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**Datasheet for the decision
of 1 October 2009**

Case Number: T 1335/07 - 3.3.03

Application Number: 00984663.5

Publication Number: 1246853

IPC: C08F 10/00

Language of the proceedings: EN

Title of invention:

Process for the gas phase polymerization and copolymerization
of olefin monomers

Patentee:

Braskem S.A., et al

Opponent:

Basell Polyolefine GmbH

Headword:

-

Relevant legal provisions:

EPC Art. 123(2), 123(3)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Main request, first and fourth auxiliary requests - amendment
- added subject-matter - yes"

"First, second, third, fifth, sixth, seventh auxiliary
requests - extension of scope of protection - yes"

Decisions cited:

-

Catchword:

-



Case Number: T 1335/07 - 3.3.03

D E C I S I O N
of the Technical Board of Appeal 3.3.03
of 1 October 2009

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office dated 30 May 2007 and
posted 12 June 2007 revoking European patent
No. 1246853 pursuant to
Article 102(1) EPC 1973.

Composition of the Board:

Chairman: A. Däweritz
Members: M. C. Gordon
C.-P. Brandt

Summary of Facts and Submissions

I. Mention of the grant of European Patent No. 1 246 853 with the title "Process for the Gas Phase Polymerization and Copolymerization of Olefin Monomers" in the names of:

- OPP Quimica S.A., later Braskem S.A and
- Convex International

in respect of European patent application No. 00984663.5, filed on 29 December 2000 as international application No. PCT/BR00/00156, published as WO 01/49750 A1 on 12 July 2001, and claiming a priority date of 30 December 1999 from PI 9906019-1 was announced on 10 November 2004 (Bulletin 2004/46) on the basis of 19 claims.

Claim 1 read as follows:

1. A process for polymerizing and copolymerizing olefin monomers in a gas phase reactor, under polymerization conditions and in the presence of high- activity catalysts, employing a recycle gas stream cooled in a heat exchanger with the aid of a cooling fluid, wherein in said process, the inert diluents of said recycle stream comprise a mixture of:
 - at least one light component designed to regulate the dew point, wherein the light components are selected from the group consisting of nitrogen, argon, ethane and propane, isolated or combined;
 - at least one intermediate volatility component, wherein the intermediate volatility components are selected from the group consisting of alkanes of from 3 to 6 carbon atoms and non-reactive olefins of from 4 to 6 carbon atoms, isolated or combined;

and wherein the dew point of the recycle gas stream is regulated by the relative composition between said at least one light component and said at least one intermediate volatility component, in order to avoid the condensation of the components inside the reactor, and wherein the recycle stream is completely volatilized.

Claims 2-19 were dependent claims.

II. A notice of opposition to the patent was filed on 8 August 2005 by Basell Polyolefine GmbH. The opponent invoked the grounds of opposition pursuant to Art. 100(a) EPC (lack of novelty, lack of inventive step) and Art. 100(c) EPC (extension of the subject-matter of the patent beyond the content of the application as filed).

III. By a decision announced orally on 30 May 2007 and issued in writing on 12 June 2007 the opposition division revoked the patent.

The decision was based on the claims of the patent as granted as the main request and three sets of claims forming a first to a third auxiliary request, all filed during the oral proceedings.

(a) With respect to the main request the decision held that the expression in the final part of claim 1

"wherein the dew point of the recycle stream is regulated by the relative composition between said at least one light component and said at least one intermediate volatility component, in order to avoid the condensation of the components inside the reactor"

lacked full support in the originally filed documents.

The original application did not comprise an explicit disclosure of this expression. Nor did the original application implicitly disclose this

expression as it did not teach to regulate the relative composition between said at least one light component and said at least one intermediate volatility component in order to avoid the condensation of the components inside the reactor.

In this respect the decision noted that the original application merely taught to use the ratio of the at least one light component and the at least one intermediate volatility component in order to regulate the dew point of the recycle stream in order to keep the recycle stream completely volatilized.

According to the minutes of the oral proceedings this finding arose in respect of objections raised by the opponent to two features of the claim, namely

- "regulated by the relative composition" and
- "in order to avoid condensation of the components inside the reactor".

It was submitted by the opponent that both of these passages did not have support in the application as originally filed.

- (b) With respect to the first, second and third auxiliary requests, the decision held that the respective claims 1 thereof also did not meet the requirements of Art. 123(2) EPC. The details of these objections are however not relevant for the present decision.

(c) Accordingly the patent was revoked.

IV. A notice of appeal against this decision was filed by the patent proprietor on 10 August 2007, the prescribed fee being paid on the same day.

V. The statement of grounds of appeal was received on 12 October 2007, accompanied by eight sets of claims forming a main request and a first to a seventh auxiliary request. The main request consisted of the claims of the patent as granted.

It was requested that the decision be set aside and that the case be remitted to the opposition division to continue the opposition proceedings

(a) With respect to the main request and Art. 123 EPC the appellant disputed the finding of the decision that the passage indicated in italics in section III.(a) above lacked support in the application as filed.

In its argumentation the appellant concentrated on the aspect of avoiding condensation of the components of the recycle stream inside the reactor. The skilled person would directly and unambiguously derive from the application as a whole that the diluents in the recycle stream were maintained in a state just above the point where they are about to condense (the "dew point"), although it was conceded that this was not explicitly disclosed. It was also directly and unambiguously derivable that the purpose of this control of the composition of the inert diluents

in the recycle stream was to ensure that the inert diluents would enter the reaction vessel in a gaseous state, but only just so, so that they would be able to absorb a significant quantity of heat on entry into the hot reactor, without introducing any liquid, reference being made to page 7 lines 24-26 of the application (reference being made to the PCT publication).

It was explained that since condensation in the reactor interfered with the production rate of the reaction - which was made clear throughout the description of the application as filed - the reaction had to be carried out in the gas phase, i.e. in the non-condensed mode.

Further the skilled person would describe efforts to avoid condensation inside the "reaction stream" synonymously and interchangeably with the avoidance of condensation in the "recycle system" or avoidance of liquid "inside the reactor". Since the reactor was operating in the non-condensed mode the only possible source of condensation was from the recycle stream, it therefore followed that controlling the dew point of the gas in the recycle stream also controlled the gas in the reactor.

Accordingly claim 1 did not contain added subject matter because the aspect of avoiding condensation not only in the recycle stream but also in the reactor was inherent in the disclosure of the application as filed and would have been derived

directly and unambiguously by the skilled person from the disclosure.

The appellant however did not provide any arguments specifically with respect to the aspect of the dew point being regulated by the "relative composition" of the inert diluents (cf section II.(a), above).

- (b) The first auxiliary request differed from the main request in that in claim 1 the final passage read as follows, additions compared to claim 1 as granted being indicated in **bold**, deletions by ~~strikethrough~~:

*"and wherein the dew point of the recycle gas stream is regulated by **admixing** ~~the relative composition between~~ said at least one light component and said at least one intermediate volatility component, **in a composition suitable for maintaining** ~~in order to avoid the condensation of the components inside the reactor, and wherein the recycle stream is~~ completely volatilized."*

The amendment was stated to be supported by the disclosure of page 7, lines 15-19 (reference being made to the published PCT application). It was submitted that the deletion of the phrase "*in order to avoid the condensation of the components inside the reactor*" was acceptable pursuant to Art 123(2) EPC since this feature was not present in the indicated passage on page 7. This amendment

was not contrary to Art. 123(3) EPC since it did not lead to a broadening of the scope of the claim. The description made clear that the process was taking place in a non-condensed mode, from which the skilled reader would understand that the reactor had no condensation in it. Hence the feature "*in order to avoid condensation of the components inside the reactor*" was not a limitation but merely repeated information already present in the claim. Moreover, the wording "*in order to*" indicated a statement of purpose, i.e. that the regulation of the composition was to avoid condensation but was not a limitation. Hence deleting this feature could not result in a broadening of the scope of the claim.

- (c) The second auxiliary request differed from the main request in that the final passage of claim 1 read as follows, amendments compared to the corresponding passage of claim 1 being indicated in **bold** and ~~striketrough~~ as above:

*"and wherein the dew point of the recycle gas stream is regulated by **admixing** ~~the relative composition between said at least one light component and said at least one intermediate volatility component, in a composition suitable for operating the reactor in a non-condensed mode and for maintaining in order to avoid the condensation of the components inside the reactor, and wherein~~ the recycle stream is completely volatilized".*

It was submitted that the purpose of this amendment was to make explicitly clear that the scope of the claim had not been broadened by deletion of the "*in order to*" feature. As the claim now referred to the composition being suitable for operating the reactor in a non-condensed mode, the composition had necessarily to avoid the condensation of the components in the reactor, otherwise it would not be suitable for operating a reactor in the non-condensed mode.

- (d) The third auxiliary request differed from the main request in that the final passage of claim 1 read as follows, amendments compared to the main request being indicated in **bold** and ~~strikethrough~~ as above:

*"and wherein the dew point of the recycle gas stream is regulated **admixing** [sic] ~~by the relative composition between said at least one light component and said at least one intermediate volatility component, in a composition suitable for maintaining in order to avoid the condensation of the components inside the reactor, and wherein the recycle stream is completely volatilized, and wherein the reactor is in a non-condensed mode.~~"*

It was submitted that the purpose of the amendment was to replace the feature "*in order to avoid condensation of the components inside the reactor*" with an equivalent feature having an explicit

basis in the application as filed, while ensuring that the scope of the claim had not been broadened.

- (e) The fourth auxiliary request differed from the main request in that in the second part of claim 1 the permissible light component and intermediate volatility component had been restricted to either the combination of ethane and propane or to propane and iso-butane, corresponding to the subject matter of granted claims 7 and 8.

As a consequence of this amendment claims 6-8 (claim 6 defining the permissible compounds for the intermediate volatility component) had been deleted and the subsequent claims renumbered.

- (f) The fifth auxiliary request corresponded to the first auxiliary request, however with the definition of the light and intermediate volatility components in claim 1 as specified in the fourth auxiliary request.
- (g) The sixth auxiliary request corresponded to the second auxiliary request, however with the definition of the light and intermediate volatility components in claim 1 as specified in the fourth auxiliary request.
- (h) The seventh auxiliary request corresponded to the third auxiliary request, however with the definition of the light and intermediate volatility components in claim 1 as specified in the fourth auxiliary request.

VI. The respondent/opponent filed a reply with a letter dated 29 February 2008.

Dismissal of the appeal was requested. In the alternative it was requested that the case be remitted to the first instance for assessment of the remaining issues concerning Art. 100(a) and (b) EPC.

(a) With respect to the main request it was, *inter alia*, disputed that the expression

"wherein the dew point...in order to avoid the condensation of the components inside the reactor" (cf section III.(a) above)

could be directly and unambiguously derived from the application as originally filed (Art. 123(2) EPC.)

In particular it was submitted that it was not explicitly disclosed in the application that the dew point of the recycle stream was regulated in order to avoid the condensation of the light and intermediate volatility components inside the reactor (emphasis of the respondent). Although the cooling of the recycle stream at temperatures above the dew point did indeed avoid condensation of the gaseous components in the recycle stream, this did not necessarily prevent local condensation of some amounts of gaseous components inside the reactor. Reference was made to the passage at page 9 lines 20-24 of the PCT publication which only excluded partial condensation of a portion of the gas recycle

stream but from which nothing could be inferred regarding a possible condensation of the gaseous components inside the reactor.

- (b) With regard to the first auxiliary request and Art. 123(2) EPC, it was submitted that the essential feature of claim 1:

"the dew point of the recycle gas stream is regulated..."

was absent from the passage cited by the appellant (page 7 lines 15-19) - see section V.(b) above). The cited passage made no hint to any regulation of the dew point of the recycle stream.

With respect to Art. 123(3) EPC it was submitted that the feature

"in order to avoid the condensation of the components inside the reactor"

in claim 1 of the patent as granted, which had been deleted from claim 1 of the first auxiliary request did represent a limitation, contrary to the submission of the appellant/patent proprietor (see section V.(b) above). It was emphasised in this connection that avoidance of condensation inside the "recycle stream" was not synonymous and interchangeable with the feature of avoidance of condensation "inside the reactor". Consequently the deletion of this feature did result in an extension of the scope of protection compared to claim 1.

- (c) With respect to the second auxiliary request and Art. 123(2) EPC it was submitted that contrary to the submission of the patent proprietor there was no basis in the application as filed for the feature

"the dew point of the recycle gas stream is regulated..." (cf the submissions with respect to the first auxiliary request, above).

It was reiterated that avoidance of condensation in the recycle stream was not synonymous or interchangeable with avoidance of condensation inside the reactor.

With respect to Art. 123(3) EPC it was submitted that the feature

"suitable for operating a reactor in a non-condensed mode"

was not equivalent to the previous feature

"in order to avoid the condensation of the components inside the reactor".

This latter feature was more limiting since it imposed no condensation of components inside the reactor and not only in the recycle stream. Accordingly the scope of protection had been extended compared to that of the claim as granted.

- (d) With respect to the third auxiliary request it was reiterated that the feature

"the dew point of the recycle gas stream is regulated..."

did not find support at page 7 lines 15-19, cited by the appellant, and consequently this feature contravened the requirements of Art 123(2) EPC.

With respect to Art. 123(3) EPC it was submitted that the introduced feature

"wherein the reactor is in a non-condensed mode"

was not equivalent to the former feature

"in order to avoid the condensation of the components inside the reactor".

This latter feature was more limiting. Accordingly the scope of protection conferred by claim 1 of the third auxiliary request encompassed also a non-condensed mode polymerisation and consequently was extended compared to the scope of protection conferred by claim 1 of the patent as granted.

- (e) Since the fourth, fifth, sixth and seventh auxiliary requests were based on the main request, and the first, second and third auxiliary requests respectively the objections raised in respect thereof applied *mutatis mutandis* to the fourth-seventh auxiliary requests.

VII. On 20 July 2009 the Board issued a summons to attend oral proceedings.

In an accompanying communication the Board noted that the reason for the refusal of the claims of the main request pursuant to Art. 123(2) EPC (see section III.(a) above) was related to an objection, raised by the opponent in its notice of opposition and reiterated in the submissions made at the oral proceedings before the opposition division, which objection had two aspects:

- the question of the **relative** composition of the two components to regulate the dew point and
- the question of avoiding condensation of the components inside the reactor, alternatively expressed as to keep the recycle stream completely volatilized.

The Board noted that objections had been raised to each of these aspects individually, not only to the combination thereof but that in its submissions in the statement of grounds of appeal the appellant/patent proprietor had however concentrated essentially on the second aspect. No submissions had been made concerning the former aspect, i.e. the question of the basis in the application as filed for the feature relating to the "relative composition of the two components".

It was further stated that the scope of the oral proceedings would be restricted to the matters of Art. 123(2) EPC.

VIII. In a letter dated 27 August 2009 the appellant/patent proprietor informed the Board that it would not be

represented at the oral proceedings.

All requests as presented in the statement of grounds of appeal were maintained. Similarly the arguments presented were reasserted.

- IX. In a letter of 1 September 2009 the respondent/opponent informed the Board that it intended to speak English at the oral proceedings.
- X. In a brief communication dated 28 September 2009 and sent by telefax the Board informed the parties, with reference to its communication (See section VII, above) that the matters pursuant to Art. 123(3) EPC would also be addressed at the oral proceedings.
- XI. Oral proceedings were held on 1 October 2009 attended only by the respondent/opponent (see section VIII, above).

The Board established that the parties had been summoned in good time. Therefore the proceedings were continued in accordance with R. 115(2) EPC.

- (a) With respect to the main request and the fourth auxiliary request, the respondent/opponent referred to its written submissions (see sections VI.(a) and (e), above).
- (b) With respect to the first auxiliary request the respondent referred to its written submissions (see section VI.(b) above).

Further with respect to the replacement of the wording "*the relative composition between*" by "*admixing*" the respondent submitted that the passage of the original description relied upon by the appellant (page 7 lines 15-19 - see section V.(b), above) specified that the components were admixed in specific amounts but did not contain any reference to regulation of the dew point of the recycle gas stream by admixing the two components of the mixture.

It was also submitted that this amendment gave rise to an objection pursuant to Art. 123(3) EPC since the term "*relative composition*" imposed a restriction as to the ratio between the two components. In contrast the term "*admixing*" merely required that the components be combined with no restriction as to the ratio thereof.

- (c) With regard to the second auxiliary request the respondent submitted that the written submissions of both parties had been concerned with the question of whether the feature that the reactor was operated in the non-condensed mode was synonymous with there being no liquid in the reactor. It had been shown that this was not necessarily the case, reference being made to page 9 line 20ff of the application. This whole discussion related to maintaining the recycle stream in volatile form, however nothing was stated about mandatorily and inevitably maintaining the state inside the reactor in volatile form.

(d) Following an observation by the Board that the situation with respect to the third auxiliary request was the same as for the second auxiliary request, the respondent did not make any submissions on the third auxiliary request.

(e) The Board further noted that the situation regarding the fifth, sixth and seventh auxiliary requests corresponded to that relating to the first, second and third auxiliary requests respectively.

The respondent did not make any submissions with respect to these requests.

(f) The Board drew attention to the request of the respondent in its written submissions in particular the reference to Art. 100(b) EPC (see section VI, above). This had not been cited as a ground of opposition and had not been introduced into the procedure by the opposition division.

In response the respondent amended its request to relate only to the remaining issues pursuant to Art. 100(a) EPC.

(g) The debate was closed.

XII. The respondent (opponent) requested that the appeal be dismissed.

In the case that the appeal is not dismissed, it is requested that the case be remitted to the first instance for assessment of the issues concerning Article 100(a) EPC.

Reasons for the Decision

1. The appeal is admissible.

2. *Main request - Art. 123(2) EPC*

2.1 As explained in section III.(a), above, and with reference to the comments made in the communication of the Board (see section VII, above) in the decision of the opposition division objections pursuant to Art. 123(2) were raised in respect of the two features in the final phrase of claim 1, specifying:

- that the dew point of the recycle gas stream was regulated by the relative composition between the light component and the intermediate volatility component
- in order to avoid the condensation of the components inside the reactor, and wherein the recycle stream was completely volatilised.

2.2 Objections were made to each of these features individually, not only to the combination thereof.

In the statement of grounds of appeal, the appellant presented comments only with respect to this latter aspect, i.e. avoidance of condensation of the components inside the reactor. However no submissions were made with respect to the former aspect, i.e. the feature that the dew point of the recycle gas stream was regulated by the **relative** composition of the two components (emphasis of the Board).

2.3 Under these circumstances the Board sees no grounds or justification for diverging from the decision of the opposition division on this matter.

2.4 The main request is therefore refused.

3. *First auxiliary request*

As reported in section V.(b), above, claim 1 of the first auxiliary request differs from the main request in that the feature "*the relative composition between*" is replaced by the term "*admixing*" and further that this composition is specified as being "*suitable for maintaining the recycle stream completely volatilized*".

3.1 *Art. 123(2) EPC*

The appellant/patent proprietor referred in the statement of grounds of appeal (see section V.(b), above) to page 7 lines 15-19 of the PCT publication as providing a basis for this amendment. This passage however specified:

"...in gas phase reactors, in the non condensed mode, where a certain mole

fraction of the recycle stream is made up of inert diluents, admixed in certain amounts, said composition being suitable for maintaining the recycle stream completely volatilized while are maximized the heat transport properties."

The term "admixed" in the cited passage however merely discloses in a general fashion that a certain mole fraction of the recycle stream is made up of inert diluents admixed in certain amounts. However this passage fails to disclose - explicitly or implicitly - regulation of the dew point of the recycle stream by means of admixing the two inert diluents, i.e. the feature specified in claim 1 of the first auxiliary request.

Accordingly this feature of claim 1 of the first auxiliary request extends beyond the content of the application as filed, contrary to the requirements of Art. 123(2) EPC.

3.2 *Art. 123(3) EPC*

Claim 1 as granted specified that the dew point of the recycle gas stream was regulated by the relative composition between the light component and the intermediate volatility component. The effect of this feature ("relative") was that there existed an interrelationship or interdependency between these two components, and consequently that a restriction applied to the proportions in which they were to be mixed. Claim 1 of the first auxiliary however defines that the dew point is regulated merely by "admixing" the two

components. In contrast to the wording of claim 1 as granted, i.e. the wording "relative composition", the terminology of claim 1 according to the first auxiliary request does not impose or even imply any interrelationship or interdependency between the two diluent components and consequently does not result in any limitation - express or implied - in respect of the proportions in which these components are to be mixed. Accordingly claim 1 of the first auxiliary request is of broader scope than claim 1 of the patent as granted, contrary to the requirements of Art. 123(3) EPC.

3.3 Claim 1 of the first auxiliary request consequently does not meet the requirements of Art. 123(2) and (3) EPC.

3.4 The first auxiliary request is therefore refused.

4. *Second auxiliary request*

4.1 As reported in section V.(c), above, the second auxiliary request differs from the main request in that the term "...*the relative composition between...*" the two volatile components is replaced by "*admixing*". Further the final part of the claim specifies that the composition is suitable for operating the reactor in a non-condensed mode.

4.2 As explained above with respect to the first auxiliary request, the replacement of the term "*relative composition*" by "*admixing*" results in a broadening of the protection conferred by the claim compared to the patent as granted.

4.3 The second auxiliary request therefore does not meet the requirements of Art. 123(3) EPC.

4.4 The second auxiliary request is therefore refused.

5. *Third auxiliary request*

5.1 As reported in section V.(d), above, claim 1 of the third auxiliary request differs from claim 1 of the main request in the manner as indicated for the first auxiliary request and further in that in the final part of the claim it is specified that the reactor is in a non-condensed mode.

5.2 As explained above with respect to the first auxiliary request, the replacement of the term "relative composition" by "admixing" results in a broadening of the scope of protection conferred by the claim compared to the patent as granted.

5.3 The third auxiliary request therefore does not meet the requirements of Art. 123(3) EPC.

5.4 The third auxiliary request is consequently refused.

6. *Fourth auxiliary request*

6.1 As explained in section V.(e), above, claim 1 of the fourth auxiliary request differs from claim 1 of the main request in that specific combinations of diluents are specified.

6.2 These combinations of diluents are disclosed in claims 11 and 12 of the application as filed, and

therefore the specification thereof in the claim does not give rise to an objection pursuant to Art. 123(2) EPC.

- 6.3 However claim 1 of the fourth auxiliary request retains the feature that the dew point of the recycle gas stream is regulated by the **relative** composition between the two components.

As explained in section 2, above with respect to the main request although this feature had been objected to by the opposition division pursuant to Art. 123(2) EPC the appellant/patent proprietor failed to make any submissions with respect thereto.

Furthermore, the situation with respect to this feature is not modified by the specification of specific components since no proportions are given.

- 6.4 Accordingly in the absence of any counterarguments of the appellant/patent proprietor, as in the case of the main request, the Board can perceive no reason to diverge from the conclusions of the opposition division that this feature contravenes the requirements of Art. 123(2) EPC.

- 6.5 The fourth auxiliary request is therefore refused.

7. *Fifth auxiliary request*

- 7.1 As explained in section V.(f), above, claim 1 of this request corresponds to a combination of the features of claim 1 of the first and fourth auxiliary requests.

7.2 Accordingly the objections pursuant to Art. 123(3) EPC in respect to the first auxiliary request arising from the replacement of "*relative composition*" by "*admixing*" (see section 3, above) also apply to the fifth auxiliary request.

7.3 The fifth auxiliary request is therefore refused.

8. *Sixth auxiliary request*

8.1 As explained in section V.(g), above, claim 1 of the sixth auxiliary request corresponds to a combination of the features of claim 1 of the second and fourth auxiliary requests.

8.2 Accordingly the objections pursuant to Art. 123(3) EPC in respect of the second auxiliary request arising from replacement of the term "*relative composition*" by "*admixing*" (see section 4, above) also apply to the sixth auxiliary request.

8.3 The sixth auxiliary request is therefore refused.

9. *Seventh auxiliary request*

9.1 As explained in section V.(h), above, claim 1 of the seventh auxiliary request corresponds to a combination of the features of claim 1 of the third and fourth auxiliary request.

9.2 Accordingly the objections pursuant to Art. 123(3) EPC in respect of the third auxiliary request arising from replacement of the term "*relative composition*" by

"*admixing*" (see section 5, above) also apply to the seventh auxiliary request.

9.3 The seventh auxiliary request is therefore refused.

10. It is therefore concluded that none of the requests on file meet the requirements of Art. 123(2) and/or (3) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

E. Goergmaier

A. Däweritz