BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

Internal distribution code:
(A) [ ] Publication in OJ
(B) [ ] To Chairmen and Members
(C) [X] To Chairmen
(D) [ ] No distribution

D E C I S I O N
of 1 September 2004

Case Number: T 1157/01 - 3.3.6

Application Number: 96919968.6

Publication Number: 0870003

IPC: C10G 45/08

Language of the proceedings: EN

Title of invention:
Hydrotreating catalyst: composition, preparation, and use thereof

Applicant:
Nippon Ketjen Co., Ltd.

Opponent:
-

Headword:
Hydrotreating catalyst/SUMITOMO

Relevant legal provisions:
EPC Art. 54, 56, 84, 111(1), 113(2), 133, 134
EPC R. 67

Keyword:
"Proper representation of the Appellant (yes) - deficiency under Article 133(2) overcome"
"Novelty (yes) - no clear and unambiguous overlap with products of the prior art"
"Inventive step (yes) - unexpected benefits in spite of a warning in the prior art to the contrary"
"Substantial procedural violation (yes) - no appealable decision on the Appellant's higher-ranking requests"
"Remittal for further prosecution (no) - examining proceedings already delayed - decision about patentability without undue investigation by the Board"

Decisions cited:
T 0274/88, T 0249/93, T 0999/93, G 0001/88, T 0234/86

Catchword:
-

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1157/01 - 3.3.6

D E C I S I O N
of the Technical Board of Appeal 3.3.6
of 1 September 2004

Appellant: Nippon Ketjen Co., Ltd.
Seavans North
2-1, 1-chome Shibaura
Minato-ku
Tokyo 105-6791 (JP)

Representative: Schalkwijk, Pieter Cornelis
Akzo Nobel N.V.
Intellectual Property Department
P.O. Box 9300
NL-6800 SB Arnhem (NL)

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 15 May 2001 refusing European application No. 96919968.6 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: P. Krasa
Members: G. Dischinger-Höppler
M. B. Tardo-Dino

Summary of Facts and Submissions

I. This appeal is from the decision of the Examining Division to refuse the European patent application No. 96 919 968.6 (international publication number WO-A-96/41848) relating to a catalyst composition suitable for hydrotreating, a process for its preparation and its use.

Oral proceedings were held during examination of the application in suit, at the end of which the Examining Division informed the Applicant of its intention to grant a patent on the basis of the claims of the then pending third auxiliary request which was held allowable whereas the then pending main request and first and second auxiliary request were found not allowable both under the provisions of Articles 52(1) and 54 EPC in view of document

(3) JP-A-07 136 523 (translated into English)

and under the provisions of Articles 84 and 123(2) EPC.

A copy of the minutes of the oral proceedings setting out the above-mentioned statements of the Examining division was sent to the Applicant as an attachment to a communication dated 28 December 1999. This communication invited the Applicant to file within 4 months its observations and to correct the indicated deficiencies, i.e. to adapt the description to the claim set of the allowable third auxiliary request, and informed the Applicant that in case of failure to comply with this invitation, the European patent

application would be deemed to be withdrawn (Article 96(3) EPC).

The Applicant, after an extension of the time limit, eventually filed an adapted description. Thereafter, a communication under Rule 51(4) EPC was sent out on 12 December 2000 to inform the Applicant of the Examining Division's intention to grant a patent on the basis of the corresponding claims and amended description. Further, the Applicant was requested to state its approval of the text within a period of four months and informed that failure to do so would result in refusal of the application under Article 97(1) EPC. The communication was accompanied by a short summary of the reasons for the refusal of the main request and first two auxiliary requests. In response, the Applicant under cover of a letter dated 19 April 2001 stated that it did not approve the text attached to the communication.

The Formalities Officer acting for the Examining Division sent a decision dated 15 May 2001 to refuse the application in suit under Article 97(1) EPC for the reason that, due to the Applicant's express declaration of non-approval of the text proposed for grant (based upon the then pending third auxiliary request) and since no amendments to the claims, description or drawings had been submitted, there was no text to serve as a basis for the grant of a European patent in the sense of Article 113(2) EPC. The decision under appeal did not contain any reasoning as to the non-patentability of the Appellant's higher ranking requests.

II. This decision was appealed by the Applicant (hereinafter Appellant) who filed different sets of claims in a main and three auxiliary requests with its statement of grounds of appeal.

