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Datasheet for the decision of 20 January 2026

Case Number: T 1899/23 - 3.3.02

Application Number: 18189655.6

Publication Number: 3425035

IPC: C11D7/60, C11D7/26, C11D17/08, C11D1/00, C11D1/72, C11D1/825, C11D3/00, C11D3/20, C11D3/48, C11D3/37, C11D3/32, C11D11/00, C11D1/722

Language of the proceedings: EN

Title of invention:
FAST DRYING AND FAST DRAINING RINSE AID

Patent Proprietor:
Ecolab USA Inc.

Opponent:
Henkel AG & Co. KGaA

Headword:
Ecolab/Rinse Aid

Relevant legal provisions:
EPC Art. 100(c), 123(2), 113(1), 112a(2), 21(4)
EPC R. 106, 12b
RPBA 2020 Art. 1

Keyword:
Amendments - extension beyond the content of the application as filed (yes)
Right to be heard - violation (no)
Competence of the panel
Right to have the case decided by the lawfully designated judge
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:
T 0954/98, T 0281/03, T 1241/03, J 0015/04, R 0004/08, R 0008/08, R 0021/22, R 0006/11, R 0010/09, G 0001/21, G 0001/05, G 0002/08, G 0003/08, R 0015/11

Catchword:

1. Objection under Rule 106 EPC as regards the composition of the board's panel (see point 2 of the reasons).

2. Analogous application of Article 8 of the Business Distribution Scheme (see points 2.3.3 - 2.3.5 of the reasons).

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Case Number: T 1899/23 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 20 January 2026

Appellant: (Patent Proprietor)	Ecolab USA Inc. 1 Ecolab Place St. Paul, MN 55102 (US)
Representative:	Godemeyer Blum Lenze Patentanwälte Partnerschaft mbB - werkpatent An den Gärten 7 51491 Overath (DE)
Respondent: (Opponent)	Henkel AG & Co. KGaA Henkelstrasse 67 40589 Düsseldorf (DE)
Representative:	Henkel AG & Co. KGaA CLI / Patente 40191 Düsseldorf (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 11 October 2023 revoking European patent No. 3425035 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	R. Elsässer
Members:	S. Arrojo
	J. Hoppe

Summary of Facts and Submissions

I. An appeal was filed by the patent proprietor (hereinafter 'the appellant') against the opposition division's decision to revoke European patent No. 3 425 035 on the grounds of opposition pursuant to Article 100(c) EPC in conjunction with Article 123(2) EPC.

II. In the statement of grounds of appeal, the appellant requested that the decision under appeal be set aside, that the claims as granted be found to comply with Article 123(2) EPC, and that the case be remitted to the opposition division for further prosecution on the basis of the claims as granted or, in the alternative, on the basis of auxiliary requests 1 and 2 filed with the statement of grounds of appeal, corresponding to auxiliary requests 1 and 2 submitted during the first-instance proceedings. Further arguments were submitted on 25 September 2024. The appellant's arguments are summarized in point 4.4 of the Reasons below.

III. The subject-matter of claim 1 as granted **(main request)** reads as follows:

"1. A solid rinse aid composition comprising:

(a) 1 to 10 wt% a sheeting agent, wherein the sheeting agent comprises at least one compound having the structure represented by formula I: $R-O-(CH_2CH_2O)_n-H$ wherein R is a (C_1-C_{12}) alkyl group, and n is an integer in the range of 20 to 100;
(b) 1 to 10 wt% of a defoaming agent;
(c) 1 to 25 wt% an association disruption agent of an alcohol alkoxylate EO/PO surfactant;

(d) 0.1 to 5.0 wt% a chelating/sequestering agent; and (e) up to 75 wt% of an anti-microbial."

- Claim 1 according to **auxiliary request 1** corresponds to that of the main request, with the following amendment: *" ... (e) ~~up to~~ 0.01 to 75 wt% of anti-microbial."*

- Claim 1 according to **auxiliary request 2** corresponds to that of the main request, with the following amendment: *" ... (e) ~~up to~~ 1.0 to 20 ~~75~~ wt% of anti-microbial."*

IV. In its reply to the appeal, the opponent (hereinafter 'the respondent') requested that the appeal be dismissed and that revocation of the patent be confirmed (see arguments in point 4.5 of the Reasons below). As an auxiliary measure, the respondent requested that the case be remitted to the opposition division for further prosecution.

V. In a communication pursuant to Article 15(1) RPBA dated 10 June 2025, the Board, composed of three members of Board 3.3.06, expressed its preliminary opinion that the ground of opposition under Article 100(c) EPC in conjunction with Article 123(2) EPC prejudiced maintenance of the patent as granted, and that auxiliary requests 1 and 2 were likewise not considered to comply with Article 123(2) EPC.

VI. On 1 September 2025, a new business distribution scheme (BDS) was adopted, according to which the IPC class of the patent underlying the decision under appeal (C11D) was to be allocated to Board 3.3.02 as of 1 December 2025 and the allocation of the technical and legal members of Board 3.3.06 terminated after 30

November 2025. In view of the retirement of the Chair of Board 3.3.06, no Chair or members were assigned to Board 3.3.06 with effect from 1 December 2025.

VII. On 9 September 2025, the appellant requested that the case be transferred to Board 3.3.02 based on the allocation of IPC class C11D to this Board pursuant to the new business distribution scheme.

