concerning maintenance of the**  
**European Patent No. 2793817 in amended form.**

**Composition of the Board:**

**Chairman**           A. Zellner  
**Members:**         M. Kollmannsberger  
                      T. Bokor

## **Summary of Facts and Submissions**

- I. The patent proprietor as well as opponent 2 lodged an appeal against the decision of the Opposition Division that the patent EP 2 793 817 may be maintained in amended form under Article 101(3) (a) EPC, based on claims and description of auxiliary request Ib as filed in opposition proceedings.
- II. The patent deals with hair dyeing compositions. In particular the patent deals with compositions that may be used in a process where hair bleaching and hair dyeing are carried out in a single step. This requires that the direct dyes used are sufficiently stable in alkaline and oxidative bleaching compositions, see paragraphs [0001] to [0007] of the patent description.
- III. The following prior art documents are referred to in the present decision:
- D1: EP 2 263 642 A2
  - D4: Wella: Wella Viva - Blonde Hair Highlights, Mintel GNPD Base, entry no. 424666, published on 31.01.2006
  - D13: EP 1 598 052 A1
  - D22: EP 1 369 105 A1
  - D26: Comparative test report, 5 July 2022
- IV. Two oppositions were filed against the patent, based on Article 100(a) EPC for lack of novelty and inventive step. The Opposition Division concluded that the claims of the granted patent as well as the claims of auxiliary request I lacked novelty. The claims of auxiliary request Ia were considered to be novel, but to lack an inventive step over D22. Finally, the claims

of auxiliary request Ib were considered to define novel and inventive subject-matter and it was decided that the patent could be maintained in this amended form under Article 101(3)(a) EPC.

V. In appeal proceedings, the appellant-proprietor defended the patent in form of auxiliary request Ia underlying the decision under appeal, as their main request, and in the form maintained by the Opposition Division, i. e. auxiliary request Ib underlying the impugned decision, as an auxiliary request.

VI. The parties submitted essentially the following:

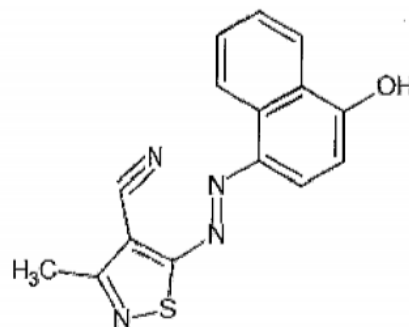
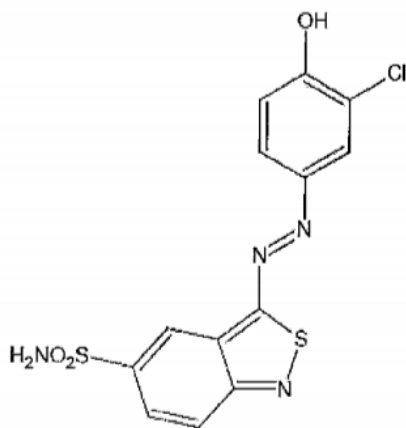
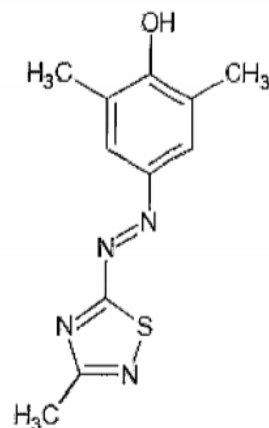
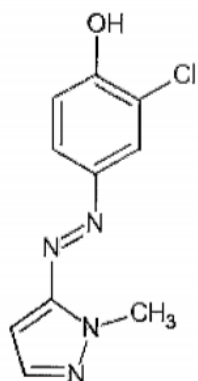
The appellant-proprietor submitted that the Opposition Division's finding of lack of inventive step over D22 regarding auxiliary request Ia was erroneous. On the other hand, the Opposition Division's decision that auxiliary request Ib fulfilled the requirements of the EPC was correct.

Appellant-opponent 2 submitted that neither the claims of auxiliary request Ia, nor the claims of auxiliary request Ib defined inventive subject-matter.

Opponent 1 submitted that the Opposition Division's finding of lack of inventive step regarding auxiliary request Ia was correct.

VII. Independent claim 1 of the appellant proprietor's main request in appeal (in the following "*auxiliary request Ia*") reads as follows:

*"An aqueous composition for bleaching and colouring hair characterized in that it comprises at least one direct dye selected from*



and

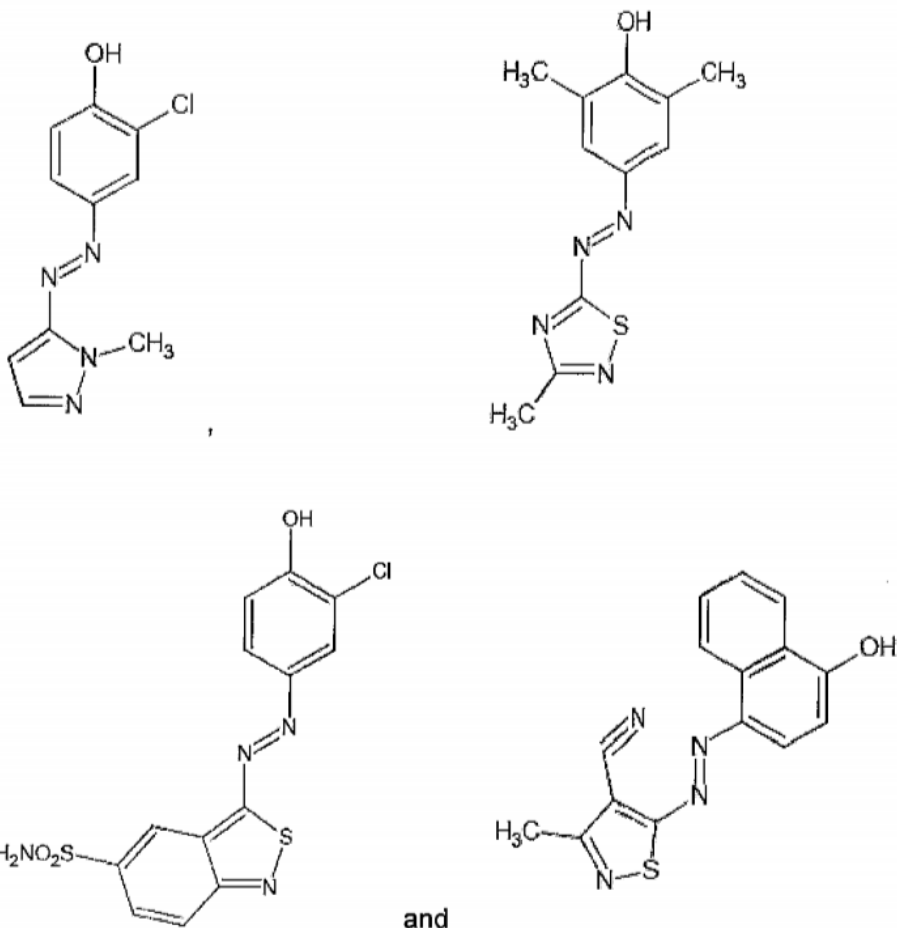
*at least one compound with hair bleaching effect, at least one oxidizing agent, at least one alkalizing agent and at least one oxidizable solvent selected from 2-phenoxyethanol, benzyl alcohol, 2-phenylethanol and 2-benzyloxyethanol, isopropanol, propanol, n-butanol, isobutanol, t-butanol and 1-pentanol"*

VIII. The independent claims of the appellant-proprietor's auxiliary request in appeal (in the following "auxiliary request Ib") read as follows:

Claim 1:

*"Method for bleaching and colouring hair wherein an aqueous composition is prepared by mixing immediately*

before use an anhydrous composition (Part A) comprising at least one direct dye selected from:



at least one compound with hair bleaching effect and at least one alkalizing agent, and an aqueous composition (Part B) comprising at least one oxidizing agent and a composition (Part C) comprising at least one oxidizable solvent selected from 2-phenoxyethanol, benzyl alcohol, 2-phenylethanol and 2-benzyloxyethanol, isopropanol, propanol, n-butanol, isobutanol, t-butanol and 1-pentanol and is applied onto hair and after processing 5 to 45 minutes rinsed off from hair."

Claim 10:

*"Kit for bleaching and colouring hair comprising three or more compositions wherein it comprises a Part A which is an anhydrous composition and comprises at least one direct dye selected from*

[formulae as in claim 1]

*at least one compound with bleaching effect and at least one alkalizing agent, and a Part B which is an aqueous composition comprising at least one oxidizing agent and a Part C comprising at least one oxidizable solvent selected from 2-phenoxyethanol, benzyl alcohol, 2-phenylethanol and 2-benzyloxyethanol, isopropanol, propanol, n-butanol, isobutanol, t-butanol and 1-pentanol".*

IX. Oral proceedings were held on 26 June 2025. The Board informed the parties in a communication under Article 15(1) RPBA that the appeals were likely to be dismissed.

X. The parties' final requests were the following:

The appellant proprietor requested to set aside the appealed decision and to maintain the patent in amended form on the basis of auxiliary requests Ia underlying the appealed decision, refiled together with the grounds of appeal. Their auxiliary request was to dismiss the appeal filed by opponent 2, i. e. to confirm the Opposition Division's decision to maintain the patent on the basis of auxiliary request Ib.

The appellant-opponent 2 requested to set aside the Opposition Division's decision and to revoke the patent.

The opponent 1, respondent to the proprietor's appeal, requested to dismiss the patent proprietor's appeal.

XI. The decision was announced at the end of the oral proceedings.

### **Reasons for the Decision**

1. The appeals are admissible.
2. The patent proprietor's appeal - amended patent in the form of auxiliary request Ia
  - 2.1 The proprietor's appeal seeks to maintain the patent on the basis of auxiliary request Ia as filed in the oral proceedings before the Opposition Division.

Claim 1 of this request is directed to an aqueous composition comprising (i) at least one of four specified direct dyes, (ii) a compound with a hair bleaching effect, (iii) an oxidizing agent, (iv) an alkalizing agent and (v) at least one of several specified oxidizable solvents. Unlike the maintained version, this claim is not limited to a kit containing three compositions having different ingredients, but covers the ready-to-use composition as such.

- 2.2 The Opposition Division chose D22 as document representing the closest prior art. D22 discloses compositions useful in hair dyeing. It emphasises that the compositions comprise direct dyes that are stable under the alkaline oxidizing conditions, see paragraph [0006]. The Opposition Division identified example compositions IV and VI in table 5, paragraph [0144], as being closest to the claimed invention. These compositions are used in a simultaneous bleaching and

coloration treatment. Claim 1 of auxiliary request Ia differs from these example compositions in that different direct dyes are used.

2.3 The Opposition Division then stated that no technical effect had been proven to be associated with the choice of the dyes defined in claim 1. The objective technical problem to be solved was thus defined as the provision of alternative effective single-step hair bleaching compositions. Since D22 itself, in the general part of the description, suggested to use one of the dyes defined in claim 1 of auxiliary request Ia, namely dye D-69 on page 22 which corresponds to the third dye listed in the claim, the Opposition Division considered the compositions defined in the claim to be obviously derivable from the teaching of D22, see point 20 of the reasons of the impugned decision. The claimed compositions lacked an inventive step, Article 56 EPC.

2.4 The appellant-proprietor contested this conclusion and submitted various arguments in this respect.

2.4.1 It was argued that D22, in contrast to the patent in paragraphs [0002] and [0003], did not discuss the problem of dyestuff stability under alkaline and oxidizing conditions.

However, this is not correct. D22 does address the problem of dyestuff stability in alkaline and oxidative environments, see paragraphs [0004] or [0006]. In paragraphs [0065] and [0066] it is expressly stated that the direct dyes used in the compositions of D22 are stable under such conditions. A similar statement is made in paragraphs [0146] and [0147] regarding the example compositions.

2.4.2 The proprietor argued that the patent, unlike D22, seeks to improve dyestuff stability by the use of oxidizable solvents. They referred to the comparative tests D26. This should be reflected in the formulation of the objective technical problem to be solved.

However, the presence of an oxidizable solvent is no distinguishing feature over D22. Example compositions IV and VI referred to above contain benzyl alcohol, a solvent used in the patent and listed in claim 1.

D26 investigates the colouring properties of freshly prepared and aged compositions. It finds that the addition of the organic solvent shortly before using the composition is essential for obtaining an intense hair colouring. The patent proprietor argued that the cited prior art did not teach that the oxidizable solvent acted as a stabilizer for the direct dye.

However, such a finding, be it correct or not, cannot be related to the feature distinguishing the claim from the cited example compositions in D22, i. e. the nature of the dyestuff. Also D22 uses oxidizable solvents. The way of preparation of the claimed compositions is not a feature of claim 1 of auxiliary request Ia.

The finding that a component of a composition described in the prior art has a certain function in this composition cannot support inventive step of claim 1 of auxiliary request Ia, which uses the same component in the same type of composition. Unexpected improvements would have to relate to the choice of the direct dye. No such improvements were alleged, let alone proven.

2.4.3 During oral proceedings the proprietor argued that a skilled person would not have changed the dye when

looking for an alternative to the compositions of examples IV and VI of D22, since a change in the dye lead to a change in the hair colouring obtained. Providing a different colour was not an alternative to examples IV and VI, but a different result based on a technical effect. In particular, from table 6a in paragraph [0146] of D22 is was clear that example compositions IV and VI lead to ash blue or blue violet colours. Thus, if at all, a skilled person would have chosen different dyes disclosed in D22 as providing these or similar colour shades, e. g. any of those disclosed in tables 1a or 1b. No colour was disclosed for dye D-69 in D22, so that a skilled person had no reason to choose this particular dye as an alternative and incorporate it into formulations shown in table 5.

The opponents stressed that the objective technical problem to be solved was the the provision of alternative effective single-step hair bleaching compositions, and was not linked to any particular colour. D22 as well as claim 1 of the patent related to a variety of different colours. Moreover, a skilled person would know that dye D-69 of D22 was "HC blue 18" and thus also would provide a colouring in the blue range.

The Board concurs with the opponents. While it is true that example compositions IV and VI relate to colours in the blue range, a skilled person, when starting from example compositions IV or VI in D22, would not be limited to colours in the blue range when trying to solve the objective technical problem defined above. It is clear from D22 that its teaching is not limited to specific colours (see tables 1a, 1b or 6a) and a skilled person would know that all dyes mentioned therein could be used in the hair dyeing compositions

presented therein. Also the dyes used in claim 1 of auxiliary request Ia lead to a variety of different colours. Thus, regardless whether a skilled person would have recognized the nature of D-69 in D22, or would have expected a different colour shade when changing the dyes used in examples IV and VI, such considerations would not have had any influence on the skilled person's way of proceeding when trying to solve the objective technical problem when starting from D22. Dye D-69 is clearly presented in D22 as an alternative possible dye that can be used in compositions according to this document.

2.5 Thus, the Board considers the appellant-proprietor's arguments to be unconvincing. The Opposition Division's decision on auxiliary request Ia is well founded. The patent cannot be maintained on the basis of auxiliary request Ia since the compositions defined in these claims lack an inventive step, Article 56 EPC. The proprietor's appeal cannot succeed.

3. Opponent 2's appeal - amended patent in the form of auxiliary request Ib.

3.1 Opponent 2's appeal seeks to revoke the patent. Opponent 2 submitted that also the kits and methods defined in the claims maintained by the Opposition Division lack inventive step.

3.2 Independent claims 1 and 10 of the maintained version are essentially characterized in that the hair dyeing kits and methods use compositions which are separated into three parts A, B and C. Part A is anhydrous and contains the direct dye, the bleaching agent and the alkalizing agent. Part B is an aqueous oxidizing composition and Part C comprises the oxidizable organic

solvent. The Opposition Division considered these kits and methods to be non-obvious alternatives to the hair dyeing methods and compositions disclosed in D22 basically because of the distribution of ingredients between the different compositions, see point 23.3 of the decision under appeal.

- 3.3 The choice of D22 as closest prior art, in particular of the compositions of examples IV and VI in table 5, was uncontested in appeal proceedings. Claims 1 and 10 of auxiliary request Ib differ from this disclosure (i) in the choice of a different direct dye and (ii) in that the composition is separated into the three different parts (A), (B) and (C) in the way defined in the claim. In the method defined in claim 1 the three components are combined immediately before use, while claim 10 defines the kit of parts used in the method.
- 3.4 The Opposition Division did not recognize any technical effect caused by the differentiating features. The opponents agreed. The patent proprietor, with reference to the examples in the patent and to D26, considered it proven that the mixing of the three components immediately before use, and in particular the provision of the oxidizable organic solvent in a separate compartment, lead to favourable colouring results.
- 3.5 The Opposition Division defined the objective technical problem to be solved as the provision of further effective single-step hair bleach-and-colour compositions.
- 3.6 As will become apparent from the reasoning below the Board considers that already this problem has been solved in a non-obvious way. It is thus not necessary to investigate whether, on the basis of the examples in

the patent and/or D26, the claimed kits or methods provide any improvement over the compositions of D22.

3.7 The objective technical problem defined above is solved by the method defined in claim 1 and by the kit defined in claim 10 of auxiliary request Ib, which are characterized by the distribution of the ingredients into three different parts A, B and C in the way defined in the claims. This was undisputed.

3.8 The Board concurs with the Opposition Division that this problem has been solved in a non-obvious way. D22 itself already proposes to divide the compositions disclosed therein into two-part or three-part kits, see claim 10 or paragraph [0126]. However, the distribution is different from what is claimed here. In D22, in case of a three-part kit one compartment should contain an alkali agent, a second one an oxidizing agent and a third one a powdery oxidizing agent such as a persulfate. The dye may be incorporated in either of the compartments. Neither is it proposed to incorporate the dye in an anhydrous composition together with the bleaching and alkalizing agents, nor to add any organic solvent, let alone particular oxidizable solvents, separately. Thus, a skilled person would not derive the three-part kit defined in claims 1 and 10 from D22 alone, when trying to solve the technical problem defined above.

3.8.1 The opponents, in particular opponent 2, referred to D4 and D13.

D4 is a database entry describing a product named "Blonde Hair Highlights", containing a "Highlighting Powder", a "Developing Emulsion", a "Highlightening Gel" and a "Conditioning Gloss". Following opponent 2

the first three of these components correspond to present compositions A, B and C.

Example 2 of D13 relates to a three-part bleaching and colouring composition. In opponent 2's view part A of this composition corresponds to part A of the present composition, part B to part C and part C to part B.

However, there is no reason why a skilled person would have applied such a distribution of ingredients to the compositions of D22, in particular since the proposal made in D22 itself does not contain any hint in this direction. Moreover, D4 is a four-part kit, not a three-part kit, and the cited example in D13 does not contain any oxidizable organic solvent as defined in the claim.

3.8.2 Also the further arguments submitted by the opponents are not convincing.

It was argued that the three-part compositions proposed in paragraph [0126] of D22 did not exclude that the powdery oxidizing agent, such as the persulfate, also contained an alkalizing agent as defined for part A of the compositions defined in the claim. Such a possibility was also suggested in D1, paragraph [0031].

In the distribution proposed in paragraph [0126] the alkali agent is in the first component, whereas the persulfate is in the third component. It is of course not literally excluded that the third component additionally contains an alkalizing agent, or that the first component additionally contains powdery persulfate. However, for a skilled person to act in a certain way, a positive disclosure is needed. In the distribution proposed in D22 the alkali agent and the

powdery oxidizing agent, i. e. the persulfate, are in separate components, not together as in part A of the claims. Moreover, as set out above, there is no indication where the solvent should go, and in particular no indication that certain types of solvents should be kept separate from any other ingredient.

It was argued that D4 does give a skilled person an idea about how to distribute the components shown in examples IV and VI of D22 into different parts. These example compositions were ready-to use compositions which cannot be marketed as such. D4 was a product on the market, and a skilled person would have considered a marketed product to provide useful information on how ingredients should be distributed between different parts.

However, while D4 concerns a marketed product, it cannot be ignored that D22 itself provides instructions on the distribution of the ingredients into different parts, see paragraph [0126], which are different. A skilled person would not ignore such instructions which are made in the context of the starting document itself, for the compositions described therein.

- 3.9 In summary, a skilled person, starting from the compositions disclosed in D22 and considering also the other cited documents D4, D13 and D1, would not have arrived in an obvious way at the kits and methods defined in independent claims 1 and 10 of auxiliary request Ib. Auxiliary request Ib complies with Article 56 EPC. Thus, also opponent 2's appeal cannot succeed.
4. Thus the Board concludes that the Opposition Division correctly decided that the patent may be maintained in amended form on the basis of auxiliary request Ib.

**Order**

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

The appeals are dismissed.

The Registrar:

The Chairman:



U. Bultmann

A. Zellner

Decision electronically authenticated