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**Datasheet for the decision  
of 25 June 2010**

**Case Number:** T 0169/08 - 3.2.07

**Application Number:** 97917652.6

**Publication Number:** 0912396

**IPC:** B65B 1/04

**Language of the proceedings:** EN

**Title of invention:**

Powder filling systems, apparatus and methods

**Patent Proprietor:**

Novartis AG

**Opponent:**

Advanced Inhalation Research Inc.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 56, 116(1), 123(2)

EPC R. 115(2)

RPBA Art. 15(3)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Added subject-matter (main request): yes (point 2)"

"Added subject-matter (auxiliary request): no (point 4)"

"Oral proceedings in absence of both parties: yes (point 1)"

"Inventive step: reasoning of first instance decision applies also to claims amended in appeal proceedings (point 5)"

**Decisions cited:**

-

**Catchword:**

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Case Number: T 0169/08 - 3.2.07

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.07  
of 25 June 2010

**Appellant:**  
(Patent Proprietor)

Novartis AG  
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**Representative:**

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**Respondent:**  
(Opponent)

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**Representative:**

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**Decision under appeal:**

Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
29 November 2007 concerning maintenance of  
European patent No. 0912396 in amended form.

**Composition of the Board:**

**Chairman:** K. Poalas  
**Members:** P. O'Reilly  
E. Dufrasne

## Summary of Facts and Submissions

- I. Opposition was filed against European patent No. 0 912 396.

The opposition division decided to reject the main request (maintenance of the patent as granted) and the first auxiliary request for not fulfilling the requirements of Article 123(2) EPC. The opposition division decided, however, to maintain the patent in amended form in accordance with the auxiliary request 2.

- II. The appellant (patent proprietor) filed an appeal against that decision.

- III. With its letter dated 1 September 2008 the appellant requested oral proceedings for the case that its main request was not allowed.

With its letter of 24 May 2010 the appellant withdrew its request for oral proceedings and indicated that it would not attend them.

The respondent (opponent) in its letter of 27 May 2010 indicated that it would not be attending the oral proceedings.

With its communication to the parties dated 7 June 2010 the Board indicated that it still intended to hold the oral proceedings as scheduled. It indicated that it intended to consider the allowability of the main request, as well as the admissibility and allowability of the auxiliary request if appropriate.

IV. The appellant requested in the written proceedings that the decision under appeal be set aside and the patent be maintained as granted or, in the alternative, that the patent be maintained on the basis of the auxiliary request filed with letter dated 24 May 2010 or on the basis of auxiliary request 2 allowed by the opposition division.

The respondent requested in the written proceedings that the appeal be dismissed.

V. Independent claims 1 and 7 of the **main request** (patent as granted) read as follows:

1. A method for transporting powder (28, 114, 208) having fine particles, comprising:  
providing a powder (28, 114, 208) having fine particles in a container (18, 108, 116, 210);  
fluidizing at least some of the fine particles by applying energy to the powder to overcome cohesive forces between particles;  
capturing, in a metering chamber (56, 120, 220) of a rotatable member (16), fluidized fine particles flowing from the container by applying a vacuum to the metering chamber via line means (60); and  
transferring the captured fine particles from the metering chamber to a receptacle (12, 230a, 230b, 230c), following movement of the rotatable member, by applying pressurized gas to the metering chamber via line means (60);  
characterized by using a controller to selectively connect a part (62) of the line means extending from the rotatable member to a vacuum source when capturing particles and to a compressed gas source when

transferring captured particles, whereby the transferred fine particles are sufficiently uncompacted so that they may be dispersed upon removal from the receptacle.

7. An apparatus (10, 100, 200) for transporting powder (28, 114, 208) having fine particles into at least one receptacle (12, 230a, 230b, 230c), said apparatus comprising:  
a container (18, 108, 116, 210) for receiving and holding the powder;  
means for fluidizing at least some of the fine particles by applying energy to the powder to overcome cohesive forces between particles;  
means for capturing in a metering chamber (56, 120, 220) of a rotatable member (16) at least a portion of the fluidized fine particles flowing from the container, the capturing means comprising a source of a vacuum for applying suction to the metering chamber via line means (60); and  
means for ejecting the captured powder from the metering chamber following movement of the rotatable member and into at least one receptacle, the ejecting means comprising a source of compressed gas for applying pressurized gas to the metering chamber via line means (62);  
characterized in that a part (62) of the line means extends from the rotatable member and is selectively connectable to one of a vacuum source and a compressed gas source by a controller when capturing particles and ejecting captured powder respectively.

Independent claims 1 and 7 of the **auxiliary request** read as follows (amendments when compared to claims 1

and 7 respectively of the main request are depicted by the Board in bold or struck through):

1. A method for transporting powder (28, 114, 208) having fine particles, comprising:  
providing a powder (28, 114, 208) having fine particles in a container (18, 108, 116, 210);  
fluidizing ~~at least some of~~ the fine particles by applying energy to the powder to overcome cohesive forces between particles;  
capturing, in a metering chamber (56, 120, 220) of a rotatable member (16), fluidized fine particles flowing from the container by applying a vacuum to the metering chamber via **a line means (60) connected to a further line (62) extending from the rotatable member**; and  
transferring the captured fine particles from the metering chamber to a receptacle (12, 230a, 230b, 230c), following movement of the rotatable member, by applying pressurized gas to the metering chamber via **the line means (60)**;  
characterized by using a controller to selectively connect ~~a part (62) of the line means extending from the rotatable member~~ **the further line (62) extending from the centre of the rotatable member** to a vacuum source when capturing particles and to a compressed gas source when transferring captured particles, whereby the transferred fine particles are sufficiently uncompact so that they may be dispersed upon removal from the receptacle.

7. An apparatus (10, 100, 200) for transporting powder (28, 114, 208) having fine particles into at least one receptacle (12, 230a, 230b, 230c), said apparatus comprising:

a container (18, 108, 116, 210) for receiving and holding the powder;

means for fluidizing ~~at least some of~~ the fine particles by applying energy to the powder to overcome cohesive forces between particles;

means for capturing in a metering chamber (56, 120, 220) of a rotatable member (16) at least a portion of the fluidized fine particles flowing from the container, the capturing means comprising a source of a vacuum for applying suction to the metering chamber via **a line means** (60); and

means for ejecting the captured powder from the metering chamber following movement of the rotatable member and into at least one receptacle, the ejecting means comprising a source of compressed gas for applying pressurized gas to the metering chamber via **the line means (62 60) connected to a further line (62) extending from the rotatable member;**

characterized in that ~~a part~~ **the further line (62) of the line means** extending **from the centre of the** rotatable member ~~and~~ is selectively connectable to one of a vacuum source and a compressed gas source by a controller when capturing particles and ejecting captured powder respectively.

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

(i) The amendments made to the claims during the grant proceedings did not offend Article 123(2) EPC.

The amendment to the independent claims to refer to "fluidizing at least some of the fine particles" is based on the application as originally filed. It is



clear that in the step of fluidizing the fine powder the vibrating sieves 20 and 22 will not fluidize necessarily all the powder in container 18 so that the amendment merely serves to clarify the claim.

The introduction into the independent claims of the wording "line means" and "a part of the line means extending from the rotatable member to a vacuum source" does not extend beyond the content of the application as originally filed, contrary to the opinion of the opposition division. On page 28, lines 22 to 32 of the application as originally filed reference is made to "line 128". A "line means" is simply something that has the functionality of a line. It is also not necessary to specify that it extends from the centre of the rotatable member, as argued by the opposition division, since that was only the case for the particular embodiment.

(ii) The amendments made to the claims of the auxiliary request comply with Article 123(2) EPC.

Compared with the claims maintained according to the decision of the opposition division the term "hose (62)" has been replaced by "further line (62)". A basis for the broader term "further line (62)" may be found on page 28, line 23 of the application as originally filed which states "a vacuum is created in the chamber 120 by a line 128" (emphasis added). Figure 20 shows the line extending from the centre of the rotatable member 118 where it communicates with the line 60 therein.

