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**Datasheet for the decision
of 10 January 2024**

Case Number: T 1146/21 - 3.3.06

Application Number: 04255073.1

Publication Number: 1512736

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Language of the proceedings: EN

Title of invention:
Stabilised diesel fuel additive compositions

Patent Proprietor:
Infineum International Limited

Opponents:
Rhodia Operations
The Lubrizol Corporation

Headword:
Infineum/Fuel stabiliser

Relevant legal provisions:
EPC Art. 100(a), 54, 56, 84, 123(2), 123(3)

Keyword:

Grounds for opposition - lack of patentability (yes)

Novelty - (no)

Inventive step - after amendment - Non-obvious alternative

Decisions cited:

T 1654/19, T 0574/17

Catchword:



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Case Number: T 1146/21 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 10 January 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
21 May 2021 concerning maintenance of the
European Patent No. 1512736 in amended form.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: S. Arrojo
 R. Cramer

Summary of Facts and Submissions

- I. Appeals were filed by the proprietor and opponents 1 and 2 against the **decision of the opposition division to maintain European patent No. 1 512 736 on the basis of auxiliary request 1 filed during oral proceedings on 15 March 2021.**
- II. In its grounds of appeal, the proprietor and appellant requested that the above decision be set aside and the patent be maintained as granted (main request). In case the board was not convinced that the main request met the requirements of inventive step, the proprietor requested that the case be remitted to the first instance to discuss this issue. It also requested that documents D33, D33a and D34 not be admitted into the appeal proceedings.
- III. **Claims 1 and 8** as granted (**main request**) read as follows:

"1. A diesel fuel composition comprising a diesel fuel, a colloidally dispersed or solubilised metal catalyst compound for diesel particulate trap regeneration and 10 to 1,000 ppm of an oil soluble or oil dispersible organic compound having a lipophilic hydrocarbyl chain having attached directly thereto at least two contiguous polar head functional groups, wherein the metal catalyst compound consists of cerium or iron oxides or mixtures thereof, and wherein the organic compound is represented by the generalised formula A-C-B, where C represents a hydrocarbyl chain of Mn (number average molecular weight) of 200-4,000, and A and B represent at least two contiguous carboxylate residues attached directly to one end of the lipophilic

C chain, being either groups of the formula -COOH or ionized as -(COO-)_n Mⁿ⁺ where M is a uni- or dipositively charged metal cation (i.e. where n = 1 or 2) or a quaternary ammonium cation."

"8. A diesel fuel additive concentrate composition comprising a carrier fluid, the colloiddally dispersed or solubilised metal catalyst compound defined in claim 1, and 3 to 75 wt. % of a stabiliser additive comprising the oil soluble or oil dispersible organic compound defined in any of claims 1 to 3."

- IV. In its grounds of appeal, opponent 1 and appellant argued that above claim 1 did not meet the requirements of Articles 83, 84, 123(2) and 123(3) EPC and its subject-matter was furthermore not inventive in view of **D33** (FR 2 768 155) combined with common general knowledge. Opponent 1 also filed new documents D39 and D40 and requested that D35 and D36 be admitted into the appeal proceedings.
- V. In its grounds of appeal, opponent 2 and appellant argued that above claim 1 did not meet the requirements of Articles 83 and 84 EPC. Furthermore, above claim 8 was neither novel in view of **D6** (WO 8705924), **D12** (CA 970553)/**D1** (FR 2097879) or D33, nor inventive in view of **D4** (WO 0110545) alone or in combination with D1/D12, **D18** (EP 0671205 A) alone or in combination with **D13** (US 3447918), **D14** (US 3346354), **D15** (US 5919276) or D1/D12 or D33 alone or in combination with D1/D12 or **D2** (Romanian Reports in Physics, Vol. 47, Nos. 3-5, P. 265-272, 1995). Opponent 2 also filed new evidence D39 (renumbered D41 by the board).
- VI. In its reply, the proprietor requested that the opponents' appeals be dismissed or, as an auxiliary

measure, that the patent be maintained on the basis of one of auxiliary requests 2 to 5, respectively designated set F, set E', set A' and set B'. It also argued that the appeals filed by the opponents were not admissible and that they included new facts, arguments and evidence which should not be admitted into the proceedings under Articles 12(4) and (6) RPBA.

