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**Datasheet for the decision
of 23 July 2012**

Case Number: T 0253/09 - 3.3.05

Application Number: 01948972.3

Publication Number: 1259459

IPC: C01B 11/02

Language of the proceedings: EN

Title of invention:

Massive bodies for producing highly converted solutions of chlorine dioxide

Applicant:

BASF Catalysts LLC

Headword:

Chlorine dioxide/BASF

Relevant legal provisions:

EPC Art. 84, 123(2), 111(1)
EPC R. 43(1)(3)

Keyword:

"Amendments (main request): allowable - no added subject-matter"
"Clarity (main request): yes"
"Essential features present (main request): yes"

Decisions cited:

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Catchword:

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Case Number: T 0253/09 - 3.3.05

D E C I S I O N
of the Technical Board of Appeal 3.3.05
of 23 July 2012

Appellant: BASF Catalysts LLC
(Applicant) 100 Campus Drive
Florham Park, NJ 07932 (US)

Representative: Fisher, Adrian John
Carpmaels & Ransford
One Southampton Row
London WC1B 5HA (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 18 August 2008
refusing European patent application
No. 01948972.3 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: G. Raths
Members: J.-M. Schwaller
S. Hoffmann

Summary of Facts and Submissions

I. This appeal lies from the decision of the examining division refusing European patent application No. 01 948 972.3 on the grounds that claim 1 of the main request, which read as follows, did not meet the requirements of Article 123(2) and 84 EPC:

"1. A massive body comprising a metal chlorite and a solid acid source, said massive body when added to liquid water will sustain a pore structure that will produce a solution of chlorine dioxide wherein the ratio of the concentration of chlorine dioxide to the sum of the concentrations of chlorine dioxide and chlorite anion is greater than 0.25."

II. In essence the examining division argued as follows:

- The amendment to claim 1 that the massive body when added to water "will sustain a pore structure" was based on the description, in which this feature was disclosed only in combination with the ingredients sodium chlorite, dried powdered sodium bisulfate and dried powder calcium chloride. The omission of these features from claim 1 thus generated other combinations of ingredients which were not directly and unambiguously disclosed in the application as filed, contrary to Article 123(2) EPC.

- The feature "sustain a pore structure" was not clear (Article 84 EPC) in the sense that it was too vague and broad for characterising the porosity, a feature essential for obtaining the claimed result that the claimed solid body enabled, when added to water, the

production of a solution of chlorine dioxide wherein the ratio of the concentration of chlorine dioxide to the sum of the concentrations of chlorine dioxide and chlorite anion is greater than 0.25.

- III. With the grounds of appeal dated 24 December 2008, the appellant submitted three sets of claims as a main request and as auxiliary requests 1 and 2, respectively, with the claims of the main request being identical to those on which the first instance decision was based.
- IV. In a communication, the board inter alia objected to claim 1 of the main request under Article 84 EPC.
- V. With letter dated 28 September 2011, the appellant submitted a new main request and a new auxiliary request in replacement of those requests then on file.

Claim 1 of the main request read as follows:

"1. A soluble tablet comprising sodium chlorite and sodium bisulfite, said tablet being formed from a mixture of dried powdered ingredients by compression in a tablet die at a pressure sufficient to produce a substantially intact tablet, wherein said tablet when added to liquid water produces a solution of chlorine dioxide wherein the ratio of the concentration of chlorine dioxide to the sum of the concentrations of chlorine dioxide and chlorite anion is greater than 0.25."

- VI. With letter dated 2 December 2011, the board objected under Article 123(2) EPC to the amendment to claim 1 that the soluble tablet comprised "*sodium bisulfite*".

The board further considered it necessary under Article 84 EPC together with Rule 43(1) and (3) EPC to specify that the tablet was "porous". This feature being nevertheless ambiguous in the sense that it was vague and undefined, it was necessary to clarify its meaning under Article 84 EPC.

VII. On 10 April 2012, the appellant filed a new main and a new auxiliary request, with claim 1 of the main request reading:

"1. A soluble tablet comprising sodium chlorite and sodium bisulfate, said tablet being porous and being formed from a mixture of dried powdered ingredients by compression in a tablet die at a pressure from 6.9 MPa to 69 MPa (1000 to 10,000 lb/in²), wherein said tablet when added to liquid water produces a solution of chlorine dioxide wherein the ratio of the concentration of chlorine dioxide to the sum of the concentrations of chlorine dioxide and chlorite anion is greater than 0.25."

VIII. The appellant requested that the contested decision be set aside and that a patent be granted on the basis of one of the two sets of claims filed on 10 April 2012 as main and auxiliary requests, respectively.

Reasons for the Decision

1. *Main request - Allowability of the amendments*

The claims of this request have a basis as follows in the application as filed, published as WO 01/56923 A1:

- Claim 1 results from the combination of claims 1, 2 and 5 with the passages at page 3, line 28, and page 6, line 10 to line 20, of the application as filed;
- Claim 2 has a basis in the passage at page 6, lines 23 and 24;
- Claim 3 corresponds to claim 6 of the application as filed;
- Claim 4 has a basis in claim 7 of the application as filed and in the passage at page 8, lines 12 to 19.

It follows that the amended claims of this request meet the requirements of Article 123(2) EPC.

2. *Main request - Article 84 EPC*

2.1 In view of the argumentation in the grounds for appeal that the essence of the invention lay in the presence of pores in the soluble tablet, the appellant included this feature in claim 1 at issue by specifying that the tablet was "porous".

2.2 The feature "porous" being nevertheless ambiguous in the sense that it is vague and undefined, the appellant

clarified its meaning by specifying the pressure under which the tablet was compressed.

2.3 With these amendments, the board is satisfied that the requirements not only of Article 84 EPC alone, but also together with Rule 43(1) and (3) EPC, are fulfilled because claim 1 thus recites all the features essential to the definition of the invention. In particular, the features necessary for obtaining a substantially intact tablet and the necessary porous framework structure in which the chlorine dioxide forming reactions may proceed to substantial completion prior to dissolution of said framework are now clearly defined in the independent claim 1 at issue.

3. As the amendments proposed in the request at issue overcome the grounds for refusing the present application, and since the claims at issue have not yet been considered by the examining division as regards the novelty and inventive step issues, the board considers it appropriate to exercise its power as conferred by Article 111(1) EPC to remit the case to the department of first instance for further prosecution.

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 for further prosecution on the basis of the claims filed as a main request with letter dated 10 April 2012.

The Registrar:

The Chairman

C. Vodz

G. Rath