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**Datasheet for the decision  
of 7 April 2022**

**Case Number:** T 0934/18 - 3.3.05

**Application Number:** 08806608.9

**Publication Number:** 2201045

**IPC:** C08F10/02, C08F4/02,  
C08F210/16, C08F4/24

**Language of the proceedings:** EN

**Title of invention:**

CATALYST PRECURSOR PARTICLES, THEIR PREPARATION AND USE

**Patent Proprietor:**

PQ Silicas UK Limited

**Opponents:**

- 1.SABIC Global Technologies B.V. /
- 2.SABIC Petrochemicals B.V.

**Headword:**

Catalyst precursor/PQ Silicas

**Relevant legal provisions:**

- EPC Art. 116(1), 54, 56, 112(1) (a)
- RPBA Art. 12(4)

**Keyword:**

Oral proceedings via videoconference (yes)  
Late-filed evidence - admitted (no)  
Novelty - (yes) - prior use (no)  
Inventive step - (yes)  
Referral to the Enlarged Board of Appeal - (no)

**Decisions cited:**

G 0001/92, G 0001/21, T 0952/92, T 0210/05, T 0897/07,  
T 0406/09, T 2045/09, T 0023/11, T 0432/12, T 1833/14

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 0934/18 - 3.3.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.05**  
**of 7 April 2022**

**Appellants 2:** SABIC Global Technologies B.V. /  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 13 March 2018  
rejecting the opposition filed against European  
patent No. 2201045 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

<b>Chairman</b>	E. Bendl
<b>Members:</b>	G. Glod
	O. Loizou

## Summary of Facts and Submissions

- I. The appeals of the patent proprietor (appellant 1) and the opponents (appellants 2) lie from the opposition division's decision to reject the opposition against European patent No. EP-B-2 201 045.
- II. Claims 1, 7, 10, 11 and 12 of the patent as granted are as follows:

*"1. A catalyst precursor for an olefin polymerization catalyst comprising a silica xerogel comprising at least 90% by weight of SiO<sub>2</sub> and carrying within a pore structure of the silica xerogel: a chromium salt, selected from chromium carboxylate, chromium sulphate, chromium chloride and a mixture thereof; aluminium carboxylate; and boric acid."*

*"7. A method for preparing a catalyst precursor for an olefin polymerization catalyst according to any preceding claim, the method comprising the steps of:*

- i) providing an inorganic support material which is a silica xerogel comprising at least 90% by weight of SiO<sub>2</sub> having a porosity from 0.5 to 4.0 cm<sup>3</sup>/g,*
- ii) providing a solution comprising chromium salt, aluminium carboxylate and boric acid in a solvent which is water, C<sub>1</sub> to C<sub>4</sub> aliphatic alcohol, or a mixture thereof,*
- iii) depositing the solution onto the silica xerogel, and*
- iv) removing the solvent to form the catalyst precursor comprising chromium salt, aluminium carboxylate and boric acid within the pore structure of the silica xerogel."*

"10. A method for formation of an olefin polymerisation catalyst comprising heating a catalyst precursor according to any one of claims 1 to 6 in a non-reducing atmosphere at a temperature from 200 to 1200 °C for a time period from 30 minutes to 15 hours."

"11. An olefin polymerisation catalyst obtained or obtainable by the method of claim 10."

"12. A method for polymerisation of one or more C<sub>2</sub> to C<sub>8</sub> α-alkenes characterized in that the polymerisation is carried out in the presence of an olefin polymerisation catalyst according to claim 11."

Claims 2 to 6 directly or indirectly relate to claim 1, while claims 8 and 9 directly or indirectly relate to claim 7.

III. The following documents cited in the decision are of relevance here:

- D3: Purchase specification of C34340 of DSM Polyethylenes to PQ, 22 April 2002
- D9: Letter PQ Corporation to Mr. Nooijen, 8 January 2004
- D10: PQ Corporation, Silica catalysts for ethylene polymerisation, 2 October 2007
- D11: PQ Corporation to whom it may concern; Food contact status, 23 October 2007
- D12: Aldrich handbook for fine chemicals and lab equipment; 2003-2004, page 57
- D19: US 5 895 770 A
- D24: WO 2005/111098 A1
- D26: Determination of boric acid in Lot KC600501063
- D27: Picture of drum of C-34340MS Lot KC600501063

- D34: Confidentiality Agreement between PQ Corporation and DSM Polyethylenes, B V and DSM Research B V, dated 22 July 1999.
- D37: Declaration of Dr Yatao Rachel Hu, 15 December 2016
- D43: EP 0 882 742 A1
- D44: EP 0 857 736 A1
- D57: Letter of PQ Corporation to Mr Mercey dated 14 May 1999
- D58: Affidavit, Paul Robbins, 10 March 2016
- D59: Agreement between PQ and DSM, dated 25 May 1994

IV. In the statement of grounds of appeal, appellants 2 further relied on the following documents:

- A1: ASAP 2010 C34340MS porosity report, dated 21.08.2008
- A2: Characterizing PQ34340MS catalyst material by ICP-MS and IC for boron, chromium, aluminium and acetate content, Barry van Hooff, April 2018
- A3: XRF Analysis report of C34340MS, lot KC600501063, dated 2 March 2007
- A4: Report 2018-05-0005, DMSC T&C Morphology-Microscopy, G. Kwakkenbos, June 2018
- A5: ssNMR characterisation of C34340MS, 29 June 2018, A.P.M. Kentgens
- A6: ToF-SIMS Imaging of a Silica Based Catalyst, R.Kersting, TASCAN Report A26567, June 2018
- A7 ToF-SIMS Imaging of a Catalyst Slices, R. Kersting, TASCAN Report A26609, June 2018
- A8: PSD Analysis of PQ catalyst material, Julia Verdult, 05-2018
- A9: Translation of claims KR 101211924, PQ Corporation
- A10: Report 2018-05-00005, XRF analysis of catalyst materials, M. Smeets, 18 June 2018

- A11: Colour copy of D26
- A12: Textbook excerpt from R.K. Iler 'The Chemistry of Silica', Wiley, 1979, pages 462-463
- A13: Description of analytical techniques used in analyses of PQ C34340MS lot KC600501063, G. Kwakkenbos, 26 June 2018
- A14: Characterisation of Chromium-Silica Catalysts, A. Ellison et al., in: Advances in Polyolefins, R. Seymour (ed.), Springer Science+Business Media, 1987, p. 111-112
- B1: Handbook of Practical X-ray Fluorescence Analysis, B. Beckhoff et al., Springer, 2006, preface and pages 4-7
- B2: F. Vanhaecke, Anal. Bioanal. Chem. (2002); 372, 20-21
- B3: Analysis of Ions using high-performance Liquid Chromatography, S. Levin, in: Instrumental Multi element Chemical Analysis, Z.B. Alfassi (ed.), Springer-Science+Business Media, B.V., 1998
- B4: J.J. Friela and C.E. Lyman., Microsc. Microanal. 12, 2-25, 2006
- B5: Size characterization by laser-light diffraction techniques, in: Particle Size Characterisation, A. Jillavenkatesa et al., NIST Special Publication 960-1, 2001, pages 93-122
- B6: B. Marino et al., e-PS, 2006, 3; 41-50, [www.Morana-rtd.com](http://www.Morana-rtd.com)
- B7: Two-dimensional NMR spectroscopy: HETCOR, COSY and TOCSY, Chapter 9 in NMR Spectroscopy Explained, N. Jacobsen, Wiley Interscience, 2007, pages 353-407
- B8: Porosity and Specific Surface Area Measurements for Solid Materials, P. Klobes et al., NIST Special Publication 960-17, 2006, pages 23-40

V. Oral proceedings took place on 7 April 2022 as a videoconference.



VI. Appellant 1's arguments are mainly reflected in the reasoning below. Furthermore they argued that the late-filed documents D39 to D47, D50 to D53 and D57 to D59 were no more relevant than the documents already on file and should not have been admitted into the opposition proceedings.

VII. Appellants 2's arguments, in so far as relevant to the present decision, can be summarised as follows:

The case was not suitable to be held via videoconference, and therefore no consent could be given to such type of oral proceedings.

A1 to A14 and B1 to B8 had been submitted in response to the impugned decision, which for the first time had made clear that the disclosure in D9 could not be taken into consideration to prove that C34340MS of lot KC600501063 of 2003 was analysable by a skilled person before the date of filing of the patent. There had been no reason to submit this information before the opposition division, since it had not been evident from the opposition division's communication that such evidence had been lacking. In accordance with T 406/09, the opponents should be given the opportunity to fill the gaps in its arguments by presenting further evidence to the department of second instance. Therefore there was no reason to disregard A1 to A14 and B1 to B8.

Catalyst material C34340MS was publicly available, could be analysed and reproduced, and disclosed all elements of claim 1 of the patent. In particular, when considering D3, D9, D10, D11, D26, D27, D37 and D58, it was confirmed that C34340MS was available to the public and that it could be analysed by a skilled person. It

was also evident from the patent that the method for producing the catalyst was rather simple, so that there was no reason to doubt that a skilled person could reproduce it. Consequently, C34340MS anticipated the subject-matter of claim 1. D24 and D43 anticipated the novelty of claims 10 to 12, and D10 the novelty of claim 12.

If the statements in D58 could not be accepted, it was requested that Mr Robbins be heard as a witness.

If the board were not to accept the line of argument and in view of diverging case law as illustrated in T 952/92 compared to T 1833/14, the following questions should be referred to the Enlarged Board of Appeal:

- "1. What is the burden of proof to be applied when assessing the analysability of a product of prior use?*
- 2. If the statement 'to reproduce it' in G1/92, reasons 1.4 would not relate to the discovery of the composition / internal structure of the product, what then does it relate to?*
- 3. If the answer to question 2 is that 'to reproduce it' implies reproduction of the product, which burden of proof then would apply to demonstration of such reproducibility, and how would this be affected by the nature of the party that is to demonstrate such reproducibility, in particular in cases where one party as e.g. the manufacturer of the product may have more information than [sic] the other party?*
- 4. Is the teaching of reproducibility of a public prior use product a requirement for establishing lack of novelty of a product claim encompassing said public prior use product?*
- 5. If the answer to question 4 is yes, does the commercial availability of a product in itself satisfy*

*the requirement of reproducibility, in other words does the opportunity for a subsequent commercial purchase constitute reproduction?*

*6. If reproducibility of a product is a requirement for constituting a product to form part of the art, to what extent does that product need to be reproduced? Would such involve a complete reproduction of the product of the art, or would such reproduction requirement be limited to a product demonstrating the features of the contested claim?*

*7. If demonstration of reproducibility of a product would be required, and would involve providing evidence of actual reproduction, do then the extent of efforts required for such reproduction play a role? Do the requirements for reproducibility depend on the availability of (on occasions expensive) means or equipment for reproducing such product? If such dependence would not exist, would that then conflict with the accessibility to demonstrating reproducibility would be depending on the complexity of the product, and thus contravene the principles of equal value of all forms of prior art under Art. 54(2)? If such dependence does exist, what criteria need to be adhered to in order to demonstrate reproducibility, and under which circumstances would they apply?"*

The subject-matter of claims 7 to 9 lacked an inventive step in view of D19. The only difference between the method of example 2 and D19 was the use of aluminium acetate with boric acid. Methanol was implied in said example since it was explicitly mentioned as one possible solvent in the list in column 4, lines 49 and 50. Therefore, the problem to be solved was to find a suitable aluminium compound for such a solvent. The solution was obvious, since D12 taught that aluminium

acetate stabilised with boric acid was more stable than unstabilised aluminium acetate.

VIII. Appellant 1 (patent proprietor) requested that the appeal be dismissed (main request), or in the alternative that the patent be maintained in amended form on the basis of one of auxiliary requests 1, 2, 2A, 3, 3A, 4, 4A, 5, 5A, 6, 6A, 7, 7A, 8, 8A, 9, 9A or 10 to 14 submitted with its reply to the statement of grounds of appeal of appellants 2.

Appellants 2 (opponents) requested that appellant 1's appeal be held inadmissible, that the impugned decision be set aside and that the patent be revoked. Further they requested that oral proceedings be held in person and objected to their being conducted by means of videoconferencing technology.

### **Reasons for the Decision**

#### 1. Admissibility of appellant 1's appeal

The opposition division rejected the opposition, thereby granting the patent proprietor's request. Therefore, the patent proprietor is not adversely affected by the impugned decision within the meaning of Article 107 EPC. The fact that part of the reasoning, in particular that relating to the admissibility of documents, is not in favour of the patent proprietor does not alter this (see also Case Law of the Boards of Appeal of the EPO, 9th edition, 2019, V.A.2.4.2 c) ii)).

Consequently, appellant 1's appeal is not admissible.

2. Oral proceedings conducted by means of videoconference

Appellants 2's request of 9 March 2022 that oral proceedings be held at the premises of the EPO in Haar was rejected for the following reasons by communication of 14 March 2022:

*"According to G 01/21 parties can only be denied in-person hearings for good reasons (Reasons 45). In the present case such good reasons exist, because the COVID-19 pandemic is not yet over and still puts limitations and impairments such as quarantine obligations, access restrictions at the EPO premises, and other health-related measures aiming at preventing the spread of the disease, on the parties' and the board's ability to attend oral proceedings at the premises of the EPO (G 01/21, Reasons 49). In addition, regarding the present case oral proceedings have already been postponed once for nine months, so that a continued postponement should be avoided in order to avoid a further delay in deciding the appeal (G 01/21, Reasons 51). Moreover in substance this case does not pertain to matters that require attending oral proceedings only in an in-person mode. In view of the increasing number of COVID-19 cases and the risk of contracting the virus in particular the omicron variant for one of the parties and/or members of the board involved, it is justified not to grant the wish of appellant 2 and to hold oral proceedings by videoconference (G 01/21, Reasons 51)."*

At the oral proceedings, appellants 2 did not provide any reason why the board's reasoning provided in said communication was erroneous. Therefore, the board sees no reason to deviate from the reasoning expressed in

said communication, which is thus incorporated as part of this decision.

The opponents' assertion that holding the oral proceedings by means of videoconference infringed their right to be heard, and that this amounted to a substantial procedural violation by the board, is rejected.

Oral proceedings were held without any disruption due to technical problems, and proper functioning of the videoconferencing technology was ascertained. The parties thus had the opportunity to present their case in full (see minutes of 7 April 2022).

Therefore the board cannot see that the parties' right to be heard was infringed and the request that oral proceedings be held in person is hereby rejected.

3. Admissibility of D39 to D47, D50 to D53 and D57 to D59

The opposition division decided to admit documents D39 to D47, D50 to D53 and D57 and D58, which were filed after the nine-month opposition period, into the proceedings because they were considered to be *prima facie* relevant (see point 4 of the Reasons for the impugned decision). The board cannot see that the opposition division exercised its discretion unreasonably and/or based on the wrong criteria. The boards do not have the power to disregard on appeal submissions admitted by the opposition division in correct exercise of its discretion (Case Law of the Boards of Appeal of the EPO, 9th edition, 2019, V.A. 3.5.4).

D59 was filed in the opposition proceedings. Its admittance is not explicitly mentioned in the impugned decision, but the board cannot discern why it should not be part of the appeal proceedings. It simply confirms what was known from other documents.

Therefore, D39 to D47, D50 to D53 and D57 to D59 are considered to be part of the appeal proceedings.

4. Admissibility of A1 to A14 and B1 to B8

According to Article 12(4) RPBA 2007, which applies in the present case (see Article 25(2) RPBA 2020), the board has the power to hold inadmissible facts, evidence or requests which could have been presented in the first-instance proceedings.

In the case at hand, the prior use of catalyst material C34340MS was substantiated for the first time with the notice of opposition. In reply thereto, appellant 1 (patent proprietor) indicated that, in line with G 1/92, evidence was lacking that the catalyst material could be analysed and reproduced without knowledge of the proprietary processing techniques (point 4.1.3 of the patent proprietor's letter of 16 December 2016). Appellants 2 responded thereto merely by relying on arguments and D26, and did not file any further evidence relating to the analysability and reproducibility of the catalyst material C34340MS.

The decision under appeal neither presented nor included any surprising conclusions which were not in line with the parties' submissions. The opposition division simply accepted the patent proprietor's arguments with respect to D9 and with respect to the presence of aluminium carboxylates or the chromium

salts. Therefore, the board cannot see that the decision would have triggered the need for additional evidence. Appellants 2 should have provided documents A1 to A14 and B1 to B8 during the opposition proceedings, for example in reply to appellants 1's reply to the opposition brief.

Admitting all these documents into the appeal proceedings would require for the first time a discussion about the different analytical methods, their suitability in the present case and a skilled person's knowledge in that respect. It is definitely not the purpose of the appeal proceedings to continue the opposition proceedings and to allow a party to shift its case to the appeal proceedings (T 432/12, Reasons 1).

In T 406/09, cited by appellants 2, the case-specific situation was analysed and the case-specific conclusion adapted to the particular circumstances was drawn (see e.g. T 0406/09, Reasons, 2.1.3: "Having regard to the present factual situation, the Appellant was entitled to file those new documents...."). T 406/09 does not relate to the prior use of a compound and to the well-established requirement set out in G 1/92 (Reasons, 1.4) according to which a product and its composition or internal structure become part of the state of the art if a skilled person is able to discover the composition or the internal structure of the product and to reproduce it without undue burden. Therefore, the case is irrelevant for assessing the present situation.

Consequently, considering all these points, the board exercised its discretion under Article 12(4) RPBA 2007



with the result that documents A1 to A14 and B1 to B8 were not admitted into the appeal proceedings.

Main request

5. Novelty

5.1 Prior use of C34340MS

In the present case, the standard of proof to be applied is the balance of probabilities (Case Law of the Boards of Appeal of the EPO, 9th edition, 2019, I.C.3.5.2 b)).

It is accepted from the available documents that catalyst C-34340MS could be purchased before the priority date of the patent. In particular, D9 confirms that C-34340MS was commercially available to interested parties in Europe. This is also in line with D57, which confirms that said catalyst had already been delivered to DSM from 1996 to 1999. Furthermore D10 provides a list of silica catalysts for ethylene production available from PQ Corporation including C-34340MS. The fact that C-34340MS was commercially available is also confirmed by its mention in D24, D43 and D44. There is no evidence of a confidentiality agreement regarding the purchase of C34340MS.

According to D58 (point 7, last sentence) catalyst C-34340MS is a catalyst in accordance with the claims of Korean patent No. 10-121924, which implies that said catalyst is also in accordance with claim 1 of the patent under appeal. There is no evidence to show that said catalyst changed its composition over time.

The situation is thus similar to the one underlying G 1/92 and it needs to be established whether a skilled person can analyse and produce catalyst C-34340MS.

The board is not convinced that such is the case for the following reasons:

Proceedings before the EPO are conducted in accordance with the principle of the free evaluation of evidence (Case Law of the Boards of Appeal of the EPO, 9th edition, 2019, III.G.4.1).

D9 dated 8 January 2004 provides details about the composition of the catalyst C-34340MS, but indicates that the information is to be treated as confidential. This falls within the definition of information given in D34 and subject to confidentiality for ten years from 22 July 1999. Consequently the compositional details of D9 cannot be considered to be in the public domain.

D11 dated 23 October 2007 is a document that was issued by the parent company of the patent proprietor and was submitted by the opponents. It is not clear how the document was obtained and how it was made available. It also contains information about the composition of catalyst C-34340MS, so that there is no reason to assume that it would not be subject to the confidentiality agreement D34.

D3 indicates that the catalyst contains chromium and aluminium, but does not give any information about the type of chromium and aluminium compounds. Similar information is available from D10. D27 confirms that chromium is present in the catalyst, but also indicates that its specific chemical identity is withheld as a

trade secret. D26 confirms that boric acid and acetate could be detected in a catalyst lot supplied by PQ.

The board concurs with the opposition division that the information that the catalyst C34340MS comprises a silica xerogel comprising at least 90% by weight of SiO<sub>2</sub> and carrying within a pore structure a chromium salt, selected from chromium carboxylate, chromium sulphate, chromium chloride and a mixture thereof in addition to aluminium carboxylate is not publicly available. There is also no evidence that would allow it to be concluded that the catalyst can be analysed with the known analytical techniques by a skilled person to such a point that the exact composition of the catalyst is known.

Even if it were accepted that a complete analysis of catalyst C34340MS were possible and that this analysis revealed a catalyst as claimed (for which proof is lacking as laid out above), it still needs to be determined whether a skilled person would be able to reproduce such a catalyst without the knowledge from the patent. Again there is no evidence that a production process would have been within a skilled person's knowledge. To allege that the patent shows that such a production process is easy is contrary to D37 (in particular point 6), which explains that process conditions are paramount for obtaining the desired catalyst. Furthermore the allegation is not corroborated by evidence. The situation is similar to that in T 1833/14 (Reasons, 1.4 and 1.5), T 23/11 (Reasons, 2.4) and T 2045/09 (Reasons, 38) with the conclusion that the catalyst could not be reproduced.

In view of the information before it, the board concludes that catalyst C-34340MS was not part of the

state of the art at the priority date of the patent and cannot anticipate the novelty of claims 1 to 6.

5.2 Appellants 2 further cited D24 and D43 against the novelty of claims 10 to 12, and D10 against the novelty of claim 12. All these documents cite catalyst C-34340MS, but since the catalyst is not considered to be part of the state of the art, these novelty objections must fail.

6. Witness hearing

The board accepted that D58 showed that catalyst C-34340MS was a catalyst in accordance with claim 1 of the patent under appeal. Appellants 2 did not provide any further reasons, in particular during oral proceedings, why hearing Mr Robbins in accordance with Article 117(1)(d) EPC would provide information going beyond the disclosure of D58, which is an affidavit by Mr Robbins.

Therefore, the board saw no reason to hear Mr Robbins as a witness.

7. Inventive step

7.1 Since catalyst C-34340MS is not considered to be part of the state of the art, objections based thereon cannot succeed. Appellants 2 further objected to lack of inventive step of claims 7 to 9 based on D19 as the closest prior art in combination with common general knowledge as exemplified in D12.

7.2 Example 2 of D19 discloses an aluminium-modified chromium catalyst that was prepared by spraying a solution of chromium acetate and an organoaluminium

compound onto silica. Example 2 does not disclose the solvent used in this particular case. It cannot be argued that methanol would be implicitly present in view of the disclosure of possible solvents in column 4 (lines 49 and 50), since an example constitutes a specific embodiment that cannot be combined with other information of the description (T 210/05, Reasons, 2.3).

- 7.3 The problem to be solved by the subject-matter of claim 7 is to provide a method for preparing catalyst precursors which avoid the formation of noxious or toxic fumes during catalyst activation (paragraph [0014] of the patent).
- 7.4 The problem is solved by a method according to claim 7, characterised in that the solution comprises aluminium carboxylate and boric acid in a solvent which is water, C<sub>1</sub> to C<sub>4</sub> aliphatic alcohol, or a mixture thereof.
- 7.5 There is no reason to doubt that the problem has been successfully solved, since this particular process does not lead to residuals which could provide undesired fumes when activating the catalyst.
- 7.6 The solution is not obvious since D19 does not disclose aluminium carboxylate. Although methanol is disclosed as a possible solvent in the list of solvents (column 4, lines 48 to 50), there is no specific preference given to it. Even if a skilled person trying to solve the posed problem knew that methanol made it possible to avoid the formation of noxious fumes during activation, there is no teaching that aluminium carboxylate and boric acid in combination have good solubility in said solvent and are advantageous for deposition on the inorganic support material. It is

this combination that makes it possible to choose the specific solvent and to obtain a catalyst precursor that has activities similar to prior-art catalysts prepared by organometallic routes.

D12 is not relevant in this respect since it only lists aluminium acetate stabilised with boric acid as one of many aluminium compounds. The conclusion that a skilled person trying to solve the posed problem would inevitably choose methanol in D19 and then learn from D12 that aluminium acetate stabilised with boric acid would be particularly suitable for use in that solvent, in view of the indication about stability in D12, is based on hindsight. There is no reason why a skilled person starting from D19 would turn to D12 and arrive at the specific aluminium compound.

The solution to the posed problem is not obvious and therefore the subject-matter of claim 7 involves an inventive step. The same conclusion applies to dependent claims 8 and 9. There were no inventive-step objections with respect to claims 1 to 6 and 10 to 12 and the board cannot identify any either. Therefore, the requirements of Article 56 EPC are met.

8. Referral to the Enlarged Board of Appeal

It is established case law that a question for which referral is requested must be relevant for deciding the case in question (Case Law of the Boards of Appeal of the EPO, 9th edition, 2019, V.B.2.3.3). This clearly does not apply here, as the board has been able to reach a conclusion without the need for a referral (see point 5 above). In addition, contrary to appellants 2's point of view, there is no conflicting case law.

T 952/92 is not of relevance to the present case since it related to an ingredient (mono- and diester of phosphorus) in a composition (Supersolve) and the board in that case was of the opinion that it was enough to be able to analyse said ingredient and that it was not necessary to reproduce the whole composition. The question of reproducibility of the ingredient is not dealt with, since it was not under debate.

T 897/07 (Reasons, 3.2.7 to 3.2.9) relates to a simple composition where reproducibility was evidently not called into question and consequently not debated.

As indicated above, the board considers the present case to be in line with T 1833/14 (Reasons, 1.4 and 1.5), T 23/11 (Reasons, 2.4) and T 2045/09 (Reasons, 38), which all related to the reproducibility of a publicly available product.

Consequently, there is no need for referral to the Enlarged Board of Appeal.

## Order

### For these reasons it is decided that:

1. The appeal of appellant 1 is rejected as inadmissible.
2. The appeal of appellants 2 is dismissed.
3. The request for referral to the Enlarged Board of Appeal is refused.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated