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**Datasheet for the decision
of 2 June 2017**

Case Number: T 0287/14 - 3.3.03

Application Number: 03010871.6

Publication Number: 1477525

IPC: C08L23/10

Language of the proceedings: EN

Title of invention:
Polyolefin composition

Patent Proprietor:
Borealis Technology Oy

Opponent:
Sabic Innovative Plastics B.V.

Relevant legal provisions:

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

RPBA Art. 13(3), 13(1)

Keyword:

Main request - Amendments - undisclosed disclaimer - Allowable
(no)

First to third auxiliary requests - Late filed - Article 13(1)
RPBA - Not admitted

Fourth and fifth auxiliary requests - Late filed - Article
13(3) RPBA - Not admitted



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Case Number: T 0287/14 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 2 June 2017

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 11 December
2013 revoking European patent No. 1477525
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman D. Semino
Members: D. Marquis
R. Cramer

Summary of Facts and Submissions

I. The appeal lies from the decision of the opposition division posted on 11 December 2013 revoking European patent No. 1 477 525.

II. European Patent No. 1 477 525 was granted on the basis of 7 claims, claim 1 reading as follows:

"1. Polyolefin composition with low coefficient of linear thermal expansion (CLTE); determined according to DIN 53752 and good impact strength and low density, having an MFR (measured according to ISO 1133 with a load of 2.16 kg at 230°C) of from 5.0-60 g/10 min, which polyolefin composition comprises

(A) 90-99 wt% of a heterophasic propylene copolymer containing

- a) 60-80 wt% of a matrix phase comprising a propylene homopolymer or a propylene copolymer with up to 5 mol% of ethylene and/or at least one C₄-C₈ α-olefin and
- b) 20-40 wt% of a disperse phase comprising an ethylene rubber copolymer with from 20-80 mol% ethylene and from 80-20 mol% of at least one C₃-C₈ α-olefin,

where the intrinsic viscosity (measured according to DIN ISO 1628-1 (October 1999) in decalin at 135°C) of the XCS-fraction of the heterophasic copolymer is ≤ 2.0 dl/g and

(B) 1-10 wt% of an inorganic filler,

wherein the composition does not contain a β-nucleating agent."

- III. A notice of opposition was filed in which revocation of the patent in its entirety was requested.
- IV. The decision of the opposition division to revoke the patent was announced at the oral proceedings on 21 November 2013. The opposition division found that several selections in the disclosure of D1 (EP 1 344 793) were necessary in order to arrive at the object of claim 1 as granted without the disclaimer. Therefore claim 1 was already novel over D1 even without the disclaimer and there was "no legal basis for the introduction of the disclaimer (Art. 100(c) & Art. 123(2) & G1/03)". Since the opposition division found that the claims as granted did not meet the requirements of Article 123(2) EPC, it revoked the patent.
- V. The proprietor (appellant) lodged an appeal against that decision. With the statement setting out the grounds of appeal dated 16 April 2014 the appellant requested that the decision of the opposition division be set aside and that the opposition be rejected.
- VI. In its reply to the statement of grounds of appeal dated 21 October 2014, the opponent (respondent) requested that the appeal be dismissed.
- VII. On 24 July 2015, the appellant filed the first to third auxiliary requests.
- VIII. In a communication sent in preparation to the oral proceedings, the Board summarised the points to be dealt with and provided a preliminary view on the disputed issues.

IX. With letter of 20 April 2017, the appellant filed a modified version of the first to third auxiliary requests.

First auxiliary request

Claim 1 of the first auxiliary request differed from claim 1 as granted in that "which polyolefin composition comprises" was replaced by "which polyolefin composition consists of" and the disclaimer "wherein the composition does not contain β -nucleating agent" was removed.

Second auxiliary request

Claim 1 of the second auxiliary request read:

"1. Process for preparing a polyolefin composition with low coefficient of linear thermal expansion (CLTE); determined according to DIN 53752 and good impact strength and low density, having an MFR (measured according to ISO 1133 with a load of 2.16 kg at 230°C) of from 5.0-60 g/10 min, consisting of meltmixing 90-99 wt% of a heterophasic propylene copolymer base resin with 1 to 10 wt% of inorganic filler, based on the propylene copolymer at temperatures from 175°C to 250°C, optionally adding stabilizers, and cooling and crystallizing the melt, wherein the heterophasic propylene copolymer contains
a) 60-80 wt% of a matrix phase comprising a propylene homopolymer or a propylene copolymer with up to 5 mol% of ethylene and/or at least one C₄-C₈ α -olefin and
b) 20-40 wt% of a disperse phase comprising an ethylene rubber copolymer with from 20-80 mol% ethylene and from 80-20 mol% of at least one C₃-C₈ α -olefin,
where the intrinsic viscosity (measured according to

DIN ISO 1628-1 (October 1999) in decalin at 135°C of the XCS-fraction of the heterophasic copolymer is ≤ 2.0 dl/g."

Third auxiliary request

Claim 1 of the third auxiliary request differed from claim 1 of the second auxiliary request in that the wording "optionally adding stabilizers" was removed.

X. With letter of 18 May 2017, the respondent contested the admission of the auxiliary requests and provided new document D10 (EP 2 055 739).

XI. On 30 May 2017, the appellant submitted the fourth and fifth auxiliary requests.

Fourth and fifth auxiliary requests

Claim 1 of these requests corresponded to claim 1 of the second and third auxiliary requests respectively in which the heterophasic propylene copolymer was defined as follows:

"...wherein the heterophasic propylene copolymer consists of

- a) 60-80 wt% of a matrix phase consisting of a propylene homopolymer with up to 5 mol% of ethylene and/or at least one C₄-C₈ α -olefin and
- b) 20-40 wt% of a disperse phase consisting of an ethylene rubber copolymer with from 20-80 mol% ethylene and from 80-20 mol% of at least one C₃-C₈ α -olefin,..."

XII. Oral proceedings were held on 2 June 2017.

XIII. The arguments provided by the appellant, as far as relevant to the present decision, can be summarised as follows:

Main request

Article 123(2) EPC

The disclaimer was allowable in claim 1 because it restored novelty over D1. D1 disclosed a polyolefin composition containing a heterophasic propylene copolymer (A) and a β -nucleating agent (B). The amount in (A) in the polyolefin composition was directly and unambiguously derivable from the subject matter of claims 8, 6, 4, 3 and 1. That claim combination disclosed that the composition contained only the components (A), (B) and a preferred amount of 1-5 wt% of fillers for enhancing stiffness. Since D1 disclosed that the amount in (B) in the composition was up to 2 wt%, it could be deduced that the amount in (A) had to be between 93 and 99 wt%. That amount in (A) did not result from a selection within D1 and was completely contained in the range of 90-99 wt% of the patent in suit. As to the nature of the fillers for enhancing stiffness, the common general knowledge of the person skilled in the art at the priority date of the patent in suit was that these fillers were mostly inorganic. That was confirmed by D1 as it only disclosed talc as a filler for enhancing stiffness. Also, only inorganic fillers could be compounded at temperatures of up to 250°C as disclosed in D1.

There were then only three further numerical ranges relating to the melt flow rate, the amount in matrix phase (a) and in disperse phase (b) from which a selection had to be made in order to arrive at the

subject matter of granted claim 1. The large overlap of the ranges of melt flow rate according to D1 and the patent in suit as well as the values of melt flow rate disclosed in examples 3, 7, 8, 10 and 11 of D1 established that the person skilled in the art would have seriously contemplated a melt flow rate of around 5 g/10min, i.e. within the lower part of the claimed range of the patent in suit. Regarding the amount in disperse phase (b), the upper limits of the ranges defined in claim 1 (5-50 wt%) and claim 3 (9-20 wt%) of D1 could be combined to generate a preferred range of 20-50 wt% that completely contained the range of 20-40 wt% according to claim 1 of the patent in suit. Although the amounts in disperse phase (b) (11 wt%, 7.5 wt% and 16 wt%) in polymers 1, 3 and 4 in Table 1a of D1 were not according to the patent in suit, they nevertheless fell within the preferred range of claim 3 of D1. This showed that the skilled person would have worked in the area overlapping the range of the patent in suit. Since the heterophasic propylene copolymer (A) was made up of the matrix phase (a) and the disperse phase (b) only, preferred ranges in matrix phase (a) were deducible from the preferred ranges in disperse phase (b) (7-25 wt% or 9-20 wt%) disclosed in claim 3 of D1. The calculated ranges in matrix phase (a) in D1 (75-93 wt% or 80-91 wt%) overlapped significantly with the range disclosed in claim 1 of the patent in suit.

In conclusion, the disclosure of D1 showed an extensive overlap with the subject matter of claim 1 of the patent in suit and it could be deduced from D1 that the skilled person would have seriously contemplated working in the area of overlap. The subject matter of claim 1 of the patent in suit without the disclaimer was not novel in view of the disclosure of D1. The disclaimer in claim 1 of the main request was therefore

allowable because D1 was otherwise novelty destroying for the claimed subject matter.

In any case, the disclaimer was still allowable in view of G 1/93 because it merely limited the protection conferred by the patent as granted and it did not provide a technical contribution to the claimed subject matter, as could be seen from a comparison of the notched impact strength and of the flexural modulus of the compositions of examples 7 and 8 of D1.

First to third auxiliary requests

Admittance

In claim 1 of the first to third auxiliary requests the disclaimer was removed and the subject matter was limited such that the polyolefin composition consisted of (A) and (B), excluding other additives in the composition. These requests were clearly allowable under Article 123(2) and (3) EPC and should therefore be admitted into the proceedings.

Fourth and fifth auxiliary requests

Admittance

The fourth and fifth request were filed in response to the submission of the opponent of 18 May 2017 relating to the open formulation used in claim 1 of the second and third auxiliary requests. The open language was avoided in claim 1 and the matrix phase was limited to a homopolymer on the basis of the last paragraph of page 4 of the application as originally filed. These requests were allowable. They should be admitted into the proceedings.

XIV. The arguments of the respondent, as far as relevant to the present decision, can be summarised as follows:

Main request

Article 123(2) EPC

Claim 1 of the main request contravened the requirements of Article 123(2) EPC as the disclaimer present therein was not allowable since D1 did not anticipate the subject matter of claim 1 without the disclaimer. The amount in component (A) in the composition could not be derived from D1. The presence of a filler in the composition was not mentioned in claim 8 of D1; moreover, there was no mention of the class of inorganic fillers in that document either. Since the examples of D1 only disclosed the use of 0.1 wt% of β -nucleating agent, the skilled person would not have considered an amount of up to 2 wt%. As to the amounts in matrix phase (a) and disperse phase (b), the person skilled in the art would not have considered working in the area of overlap with the claimed range. Multiple selections in the ranges defining the amounts of the components and the range in melt flow rate were necessary to arrive at the claimed subject matter. There was no pointer to the multiple selections to be made within D1. The disclaimer was therefore not necessary to restore the novelty of the claimed subject matter. Since the disclaimer was not allowable, claim 1 contravened the requirements of Article 123(2) EPC.

The β -nucleating agent made a technical contribution to the claimed compositions since it had an effect on the impact resistance of samples produced thereof, as could be deduced from the examples of D1. The disclaimer

could not be maintained in the claim even in view of G 1/93.

First to third auxiliary requests

Admittance

Claim 1 of these requests were defined by an open formulation that allowed the β -nucleating agent to be present in the matrix phase. As a result, claim 1 of these requests contravened the requirements of Article 123(3) EPC. As there was also no justification for their late filing, these requests should not be admitted into the proceedings.

Fourth and fifth auxiliary requests

Admittance

These requests were filed a few days before the oral proceedings only. They contained substantial modifications that raised issues that had not been discussed before the oral proceedings. Also, these requests could and should have been filed earlier. These requests should therefore not be admitted into the proceedings.

- XV. The appellant requested that the decision under appeal be set aside and the case be remitted to the department of first instance for further prosecution on the basis of the patent as granted (main request), or on the basis of one of the first to third auxiliary requests filed with the letter of 20 April 2017, or on the basis of the fourth or fifth auxiliary request filed with the letter of 30 May 2017.

XVI. The respondent requested that the appeal be dismissed and that the auxiliary requests not be admitted into the proceedings. If the main request were found to meet the requirements of Article 123(2) EPC it requested that the case be remitted to the department of first instance for further prosecution. If one or more auxiliary requests were admitted, it requested an apportionment of costs in the event the case were remitted for further prosecution on the basis of an auxiliary request.

Reasons for the Decision

Main request

1. Article 123(2) EPC
 - 1.1 The subject matter of claim 1 as granted concerns a polyolefin composition and is defined by a disclaimer "wherein the composition does not contain a β -nucleating agent" added in the course of the examination proceedings in response to an objection of lack of novelty in view of D1. It was undisputed that that disclaimer was not disclosed as such in the application as originally filed. The opposition division found in its decision that the disclaimer was not allowable because it did not fulfil the requirements set out in the decision of the Enlarged Board of Appeal G 1/03 (OJ EPO 2004, 413).
 - 1.2 In its decision G 1/03 the Enlarged Board decided that a disclaimer that had not been disclosed in the originally filed application may be allowable in order to:

(i) - restore novelty by delimiting a claim against state of the art under Article 54(3) and (4) EPC;

(ii) - restore novelty by delimiting a claim against an accidental anticipation under Article 54(2) EPC; an anticipation is accidental if it is so unrelated to and remote from the claimed invention that the person skilled in the art would never have taken it into consideration when making the invention; and

(iii) - disclaim subject-matter which, under Articles 52 to 57 EPC, is excluded from patentability for non-technical reasons.

Also, a disclaimer should not remove more than is necessary either to restore novelty or to disclaim subject-matter excluded from patentability for non-technical reasons. A disclaimer which is or becomes relevant for the assessment of inventive step or sufficiency of disclosure adds subject-matter contrary to Article 123(2) EPC. Finally, a claim containing a disclaimer must meet the requirements of clarity and conciseness of Article 84 EPC.

1.3 Since D1 is a document according to Article 54(3) EPC for the patent in suit, which has not been disputed by the parties, the question that has to be answered first in view of the admissibility of the disclaimer in claim 1 is whether it restored novelty by delimiting claim 1 against D1 (condition (i) of G 1/03). Thus, in order for the disclaimer to be allowable in this case, it is a precondition that D1 is novelty destroying for the object of granted claim 1 without the disclaimer.

- 1.4 Claim 1 of D1 discloses polyolefin compositions with high impact strength and high gloss, comprising
- A) a heterophasic propylene copolymer containing
- a) 50-95 wt% of a matrix phase comprising a propylene homopolymer or a propylene copolymer with up to 5 mol% of ethylene and/or at least one C₄-C₈ α -olefin and
 - b) 5-50 wt% of a disperse phase comprising an ethylene rubber copolymer with from 20-80 mol% ethylene and from 80-20 mol% of at least one C₃-C₈ α -olefin and where the intrinsic viscosity of the XCS-fraction of the heterophasic copolymer is ≤ 2 dl/g and
- B) a β -nucleating agent.
- 1.5 It was submitted by the appellant that the composition of D1 which was the closest to that of claim 1 of the patent in suit corresponded to the subject matter formed by the claims 8, 6, 4 and 3 in combination with claim 1. That specific subject matter formed by the aforementioned combination of dependent claims constitutes a first selection within the disclosure of D1.
- 1.6 Claim 8 of D1 concerns a process for producing a polyolefin composition according to one of claims 1 to 7, characterized by mixing a heterophasic propylene copolymer containing (a) a matrix phase and (b) a disperse phase, with an effective amount of β -nucleating agent, melting and homogenising the mixture and cooling and crystallising the mixture.
- 1.7 It was argued by the appellant that a polyolefin composition resulting from that process contained exclusively an heterophasic propylene copolymer containing the matrix phase (a), the disperse phase

(b), a β -nucleating agent and fillers for enhancing stiffness which leads to an amount in weight percent of the heterophasic propylene copolymer fully within the range 90-99 wt% given in claim 1. As to the only remaining numerical ranges of granted claim 1, namely 60-80 wt% for the matrix phase, 20-40 wt% for the disperse phase and 5.0-60 g/10 min for the MFR, they were overlapping with the ranges in claims 1, 3 and 4 of D1 and the examples of D1 pointed to the overlapping parts of the ranges.

- 1.8 Even accepting the argument of the appellant that the specific combination of claims directly and unambiguously discloses a composition with all the features of claim 1 apart from the listed ranges, the Board does not agree with the conclusion of the appellant for the following reasons.

- 1.9 D1 discloses numerical ranges relating to the amount of ethylene rubber copolymer as disperse phase (b) and MFR as follows:
 - 1.9.1 The amount in ethylene rubber copolymer of the disperse phase (b) is generically defined by three ranges in D1, 5-50 wt% (claim 1 and paragraph 9), 7-25 wt% and 9-20 wt% (claim 3 and paragraph 15), overlapping the range of 20-40 wt% of claim 1 of the main request. The polyolefin compositions of examples 3, 7, 8, 10 and 11 of D1 that were found the most relevant by the appellant in that respect are based on polymers 1, 3 and 4 of Table 1a that contain an ethylene rubber copolymer in amounts of respectively 11 wt%, 7.5 wt% and 16 wt%. These amounts are all within the preferred range of 9-20 wt% of D1 but are not within the range of claim 1 of the patent in suit (20-40 wt%). It can only be concluded that D1 generically teaches that the

amount in ethylene rubber copolymer of the disperse phase (b) may be chosen within a range (7-25 wt% or 5-20 wt%) overlapping with that of claim 1 of the main request (20-40 wt%), but in order to arrive at the claimed subject matter, a second selection within the general disclosure of D1 is necessary.

1.9.2 The melt flow rate (MFR) of the polyolefin compositions according to D1 is defined in claim 4 and in paragraph 16 of D1 as being comprised between 1 and 30 g/10min, preferably between 2.5 and 10 g/10 min, showing some overlap with the range of 5-60 g/10 min of claim 1 of the main request. The specific MFR values of the compositions according to the examples 3, 7, 8, 10 and 11 of D1 cited by the appellant are 2.9, 4.7, 4.9, 4.2 and 4.7 g/10min (Table 2). While these values of MFR are within the preferred range of D1, they are all outside the claimed range of the patent in suit. Even if some of these values of the examples of D1 come close to the lower end of the area of overlap, none of them was shown to fall within the range of 5-60 dl/g. It can only be concluded that D1 generically teaches that the polyolefin compositions may have an MFR within a range overlapping with that of claim 1 of the main request, but in order to arrive at the claimed subject matter, a third selection within the general disclosure of D1 is necessary.

1.10 A total of three selections within D1 is therefore needed to arrive at polyolefin compositions falling under claim 1 of the main request. D1 does not point at this very specific set of three selections. It has also not been established that the selected features of the polyolefin compositions (presence of an inorganic filler, amount in ethylene rubber and MFR) were in any way convergent so that the specific compositions

selected clearly arose from D1. The Board can only conclude that D1 does not take away the novelty of claim 1 of the main request.

1.11 Under these circumstances there was no necessity to disclaim β -nucleating agents from the scope of claim 1 in order to restore novelty over D1 as no lack of novelty was present. Therefore, the disclaimer of claim 1 of the main request does not fulfil the first condition set out in the decision of the Enlarged Board of Appeal G 1/03. As there was evidently no basis for that disclaimer in the description as originally filed, its introduction in claim 1 infringes Article 123(2) EPC.

1.12 The appellant also submitted that the disputed disclaimer did not contribute to the technical teaching of the claimed subject-matter; its addition to claim 1 thus could not be considered to contravene the requirements of Article 123(2) EPC for the reasons given in G 1/93 (OJ EPO 1994, 541).

1.12.1 As regards decision G 1/93, a feature which has not been disclosed in the application as filed but which has been added to the application during examination and which, without providing a technical contribution to the subject-matter of the claimed invention, merely limits the protection conferred by the patent as granted by excluding protection for part of the subject-matter of the claimed invention as covered by the application as filed, is not to be considered as subject-matter which extends beyond the content of the application as filed within the meaning of Article 123(2) EPC (see headnote 2). However, also according to this decision, the idea underlying the requirements of Article 123(2) EPC is that an applicant shall not be

allowed to improve his position by adding subject-matter not disclosed in the application as filed, which would give him an unwarranted advantage and could be damaging to the legal security of third parties relying on the content of the original application (G 1/93, point 9 of the reasons). Therefore, if such a feature added to a claim is found to provide a technical contribution to the subject-matter of the claimed invention, it would give the applicant an unwarranted advantage and the amendment is to be considered contrary to the requirements of Article 123(2) EPC (see G 1/93, point 16 of the reasons).

1.12.2 In the present case, the disputed disclaimer is a feature providing necessarily a technical contribution to the claimed subject-matter since it excludes β -nucleating agents generally known in the art to induce crystallization of polypropylene homo- and copolymers in polyolefin compositions, as already indicated by the name of the class of compounds and as also shown for instance in D1 itself (paragraph 11) and in D10 (paragraphs 69-74), whereby the presence of crystals has an undisputable effect on the chemical and mechanical properties of the composition. Therefore, the disclaimer, by modifying the technical characteristics of the matrix phase of the polyolefin composition of claim 1, necessarily gives the appellant an unwarranted advantage by restricting the claimed subject-matter to a group of polyolefin compositions having specific technical characteristics and properties. Therefore, even taking into account the exception in decision G 1/93, the disclaimer in question constitutes an amendment that contravenes the requirements of Articles 123(2) EPC.

First to third auxiliary requests

2. Admittance

2.1 The first to third auxiliary requests were filed by the appellant on 20 April 2017, after the reply to the statement of grounds of appeal by the respondent on 21 October 2014. Any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion is 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 (Article 13(1) RPBA).

2.2 Claim 1 of the first auxiliary request differs from claim 1 as granted in that the wording "which polyolefin composition comprises" has been replaced by "which polyolefin composition consists of" and in that the disclaimer "wherein the composition does not contain β -nucleating agent" has been removed.

2.3 Such amendments were introduced in order to look for a solution to the disclaimer issue which was the central point on which revocation was based. Therefore there was no justification not to file appropriate requests at the outset of the appeal proceedings. Moreover, the amendments do not provide a clear solution to the issue, since, in spite of the introduction of the expression "consists of", the presence of the "comprising" language in the definition of the matrix phase and of the disperse phase, leaves strong doubts as to whether the presence of β -nucleating agents is excluded. Under these circumstances and in particular in view of the need for procedural economy, the Board finds it appropriate to exercise its discretion by not

admitting the first auxiliary request into the proceedings.

- 2.4 The subject matter of claim 1 of the second and third auxiliary requests was reformulated as a process for preparing a polyolefin composition consisting of meltmixing 90 to 99 wt% of a heterophasic propylene copolymer base resin with 1 to 10 wt% of inorganic filler, based on the propylene copolymer at temperatures from 175°C to 250°C, and cooling and crystallizing the melt. The heterophasic propylene copolymer of that composition mentioned in claim 1 contains a matrix phase (a) and a disperse phase (b) defined by the same open formulation as that used in claim 1 of the first auxiliary request.
- 2.5 The situation is therefore the same as the one detailed for the first auxiliary request in point 2.3 above.
- 2.6 In addition, the process of claim 1 of the second and third auxiliary requests sets out that the amount of 1 to 10 wt% in inorganic filler meltmixed with 90-99 wt% of the heterophasic propylene copolymer is based on the propylene copolymer. Claim 1 as granted did not specify that the amount in inorganic filler was based on the propylene copolymer. On the contrary, claim 1 as granted implied that the amount in inorganic filler and that of the heterophasic propylene copolymer were both based on the polyolefin composition as a whole. As a result, the extent of the modifications performed in the second and third auxiliary requests appears to raise further issues of Article 123 EPC (paragraphs 2 and 3) and/or Article 84 EPC that were not part of the discussion before the opposition division and that have been raised for the first time in appeal proceedings.

- 2.7 Under such circumstances the Board finds it appropriate to exercise its discretion by not admitting the second and third auxiliary requests into the proceedings.

Fourth and fifth auxiliary requests

3. Admittance

- 3.1 The fourth and fifth auxiliary requests were filed by the appellant on 30 May 2017, just three days before the oral proceedings. Such late filed amendments are not admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings (Article 13(3) RPBA).
- 3.2 Claim 1 of the fourth and fifth auxiliary requests corresponds to the process for preparing a polyolefin composition of claim 1 of the second and third auxiliary requests respectively, further amended in that the heterophasic propylene copolymer, the matrix phase (a) and the disperse phase (b) are defined by a closed formulation and in that the matrix phase (a) consists of "a propylene homopolymer with up to 5 mol% of ethylene and/or at least one C₄-C₈ α -olefin". As to the definition of the matrix phase (a) now part of claim 1 of both requests, the limitation to a propylene homopolymer seems is not in line with the fact that the polymer can still contain substantial amounts of ethylene or C₄-C₈ α -olefin comonomers, thereby raising serious doubts as to whether claim 1 refers to a homopolymer or a copolymer, amounting to an issue of lack of clarity (Article 84 EPC). This issue, together with the issue relating to the basis for the calculation of the amount in inorganic filler relating to the second and third auxiliary requests mentioned

above in point 2.6, implies that the fourth and fifth auxiliary requests contain amendments that add further complexity to the case at the latest possible stage of the proceedings.

- 3.3 Apart from the fact that the amendments present in claim 1 of the fourth and fifth auxiliary request constitute a very late attempt to address an issue, the allowability of the disclaimer, that was already known to the appellant since the decision of the opposition division in 2013, the large number of amendments raises numerous issues relating to Article 123(2) and (3) EPC as well as Article 84 EPC which the Board and the other party could not reasonably be expected to deal with without adjournment of the oral proceedings. The fourth and fifth auxiliary requests are therefore not admitted into the proceedings according to Article 13(3) RPBA.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



B. ter Heijden

D. Semino

Decision electronically authenticated