VII. **Claims 1 and 8** according to **auxiliary request 1** as upheld by the opposition division correspond to claims 1 and 8 as granted, wherein:

- the alternative *"uni- or dipositively charged metal cation (i.e. where $n = 1$ or 2)"* in claim 1 as granted has been deleted, and
- claim 8 has been amended to indicate that the diesel fuel additive comprises *" ... one or more other fuel additives"*.

Claims 1 and 8 according to **auxiliary request 2** correspond to claims 1 and 8 of auxiliary request 1, wherein claim 8 has been further amended to indicate that the one or more other fuel additives are *" ... selected from other lubricity-enhancing compounds; cold flow improvers such as ethylene-unsaturated ester copolymers, hydrocarbon polymers, polar nitrogen compounds, alkylated aromatics, linear polymer compounds and comb polymers; detergents; corrosion inhibitors; dehazers; demulsifiers; metal deactivators; antifoaming agents; combustion improvers such as cetane improvers; package compatibilisers; reodorants; metallic-based additives such as metallic combustion improvers; dyes; bacteriostatic agents; gum inhibitors; upper cylinder lubricants and anti-icing agents and antioxidants."*

- VIII. In its reply, opponent 1 argued that the claims as granted (main request) extended beyond the content of the application as filed, were insufficiently disclosed and not novel in view of D1/D12 and D33.
- IX. In its reply, opponent 2 submitted new documents D42 to D46 and further argued that the claims as granted were not novel in view of D1/D12 and D33.
- X. In its preliminary opinion, the board indicated that the subject-matter of claim 8 according to the main and first auxiliary requests was not novel in view of D1/D12 or D33, and that the claims according to auxiliary request 2 appeared to meet the requirements of the EPC.
- XI. At the oral proceedings, which took place on 10 January 2024, the parties' final requests were as follows:

The proprietor-appellant requested that the decision of the opposition division be set aside and the patent be maintained as granted (main request) or, as an auxiliary measure, that the appeals of the opponents be dismissed, or the patent be maintained in amended form on the basis of one of auxiliary requests 2 to 5, respectively designated set F, E', A' and B'. It also requested that the opponents' appeals be declared inadmissible.

The opponents-appellants requested that the decision of the opposition division be set aside and the patent be revoked in its entirety.

Reasons for the Decision

1. Admissibility of the appeals by opponents 1 and 2
 - 1.1 According to the proprietor, the notice of appeal of opponent 1 did not correctly identify the appellant. In particular, a first notice of appeal had been filed on 26 July 2021, in which the party was incorrectly identified as the proprietor, and a second notice of appeal had been subsequently filed (on 28 July 2021), in which no reference was made to the previous error or to the identity of opponent 1. Furthermore, the grounds of appeal referred back to the erroneous first notice of appeal.
 - 1.2 The board notes that both notices of appeal include the name "RHODIA OPERATIONS" at the bottom of the page. Consequently, anyone reading these notices would have readily understood that the identification as the "proprietor" was simply an error and that the actual appealing party was the opponent "RHODIA OPERATIONS". Moreover, the second notice of appeal (also filed within the two-month period) provides a further identification as "Opponent 1", a designation which unambiguously confirms the party's identity.
 - 1.3 The proprietor also argued that the arguments brought forward in the grounds of appeal related to i) aspects of the decision in which opponent 1 was not adversely affected or ii) new arguments and evidence presented for the first time at the appeal stage. The appeal filed by opponent 1 was therefore not admissible.
 - 1.4 The board disagrees with the above argumentation, as it is apparent that at least some of the issues raised by

opponent 1, such as the objections under Article 123(2) EPC or the lack of inventive step with respect to D33, represent an attempt to contest the conclusions of the appealed decision (see for example points 8 and 11.8 of that decision). In any event, the board considers that opponent 1 puts forward several grounds for setting aside the contested decision, as well as facts and evidence in support of its arguments. It is thereby irrelevant which objection opponent raised in the first instance as each opponent may rely on any grounds, facts, evidence and arguments duly submitted by other opponents (see e.g. T 1654/19, Reasons 27). Therefore, regardless of whether all or only some of these facts and evidence are admissible, the board has no doubt that the appeal meets the requirements of Rule 99(2) EPC.

- 1.5 The proprietor also argued that opponent 2's appeal was not admissible for substantially the same reasons as those presented against opponent 1's grounds of appeal.
- 1.6 The board notes that opponent 2's appeal contains several grounds for setting aside the contested decision. Again, some of the grounds expressly relate to the issues raised in the decision, while others clearly constitute amendments to the case. For analogous reasons to those set out in the previous points, the board considers that opponent 2's appeal meets the requirements of Rule 99(2) EPC and is therefore admissible.
- 1.7 In view of the above considerations, the board concludes that the appeals of opponents 1 and 2 are admissible.

2. Late filed documents

Since none of the documents D33 to D46 is decisive for the outcome of the present proceedings, there is no need to discuss the question of their admissibility.

3. Main request - Novelty

The opposition ground under Article 100(a) EPC in relation to Article 54 EPC prejudices the maintenance of the patent as granted for the following reasons:

3.1 **Claim 1** defines a diesel fuel including a metal catalyst and a certain concentration of an organic compound of formula A-C-B. **Claim 8**, on the other hand, defines a diesel fuel additive concentrate comprising a carrier fluid as well as the metal catalyst defined in claim 1 and a stabiliser additive including the organic compound of formula A-C-B defined in claim 1.

3.2 Document D12 discloses (see examples 1-1a, 1-1b, 1-1c and 1-8 in table I on page 26) compositions including kerosene as a carrier fluid, magnetite (i.e. an iron oxide which falls within the scope of the metal catalyst compound defined in claims 1 and 8) and polyisobutene succinic acid (PIBSA-acid), a compound falling within the scope of the formula A-C-B in concentrations as defined in claim 8 at issue (see table I on page 26). While there is no explicit disclosure of the number average molecular weight of the PIBSA-acid, table II on page 27 indicates that this product has a peak molecular weight of 1000 g/mol and an acid number of 105 to 120 mg KOH/g.

3.3 It is undisputed that D12 anticipates a composition comprising a carrier fluid, a metal catalyst and an

organic compound represented by the formula A-C-B as defined in claims 1 and 8 at issue. The proprietor however argued that D12 did not directly and unambiguously disclose that the PIBSA used in the examples had a number average molecular weight of 200 to 4000. In particular, it argued that the peak molecular weight of the PIBSA in table II corresponded to the mode and could not be used to directly calculate the number average molecular weight. The acid number in table II could also not be used to calculate the number average molecular weight, because there was no indication that the PIBSA-acid was 100% pure, and the impurities in the form of unreacted polyisobutylene and maleic anhydride would not contribute to the acid number, therefore lowering the figure with respect to the true value.

- 3.4 The board disagrees, because the disclosure of the acid number of 105 to 120 mg KOH/g for the PIBSA-acid is considered to provide sufficient evidence to conclude that the number average molecular weight of this product falls within the claimed range. In view of the calculations presented by the opponents (with which the board agrees), the number average molecular weight of the PIBSA-acid corresponding to the acid number of 105 mg KOH/g is 1068 g/mol. The board notes that the data in table II of D12 correspond to commercial products which are unlikely to contain significant amounts of impurities, so the number average molecular weight of the PIBSA-acid is not expected to differ significantly (if at all) from the value calculated above. Moreover, the proprietor has neither provided any alternative calculation of the average molecular weight of PIBSA in D12, nor any evidence of the levels of impurities that might be expected in the commercial products used in this document or the extent to which such impurities

would affect the number average molecular weight of PIBSA. In this respect, even if it were accepted that the presence of impurities is proven or unavoidable, it is not apparent how this could call into question that the PIBSA-acid of D12 falls within the scope of claim 8 at issue, since the calculated value (i.e. 1068 g/mol) is far removed from the end values of the broad range defined in the invention (200 to 4000 g/mol). In other words, for the PIBSA acid in D12 to fall outside the claimed range, the impurities would have to increase or decrease the calculated value by more than 4 to 5 times, which does not seem technically plausible.

In view of the above, the board concludes that the PIBSA-acid in D12 falls within the scope of the compound A-C-B in claim 8 at issue, the subject-matter of which is thus not novel in view of D12.

4. Auxiliary request 1 - Novelty

The requirements of Article 54 EPC are not met for the following reasons:

- 4.1 Claim 8 at issue is further restricted with respect to the one as granted by the indication that the additive concentrate comprises "*... one or more other fuel additives*".
- 4.2 The proprietor argued that D12 did not disclose a fuel additive within the meaning of claim 1. The relevant embodiments in Table I disclosed compositions with only three components, none of which could be regarded as a fuel additive. In particular, it was clear that kerosene was the carrier fluid, the same function it had in the compositions of D12, which directly excluded this substance as a possible fuel additive. Although

kerosene was a mixture of different hydrocarbons, a skilled person reading the disclosure of D12 would clearly regard it as a single component with the sole function of being a carrier fluid and not as a mixture of substances with different functions.

- 4.3 The board disagrees, because the broad concept of "fuel additives" encompasses (see par. [0044] of the patent) co-solvents, which would clearly include certain components of kerosene such as naphthenes. Whether the skilled person would consider the kerosene in the compositions of D12 to be a single component with a specific function or a plurality of components with different functions is irrelevant for the underlying discussion on novelty, as the only relevant question is whether the compositions in D12 fall within the scope of claim 1 at issue. In this respect, since kerosene is a mixture of different hydrocarbons, some (or all) of which may be considered suitable to act as a carrier fluid or as a co-solvent, it follows that the kerosene-containing compositions of D12 implicitly contain at least one hydrocarbon suitable to act as a carrier fluid and at least one other hydrocarbon suitable to act as a co-solvent, and thus as a fuel additive within the meaning of claim 1 at issue.

Consequently, the subject-matter of claim 8 is still not novel in view of the compositions in D12.

5. Auxiliary request 2 (set F) - Article 84 EPC
- 5.1 Claim 8 at issue is further restricted with respect to the one of auxiliary request 1 by further defining the different groups of fuel additives that are present in the diesel fuel additive concentrate.

- 5.2 The opponents argued that at least some of the functional definitions of the fuel additives were unclear. It was in particular unclear how the features "*package compatibilisers*", "*upper cylinder lubricants*" and "*metallic-based additives*" should be interpreted.
- 5.3 The board notes, however, that notwithstanding the breadth of the functional definitions in claim 8, each of the alternative groups of components, including those cited by the opponents, represent or at least would readily be associated with additives known in the art. For example, "*package compatibilisers*" would be recognised as referring to substances suitable for avoiding undesirable interactions between other components (e.g. precipitation); "*metal-based additives*" would be recognised as compounds containing a metal suitable for improving the performance and/or properties of the diesel fuel; and "*upper cylinder lubricants*" would be recognised as compounds suitable for lubricating the cylinder walls and piston rings.
- 5.4 The requirement of clarity under Article 84 EPC is thus met, and so there is no need to address the question of admissibility of the late filed Article 84 EPC objection against auxiliary request 2.
6. Auxiliary request 2 (set F) - Article 123 EPC
- 6.1 No objection under Article 123(2) EPC was presented, but opponent 2 stated in its letter of 8 December 2023 that the formal admissibility of the amendment introduced should be examined by the Board of its own motion and it would not even be necessary for the opponents to raise such objection. While the board is not convinced that this statement is true (cf.

T 574/17, Reasons Nr. 2.3.8) it briefly indicates, for the sake of completeness, the basis for the amendments:

6.1.1 Claim 1 at issue is based on claim 1 as originally filed with the following amendments:

i) the metal catalyst is specified to consist of cerium oxide, iron oxide or mixtures thereof.

A basis for this amendment can be found in claim 9 as filed or on page 4, lines 22-23, indicating that iron and cerium oxides constitute preferred metal catalysts.

ii) the organic compound is further defined as *"represented by the generalised formula A-C-B, where C represents a hydrocarbyl chain of Mn (number average molecular weight) of 200-4,000, and A and B represent at least two contiguous carboxylate residues attached directly to one end of the lipophilic C chain, being either groups of the formula -COOH or ionized as $-(COO^-)_nM^{n+}$ where M is a quaternary ammonium cation"*. A basis for this amendment is found on page 5, lines 1-3 (describing the general formula and group C) and page 6 lines 22-26 (describing the preferred form for groups A and B), wherein one of the alternatives (M being a uni- or dipositively charged metal cation) has been deleted.

6.1.2 Claim 8 corresponds to claim 11 as filed (the back-reference to the substances having been limited to those of claim 1 only) amended to include the presence of certain fuel additives selected from different groups defined therein. A basis for this amendment can be found on page 13, lines 1-10, wherein one of the alternatives (co-solvents) has been deleted.

- 6.1.3 Claims 2, 4 to 7 and 9 to 11 are respectively based on claims 3, 6, 7, 8, 10, 12, 13 and 14 as filed. Claim 3 is based on page 7, lines 1-5, of the description as filed.
- 6.1.4 The claims according to auxiliary request 2 therefore meet the requirements of Article 123(2) EPC.
- 6.2 The opponents argued that the scope of protection defined by claim 8 at issue extended beyond that of the granted claims. In particular, the fuel additives defined as part of the composition of claim 8 included components falling within the scope of the organic compound A-C-B. As a result, the invention defined in claim 8 encompassed embodiments with concentrations of the organic compound A-C-B higher than those defined in claim 8 as granted (e.g. an embodiment with 75% of the organic compound additive A-C-B and 5% of a fuel additive also falling within the scope of the A-C-B organic compound). The requirements of Article 123(3) EPC were thus not met.
- 6.2.1 The board notes that, even if the opponents' approach were followed, it is not apparent why claim 8 as granted would exclude the presence of an additional fuel additive with the formula A-C-B. Although claim 8 as granted does not explicitly require the presence of additional fuel additives, this alternative is not excluded, so the invention encompasses the presence of any fuel additive, such as those described in par. [0044] (corresponding to those defined in claim 8 at issue, with the exception of the omitted alternative "co-solvents"). Therefore, if it were to be concluded that the fuel additives in claim 8 at issue comprise compounds of the formula A-C-B, this would also be the case for the invention as granted in claim 8. It

follows that the invention as granted would also include compositions containing fuel additives falling within the scope of the A-C-B organic compound in amounts such that the added concentration of components having an A-C-B formula is greater than 75%. It should also be noted that this interpretation does not lead to any contradiction with the wording of claim 8, which does not exclude that the sum of the concentrations of multiple components having an A-C-B formula is higher than 75%, but only requires the presence of 3 to 75% of an additive containing a component having an A-C-B formula.

6.2.2 The requirements of Article 123(3) EPC are therefore met. In view of this conclusion, there is no need to address the question of admissibility of the late filed Article 123(3) EPC objection against auxiliary request 2.

7. Auxiliary request 2 (set F) - Novelty

7.1 The opponents argued that the definition of the fuel additives in claim 8 at issue did not overcome the novelty objections, because the hydrocarbons in the kerosene of the compositions in D12 could still be considered to fall within some of the groups of fuel additives defined in claim 8. In particular, at least some of those hydrocarbons could be regarded as "hydrocarbon polymers" in the sense of claim 8, as the terms in the claim had to be given their broadest possible technical sense.

7.2 The board disagrees therewith, because a person skilled in the art would not consider any of the C₁₀ to C₁₆ hydrocarbon components of kerosene to be substances falling within the scope of "hydrocarbon polymers",

even if that term is interpreted in its broadest technical sense. Hydrocarbon polymers are namely large molecules composed of repeating units of hydrocarbons. Kerosene, on the other hand, consists of smaller hydrocarbon molecules without the repeating patterns characteristic of polymer structures.

Since the option "co-solvent" is no longer defined as a possible additive, the board considers that the hydrocarbons in kerosene do not fall - in the absence of any further evidence - into any of the groups defined in claim 8 at issue. The subject-matter of claim 8 is therefore novel in view of D12, and the board concludes that the requirement of novelty under Article 54 EPC is met. In view of this conclusion, there is no need to address the question of admissibility of the late filed Article 54 EPC objection against auxiliary request 2.

- 8. Auxiliary request 2 (set F) - Inventive step
 - 8.1 Closest prior art
 - 8.1.1 In the board's view, document D12 does clearly not represent a suitable starting point, because it does not relate to diesel fuel or diesel fuel additives but to the removal of oil slicks or spills from bodies of water.
 - 8.1.2 At the oral proceedings, the opponents relied solely on document D33, as this document also relates to diesel fuels and fuel additives.
 - 8.1.3 In particular, D33 discloses (see example 2) a diesel fuel additive comprising 90 molar % of a cerium oxide metal catalyst and 10 molar % (corresponding to 19.1

wt. % as calculated by the opponents) of a strontium salt "Sr-PIBSA₄₂₀" obtained with the method described in examples 13 and 14 of WO 96/34074 (D27).

Example 13 of D27 discloses the synthesis of 420 Poly(isobutylene) Succinic Anhydride, a substance used in example 14 to produce the strontium salt Sr(PIBSA₄₂₀)₂ for the additive of example 2 in D33.

8.1.4 The board first notes that it is questionable whether a skilled person trying to develop additives for the stabilisation of diesel fuel would choose as a starting point the composition containing the Sr-PIBSA in example 2 of D33, as this composition is intended to improve the self-ignition of soot at lower temperatures (see page 2, lines 3-6) and not to act as a stabiliser for the diesel fuel. Nonetheless, for the sake of the argument it will be assumed (in the opponents' favour) that the composition of example 2 of D33 represents the closest prior art.

8.1.5 Claim 8 differs from example 2 of D33 at least in that the carboxylate residues in the organic compound are either in the form -COOH or ionised with a quaternary ammonium cation.

8.2 Problem solved by the invention

8.2.1 The opponents argued that the Sr-PIBSA salt in D33 already provided the same stabilising effect as the invention, which differed only in the addition of a certain unspecified amount of a similar product (acid or ammonium PIBSA salt). This difference was not associated with any specific effect, so the only problem solved by the invention was to provide an alternative fuel additive composition.

8.2.2 While the board tends to agree with the opponents that the invention cannot be linked to the effect of improved stability, the examples of the patent (see examples 6, 8 and 9) at least show that the additive according to the invention provides stability in a suitable manner. The problem solved by the invention of claim 8 is therefore not only to provide an alternative composition, but to provide an alternative composition for stabilising diesel fuel.

8.3 Non-obviousness of the solution

8.3.1 The opponents argued that since PIBSA was a well-known additive in the field of fuels, it was obvious when starting from D33 to contemplate alternatives with other forms of PIBSA.

8.3.2 The board notes that there is no indication in D33 or in any of the other cited documents that an additive with the formula proposed in D1 should be incorporated in order to provide a suitable stabiliser composition. Indeed, since Sr-PIBSA is not identified as a stabiliser component, the skilled person would have no incentive to consider similar substances and, even if it did, there is no teaching in the cited prior art that an organic compound of the formula defined in claims 1 and 8 would be suitable for forming a composition for stabilising diesel fuel.

The subject-matter of claim 8 is therefore a non-obvious alternative to the composition disclosed in D33.

8.4 The board thus concludes that the requirements of Article 56 EPC are met. In view of this conclusion, there is no need to address the question of

admissibility of document D33 and the late filed Article 56 EPC objections against auxiliary request 2.

9. Since the claims according to auxiliary request 2 meet the requirements of the EPC, the patent should be maintained on the basis of this claim request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of the claims of auxiliary request 2 (set F) filed on 14 March 2022 with the reply to the opponents' statements of grounds of appeal, and a description to be adapted where appropriate.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated