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Datasheet for the decision of 5 March 2020

Case Number: T 0205/18 - 3.3.05

Application Number: 01124513.1

Publication Number: 1254878

IPC: C05G3/00, C05C9/02

Language of the proceedings: EN

Title of invention:
Method for making a highly-stable liquid nitrogenous fertilizer for controllably releasing nitrogen and the fertilizer made thereby

Patent Proprietor:
Sadepan Chimica S.r.l.

Opponents:
Advachem Sa
Forresters
Marubeni Specialty Chemicals, Inc.

Headword:
Highly-stable fertilizer/SADEPAN

Relevant legal provisions:
EPC Art. 123(2), 112(1)(a)

Keyword:
Amendments - allowable (no)
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

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Case Number: T 0205/18 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 5 March 2020

Appellant: (Patent Proprietor)	Sadepan Chimica S.r.l. Viale Lombardia, 29 46019 Viadana (IT)
Representative:	De Gregori, Antonella Studio Legale Bird & Bird Via Borgogna, 8 20122 Milano (IT)
Respondent 1: (Opponent 1)	Advachem Sa Route N624 de Wallonie Darse d'Hautrage 7334 Hautrage (BE)
Representative:	Powis de Tenbossche, Roland Cabinet Bede S.A. Boulevard Général Wahis 15 1030 Bruxelles (BE)
Respondent 2: (Opponent 2)	Forresters Skygarden Erika-Mann-Strasse 11 80636 München (DE)
Representative:	Bond, Christopher William Forresters IP LLP Skygarden Erika-Mann-Strasse 11 80636 München (DE)
Respondent 3: (Opponent 3)	Marubeni Specialty Chemicals, Inc. 10 Bank Street Ste. 740 White Plains, NY 10606 (US)

Representative: Dörr, Klaus
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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted on 9 November 2017 concerning maintenance of the European Patent No. 1254878 in amended form.**

Composition of the Board:

Chairman E. Bendl
Members: G. Glod
R. Winkelhofer

Summary of Facts and Submissions

I. The patent proprietor's (appellant's) appeal lies from the decision of the opposition division that the amended European patent EP-B-1 254 878 based on auxiliary request 2 meets the requirements of the EPC.

II. In the appeal proceedings, the appellant initially maintained the main request (claims as granted) and the first auxiliary request which had formed the basis of the appealed decision.

III. In the communication pursuant to Article 15(1) RPBA, the board was of the preliminary opinion that the appeal was likely to be dismissed, since the appellant's reasoning with regard to the main request was not substantiated, and claim 10 of the first auxiliary request did not meet the requirements of Article 123(2) EPC.

IV. Said claim 10 is as follows:

"*10. A liquid nitrogenous fertilizer, characterized in that said fertilizer comprises a Nitrogen concentration from 12% to 34% by weight, a P_2O_5 concentration from 0 to 3% by weight, a K_2O concentration from 0 to 5% by weight, obtainable according to the method of any of the previous claims, said fertilizer in a range from -20°C to +50°C having*

- a storing stability at -20°C of at least two months;
- a storing stability at +20°C of at least six months;
- a storing stability at +50°C of at least three months."

V. In response to the communication, the appellant maintained only its auxiliary request 1, withdrew its request for oral proceedings, indicated that it would not be present or represented at the scheduled oral proceedings, and further indicated its preference for remittal of the case to the opposition division if the novelty of the claimed subject-matter was recognised.

VI. The appellant requests that the impugned decision be set aside and that the patent be maintained based on auxiliary request 1.

Respondent 1 (opponent 1) - without itself appealing the opposition division's decision - requests that the patent be revoked. If the patent was not revoked under Article 123(2) EPC, the following two questions should be referred to the Enlarged Board of Appeal.

"*Au cas où une demande de brevet comporte plus de cinq revendications indépendantes de produits A,B,C,D,E, sans existence d'un lien direct entre l'objet des ces plus de cinq revendications indépendantes dans la description, le demandeur peut-il choisir librement l'objet d'une revendication principale parmi toutes les combinaisons possibles de l'objet des revendications indépendantes (120 combinaisons différentes dans le cas de 5 revendications indépendantes), sans contrevenir à l'article 123(2) de la CBE ?*

Au cas où, pour solutionner un même problème technique, une demande de brevet comporte une série de revendications indépendantes de produits non liées directement entre elles, à la fois dans les revendications et dans la description, le demandeur peut-il supprimer de manière arbitraire une revendication indépendante de produit (par exemple C),

mais décider de combiner entre elles les autres revendications originellement indépendantes (A+B; A+D, A+E, B+D+E, D+E, A+B+D, A+B+E; A+B+D+E) sans enfreindre l'article 123(2) de la CBE?"

Translation by the board:

If a patent application contains more than five independent claims of products A,B,C,D,E and there is no direct link between the subject-matter of these independent claims in the description, is the applicant allowed to freely choose the subject-matter of a main claim among all possible combinations of the subject-matter of the independent claims (120 different combinations in the case of five independent claims) without contravening Article 123(2) EPC?

If a patent application contains a series of independent product claims that are not directly linked either in the claims or in the description for solving the same technical problem, is the applicant allowed to arbitrarily delete an independent product claim (for example C), but to decide to combine the other originally independent claims (A+B; A+D, A+E, B+D+E, D+E, A+B+D, A+B+E; A+B+D+E) without contravening Article 123(2) EPC?

Respondents 2 and 3 (opponents 2 and 3) request that the appeal be dismissed.

Reasons for the Decision

Main request (filed as first auxiliary request during oral proceedings before the opposition division)

2. Article 100(c) EPC in combination with Article 123(2) EPC

The subject-matter of claim 10 is not directly and unambiguously derivable from the application as filed, which in the present case is the Italian version of the original application, for the following reasons:

Claim 20 of the application as filed, relating to a preferred fertilizer, refers to claim 19, which mentions the amounts of nitrogen, P_2O_5 and K_2O as defined in claim 10 of the request at issue. Claim 21 as filed, which contains the features relating to stability that are now present in claim 10, is formulated as an independent claim, with no reference to any other claim. Claim 21 as filed does not even relate to liquid fertilisers. Stability is not mentioned elsewhere in the application as filed. None of the examples contains any information about stability. There is no pointer in the application as filed that the methods according to claims 3 and 4 of the application, which are now reflected in claims 1 and 2, necessarily lead to a fertiliser having all the stability properties listed in claim 21 as filed.

Therefore, this request must fail.

Second auxiliary request found allowable by the opposition division

3. Because the proprietor is the sole appellant, this request is not open to debate in view of the principle of prohibition of *reformatio in peius.*

4. Referral of questions to the Enlarged Board of Appeal

As the main request does not fulfil the requirements of Article 123(2) EPC, the prerequisite for respondent 1's request for referral to the Enlarged Board of Appeal is not met. Additionally, respondent 1 has confirmed in its submission dated 28 January 2020 that, given the board's preliminary opinion, there is no need to refer the questions to the Enlarged Board of Appeal.

5. Request for remittal

Since the only request at issue does not meet the requirements of Article 123(2) EPC, the question of remittal of the case to the opposition division does not arise.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

C. Vodz E. Bendl

Decision electronically authenticated