III. In a first communication, the Board drew attention to objections under Article 123(2) EPC to the amendments made to the claims of the Appellant's main request and second and third auxiliary requests, and under Article 52(1) EPC for possible lack of novelty and inventive step of the claimed subject-matter in view of document (3).

IV. Under cover of a letter dated 28 January 2003, the Appellant filed two expert statements concerning the technical definition of the term "conventional hydrotreating catalyst" by those skilled in the art and the technical contribution of its use as a starting material in the claimed process as compared to the prior art disclosed in document (3). It further filed an experimental report to show the technical difference between the catalyst used in the application in suit and that of document (3).

V. In an annex attached to the summons to oral proceedings, the Board *inter alia* drew attention to the fact that document (3) appeared to assume the same beneficial properties for the catalysts obtained by the method disclosed therein and that no evidence was on file in support of the alleged effects or contribution of the claimed subject-matter as compared with that prior art.

VI. Oral proceedings were held on 30 January 2004 in the presence of Mr Van Deursen who appeared before the

Board on behalf of the Appellant. In the course of these proceedings, the Board raised the issue that the Appellant was not properly represented since the appeal brief dated 18 June 2001, filed under the letterhead of AKZO NOBEL and signed by Ms Hesselink, indicated that the Appellant "Sumitomo Metal Mineral Mining Company Limited", a company residing in Japan was represented by the company "AKZO Nobel N.V., Netherlands". The Board drew attention to the fact that it was not possible under Articles 133 and 134 EPC for the Appellant to be represented by another company, i.e. another legal person. Mr Van Deursen indicated that he was authorised by the Applicant as a professional representative and would submit due authorisations for him and Ms Hesselink signed by the Applicant. He further filed in the course of the oral proceedings an amended set of 9 claims as its single request, the independent claims reading:

"1. A process for activating a hydrotreating catalyst comprising a Group VIII hydrogenation metal oxide and a Group VI hydrogenation metal oxide on a carrier in which the hydrotreating catalyst is contacted with an additive which is at least one compound selected from the group of compounds comprising at least two hydroxyl groups and 2-10 carbon atoms, and the (poly)ethers of these compounds, after which the catalyst is dried under such conditions that at least 50% of the additive remains in the catalyst, wherein the hydrotreating catalyst to be activated is a conventional hydrotreating catalyst prepared by a process in which hydrogenation metal components are composited with a carrier, after which the composite material is subjected to a calcination step to convert the

hydrogenation metal components into their oxides, or a used hydrotreating catalyst which has been regenerated.

6. A hydrotreating catalyst obtainable by the process of any one of claims 1-5 which comprises a Group VIII metal oxide and a Group VI metal oxide on a carrier, which catalyst additionally comprises an additive which is at least one compound selected from the group of compounds comprising at least two hydroxyl groups and 2-10 carbon atoms, and the (poly)ethers of these compounds, wherein the Group VIII metal compound and the Group VI metal compound are in the form of oxides.

8. A process for hydrotreating a hydrocarbon feed in which a hydrocarbon feed is contacted under hydrotreating conditions with a catalyst according to claim 6 or 7, which optionally has been (pre)sulphided before it is contacted with the hydrocarbon feed."

Dependent claims 2 to 5, 7 and 9 refer to preferred embodiments of the subject-matter of these claims.

VII. The Appellant submitted in summary the following arguments:

- The reasoning given by the Examining Division why it considered the term "calcination step to convert the hydrogenation metal components into their oxides" inadequate to delimit the claimed subject-matter from that disclosed in document (3) was insufficient for the Appellant to understand whether the decision was justified or not. This amounted to a substantial procedural violation.

- The hydrogenation catalyst used for activation in document (3) was not a conventional one as in the application in suit wherein necessarily all the hydrogenation metal components were present in the form of oxides. This was apparent from the experimental report filed by the Appellant under cover of its letter dated 28 January 2003.

- An advantage of the claimed subject-matter as compared with that of document (3) resided in its flexibility since it was not limited to a specific starting material. Instead, a wide variety of conventional catalysts, namely those with all the active metals in oxide form could be used. Another advantage was the possibility to activate used catalysts for reuse whereas in document (3) the fully calcinated catalyst which was left after use did no longer fulfil the requirements of the starting material.

- The technical problem to be solved in view of document (3) as the closest prior art consisted therefore in the provision of an activated hydrotreating catalyst in a simpler way.

- The proposed solution was not obvious since document (3) taught away from using fully calcinated conventional catalysts.

VIII. The Appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the request filed during oral proceedings.

He further requested reimbursement of the appeal fee.

IX. At the end of the oral proceedings, the Board gave the following interlocutory decision:

1. The proceedings are continued in writing.

2. The Appellant is requested to file within a period of two months due authorisations for him and Ms Hesselink signed by the applicant.

3. The Appellant is requested to provide evidence concerning the activity of the catalyst according to the patent in suit and document (3), respectively, within a period of two months.

X. Under cover of its letter dated 26 March 2004, the Appellant filed authorisations for Mr Van Deursen and Ms Hesselink as well as comparative data concerning the activity of the catalyst as claimed in comparison with that of document (3). By letter of 25 June 2004, the Appellant filed an amended page 4 in order to adapt the description of the application to the claims filed during the oral proceedings on 30 January 2004.

Reasons for the Decision

1. *Representation of a party in proceedings before the EPO*

Article 133 EPC establishes a general scheme of representation for parties to proceedings established by the EPC. Article 133(1) EPC provides that - subject to the provisions of Article 133(2) EPC - "no person shall be compelled to be represented by a professional

representative". Further, Article 133(3) EPC provides that a person having its residence or principal place of business within a contracting state (hereinafter referred to as a "European party") may act through an employee, "who need not be a professional representative". However, Article 133(2) EPC provides that a person not having either a residence or its principal place of business within a contracting state to the EPC (hereinafter referred to as a "non-European party") "must be represented by a professional representative and act through him" in all proceedings established by the Convention, except in filing the European patent application. In other words, under Article 133(2) EPC, in appeal proceedings a non-European party must be represented by a professional representative.

The requirements which must be fulfilled by a person to act as a professional representative under Article 133 EPC are set out in Article 134 EPC. Under Article 134(1) EPC a person may act as a professional representative if, being duly qualified, his name appears on a list of such professional representatives maintained by the EPO. Article 134 (2) to (8) EPC lists the requirements for professional representatives, all of which concern exclusively natural persons.

In the present case, the Appellant and Applicant is a non-European party and has, therefore, to be represented before the organs of the EPO as set out in Article 133(2) EPC by a professional representative as defined in Article 134 EPC who is a natural person but not a legal person. Hence, it is not possible for the Appellant to be represented by AKZO Nobel N.V..

By filing, upon the Board's request (see IX above), authorisations for both, Ms Hesselink and Mr van Deursen, i.e. natural person which are also professional representatives in the sense of Article 134 EPC (see list of professional representatives maintained by the European Patent Office), the Appellant overcame the initial deficiencies under Article 133(2) EPC.

2. *Amendments (Article 123(2) EPC; all requests)*

The Board is satisfied that the claims as amended comply with the requirements of Article 123(2) EPC since their wording is supported by the application as originally filed (see Claims 1 to 4 and 6 to 11 in combination with page 4, lines 3 to 11).

3. *Interpretation of the claims and Article 84 EPC*

The points at issue during the Examining and Appeal proceedings concerned the interpretation of the terms "conventional hydrotreating catalyst" and "subjected to a calcination step to convert the hydrogenation metal components into their oxides".

The Appellant filed three expert declarations stating that it was clear to those skilled in the art that a conventional hydrotreating catalyst was one wherein all the hydrogenation metal components have been converted into their oxides by a corresponding calcination treatment, that the exact calcination conditions were less relevant and to be selected in accordance with the catalyst composition and that, in general, calcination

temperatures ranging from 350 to 750°C and calcination times ranging from 1 to 6 hours were employed. The Appellant, further referred to the prior art mentioned in the application in suit (page 9, lines 1 to 4), in particular to US-A-4 500 424 and GB-A-1 504 586, to show that conventional catalysts are only those where all the active metals are present in their oxide forms irrespective of the calcination conditions.

However, apart from these two documents which mention that "calcination ... converts the metals to their respective oxide forms" (US-A-4 500 424, column 8, lines 10 to 14) or "during calcination ... decomposition of the metal salts occurs with formation of the corresponding metal oxide" (GB-A-1 504 586, page 5, lines 30 to 36), none of the other seven documents cited on said page 9 of the application in suit indicates that the **whole** content of active metal components is necessarily converted into the respective oxides. On the contrary, as admitted by the Appellant via the expert statements (see above), the degree of conversion into the oxides depends largely on the composition of the material to be calcined and on the exact calcination conditions (temperature and time). Therefore, these documents cannot give any other meaning to the term "conventional catalyst" than that of having been calcined at the temperatures and for the times indicated in these documents (about 350°C to 870°C at about 0.5 to 10 hours; see e.g. EP-A-0 469 675, page 3, line 48; US-A-4 212 729, column 6, lines 31 to 33). It is, however, not possible to conclude from these documents that the term "conventional hydrotreating catalyst" is synonymous with a catalyst having all its active metals in the oxide form.

Whilst it is appreciated that those skilled in the art might normally prefer a hydrotreating catalyst wherein all the hydrogenation metals have been converted into their oxides, the term "conventional" is not necessarily restricted in the same way but may include other hydrotreating catalysts which were known at the priority date of the application in suit, but less usual in the art.

Therefore, the Board concludes that the term "conventional hydrotreating catalyst" itself is not a technical term which is unambiguous with respect to the composition of the catalyst.

In contrast, the definition of the catalyst to be used in the claimed process given in the application in suit, namely "a conventional hydrotreating catalyst prepared by a process ... to convert the hydrogenation metal components into their oxides" (page 4, lines 3 to 8) which is identical to the corresponding amendment in Claim 1 is acceptable to indicate that the catalyst to be activated is any one known in the art at the priority date of the application in suit which has been fully calcinated to convert all hydrogenation metal compounds into the oxide form. Thus, the claims are not objected under Article 84 EPC.

4. *Novelty*

Lack of novelty was in dispute in relation to the prior art known from document (3). This document discloses a method of catalyst activation wherein a precursor catalyst comprising a Group VIII and a Group VI

hydrogenation metal compound on a carrier is first calcined and then treated with a polyhydric alcohol such as ethylene glycol (page 5, last line to page 6, line 9 and page 7, lines 11 to 12). In document (3), the calcination is carried out at temperatures of between 200 and 400°C for 0.5 to 4 hours, depending on the burning temperature (Claim 1 and page 7, last five lines to page 8, line 2). Thus, for the upper limit of 400°C which overlaps with the temperature range recommended in the application in suit (e.g. page 8, line 11) the minimum calcination time is necessarily 0.5 hours.

The Appellant, by way of its experimental data (see IV. above) showed that a citric acid containing catalyst which is calcined for 0.5 hours at 400°C still contains 8% of its molybdenum content in the form of citrate, whereas all the molybdenum compounds are converted into the oxide form if the calcination time at the same temperature is prolonged to two hours. The experiments thus show that, contrary to what is claimed in the application in suit, the catalyst obtained according to document (3) does not necessarily contain all the hydrogenation metal components in their oxide form.

The Board is, therefore, satisfied that document (3) does not disclose embodiments which clearly and unambiguously overlap with the claimed subject-matter and concludes that the subject-matter of independent Claims 1, 6 and 8 has to be regarded as being novel.

5. *Inventive step*

The application in suit as well as document (3) both aim at the provision of a hydrotreating catalyst displaying improved activity (see in the application, page 2, lines 8 to 14; in document (3), page 5, lines 19 to 24).

Therefore, as agreed by the Appellant, document (3) qualifies as a suitable starting point for the assessment of inventive step.

The Appellant argued that according to document (3) control and maintenance of specific calcination conditions were required in order to manufacture a particular precursor catalyst which was not completely calcined whereas according to the application in suit any conventional hydrotreating catalyst having all the hydrogenation metal compounds in oxide form could be used. Thus, a wide variety of suitable starting catalysts was available and the technical problem solved in view of document (3) was to provide an active hydrotreating catalyst in a simplified and more flexible manner. Another advantage of the claimed subject-matter consisted in the fact that according to the application in suit the used catalysts could be reproducibly regenerated whereas according to document (3) the used catalysts were not suitable for regeneration since they no longer did fulfil the requirement of having been heat treated under mild conditions.

In spite of these advantages of the subject-matter as claimed in view of document (3), evidence is required

to prove that the activity of the claimed catalyst is still comparable to that disclosed in document (3). In this respect, it is observed that - although the Appellant's experiments show an incomplete decomposition of the organic acid (citric acid) in accordance with the method of document (3) - this document nevertheless assumes the same beneficial properties for the catalysts obtained by the method disclosed therein (page 7, paragraph [0012]). In particular, document (3) seeks to provide a method suitable to overcome the activity loss involved if calcination is carried out at temperatures of 400°C or higher, i.e. at temperatures in accordance with the application in suit (see pages 4 to 5, paragraphs [0003] to [0006]). Therefore, evidence showing that the activity of the claimed catalyst was comparable to that of document (3) is needed to be able to rely on the improved flexibility or simplification without having to assume that those advantages might be obtained only at the expense of activity, because it would then be obvious for those skilled in the art to abstain from the particular method of catalyst production disclosed in document (3) and use known starting catalysts in order to simplify the provision of activated hydrotreating catalysts.

However, the Appellant under cover of its letter dated 26 March 2004 filed further experiments showing that the activity of the claimed catalyst obtained by starting from a precursor catalyst which had been calcined at 400°C for two hours to convert all the hydrogenation metal components into their oxides was comparable to the activity of the catalyst obtained in

accordance with document (3) (calcination at 400°C for 0.5 hours).

In view of document (3), it is therefore credible that the claimed subject-matter actually solves the problem of providing an activated catalyst in a simplified and more flexible manner whilst maintaining its activity.

It remains to be assessed whether, in view of the available prior art documents, it was obvious for someone skilled in the art to solve this problem by the means claimed.

Document (3) leads away from the claimed solution since it teaches that the activity of the catalyst would decrease if it was calcinated under severe conditions at temperatures of 400°C or higher and that any treatment for re-dispersing the active components was less effective (see pages 4 to 5, paragraphs [0003] and [0006]).

Therefore, a skilled person would not have expected that despite this warning no activity loss would occur if the calcination is carried out under the more severe conditions required to convert all the hydrogenation metal compounds into their oxides. Also the other documents on file do not suggest or give those skilled in the art any incentive to expect that a fully calcined precursor catalyst could be activated to a degree comparable with what is possible in accordance with document (3).

The Board, therefore, concludes that it was not obvious for someone skilled in the art seeking for a more

flexible method of providing a hydrogenation catalyst of similar activity to use a conventional and fully calcined hydrotreating catalyst for activation instead of the particular mildly calcined catalyst of document (3).

The other documents cited in the course of the examining proceedings are less relevant and not suitable to question the patentability of the claimed subject-matter.

For all these reasons, the Board holds that the subject-matter of independent Claims 1, 6 and 8 involves an inventive step (Articles 52(1) and 56 EPC).

The dependent claims 2 to 5, 7 and 9 refer to specific embodiments of Claims 1, 6 and 8 and derive their patentability therefrom.

6. *Reimbursement of the appeal fee*

Pursuant to Rule 68(1) EPC, when oral proceedings are held, the decision can be given orally. But subsequently, the decision shall be notified in writing. Rule 68(2) EPC provides that decisions which are open to appeal shall be reasoned and accompanied by a written communication of the possibility of appeal.

The decision under appeal is the formal decision, issued on 15 May 2001 and sent out in the name of the Examining Division. It followed the previous communication under Rule 51(4) EPC and was based on the reason that, due to the Appellant's non-approval, there

was no text to serve as a basis for the grant according to Article 113(2) EPC.

It appears from the minutes of the oral proceedings held by the Examining Division on 26 November 1999 that the Applicant maintained all its requests (main and three auxiliary requests: see points 3, 4, 6 and the comments on the EPO form 2009 sent to the Applicant with these minutes). When it declared its non-approval of the text proposed for grant based on the third auxiliary request, the Appellant did not explicitly repeat that it maintained all its previous and higher ranking requests. However, according to the general principle "A jure nemo recedere praesumitur" mentioned in G 1/88 (OJ EPO, 1989, 189, reasons Nos. 2 and 3) in the absence of an explicit withdrawal, surrender of a right cannot be simply presumed and silence cannot be deemed to be equivalent to surrender in the logic of how the Convention operates.

Consequently, the decision under appeal simply omitted to give reasons for the refusal of the higher ranking requests still pending before the Examining Division.

The question is whether some of the previous documents issued by the department of first instance can be regarded as amounting to a decision within the meaning of Rule 68 EPC (see T 234/86, OJ EPO, 1989, 079, Reasons No. 5.10).

The EPO form 2009 concerning the minutes of the oral proceedings which was sent to the Appellant under cover of a letter dated 28 December 1999, contains on page 1 (second page of form 2009) the information that the

Examining Division intends to grant a patent on the basis of the third auxiliary request, that the higher ranking requests were not allowable and that the Applicant was given a period of 4 months to adapt the description to the claim set of the third auxiliary request. In the first paragraph of page 2 (last page of form 2009), just before the signatures of the Examining Division, the EPO form 2009 provides the pre-printed information, that "The applicant(s) were informed that the minutes of the oral proceedings **and** a written decision (including an indication of the possibility of appeal) will be notified to him/them as soon as possible".

It is clear from the above cited sentence on page 2 of EPO form 2009 in combination with the text of the minutes that the minutes itself are not meant as a decision but that the notification of a written decision concerning the higher ranking requests mentioned therein is required and had to be expected by the Applicant so that the intention of the Examining Division announced on page 1 of the EPO form could take effect.

Apart from the information contained in these minutes concerning the Appellant's higher ranking requests, the only information ever forwarded to the Appellant in this respect before the decision under appeal was sent out was the communication under Rule 51(4) EPC which was accompanied by comments concerning the reasons for which the main request and first and second auxiliary requests were held to be not allowable. These comments are a summary of the reasons given in the minutes of the oral proceedings.

However, the aim of the communication under Rule 51(4) EPC is quite clear from the sentence bridging pages 1 and 2 of the form sheet (EPO form 2004) where the Appellant is requested to approve the proposed text and that "Failure to do so would result in the refusal of the application under Article 97(1) EPC". There is nothing in this communication suggesting that it contained a reasoned decision about the Appellant's higher ranking requests. In particular, it does not contain any indication that there was a possibility of appeal as required by Rule 68 EPC.

The Board, therefore, concludes that neither the minutes of the oral proceedings nor the communication under Article 51(4) EPC including the comments attached to it fulfil the requirements of an appealable decision complying with the provisions under Rule 68 EPC (see also T 999/93, not published in the OJ EPO, Reasons Nos. 3 and 4).

The Board further finds that the only decision fulfilling those requirements does not contain any reasoned statements concerning the Appellant's pending main request and first two auxiliary requests.

This, however, amounts to a substantial procedural violation justifying a reimbursement of the appeal fee (Rule 67 EPC) since the Appellant was deprived of its right to obtain a reasoned decision enabling it to prepare arguments or amendments in order to overcome the objections raised.

7. *Remittal to the department of first instance*

If fundamental deficiencies are apparent in the first instance proceedings, a Board normally remits a case to the department of first instance unless special reasons present themselves for doing otherwise in accordance with to Article 10 of the Rules of Procedure of the Boards of Appeal.

However, in the present case other issues are to be taken into account by the Board, which mitigate the necessity of remitting the case to the department of first instance, and deprive such remittal from a real justification.

Actually, the Examining Division had already expressed its conditional approval with respect to patentability but refused the application solely on formal grounds. After amendment of the claims, submission of evidence concerning the merits of the case and filing a description adapted to the amended claims, the Board finds without undue investigation the conditions of the EPC to be fulfilled and the claimed subject-matter to be patentable. Considering the age of the file (international filing date: 7 June 1996), the Board further finds that any decision to grant a patent which is still open to opposition and appeal proceedings is already delayed.

Therefore, despite the occurrence of a substantial procedural violation during examining proceedings, the Board decides not to remit the present case for further prosecution but exercises its discretion under Article 111(1) EPC to decide within the competence of

the Examining Division (see e.g. T 274/88, not published in the OJ EPO, reasons No. 3 and T 249/93, not published in the OJ EPO, Reasons No. 2.2).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the first instance with the order to grant a patent in the following version:

Description:
Pages 1 to 3 and 5 to 33 as originally filed.
Page 4 filed with letter of 25 June 2004.

Claims:
No. 1 to 9 received during the oral proceedings held on 30 January 2004.

3. The request for reimbursement of the appeal fee is allowed.

The Registrar: The Chairman:

G. Rauh P. Krasa