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Datasheet for the decision of 7 July 2026

Case Number:	T 1101/24 - 3.3.07
Application Number:	17816569.2
Publication Number:	3547992
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Language of the proceedings:	EN

Title of invention:
MIXTURES COMPRISING A PHENYL ALKANOL AND A LINEAR ALCOHOL WITH 8 TO 12 CARBON ATOMS

Patent Proprietor:
Symrise AG

Opponent:
Firmenich SA

Headword:
Mixtures comprising a phenyl alkanol and an alcohol/SYMRISE

Relevant legal provisions:
EPC Art. 123(2), 123(3)
RPBA 2020 Art. 12(4), 12(6), 13(2)

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It can be changed at any time and without notice

Keyword:
Amendments not allowable - Suppression of brackets
Objections admissible
Admission of a new request during oral proceedings (No)

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Case Number: T 1101/24 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 7 July 2026

Appellant: (Opponent)	Firmenich SA Rue de la Bergère, 7 1242 Satigny (CH)
Representative:	Strych, Sebastian Mitscherlich PartmbB Karlstraße 7 80333 München (DE)
Respondent: (Patent Proprietor)	Symrise AG Mühlenfeldstrasse 1 37603 Holzminden (DE)
Representative:	Fabry, Bernd IP2 Patentanwalts GmbH Schlossstrasse 523 41238 Mönchengladbach (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted/ electronically transmitted on 26 June 2024 concerning maintenance of the European Patent No. 3547992 in amended fo rm.**

Composition of the Board:

Chairman	A. Usuelli
Members:	D. Boulois
	C. Heath

Summary of Facts and Submissions

I. European patent No. 3 547 992 B1 was granted on the basis of a set of 13 claims.

Independent claim 1 as granted read as follows:

"1. A mixture comprising or consisting of

a) at least one phenyl alkanol selected from the group consisting of 2-benzylheptanol (2-benzylheptan-1-ol), 2- methyl 5-phenylpentanol, dimethyl phenylbutanol (2-methyl-4-phenylbutan-2-ol), dimethyl phenylpropanol (2,2- dimethyl-3-phenylpropanol), 3-methyl-4-phenylbutan-2-ol (2-methyl-4-phenyl-2-butanol) or a mixture thereof,

b) at least one primary, monohydric, linear alcohol with 8 to 12 carbon atoms, and optionally

c) one or more diols."

II. The patent had been opposed under Article 100 (a) and (b) EPC on the grounds that its subject-matter lacked novelty and inventive step, and was not sufficiently disclosed.

III. The appeal lies from the decision of the opposition division that the patent in amended form meets the requirements of the EPC. The decision was based on the main request filed during the oral proceedings before the opposition division on 21 March 2023.

Claim 1 of the main request read:

"1. A mixture comprising or consisting of

a) at least one phenyl alkanol selected from the group consisting of 2-benzylheptanol, 2-methyl 5 phenylpentanol, dimethyl phenylbutanol, dimethyl phenylpropanol, 3-methyl-4-phenylbutan-2-ol or a mixture thereof,

b) at least one primary, monohydric, linear alcohol with 8 to 12 carbon atoms selected from the group consisting of undecan-1-ol, decan-1-ol, nonan-1-ol, octan-1-ol, 1-dodecanol or a mixture thereof, and

c) one or more diols selected from the group consisting of 1,2-pentanediol, 1,2-hexanediol, 1,2-octanediol, 1,2-decanediol, 1,2-dodecanediol, glyceryl monocaprylate, glyceryl monocaprate, glyceryl monolaurate, ethylhexylglycerin or a mixture thereof."

IV. According to the decision under appeal, the main request complied with the requirements of Rule 80 EPC and was admitted into the proceeding.

The subject-matter of claims 1-3 complied with the requirements of Article 123(2) EPC and of Article 123(3) EPC.

The main request also complied with the requirements of Article 83 and 56 EPC.

