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Datasheet for the decision of 20 October 2025

Case Number: T 1551/23 - 3.3.02

Application Number: 15766538.1

Publication Number: 3197427

IPC: A61K8/37, A61K8/55, A61Q19/00, A61K8/06, A61K8/39

Language of the proceedings: EN

Title of invention:
O/W EMULSIONS

Patent Proprietor:
DSM IP Assets B.V.

Opponent:
Dalli-Werke GmbH & Co. KG

Headword:

Relevant legal provisions:
EPC Art. 123(3), 123(2), 54, 56

Keyword:
Amendments - extension of protection (no) - added subject-matter (no)
Novelty - novelty of use - second (or further) non-medical use
Inventive step - (yes)

Decisions cited:
T 2017/07, T 0287/11, G 0002/88, G 0006/88

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

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Case Number: T 1551/23 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 20 October 2025

Appellant: (Patent Proprietor)	DSM IP Assets B.V. Het Overloon 1 6411 TE Heerlen (NL)
Representative:	Kraus & Lederer PartGmbB Thomas-Wimmer-Ring 15 80539 München (DE)
Appellant: (Opponent)	Dalli-Werke GmbH & Co. KG Zweifaller Strasse 120 52224 Stolberg (DE)
Representative:	f & e patent Braunsberger Feld 29 51429 Bergisch Gladbach (DE)
Decision under appeal:	**Interlocutory decision of the Board Division of the European Patent Office posted on 23 June 2023 concerning maintenance of the European Patent No. 3197427 in amended form.**

Composition of the Board:

Chairman	M. O. Müller
Members:	M. Kollmannsberger
	B. Burm-Herregodts

Summary of Facts and Submissions

I. Both the patent proprietor and the opponent appealed the opposition division's decision that amended patent EP 3 197 427 in the form of auxiliary request 5 lying before it complies with the requirements of the EPC, Article 101(3)(a) EPC.

II. The patent deals with O/W emulsions containing a polyglyceryl fatty ester surfactant. The patent is based on the finding that the addition of a phosphate ester co-surfactant to such an emulsion, in particular the addition of potassium cetyl phosphate, results in a reduction of the viscosity of the emulsion, without compromising its long-term stability (see paragraph [0005]).

III. The patent as granted contained independent claims directed to a composition (claim 1), the use of a phosphate ester to reduce the viscosity of an O/W emulsion (claim 11), a method for reducing the viscosity of a topical composition (claim 12) and a method for preserving the long-term thermal storage stability of a topical composition (claim 13).

IV. The opposition was based on Article 100(a) and (c) EPC. The substantiated grounds for opposition were lack of novelty (Article 54 EPC), lack of inventive step (Article 56 EPC) and unallowable amendments (Article 123(2) EPC).

V. The following documents are referred to in the present decision:

D1: EP 0 901 811 A2

D2: DE 103 07 465 A1

D3: DE 10 2011 077 028 A1

D6: Comparative data, filed 14 April 2022

VI. During opposition proceedings, the patent proprietor defended the patent in amended form based on a main request and auxiliary requests (ARs) 1 to 13. In its decision, the opposition division came to the following conclusions.

(a) The amended composition claim of the main request extended the scope of protection of the patent as granted and was thus not allowable under Article 123(3) EPC. The same applied to AR1, AR3 and AR4.

(b) AR2, in which the composition claims were deleted, was not allowable because the method claims were not novel over D1.

(c) AR5, restricted to use claims, fulfilled the requirements of the EPC. In particular, the use claims did not result from unallowable amendments, and the claimed uses were novel over D1 and involved an inventive step starting from D3 as the closest prior art document.

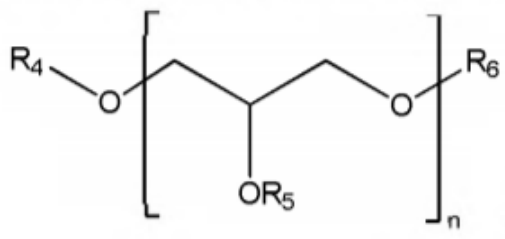
VII. In the written part of the appeal proceedings, the patent proprietor submitted that the objection under Article 123(3) EPC against the amended composition claim was unjustified. Furthermore, the composition, use and method claims were not the result of unallowable amendments, and the claimed subject-matter

was novel and inventive over the cited prior art, in particular D1 and D3.

VIII. The patent proprietor's main request in appeal proceedings, filed as auxiliary request 1 with the letter dated 14 October 2025, contains two independent claims, a composition claim and a use claim. The composition claim is identical to independent composition claim 1 of the main request underlying the decision under appeal. The use claim is identical to independent use claim 11 of the patent as granted and to independent use claim 1 of AR5 underlying the decision under appeal, i.e. the version of the amended patent found allowable by the opposition division.

Independent composition claim 1 of the main request is worded as follows (amendments with respect to the granted claim underlined; structural drawing as corrected later in the proceedings, see point XI below):

"*Topical composition in the form of an oil-in-water (O/W) emulsion comprising an oil phase dispersed in an aqueous phase in the presence of a polyglyceryl fatty ester surfactant and a phosphate ester co-surfactant characterized in that the polyglyceryl fatty ester surfactant is a mono-ester of stearic or isostearic acid of formula (II)*

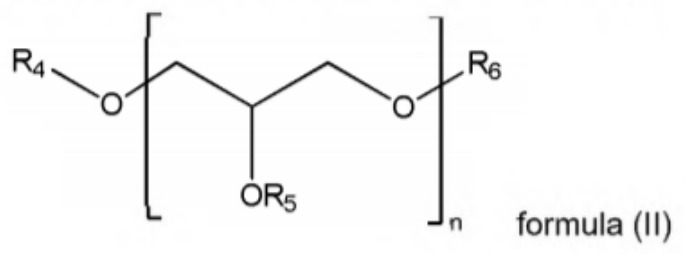


formula (II)

wherein
R_4, R_5 and R_6 are independently of each other hydrogen, a stearoyl and/or an isostearoyl group with the proviso that at least one of R_4, R_5 and R_6 is a stearoyl and/or an isostearoyl group and the other ones are hydrogen and n is an integer selected from 2 to 10, and wherein the phosphate ester co-surfactant is potassium cetyl phosphate and wherein the wt.-ratio between the polyglyceryl fatty acid ester surfactant and the phosphate ester co-surfactant is selected in the range of 8:1 to 1:1."

Independent use claim 9 of the main request is worded as follows:

"Use of a phosphate ester surfactant to reduce the viscosity of a topical composition in the form of an O/W emulsion comprising an oil phase dispersed in an aqueous phase in the presence of a polyglyceryl fatty ester surfactant, characterized in that the polyglyceryl fatty ester is an ester of stearic or isostearic acid of formula (II)



formula (II)

wherein
R_4, R_5 and R_6 are independently of each other hydrogen, a stearoyl and/or an isostearoyl group with the proviso that at least one of R_4, R_5 and R_6 is a stearoyl and/or an isostearoyl group and the other ones are hydrogen and n is an integer selected from 2 to 10 and wherein

the wt.-ratio between the polyglyceryl fatty ester surfactant and the phosphate ester co-surfactant is selected in the range of 8:1 to 1:1."

IX. In the written part of the appeal proceedings, the opponent submitted that the only independent claim of the patent as maintained, i.e. the use claim recited above, lacked novelty over D1 and lacked inventive step over D1 or D3 as documents representing the closest prior art. The composition claim of the patent proprietor's main request, i.e. the composition claim recited above, was rightly found to contravene Article 123(3) EPC. Moreover, this claim also contained subject-matter extending beyond the application as originally filed, Article 123(2) EPC, and lacked an inventive step over document D1 or D3 as documents representing the closest prior art.

X. The parties were summoned to oral proceedings to be held on 20 October 2025. In preparation for the oral proceedings, the Board issued a communication under Article 15(1) RPBA setting out the issues to be discussed during these oral proceedings and giving a preliminary opinion on some of them. The Board noted that the structural drawings in the claim requests appeared to be erroneous.

