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**D E C I S I O N**  
**of 5 February 2003**

**Case Number:** T 0003/01 - 3.3.3

**Application Number:** 91113752.9

**Publication Number:** 0468537

**IPC:** C08F 10/00

**Language of the proceedings:** EN

**Title of invention:**

Catalyst, method of preparing these catalysts and method of using said catalysts

**Patentee:**

ExxonMobil Chemical Patents Inc.

**Opponents:**

Bayer AG Konzernbereich RP Patente und Lizenzen  
Basell Polyolefine GmbH  
THE DOW CHEMICAL COMPANY

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 76(1), 84, 97, 113(1), 123(2), 123(3)

**Keyword:**

"Extension of subject-matter (no)"  
"Proceedings in the absence of the opponents"

**Decisions cited:**

G 0009/91, G 0004/92, T 0002/80, T 0301/87, T 0912/91,  
T 0438/98

**Catchword:**

-



Case Number: T 0003/01 - 3.3.3

**D E C I S I O N**  
**of the Technical Board of Appeal 3.3.3**  
**of 5 February 2003**

**Appellant:** ExxonMobil Chemical Patents Inc.  
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**Respondents:** Bayer AG  
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**Representative:** -

(Opponent) Basell Polyolefine GmbH  
Carl-Bosch-Strasse 38, C6  
D-67056 Ludwigshafen (DE)

**Representative:** -

(Opponent) THE DOW CHEMICAL COMPANY  
2030 Abbott Road  
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**Representative:** Smulders, Theodorus A. H. J., Ir.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 23 October 2000  
revoking European patent No. 0 468 537 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** R. Young  
**Members:** C. Idez



## Summary of Facts and Submissions

I. The grant of European patent No. 0 468 537 in respect of European patent application No. 91 113 752.9 filed on 27 January 1988 and claiming priority of two earlier patent applications in the United States of America, was announced on 13 November 1996 (Bulletin 1996/46) on the basis of 8 claims.

Independent Claims 1, 6 and 7 as granted read as follows:

"1. An ionic catalyst for polymerising olefins, diolefins, and/or acetylenically unsaturated monomers, comprising:

a bis(cyclopentadienyl)group IV B metal cation, and a compatible, bulky, non-coordinating anion of a single coordination complex having a plurality of lipophilic radicals covalently coordinated to and shielding a central, formal charge-bearing metal or metalloid atom and sufficiently labile to be displaced by a neutral Lewis base, in which the anion comprises an aryl group and is substituted on aromatic carbon atoms so as to avoid transfer of a fragment of the anion to the metal cation."

"6. A method for preparing a catalyst according to any of the preceding claims comprising reacting a bis(cyclopentadienyl) compound with an ion exchange compound so as to [sic] at least one ligand of the bis(cyclopentadienyl) compound with the ion exchange compound or at least a portion thereof, thereby generating the ionic catalyst."

"7. Method for polymerising an  $\alpha$ -olefin, diolefin and/or an acetylenically unsaturated monomer either alone or in combination using a catalyst according to any of the preceding claims 1 to 5 in which said method comprises the steps of (a) contacting monomer and the catalyst prepared previously or *in situ* during polymerisation, (b) continuing the contacting of step (a) for a sufficient period of time to polymerise at least a portion of the monomer; and (c) recovering a polymer product."

The remaining dependent Claims 2 to 5, and 8 were directed to specific embodiments of the subject-matter of the independent Claims 1 and 7, respectively.

II. Three notices of Opposition were filed against the patent, as follows:

- (i) by Opponent I, on 12 August 1997, on the grounds of lack of inventive step (Article 100(a) EPC),
- (ii) by Opponent II, on 13 August 1997, on the grounds of lack of inventive step (Article 100(a) EPC), and
- (iii) by Opponent III, on 13 August 1997, on the grounds of lack of inventive step (Article 100(a) EPC), of insufficiency (Article 100(b) EPC) and extension of subject-matter (Article 100(c) EPC).

III. By a decision announced orally on 11 October 2000 and issued in writing on 23 October 2000 the Opposition Division revoked the patent.

The decision of the Opposition Division was based on a main request as filed with letter of 5 May 1998, on a set L as filed during the oral proceedings of 11 October 2000 as first auxiliary request, on a set M as second auxiliary request filed with letter of 6 October 2000, and on a set L' as third auxiliary request as filed during the oral proceedings of 11 October 2000. The Opposition Division revoked the patent on the grounds that all pending requests violated the requirements of Articles 76(1) and 123(2) EPC.

