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**Datasheet for the decision
of 1 June 2022**

Case Number: T 0137/19 - 3.3.06

Application Number: 12183842.9

Publication Number: 2568033

IPC: C10L1/18

Language of the proceedings: EN

Title of invention:

Gasoline compositions and method of producing the same

Patent Proprietor:

Neste Oyj

Opponents:

UPM-Kymmene Corporation
AWA Sweden AB

Headword:

Neste/Bio-fuel

Relevant legal provisions:

EPC Art. 123(2)
RPBA Art. 12(4)
RPBA 2020 Art. 13(2)

Keyword:

Amendments - intermediate generalisation - allowable (no)
Late-filed request - submitted with the statement of grounds
of appeal - request could have been filed in first instance
proceedings (yes) - admitted (no)
Amendment after summons - exceptional circumstances (no) -
taken into account (no)

Decisions cited:

T 1067/08, T 0969/14, T 2432/11

Catchword:



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Case Number: T 0137/19 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 1 June 2022

Appellant:
(Patent proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 14 November
2018 revoking European patent No. 2568033
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: S. Arrojo
 C. Heath

Summary of Facts and Submissions

- I. The patent proprietor filed an appeal against the decision of the opposition division to revoke European patent No. 2 568 033 under the ground for opposition pursuant to Article 100(c) EPC and for non-compliance with the requirements of Article 123(2) EPC.
- II. In its statement of grounds of appeal, it requested to set aside the above decision and to maintain the patent as granted (main request) or, as an auxiliary measure, to maintain the patent in amended form on the basis of auxiliary requests 1 to 4 filed therewith, wherein claim 1 as granted (**main request**) reads:

"1. Gasoline fuel, comprising a first gasoline component being a conventional mix of alkanes, straight chain, branched and cyclic having 5 to 12 carbon atoms, along with some aromatic compounds, derived from fossil sources, and a second paraffinic hydrocarbons originating from biological oils, fats, or derivatives or combinations thereof, and oxygenates, wherein

- the concentration of the hydrocarbons originating from biological oils, fats, or derivatives or combinations thereof ranges from 5 to 20 vol-%; and*
- the oxygenates are selected from*
 - o ethyl tertiary butyl ether (ETBE) present in a concentration of 7 to 25 vol-%, preferably about 15 to 22 vol-%;*
 - o wherein the bioenergy content of the fuel is at least 14 Energy equivalent percentage {E_{eqv}-%}, preferably about 15 to 35 E_{eqv} %, said Energy Equivalent percentage being calculated based on the*

heating values given in the European Renewable Energy Directive 2009/28/EC, and wherein - the maximum concentration of aromatics in the gasoline fuel is 35 vol-%."

Claim 1 of **auxiliary request 1** corresponds to that of the main request with the following amendments (highlighted by the board):

"... Directive 2009/28/EC, and wherein the remaining portion of the fuel is formed by the first gasoline component, and wherein ..."

Claim 1 of **auxiliary request 2** corresponds to that of the main request with the following amendments (highlighted by the board):

"..., and a second paraffinic gasoline component comprising paraffinic C2 to C14 hydrocarbons originating from hydrogenation of biological oils, Directive 2009/28/EC, and wherein the maximum concentration of aromatics in the gasoline fuel is 35 vol-%, and wherein the concentration of oxygen is 5 mass % at maximum, calculated from the total mass of the fuel."

Claim 1 of **auxiliary request 3** corresponds to that of the 2nd auxiliary request with the following amendments (highlighted by the board):

"... mass of the fuel. , wherein the bioenergy content of the C2 to C14 hydrocarbons originating from biological oils, natural fats or combinations thereof is at least 14 E_{eqv}-%."

Claim 1 of **auxiliary request 4** reads:

1. A method of producing a gasoline fuel composition comprising a first gasoline component being a conventional mix of alkanes, straight chain, branched and cyclic having 5 to 12 carbon atoms, along with some aromatic compounds, derived from fossil sources, and a second paraffinic hydrocarbons originating from biological oils, fats, or derivatives or combinations thereof, and oxygenates, wherein
 - the concentration of the hydrocarbons originating from biological oils, fats, or derivatives or combinations thereof ranges from 5 to 20 vol-%; and
 - the oxygenates are selected from
 - o ethyl tertiary butyl ether (ETBE) present in a concentration of 7 to 25 vol-%, preferably about 15 to 22 vol-%;
 - o wherein the bioenergy content of the fuel is at least 14 Energy equivalent percentage $\{E_{eqv}\}$, preferably about 15 to 35 E_{eqv} %, said Energy Equivalent percentage being calculated based on the heating values given in the European Renewable Energy Directive 2009/28/EC, and wherein
 - the maximum concentration of aromatics in the gasoline fuel is 35 vol-%, comprising the steps of
 - providing a first gasoline component being a conventional mix of alkanes, straight chain, branched and cyclic having 5 to 12 carbon atoms, along with some aromatic compounds, derived from fossil sources;
 - providing a second paraffinic gasoline component comprising paraffinic C2 to C14 hydrocarbons originating from biological oils, natural fats or combinations thereof, optionally obtained after hydrogenation of said oils, fats or combinations thereof;
 - providing an oxygenate; and
 - blending the first gasoline component, the second gasoline component and the oxygenate to produce a

gasoline fuel composition containing a concentration of oxygen not exceeding 5 mass %; and at least 14 % of Energy equivalent of said C₂ to C₁₄ hydrocarbons, wherein the step of providing a second paraffinic gasoline component preferably comprises hydrotreating in a hydrotreating step and isomerising in an isomerisation step a feed of biological oils, natural fats or combinations thereof."

The appellant further requested to remit the case to the opposition division for further prosecution.

- III. With their replies, opponents 1 and 2 (also respondents) requested that the appeal be dismissed and that auxiliary requests 1, 3 and 4 not be introduced into the proceedings under Article 12(4) RPBA 2007.
- IV. In its preliminary opinion the board concluded that claim 1 of the main request extended beyond the content of the application as filed and that auxiliary request 1 appeared to be admissible and allowable under Article 123(2) EPC.
- V. At the oral proceedings, which took place on 1 June 2022, the board changed its preliminary opinion in view of the outcome of the discussion and concluded that auxiliary request 1 was not allowable under Article 123(2) EPC. After announcing that auxiliary request 2 was also not allowable under Article 123(2) EPC and that auxiliary requests 3 and 4 were not admitted into the proceedings, the appellant expressed its intention to file a further request to overcome the outstanding objections. The board nonetheless concluded that this additional request should not be admitted into the appeal proceedings under Article 13(2) RPBA 2020.

VI. Once the debate was closed, the Chairman established the final requests of the parties as follows:

The proprietor and appellant requested to set aside the appealed decision and to maintain the patent as granted (main request) or, as an auxiliary measure, to maintain the patent on the basis of auxiliary requests 1 to 4 filed with the grounds of appeal. It also maintained its request to admit a further auxiliary request at the oral proceedings.

The opponents and respondents requested to dismiss the appeal.

Reasons for the Decision

1. Main request - Added subject-matter

The board has concluded that the ground for opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted for the following reasons:

1.1 Claim 1 as granted is based on claim 1 as filed with the following amendments (highlighted by the board):

"1. Gasoline fuel, comprising a first gasoline component being a conventional mix of alkanes, straight chain, branched and cyclic having 5 to 12 carbon atoms, along with some aromatic compounds, derived from fossil sources, and a second paraffinic hydrocarbons originating from biological oils, fats, or derivatives or combinations thereof, and oxygenates, wherein
- the concentration of the hydrocarbons originating from biological oils, fats, or derivatives or combinations thereof ranges from 5 to 20 vol-%; and
- the oxygenates are selected from

- ethyl tertiary butyl ether (ETBE) present in a concentration of 7 to 25 vol-%, preferably about 15 to 22 vol-%;
- wherein the bioenergy content of the fuel is at least 14 Energy equivalent percentage {E_{eqv}-%}, preferably about 15 to 35 E_{eqv}-%, said Energy Equivalent percentage being calculated based on the heating values given in the European Renewable Energy Directive 2009/28/EC, and wherein
- the maximum concentration of aromatics in the gasoline fuel is 35 vol-%."

1.2 According to the appellant, these amendments find a basis in the following parts of the application as filed:

- claim 1 (defining a gasoline fuel),
- claim 3 (defining the concentration range of 5 to 20 vol.-% of the bio-component),
- claim 4 (defining the oxygenates) with a selection of the oxygenate ETBE in a concentration of 7 to 25 vol-% from a list of alternatives,
- claim 5 (defining the bioenergy content of at least 14 E_{eqv}-%), and
- page 15, lines 5-9 of the description (defining the composition of the first fossil derived gasoline component).

1.3 The contested aspect is whether the disclosure on page 15 as filed (the last element in the previous point) used as basis for describing the fossil gasoline component in claim 1 at issue is part of a specific embodiment on pages 14-15 of the description as filed, and whether the omission of certain features from this embodiment in claim 1 leads to an unallowable intermediate generalisation of the contents of the application as filed.

- 1.4 During first instance proceedings, the discussion focused on whether the description of the gasoline fuel in the passage extending from page 14, line 31 to page 15, line 9 as filed was inextricably linked to the method described in the preceding passage on page 14, lines 15-29. The respondents argued that these passages concerned a single specific embodiment and that, consequently, the omission of certain features in claim 1 at issue led to an unallowable intermediate generalisation.
- 1.5 The appellant contested that the description of the first gasoline component as a "*conventional mix of alkanes, straight chain, branched and cyclic having 5 to 12 carbon atoms, along with some aromatic compounds, derived from fossil sources*" (page 15, lines 5-8 as filed) was a general disclosure concerning all the embodiments of the invention, so its addition to claim 1 as a stand-alone feature complied with the requirements of Article 123(2) EPC.
- 1.6 In its preliminary opinion, the board saw the method for producing a gasoline fuel on page 14 of the application as filed to be not inextricably linked to the embodiment of the gasoline fuel blend described in the passage bridging pages 14 and 15 as filed (immediately after the description of the method). The board nonetheless concluded that claim 1 as granted still failed to define some of the features of the fuel gasoline blend described on the passage bridging pages 14 and 15, so its subject-matter represented an unallowable intermediate generalisation.

The board maintains its preliminary opinion in this respect, and notes that this point was not contested by the appellant.

In particular, the board considers that the description of the first gasoline component on page 15, lines 5-9 is (at least) part of a specific embodiment describing the composition of the gasoline fuel blend in the passage extending from page 14, line 31 to page 15, line 9 as filed. For example, it is apparent that the concentration of aromatics in the final gasoline composition described on page 15, lines 8-9 is directly linked to the concentration of the first gasoline component (containing these aromatics) in the fuel composition described on page 15, lines 5-8. Since claim 1 at issue omits that the remaining portion of the fuel (once the oxygenates and the second component are taken into account) is formed by the first gasoline component (i.e. the conventional gasoline), its subject-matter is considered to represent an intermediate generalisation going beyond the content of the application as filed.

- 1.7 Furthermore, claim 1 at issue also omits that the sum of bio-gasoline component and oxygenates represent 15 to 40 vol.-% of the fuel, a feature which is disclosed on page 15, line 1 as filed, and which also forms part of the embodiment of the fuel gasoline blend in the paragraph bridging pages 14 and 15 as filed.

- 1.8 In response to this objection, the appellant argued that the sum of bio-gasoline component and oxygenates representing 15 to 40 vol.-% was implicitly described as an optional feature. This was immediately obvious in view of the concentration ranges proposed for the remaining portion of the fuel (i.e. the fossil fuel component), which was said to be 55 to 90 vol.-% and "*preferably 60 to 85 vol.-%*". Since the concentration for the sum of bio-gasoline and oxygenates and that for the fossil fuel component had to add-up to 100%, it was

apparent that the range of 15 to 40 vol.-% corresponded to the range for the fossil fuel component of 60 to 85 vol.-%, and not to the broadest range of 55 to 90 vol.-%. The concentration range of fossil fuel component of 60 to 85 vol.-% was however optional ("preferably 60 to 85 vol.-%"), so it was immediately clear for the skilled person that the range of 15 to 40 vol.-% also had to be an optional or preferable aspect of the invention. The omission of this feature from claim 1 could therefore not lead to an unallowable intermediate generalisation of the original disclosure.