XI. On 14 October 2025, the patent proprietor filed corrected copies of the claim requests which included the structural drawings that had been present in the patent as granted as well as in the claim requests decided upon by the opposition division.

XII. Oral proceedings took place on 20 October 2025 in the presence of both parties.

In the course of the oral proceedings, the opponent withdrew its appeal.

XIII. The final requests by the parties were the following.

The patent proprietor requested that the appealed decision be set aside and that the patent be maintained in amended form based on its main request, filed as auxiliary request 1 with the letter dated 14 October 2025.

The opponent requested that the patent proprietor's appeal be dismissed.

XIV. The Board's decision was announced at the end of the oral proceedings.

XV. The parties' arguments relevant for the present decision are summarised below in the reasons for the decision.

Reasons for the Decision

1. Since the opponent withdrew its appeal at the end of the oral proceedings, there is no appeal from the opponent to decide on. Thus, in the following, the patent proprietor is referred to as the appellant and the opponent as the respondent.

2. The appellant's main request

The claim set of the appellant's main request for maintenance of the patent in amended form under Article 101(3)(a) EPC contains two independent claims, a claim directed to a composition (claim 1) and a claim directed to the use of a phosphate ester surfactant (claim 9) (see point VIII above). The opposition division decided that the use claim complies with the requirements of the EPC, while the composition claim extended the scope of protection beyond the patent as granted (Article 123(3) EPC).

However, the Board concludes that both these independent claims and the claims dependent on them comply with the requirements of the EPC. The reasons for this conclusion are set in the following.

3. Extended scope of protection (Article 123(3) EPC)

3.1 Granted claim 1 defines a composition comprising a polyglyceryl fatty acid ester (II) and a phosphate ester. These ingredients are present in a weight ratio of 8:1 to 1:1. In claim 1 of the main request, the generic definition "*phosphate ester*" is specified by adding "*wherein the phosphate ester co-surfactant is potassium cetyl phosphate*". The opposition division, following the principles defined in decision T 2017/07, interpreted the amended claim to mean that the weight ratio now applied only to potassium cetyl phosphate. Thus, it decided that the amended claim covered compositions not encompassed by the granted claims, e.g. compositions additionally containing phosphate

esters other than potassium cetyl phosphate in an amount outside the weight ratio as defined in granted claim 1.

3.2 Claim 1 of the main request containing a "*double limitation*"

3.2.1 The appellant argued that in claim 1 of the main request, the weight ratio still applies to the totality of phosphate esters, not only to potassium cetyl phosphate (a double limitation). In the appellant's view, this interpretation of a double limitation with respect to the phosphate esters arose from the wording of the claim. The definition of "*phosphate ester*" was not replaced by a more specific one but was kept as such, supplemented by the more specific definition. The patent proprietor cited several decisions of the Boards in which such a cascade-like claim drafting led to a double limitation and was, according to the appellant's interpretation, accepted under Article 123(3) EPC. The appellant referred to a series of decisions of the Boards, namely T 0287/11, T 999/10, T 009/10, T 1360/11, T 1063/15, T 2215/18 and T 664/20.

3.2.2 The respondent referred to decision T 0287/11, one of the decisions relied on by the appellant, and argued that an explicit limitation of the ratio for the totality of phosphate esters would be necessary in claim 1 of the main request to limit the scope of this claim to the scope of claim 1 of the patent as granted. Absent such an explicit limitation, the considerations of T 2017/07 applied, as correctly held by the opposition division.

3.2.3 In decision T 287/11, the double-limitation argument was rejected for the main request. An auxiliary request

explicitly defining the limitation on the generic ingredient was held to comply with the provisions of Article 123(3) EPC.

3.2.4 Moreover, the amended claim underlying decision T 2017/07 - the decision referred to by the opposition division - also had a cascade-like definition of the respective ingredient similar to that in the case at hand: "*the content of the alkylene carbonate is 0.5-50% per weight, the alkylene carbonate being propylene carbonate*" (see point 2.4 of the Reasons).

