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Datasheet for the decision of 22 January 2026

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Application Number: 17180487.5

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Title of invention:
PACKAGED LIQUID FABRIC SOFTENER COMPOSITION HAVING IMPROVED STABILITY

Patent Proprietor:
The Procter & Gamble Company

Opponent:
Henkel AG & Co. KGaA

Headword:
Packaged liquid fabric softener/Procter

Relevant legal provisions:
EPC Art. 56

Keyword:
Inventive step - effect not made credible within the whole scope of claim

Decisions cited:

T 0205/22, T 1852/11, T 1201/14, T 1525/17, T 1425/16, T 0110/18, T 2026/15, T 2324/14

Catchword:

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Case Number: T 0265/24 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 22 January 2026

Appellant: (Opponent)	Henkel AG & Co. KGaA Henkelstrasse 67 40589 Düsseldorf (DE)
Representative:	Henkel AG & Co. KGaA CLI / Patente 40191 Düsseldorf (DE)
Respondent: (Patent Proprietor)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, OH 45202 (US)
Representative:	Gill Jennings & Every LLP The Broadgate Tower 20 Primrose Street London EC2A 2ES (GB)
Decision under appeal:	**Interlocutory decision of the opposition division of the European Patent Office posted on 21 December 2023 concerning maintenance of European patent No. 3428259 in amended form.**

Composition of the Board:

Chair	R. Winkelhofer
Members:	R. Elsässer
	J. Roider

Summary of Facts and Submissions

I. The appeal of the opponent was directed against the decision of the opposition division to maintain the patent in amended form based on the request then on file as auxiliary request 1.

The opposition division had come to the conclusion that the main request (patent as granted) was not allowable since claim 1 was not inventive when starting from **D1** (WO 2015/006635 A1) and taking into account experimental report **D10** and common general knowledge as exemplified by both **D5** (Softener: PET bottle) and **D6** (Softener: PP bottle).

II. Claim 1 of the request found allowable reads as follows (with amendments compared with granted claim 1 shown).

"1. A packaged product comprising: a packaging having a closed end (23) and a peripheral wall (24) extending from said closed end to an open neck (25), said peripheral wall having an interior surface (27) comprising a material selected from the group consisting of polyethylene terephthalate, polypropylene, and mixtures thereof; and a liquid fabric softener composition contained in said packaging and in contact with said material, wherein said fabric softening composition comprises a quaternary ammonium ester softening active at a level of from 3% to 25%, dispersed perfume at a level of from ~~0.1~~ 1.0% to 5.0%, and cellulose fibers at a level of from 0.01% to 5.0 %, by weight of the composition."

In the following, the abbreviations PET, PP, PS, PE, LDPE and HDPE are used for polyethylene terephthalate,

polypropylene, polystyrol, polyethylene, low density polyethylene and high density polyethylene, respectively.

III. The appellant argued, in particular, that the subject-matter of claim 1 of the request found allowable was not inventive when starting from **D1** and taking into account **D10**, **D5** and **D6**. With regard to auxiliary requests 1 and 2, they argued that the features added in each case to claim 1 did not result in a technical effect, and therefore these requests also lacked an inventive step.

IV. The respondent argued, in particular, that the specific packaging materials recited in the claim resulted in a technical effect, namely that the compositions had improved phase stability. The opposition division should not have admitted experimental report **D10**, which should therefore be disregarded. Even if it were considered, **D10** was not suitable for demonstrating that this effect was not obtained over the entire scope of the claim, for various reasons. Based on the effect achieved, the problem to be solved was the provision of a composition in which the amount of dispersed perfume could be increased while avoiding phase instabilities. The solution to this problem was not obvious. For the same reasons, auxiliary requests 1 and 2 were also inventive.

V. The appellant (opponent) requests that the decision under appeal be set aside and amended such that the patent be revoked.

The respondent (patent proprietor) requests that the appeal be dismissed, or that the patent be maintained

based on auxiliary request 1 or auxiliary request 2.

Reasons for the Decision

1. Experimental report **D10**

The respondent's request that **D10** be disregarded could not be granted.

D10 was explicitly admitted by the opposition division (point 3.4 of the decision), and there is no legal basis for overruling a decision of an opposition division to admit late-filed evidence (Case Law of the Boards of Appeal, 11th edition, 2025, V.A.3.4.3, with reference to, for example, T 205/22, Reasons 2.5; T 1852/11; T 1201/14; T 1525/17; T 1425/16; T 110/18; T 2026/15; T 2324/14), particularly if the contested decision is based on this document, as is the case here.

Notably, Article 12(6) RPBA also only provides for the (non-)admittance of evidence that was not submitted or not admitted at first instance.

Therefore, **D10** is part of the proceedings. It discloses storage experiments for two different compositions, both having a content of dispersed perfume of 0.68%, which is outside of the claimed range of 1% to 5%. Composition 1 was stored in containers made from the same materials as those used in the example of the patent, namely HDPE, LDPE, PP, PET and PS. Composition 2 was stored in the same containers, with the exception of the PS container.

2. Inventive step - main request (Article 56 EPC)

This request corresponds to auxiliary request 1 as found allowable by the opposition division.

2.1 The invention relates to packaged liquid fabric softener compositions with improved phase stability.

2.2 Closest prior art

It is undisputed between the parties that Examples A and B of **D1** represent suitable starting points for the assessment of inventive step. **D1** is directed to liquid fabric softening compositions which are inherently intended to be packaged, although packaging is not discussed in the document. Moreover, the underlying problem of **D1** is similar to that of the patent, namely the provision of fabric softening compositions with good phase stability. With Examples A and B, **D1** discloses fabric softening compositions which differ from those claimed by having a lower perfume content of 0.54%. Furthermore, as already noted above, no details of the packaging are disclosed therein.

2.3 Technical effect

The case hinges on the question of whether the distinguishing features, namely a higher perfume content of between 1% and 5% and the features defining the packaging material, are technically linked and result in a technical effect being present over the entire scope of the claim.

2.3.1 According to paragraph [0004], the problem the patent intends to solve is the provision of a fabric softener composition which has a rich appearance and improved

phase stability. In this context, paragraphs [0049] to [0050] of the patent teach that dispersed perfume in the composition impairs phase stability. Accordingly, it is shown in the example of the patent that compositions having a perfume content of 2.35% and being stored for four weeks are only stable when stored in bottles made of PP or PET. In contrast, cracks appear in the compositions stored in bottles made of HDPE, LDPE or PS.

2.3.2 The appellant did not challenge the validity of these experiments, and thus did not contest that the effect relied upon by the respondent is present for compositions comprising a high amount of perfume, such as 2.35%. However, the appellant has contested the presence of the effect over the entire scope claimed, in particular for compositions having a perfume content at the lower limit of the claimed range.

2.3.3 In this context, the appellant is relying on **D10**, in which compositions containing 0.68% of dispersed perfume are reported to be stable, irrespective of the packaging material. While it is not disputed that these compositions do not fall within the scope of the claim, due to their low content of dispersed perfume, the claimed lower limit of 1% is much closer to the amount of perfume in the compositions tested in **D10** than to that of the compositions tested in the patent (2.35%). Therefore, the conclusion drawn by the appellant, namely that the compositions of **D10** are more representative of compositions at the lower end of the claimed range than the composition of the example, is correct.

The respondent argued that it should be taken into account that it was to be expected that due to their

higher amount of perfume, compositions at the lower end of the claimed range had a greater tendency to exhibit instabilities than the compositions of **D10**, and therefore **D10** was not representative of these compositions.

This argument is not convincing since the same applies to these compositions in relation to the example of the patent. While a composition at the lower end of the claimed range can indeed be expected to be less stable than the compositions of **D10**, it can also be expected to be much more stable than the composition of the example. In view of the compositions of **D10** being much closer to compositions at the lower end of the claimed range than the composition of the example, the former are more representative for such compositions than the latter.

2.3.4 The respondent also argued that the data of **D10** were incomplete since composition 2 was not stored in a PS container, see above. This was noteworthy since an instability observed in a PS container, as observed in the example of the patent for a higher amount of dispersed perfume, would have been evidence in support of the invention.

This argument is not convincing either, since there is no reason to assume that **D10** does not contain, or even omits, the results of storing composition 2 in a PS container for a particular reason, as alluded to by the respondent. Rather, as pointed out by the appellant, it is merely the case that one data point is missing for composition 2 while the data set is complete for composition 1. No further conclusions can be drawn from this fact.

2.3.5 Furthermore, and more importantly, the respondent argued that, for reasons of principle, **D10** was not suitable for proving that the effect was not achieved over the full scope of the claim. In particular, it did not prove that the stability of the compositions tested was not impaired at lower amounts of perfume, nor that packaging made from PP or PET was not suitable for increasing the stability of such compositions. This was because the storage period of 12 weeks was insufficient to show the differences between the various packaging materials. Paragraph [0049] of the patent disclosed that dispersed perfume increased the tendency of a composition to exhibit phase instabilities. In the example of the patent, a storage period of four weeks had been sufficient to observe the occurrence of instabilities in the comparative examples as well as the stabilising effect of PP and PET packaging. Since the compositions of **D10** contained considerably less perfume, they were inherently more stable, irrespective of the packaging materials used. As no instabilities were observed at all in the compositions tested in **D10**, the storage time of 12 weeks was evidently too short and/or the storage conditions were not severe enough to observe the effect. In a properly designed test, the compositions would have been stored under suitable conditions until at least one of the samples stored in PP or PET or one of the comparative samples exhibited phase instabilities. Since **D10** was not designed that way, it could not show the absence of an effect.

2.3.6 This argument cannot be accepted either. In the example of the patent, the compositions were stored for four weeks and there is no teaching that the storage period has to be increased, let alone any teaching as to how much to increase it by, when compositions having a lower perfume content are to be tested. Likewise, there

is no indication that more severe test conditions should be used, for instance at elevated temperatures.

It is common practice that when relying on a technical effect, a proprietor or applicant will provide examples which exhibit said effect and, where appropriate, will also provide a suitable test method to detect and/or measure this effect. An opponent wanting to prove that the claimed effect is not exhibited, or not exhibited over the entire scope of the claim, would then normally use the same test method, so that the results are comparable. The appellant is thus correct in pointing out that an opponent using a different method from the patent, such as a stress test at increased temperatures as suggested by the respondent here, would run the risk of having their experiments rejected on the grounds that the method used was not the same as that used in the patent or that the method only proved the absence of a different effect. Therefore, the respondent's suggestion that it would have been incumbent on the appellant to design a new test method specifically for compositions comprising low amounts of perfume is not convincing.

With regard to the duration of the test, the patent does not indicate the point during storage at which the problem, namely the occurrence of cracks in compositions stored in the "wrong materials", can be observed for compositions having a perfume content at the lower end of the claimed range. In view of this lack of information and further taking account the practical necessities of preparing an experimental report in the context of opposition proceedings, the approach taken by the appellant of tripling the storage times from four to 12 weeks when using a lower amount of perfume is not an inappropriate measure for taking

into account the lower amount of dispersed perfume as compared with the example of the patent.

2.3.7 The respondent also suggested that, if the appellant genuinely wished to negate the existence of the claimed technical effect, instead of implementing stress test conditions or employing a longer test duration it could have tested compositions falling within the preferred part of the claim. In other words, the appellant could have repeated the example of the patent.

Yet this is not convincing either since the appellant is free to attack any part of the claim, be it a preferred one or less preferred one. In particular, in a case like the present one where an effect is shown only at one point within a broad claimed range, the appellant has the possibility of attacking specifically the fringe area of the claim.

2.3.8 From the above, it follows that in view of document **D10** a technical effect cannot be seen to be present over the entire scope claimed.

2.4 Problem to be solved

Without such an effect, the problem to be solved can be formulated merely as the provision of an alternative packaged fabric softener composition.

2.5 Solution

As a solution, the patent proposes the packaged composition of claim 1, having a packaging based on PP or PET and a perfume content of between 1% and 5%.

2.6 Obviousness

In the absence of any effect, there is no reason to assume that the distinguishing features are technically interrelated and therefore they are to be treated separately in the examination of inventive step.

2.6.1 Starting from the examples of **D1**, modifying the perfume content is an obvious measure since the skilled person would take into account the disclosure on page 11, lines 19 to 23, where a most preferred range of between 0.6% and 2% is disclosed. In view of this teaching, the selection of an increased perfume content, such as 2%, for example, is not an inventive measure.

2.6.2 The same applies to the selection of a packaging made from PP or PET. As the compositions of **D1** are intended to be sold on the open market, selecting a suitable packaging material is unavoidable and it has not been disputed that containers such as bottles made from PP and PET were known to the skilled person. This is also shown by **D5** and **D6**, for example. In the absence of any unexpected advantages resulting from the use of PP or PET, the selection of one of these materials is arbitrary and therefore not inventive.

2.6.3 It follows from the above that the skilled person will arrive at the subject-matter of claim 1 without having to exercise any inventive skill.

2.6.4 The main request is thus not allowable.

3. Auxiliary request 1

This request is based on the main request but with the following feature (from claim 8 as filed) having been

incorporated into claim 1.

"wherein the cellulose fibres have an average fibre diameter of 10nm to 350nm"

Concerning inventive step, the respondent argued that this amendment brought the scope of the claim closer to the working examples of the patent.

This is not convincing, however, in view of the fact that the effect shown by the working example is not disputed in any case.

However, there is no evidence on file that shows that the fibre diameter now claimed contributes to the solution of the alleged problem.

The respondent only referred to its arguments with respect to the obviousness of the solution in the context of the main request.

Since those arguments are not convincing (see the reasoning set out above with regard to the main request), auxiliary request 1 is not inventive for the same reasons.

4. Auxiliary request 2

This request is based on the main request but with the following feature (from claim 4 as filed) having been incorporated into claim 1.

"wherein the quaternary ammonium ester softening active has the following formula:

$\{R^2(4-m)-N^+-[X-Y-R^1]m\}A^-$ wherein:

m is 1, 2 or 3 with proviso that the value of each m is identical;
each R^1 is independently hydrocarbyl or branched hydrocarbyl group;
each R^2 is independently a C_1-C_3 alkyl or hydroxyalkyl group;
each X is independently -(CH_2)n-, -CH_2-$CH(CH_3)$- or -$CH(CH_3)$-CH2- and
each n is independently 1, 2, 3 or 4;
each Y is independently -O-(0)C- or -C(O)-O-;
A- is independently selected from the group consisting of chloride, methyl sulfate, and ethyl sulfate;
with the proviso that when Y is -0-(0)C-, the sum of carbons in each R^1 is from 13 to 21."

This request lacks an inventive step for the same reasons as those set out with regard to auxiliary request 1. The statement of the respondent that the amendment brings the claimed scope closer to the working example does not address the reasoning set out above with regard to the main request.

Moreover, quaternary ammonium esters, which fall under the added feature, are commonly known as softening actives.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chair:

C. Vodz R. Winkelhofer

Decision electronically authenticated