According to the decision, Claims 1 of these requests contained embodiments, in particular definitions of the ligands  $X_3$ ,  $X_4$ ,  $Ar_1$  and  $Ar_2$ , which were not derivable from the parent patent application EP-A-0 277 004 (referred to as D1).

- IV. On 28 December 2000, the Appellant (Proprietor) lodged an appeal against the above decision. The prescribed fee was paid on the same day.

With the Statement of Grounds of Appeal filed on 2 March 2001, the Appellant maintained its main request. It also submitted three sets of claims referred to as N, O and P as new first, second and third auxiliary requests, respectively. It presented detailed arguments regarding the allowability of these requests pursuant of Article 123 EPC.

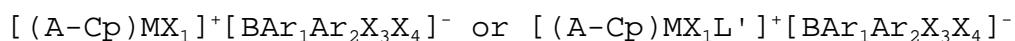
- V. Following the submissions of Respondent I (Opponent I) (letter dated 13 June 2001), of Respondent II (opponent II) (letter dated 22 September 2001) and Respondent III (Opponent III) letter dated 24 September 2001), in which objections based on Articles 123(2),

76(1), 83 and 84 EPC were raised in respect of the requests on file, the Appellant maintained with its letter of 19 February 2002, its main request. It made set O its first auxiliary request, and filed two sets of claims referred to as N' and P', as new second and third auxiliary requests, respectively.

VI. In its letter dated 14 June 2002, the Appellant withdrew its main request. Thus, sets O, N' and P' became its main request, first and second auxiliary requests respectively.

Claims 1 to 4 of set O read as follows:

"1. An ionic catalyst for polymerizing olefins, diolefins and/or acetylenically unsaturated monomers comprising an organometallic compound of the general formula:



wherein M is titanium, zirconium or hafnium;

(A-Cp) is either (Cp)(Cp\*) or Cp-A'-Cp\* and Cp and Cp\* are the same or different substituted or unsubstituted cyclopentadienyl radicals;

A' is a covalent bridging group;

X<sub>1</sub> is selected from hydride radicals, hydrocarbyl radicals, substituted-hydrocarbyl radicals or organometalloid radicals;

L' is a neutral Lewis base;



[BAr<sub>1</sub>Ar<sub>2</sub>X<sub>3</sub>X<sub>4</sub>]<sup>-</sup> being a compatible, bulky, non-coordinating anion comprising an aryl group and being a single coordination complex having a plurality of lipophilic radicals covalently coordinated to and shielding a central, formal charge bearing metal or metalloid atom and sufficiently labile to be displaced by a neutral Lewis base, wherein:

B is boron in a valence state of 3;

Ar<sub>1</sub>, Ar<sub>2</sub>, X<sub>3</sub> and X<sub>4</sub> are the same substituted aromatic hydrocarbon radicals containing from 6 to 20 carbon atoms, and the substituents on the substituted aromatic hydrocarbon radicals are selected from hydrocarbyl radicals and fluorohydrocarbyl radicals;

the anion being selected as to avoid transfer of a fragment of the anion to the metal cation by steric hindrance resulting from substitutions on the aromatic carbons of the anion.

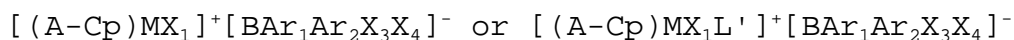
2. A method for preparing a catalyst according to Claim 1 comprising reacting a bis(cyclopentadienyl) compound with an ion exchange compound so as to combine at least one ligand of the bis(cyclopentadienyl) compound with the ion exchange compound or at least a portion thereof, thereby generating the ionic catalyst.
3. Method for polymerising an  $\alpha$ -olefin, diolefin and/or an acetylenically unsaturated monomer either alone or in combination using a catalyst according to claim 1, which method comprises the

steps of (a) contacting monomer and the catalyst prepared previously or *in situ* during polymerisation, (b) continuing the contacting of step (a) for a sufficient time to polymerise at least a portion of the monomer; and (c) recovering a polymer product.

4. A method according to Claim 3 wherein the monomer is a prochiral olefin, the catalyst is prepared by the method of claim 2 in which the bis(cyclopentadienyl) metal compound (i) is a pure enantiomer or racemic mixture of two enantiomers of a rigid, chiral metallocene; or (ii) contains a covalent bridging group between two substituted cyclopentadienyl radicals; and the polymer product is an isotactic polymer."

Claim 1 of set N' read as follows

"An ionic catalyst for polymerizing olefins, diolefins and/or acetylenically unsaturated monomers comprising an organometallic compound of the general formula:



wherein M is titanium, zirconium or hafnium;

(A-Cp) is either (Cp)(Cp\*) or Cp-A'-Cp\* and Cp and Cp\* are the same or different substituted or unsubstituted cyclopentadienyl radicals;

A' is a covalent bridging group;

X<sub>1</sub> is selected from hydride radicals, hydrocarbyl

radicals, substituted-hydrocarbyl radicals or organometalloid radicals;

L' is a neutral Lewis base;

[BAr<sub>1</sub>Ar<sub>2</sub>X<sub>3</sub>X<sub>4</sub>]<sup>-</sup> being a compatible, bulky, non-coordinating anion comprising an aryl group and being a single coordination complex having a plurality of lipophilic radicals covalently coordinated to and shielding a central, formal charge bearing metal or metalloid atom and sufficiently labile to be displaced by a neutral Lewis base, wherein:

B is boron in a valence state of 3;

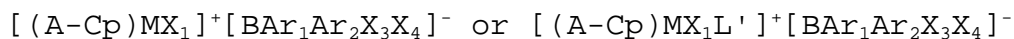
Ar<sub>1</sub>, Ar<sub>2</sub>, X<sub>3</sub> and X<sub>4</sub> are the same hydrocarbyl substituted aromatic hydrocarbon radicals containing from 6 to 20 carbon atoms;

the anion being selected as to avoid transfer of a fragment of the anion to the metal cation by steric hindrance resulting from substitutions on the aromatic carbons of the anion."

Claims 2 to 4 of set N' were the same as those of set O.

Claim 1 of set P' reads as follows:

"An ionic catalyst for polymerizing olefins, diolefins and/or acetylenically unsaturated monomers comprising an organometallic compound of the general formula:



wherein M is titanium, zirconium or hafnium;

(A-Cp) is either (Cp)(Cp\*) or Cp-A'-Cp\* and Cp and Cp\* are the same or different substituted or unsubstituted cyclopentadienyl radicals;

A' is a covalent bridging group;

X<sub>1</sub> is selected from hydride radicals, hydrocarbyl radicals, substituted-hydrocarbyl radicals or organometalloid radicals;

L' is a neutral Lewis base;

[BAR<sub>1</sub>Ar<sub>2</sub>X<sub>3</sub>X<sub>4</sub>]<sup>-</sup> being a compatible, bulky, non-coordinating anion comprising an aryl group and being a single coordination complex having a plurality of lipophilic radicals covalently coordinated to and shielding a central, formal charge bearing metal or metalloid atom and sufficiently labile to be displaced by a neutral Lewis base, wherein:

B is boron in a valence state of 3;

Ar<sub>1</sub>, Ar<sub>2</sub>, X<sub>3</sub> and X<sub>4</sub> are the same hydrocarbyl substituted phenyl radicals containing up to 20 carbon atoms; the anion being selected as to avoid transfer of a fragment of the anion to the metal cation by steric hindrance resulting from substitutions on the aromatic carbons of the anion."

Claims 2 to 4 of set P' are the same as those of set O.

VIII. With its letter of 27 June 2002, Respondent III

indicated that it had no further objections in respect of the new main request and the two auxiliary requests.

- VIII. Respondent II submitted in its letter dated 26 July 2002 that document D1 did not provide a clear and unambiguous support for the feature in Claim 1 of sets O, N' and P' that the groups Ar<sub>1</sub>, Ar<sub>2</sub>, X<sub>3</sub> and X<sub>4</sub> be the same substituted aromatic hydrocarbon groups and that, therefore, these sets of claims did not meet the requirements of Articles 76(1) and 123(2) EPC.
- IX. Respondent I considered in its letter dated 13 August 2002, that the objection under Article 123(2) EPC might have been removed by the set of claims then on file.
- X. With its letter dated 26 August 2002, the Appellant submitted three further sets of claims referred as O', N'' and P''.

It further indicated that sets O', N'' and P'' represented amended versions of sets O, N', and P', respectively. The amendment consisted of moving the phrase "comprising an aryl group" to the final part of Claim 1 of each request to read "the anion comprising an aryl group and being selected so as to avoid...".

- XI. In view of the requests on file Respondent II withdrew in its letter of 4 December 2002 its objections under Articles 123 and 83 EPC. It also informed the Board that it would not attend the oral proceedings scheduled for 5 February 2003.

Respondent I with its letter of 12 December 2002, informed the Board that it would not attend the oral proceedings scheduled for 5 February 2003.

Respondent III indicated in its letter dated 20 December 2002, that it had no further objections in respect of the new main request and two auxiliary requests or more limited requests. It also informed the Board that it would not attend the oral proceedings scheduled for 5 February 2003.

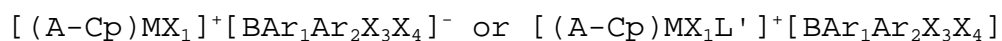
XII. None of the Respondents took part at the oral proceedings held on 5 February 2003.

At the beginning of the oral proceedings, the Appellant indicated that it withdrew its sets of claims O', N'' and P''.

Following preliminary observations of the Board under Articles 123(2), 76(1) and 84 EPC concerning the definition of the groups  $Ar_1$ ,  $Ar_2$ ,  $X_3$  and  $X_4$  in the requests O and N', the Appellant submitted a set of Claims 1 to 4 as new main request on the basis of an amended version of set N' and relied on set P' filed on 21 February 2002 (letter of 19 February 2002) as its only auxiliary request.

Claim 1 of the main request reads as follows:

"An ionic catalyst for polymerizing olefins, diolefins and/or acetylenically unsaturated monomers comprising an organometallic compound of the general formula:



wherein M is titanium, zirconium or hafnium;

(A-Cp) is either (Cp)(Cp\*) or Cp-A'-Cp\* and Cp and Cp\* are the same or different substituted or unsubstituted cyclopentadienyl radicals;

A' is a covalent bridging group;

X<sub>1</sub> is selected from hydride radicals, hydrocarbyl radicals, substituted-hydrocarbyl radicals or organometalloid radicals;

L' is a neutral Lewis base;

[BAR<sub>1</sub>Ar<sub>2</sub>X<sub>3</sub>X<sub>4</sub>]<sup>-</sup> being a compatible, bulky, non-coordinating anion comprising an aryl group and being a single coordination complex having a plurality of lipophilic radicals covalently coordinated to and shielding a central, formal charge bearing boron atom and sufficiently labile to be displaced by a neutral Lewis base, wherein:

B is boron in a valence state of 3;

Ar<sub>1</sub>, Ar<sub>2</sub>, X<sub>3</sub> and X<sub>4</sub> are selected from hydrocarbyl substituted aromatic hydrocarbon radicals containing up to 20 carbon atoms; the anion being selected as to avoid transfer of a fragment of the anion to the metal cation by steric hindrance resulting from substitutions on the aromatic carbons of the anion."

Claims 2 to 4 are the same as Claims 2 to 4 of set N'.

XIII. The Appellant requested that the decision under

appeal be set aside and that the case be remitted to the first instance for further prosecution on the basis of the set of Claims 1 to 4 filed as main request at the oral proceedings or, in the alternative, on the basis of the set of claims P' filed on 21 February 2002.

## **Reasons for the decision**

1. The appeal is admissible.

### *Main request*

2. *Procedural matters*

- 2.1 As indicated in section XI above, the Respondents communicated their intention not to attend the oral proceedings scheduled for 5 February 2003.

- 2.2 While Respondent I submitted, in its letter of 13 August 2002, that the deficiencies under Article 123(2) EPC might have been removed by the requests then on file, and Respondent II withdrew, with its letter of 4 December 2002, its objections under Article 123(2) EPC in view of the requests then on file, as well as Respondent III having indicated, in its letter of 20 December 2002, that it had no further objections in respect to the main request and the two auxiliary requests then on file or in respect of further more limited requests, this did not alter the fact that the alleged deficiencies of wording still remained in the claims then on file.

- 2.2.1 Whilst Respondent II had raised objection to the



reference, in Claim 1, to all groups  $Ar_1$ ,  $Ar_2$ ,  $X_3$  and  $X_4$  being "the same" substituted aromatic hydrocarbon groups (cf. submission dated 26 July 2002), the same party withdrew its objections with the submissions of 4 December 2002, even though the wording objected to remained in the claims then on file.

2.2.2 Similarly, whilst Respondent III had raised objection under Article 84 EPC in view of the expression "hydrocarbyl-substituted phenyl radicals having 6 to 20 carbon" atoms in Claim 1 of set P (submission of 4 September 2001) since hydrocarbyl substituted-phenyl radicals could not have only 6 carbon atoms, it stated in its submissions of 27 June 2002 that it had "no further objections" in respect of the main request and two auxiliary requests, even though a similar objection would also apply in respect of the expression "hydrocarbyl substituted aromatic hydrocarbon radicals containing 6 to 20 carbon atoms" in Claim 1 of set N'.

2.3 According to established jurisprudence of the boards of appeal of the EPO, however, amendments of the claims of a patent in the course of appeal proceedings are to be fully examined by the Board of its own motion as to their compatibility with the requirements of the EPC, i.e. in the present case, the formal requirements with regard to Articles 76(1), 123(2), 123(3) and 84 EPC (cf. G 9/91, OJ EPO 1993, 408, point 19 of the Reasons for the Opinion; cf also T 301/87, OJ EPO, 1990, 335).

2.4 As indicated in point XII above, the Appellant submitted a new main request during the oral

proceedings in response to objections under Article 123(2), 76(1) and 84 EPC raised by the Board in view of the requests O and N', which, however, corresponded in substance to the objections previously raised by the Respondents II and III in view of the definitions of the groups  $Ar_1$ ,  $Ar_2$ ,  $X_3$  and  $X_4$ . Hence, it could not occasion surprise to the absent parties if amendments were carried out by the Proprietor in relation to such objections whether of a broadening or narrowing nature.

- 2.5 Whilst, according to the Opinion G 4/92 of the Enlarged Board of Appeal (OJ EPO 1994, 149), a party who fails to appear at oral proceedings must have the opportunity, in accordance with Article 113(1) EPC, to comment on new facts and evidence submitted for the first time during those oral proceedings, the filing of amended claims at the oral proceedings represents neither a fact nor an evidence within the meaning of the Opinion G 4/92 and a decision on their formal allowability under Articles 123(2), 123(3), 76(1) and 84 EPC can be taken in the absence of the Respondents (Opponents) without infringing Article 113(1) EPC (cf. also T 912/91 of 25 October 1994, not published in OJ EPO; point 10 of the Reasons for the Decision).

3. *Wordings of the claims.*

3.1 Articles 123(2) EPC and 76(1) EPC:

3.1.1 As indicated in section XII above, the main request is an amended version of set N'.

3.1.2 Apart from a minor editorial change (i.e. replacement

of the expression "metal or metalloid" by "boron"), Claim 1 of the main request essentially differs from Claim 1 of set N' by the feature (i) that Ar<sub>1</sub>, Ar<sub>2</sub>, X<sub>3</sub> and X<sub>4</sub> are selected from hydrocarbyl substituted aromatic hydrocarbon radicals containing up to 20 carbon atoms. Claims 2 to 4 of the main request are the same as Claims 2 to 4 of set N'.

3.1.3 The parties have focused their objections under Articles 123(2) and 76(1) EPC concerning the set of claims N' on the definitions of the groups Ar<sub>1</sub>, Ar<sub>2</sub>, X<sub>3</sub> and X<sub>4</sub> in Claim 1 of this set of claims but no objection has been raised by them under Articles 123(2) and 76(1) EPC whether in respect of the remaining parts of Claim 1 of the set N', or in respect of Claims 2 to 4 thereof. The Board is also satisfied that no objection under these Articles arises whether from the corresponding remaining parts of Claim 1 of the main request, or from Claims 2 to 4 thereof.

3.1.4 Thus, the question as to whether the claims of the main request meet the requirements of Articles 123(2) and 76(1) EPC boils down to the question as to whether the amendment (i) meets these requirements.

3.1.5 Amendment (i) is supported by lines 28 to 38 on page 14, and by lines 10 to 12 and 21 to 23 on page 15 of the application as originally filed. The deletion of the lower value (i.e. 6) of the number of carbon atoms range (i.e. 6 to 20) does not permit the range to become open-ended, since there is no hydrocarbon substituted aromatic hydrocarbon groups having 6 or less carbon atoms. This deletion cannot therefore be held to involve the addition of subject-

matter (cf. T 2/80, OJ EPO, 1981, 431).

3.1.6 Amendment (i) also finds its support on page 6, lines 38 to 42, lines 46 to 47 and lines 51 to 52 of document D1. The deletion of the lower value (i.e. 6) of the number of carbon atoms range (i.e. 6 to 20) does not for the same reasons indicated in point 3.1.4 above, lead to an addition of subject-matter.

3.1.7 It thus follows that the requirements of Articles 123(2) and 76(1) EPC are complied with by all the claims.

3.2 Article 123(3) EPC

3.2.1 Claim 1 of the main request differs from Claim 3 as granted by (a) the mention that the groups  $Ar_1$ ,  $Ar_2$ ,  $X_3$  and  $X_4$  are selected only from hydrocarbyl substituted aromatic hydrocarbon radicals containing up to 20 carbon atoms and by (b) the indication that the transfer of a fragment of the anion to the metal cation is avoided by steric hindrance resulting from substitutions on the aromatic carbons of the anion.

Since the amendments (a) and (b) amount to a restriction of the granted scope, Claim 1 meets the requirements of Article 123(3) EPC.

3.2.2 It is obvious that a printing error has occurred in the wording of Claim 6 of the published patent, and that a verb is missing between the expressions "as to" and "at least". It is however the decision dated 3 October 1996 to grant the patent which is legally binding as regards existence and scope of the patent

(Article 97 EPC). Since Claim 2 of the main request exactly corresponds to Claim 6 as proposed to grant by the Examining Division (cf. communication under Rule 51(4) EPC of 7 December 1995), it meets the requirements of Article 123(3) EPC.

Claim 3 corresponds to Claim 7 as granted. Thus, the requirements of Article 123(3) EPC are complied with by this claim.

3.2.3 Claim 4 originates from Claim 8 as granted, wherein the bis(cyclopentadienyl) metal compound (i) component **or** the catalyst was required to be a pure enantiomer or racemic mixture of two enantiomers of a rigid, chiral metallocene, or to contain (ii) a covalent bridging group between two cyclopentadienyl radicals. Claim 4 requires that the catalyst is prepared by the method of Claim 2 in which the bis(cyclopentadienyl) metal compound (i) is a pure enantiomer or racemic mixture of two enantiomers of a rigid, chiral metallocene; or (ii) contains a covalent bridging group between two substituted cyclopentadienyl radicals.

It is however evident in the light of the description of the patent insuit (cf. page 10, lines 39 to 43) as well of Claim 10 of the application as originally filed that the wording "or" used in Claim 8 as granted between "bis(cyclopentadienyl) metal compound (i) component" and "the catalyst" results from a clerical error and should have read "of".

As indicated in decision T 438/98 of 12 October 2000 (not published in OJ EPO, point 3.1.3 of the Reasons for the Decision) a prerequisite for an amendment to

be admissible is that the granted claim properly construed could only be interpreted as the amended claim and satisfy the requirements of Article 123(2) EPC.

Since both conditions are met in the present case, the amendment made is not objectionable under Article 123(3) EPC.

Since the introduction of the term "substituted" between "two" and "cyclopentadienyl radicals" results in a restriction of the granted scope, no objection under Article 123(3) EPC arises in that respect.

Thus, it follows from the above that Claim 4 meets the requirements of Article 123(3) EPC.

4. *Article 84 EPC*

The Board is satisfied that, having regard to the amendments made, the claims meet the requirements of Article 84 EPC .

5. As a consequence of the above the Appellant's main request is allowable. Thus, there is no need for the Board to deal with the auxiliary request of the Appellant.

6. The Opposition Division revoked the patent on the grounds of Article 100(c) EPC and, as a consequence did not express its opinion regarding the grounds of opposition under Article 100(a) (inventive step) and 100(b) EPC. In order not to deprive any of the parties of the possibility to be heard by two instances, the Board makes use of its power under

Article 111(1) EPC and refers the case back to the Opposition Division for further prosecution on the basis of Claims 1 to 4 of the main request.

## **Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of the set of Claims 1 to 4 filed as main request at the oral proceedings.

The Registrar:

The Chairman:

E. Görgmaier

R. Young