- 1.9 The board does not agree with this argumentation because it is based on certain assumptions and not on the direct and unambiguous disclosure of the application as filed. The appellant has rightly identified an ambiguity in the original description, because it is the preferred range for the "remaining portion" (and not the broader range) of the fuel which fits with the proposed range for the bio-component and oxygenates, despite the fact that this latter range is not presented as an optional aspect. However, as the respondents argued, it is precisely this ambiguity which is incompatible with the requirement of a direct and unambiguous disclosure to support the amendments. In other words, while the appellant's argument provides a logical solution to the ambiguity in the description, it is by no means the only way of removing this ambiguity and for this reason cannot be said to be based on an unambiguous disclosure. The ambiguity should thereby not be resolved to the detriment of the general public and in favour of the party who was responsible for the ambiguous drafting of the application in the first place. Furthermore, even if the appellant's line of argumentation was followed, the combination of ranges in claim 1 at issue (5 to 20

vol.-% of a bio-component and 7 to 25 vol.-% of ETBE) would imply that the sum of oxygenates and bio-component is 12 to 45 vol.-%. This range would be incompatible with the broader range for the fossil component 55 to 90 vol.-%, because working at the highest fossil component concentration of 90 vol.-% would involve working under the minimum value for the other two components (10 vol.-% versus a minimum of 12 vol.-%). So following the appellant's logic, the restriction of claim 1 at issue to 7 to 25 vol.-% of ETBE would imply that more restricted ranges have to be selected for the remaining portion of the fuel, which within the context of the embodiment on pages 14-15 would lead to the conclusion that the fossil fuel component must represent 60 to 85 vol.-% and that the sum of bio-component and oxygenates should be 15 to 40 vol.-% of the fuel (which is coherent with the description of this range as non-optional). In other words, it appears that the only way to allowably combine the embodiment in the passage bridging pages 14-15 and the selection of 7 to 25 vol.-% of ETBE would (at least) involve defining the range of 15 to 40 vol.-% for the sum of bio-component and oxygenates in the fuel.

The board therefore concludes that omitting the feature indicating that the sum of bio-gasoline component and the oxygenates represents 15 to 40 vol.-% as disclosed on page 15, line 1 as filed also leads to an unallowable intermediate generalisation.

- 1.10 Therefore the subject-matter of claim 1 as granted extends beyond the content of the application as originally filed, because it represents an unallowable intermediate generalisation between the disclosure of

the specific embodiment on pages 14-15 as filed and the broad subject-matter of the claims as filed.

2. Auxiliary request 1 - Article 123(2) EPC

Since claim 1 at issue does not define that the sum of the bio-component and the oxygenates represent some 15 to 40 vol.-%, the objection raised above remains, and the subject-matter of claim 1 at issue extends beyond the content of the application as filed, in particular because it represents an unallowable intermediate generalisation between the disclosure of the specific embodiment on pages 14-15 as filed and the broad subject-matter of the claims as filed. Auxiliary request 1 does therefore not meet the requirements of Article 123(2) EPC.

3. Auxiliary request 2 - Article 123(2) EPC

Claim 1 of this request does not either define that the sum of the bio-component and the oxygenates represents 15 to 40 vol.-%, nor does it define that the fossil fuel component represents the remaining portion of the fuel. Consequently, the objections raised above remain outstanding and the board concludes that the subject-matter of claim 1 at issue extends beyond the content of the application as originally filed, in particular because it represents an unallowable intermediate generalisation between the disclosure of the specific embodiment on pages 14-15 of the description as filed and the broad subject-matter of the claims as filed. Auxiliary request 2 does therefore not meet the requirements of Article 123(2) EPC.

4. Auxiliary requests 3 and 4 - Admittance

- 4.1 These requests having been submitted for the first time with the statement of grounds of appeal, the question of their admittance is governed by Article 12(4) RPBA 2007, with the decisive question under this provision being whether the appellant could/should have filed these requests earlier in the proceedings.
- 4.2 The appellant argued in this respect that during first instance proceedings, the position of the opponents had been that claim 1 should include all the features in the embodiments of pages 14 and 15 as filed, so there was no simple way to overcome those objections. This was also apparent in view of the minutes of the oral proceedings, which indicated that auxiliary request was not allowable "*at least because*" there was one feature missing, thereby hinting that other features might have had to be added in order to overcome the objections. Consequently, the statement of grounds represented the first opportunity for the appellant to draft a proper response to address the outstanding objections.
- 4.3 The board does not share this argumentation, because it is apparent that there were multiple opportunities to submit the auxiliary requests at issue during first instance proceedings, as well as compelling reasons to do so. Already in its preliminary opinion (submitted on 9 February 2018), the opposition division clearly indicated (point 7) the three features that needed to be added to claim 1 to overcome the outstanding objections. The appellant responded with a single auxiliary request, which only included two of the three required features. According to the minutes of the oral proceedings (point 6), the opposition division offered a further opportunity to file an allowable request, and the proprietor declined to do so, which effectively prevented a discussion on patentability before the

opposition division. Contrary to the appellant's allegations, the expression "*at least because*" in the minutes merely represented a standard indication that (possibly) other contested issues had not been decided upon, so it is not apparent how this could be seen as a disincentive (let alone a justification) for not reacting to the invitation to file a further request.

4.4 The board therefore concludes that auxiliary requests 3 and 4 could and should have been filed during first instance proceedings, and therefore exercises its discretion under Article 12(4) RPBA 2007 not to admit them into the appeal proceedings.

5. Further requests - Admittance

5.1 After the board announced its opinion that the patent should be revoked because auxiliary requests 1 and 2 were not allowable under Article 123(2) EPC and auxiliary requests 3 and 4 were not admissible, the appellant requested to file an additional set of claims to address the outstanding issues. In particular, it proposed to restrict claim 1 of auxiliary request 1 at issue by further defining that the sum of the bio-component and the oxygenates represented 15 to 40 vol.-% of the fuel.

5.2 The admittance of an auxiliary request at this late stage is governed by Article 13(2) RPBA 2020, which indicates that requests filed after notification of the summons to attend oral proceedings should not be admitted unless exceptional circumstances apply.

5.3 The appellant argued that the late filing of the request was justified because it had been taken by surprise by the argument that claim 1 of auxiliary

request 1 extended beyond the content of the application as filed due to the omission of the range of 15 to 40 vol.-% and by the ensuing change of opinion of the board. This argument had been presented for the first time at the oral proceedings, so the subject of the discussion had changed, which represented an exceptional circumstance pursuant to Article 13(2) RPBA 2020.

- 5.4 The board however notes that, as pointed out by the respondents, the argument that the omission of the range of 15 to 40 vol.-% led to an intermediate generalisation was not presented for the first time at the oral proceedings. Rather, this argument was submitted in the replies to the appeal of both opponent 2 (point 4.1. on page 8) and opponent 1 (point 5.5.3 on pages 14 and 15 with reference to auxiliary request 4). It is thus apparent that this argument was not new and did not represent a change in the subject of the proceedings.
- 5.5 The appellant contended that the oral proceedings had been the first time in which this argument had been presented in a structured fashion and that, in any case, this specific range had never been the focus of the discussion. The written objections by opponent 2 merely referred to the oxygenates range of 15 to 40 vol.-% as one of several omitted features without giving any relevance to this particular aspect. The objection from opponent 1 was not relevant because it referred to auxiliary request 4 and not to auxiliary request 1. It was therefore not reasonable to expect an earlier reaction from the appellant in this respect.
- 5.6 The board is also not persuaded by these arguments, because the objection raised by opponent 2 not only

addressed the contested feature, but did it in a clear and straightforward way as part of an argumentation which essentially corresponds to the board's present position, namely that the passage bridging pages 14 and 15 describes a specific embodiment and that, consequently, any amendment to claim 1 based on this embodiment should include all the features in this passage. Furthermore, even though the objection of opponent 1 concerned auxiliary request 4, it was readily apparent that it also applied to auxiliary request 1. The board can therefore not see any exceptional circumstances which would justify the admittance of a request at this late stage under Article 13(2) RPBA 2020.

- 5.7 For the sake of completeness, the board further notes that there are other aspects (not necessarily being the decisive ones) which also speak against the admittance of further requests: first, as pointed out by the respondents and explained in point 4.3 above, the appellant declined to submit additional requests during the first instance proceedings despite having been given several opportunities to do so; second, the further request proposed by the appellant did not include other features which could have been considered necessary to overcome the outstanding objections, such as the concentration of the oxygen (as indicated by the chairman during the discussion on admittance), so the proposed subject-matter was not clearly allowable; third, the relative complexity of the discussion under Article 123(2) EPC appears to be the consequence of a very broad drafting of claim 1 and of certain ambiguities in the description as filed, so it was the appellant who was ultimately responsible for making all reasonable efforts to overcome the objections by filing appropriate auxiliary requests in good time.

6. Since none of the requests filed by the appellant is considered to be both admissible and allowable, the board concludes that the appeal must be dismissed.

7. In view of this conclusion, there is no need to deal with the question of admittance of auxiliary request 1 or to further discuss the decisions cited by the respondents (**T 1067/08**, **T 2432/11** and **T 969/14**).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated