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**Datasheet for the decision
of 31 January 2022**

Case Number: T 1135/18 - 3.3.02

Application Number: 11749301.5

Publication Number: 2606040

IPC: C07D307/20, C07D309/10,
A01N25/30

Language of the proceedings: EN

Title of invention:
AGROCHEMICAL ADJUVANTS AND FORMULATIONS

Patent Proprietor:
Croda, Inc.

Opponent:
Akzo Nobel Chemicals International B.V.

Headword:

Relevant legal provisions:

EPC Art. 54
RPBA Art. 12(2)
RPBA 2020 Art. 13(2)

Keyword:

Novelty - all requests (no)

Statement of grounds of appeal - appellant's complete case (no)

Amendment of the appellant's case after summons - exceptional
circumstances (no) - admitted (no)

Decisions cited:

Catchword:



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Case Number: T 1135/18 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 31 January 2022

Appellant: Croda, Inc.
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Respondent: Akzo Nobel Chemicals International B.V.
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Representative: LKGlobal UK Ltd.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 9 March 2018
revoking European patent No. 2606040 pursuant to
Article 101(3)(b) EPC.**

Composition of the Board:

Chairman M. O. Müller
Members: M. Maremonti
P. de Heij

Summary of Facts and Submissions

- I. The appeal by the patentee ("appellant") lies from the decision of the opposition division to revoke European patent No. 2 606 040 ("the patent").
- II. The following documents were cited, *inter alia*, during the opposition proceedings:
- D1: WO 2010/003889 A1
- D3: International Journal of Toxicology, 19 (Suppl. 2): 43-89, 2000
- D4: US 2004/0146472 A1
- D5: US 2008/0051461 A1
- D6: US 2007/0196291 A1
- III. The opposition division came to, *inter alia*, the following conclusion on the then pending main request (patent as granted) and auxiliary requests 1 to 3:
- The subject-matter of claims 1 and 6 as granted was not novel over the disclosures in documents D1 and D6.
 - The subject-matter of claim 1 according to auxiliary requests 1 and 2 was not novel over the disclosures in documents D1 and D6.
 - The subject-matter of claim 1 according to auxiliary request 3 was not novel over the disclosure in document D1.
- IV. In its statement of grounds of appeal, the appellant submitted that the subject-matter of the main request, corresponding to auxiliary request 2 underlying the appealed decision, was novel over documents D1 and D3

to D6. Moreover, the subject-matter of auxiliary request A1, corresponding to auxiliary request 3 underlying the appealed decision, was novel over D1.

- V. In its reply to the appeal, the opponent ("respondent"), *inter alia*, contested the admittance of the main request into the proceedings and argued that documents D1 and D3 to D5 were novelty destroying for the claimed subject-matter.
- 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 this communication, the board expressed, *inter alia*, its preliminary opinion that novelty of the main request over document D1 and D6 had not been substantiated in the statement of grounds of appeal.
- VIII. In a subsequent communication, the board informed the parties that the oral proceedings would be held by videoconference.
- IX. Oral proceedings before the board were held on 31 January 2021 by videoconference.
- X. Final requests

The appellant requested that the appealed decision be set aside and the patent be maintained on the basis of the claims of the main request or, alternatively, auxiliary request A1, both requests filed with the statement of grounds of appeal.

The respondent requested that the appealed decision be upheld, meaning that the appeal be dismissed. It further requested that the main request of the appellant not be admitted into the proceedings. Should

the board decide that the claimed subject-matter was novel, the respondent also requested that the case be remitted to the opposition division for examination of inventive step.

At the oral proceedings, the respondent further requested that the appellant's defence with regard to novelty of the main request over D6 as submitted during the oral proceedings not be admitted into the proceedings.

It also requested that the appellant's defence as regards the need for multiple selections in D1, including selections to arrive at the compound of formula (I) of claim 1, as submitted during the oral proceedings not be admitted into the proceedings.

XI. The appellant's submissions, insofar as they are relevant to the present decision, are summarised as follows.

Main request

- Claim 1 of the main request required the presence in the claimed formulation of an agrochemical active.
- The washing composition disclosed in table 33 of document D6 did not anticipate the formulation of claim 1 since the antiseptics contained therein could not be considered as agrochemical actives within the meaning of claim 1.
- This defence as regards novelty over D6 had been already put forward in the statement of grounds of appeal and thus, it should be admitted into the proceedings.

Auxiliary request A1

- Claim 16 of document D1 did not directly and unambiguously disclose compounds of formula (I) of claim 1. Multiple selections within claim 16 of D1 were needed to arrive at compounds of formula (I).
- This defence as regards novelty over D1 had been already brought forward in the statement of grounds of appeal and thus, it should be admitted into the proceedings.
- Moreover, no combinations of herbicides and agrochemical actives as defined especially in alternative (i) of claim 1 were directly and unambiguously disclosed in D1.
- It had to be concluded that auxiliary request A1 was novel over D1.

XII. The respondent's submissions, insofar as they are relevant to the present decision, are summarised as follows.

Main request

- The appellant's defence that the washing composition of table 33 of D6 did not anticipate the subject-matter of claim 1 in view of the presence of antiseptics was not contained in the statement of grounds of appeal.
- Thus, this defence represented an amendment to the appellant's case submitted during oral proceedings before the board for the first time. No time was available for the respondent to reply to this new defence.
- Therefore, this defence should not be admitted into the proceedings under Article 13(2) RPBA 2020.

Auxiliary request A1

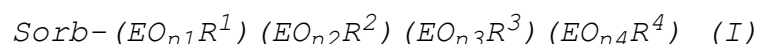
- The appellant's defence that multiple selections were needed within claim 16 of D1 to arrive at compounds of formula (I) of claim 1 was not contained in the statement of grounds of appeal.
- Thus, this defence represented an amendment to the appellant's case submitted during oral proceedings before the board for the first time.
- Therefore, this defence should not be admitted into the proceedings under Article 13(2) RPBA 2020.
- The remaining features of claim 1 were directly and unambiguously disclosed in claim 17 of D1.
- It had to be concluded that claim 1 of auxiliary request A1 lacked novelty over document D1.

Reasons for the Decision

Main request - admittance into the proceedings

1. Claim 1 of the main request reads as follows:

"1. An agrochemical formulation, wherein the formulation comprises a compound or mixture of compounds which is/are ethoxylated fatty acid mono-ester(s) of sorbitan, where the ester(s) are compounds of formula (I):



wherein;

(i) Sorb represents a residue obtained by removing four hydroxyl H atoms from sorbitan;

(i) EO represents an ethyleneoxy residue;

- (ii) $n_1, n_2, n_3,$ and n_4 each independently represent average values from 0 to 10;
- (iii) the total $n_1 + n_2 + n_3 + n_4$ has an average value from 8 to 12; and
- (iv) $R^1, R^2, R^3,$ and R^4 each independently represents H or an acyl group $-C(O)-R^5,$ where R^5 is a C_7 to C_{13} hydrocarbyl,

and wherein the agrochemical formulation comprises at least one agrochemical active."

- 1.1 The main request corresponds to auxiliary request 2 underlying the appealed decision. The respondent requested that the main request not be admitted into the proceedings.
- 1.2 At the oral proceedings, the board decided to admit the main request into the proceedings. However, since the final decision of the board is in favour of the respondent (see below), no reasoning as regards this admittance decision of the board is needed.

Main request - claim 1 - appellant's defence with regard to novelty over document D6 as submitted during the oral proceedings - admittance into the proceedings

- 2. According to the appealed decision (point 19 in combination with point 17.2), the subject-matter of claim 1 of the present main request (auxiliary request 2 in the appealed decision) was found to lack novelty, *inter alia*, over document D6. The opposition division specifically referred to table 33 of D6 (page 25), disclosing a washing composition, comprising, *inter alia*, polyoxyethylene-10 sorbitan monolaurate (component 5 in table 33), a compound indisputably falling under formula (I) of claim 1, and antiseptics (component 18). According to the opposition division's reasoning, antiseptics "are generally considered to

kill bacteria and may be considered suitable as an agrochemical active". The division thus concluded that the subject-matter of claim 1 (point 1 above) lacked novelty over this specific washing composition of D6.

- 2.1 At the oral proceedings before the board, the appellant argued that *antiseptics* as disclosed in D6 would not have been understood by a skilled person as being *agrochemical actives* within the meaning of claim 1. It referred to paragraph [0046] of the patent, defining agrochemical actives as being selected from herbicides, fungicides, insecticides or plant growth controlling compounds. This was the meaning of *agrochemical active* as generally understood in the art. Paragraph [0107] of D6 disclosed instead typical examples of antiseptics. None of the mentioned compounds fell under the definition of agrochemical active as given in the patent. The appellant put forward that this defence with regard to D6 should be admitted into the proceedings since it did not bring up new issues. It was, namely, already contained in its statement of grounds of appeal, page 3, first full paragraph.
- 2.2 The respondent requested that this defence of the appellant not be admitted into the proceedings.
- 2.3 The board finds the appellant's arguments non convincing for the following reasons.
 - 2.3.1 The appellant's statement of grounds of appeal does not contain any reasons contesting the above-mentioned finding of lack of novelty of the opposition division based on the washing composition disclosed in table 33 of D6. The first paragraph on page 3 of the statement of grounds of appeal, referred to by the appellant, merely contains the vague statements that "*D3 to D6 are not relevant to agrochemical use which is what the opposed patent relates to*" and that it is "*difficult to*

believe the skilled person would see the components mentioned as 'agrochemical active'". No discussion of the opposition division's reasoning, specifically as regards the significance of the *antiseptics* comprised in the washing composition of table 33 of D6, is included. In fact, this washing composition is not discussed at all in the statement of grounds of appeal.

- 2.3.2 It follows that the statement of grounds of appeal does not comply with Article 12(2) RPBA 2007 (and Article 12(3) RPBA 2020), requiring that the statement of grounds of appeal shall contain the appellant's **complete case** setting out clearly and concisely **the reasons** why it is requested that the decision under appeal be reversed and specifying expressly *inter alia* all the facts, arguments and evidence relied on. The above statements contained in the grounds of appeal do not allow the respondent and the board to understand why the appealed decision on lack of novelty of the main request over document D6 should be reversed.
- 2.3.3 In its communication issued in preparation for the oral proceedings (points 7.2 and 7.3), the board had already expressed the preliminary opinion that the main request had not been substantiated in the grounds of appeal with regard to the finding of lack of novelty over D6. The appellant has not replied to the board's communication and chosen instead to present its defence only at the oral proceedings.
- 2.3.4 Therefore, contrary to the appellant's view, the above-mentioned defence brought forward by the appellant at the oral proceedings before the board does represent an amendment to its case, submitted at the latest point in time of the appeal proceedings. In fact, at the oral proceedings for the first time, the appellant put forward why the *antiseptics* as comprised in the washing composition of table 33 of D6 would not fall under the

agrochemical active as included in the claimed formulation.

2.3.5 Under Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned. No exceptional circumstances exist in the present case justifying the submission of the appellant's defence as regards novelty over D6 only at the oral proceedings. In fact, as mentioned above, the finding of lack of novelty over D6 forms part of the appealed decision and a complete defence in this respect should have been included in the grounds of appeal.

2.4 For these reasons, the board decided not to admit into the proceedings the appellant's defence with regard to novelty over document D6 as submitted during the oral proceedings.

Main request - claim 1 - novelty over document D6 under Article 54 EPC

3. As set out above, the grounds of appeal do not contain any reasons contesting the finding of the opposition division that the subject-matter of claim 1 lacks novelty over the washing composition disclosed in table 33 of D6. In particular, no discussion of the significance of the *antiseptics* included in the composition of D6 as compared to the *agrochemical active* comprised in the claimed formulation has been made in the grounds of appeal.

The defence in this respect as submitted by the appellant at the oral proceedings has not been admitted into the proceedings. Therefore, there are no reasons of the appellant on file as to why the appealed

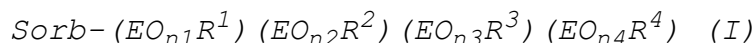
decision on lack of novelty of claim 1 over D6 should be reversed.

Absent any such reasons, the decision of the opposition division (appealed decision, point 19 in combination with point 17.2) that the subject-matter of claim 1 lacks novelty over document D6 has to be maintained. Therefore, the main request is not allowable (Articles 52(1) and 54 EPC).

Auxiliary request A1 - claim 1 - appellant's defence as regards the need for multiple selections including selections to arrive at the compound of formula (I) of claim 1 as submitted during the oral proceedings - admittance into the proceedings

4. Claim 1 of auxiliary request A1 reads as follows, the amendments to claim 1 of the main request (point 1 above) having been highlighted by the board:

"1. An agrochemical formulation, wherein the formulation comprises a compound or mixture of compounds which is/are ethoxylated fatty acid mono-ester(s) of sorbitan, where the ester(s) are compounds of formula (I):



wherein;

- (i) Sorb represents a residue obtained by removing four hydroxyl H atoms from sorbitan;
- (i) EO represents an ethyleneoxy residue;
- (ii) n_1 , n_2 , n_3 , and n_4 each independently represent average values from 0 to 10;
- (iii) the total $n_1 + n_2 + n_3 + n_4$ has an average value from 8 to 12; and

- (iv) R^1 , R^2 , R^3 , and R^4 each independently represents H or an acyl group $-C(O)-R^5$, where R^5 is a C_7 to C_{13} hydrocarbyl,

and wherein the agrochemical formulation comprises at ~~least one agrochemical active~~ **combinations of actives selected from:**

- (i) **a non-selective herbicide and another type of agrochemical active;**
- (ii) **a selective herbicide and a graminicide;**
- (iii) **a selective broadleaf herbicide and a graminicide; or**
- (iv) **a graminicide and a non-selective herbicide."**

4.1 According to the appealed decision (point 20.3), the features added to claim 1 of present auxiliary request A1 (corresponding to auxiliary request 3 underlying the appealed decision) were known from claim 17 of document D1 and therefore, did not contribute to establish novelty over document D1. The latter had been found, namely, to be novelty destroying for claim 1 of the present main request (corresponding to auxiliary request 2 underlying the appealed decision), see point 19 in combination with point 17.2 of the appealed decision, which specifically referred to claim 16 of D1, which claim 17 depends on, as anticipating formulations comprising compounds of formula (I) of claim 1. Thus, the combination of claims 16 and 17 of D1 was found to anticipate the subject-matter of present auxiliary request A1.

4.2 At the oral proceedings before the board, the appellant argued that several selections within D1 would have been needed to arrive at the subject-matter of claim 1 of auxiliary request A1. Not only a combination of at

least two agrochemical actives as disclosed in claim 17 of D1 would have had to be selected. Further selections within claim 16 of D1, which claim 17 was dependent on, were necessary to arrive at a compound falling under formula (I) of claim 1. The need for multiple selections thus rendered the claimed subject-matter novel over D1. The appellant put forward that this defence with regard to novelty over D1 should be admitted into the proceedings since it did not bring up new issues. It was, namely, already contained in its statement of grounds of appeal, page 3, third full paragraph under "Auxiliary request A1".

- 4.3 The respondent requested that this defence of the appellant not be admitted into the proceedings.
- 4.4 The board finds the appellant's arguments non convincing for the following reasons.
 - 4.4.1 The appellant's statement of grounds of appeal does not contain any discussion of claim 16 of D1, found by the opposition division to anticipate a formulation comprising, *inter alia*, a compound of formula (I) as defined in claim 1. The third paragraph under "Auxiliary request A1" on page 3 of the statement of grounds of appeal, invoked by the appellant, merely states that "*Claim 1 of the Auxiliary Request A1 requires selection of the adjuvant [compound of formula (I)] and two agrochemical actives, which is not disclosed in D1. There is no specific disclosure or exemplification of the adjuvant [compound of formula (I)] claimed with two agrochemical actives in a formulation in D1*" (text in square brackets added by the board). No reference to the need of multiple selections within claim 16 of D1 to arrive at the compound of formula (I) as required by claim 1 of auxiliary request A1 is included in this passage. On the contrary, in the light of the sentence following

the quoted passage above ("*Whilst claim 17 of D1 does show a long list of actives there is no specific disclosure to combine in such a way that they would anticipate this Auxiliary Request*"), the selection the appellant is referring to is the selection needed in D1 in order to arrive at the combination of agrochemical actives defined in claim 1 of auxiliary request A1 rather than the claimed compound of formula (I). That a selection is needed in D1 to arrive at this compound has never been put forward by the appellant till the oral proceedings before the board.

4.4.2 In its communication issued in preparation for the oral proceedings (point 7.4), the board had already expressed the preliminary opinion that no sufficient substantiation within the meaning of Article 12(2) RPBA 2007 was present in the grounds of appeal with regard to the finding of lack of novelty over D1, especially because claim 16 of D1 had not been discussed at all in the grounds of appeal. The appellant has not replied to the board's communication and chosen instead to present its defence only at the oral proceedings.

4.4.3 Therefore, contrary to the appellant's view, the above-mentioned defence brought forward at the oral proceedings before the board does represent an amendment to the appellant's case, submitted at the latest point in time of the appeal proceedings.

4.4.4 Under Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned. No exceptional circumstances exist in the present case justifying the submission of the new defence of the appellant as regards novelty over D1 only at the oral proceedings.

In fact, as mentioned above, the finding of lack of novelty in view of claim 16 of D1 forms part of the appealed decision and a complete defence in this respect should have been included in the grounds of appeal.

- 4.5 For these reasons, the board decided not to admit into the proceedings the appellant's defence as regards the need for multiple selections including selections to arrive at the compound of formula (I) of claim 1 as submitted during the oral proceedings.

Auxiliary request A1 - claim 1 - novelty over document D1 under Article 54 EPC

5. In view of the above, the decision of the opposition division (appealed decision, point 17.2) that claim 16 of D1 anticipates a formulation comprising compounds of formula (I) as defined in claim 1 has to be maintained.
6. Claim 16 of D1 discloses that the formulation defined therein further comprises at least one acid functional herbicidal active. Claim 17, dependent on claim 16, gives a list of these acid functional actives of claim 16 and at the end refers to "*and mixtures and combinations thereof*".
7. At the oral proceedings, the appellant did not dispute that the compounds listed in claim 17 of D1 were non-selective herbicides and at the same time agrochemical actives. However, it submitted that no combinations of such compounds were directly and unambiguously disclosed in D1. In particular, none of the examples of D1 disclosed such a combination. Also the wording included at the end of claim 17 of D1 which referred to mixtures and combinations of the listed compounds had to be merely regarded as typical claim language but not as a direct and unambiguous disclosure of especially alternative (i) of claim 1, reciting a combination of

"a non-selective herbicide and another type of agrochemical active". Therefore, a multiple selection was needed in claim 17 of D1 to arrive at the combination of actives as defined, e.g. in alternative (i) of claim 1 of auxiliary request A1.

8. The board disagrees.

8.1 Mixtures and combinations of the compounds listed in claim 17 of D1 are disclosed in claim 17 by the explicit reference in this claim to "*mixtures and combinations thereof*". The board does not see any reason why this disclosure should be disregarded, as asked for by the appellant, on the mere ground that it forms part of a claim of a prior art patent document.

8.2 Furthermore, as set out above, it was not disputed by the appellant that each of the compounds listed in claim 17 of D1 represents at the same time a non-selective herbicide and an agrochemical active. Therefore any combination of compounds listed in claim 17 represents a combination of a non-selective herbicide and another agrochemical active. To arrive at alternative (i) of claim 1, only one selection for a mixture or combination of compounds is needed within claim 17 of D1. Hence, the feature added to claim 1 of auxiliary request A1 by means of alternative (i) does not contribute to establish novelty of the claimed formulation over document D1.

8.3 Therefore, in view of the undisputed finding of the opposition division that claim 16 of D1, which claim 17 is dependent on, defines an adjuvant composition containing compounds of formula (I) of claim 1, it follows that the subject-matter of claim 1 of auxiliary request A1, namely a formulation comprising at least one compound of formula (I) and a combination of a non-

selective herbicide and another type of agrochemical active, is disclosed in claims 16 and 17 of D1.

8.4 Thus, the board concludes that the subject-matter of claim 1 of auxiliary request A1 lacks novelty over D1. Also auxiliary request A1 is not allowable (Articles 52(1) and 54 EPC).

Conclusions

9. None of the appellant's claim requests is allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



N. Maslin

M. O. Müller

Decision electronically authenticated