3.2.5 Thus, the appellant's argument that a cascade-like definition alone automatically leads to a double limitation and to a claim not extending the scope of protection is not in accordance with the prevailing view in the case law of the Boards and is, in the absence of any further insights given by the appellant, unconvincing.

3.3 Claim 1 of the main request corresponding to a claim as granted

3.3.1 The appellant further argued that claim 1 of the main request was a combination of claims 1 and 6 as granted and corresponded thus literally to claim 6 of the patent as granted. There could thus not be any extension of scope of protection of claim 1 of the main request compared to the claims of the patent as granted.

3.3.2 The respondent, throughout the appeal proceedings, never contested that claim 1 of the main request is identical to claim 6 of the patent as granted.

3.3.3 In the Board's view, an amendment of the patent in the form of a restriction to a granted claim cannot extend the protection conferred by the patent. Whatever is protected (or not) by the amended patent was already protected (or not) by the patent in its granted form.

3.3.4 Since in the case at hand it was uncontested that claim 1 of the main request is identical to claim 6 of the granted patent, the amended patent in the form of the main request cannot extend the protection compared to the granted patent.

The same holds for claim 3 of the main request, which was likewise objected to by the respondent during oral proceedings under Article 123(3) EPC. Since claim 3 of the main request is dependent on claim 1 of the main request, which does not extend the protection of the patent as granted, dependent claim 3, being narrower in scope, likewise cannot extend the protection conferred by the patent as granted.

3.3.5 The Board stresses that in both decisions referred to by the opposition division and the respondent, namely T 2017/07 and T 0287/11, the disputed claims did not correspond to any granted claim but contained features taken from the description. In these cases, the question of whether an amended claim corresponded to a granted claim did not arise.

3.4 Thus, the claims of the appellant's main request are not the result of amendments that extend the protection conferred by the granted patent.

4. Extension beyond the content of the application as filed (Article 123(2) EPC)

4.1 Claim 1 of the appellant's main request results from a combination of original claims 1, 4, 7 and 8. Furthermore, the polyglycerol fatty acid esters (II) defined in original claim 8 have been restricted to monoesters, as disclosed on page 4 of the description of the application as filed, first sentence of the second paragraph. This definition implies that only one of R_4, R_5 and R_6 can be a stearoyl or isostearoyl group while the other two are hydrogen, implying monoesters as defined in the claim.

For the discussion of the respondent's arguments below, the disclosure on page 4 as filed is, *inter alia,* relevant. On this page, formula (II) of claim 1 of the main request is disclosed in the first paragraph. In the first sentence of the second paragraph, the following is stated:

"It is further preferred when the polyglyceryl fatty ester surfactants of formula (II) are mono- or diesters of ether stearic acid or isostearic acid."

4.2 In the respondent's view, claim 1 of the main request extends beyond the application as filed.

4.2.1 The respondent submitted that claim 1 of the main request was the result of a selection from two lists, namely the selection of a monoester and the selection of stearic acid or isostearic acid.

However, the first sentence of the second paragraph on page 4 as filed literally discloses that the compounds (II) may be mono- or diesters of stearic or isostearic

acid. The selection of monoesters (or the deletion of diesters) from this disclosure is not a selection from two lists but from one, if a selection at all.

4.2.2 The respondent further submitted that starting from the first sentence of the second paragraph on page 4 as filed, claim 1 of the main request amounts to an intermediate generalisation since the definition of formula (II) on page 4 as filed did not define that two of R_4, R_5 and R_6 should be hydrogen atoms.

However, this argument is unconvincing. The definition of the R groups in formula (II) only allows for ester groups or hydrogen. The fact that two of R_4, R_5 and R_6 in formula (II) of the first paragraph of page 4 as filed are hydrogen atoms follows automatically from the statement in the first sentence of the second paragraph of page 4 as filed that the compounds are monoesters.

4.2.3 During the oral proceedings, the respondent further argued that the ratio of the surfactants, 8:1 to 1:1, was not disclosed for the combination of the monoesters (II) as defined in claim 1 of the main request and specifically potassium cetyl phosphate but only for compounds (II) and phosphates in general. The same applied to the amounts of surfactants defined in claims 2 and 3 of the main request. However, this ratio is disclosed in original claim 4 and on page 2 of the description of the application as filed in a general way. The disclosure of the ratio in the first full paragraph of page 2 even explicitly states that it applies to "*all embodiments of the invention*". Thus, the combination of the ratio and the surfactants in claim 1 of the main request does not add any originally undisclosed subject-matter. The same holds for the amounts of surfactants in claims 2 and 3 of the main

request. These are disclosed in claims 2 and 3 as filed as well as on page 2 of the description as filed in a general way, without any restriction, and it is thus clear to the skilled reader that they apply to all surfactants disclosed in the application as filed.

4.3 In conclusion, claims 1 to 3 of the main request do not contain subject-matter extending beyond the application as filed. No objection was raised against use claim 9. Thus, the appellant's main request complies with the provisions of Article 123(2) EPC.

5. Novelty (Article 54 EPC)

5.1 Novelty of claim 1 of the main request was not objected to.

5.2 The respondent objected to use claim 9 of the main request for lack of novelty over D1.

D1 deals with phosphate alkyl esters and their use as emulsifiers in cosmetic and pharmaceutical emulsions (see paragraph [0001]). It was undisputed that D1 discloses, on pages 6 and 7, two example compositions, O/W cream (II) and O/W skin lotion (III), which contain a polyglyceryl stearate and an alkyl phosphate ester according to claim 9 of the main request.

5.3 D1 does not disclose that the phosphate ester reduces the viscosity of the O/W emulsion containing the polyglyceryl stearate. The only reference to viscosity in D1 is in paragraph [0016], which mentions that the viscosity of the compositions may be regulated by the oil and water content.

5.4 The respondent argued that the effect underlying the claimed use, the reduction of viscosity, was already achieved in D1. Should the Board recognise that the examples in the patent and the tests in D6 establish such an effect over the whole of the claim, this effect was likewise present in D1. In the respondent's view, an effect inherently present in the prior art cannot confer novelty on a use claim based on that effect.

5.5 The Board disagrees.

5.5.1 The novelty of non-medical use claims is assessed in accordance with the criteria established in G2/88 and G6/88.

5.5.2 Headnote (III) of G 2/88 reads:

"*A claim to the use of a known compound for a particular purpose, which is based on a technical effect which is described in the patent, should be interpreted as including that technical effect as a functional technical feature, and is accordingly not open to objection under Article 54(1) EPC provided that such technical feature has not previously been made available to the public*."

The important question is thus not whether the technical feature, in this case, the reduction of viscosity of an O/W emulsion containing polyglyceryl stearates as emulsifiers, is inherently present in the compositions of D1, but whether such an effect *has been made available to the public*, i.e. disclosed in a direct and unambiguous way. This is not the case here.

5.5.3 As highlighted by the appellant, G 2/88 contains a detailed reasoning on the inherence argument in points

10.1 to 10.3. In accordance with G 2/88, if the technical feature, i.e. the effect the use claim is based on, has not been disclosed to the public, the claimed invention is novel, even if the technical effect may have inherently been present in the prior art.

5.5.4 Since in the current case the effect the use is based on is not disclosed in D1, neither explicitly nor in any other way, the use claim is novel under the criteria established in G 2/88.

5.6 The respondent also argued that the claim was not novel if the effect underlying the use claim was not established over the whole scope of the claim. The respondent argued in its submission on inventive step that the data in the patent and the data in D6 were insufficient to conclude that a reduction of viscosity might be obtained over the whole scope of the claim.

5.7 This objection is also not convincing.

5.7.1 The patent shows in its only example, in particular in Table 1, that the addition of potassium cetyl phosphate leads to a reduction of the viscosity of two O/W emulsions containing different polyglyceryl stearates, the surfactants being present at the weight ratio as defined in the claim. D6 contains further such data.

5.7.2 No counter experiments are on file. No data on file show that the addition of a phosphate ester surfactant would not reduce the viscosity of an O/W emulsion containing a polyglyceryl stearate as an emulsifier, at the weight ratio defined in the claim. The fact that some experiments in D6, as highlighted by the respondent, show a viscosity reduction also when the

emulsifier is polyglyceryl di-stearates, which are not claimed, or polyglyceryl stearates outside the weight ratio defined in the claims, does not change the fact that such an effect has been shown to exist within the scope of the claim.

5.7.3 Thus, irrespective of whether novelty of the use claim could be compromised by a failure to achieve the effect underlying the claimed use over the whole scope of the claim, such a situation has not been established in the case at hand.

5.8 The subject-matter defined in the claims of the appellant's main request is novel over the cited documents.

6. Inventive step of use claim 9 of the main request (Article 56 EPC)

6.1 In the decision under appeal, the opposition division considered D3 to be the document representing the closest state of the art and concluded that the claimed use involved an inventive step. The opposition division also stated that even if D1 was taken as the document representing the closest state of the art, inventive step would be present (see point 18.5.4 of the reasoning).

6.2 The respondent argued that the claimed use was obvious when starting from D1 as well as when starting from D3 as documents representing the closest state of the art.

6.3 The patent seeks to reduce the viscosity of O/W emulsions containing polyglyceryl fatty esters as

emulsifiers (see paragraph [0002]). Neither D1 nor D3 is directed to this problem.

6.4 Starting from D1

6.4.1 D1 presents alkyl phosphate esters as emulsifiers and stresses their advantageous properties in cosmetic emulsions, namely their ability to reduce surface tension, leading to high stability over a wide temperature range and robustness against electrolytes and acids. Two example compositions of D1 contain, among other components, octyldecyl phosphate and polyglyceryl stearates.

6.4.2 A skilled person, having in mind the problem as presented in the patent, i.e. to reduce the viscosity of emulsions containing polyglyceryl fatty esters as emulsifiers, would have had no reason to take this document as a starting point. The document does not prominently deal with polyglyceryl fatty esters, nor with the viscosity of emulsions. The Board considers the opposition division's choice of D3 as the document representing the closest prior art to be well founded (see point 18.5.3 of the decision under appeal). However, for the sake of argument, D1 is nevertheless taken as an alternative starting point in the current decision.

6.4.3 As set out above under novelty, claim 9 differs from the disclosure of D1 in the use of the phosphates for the reduction of viscosity of polyglyceryl stearate-containing emulsions.

6.4.4 The respondent argued that the claimed effect of reducing the viscosity might not be achieved over the scope of the claim, which would not only lead to a lack

of novelty under Article 54 EPC, and to a lack of disclosure under Article 83 EPC, but also to a lack of inventive step under Article 56 EPC.

However, as set out above under novelty, the Board notes that the respondent has not pointed to any experimental data in which the effect defined in the claim, i.e. the viscosity reduction of an O/W emulsion containing polyglyceryl fatty acid surfactants by adding phosphate esters, is not obtained. Thus, this objection is unfounded, no matter whether it is raised under novelty (see point 6.7 above), inventive step or lack of sufficient disclosure; the latter not being part of the appeal proceedings.

As a consequence, the effect of reducing the viscosity can be taken into account when defining the objective technical problem.

6.4.5 Thus, starting from D1, the objective technical problem to be solved may still be seen as the problem indicated in the patent (see paragraphs [0002] and [0005]), i.e. how to reduce the viscosity of polyglyceryl fatty ester-containing emulsions without compromising storage stability.

6.4.6 The claimed solution is to use phosphate ester surfactants for this purpose in a specific weight ratio.

6.4.7 The respondent did not point to any disclosure in D1 or any other document on file from which a skilled person could learn that phosphate ester surfactants were suitable for reducing the viscosity of emulsions. The respondent argued that the compositions of D2 and D3 were also of low viscosity and referred to paragraph

[0048] of D3 as well as to paragraph [0030] and the examples of D2. The respondent also argued that the effect had already been achieved in D1.

However, whether the effect may have been inherently present in D1 is irrelevant. A skilled person needs some disclosure in the prior art that can direct them to the solution of the technical problem, i.e. to use phosphate ester surfactants to reduce the viscosity of O/W emulsions containing polyglyceryl fatty esters as emulsifiers. No such disclosure is apparent. D2 and D3 may disclose low-viscosity compositions, but they do not disclose that these compositions would be more viscous in the absence of the phosphate esters. An inherent, i.e. hidden, effect cannot lead a skilled person to the solution of a technical problem.

6.5 Starting from D3

6.5.1 D3 is directed to emulsions containing polyglyceryl-10-stearate as an emulsifier (see paragraph [0001]). D3 discloses such emulsions as being particularly stable also when being of low viscosity (see paragraphs [0019] to [0031]). D3 is thus a much more realistic starting point than D1 for a skilled person having the technical problem of the patent in mind.

6.5.2 D3 does not disclose any composition containing polyglyceryl fatty acid esters together with phosphate surfactants. Thus, the subject-matter of claim 9 of the main request differs from the disclosure of D3 in the use of phosphate ester surfactants at a specific weight ratio for the reduction of the viscosity of polyglyceryl stearate-containing emulsions.

6.5.3 Also starting from D3, the objective technical problem to be solved was to reduce the viscosity of polyglyceryl stearate-containing emulsions.

6.5.4 The claimed solution is to use phosphate ester surfactants for this purpose in a specific weight ratio.

6.5.5 As in the assessment starting from D1, the respondent did not point to any disclosure in D3 or anywhere else from which a skilled person could learn that phosphate ester surfactants were suitable to further reduce the viscosity of these emulsions.

6.5.6 The respondent pointed to the comparative experiments in Table 2 of D3. These experiments concern two compositions, one containing polyglyceryl-10-stearate as an emulsifier (A), the other one an alkyl phosphate (B). The results in Tables 3 and 4 showed that if both systems have a similar viscosity, composition (A) leaves less residues in a flask upon it being emptied than composition (B).

However, no conclusions on viscosity-reducing properties of phosphate esters can be drawn from this experiment.

The respondent further pointed to paragraph [0074] of D3, where a long list of possible co-surfactants for the emulsions is disclosed, should the presence of a co-surfactant be desired. However, there is no specific information on why these co-surfactants should be added, let alone any information on a viscosity-reducing effect.

The respondent's further arguments centred around whether the data on file might support a viscosity-reducing effect of the phosphate esters. However, these arguments are unconvincing, as outlined above.

6.6 Thus, use claim 9 defines inventive subject-matter and complies with Article 56 EPC.

7. Inventive step of composition claim 1 (Article 56 EPC)

7.1 Inventive step of the composition claim is not addressed in the decision under appeal since the composition claim was considered to contravene Article 123(3) EPC.

7.2 In the Board's view, inventive step of the composition claim must be assessed essentially in the same way as for inventive step of the use claim. The objective technical problem to be solved, its solution and the relevant disclosures in the prior art are the same, as set out below.

7.3 Closest prior art

7.3.1 The patent seeks to reduce the viscosity of O/W emulsions containing polyglyceryl fatty esters as emulsifiers (see paragraph [0002]). Neither D1 nor D3 is directed to this problem.

7.3.2 D1 presents alkyl phosphate esters as emulsifiers and stresses their advantageous properties in cosmetic emulsions, namely their ability to reduce surface tension, leading to high stability over a wide temperature range and robustness against electrolytes and acids. Two example compositions of D1 contain,

among other components, octyldecyl phosphate and polyglyceryl stearates.

7.3.3 D3 is directed to emulsions containing polyglyceryl-10-stearate as an emulsifier (see paragraph [0001]). D3 discloses such emulsions as being particularly stable also when having a low viscosity (see paragraphs [0019] to [0031]).

7.3.4 A skilled person trying to tackle the technical problem the patent is dealing with, i.e. to achieve a reduction of viscosity of emulsions containing polyglyceryl fatty esters as an emulsifier, while maintaining their stability (see paragraph [0005]), would not have had any good reason to start from D1. D1 does not prominently deal with polyglyceryl fatty esters, nor with the viscosity of emulsions. Instead, a skilled person would have started from D3 since D3 deals with emulsions whose viscosity is to be reduced. However, for the sake of argument, D1 is also taken as an alternative starting point for the problem-solution approach in this decision.

7.4 Starting from D3

7.4.1 The compositions defined in claim 1 of the main request differ from the compositions disclosed in D3 at least in the presence of potassium cetyl phosphate.

7.4.2 The fact that the presence of potassium cetyl phosphate reduces the viscosity of emulsions containing polyglyceryl stearate as a surfactant, without compromising the long-term stability, is shown in Table 1 of the patent and in D6.

7.4.3 Thus, starting from D3, the objective technical problem to be solved was to reduce the viscosity of polyglyceryl stearate-containing emulsions.

7.4.4 This problem is solved by the addition of potassium cetyl phosphate. It has been discussed in detail for novelty and inventive step of the use claim that the technical problem has indeed been solved.

7.4.5 For the same reasons as set out in point 6.5 above, this solution of the objective technical problem was not obvious to a skilled person.

7.5 Starting from D1

7.5.1 The compositions defined in claim 1 of the main request differ from the compositions disclosed in D1, in particular from compositions (II) and (III), at least in the presence of potassium cetyl phosphate. These compositions contain octyldecyl phosphate. The general disclosure refers to C12-C22 alkyl but does not specifically mention cetyl phosphate either (see paragraph [0008]). It is shown in Table 1 of the patent and in D6 that the presence of potassium cetyl phosphate reduces the viscosity of emulsions containing polyglyceryl stearate as the surfactant without compromising the long-term stability.

7.5.2 Thus, also starting from D1, the objective technical problem to be solved was the one indicated in the patent, i.e. to reduce the viscosity of polyglyceryl stearate-containing emulsions.

7.5.3 There is no disclosure in D1 that the presence of the octyldecyl phosphate reduces the viscosity of the corresponding polyglyceryl stearate-containing

emulsions. Neither is there any such disclosure in the other cited documents (see point 6.4.7 above). There was no indication for the skilled person that the solution of the technical problem could be achieved by the addition of potassium cetyl phosphate to emulsions containing polyglyceryl stearate as a surfactant.

7.5.4 The respondent submitted that there was no direct comparison with the compositions exemplified in D1. These composition already had a reduced viscosity. Thus, it could not be concluded that, compared to the compositions obtained in D1, any technical effect had been achieved at all. For this reason, the objective problem to be solved starting from D1 was less ambitious, namely the provision of alternative low-viscosity compositions.

7.5.5 However, a reformulation of the technical problem based on the disclosure of the closest prior art is justified only if the problem was already solved in that prior art. In the current case, there is no disclosure in D1 that this is the case, i.e. that a viscosity reduction of emulsions stabilised by glyceryl stearate as an emulsifier may be achieved by the presence of phosphate co-surfactants. The assertion that the compositions of D1 already have a "*reduced viscosity*", as submitted by the respondent, could at most be inferred from the teaching of the patent itself, i.e. with the benefit of hindsight.

7.5.6 The respondent furthermore submitted that there was no proof on file that the weight ratio between the phosphate and the polyglyceryl stearate defined in the claim played any role in the viscosity reduction of the emulsions. However, since the above analysis does not

rely on this weight ratio, this argument does not need to be considered.

7.5.7 Thus, also when starting from D1, the objective technical problem defined above has been solved in a non-obvious way.

8. Composition claim 1 of the main request also defines inventive subject-matter and complies with Article 56 EPC.

9. To summarise, the patent in amended form based on the main request in appeal proceedings and the invention to which it relates meet the relevant requirements of the Convention, Article 101(3)(a) EPC. The appellant's main request is thus allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division with the order to maintain the patent in amended form on the basis of the main request, filed as auxiliary request 1 with the letter dated 14 October 2025, and a description possibly to be adapted thereto.

The Registrar: The Chairman:

U. Bultmann M. O. Müller

Decision electronically authenticated