V. The opponent (hereinafter the appellant), filed an appeal against said decision.

VI. With its reply to the statement of grounds of appeal dated 17 January 2025, the patent proprietor

(hereinafter the respondent) filed auxiliary requests 1 and 2.

The subject-matter of the independent claim 1 of auxiliary requests 1 and 2 was amended by the following feature:
"wherein the amounts of
i)compound a) is from 1% by weight to 50% by weight,
ii)compound b) is from 50% by weight to 99% by weight,
iii)compound c) is from 1% by weight to 50% by weight,
on condition that the amounts add to 100% b.w."

In auxiliary request 1, dependent claim 4 was deleted while dependent claims 4 and 5 were deleted in auxiliary request 2.

VII. The Board set out its preliminary opinion in a communication under Article 15(1) RPBA issued on 3 February 2026. The preliminary opinion of the Board was *inter alia* that the main request did not meet the requirements of Article 123(2) EPC, that the objection under Article 123(3) EPC should be admitted and that the requirements of Article 123(2) EPC should in principle apply *mutatis mutandis* also to the objections raised under Article 123(3)EPC.

VIII. With a letter dated 7 April 2026, the respondent submitted auxiliary requests 3-6.

IX. Oral proceedings took place on 7 July 2026. During the oral proceedings the appellant withdrew auxiliary requests 3-6 and filed a new auxiliary request 7.

Claim 1 of auxiliary request 7 read as follows with the modifications over claim 1 as granted shown in bold:

"1.A mixture comprising or consisting of

a) at least one phenylalkanol selected from the group consisting ~~**of 2-benzylheptanol (**~~ 2-benzylheptan-1-ol ~~**)**~~, 2-methyl 5-phenylpentanol, dimethyl phenylbutanol ~~**(2-methyl-'1-phenylbutan-2-ol)**~~, ~~**dimethyl phenylpropanol (**~~ 2,2-dimethyl-3-phenylpropanol ~~**)**~~, 3-methyl-4-phenylbutan-2-ol ~~**(2-methyl-'1-phenyl-2-butanol)**~~ or a mixture thereof,

b) at least one primary, monohydric, linear alcohol with 8 to 12 carbon atoms **selected from the group consisting of undecan-1-ol, decan-1-ol,nonan-1-ol,octan-1-ol,1-dodecanol or a mixture thereof,** ~~**and optionally**~~

c) one or more diols **selected from the group consisting of 1,2-pentanediol, 1,2-hexanediol, 1,2-octanediol, 1,2-decanediol,1,2-dodecanediol, glyceryl monocaprylate, glycerylmonocaprate, glycerylmonolaurate, ethylhexylglycerin or a mixture thereof."**

X. The arguments of the appellant may be summarised as follows:

Main Request Article 123(2) and 123 (3) EPC

The main request did not comply with the requirements of Article 123(2) EPC. The deletion of the brackets containing the chemical names of the compounds in claim 1 resulted in an extension beyond the application as filed, because the definition in brackets represented a technical limitation.

The objection under Article 123(3) EPC concerned the same points and arguments as under Article 123(2) EPC.

Admittance of auxiliary request 7

This request was late filed, not convergent and was not *prima facie* allowable.

XI. The arguments of the respondent may be summarised as follows:

Main Request Article 123(2) and 123 (3) EPC

The deletion of the features in brackets on claim 1 did not contravene Article 123(2) EPC under the gold standard; the compounds in brackets did not contain additional information and the skilled person would have derived directly and unambiguously the subject-matter of claim 1 from the application as filed.

Two of the four compounds in brackets did not correspond to the corresponding claimed compounds and the person skilled in the art would have understood that the compounds were different.

Moreover, there was no new technical teaching or further technical restriction, and the requirements of Rule 43(7) EPC with regard to the reference numbers should have been applied analogously.

The objection under Article 123(3) EPC should not be admitted, since the opposition division did not decide on this issue.

Admittance of auxiliary request 7

This request deleted most of the general formulas and maintained the limiting compounds in brackets. There were no new points raised by the filing of this request. The request was limiting, convergent and *prima facie* allowable with regard to Articles 123(2) and 123(3) EPC. With regard to the last deleted bracket in the wording of claim 1, the person skilled in the art would have understood that the chemical name in this bracket merely represented an alternative.

XII. Requests

The appellant requested to set aside the decision of the opposition division, and to revoke the opposed patent.

The respondent requested that the appeal be dismissed (i.e. that the patent be maintained according to the set of claims allowed by the opposition division), alternatively if the decision under appeal is set aside, that the patent be maintained according to the sets of claims filed as auxiliary requests 1 - 2 with letter of 17 January 2025 or as auxiliary requests 7 filed during the oral proceedings.

Reasons for the Decision

1. Main request - Amendments

1.1 The subject-matter of claim 1 of the main request relates to a mixture comprising or consisting *inter alia* of:

"a) at least one phenyl alkanol selected from the group consisting of 2-benzylheptanol, 2-methyl 5 phenylpentanol, dimethyl phenylbutanol, dimethyl phenylpropanol, 3-methyl-4-phenylbutan-2-ol or a mixture thereof".

Feature a) originates from dependent claim 2 of the patent application. The subject-matter of original claim 2 was also present, in identical wording, in claim 1 as granted. Original claim 2 reads as follows:

"2. The mixture of claim 1, wherein the phenyl alkanol (compound a) is selected from the group consisting of 2-benzylheptanol (2-benzylheptan-l-ol), 2-methyl 5-phenylpentanol, dimethyl phenylbutanol (2-methyl-4-phenylbutan-2-ol), dimethyl phenylpropanol (2,2-dimethyl-3-phenylpropanol), 3-methyl-4-phenylbutan-2-ol (2- methyl-4-phenyl-2-butanol) or a mixture thereof."

The subject-matter of claim 1 of the main request differs therefore from the original subject-matter of dependent claim 2 in the omission of the terms that were given in brackets.

The compounds of claim 1 affected by the deletion of the definitions in brackets are the following:

- "2-benzylheptanol": omission of "(2-benzylheptan-1 ol)";
- "dimethyl phenylbutanol": omission of "(2-methyl-4 phenylbutan-2-ol)";
- "dimethyl phenylpropanol": omission of "(2,2 dimethyl-3-phenylpropanol)";
- "3-methyl-4-phenylbutan-2-ol": omission of "(2 methyl-4-phenyl-2-butanol)"

1.1.1 Deleting features in parentheses from claims can be allowed under Article 123(2) EPC if the change is directly and unambiguously derivable from the original filing and does not add new subject matter.

In the present case, the brackets were consistently used in the original description and claims in relation to the corresponding phenylalkanols, namely in paragraphs [0015], [0020], [0023], [0024] and in claim 2 of the original application. The same brackets were also present in the patent as granted in corresponding paragraphs [0015], [0020],]0023], [0024] and in the granted claim 1.

The disclosure of paragraph [0031] of the original application, which is the unique passage wherein a phenylalkanol a), namely the compound "2-benzylheptanol", is given without any corresponding compound in brackets, relates to a specific composition consisting of benzylheptanol, 1-dodecanol and 1,2-decanediol or a mixture of at least two different 1,2-alkane diols. This disclosure cannot be extended to the claimed subject-matter. Moreover, it must be pointed out that the same preferred composition is present in original dependent claim 6, wherein the compound a) is again in the form of the term "2-benzylheptanol(2-benzylheptan-1-ol"), contrary to the disclosure of paragraph [0031] of the patent application.

The Board considers that these brackets were essential to the definition of the phenylalkanol compounds, since they served to restrict a generic chemical definition covering multiple isomers to one specific isomer, i.e an individual chemical compound. In this regard, the Board observes that the application as originally filed contains no indication that the chmical names in

brackets were merely illustrative examples of compounds encopmassed by the corresponding generic chemical definition. Accordingly, the content enclosed within the parentheses was not optional but constituted a limiting disclosure. Thus, the term “2-benzylheptanol (2-benzylheptan-1-ol)” must be interpreted as referring to 2-benzylheptan-1-ol, and the term “dimethyl phenylpropanol (2,2-dimethyl-3-phenylpropanol)” must be interpreted as referring to "2,2-dimethyl-3-phenylpropanol”.

The removal of the parentheses in claim 1 of the main request implies the possibility of covering other compounds not covered previously, therefore extending beyond the original subject-matter. As a matter of example, even though the term 2-benzylheptanol refers usually to 2-benzylheptan-1-ol, the alcohol function (-OH) can be moved along the carbon chain to form other secondary or tertiary alcohols, such as 2 benzylheptan-2-ol, which are also formally covered by the denomination 2-benzylheptanol used now in claim 1. This is also true for the claimed compound "dimethyl phenylpropanol", which encompasses further isomers different from the compound 2,2-dimethyl-3-phenylpropanol present original into brackets.

Accordingly, the omission of the terms in brackets "(2-benzylheptan-1 ol)" and "(2,2 dimethyl-3-phenylpropanol)" results in the isolated terms "2-benzylheptanol" and "dimethyl phenylpropanol" encompassing compounds that were not previously covered, thereby extending the subject-matter beyond the content of the application as originally filed.

Accordingly, claim 1 does not comply with the requirements of Article 123(2) EPC.

1.1.2 The reference made by the respondent to Rule 43(7) EPC and decision **T 66/85**, is not relevant to the assessment of the present case and does not alter the Board's conclusions.

(a) Rule 43(7) EPC relates to **drawings** including reference signs, and specifies that the technical features specified in the claims shall preferably be followed by such reference signs relating to these features, placed in parentheses, if the intelligibility of the claim can thereby be increased. These reference signs shall not be construed as limiting the claim.

In the present case, the brackets enclose the name of specific chemical compounds, which cannot be treated as mere reference signs. The situation is therefore different and the provisions of the rule are neither applicable to nor transposable to the present case.

Moreover, the features in brackets were not added to make the claims easier to understand but represent technical features meant to limit the claim.

(b) In decision **T 66/85**, it was concluded that when a technical feature is deleted from a claim with the aim of no longer excluding certain embodiments from protection, the broadening of the claim does not contravene Article 123(2) EPC provided that the text of the originally filed application can serve as a basis for a claim not including that feature.

The conclusion reached in the present case is not at variance with the cited decision. As argued above under point 1.1.1, there is indeed no basis in the application as filed for other compounds than the specific "2-benzylheptan-1 ol" or "2,2 dimethyl-3-phenylpropanol". The reference to the decision **T 66/85** is therefore irrelevant.

1.2 The suppression of the brackets in claim 1 of the main request has furthermore been objected to by the appellant under Article 123(3) EPC.

The respondent considers that the objection regarding an alleged extension within the meaning of Article 123(3) EPC was raised by the appellant for the first time and should not be admitted into the appeal proceedings.

The Board considers the objection admissible.

The objection under Article 123(3) EPC was raised in point 2.3 of the statement of grounds of appeal.
The Board notes that the objection under Article 123(3) EPC follows the same line of argument as the objections under Article 123(2) EPC, namely that the deletion of the bracket leads to an addition of the subject-matter and extension of the scope of protection as granted. Thus, the objection under Article 123(3) EPC does not add any complexity to the case and is not contrary to the principle of procedural economy.

Accordingly, the Board in the exercise of its discretion admits the objections under Article 123(3) EPC (Article 12(4) and 12(6) RPBA).

1.2.1 As set out above, the deletion of the terms “2,2-dimethyl-3-phenylpropanol” and “2-benzylheptan-1-ol” results in an extension of the scope of protection beyond that conferred by the patent as granted, since claim 1 now encompasses any 2-benzylheptanol and any dimethylphenylpropanol whereas claim 1 as granted was limited to two specific isomers.

For these reasons,claim 1 of the main request also violates the requirements of Article 123(3) EPC.

2. Auxiliary requests 1 and 2 - Amendments

In these requests, claim 1 has been amended with the specification of the amounts of compounds a), b) and c). The terms "(2-benzylheptan-1 ol)" and "(2,2 dimethyl-3-phenylpropanol)" remain omitted. Consequently, the conclusions reached for the main request apply mutatis mutandis also to auxiliary requests 1 and 2.

Auxiliary requests 1 and 2 therefore do not meet the requirements of Article 123(2) and 123(3) EPC for the same reason as the main request.

3. Admittance of auxiliary request 7

3.1 Auxiliary request 7 has been filed during the oral proceedings after the Board had announced its conclusions with regard to the main request and auxiliary request 1 and 2.

In comparison to claim 1 of the main request, claim 1 of auxiliary request 7 has been amended with regard to the characterization of feature a) as shown below:

"a)at least one phenylalkanol selected from the group consisting of 2-benzylheptan-1-ol, 2-methyl 5-phenylpentanol, dimethyl phenylbutanol, 2,2-dimethyl-3-phenylpropanol, 3-methyl-4-phenylbutan-2-ol or a mixture thereof".

Accordingly, the terms "2-benzylheptanol" and "dimethyl phenylpropanol" were replaced by the respective terms which were in brackets in claim 1 as granted or in original dependent claim 2, namely "2-benzylheptan-1-ol" and "2,2-dimethyl-3-phenylpropanol".

Moreover, the terms "dimethyl phenylbutanol" and "3-methyl-4-phenylbutan-2-ol" are now present without the respective terms in brackets "(2-methyl-4-phenylbutan-2-ol)" and "(2-methyl-4-phenyl-2-butanol)" which were present in claim 1 as granted and in original claim 2.

This new request has been filed by the respondent as an attempt to overcome the objections raised under Article 123(2) and 123(3) EPC.

3.2 This request is filed at a very late stage of the proceedings and constitutes an amendment of the respondent's case.

Hence, Article 13(2) RPBA is relevant with regard to the new submission. That provision indicates that: "Any amendment to a party's appeal case made...after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned".

In the present case, the objections under Article 123(2) and 123(3) EPC were presented by the appellant in its notice of appeal. The Board mentioned the same points in its preliminary opinion and gave a negative preliminary opinion. The respondent has taken this opportunity to file auxiliary requests 3-6 in response to the preliminary opinion of the Board. These requests were withdrawn during oral proceedings and no decision was rendered in this regard.

For auxiliary request 7, the Board sees no exceptional circumstances justifying the filing at such late stage of the appeal proceedings. The respondent has not provided any reason that could justify the existence of exceptional circumstances. For this reason alone, this request is not admissible.

The Board notes furthermore that the subject-matter of claim 1 of auxiliary request 7 is also shifted as a result of the suppression of the terms in brackets "(2-methyl-4-phenylbutan-2-ol)" and "(2-methyl-4-phenyl-2-butanol)", both present in claim 1 as granted and in original dependent claim 2. The terms appearing before the brackets and retained in claim 1 of auxiliary request 7, namely "dimethyl phenylbutanol" and "3-methyl-4-phenylbutan-2-ol", denote compounds different from those identified in the brackets. This, was already noted by the opposition division (cf. point 4.2.3 of the decision) and was also raised by the appellant in the statement of grounds of appeal. In light of these amendments, the Board takes the view that claim 1 of auxiliary request 7 is not *prima facie* allowable under Articles 123(2) and 123(3) EPC.

Consequently, the Board decides not to admit auxiliary request 7 into the proceedings (Article 13(2) RPBA).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

B. Atienza Vivancos A. Usuelli

Decision electronically authenticated