VIII. On 4 November 2025, the case was transferred to Board 3.3.02 with effect from 1 December 2025 and the parties were informed accordingly. The composition of the Board in the present case remained unchanged.

IX. In a submission dated 13 January 2026, the appellant raised an objection under Rule 106 EPC and requested "to cancel the oral proceedings and to hold oral proceedings with the Board 3.3.02 in a composition of the Board 3.3.02 in a composition meeting the requirements of the business distribution scheme dated September 1, 2025". It argued that the composition of the panel with members of previous Board 3.3.06 contravened the BDS of 1 September 2025 [27 June 2025] as none of the members belonged to Board 3.3.02, i.e. the Board the case was allocated to with effect from 1 December 2025. The members needed to be replaced. This was also supported by Article 8(1) RPBA. The Chair of Board 3.3.02 should determine the composition of the Board. Since the composition ignored the BDS, there was a fundamental violation of the right to be heard.

X. In a communication dated 15 January 2026, the Chairman of Board 3.3.02 confirmed that the composition of the Board for the present case remained unchanged in view of Article 8 of the business distribution scheme of the Technical Boards of Appeal for 2026.

XI. Oral proceedings took place on 20 January 2026 with the panel being composed of the previous members of Board 3.3.06, i.e. the same panel that was allocated to the case when the summons were sent and that had issued the Board's preliminary opinion in the communication under Article 15(1) RPBA.

XII. At the oral proceedings, the appellant argued that, in view of the current composition of the panel, two principles had been violated, namely the right to have the case considered by the lawful judge based on the BDS and the right to be heard. This constituted a severe defect pursuant to Article 112a EPC. In G 2/08, the right to have a case considered by the judge appointed by law had been found to apply also to proceedings before the Boards of Appeal. Therefore, the Boards had to be composed based on the BDS and not in an arbitrary manner. In the present case, the BDS was clearly not observed, meaning that the right to have fair proceedings with judges assigned by law was fundamentally violated. Even if Article 8 BDS could, in principle, be applied in an analogous manner, this would not apply to the present case after the transfer of the case to Board 3.3.02, i.e. with effect from 1 December 2025, because there was no transitional situation. Rather, only the provisions of the new BDS were relevant. With this transfer, Board 3.3.02 became responsible for the case and the panel needed to be composed of the members and the Chair or Vice Chair of this Board pursuant to Article 1(3) RPBA and Article 3(1) BDS. Accordingly, the former members of Board 3.3.06 needed to be replaced.

XIII. The respondent considered the composition of the panel to be in accordance with the BDS based on an analogous

application of Article 8 BDS. As there was no explicit provision covering the situation of the present case, applying Article 8 BDS in analogous manner was the most appropriate way to fill this gap.

XIV. Over the course of the oral proceedings, the appellant withdrew its request to cancel oral proceedings and twice changed its requests with respect to the composition of the Board. At the end of the oral proceedings, the parties confirmed that the decision should be based on the following requests.

The appellant (patent proprietor) requested that the case be continued with a panel composed according to the BDS of 1 September 2025, namely of members of Board 3.3.02 and its Chair or Vice Chair,
or, as an auxiliary measure, that the decision under appeal be set aside,
that the claims as granted be deemed allowable under Article 123(2) EPC, and
that the case be remitted to the opposition division for further prosecution on the basis of the claims as granted, or
that the claims of one of auxiliary requests 1 or 2, filed with the grounds of appeal, be deemed allowable under Article 123(2) EPC and that the case then be remitted to the opposition division for further prosecution.

The respondent (opponent) requested that the appeal be dismissed
or, as an auxiliary measure,
that the case be remitted to the opposition division for further prosecution if the claims of one of the requests were deemed allowable under Article 123(2) EPC.

Reasons for the Decision

1. Appellant's request to continue the case with members of Board 3.3.02 and their Chair/Vice Chair

1.1 The appellant's request "that the case be continued with a panel composed according to the BDS of 1 September 2025, namely of members of Board 3.3.02 and its Chair or Vice Chair" is not admissible.

1.2 The appellant did not challenge the correctness of the initial composition of the panel as designated by the Chairman of Board 3.3.06, nor did it challenge the transfer of the case from Board 3.3.06 to Board 3.3.02. Rather, it contended that after the case had been transferred, the composition of the panel of the present case, with members who were not allocated to Board 3.3.02, was not in accordance with the business distribution scheme of 27 June 2025 (hereafter: BDS of 27 June 2025).

1.3 The competence of the panel of a Technical Board of Appeal to assess whether its composition was correct pursuant to the Rules of Procedure for the Boards of Appeal and the relevant business distribution scheme was acknowledged in decision T 281/03 (see Reasons 1.3.1).

1.4 However, in G 1/21, the Enlarged Board held that it was not competent to change its composition or to declare itself to lack competence to deal with the case because of an allegedly incorrect application of the business distribution scheme (G 1/21 – 16.07.2021, Reasons 3; G 1/21 - 28.05.2021, Reasons 35). The Enlarged Board had

no competence to replace one or more of its members, other than by the mechanism of Article 24 EPC (G 1/21 – 16.07.2021, Reasons 3). If the composition of the Enlarged Board needed to be corrected, it would fall to the Chairman of the Enlarged Board to make the correction (G 1/21 – 16.07.2021, Reasons 3). The composition of a panel for dealing with a particular case was determined by the Chair of the Enlarged Board (see Article 2(2) RPEBA) and changes to the composition of the panel were regulated in Article 2 of the business distribution scheme of the Enlarged Board. The provisions of this article did not indicate a competence for a panel as composed by the Chair to change its own composition (G 1/21 - 28.05.2021, Reasons 35). In view of this, an incorrect application of the provisions of the business distribution scheme should be corrected by the Chair of the Enlarged Board and not by the panel as such (G 1/21 - 28.05.2021, Reasons 36; G 1/21 – 16.07.2021, Reasons 3).

1.5 The conclusions of the Enlarged Board of Appeal as cited above were set out with respect to the composition of the Enlarged Board of Appeal. However, since the respective reasoning was not related to the specific aspects of the proceedings before the Enlarged Board of Appeal and its business distribution scheme, the conclusions are considered to be applicable also when the party requests to change the composition of the panel of a Technical Board of Appeal.

1.6 The Board wishes to stress that the appellant's final request was not to the effect that the Board declare itself to lack competence to deal with the case, but rather that the case be continued with members of Board 3.3.02. This implies that the panel would have to determine that members of Board 3.3.02 would have to

continue the assessment of this case. The panel has no competence to decide accordingly (see Article 1(3) RPBA and Article 3, 4 BDS). Hence, since the Chairman of Board 3.3.02 also did not meet the appellant's request to change the composition of the panel in this case but rather confirmed that its composition remained unchanged, there is no basis for continuing the case with members of Board 3.3.02 and its Chair or Vice Chair.

Accordingly, the panel in its current composition is not competent to decide that the case be continued with members of Board 3.3.02 and its Chair or Vice Chair as requested by the appellant.

1.7 This finding is not challenged by the appellant's reference to Article 8 RPBA, which merely addresses the consequences of a change in the Board's composition after oral proceedings, but does not deal with the replacement as such.

1.8 Therefore, the appellant's request is rejected as inadmissible.

However, as set out below (see point 2.3), with respect to the objection under Rule 106 EPC, the Board considers, in any event, that the composition of the panel for this case was in accordance with the applicable provisions of the relevant business distribution schemes for the Technical Boards of Appeal.

2. Objection under Rule 106 EPC

2.1 The appellant raised an objection under Rule 106 EPC. The appellant considered that a panel composition that

is not in accordance with the business distribution scheme violated the right to have the case considered by the lawfully designated judges, the right to have fair proceedings and the right to be heard. It held that these deficiencies were to be regarded as severe defects pursuant to Article 112a EPC.

The Board is not convinced by the appellant's arguments.

2.2 Prerequisites for an objection under Rule 106 EPC

The appellant's objection is based on Rule 106 EPC, which is a prerequisite for the admissibility of a petition for review under Article 112a EPC. According to the case law (see R 4/08, Reasons 2.1; R 8/08, Catchword), the reference in Rule 106 EPC to the specific procedural defects as set out in Article 112a(2)(a) to (d) EPC not only implies that the objection should be based on one of these grounds, but also that the party must explicitly indicate which of them is considered to apply.

While the party's interest in having the case considered and decided by the lawfully designated judges has been acknowledged also for proceedings at the Boards of Appeal (see G 1/21 - 16.07.2021, Reasons 4; G 1/05, Reasons 8; G 2/08, Reasons 3.1: "...the judge designated or appointed by law (Droit d'être jugé par son juge naturel; Recht auf den gesetzlichen Richter)"; G 3/08;, Reasons 2.5; T 954/98, Reasons 2.3; J 15/04, Reasons 12), this does not imply that this principle is also covered by the procedural defects as exhaustively enumerated in Article 112a(2) EPC. The defects set out in Article 112a(2)(a),(b) and (d) EPC at least do not encompass a violation of the right to

have the case decided by the lawfully designated judges in accordance with the business distribution scheme.

The appellant's objection with respect to the composition of the panel cannot be based on Article 112a(2)(a) EPC, as this provision explicitly concerns the allocation of members in breach of Article 24(1) or (4) EPC. The same applies to 112a(2)(b) EPC, as this provision refers to the appointment of a member to the Boards of Appeal as a whole and not to the allocation of a member to a particular Board (see R 21/22, Reasons 2, 3) or panel.

Moreover, the appellant's objection cannot be based on Article 112a(2)(d) EPC, since this exclusively covers the defects set out in Rule 104 EPC (R 6/11, Reasons 11.1; R 10/09, Reasons 2.5) which are not related to the right to be heard by lawfully designated judges.

Hence, there would only be a basis for an objection under Rule 106 EPC if an (allegedly) incorrect composition of the panel could be regarded as a fundamental violation of the right to be heard according to Articles 112a(2)(c) and 113(1) EPC.

However, for the purposes of the present case, there is no need to decide whether a fundamental defect in the composition of the responsible panel could indeed be regarded as a violation of the right to be heard under particular circumstances (e.g. if the defect were so severe that the composition was entirely arbitrary) and what consequences this might have for the continuation of the proceedings. This is because the parties' interest to be heard by the lawfully designated judges (and, accordingly, the right to have fair proceedings) is not affected in the present case. Under these

circumstances, the Board finds it appropriate to comment on the composition of the panel in this particular case.

2.3 As to the allowability of the objection under Rule 106 EPC

The composition of the panel is in accordance with the relevant provisions of the applicable business distribution schemes, the Rules of Procedure of the Boards of Appeal and the EPC.