VII. The respondent made no submission regarding the reasoning of the appeal other than indicating that the appeal should be dismissed.

## **Reasons for the Decision**

### 1. *Oral proceedings*

1.1 The appellant withdrew its request for oral proceedings with its letter of 24 May 2010, also indicating that it would not attend them. The respondent had not requested oral proceedings and indicated in its letter of 27 May 2010 that it would not attend them.

1.2 As allowed for under Article 116(1) EPC oral proceedings may take place at the instance of the European Patent Office if it considers this to be expedient. In the present case the Board considered it to be expedient for the oral proceedings to take place even though the request for oral proceedings made by the appellant had been withdrawn.

1.3 Both parties had been duly summoned to the oral proceedings but neither appeared. In accordance with Rule 115(2) EPC and Article 15(3) Rules of Procedure of the Boards of Appeal, the oral proceedings were held without them.

*Main request*

2. *Article 123(2) EPC*

2.1 The opposition division considered that the feature in claims 1 and 7 of "fluidizing at least some of the fine particles" was not disclosed in the application as originally filed (point 2.1 of the decision grounds). The appellant argued based on page 17, line 27 to page 18, line 11, of the application as originally filed and what would happen if the sieving process were stopped at any time. The argument of the appellant is not convincing since there is no indication in the application as originally filed that not all of the powder will be fluidized at once, nor is there any indication that the sieving process would be stopped before the powder is fluidized.

2.2 The opposition division considered that the features of the "line means (60)" and "a part (62) of the line means" were not disclosed in the application as originally filed. It is not disputed by the appellant that these features were not in the claims of the application as originally filed so that a basis for them must be sought in the description. The opposition division considered that there was an original disclosure of a line 60 and a hose 62 as separate elements whereas the claim specifies these two elements together as a "line means" with the hose being merely a "part" of the line means. Furthermore, the opposition division noted that the description showed the hose 62 as extending from the centre of the rotatable member whereas the claim merely specifies the part 62 to be "extending from the rotatable member". The claim thus

allows that this part may have any form and may extend from any point of the rotatable member.

The Board would note that the fact that the hose was originally disclosed in the drawings as extending from the centre or axis of the rotatable member does not appear to have been mere chance since that is the one position where the problem of attaching a single hose to a rotatable member is minimised.

The Board also considers that the expression "line means" has a broader meaning than a "line" or a "hose". The appellant has argued that the expression "line means" just implies "something providing the functionality of a line, i.e. a line". The Board does not agree with the appellant in this respect since the meaning is at least "something providing the functionality of a line or lines, without necessarily being just a line or lines". This is normally the purpose of using a "means" type of expression. The expression "line means" could, for instance, include a plurality of parallel lines within its scope. There was, however, no indication in the application as originally filed that there could be a plurality of parallel lines or how these could be arranged.

- 2.3 With regard to the position from which the part 62 extends from the rotatable member the appellant argues that the centre of the rotatable member was just the particular embodiment and that the skilled person would see the matter more broadly. The appellant, however, has provided no proof that the skilled person would see the matter more broadly. As already indicated above, the position of the hose 62 at the centre of the

rotatable member is not arbitrary since that position avoids problems due to the rotating movement of the member. There is nothing in the application as originally filed to suggest that other positions are possible or how an attachment at another position could be effected.

- 2.4 Therefore, the amended claims 1 and 7 of the main request do not fulfil the requirements of Article 123(2) EPC.

*Auxiliary request*

3. *Admissibility of the auxiliary request*

- 3.1 This request was filed one month in advance of the oral proceedings before the Board. The independent claims of the request differ from those decided upon by the opposition division in just one aspect. The amended claims lie in terms of their scope between those as granted and those as maintained in accordance with the decision of the opposition division. Therefore no new matters can arise which could not reasonably be dealt with by the respondent and the Board during the oral proceedings. The request may also be seen as a response to the provisional opinion of the Board since the claims overcome problems that were mentioned in that opinion with respect to Article 123(2) EPC and the main request (see point 2 above).

- 3.2 The respondent, although not appearing at the oral proceedings, knew that the request would be dealt with during the oral proceedings since the Board informed the parties of this in its communication dated

7 June 2010. The respondent could therefore have communicated its arguments in writing and/or at the oral proceedings. The respondent did not, however, avail itself of this possibility. The Board considered therefore that the right to be heard of the respondent would not be infringed by admitting the request into the proceedings.

In accordance with Article 15(3) Rules of Procedure of the Boards of Appeal the Board is not obliged to delay any step in the appeal proceedings by reason of the absence of the respondent, including its decision. The Board therefore took a decision on the admissibility of the request.

3.3 Accordingly the Board admitted the auxiliary request into the appeal proceedings and considered it during the oral proceedings.

4. *Article 123(2) EPC*

4.1 Compared to the patent as maintained in accordance with the decision of the opposition division claims 1 and 7 of the auxiliary request have been amended so that the term "hose (62)" has been replaced by "further line (62)". The appellant has cited as a basis for this amendment page 28, line 23, of the application as originally filed.

In this part of the application an alternative embodiment (figure 20) is being described and reference is made to "a vacuum is created in the chamber 120 by a line 128 in a similar manner to that previously described with the apparatus 10". In the apparatus 10

shown in the first embodiment in figures 1 and 5 to 8 there is a "line 60" (which is an internal passage of the wheel 16) directly connected to chamber 56, the line 60 being in turn connected to hose 62 which leads out from the centre of the rotatable wheel 16. In the alternative embodiment the line 128 leads out from the centre of the wheel 16 as is visible in figure 20. There is a passage internal of the wheel which is connected to line 128. Also on page 28, lines 14 to 17, it is indicated that the wheel and chamber are identical to those of the apparatus 10.

4.2 The Board concludes therefore that an explicit basis for the amendment is therefore to be found on page 28.

5. *Inventive step*

5.1 Claims 1 and 7 of this request differ from the corresponding claims in the version of the patent to be maintained in accordance with the decision of the opposition division (auxiliary request 2) only in that the term "hose (62)" has been replaced by "further line (62)".

This latter term is a more general definition of the feature than the one considered by the opposition division. For example, the term "hose" could be considered to imply flexibility whereas "further line" would not necessarily imply flexibility.

Nevertheless, it is clear from the reasoning of the opposition division that it considered the provision of a single port and the hose extending from the centre of the rotatable member not to be obvious to the skilled

person. The position of the hose played a role in its decision since specific reference was made to it. No particular properties of the hose played a role since such properties are not discussed in the decision. Since the "further line" specified in the independent claims of this request is required to extend from the centre of the rotatable member the reasoning of the opposition division would apply correspondingly to these claims.

- 5.2 This request contains independent claims that are broader in scope than those maintained in accordance with the decision of the opposition division as explained above.

Before a decision can be taken to maintain the patent including these claims the Board has to consider whether the requirements of the Convention have been met (Article 101(3) EPC) including in particular that of inventive step.

As also explained above the Board considers that the reasoning of the opposition division with respect to inventive step concerning the claims accepted in accordance with its decision would also apply to the claims of this auxiliary request.

The Board considers that it would be out of its competence to review this reasoning since the present appeal is not concerned with the conclusions of the opposition division with respect to inventive step of the subject-matter of the claims which it intends to maintain. It is sufficient that the Board has established that the same reasoning applies in the



present case in order for the Board to refrain from forming its own conclusion on the matter.

Therefore the Board does not make any finding of its own concerning inventive step.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent in the following version:

claims: 1 to 13 filed as auxiliary request with letter of 24 May 2010;

description: pages 2, 3, 5 and 7 to 12 of the patent as granted and pages 4 and 6 as filed during the oral proceedings on 10 October 2007; and

figures: 1 to 21 of the patent as granted.

The Registrar:

The Chairman:

A. Wolinski

K. Poalas