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**Datasheet for the decision
of 23 March 2021**

Case Number: T 0170/16 - 3.3.02

Application Number: 08709121.1

Publication Number: 2121876

IPC: C10L1/08, C10G3/00, C11C3/12

Language of the proceedings: EN

Title of invention:
PROCESS FOR PRODUCING PARAFFINIC HYDROCARBONS

Patent Proprietor:
Shell Internationale Research Maatschappij B.V.

Opponents:
Gudat, Axel
Haldor Topsoe A/S

Headword:

Relevant legal provisions:
EPC Art. 52(1), 54(3), 84
RPBA 2020 Art. 11
RPBA Art. 13(1)

Keyword:

Novelty - main request (no)

Auxiliary requests 1 and 2 - admitted (yes)

Auxiliary requests 3 and 4 - admitted (no)

Remittal - (no)

Auxiliary requests 1 and 2 - clarity (no)

Decisions cited:

Catchword:



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Case Number: T 0170/16 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 23 March 2021

Appellant: Gudat, Axel
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Appellant: Haldor Topsoe A/S
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 30 November
2015 rejecting the oppositions filed against
European patent No. 2121876 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman	M. O. Müller
Members:	M. Maremonti
	R. Romandini

Summary of Facts and Submissions

I. The appeals by opponents 1 and 2 (hereinafter "appellant 1" and "appellant 2") lie from the decision of the opposition division to reject the oppositions against European patent No. 2 121 876 (hereinafter "the patent").

II. The patent as granted contains 13 claims. Independent claim 1 is directed to a process for producing paraffinic hydrocarbons. Claims 2 to 13 define specific embodiments of the process set out in claim 1.

III. The following document was cited among others during the opposition proceedings:

C26: WO 2008/058664 A1

The opposition division came, *inter alia*, to the following conclusions:

- The subject-matter of claim 1 was novel over the disclosure of document C26.
- The grounds for opposition under Article 100(a) and (b) EPC did not prejudice the maintenance of the patent as granted.

IV. In their statements of grounds of appeal and in subsequent submissions, the appellants raised objections of lack of novelty and lack of inventive step against the subject-matter claimed in the patent as granted.

Appellant 2 corroborated its arguments by filing the following new items of evidence:

C29: Declaration of Rasmus G. Egeberg dated 4 April 2016.

C30: Soveran, D et al., "The effect on diesel engine emissions with high cetane additives from biomass oils", Proc. American Chemical Society (Division of Fuel Chemistry) Meeting, San Francisco, CA, 1992, pages 74 to 85.

The appellants also objected to the admittance of the patentee's auxiliary requests. They further objected to the subject-matter of the auxiliary requests under Rule 80 EPC and under Articles 123(2), 84, 54 and 56 EPC.

- V. In its reply to the statements of grounds of appeal, the patentee (hereinafter "respondent") submitted that the subject-matter claimed in the patent was novel and inventive over the cited prior art. It also contested the admittance into the proceedings of documents C29 and C30. It further maintained auxiliary requests 1 to 12 as filed before the opposition division by letter dated 3 September 2015 and filed an additional auxiliary request 13.
- VI. The parties were summoned to oral proceedings in accordance with their requests.
- VII. In preparation for the oral proceedings, the board issued a communication pursuant to Article 15(1) RPBA 2020 in which it expressed, *inter alia*, the preliminary opinion that the subject-matter of claim 1 as granted was not novel over C26.
- VIII. By letter dated 20 February 2020, the respondent replied to the board's communication and maintained that the subject-matter claimed in the patent as granted was novel and inventive. It replaced the previous auxiliary requests 1 to 13 with new auxiliary requests 1 to 4.

IX. By letters dated 10 March 2020, both the respondent and appellant 2 requested that the oral proceedings be postponed in view of the coronavirus pandemic.

X. The board cancelled the oral proceedings and summoned the parties to oral proceedings to be held at a later date.

XI. In a subsequent communication, the board informed the parties that the oral proceedings would be held by video conference.

XII. By letter dated 16 February 2021, appellant 1 announced that it would not be attending the oral proceedings.

XIII. Oral proceedings before the board were held by video conference on 23 March 2021 in the absence of appellant 1 pursuant to Rule 115(2) EPC and Article 15(3) RPBA.

XIV. Final requests

Appellant 1 requested in writing that the decision under appeal be set aside and the patent be revoked.

Appellant 2 requested that the decision under appeal be set aside and that the patent be revoked. It further requested that auxiliary requests 1 to 4 as filed by the respondent with the letter dated 20 February 2020 not be admitted into the proceedings, and also that documents C29 and C30 be admitted into the proceedings.

The respondent requested that the appeals be dismissed. Alternatively, it requested that the case be remitted to the opposition division for further prosecution on the basis of the claims of one of auxiliary requests 1 to 4 as filed by letter dated 20 February 2020.

Alternatively, it requested that the patent be maintained on the basis of the claims of one of auxiliary requests 1 to 4 as filed by letter dated 20 February 2020. The respondent also requested that

documents C29 and C30 not be admitted into the proceedings.

XV. The content of C29 and C30 did not play any role in the decision taken by the board. As such, a decision by the board on the admittance of C29 and C30 is not needed.

XVI. The appellants' objections, in so far as relevant to the present decision, are summarised as follows:

- In view of dependent claims 4, 6 and 8 to 10 and example 3 of the patent, steps (a) and (b) of claim 1 might be carried out with the same catalyst and at the same temperature and pressure.
- Document C26 disclosed a process for producing paraffinic hydrocarbons, comprising a hydro-deoxygenation (hereinafter HDO) and a hydro-isomerisation (hereinafter HI) step. In view of the catalyst used and the temperature and pressure adopted, the sole HDO step of C26 anticipated the process of claim 1.
- Therefore the subject-matter of claim 1 was not novel over C26.
- The auxiliary requests had been late-filed before the opposition-division. No justification for the late-filing of these requests had been presented. Moreover, no substantiation of the auxiliary requests had been provided with the reply to the statement of grounds of appeal, despite the very detailed objections raised by appellant 2.
- The respondent's letter dated 20 February 2020 contained insufficient reply to the objections raised as well.

- Thus the auxiliary requests were not to be admitted under the Rules of Procedure of the Boards of Appeal.
- Should one or more of the auxiliary requests be admitted, remittal of the case to the opposition division would not be justified.
- Such a remittal would grant an unallowable advantage to the respondent and delay the whole proceedings.
- The subject-matter of claim 1 of auxiliary request 1 was not clear. In particular, the limitation provided by the designations of steps (a) and (b) introduced into claim 1 of these requests was not clear. Especially the extent of isomerisation allowed in step (a) was unclear. Nor could any clear difference be seen between real and non-real hydro-deoxygenation. If no limitation was intended, then the amendments were superfluous.
- Moreover, the amendments to claim 1 were in contradiction to the dependent claims, as they still allowed use of the same catalyst and same operating conditions in steps (a) and (b).
- The same objections applied to claim 1 of auxiliary request 2. The temperature range indicated for step (a) still allowed isomerisation to occur. In view of the designation of step (a) as an HDO step, the extent of isomerisation allowed in this step was unclear.
- It had to be concluded that auxiliary requests 1 and 2 lacked clarity under Article 84 EPC.

XVII. The counter-arguments presented by the respondent can be summarised as follows:

- Claim 1 as granted included two distinct steps (a) and (b), the first directed to HDO and the second to HI reactions, with no purification in-between. The two reactions had to occur sequentially.
- Document C26 disclosed a process comprising an HDO and an HI step with purification in-between. Even if some isomerisation might occur during the HDO step, this isomerisation was very limited and did not represent an HI step within the meaning of step (b) of claim 1 as granted.
- It had to be concluded that claim 1 as granted was novel over C26.
- Even if no substantiation of the auxiliary requests was contained in the reply to the statements of grounds of appeal, this reply contained a clear reference to the opposition proceedings. The auxiliary requests had been filed before the opposition division in a timely manner.
- Moreover, the auxiliary requests filed by the letter dated 20 February 2020 had been reduced in number and made convergent, and substantiation had been provided.
- Therefore the auxiliary requests had to be admitted into the proceedings.
- The subject-matter of the auxiliary requests had not been discussed before the opposition division, and thus remittal of the case was justified.

- The designations of steps (a) and (b) introduced into claim 1 of auxiliary requests 1 and 2 clearly distinguished the two steps from one another. In claim 1 of auxiliary request 2, this distinction was even clearer in view of the added temperature ranges.
- It had to be concluded that auxiliary requests 1 and 2 were clear under Article 84 EPC.

Reasons for the Decision

Main request - patent as granted - interpretation of claim 1

1. Claim 1 as granted reads as follows:

"1. Process for producing paraffinic hydrocarbons, the process comprising the following steps:

(a) contacting hydrogen and a feedstock comprising triglycerides, diglycerides, monoglycerides and/or fatty acids with a hydrogenation catalyst under hydro-deoxygenation conditions; and

(b) contacting the whole effluent of step (a) with a hydroprocessing catalyst comprising sulphided Ni and sulphided W or Mo as hydrogenation components on a carrier comprising amorphous silica-alumina and/or a zeolitic compound under hydro-isomerisation conditions."

1.1 The respondent argued that claim 1 had to be read as encompassing two distinct process steps, namely an HDO and an HI step. It acknowledged (reply to the statements of grounds of appeal, page 3, third paragraph) that some isomerisation might occur during HDO, but it argued that this could not be identified as an HI step within the meaning of claim 1 as granted. It

also acknowledged (reply to the statements of grounds of appeal, page 4) that claim 1 encompassed a process in which a feedstock as defined in claim 1 was fed to a single catalyst bed containing a single catalyst as defined in step (b) of claim 1. However, in this embodiment too each step had to be performed under its own conditions which were to be controlled over the catalyst bed. In particular, the temperature at the bottom of the bed was controlled to be higher than the temperature at the top of the bed, so that first HDO and then HI occurred.

- 1.2 The board cannot see any basis for the narrow interpretation of claim 1 as proposed by the respondent. Paragraphs [0021], [0027], [0029] and [0034], example 3 and claims 4, 6 and 8 to 10 of the patent clearly confirm that steps (a) and (b) of claim 1 may be performed under the same temperature and pressure conditions, using the same catalyst in a single catalyst bed. In particular, the temperature and pressure ranges taught in the patent for HDO and HI largely overlap (claims 8 to 10). No temperature control over the catalyst bed is defined in claim 1. Moreover, claim 1 is not limited to any extent of the HDO and HI reactions. It merely requires that steps (a) and (b) be carried out "*under hydro-deoxygenation conditions*" and "*under hydro-isomerisation conditions*" respectively. In view of the above-mentioned teaching of the patent concerning the overlapping operating conditions, the skilled person would not have understood these expressions in the sense that the operating conditions for HDO and HI had to be different. They would merely have inferred that these conditions had to be chosen such that HDO and HI reactions occur, no matter to what extent.

- 1.3 As a consequence, a process, comprising contacting hydrogen and a feedstock as defined in claim 1 with a catalyst as defined in step (b) of claim 1 under operating conditions such that HDO and HI take place to any extent so to produce paraffinic hydrocarbons, is encompassed by the wording of claim 1 as granted.

Main request - ground for opposition under Article 100(a) EPC - novelty under Article 54 EPC

2. The appellants cited document C26, *inter alia*, against the novelty of the subject-matter of claim 1 as granted.
- 2.1 Document C26 was filed as PCT application no. PCT/EP2007/009668 on 7 November 2007, claiming a priority date of 15 November 2006. It was published on 22 May 2008. Thus C26 has a priority date before the priority date of the patent (20 February 2007), but was published after both its priority and filing dates (20 February 2008). The priority date claimed by C26 has not been contested by the respondent. Therefore C26 represents prior art relevant only for novelty under Article 54(3) EPC, regardless of the validity of the priority date of the patent.
- 2.2 C26 (page 6, line 4 to page 10, line 13; page 11, lines 10 to 16) discloses a process for producing paraffinic hydrocarbons particularly for diesel fuel, comprising a step in which hydrogen and a feedstock comprising triglycerides and possibly fatty acids is contacted with a catalyst at a temperature ranging from 240 to 450 °C and at a pressure of 25 to 70 bar. Among others, a catalytic composition including sulphided Ni and Mo on zeolite (page 9, lines 4 to 14) can be used.
- 2.3 It was not disputed by the respondent that the temperature and pressure conditions mentioned are such that both HDO and HI occur at least to a certain

extent. In fact, the above temperature and pressure ranges disclosed in C26 largely overlap with the temperature and pressure ranges defined in the patent (claims 8 to 10) for both HDO and HI. The fact that the above contacting step is referred to in C26 (page 7, line 24) as an "*HDO step*" is immaterial.

- 2.4 Therefore, given the interpretation of claim 1 set out under 1.2 and 1.3 above, the HDO step of the process taught in C26 discloses all the features of claim 1 as granted, which thus lacks novelty over C26.
- 2.5 According to the respondent (letter dated 20 February 2020, page 4), the skilled person would not have identified the above-mentioned *HDO step* of C26 as a process comprising steps (a) and (b) within the meaning of claim 1 as granted. This was because, in a "one-pot" reaction, a feed was treated in the presence of a catalyst and hydrogen under one set of reaction conditions. In this case, either the chosen temperature would have been too low, and the conversion to branched (isomerised) products would not have been efficient, or too high, thus leading to the formation of unwanted side-products. Had an intermediate temperature been selected, the diesel product with improved cold flow properties according to the patent would not have been obtained.
- 2.6 These arguments are not convincing. In fact, claim 1 is not limited to any amount of branched products being formed. Nor is the formation of side-products excluded from the wording of claim 1. Nor are any cold flow properties of the paraffinic hydrocarbons being produced by the claimed process defined in claim 1. Thus the features invoked by the respondent cannot be used to distinguish the claimed process from the HDO step disclosed in C26.

2.7 For the reasons set out above, the board comes to the conclusion that the subject-matter of claim 1 as granted is not novel over the above disclosure of C26 (Articles 52(1) and 54(3) EPC).

2.8 The main request is not allowable.

Auxiliary requests - admittance into the proceedings

3. The respondent filed auxiliary requests 1 to 4 with its letter dated 20 February 2020. Appellant 2 requested that these requests not be admitted into the proceedings.

3.1 Claim 1 of auxiliary request 1 reads as follows, the amendments to claim 1 as granted having been highlighted by the board:

*"1. **A hydro-deoxygenation/hydro-isomerisation p**rocess for producing paraffinic hydrocarbons, the process comprising the following steps:*

***a hydro-deoxygenation step** (a) contacting hydrogen and a feedstock comprising triglycerides, diglycerides, monoglycerides and/or fatty acids with a hydrogenation catalyst under hydro-deoxygenation conditions; and*

***a hydro-isomerisation step** (b) contacting the whole effluent of step (a) with a hydroprocessing catalyst comprising sulphided Ni and sulphided W or Mo as hydrogenation components on a carrier comprising amorphous silica-alumina and/or a zeolitic compound under hydro-isomerisation conditions."*

3.2 Claim 1 of auxiliary request 2 is identical to claim 1 of auxiliary request 1, with the following features added at the end of the claim:

"wherein the temperature in step (a) is in the range of from 280 to 340 °C, and

wherein the temperature in step (b) is in the range of from 350 to 410 °C."

- 3.3 Claim 1 of auxiliary requests 3 and 4 contains the same amendments as claim 1 of auxiliary request 2, with the following features added at the end of the claim:

"and wherein the feed is supplied to the catalyst of step (a) at a weight hourly space velocity (WHSV) in the range of from 0.1 to 10 kg feed per litre catalyst per hour; and

wherein the WHSV in step (b) is in the range of from 0.1 to 2 kg feed per litre catalyst per hour, wherein reference herein to the WHSV for step (b) is to the weight of feed supplied to step (a) per litre catalyst of step (b) per hour, and wherein the WHSV in step (b) is preferably lower than in step (a)."

- 3.4 The board notes that auxiliary requests 1 to 3 correspond to the previous auxiliary requests 1, 3 and 6, while auxiliary request 4 is based on the previous auxiliary request 10 with some features having been deleted. The previous requests had been filed before the opposition division by letter dated 3 September 2015 and had been maintained by the respondent with its reply to the statements of grounds of appeal (page 19).

- 3.5 The board furthermore notes that the respondent did not substantiate the auxiliary requests in its reply to the statements of grounds of appeal. Neither the basis for the amendments carried out nor the technical significance thereof was indicated, despite the detailed objections raised by appellant 2 against these requests in its statement of grounds of appeal (pages 16 to 28). A substantiation of the present auxiliary requests 1 to 4 was only filed by letter dated 20 February 2020 (pages 8 to 10).

3.6 Under Article 13(1) RPBA 2007, any amendments to a party's case after it has filed, *inter alia*, its reply to the grounds of appeal may only be admitted and considered at the board's discretion. This discretion is to be exercised in view of, *inter alia*, the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

3.7 In view of these provisions, the board considers that auxiliary requests 1 and 2 on one hand and 3 and 4 on the other hand have to be dealt with separately, for the following reasons.

Auxiliary requests 1 and 2

3.7.1 Even if no substantiation of the amendments carried out was contained in the reply to the statements of grounds of appeal, the aim of the amendments (see points 3.1 and 3.2 above) contained in the previous auxiliary requests 1 and 3, to which the present auxiliary requests 1 and 2 correspond, was immediately evident at the onset of the appeal proceedings. In fact, these amendments represented an attempt to distinguish steps (a) and (b) of claim 1 as granted from one another, either by means of a different designation (auxiliary request 1) or a different designation and the indication of the respective temperature ranges. Moreover, the added temperature ranges were included in claims 8 and 9 as granted. Therefore these amendments aimed at overcoming the novelty objections raised by the appellants, especially in view of C26 (point 2 above).

The substantiation of these amendments as submitted by the respondent in its letter dated 20 February 2020 (page 9) merely confirms the above aim, and thus does

not lead to any amendment of the respondent's case within the meaning of Article 13(1) RPBA 2007.

Therefore the board decided to admit auxiliary requests 1 and 2 into the proceedings.

Auxiliary requests 3 and 4

- 3.7.2 The features (see point 3.3 above) added to claim 1 of the previous auxiliary requests 6 and 10, to which the present auxiliary requests 3 and 4 correspond, were not included in the granted claims but taken from the description (paragraph [0024] of the patent). Without any substantiation in the reply to the statements of grounds of appeal, the purpose and technical significance of these amendments were unknown.
- 3.7.3 In its letter dated 20 February 2020 (pages 9 and 10), the respondent submitted that the inclusion of the process parameter WHSV in claim 1 defined the products that were formed in the claimed process. The speed at which the isomerisation took place and the time in the isomerisation reactor bed defined the extent of isomerisation, and consequently the cold flow properties of the products.
- 3.7.4 Since these allegations were not made by the respondent until the letter dated 20 February 2020, they represent an amendment of its appeal case within the meaning of Article 13(1) RPBA 2007. The board holds that these allegations raise complex issues at a late stage of the proceedings. In fact, by admitting auxiliary requests 3 and 4, a factual assessment would have had to be made regarding the influence of the parameter WHSV on the nature and properties of the products formed by the claimed process. Therefore the admittance of these requests would have led to an entirely fresh case to be considered for the first time at a late stage of the appeal proceedings. However, the primary object of the

appeal proceedings is to review the decision under appeal (Article 12(2) RPBA 2020) and not to start new opposition proceedings. Moreover, the admittance of such a fresh case would have been contrary to procedural economy.

- 3.7.5 Therefore, in exercising its discretion under Article 13(1) RPBA 2007, the board decided not to admit auxiliary requests 3 and 4 into the proceedings.

Remittal of the case to the opposition division

4. The respondent argued that the subject-matter claimed in auxiliary requests 1 and 2 had not been discussed before the opposition division, hence remittal of the case to the opposition division was justified.
5. The board disagrees.
- 5.1 Under Article 11 RPBA 2020, the board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so.
- 5.2 As set out under point 3.7.1 above, the amendments contained in auxiliary requests 1 and 2 do not generate any amendment of the respondent's case. Since the substance of the case has not changed, the board sees no special reasons to remit the case to the opposition division. Remittal would have unnecessarily delayed a final decision on the case.
- 5.3 Consequently, the request for remittal was refused.

Auxiliary requests 1 and 2 - claim 1 - clarity under Article 84 EPC

6. Appellant 2 raised a clarity objection against the amendments introduced into claim 1 of auxiliary requests 1 and 2.

Auxiliary request 1

- 6.1 At the oral proceedings, the respondent argued that the designation of steps (a) and (b) introduced into claim 1 (point 3.1 above) represented a clear limitation to claim 1 as granted. Step (a) was limited to a real HDO step, thus meaning that the extent of isomerisation allowed in this step was very limited. The isomerisation then occurred in the second "*hydro-isomerisation*" step (b), in which the extent of isomerisation had to be high. Therefore the HDO step disclosed in C26, during which a small amount of iso-paraffins might have formed, no longer anticipated step (b) of claim 1.
- 6.2 The arguments of the respondent are not convincing. In fact, the amount of iso-paraffins allowed to be formed in step (a) is not defined in claim 1. The mere designation of step (a) as a "*hydro-deoxygenation step*" does not impose any clear limitation on the extent of isomerisation allowed in this step. The respondent's argument that this designation would imply "*real hydro-deoxygenation*" cannot be accepted since it is unclear what the difference would be between *real* and *non-real* hydro-deoxygenation. Moreover, dependent claims 4, 6, 8 and 9 of auxiliary request 1 still allow the same catalyst to be used in steps (a) and (b), and both steps to be carried out at the same temperature and pressure.
- 6.3 Therefore either the designations introduced in claim 1 do not impose any limitation to claim 1 as granted and are thus superfluous, or, by arguing in the respondent's favour, they are limiting, but the limitation imposed, e.g. on the extent of isomerisation allowed in step (a), is not clear. In either one of these two cases, the amendments to claim 1 as granted introduced into claim 1 of auxiliary request 1 render

the claimed subject-matter unclear, contrary to the requirements of Article 84 EPC.

6.4 Therefore auxiliary request 1 is not allowable under Article 84 EPC.

Auxiliary request 2

6.5 At the oral proceedings, the respondent argued that the introduction into claim 1 of different temperature ranges for steps (a) and (b) clearly distinguished the two steps from one another. Step (a) was limited to a real HDO, while HI occurred in step (b). The designation of steps (a) and (b) as "*hydro-deoxygenation*" and "*hydro-isomerisation*" could have been left out but had been maintained to render auxiliary request 2 convergent with auxiliary request 1.

6.6 The board disagrees. The temperature range of from 280 to 340 °C indicated in claim 1 for step (a) still allows for the isomerisation reaction to occur. This is confirmed by paragraph [0027] of the patent, stating that preferably the hydro-isomerisation temperature is in the range of from 300 to 450 °C, i.e. in a range overlapping with the temperature range defined in claim 1 for step (a). Therefore the additional limitation imposed by the designation of step (a) as "*hydro-deoxygenation step*" on the extent of isomerisation allowed to occur in this step is unclear.

6.7 On the contrary, if no additional limitation is imposed by the introduced designations, as alleged by the respondent during oral proceedings (point 6.5 above), then the added designations are superfluous and should not have been introduced.

6.8 In either one of these two cases, the amendments to claim 1 as granted introduced into claim 1 of auxiliary

request 2 render the claimed subject-matter unclear,
contrary to the requirements of Article 84 EPC.

6.9 Therefore auxiliary request 2 is not allowable under
Article 84 EPC.

Conclusions

7. None of the respondent's requests is both allowable and
admissible.

Order

For these reasons it is decided that:

1. The appealed decision is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



N. Maslin

M. O. Müller

Decision electronically authenticated