2.3.1 According to Article 21(4)(a) EPC, a Board of Appeal shall consist of two technically qualified members and one legally qualified member, if the appeal lies against a decision of an opposition division consisting of three members.

According to Article 1(1) BDS of the Technical Boards of Appeal, appeals are assigned to specific Technical Boards according to the classification attributed to the application or the patent concerned. Pursuant to Article 2(1) BDS, the members of the Boards of Appeal are allocated to individual Technical Boards.

Article 1(3) RPBA and Article 3(1) BDS provide that the Chair of each Board of Appeal shall determine the composition of the Board responsible for deciding a particular case amongst the Board members. Moreover, the Chair shall designate itself or a technically or legally qualified member as Chair for the panel in the particular appeal. Article 3(2) BDS refers to the circumstances to be taken into account for determining the respective composition.

2.3.2 In accordance with Article 21(4)(a) EPC, the provisions of the respective BDS and the Rules of Procedure of the Technical Boards of Appeal as cited above, the former Chairman of Board 3.3.06 (at that time responsible for IPC class C11 pursuant to Article 1(1) BDS of 25 March 2025) had determined the composition of the panel for the present case on 21 May 2025 based on Article 1(3) RPBA and Article 3(1)(2) BDS of 25 March 2025 by designating members, one technically qualified member as Chair, another technically qualified member as rapporteur (Article 5(1) RPBA) and a legal member, from amongst the members that were at that point in time allocated to Board 3.3.06 (Article 2 BDS of 25 March 2025).

The determination made by the former Chairman of Board 3.3.06 was thus not arbitrary but based on the BDS which was in force at that time. Hence, the objective of the respective provisions of the BDS, namely to ensure that the case be considered and decided upon by judges designated objectively based on the applicable business distribution scheme, was fulfilled at that stage of the proceedings. This was not contested by the appellant.

2.3.3 With effect from 1 December 2025, the IPC class of the present case (C11D) was allocated to Board 3.3.02 according to Article 1(1) BDS of 27 June 2025.

Contrary to the appellant's argument, this amendment in the BDS of 27 June 2025 did not presuppose a new composition of the panel with the Chair and members allocated to Board 3.3.02. Rather, pursuant to Article 8 BDS of 27 June 2025 the composition of the panel had to remain unchanged.

(a) The wording of Article 8 BDS of 27 June 2025 is as follows:

> *"Cases in which before 1 January 2025 a communication has been sent or oral proceedings have been appointed shall not be affected by this business distribution scheme, nor shall those cases individually allocated in transitional provisions of previous business distribution schemes. This provision applies mutatis mutandis if the business distribution scheme is amended during the working year."*

A respective Article 8 can also be found in the other versions of the BDS for 2025 and - albeit with a different date - also in the BDS for 2026.

(b) Since both, the Board's communication under Rule 15(1) RPBA and the summons to oral proceedings had already been issued before the new business distribution scheme of the Technical Boards of Appeal of 27 June 2025 entered into force, the composition of the panel as set out in the communication of 21 May 2025 had to be maintained pursuant to Article 8 BDS.

(c) The appointment of oral proceedings and the dispatch of a communication under Article 15(1) RPBA are usually an indication that the legal assessment of the specific case has started. Article 8 BDS serves to ensure that the Board and the composition of the panel, which was determined objectively on the basis of the BDS before the decision-making process started, remains unaffected by subsequent amendments in the BDS. This ensures

that there can be no interference in the decision-making process due to changes in the responsibility for a specific case triggered by amendments to the BDS. It also ensures that at this stage, the designated judges can only be replaced pursuant to the specific provisions as set out in the BDS, the Rules of Procedure of the Boards of Appeal or Article 24(4) EPC. This also enhances efficiency by preventing the effort and working time that has already been invested by the designated panel to prepare the board's communication being wasted. This supports judicial efficiency, which also constitutes an essential element of the right to have fair proceedings (see J 15/04, Reasons 7).

(d) Accordingly, based on Article 8 BDS, the fact that the IPC class of the present case (C11D) was allocated to Board 3.3.02 with effect from 1 December 2025, i.e. after oral proceedings were appointed and a communication under Article 15(1) RPBA was sent, was in itself incapable of depriving Board 3.3.06 and the designated panel of their responsibility to assess and decide the case.

(e) Hence, if the members of the panel had still been allocated to Board 3.3.06, it would have been perfectly clear from a *direct* application of Article 8 BDS that the amendments to the BDS would not affect the responsibility of the Board and the composition of the panel.

2.3.4 However, the peculiarity of the present case is that all the members of Board 3.3.06 were allocated to other Boards with effect from 1 December 2025 and the Chairman of Board 3.3.06 retired and, as a result, Board 3.3.06 remained in the BDS as an empty shell and

became *de facto* ineffective. For this reason, the case did not remain with Board 3.3.06. Rather, the previous Chair of Board 3.3.06 transferred the remaining cases of Board 3.3.06, including this case, to the Boards to which they had been allocated with effect from 1 December 2025, pursuant to Article 1(1) of the BDS of 27 June 2025.

(a) The BDS does not define the measures to be taken if a Board loses its Chair and all its members and, for practical purposes, ceases to exist.

As no provision in the BDS explicitly covers this specific constellation, the gap needs to be filled with an analogous application of the provisions in the BDS taking into account their suitability to fill the legal loophole and the applicability of their specific purpose to providing an adequate solution in line with the objectives of the respective business distribution schemes.

In this respect, the following aspects need to be taken into account.

Rule 12b(4) EPC and Article 1(1) RPBA stipulate that the Presidium shall allocate the duties to the Boards and designate the members of the various Boards *before* the beginning of the working year. Adopting the business distribution scheme in advance of the working year serves to ensure the principle of having the case decided by lawfully and objectively designated judges (T 954/98, Reasons 2.3) and ensures that the decision making process is not influenced by the selection of judges for a particular case. Therefore, the business distribution scheme is an important

element of an independent, reliable and efficient judicial system (R 15/11, Reasons 9). Any change in a Board's composition without good reason would be contrary to the evident purpose of the BDS and thus also detrimental to the public's confidence in the judicial character of appeal proceedings (R 15/11, Reasons 9). To ensure that this important objective is also safeguarded for ongoing changes during the working year, Article 8 BDS provides that the responsibility of the Board and/or the panel shall not be affected if the business distribution scheme is changed at the beginning or during the working year if a communication has already been sent or oral proceedings have been appointed.

(b) The Board considers that Article 8 BDS is to be applied analogously if the case is transferred to another Board because the previous Board effectively ceases to exist.

(c) Replacing the members of a panel that was originally composed on the basis of objective criteria set out in the business distribution scheme would run counter to the principle that responsibilities shall be determined before the assessment of a specific case begins. The objection aimed at preventing changes to the business distribution scheme that might call into question the competence of a Board or a panel that has already commenced assessment of a case applies equally in such a constellation. This principle also applies if the case is transferred to another Board due to the previous Board effectively ceasing to exist. In such a scenario, where the reason for the transfer is solely the lack of continuity of the previous Board, the objective of Article 8 BDS

- i.e. to prevent any amendment of the BDS potentially influencing the decision making-process and impairing effectiveness after assessment of the case has already started - takes precedence over the fact that the members of the panel do not belong to the Board to which the case has been transferred.

(d) As correctly pointed out by the appellant, the BDS does not generally provide for a case that is allocated or transferred to a specific Board to be dealt with by members allocated to other Boards.

However, it should be noted that such a concept is contemplated in Articles 3(3)(4) and 4(3)(4) BDS at least if required by the specific circumstances of the appeal. While the Board is aware that these provisions cannot be applied directly in the present case, they nonetheless show that the BDS supports the designation of members from other Boards under particular circumstances. The Board considers that the *de facto* cessation of existence of a Board after the summons to oral proceedings and dispatch of the communication under Article 15(1) RPBA can be regarded as specific circumstances that allow an analogous application of such a concept without infringing the essence of the BDS.

2.3.5 Hence, although the case was transferred to Board 3.3.02, the present panel, consisting of members not allocated to this Board, did not have to be replaced in the given constellation. Rather, the composition of the panel as set out previously could remain unchanged pursuant to an analogous application of Article 8 BDS,

which was also confirmed by the Chair of Board 3.3.02 with communication of 15 January 2026.

2.4 In view of the above, the current composition of the Board cannot be considered arbitrary, but rather is based on the provisions of the business distribution scheme of the Technical Boards of Appeal respectively in force at the relevant points in time. For this reason, the parties' rights to be heard by lawfully designated judges and to have fair proceedings are not impaired.

Hence, in view of the absence of any procedural defect with respect to the composition of the panel, the objection under Rule 106 EPC is dismissed.

3. The appellant did not wish to file an explicit request that the case be referred to the Enlarged Board of Appeal but rather encouraged the Board to consider such a referral.

The Board does not see any need for a referral under Article 112(1)(a) EPC, because the legal loophole in the business distribution scheme can be closed by the analogous application of Article 8 BDS, in line with established legal methodology. The appellant has also not demonstrated any non-uniform application of the principles relating to the designation of Boards and/or members. Accordingly, a referral is not required to ensure the uniform application of the law.

4. Main request - Article 100(c)/123(2) EPC

4.1 The subject-matter of claim 1 as granted is based on claim 1 as filed with the following amendments (highlighted by the Board).

'1. A solid rinse aid composition comprising:
(a) 1 to 10 wt% a sheeting agent, wherein the sheeting agent comprises at least one compound having the structure represented by formula I: R-O-$(CH_2CH_2O)_n$-H wherein R is a (C_1-C_{12}) alkyl group, and n is an integer in the range of 20 to 100;
(b) 1 to 10 wt% of a defoaming agent;
(c) 1 to 25 wt% an association disruption agent of an alcohol alkoxylate EO/PO surfactant~~, and/or a C12-C14 fatty alcohol EO/PO surfactant~~;
~~(e)~~ (d) 0.1 to 5.0 wt% a chelating/sequestering agent; and
~~(f)~~ (e) up to 75 wt% of an anti-microbial.'

4.2 For reasons of consistency with the decision under appeal and the written submissions, references to the description 'as filed' in fact relate to the description as published (EP 3 425 035 A1).

4.3 The opposition division concluded that the amendments extended the subject-matter of claim 1 beyond the content of the application as filed, *inter alia* for the following reasons.

4.3.1 Although the added concentration ranges for the components were explicitly disclosed in the description as filed (see paragraphs [0045], [0050], [0057], [0064] and [0073]), they related to separate embodiments. The subject-matter of claim 1 was thus based on selecting isolated features from different embodiments.

4.3.2 Furthermore, although the application as filed contemplated both aqueous liquid and solid rinse aid compositions (see paragraph [0080]), there was no indication that the concentration ranges now defined in

claim 1 were associated with a solid rinse aid composition. On the contrary, the 'aspects' section of the description as filed linked these concentration ranges to aqueous rinse aid compositions.

4.3.3 Exemplary compositions 1 and 2 could also not be considered to support the amendments because, unlike claim 1 at issue, they did not include an anti-microbial agent or a chelating agent.

4.3.4 Finally, the opposition division noted that not all of the ranges had been selected from convergent lists of alternatives. In particular, the defoamer component, which is specified in an amount of 1 to 10 wt%, could alternatively be present in amounts of 20 to 40 wt% or 40 to 90 wt% (see paragraph [0050]), and the chelating agent, which is specified in an amount of 0.1 to 5.0 wt%, could alternatively be present in amounts of less than 1 wt% or less than 0.5 wt% (see paragraph [0064]).

4.4 The appellant argued as follows.

4.4.1 The components were already defined in claim 1 as filed and no selection was required in order to amend the claim by specifying their concentrations. A skilled person would recognise that the most common practice and the preferred manner of amending a composition claim was to define the concentrations of its components.

4.4.2 The application as filed provided direct and unambiguous support for each of the ranges defined in claim 1 at issue, specifically as follows.

- The range of 1 to 10 wt% for the sheeting agent was the broadest alternative disclosed in paragraph [0045] as filed.

- The range of 1 to 10 wt% for the defoaming agent was disclosed in paragraph [0050] of the description as filed.

- The range of 1 to 25 wt% for the association disruption agent was the broadest alternative disclosed in paragraph [0057] of the description as filed.

- The range of 0.1 to 5.0 wt% for the chelating/ sequestering agent was the narrowest and therefore the most preferred alternative disclosed in paragraph [0064] of the description as filed.

- The range of up to 75 wt% for the antimicrobial agent was disclosed in paragraph [0073] of the description as filed.

4.4.3 Notwithstanding the disclosure of the ranges in different parts of the description, they were clearly part of the same embodiment. In this respect, decision T 1241/03 (Reasons 7) confirmed that where a claim defined a formulation comprising components in certain concentrations, there was no need to identify a literal basis for all the defined features in a single passage, provided that the claimed concentrations were disclosed in the application as filed.

4.4.4 Moreover, the ranges had been predominantly selected from lists of converging alternatives. Notwithstanding the disclosure of certain alternatives in which the defoamer could be present in other non-convergent concentrations, such as 20 to 50 wt% or 40 to 90 wt%

(see paragraph [0050]), a skilled person would clearly regard these embodiments as less preferred, since the compositions in paragraph [0013] and table 4 of the application as filed provided pointers to the preferability of the 1 to 10 wt% concentration range for the defoamer. Furthermore, the higher concentration alternatives would not be contemplated by the skilled person because the total amount of components would exceed 100 wt%.

4.4.5 Concerning the presence of low-concentration alternatives for the chelating/sequestering agent (see 'less than about 1 wt%' or 'less than about 0.5 wt%' in paragraph [0064]), the appellant noted that such embodiments would in any case fall within the defined most preferred range of 0.1 to 5.0 wt%.

4.4.6 The appellant also contested the argument that the compositions disclosed in paragraph [0013] and table 4 of the application as filed did not constitute valid pointers to the proposed solution. In particular, the appellant submitted that, although paragraph [0013] referred to an aqueous rinse composition, the term 'aqueous' merely required the presence of some water, which, as demonstrated by the compositions disclosed in D5, was compatible with solid rinse compositions.

4.4.7 As regards the absence of a chelating agent and an antimicrobial in the exemplary embodiments of table 4, the appellant argued that these compositions were only partially described and that the presence of such components was not excluded. Moreover, the exemplary compositions were relied upon solely as pointers to the concentrations of the components, i.e. as indications that the selected ranges represented preferred options.

Accordingly, there was no need for these embodiments to disclose all the features of claim 1.

4.4.8 In view of the above arguments, the appellant concluded that the cited passages in the description as filed provided a direct and unambiguous basis for the subject-matter of claim 1 as granted.

4.5 On the other hand, the respondent's arguments can be summarised as follows.

4.5.1 The expression 'up to 75 wt%' in point (e) of claim 1 encompassed the presence of 0 wt% of the substance in question (the anti-microbial), for which there was no support in the application as filed.

4.5.2 There was furthermore no basis in the application as filed for defining the concentration ranges in the context of a solid rinse aid composition.

4.6 The Board disagrees with the appellant for the following reasons.

4.6.1 Comments on cited decision T 1241/03

Decision T 1241/03 was cited by the appellant in support of the argument that amending a composition claim in terms of concentration ranges directly and unambiguously disclosed in the description as filed should be permissible under Article 123(2) EPC, irrespective of whether those ranges were disclosed in a single passage or in different parts of the description.

Reference was in particular made to Reasons 7, which indicates that:

'In the light of this disclosure in the application as originally filed the Board comes to the conclusion that claims to formulations comprising the compounds in question in specific concentrations do not need to have a literal basis in a single passage of the application as originally filed, as long as the exact concentrations and ranges claimed for the specific substances are disclosed as such in the original application.'

and that

' ... considering the general disclosure of the application as filed, the reference in a claim to a combination of compounds in specific concentrations, explicitly disclosed in different passages of the application, is not considered to be an amendment of the patent which extends beyond the content of the application as originally filed.'

Nevertheless, all that can be derived from the above passages is that, where a formulation is claimed, there is no need to identify a single passage containing all the claimed features, and that basing amendments on different parts of the description does not, in itself, imply that the requirements of Article 123(2) EPC are not met. The present Board sees no reason to disagree with these conclusions.

However, concluding that amendments drawn from different parts of the description do not necessarily infringe Article 123(2) EPC, even where no direct disclosure of all the features is provided in a single

passage, does not imply that such amendments should, as a general rule, be deemed allowable. The conclusion in this respect ultimately depends — as the appellant itself submitted — on whether the subject-matter of the claim is directly and unambiguously derivable, whether explicitly or implicitly, from the application as filed.

In the case at issue, and since it is not contested that the respective defined ranges are explicitly disclosed in the description as filed, the question to be answered is whether the combination of features in claim 1 at issue is directly and unambiguously derivable, be it explicitly or implicitly, from the content of the application as filed.

4.6.2 Multiple selections from equally-ranked aspects in the description as filed

Although claim 1 as filed provides a direct basis for a formulation comprising the components defined in claim 1 at issue, no clear basis has been identified for amending the claim by specifying the concentrations of these components.

Firstly, the dependent claims as filed define either the chemical nature of the components or the incorporation of further components into the formulation, with none of them defining concentration ranges. This is regarded as a first indication that the preferred fall-back positions for the underlying invention relate to the chemical nature of the components and/or the presence of other ingredients, rather than to their concentration.

The description as filed likewise does not provide any indication that the concentration ranges, in particular in the combination as claimed, would represent a preferred alternative for further defining the composition in claim 1 as filed. More specifically, the description discloses a significant number of independently defined alternative aspects which are equally ranked (i.e. without any explicit or implicit indication of their preferability, optionality or relative importance), such as the chemical nature of the components, the specific compounds to be used, their effects, their total concentration, their relative concentrations, or the presence of additional components. No explicit or implicit information has been identified that could assist in determining which one or more of these aspects is preferred for further defining the invention, let alone how these different aspects should be combined.

Consequently, the choice to amend the claim by defining the total concentration of each of the components represents, as such, a selection of one among several equally ranked options for restricting the subject-matter of claim 1 as originally filed. It follows that the choice to amend the claim specifically by introducing the concentrations of the five components therefore amounts to multiple selections from a list of equally ranked alternative aspects in the description as filed.

In other words, the skilled person is confronted with the choice of amending the composition claim in terms of the chemical nature of the components, the specific compounds to be used, their effects, their total concentration, their relative concentrations, the presence of additional components, and all possible

combinations of these aspects. Since no indication is provided as to the preferability of each alternative, the Board finds no clear basis for the combination of features defined in claim 1 at issue.

The appellant's argument that, irrespective of the content of the description, the primary and most preferred manner of amending a composition claim would necessarily be by defining the total concentrations of the components is not persuasive. Firstly, the alleged preferences of the skilled person represent a subjective consideration which is not in line with the strict requirements of the gold standard. In any case, it is not apparent to the Board why restricting the scope of a composition by specifying the total concentrations of the components should be regarded as inherently more preferred than a restriction based, for example, on the nature of the components, the presence of additional components, their relative concentrations, or the effects achieved by such components. In practice, the preferred manner of amending a claim may depend on the specific purpose of the invention concerned, for example the technical problem being addressed, rather than on any alleged preconception or assumption as to what would be more or less usual or preferred in the relevant technical field.

Moreover, this argument is inconsistent with the fact that none of the dependent claims defines the concentrations of the components. Contrary to the appellant's submission, this circumstance is not irrelevant, since the very purpose of dependent claims is to set out the most preferred alternatives or fall-back positions for further defining the underlying invention. Accordingly, the features developed or

introduced in the dependent claims as filed are justifiably regarded as a crucial indication of which aspects are considered of greater relevance to the invention as originally disclosed.

The Board therefore concludes that, based on the gold standard under G 2/10, the choice of five concentrations to restrict the scope of the five components in the composition claim, as such, involves multiple selections from what effectively constitutes a list of equally ranked aspects disclosed in the description as filed.

4.6.3 Sub-selections within non-convergent lists of alternatives

The amendments to claim 1 also involve a second level of sub-selections within non-convergent lists of alternatives, at least in the case of the defoamer and the chelating agent.

In particular, at least two further selections from non-converging alternatives are required, namely the selection of 1 to 10 wt% of defoamer, instead of the higher-concentration embodiments of 20 to 50 wt% or 40 to 90 wt%, and the selection of 0.1 to 5.0 wt% of chelating agent, instead of the lower-concentration alternatives of less than 1 wt% or less than 0.5 wt%.

In this respect, the argument that the skilled person would disregard the embodiments with higher defoamer concentrations as being incompatible with the amounts of the other components, on the ground that their combined concentrations would exceed 100%, is not convincing. First, the argument is mathematically incorrect. Even in the embodiment with the highest

defoamer concentration range (40 to 90 wt%), the combined concentrations do not lead to any internal inconsistency, as the sum of the minimum concentrations in the ranges does not exceed 100%. This remains the case even when considering an embodiment with a defoamer concentration at the upper end of this range, namely 90 wt%, since adding this value to the minimum concentrations of the remaining components results in a total of only about 92.1 wt%.

The fact that a minimum defoamer concentration of 40 wt% would be incompatible with the highest disclosed concentration of the antimicrobial agent of 75 wt% does not imply that such an embodiment would be less preferred. Rather, it reflects that, as confirmed in paragraph [0073] of the description as filed, the preferred concentrations of the antimicrobial agent are in fact significantly lower than the maximum value of 75 wt% defined in claim 1 at issue, with the most preferred value, or at least the narrowest disclosed range, being as low as 0.05 wt%.

As regards the low-concentration alternatives for the chelating agent of less than 1 wt% or less than 0.5 wt%, the Board notes that, although these alternatives partially overlap with the defined range of 0.1 to 5.0 wt%, they also encompass concentrations falling outside the range specified in claim 1 and are therefore effectively non-convergent. Moreover, the Board also disagrees that 0.1 to 5.0 wt% would constitute the narrowest and therefore the most preferred embodiment, as paragraph [0064] gives no indication of which range would be most preferable, and, contrary to the appellant's arguments, the narrowest alternative is not the range '0.1 to 5.0 wt%' but the option of 'less than about 0.5 wt%'.

The Board therefore concludes that the amendments additionally involve a second round of sub-selections from lists of non-converging alternatives.

4.6.4 No pointers to the subject-matter of claim 1

In the absence of a clear basis for the selected amendments, the appellant relies on alleged pointers in the aspects described in paragraph [0013] as filed and in the exemplary compositions in table 4 as filed. The Board is, however, not convinced that these disclosures qualify as pointers to the subject-matter of claim 1 at issue.

As already indicated in the preliminary opinion, the aspects in paragraph [0013] concern a solid rinse composition and not an aqueous rinse composition. The appellant's argument that any composition containing water might be regarded as an aqueous composition, even if it is provided in solid form, is not convincing.

First and foremost, this argument is not considered to reflect how a person skilled in the art would interpret the terms in question. An aqueous rinse composition implies, as argued by the respondent, not only that water is present but that it constitutes the most, or one of the most, prevalent components. Therefore, aqueous rinse compositions can be assumed to be in liquid form, or at the very least not in solid form. The fact that paragraph [0080] of the application as filed refers to 'aqueous liquid rinse aid compositions' (emphasis added by the Board) does not imply, as the appellant argued, that the liquid form represents a subset of the aqueous rinse aid compositions, but instead confirms that aqueous rinse

compositions according to the patent are understood to be in liquid form. Either way, even if it were assumed that the term aqueous does not necessarily exclude a solid form, there would still be no clear indication or suggestion that the compositions in paragraph [0013] can be in solid form, so it would still not provide any valid pointer.

Furthermore, as also pointed out in the preliminary opinion, the aqueous rinse aid composition in paragraph [0013] of the description as filed is described as 'consisting essentially of' components which do not include an antimicrobial agent. It is thus apparent that these rinse aid compositions cannot provide a pointer to a composition that includes an amount of up to 75 wt% of an antimicrobial agent as defined in claim 1 at issue.

A similar conclusion can be reached in the case of the exemplary embodiments in table 4 as filed. Compositions 3 and 4 do not include a defoaming agent, composition 3 also does not include a sheeting agent, and none of the four exemplary compositions includes a chelating/ sequestering agent or an antimicrobial agent. Irrespective of the fact that not all components in these compositions are described in table 4, since there is no clear indication that the components in question should be part of these compositions, it can be concluded that they do not fall within the scope of claim 1 at issue.

In this respect, it should be clarified that, as a rule, exemplary embodiments can only qualify as pointers to the preferability of certain features if they fall within the scope of the amended claim. When, as in the present case, this is not the case, the

exemplary compositions can usually not be assumed to concern the same formulation as the amended claim, and therefore they cannot be relied upon to demonstrate that certain features would be preferred within the context of the subject-matter of the claim in question.

In other words, only where the subject-matter of the invention clearly converges towards certain detailed disclosures may these be considered to act as pointers to the features disclosed therein. Consequently, exemplary embodiments not falling within the scope of the claims can generally not be relied upon as pointers to the preferability of a particular amended feature.

4.7 All in all, in view of the fact that:

i) the choice of limiting each of the five components in terms of their respective concentrations involves multiple selections from a list of equally ranked alternative aspects in the description as filed,

ii) at least the ranges selected for the defoamer and the chelating/sequestering agent involve two additional sub-selections from lists of non-convergent alternatives, and

iii) the application as filed includes no pointer to the above selections,

the Board concludes that the subject-matter of claim 1 at issue extends beyond the content of the application as filed.

4.8 The opposition ground under Article 100(c) EPC in relation to Article 123(2) EPC therefore prejudices maintenance of the patent as granted.

5. Auxiliary requests 1 and 2 - Article 123(2) EPC

5.1 Claim 1 according to auxiliary requests 1 and 2 respectively restricts the lower limit and the lower and upper limits of the antimicrobial concentration range.

5.2 Therefore, the proposed amendments do not address any of the outstanding issues of extended subject-matter discussed above.

5.3 The same arguments and conclusions presented for the main request thus apply to auxiliary requests 1 and 2.

5.4 The requirements of Article 123(2) EPC are therefore not met.

6. In the absence of any request which meets the requirements of the EPC, the appellant's appeal is not successful.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

I. Aperribay R. Elsässer

Decision electronically authenticated