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Datasheet for the decision of 23 June 2015

Case Number: T 0475/13 - 3.3.03

Application Number: 06807221.4

Publication Number: 1940889

IPC: C08F10/06

Language of the proceedings: EN

Title of invention:
PROPYLENE POLYMERS

Patent Proprietor:
Basell Polyolefine GmbH

Opponent:
Lummus Novolen Technology GmbH

Headword:

Relevant legal provisions:
EPÜ Art. 54
EPC Art. 111(1), 56
RPBA Art. 12(4)

Keyword:
main request - novelty (no)
Third auxiliary request -
 remittal to the department of first istance (no)
Third auxiliary request - inventive step (no)
Fourth auxiliary request - not admitted to the proceedings

Decisions cited:

Catchword:

Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0475/13 - 3.3.03

DECISION
of Technical Board of Appeal 3.3.03
of 23 June 2015

Appellant:
(Patent Proprietor)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted on 21 December 2012 revoking European patent No. 1940889 pursuant to Article 101(3)(b) EPC.

Composition of the Board:

Chairwoman B. ter Laan
Members: F. Rousseau
R. Cramer

Summary of Facts and Submissions

I. The appeal by the patent proprietor (appellant) lies from the decision of the opposition division posted on 21 December 2012 revoking European patent No. 1 940 889 (application No. 06 807 221.4).

II. A notice of opposition was filed in which the revocation of the patent in its entirety was requested on the grounds that its subject-matter lacked novelty and an inventive step (Article 100(a) EPC). The following evidence was cited in the course of the opposition:

D1: EP 0 600 461 B1,
D2: Experimental report of Dr. Anita Dimeska submitted with letter of 28 February 2011,
D3: WO 2005/005495 A2,
and
D6: Additional experimental report of Dr. Anita Dimeska submitted with letter of 14 August 2012.

III. The decision was based on the documents of the patent as granted, claim 1 reading as follows:

"1. A polypropylene resin comprising a propylene polymer endowed with the following characteristics:
a) distribution of molecular weight Mw/Mn lower than 4;
b) the melt-viscosity measured at a temperature of 250°C in the shear rate range between 1000 1/s and 40000 1/s meet the following relationship:

$$h \leq 9*e(-0.00006*sr)+2$$

wherein h represents the melt-viscosity in Pas and sr the shear rate in 1/s
c) the isotactic pentads (mmmm) measured with ^{13}C-NMR are higher than 90%; preferably higher than 92%; more

preferably higher than 95% and most preferred higher than 96%;
d) the hexane extractables according FDA regulations are preferably below 2.6 wt.%; and
e) the xylene solubles are below 2 wt.%;
with the proviso that the propylene polymer was not visbroken."

IV. According to the reasons for the decision experimental reports D2 and D6 demonstrated that the polypropylene resin described in example 25 of D1 met the parametric definition of claim 1 of the patent in suit. There was in particular no doubt that the amount of methylalumoxane used in example 25 of D1 was the same as in example 1 of that document. In addition the examples of D1 were sufficiently disclosed, in particular concerning the nature of the methylalumoxane, so that they could be repeated. Experimental reports D2 and D6 demonstrated that the polypropylene resin described in example 25 of D1 met the parametric definition of claim 1 of the patent in suit. Accordingly, claim 1 of the patent in suit lacked novelty over the disclosure of example 25 of D1.

V. With the statement setting out the grounds of appeal dated 26 April 2013, the appellant submitted *inter alia* a new main and four auxiliary requests as well as analysis certificates of various alumoxanes (D16).

VI. The claims 1 of the main, third and fourth auxiliary request read as follows:

Main request

"1. A polypropylene resin comprising a propylene polymer endowed with the following characteristics:

a) distribution of molecular weight Mw/Mn lower than 4;
b) the melt-viscosity measured at a temperature of 250°C in the shear rate range between 1000 1/s and 40000 1/s meet the following relationship;
h≤9*e(-0.00006*sr)+2
wherein h represents the melt-viscosity in Pas and sr the shear rate in 1/s
c) the isotactic pentads (mmmm) measured with ^{13}C-NMR are higher than 90%; preferably higher than 92%; more preferably higher than 95% and most preferred higher than 96%;
d) the hexane extractables according FDA regulations are below 2.6 wt.%; and
e) the xylene solubles are below 2 wt.%;
with the proviso that the propylene polymer was not visbroken."

Third auxiliary request

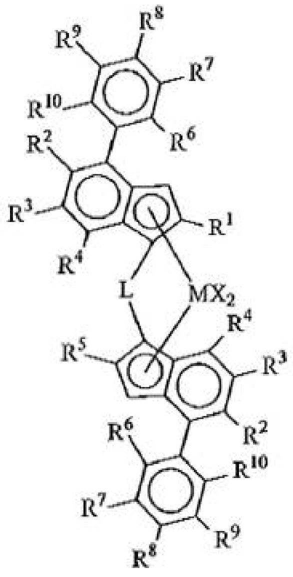
"1. A polypropylene resin comprising a propylene polymer endowed with the following characteristics:
a) distribution of molecular weight Mw/Mn lower than 4;
b) the melt-viscosity measured at a temperature of 250°C in the shear rate range between 1000 1/s and 40000 1/s meet the following relationship:
h≤2.5*e("0.00006*sr)+1.3
wherein h represents the melt-viscosity in Pas and sr the shear rate in 1/s
c) the isotactic pentads (mmmm) measured with ^{13}C-NMR are higher than 90%; preferably higher than 92%; more preferably higher than 95% and most preferred higher than 96%;
d) the hexane extractables according FDA regulations are below 2.6 wt.%; and
e) the xylene solubles are below 2 wt.%;

with the proviso that the propylene polymer was not visbroken.”

Fourth auxiliary request

“1. A process for preparing a propylene polymer endowed with the following characteristics:
a) distribution of molecular weight Mw/Mn lower than 4;
b) the melt-viscosity measured at a temperature of 250°C in the shear rate range between 1000 1/s and 40000 1/s meet the following relationship:
$h \leq 9*e(-0.00006*sr)+2$
wherein h represents the melt-viscosity in Pas and sr the shear rate in 1/s
e) the isotactic pentads (mmmm) measured with ^{13}C-NMR are higher than 90%; preferably higher than 92%; more preferably higher than 95% and most preferred higher than 96%;
d) the hexane extractables according FDA regulations are preferably below 2.6 wt.%; and
e) the xylene solubles are below 2 wt.%;
with the proviso that the propylene polymer was not visbroken;
by using a catalyst system supported on an inert carrier obtainable by contacting:

a) a metallocene compound of formula (I)



(I)

wherein

M is titanium, zirconium or hafnium;

X is a hydrogen atom, a halogen atom or a R group wherein R is a linear or branched C_1-C_{20}-alkyl radical;

L is a group $(Z(R'')_2)_n$ wherein the group $(Z(R'')_2)_n$ is $Si(CH_3)_2$, $SiPh_2$, SiPhMe, $SiMe(SiMe_3)$, CH_2, $(CH_2)_2$, and $C(CH_3)_2$;

R^1 and R^5 are a linear or branched, saturated or unsaturated C_1-C_{20}-alkyl radical;

R^2, R^3 and R^4, are hydrogen atoms or C_1-C_{20}-alkyl radicals;

R^6, R^7, R^8, R^9, and R^{10} equal to or different from each other, are hydrogen atoms or C_1-C_{40} hydrocarbon radicals with the proviso that at least one among R^6, R^7, R^8, R^9, and R^{10} is different from an hydrogen atom;

b) at least an alumoxane;
c) optionally an organo aluminum compound; and
d) an inert carrier."

VII. With their rejoinder of 16 September 2013 the respondent submitted *inter alia* the following documents:

D7: Graph showing melt viscosity (h) vs shear rate (h) for relationships h = 9*e(-0.00006*sr)+2), h = 7.25*e(-0.00006*sr)+2) and the product obtained by repeating example 25 of D1,
D9: Graph showing melt viscosity (h) vs shear rate (h) for the relationship h = 2,5*e(-0.00006*sr)+1.3 and the product obtained by repeating example 25 of D1 and
D10: WO 02/16681.

VIII. A summons to attend oral proceeding was issued on 7 October 2014.

IX. In reply to a Board's communication issued in preparation of the oral proceedings, with letter of 17 June 2015 the appellant submitted a new fourth auxiliary request consisting of one claim, which claim was stated to be identical to claim 1 of the fourth auxiliary request already on file.

X. In the course of the oral proceedings which took place on 23 June 2015, the appellant withdrew the first and second auxiliary requests.

XI. The appellant's arguments can be summarised as follows:

a) Example 25 of D1 was a repetition of example 1 of that document using a different amount of catalyst. It was however not specified whether the amount of methylalumoxane used had also been changed, so as to keep the ratio of catalyst to cocatalyst constant. Moreover, the type of methylalumoxane employed was not disclosed.

Accordingly, the disclosure of example 25 of D1 was ambiguous with respect to the amount and type of methylalumoxane so that it could not anticipate the subject-matter of claim 1 of the main request.

b) The subject-matter of the third auxiliary request submitted with the grounds of appeal was novel over D1. As the issue of inventive step had not been decided by the opposition division, the case should be remitted for further prosecution. Arguments concerning inventive step had not been submitted because it was not known whether novelty would be acknowledged. Nevertheless, the representative of the appellant stated during the oral proceedings that he did not need additional time to consider the issue of inventive step.

c) D1, example 25 was the closest prior art. The problem solved over that disclosure was to provide further high flowing polypropylene compositions that could be used for melt blown fibres and fabrics. The prior art did not suggest to use a polypropylene having the melt viscosity required by present claim 1 in order to solve that problem. D1 did not teach the threshold defined by the inequation in operative claim 1 and the prior art did not contain any suggestion to meet all the parameters defined in claim 1. In particular, the skilled person would find no motivation to increase the melt flow rate of the polypropylene produced in example 25 of D1, as that resin already exhibited the highest melt flow rate taught in that document. In addition, the response to hydrogen of the metallocene catalyst used in example 25 of D1 was unknown so that it could not be concluded that an increase of the hydrogen concentration in the process of example 25 of D1 would lead to a decrease of the melt viscosity. Consequently, the subject-matter of the third auxiliary request was inventive.

d) As to the fourth auxiliary request, the polypropylene resins were obtained with a specific class of metallocene catalysts that allowed production in a manufacturing plant. Those resins were therefore commercially valuable. Therefore, it was justified to remit the case to the first instance for further prosecution on the basis of the process claim of the fourth auxiliary request.

XII. The respondent's arguments can be summarised as follows:

a) Claim 1 of the main request was anticipated by the resin disclosed in example 25 of D1. Example 25 specified exactly in what aspects that embodiment deviated from example 1 meaning that the conditions not mentioned in that example, in particular the amount of methylalumoxane, had been kept the same. Moreover, the use of different methylalumoxanes would not lead to different properties of the polypropylene resin, as confirmed by the patent in suit in which it was not deemed necessary to specify which methylalumoxane had to be used, even in the examples, despite the reference therein to D3. Accordingly, the process of example 25 of D1 had been correctly repeated. Experimental reports D2 and D6 showed that a resin had been produced in accordance with claim 1 of the main request. Thus, claim 1 of the main request lacked novelty.

b) Novelty of the third auxiliary request was not contested. It was requested that the issue of inventive step be decided as the respondent had provided the objection with their rejoinder to the appeal. Thus, the appellant should be prepared to discuss that objection. There was no justification for a remittal.

c) D1, example 25 constituted the closest prior art. Examples 1 to 3 of the contested patent showed that no advantage, except the higher melt flow rate, or unexpected effect was achieved for the polymer having a melt viscosity below the threshold defined in operative claim 1. Starting from the resin described in example 25 of D1, the problem solved by the subject-matter of claim 1 was to provide further high flowing polypropylene compositions that could be used for melt blown fibres and fabrics. D10 taught that a melt flow rate index of polypropylene of up to 5000 g/10 min could be used for producing fibres and fabrics. That upper limit corresponded to resins having a melt viscosity below the threshold defined in claim 1 of the third auxiliary request. This was illustrated by the polymer of example 3 of the patent in suit having a melt flow rate of 1700 g/10 min. The skilled person knew how to decrease the melt viscosity of the polypropylene (i.e. increase its melt flow rate). This was conventionally achieved by increasing the concentration of hydrogen, as confirmed in D1 by a comparison of examples 1 and 2 and also of examples 4 and 6. Consequently, the subject-matter of claim 1 was obvious and therefore not inventive.

d) As to the fourth auxiliary request, its examination would necessitate a remittal to the first instance for allowing the respondent to make an additional search. The argumentation presented by the respondent against the product claims was the same as before the first instance. Claims directed to the process for preparing the polypropylene should have been filed before the first instance, even before the examining division. Accordingly, the fourth auxiliary request should not be admitted to the proceedings.

XIII. The appellant requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the claims of the main request or of the third auxiliary request, both attached to the statement of grounds of appeal, or alternatively on the basis of the claim of the fourth auxiliary request submitted with letter of 17 June 2015.

XIV. The respondent requested that the appeal be dismissed.

XV. At the end of the oral proceedings the decision of the Board was announced.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. Novelty

2.1 D2 is a test report according to which polypropylene is produced as described in example 25 of D1. That polypropylene has a polydispersity Mw/Mn of 2.1, isotactic pentads (mmmm) of 98.8 mol% and an amount of hexane extractables and xylene solubles of less than 0.5%. As shown in Figure 1 of D2, the melt-viscosity of that propylene measured at a temperature of 250°C in the shear rate (sr) range between 1000 1/s and 40000 1/s is less than 9*e(-0.00006* sr)+2. A graph showing the melt viscosity (h) vs shear rate (h) for the product obtained by repeating example 25 of D1, as well as the relationships h = 9*e(-0.00006*sr)+2) is also provided with D7.

Accordingly, example 25 of D1 as repeated by the respondent leads to the polypropylene resin defined in claim 1 of the main request.

2.2 The appellant did not contest that the polymerization as carried out by the respondent and described in D2 provided such a polypropylene. However, what is disputed by the appellant is the validity of the repetition of example 25, as its teaching is considered to be ambiguous and incomplete with respect to the amount and type of methylalumoxane used, respectively.

2.2.1 Operative claim 1 is not directed to a process requiring a specific type or amount of methylalumoxane but to a product defined by specific properties. Thus, the question to be answered is not whether the amount and type of methylalumoxane used in example 25 of D1 are unambiguously disclosed, but rather whether that alleged ambiguity in the process features would result in an ambiguity with respect to the properties of the resulting polypropylene defined in operative claim 1.

2.2.2 According to D1, example 25: "*Es wurde ein Polymer analog zu Beispiel 1 hergestellt, es wurde jedoch ...*"

followed by a precise indication of the amount and type of metallocence catalyst, polymerization temperature, polymerization time and hydrogen content. Example 25 does not explicitly describe the other conditions used for the polymerization, in particular not the amount of methylalumoxane cocatalyst. However, from that wording it can only be concluded that the only conditions that varied between example 1 and example 25 were those expressly mentioned, so that that the other conditions, including the amount of methylalumoxane, indicated in example 1 had been kept constant. Neither in that passage of example 25, nor in the whole of document D1, is there a reference to the ratio of catalyst to cocatalyst, so that based on that passage there is no reason to assume that the amount of methylalumoxane was varied so as to keep that ratio constant.

2.2.3 The polymer of D1, example 25 is described to have a melt flow rate index (230/2,16) of 1000 g/min, a viscosity number of 71 cm^3/g, a M_w of 75400 g/mol, a M_w/M_n of 2.0, a melting point of 165°C and an isotactic index of 99,5%.

With experimental report D6 the respondent has moreover demonstrated that the repetition of example 25 of D1 led to a polypropylene having a melt flow rate index (230/2,16) of 996 g/ 10 min, a viscosity number of 70.5 cm3/g, a M_w of 74800 g/mol, a M_w/M of 2.1, a melting point of 164°C and an isotactic index of 99.5%, i.e. values that may be, within the usual experimental fluctuations, considered to be identical to those reported in example 25 of D1 (see preceding paragraph).

2.2.4 The exact type of methylalumoxane used in example 1 of D1, and therefore in example 25 of D1, is not reported. The appellant, however, did not provide any evidence that the choice of a specific methylalumoxane compound for repeating example 25 of D1 would have any influence on the properties of the polypropylene polymer produced with it. It follows from the broadly formulated list of alumoxane compounds used in the catalytic system for the preparation of the polypropylene according to the patent in suit (see paragraphs [0023] to [0029]), that the choice of a particular alumoxane, let alone of a particular methylalumoxane, is not required for providing a polypropylene polymer meeting the requirements of present claim 1. Even the alumoxane used in the catalytic system of the examples of the patent in suit is not specifically indicated, but defined by reference to PCT/EP2004/007061, i.e. document D3 in the present proceedings. The examples of D3 also use a methylalumoxane the nature of which is not further specified.

Accordingly, the absence of an indication in example 1 of D1 of the particular methylalumoxane employed does not result in an ambiguous disclosure with respect to the properties of the polypropylene polymer defined in operative claim 1.

2.2.5 Hence, the Board is satisfied that the polymer obtained in experimental report D2 is the inevitable result of what would be obtained by repeating example 25 of D1. Accordingly, example 25 of D1 discloses the subject-matter of claim 1 of the main request, which subject-matter is therefore not novel.

2.3 In view of the above, the main request is not allowable.

Third auxiliary request submitted with the statement of grounds of appeal

3. The novelty of the claims of the third auxiliary request was not contested. Claim 1 of that request differs from claim 1 of the main request in that the melt viscosity h measured at a temperature of 250°C is defined to meet the relationship $h \leq 2.5 * e(-0.00006 * sr) + 1.3$. As shown in D9 which provides both the graphical representation of $2.5 * e(-0.00006 * sr) + 1.3$ and the melt-viscosity of the propylene according to example 25 of D1 versus the shear rate (sr), the melt viscosity of the propylene obtained in example 25 of D1 is within the shear rate range of 1000 1/s to 40000 1/s above the maximum value now allowed by claim 1. Accordingly, the Board is satisfied that the amendment introduced in claim 1 overcomes the lack of novelty over example 25 of D1 found with respect to the main request.

4. Inventive step

4.1 With the submission of 17 June 2015 the appellant requested for the first time that the case be remitted to the opposition division for further prosecution on the basis of the third auxiliary request submitted with the grounds of appeal.

In their rejoinder to the appeal dated 16 September 2013, the respondent provided a fully reasoned objection in respect of lack of an inventive step of claim 1 of the third auxiliary request. That submission was made at the earliest possible point in the appeal proceedings and therefore meets the conditions defined in Article 12(4) RPBA. Moreover, in the communication sent in preparation for oral proceedings the Board indicated that inventive step needed to be discussed with respect to the third auxiliary request. Therefore, the appellant should have expected that a decision on inventive step would be taken. Under those circumstances and in the interest of procedural economy, the Board refused the appellant's request for remittal (Article 111(1) EPC).

4.2 Closest prior art

The patent in suit (paragraph [0004]) aims at providing propylene polymers having a high melt flow rate without any residuals coming from peroxidic or other kinds of degradation. Both parties agreed that example 25 of D1 represents the closest state of the art and the Board sees no reason to depart from their view.

4.3 Problem solved and solution

The parties agreed that the problem solved over the disclosure of example 25 of D1 was to provide further high flowing polypropylene compositions that could be used for melt-blown fibres and fabrics. The Board, in the absence of any indication to the contrary, accepts that the problem thus formulated is effectively solved. As the solution to that problem the patent in suit proposes the polypropylene resin defined in claim 1, characterised in particular as having a melt-viscosity (h in Pas) measured at a temperature of 250°C in the shear rate (sr) range between 1000 1/s and 40000 1/s that meets the relationship $h \leq 2.5*e(0.00006*sr)+1.3$.

4.4 Obviousness

4.4.1 It remains to be decided whether or not the skilled person starting from example 25 of D1 and wishing to solve the above defined problem would have been guided by the available prior art on polypropylene resins that fall within the ambit of present claim 1.

4.4.2 D10 describes melt-blown polypropylene fibres produced with a metallocene catalyst system, wherein the melt flow rate of the polypropylene is in the range of 100 to 5000 g/10 min (claim 14), in line with the disclosure on page 38, lines 10-25 of that document. Considering that the polypropylene of example 3 of the patent in suit exhibits a melt flow rate of 1700 g/10 min and fulfils the inequation $h \leq 2.5 * e(0.00006 * sr) + 1.3$, it follows, taking into account that melt flow rate is inversely proportional to melt viscosity, that polypropylene resins having a melt flow rate index of 5000 g/10 min, as disclosed in D10 will also meet the requirement $h \leq 2.5 * e(0.00006 * sr) + 1.3$. The selection of a maximum value of the melt viscosity as defined by the above inequation in operative claim 1, which corresponds to the selection of a minimum value of the melt flow rate within the range disclosed in D10, has not been shown, nor argued, to be associated with any advantage or effect. Therefore it is considered to be a random selection from the possibilities offered by the prior art. Such a selection, with the aim of providing further high flowing polypropylene compositions that can be used for melt-blown fibres and fabrics, lies within the routine activities of the skilled person.

4.4.3 As to the question whether the skilled person would know how to reduce the melt viscosity of the polypropylene resin of example 25 of D1 in order to put into practice what is suggested by D10, a conventional way to regulate the molecular weight in metallocene catalyzed olefin polymerization is the use of hydrogen. Examples 4 and 6 of D1 show the response to hydrogen in the polymerization of propylene when using the type of metallocene catalysts employed in D1, namely that an increase of the hydrogen concentration results in a significant increase of the melt flow rate index, i.e. a decrease of the melt viscosity. Consequently, starting from example 25 of D1, the skilled person who sought to provide further high flowing polypropylene compositions that can be used for melt-blown fibres and fabrics would have found it obvious to increase the concentration of hydrogen in order to increase the melt flow rate index of the polypropylene to values within the range taught in D10, resulting in a decrease of the melt viscosity below the threshold defined in operative claim 1.

4.4.4 A comparison of the molecular weight distribution M_w/M_n, the amount of isotactic pentad, hexane extractables and xylene solubles provided for in examples 1 to 3 of the patent in suit (see tables 1 and 2, page 9, as well as paragraph [0056]) indicates that for a metallocene catalyst similar to that used in example 25 of D1, an increase of the hydrogen concentration so as to obtain a melt viscosity below the threshold defined in present claim 1 does not lead to a significant change of the other values defining the polypropylene: they remain well within the ranges of values defined in operative claim 1. Accordingly, an increase of the hydrogen concentration in example 25 of D1 so as to obtain a melt viscosity below the threshold defined in present claim 1 can be considered to result in a polypropylene meeting also the additional parametric conditions of claim 1. This was not disputed by the appellant.

4.4.5 Consequently, the skilled person wishing to solve the problem defined in point 4.3 above would have been guided by the available prior art to polypropylene resins that fall within the ambit of present claim 1.

4.5 Claim 1 therefore does not meet the requirements of Article 56 EPC, with the consequence that the third auxiliary request (submitted with the statement of grounds) is not allowable.

Fourth auxiliary request submitted with letter of 17 June 2015

5. The sole claim of the fourth auxiliary request is identical to claim 1 of the fourth auxiliary request submitted with the statement setting out the grounds of appeal. It is directed to a process for preparing the polypropylene defined in claim 1 as granted, characterized by the use of a specific catalytic system defined amongst others by a large family of metallocene catalysts.

5.1 A process for making a propylene resin, let alone using the catalytic system now defined in the claim, has never been the subject of a claim in the whole of the examination and opposition proceedings. The catalytic system to be used in the method of claim 1 of the present request was not even defined in any of the product claims examined by the examining or opposition division.

5.2 Moreover, it cannot be assumed that the whole family of metallocene catalysts now defined in claim 1 was considered when carrying out the search. This is not only because the metallocene catalysts were described only in the description, but also because the definition in claim 1 pertains to a large family of metallocene compounds, so that doubts arise whether all compounds encompassed by that definition were taken into account when carrying out the search.

5.3 Although the filing of new submissions by a party is not precluded in appeal proceedings, a party is not automatically entitled to have a request that should and could have been filed in first instance proceedings admitted in the appeal proceedings. Whether that request is admitted to the proceedings is at the Board’s discretion under Article 12(4) RPBA. In the present case admitting the fourth auxiliary request would, as submitted by the respondent, require remittal of the case to the first instance for allowing not only an additional search, but also for examining patentability aspects in relation to the use of the family of catalysts now defined in the claim. Such a prolongation of the proceedings is incompatible with procedural economy and would deprive the respondent and the public of legal certainty about the validity of the patent in suit for an extended period of time.

5.4 For that reason the Board decided not to admit the fourth auxiliary request into the proceedings (Article 12(4) RPBA).

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar: The Chairman:

Beschwerdekammern des Europäischen Patentamts
Boards of Appeal of the European Patent Office
Chambres de recours de l'Office européen des brevets

B. ter Heijden B. ter Laan

Decision electronically authenticated