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**Datasheet for the decision
of 24 September 2021**

Case Number: T 1287/18 - 3.3.03

Application Number: 12707091.0

Publication Number: 2681277

IPC: C08L23/12, C08F2/00

Language of the proceedings: EN

Title of invention:

POLYOLEFIN COMPOSITION WITH LOW CLTE AND REDUCED OCCURRENCE OF
FLOW MARKS

Patent Proprietor:

Borealis AG

Opponent:

Total Research & Technology Feluy

Relevant legal provisions:

EPC Art. 54, 56, 100(b), 107 sentence 2, 112(1)(a), 123(2)
RPBA 2020 Art. 12(2), 13(2)

Keyword:

Interpretation of respondent's requests as cross-appeal (no)
Auxiliary request correctly admitted in first instance
proceedings - impugned decision based on it - part of the
appeal proceedings (yes)
Amendments - added subject-matter (no)
Grounds for opposition - insufficiency of disclosure (no)
Novelty - (yes)
Referral to the Enlarged Board of Appeal - admissibility (no)
Amendment after summons - cogent reasons (no)
Inventive step - (no)

Decisions cited:

G 0008/91, G 0009/92, G 0004/93, G 0007/93, G 0001/95,
G 0007/95, G 0001/99, G 0002/08, G 0003/08, G 0002/10,
G 0001/12, G 0003/14, R 0011/08, R 0015/09, R 0014/10,
R 0007/11, R 0006/14, R 0007/14, T 0390/90, T 0653/93,
T 1242/04, T 0162/09, T 1852/11, T 2541/11, T 1201/14,
T 1227/14



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Case Number: T 1287/18 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 24 September 2021

Appellant: Total Research & Technology Feluy
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
19 March 2018 concerning maintenance of the
European Patent No. 2681277 in amended form.**

Composition of the Board:

Chairman D. Semino
Members: O. Dury
A. Bacchin

Summary of Facts and Submissions

- I. The appeal of the opponent is against the interlocutory decision of the opposition division posted on 19 March 2018 concerning maintenance of European patent No. 2 681 277 in amended form according to the claims of auxiliary request V filed during the oral proceedings of 14 February 2018 and a description adapted thereto.
- II. A notice of opposition had been filed against the patent as granted, requesting the revocation of the patent in its entirety.
- III. The decision under appeal was based on the patent as granted as the main request, on the first to fourth auxiliary requests filed with letter of 5 January 2017 and on auxiliary request V (11 claims) filed during the oral proceedings on 14 February 2018.

Claim 1 of auxiliary request V, which is the sole claim relevant for the present decision (additions as compared to claim 1 as originally filed in **bold**, deletions in ~~striketrough~~), read as follows:

"1. Polyolefin composition comprising

a. 35 - 90 wt%, based on the weight of the polyolefin composition, of a heterophasic polypropylene composition comprising

i. 10 - 50 wt%, based on the weight of the heterophasic polypropylene composition, of a first propylene homopolymer (PPH1) having an

MFR₂ measured according to ISO 1133 of
from 30 - 80 g/10 min (230 °C, 2.16 kg),

ii. 20 - 65 wt%, based on the weight of the
heterophasic polypropylene composition, of a second
propylene homopolymer (PPH2) having an
MFR₂ measured according to ISO 1133 of from
100 - 250 g/10 min (230 °C, 2.16 kg),

iii. 5 - 30 wt%, based on the weight of the
heterophasic polypropylene composition of a first
xylene cold soluble fraction (XS1) having an
intrinsic viscosity IV_{XS1} of 2.0 - 3.0 dl/g,

iv. 5 - 25 wt%, based on the weight of the
heterophasic polypropylene composition of a second
xylene cold soluble (XS2) fraction having an
intrinsic viscosity IV_{XS2} of 1.5 - 2.8 dl/g,

with the proviso that $IV_{XS1} \neq IV_{XS2}$,

b. 5 - 40 wt%, based on the weight of the polyolefin
composition, of an inorganic filler, and

c. 5 - ~~25~~ **14** wt%, based on the weight of the polyolefin
composition, of an ethylene/1-butene elastomer".

IV. In the decision under appeal it was held that:

- The main request (patent in suit) satisfied the
requirements of sufficiency of disclosure but its
subject-matter was not novel over D1
(WO 2010/142540);

- The first to fourth auxiliary requests did not satisfy the requirements of Article 84 EPC;
- Auxiliary request V was admitted into the proceedings, satisfied the requirements of Article 123(2) and 84 EPC and its subject-matter was both novel over D1 and inventive starting from D1 as closest prior art.

Therefore, the patent in amended form according to auxiliary request V was found to meet the requirements of the EPC.

- V. The opponent (appellant) appealed against the above decision. With the statement setting out the grounds of appeal the appellant requested that the opposition division's decision be set aside and that the patent be revoked.
- VI. The patent proprietor (respondent) did not reply to the statement of grounds of appeal.
- VII. By letter of 16 November 2020, the parties were summoned to oral proceedings. The Board specified issues to be discussed at the oral proceedings in a communication under Article 15(1) RPBA 2020 dated 22 December 2020. It was *inter alia* indicated therein that:
- The criteria of "selection invention" applied by the opposition division for the assessment of novelty of claim 1 of auxiliary request V over D1 were not the correct ones to be applied. Rather, since it seemed that the combination of features according to operative claim 1 could only be arrived at after making a series of selections

within the ambit of D1, it appeared that the question to be answered was rather whether or not D1 provided a direct and unambiguous disclosure for the combination of parameters specified in the subject-matter being claimed, i.e. if said combination emerged from the prior art document. In the present case, the arguments put forward by the appellant did not allow to conclude that this was the case (sections 9.3 and 9.4 of the Board's communication);

- The appellant's mere reference to the arguments submitted in the notice of opposition in respect of inventive step of the patent as granted did not appear to meet the substantiation requirements of Article 12(3) RPBA 2020. The appellant had submitted that auxiliary request V was not inventive because it was not novel over D1 (section 5 of the statement of grounds of appeal), without however giving any reasons why the decision of the opposition division with respect to inventive step was incorrect. Therefore, the Board did not need to revise this part of the decision (sections 5.1 and 10 of the Board's communication).

VIII. By letter of 9 July 2021 the appellant made further submissions. It was in particular argued that the Board's considerations regarding novelty went beyond the scope of the present appeal and the Board's preliminary views regarding the lack of substantiation of an inventive step objection in the statement of grounds of appeal was rebutted. Arguments regarding inventive step starting from D1 as closest prior art were also put forward.

- IX. With letter of 22 July 2021 the respondent filed a submission for the first time in appeal proceedings, indicating that they would not attend the oral proceedings and that it was "still requested to maintain the Patent, either according to the Main Request or to any of the Auxiliary Requests filed by the Patentee".
- X. At the beginning of the oral proceedings before the Board held in the absence of the respondent, as announced, the appellant requested that the oral proceedings be postponed in order to clarify the respondent's request(s) (see section XI(a) below). Also, during the discussion related to inventive step, the appellant requested that a question be referred to the Enlarged Board of Appeal (see section XI(1) below).
- XI. The appellant's arguments, in so far as relevant to the present decision, may be summarised as follows:

Respondent's request(s) - Postponement of the oral proceedings

- (a) The requests filed by the respondent on 22 July 2021 "to maintain the Patent, either according to the Main Request or to any of the Auxiliary Requests" were not immediately clear and would have required that the Board ask for clarification before a decision was taken. In this respect, reference was made to decisions R 7/14 (of 18 February 2016) and R 14/10 (of 26 January 2011). The appellant acknowledged that in the respondent's letter there was no indication of withdrawal of auxiliary request V. However the language of the letter was not entirely clear, so that it could not be excluded that the respondent actually requested

the maintenance of the higher ranking requests, and thereby intended to lodge a "cross-appeal". Since no clarification of the requests was asked by the Board in advance of the oral proceedings and the respondent, as announced, was absent, oral proceedings had to be postponed.

Admittance of auxiliary request V

- (b) Considering that auxiliary request V was submitted during the oral proceedings before the opposition division, it was late-filed. Therefore, in order to be admitted into the proceedings, it should be clearly allowable, which was not the case since it gave rise to additional objections e.g. pursuant to Article 123(2) EPC and did not overcome the objections raised against the higher ranked requests, in particular the lack of novelty over D1. Therefore, the opposition division did not exercise correctly their discretion when they admitted auxiliary request V into the proceedings.

In addition, as reflected in the minutes of the oral proceedings before the opposition division, auxiliary request V was only submitted after an explicit invitation from the Chairman to do so and after the higher ranked requests had been found to be not allowable, which would have led - without the Chairman's intervention - to the revocation of the patent. In doing so, the opposition division violated the principle of equality of arms, which was at least partly accepted by the boards (T 2541/11 of 17 December 2014).

Also, considering that claim 1 comprised several ranges defining the amounts of the components

contained therein, the amendment of the upper limit of the range of component c) defined in claim 1 which was made during the oral proceedings was only one out of many possibilities to amend claim 1 according to a preferred embodiment disclosed in the description. The opponent could not have foreseen which of these possible numerous amendments would be made and was effectively taken by surprise at the oral proceedings. The opponent would have needed to look for further prior art, at least to prepare an inventive step attack.

In reply to questions of the Board, it was further clarified at the oral proceedings that:

- At the oral proceedings before the opposition division, the opponent did not ask for more time or for a postponement of the oral proceedings to deal with auxiliary request V. At that time, the opponent held that, *prima facie*, many issues would lead to the rejection of that request.

- Although the wording of the minutes of the oral proceedings "asked ... to present any further requests" could be read as an enquiry whether the patent proprietor intended to submit further requests, it was rather in the context of the present case a clear invitation to do so, since the patent proprietor had until then not announced its intention to do it and had not filed further auxiliary requests in the written proceedings.

In view of the above, the opposition division did not properly exercise its discretion to admit auxiliary request V into the proceedings. Rather,

in doing so, it applied the wrong standards, went beyond its discretion and/or exercised it in an unreasonable manner. For these reasons that decision should be overturned to re-establish procedural fairness.

Article 123(2) EPC

(c) The amendment made in respect of the upper limit of 14 wt.% of the amount of ethylene/1-butene elastomer (component c) according to operative claim 1) was not supported by the application as filed. In particular, the first paragraph on page 8 of the application as filed, which was retained by the opposition division, did not constitute a valid basis for that amendment because said passage should be read together with some additional requirements of the preceding passage at page 7, lines 25-30 of the application as filed, which were not reflected in operative claim 1.

Also, reading said passage at page 7, lines 25-30 within the context of the application as filed as a whole, it was derivable that the compositions described therein had a low coefficient of thermal expansion (CLTE) and a reduced tendency to flow marks and that these properties were only achieved for a heterophasic polypropylene composition which had bimodal distributions and contained ethylene-propylene rubbers. Therefore, the upper limit of 14 wt.% elastomer was only disclosed in combination with a composition which was bimodal and comprised ethylene-polypropylene rubber. Considering that these requirements were not reflected in operative claim 1, the amendment made constituted an unallowable intermediate generalisation.

For these reasons, claim 1 of the main request did not meet the requirements of Article 123(2) EPC.

Article 100(b) EPC

(d) According to the description of the patent in suit, the xylene cold soluble fractions specified in operative claim 1 were related to ethylene-propylene rubbers. However, said claim 1 did not refer to ethylene-propylene rubbers but only to heterophasic polypropylene compositions. Said claim 1 contained no indication with respect to a second or further component(s) which modified the homopolymer matrix to become a heterophasic polypropylene composition. Therefore, the claimed teaching could not be put into practice over the whole breadth of the claim, in particular for each and every conceivable heterophasic polypropylene compositions encompassed by operative claim 1.

In addition, since the patent in suit technically linked the xylene cold soluble fractions specified in claim 1 to the presence of ethylene, claim 1 could only be carried out for compositions in which ethylene was effectively present. Considering that claim 1 was silent with respect to any contained ethylene polymer or copolymer, claim 1 was not enabled over its whole breadth and the patent in suit did not provide sufficient information how to prepare compositions which lack the presence of ethylene.

During the oral proceedings before the Board, it was pointed out that the objection of insufficiency of disclosure in respect of features XS1 and XS2

was equally valid for the inequation $IV_{XS1} \neq IV_{XS2}$ specified in operative claim 1, which became purely speculative for other xylene cold soluble fractions different from ethylene-propylene rubbers. Also, it was argued that a research program would be necessary for the skilled person to prepare a composition according to operative claim 1 which contained no ethylene-propylene rubber.

- (e) In addition, it was "maintained" that the MFR_2 parameter specified in operative claim 1 with a norm but without a version number did not provide sufficient guidance to determine said feature in a consistent manner. The situation was even worse for the intrinsic viscosity features, which was also specified in said claim 1 without any reference to a norm.
- (f) For these reasons, the requirements of sufficiency of disclosure were not met.

**Article 54 EPC - Scope of the subject-matter in appeal
- Competence of the Board**

- (g) In the statement of grounds of appeal the question of novelty over D1 was limited to the amended feature of claim 1 according to auxiliary request V. On the contrary, the finding of lack of novelty with regard to the combination of features of the whole claim 1 had not been appealed. Thus, on account of the principle of party disposition, as stated in decision G 8/91 (cf. OJ EPO 1993, 346, particularly reasons 10.2), the Board had no competence to decide whether the feature combination of claim 1 was novel over D1. The considerations indicated in the Board's

communication according to which the criteria to be applied in the present case were not those of "selection inventions" went beyond the subject of the present appeal case. Reference was made to the principle of devolutive effect of an appeal with regard to the extent to which the impugned decision had been appealed. Appeal proceedings would become *de novo* if the Board were to revise the part of the decision concerning the question of the feature combination of claim 1. This would clearly be in contrast with the provision of Article 12(2) RPBA 2020.

Article 54 EPC - Novelty over D1

- (h) The opposition division correctly concluded that the subject-matter of claim 1 as granted was not novel over D1. However, the opposition division erred when deciding that a further selection within the range of 12 to 30 wt.% according to D1 would be necessary in order to arrive at the range of 5 to 14 wt.% as defined in operative claim 1. In particular, not only was the end-point 12 wt.% specifically disclosed in D1 but also the criteria for a selection invention were not met.

- (i) In reply to a question of the Board regarding the appellant's arguments as to why the combination of features according to operative claim 1 could be considered to be directly and unambiguously derivable from D1, it was argued that there was so much overlap between the disclosure of D1 and the subject-matter defined in operative claim 1 that novelty should not be acknowledged.

- (j) Under these circumstances, the subject-matter of operative claim 1 was not novel over D1.

Article 56 EPC - Objection raised in the statement of grounds of appeal - Referral - Objection raised with letter of 9 July 2021

- (k) The statement of grounds of appeal was sufficiently substantiated with regard to the objection of lack of inventive step. Since the appellant's line of argumentation was based on the fact that the subject-matter of operative claim 1 lacked novelty over D1, a discussion of the grounds for opposition of lack of inventive step would have been baseless. A reference, as a precautionary measure, to the arguments presented in this respect in the notice of opposition was sufficient.

Under such circumstances, requiring that the appellant additionally substantiate an objection of lack of inventive step would effectively weaken the appellant's novelty objection, in violation of its right to a fair trial.

In addition, operative auxiliary request V was first filed and discussed during the oral proceedings before the opposition division. Considering that the minutes of said oral proceedings had to be taken into account in appeal proceedings under Article 12(1)(a) in conjunction with Article 25(1) RPBA 2020, the arguments put forward by the opponent specified in said minutes were also part of the appeal proceedings.

- (l) During the oral proceedings before the Board it was requested that if the Board decided not to admit

the objection of lack of inventive step against auxiliary request V, the following question be referred to the Enlarged Board of Appeal:

"Must an appellant in the grounds of appeal substantiate lack of inventive step over a document considered novelty destroying in order to meet the substantiation requirements set out in Article 12(3) RPBA with respect to the ground for opposition under Article 100(a) in conjunction with Article 56 EPC, especially when there is no closer prior art document on file?"

The appellant considered that the question of law was one of a fundamental importance as it related to the application of the Rules of Procedure of the Boards of Appeal (RPBA), especially those in force since January 2020. It was in particular argued that the importance of the RPBA for the practice of the Boards of Appeal had tremendously increased, as it was reflected in a recent contribution published in the *Mitteilungen der deutschen Patentanwälte* of 2021, in which it was reported that the number of decisions citing the RPBA in the period between January 2020 and Mai 2021 had increased of more than 2/3 as compared to the period between the beginning of 2000 and end of 2019 (cf. "Aktuelle Rechtsprechung der Beschwerdekammern des EPA - Notizen für die Praxis", Rudolf Teschemacher, in Mitt. 2021, 297 - 305 (Heft 7-8)). The appellant could not find diverging case law with respect to the question of substantiation requirements in the statement of grounds of appeal of an inventive step attack when an objection of lack of novelty over the same prior art had been substantiated. Nevertheless the referral would be justified on

account of the fundamental importance of the question raised.

(m) The appellant's argumentation as to lack of inventive step put forward with letter of 9 July 2021 was short and straightforward: auxiliary request V was nothing but an effectless alternative to the closest prior art D1 and was obvious because the - potentially - distinguishing feature was conventional. That argumentation was further in line with the one put forward in the notice of opposition to which the appellant's grounds of appeal precautionarily referred to in its statement of grounds of appeal. For these reasons, that objection should be admitted into the proceedings.

(n) In view of the above, the subject-matter of operative claim 1 was not inventive over D1.

XII. The respondent did not make any submissions in substance during the appeal proceedings.

XIII. The appellant requested that the decision under appeal be set aside and that the European patent No. 2 681 277 be revoked. Further, the appellant requested that the oral proceedings be postponed in order to clarify the requests filed by the respondent with letter of 22 July 2021 and that a question be referred to the Enlarged Board of Appeal pursuant to Article 112 EPC.

The respondent requested that the patent be maintained according to "the Main Request or to any of the Auxiliary Requests filed by the Patentee".

Reasons for the Decision

1. Request for postponement of the oral proceedings - Clarification of the respondent's request(s)
 - 1.1 The appeal of the opponent lies from the interlocutory decision of the opposition division concerning maintenance of the patent in suit in amended form according to auxiliary request V filed during the oral proceedings of 14 February 2018.
 - 1.2 In its letter of 22 July 2021, the respondent (proprietor) filed for the first time a submission in appeal proceedings and requested "to maintain the Patent, either according to the Main Request or to any of the Auxiliary Requests".
 - 1.3 The Board does not agree with the appellant's objection, raised at the oral proceedings, that the respondent's requests required clarification, as they could be interpreted as a "cross-appeal", and thus oral proceedings had to be postponed.

Considering that the respondent neither lodged an appeal, nor provided any substantive arguments in the whole appeal proceedings and that auxiliary request V, according to which the patent was to be maintained according to the opposition division, was the lowest ranking request defended during the first instance proceedings, the respondent's submission can only be understood as meaning that it is requested that the appeal be dismissed (i.e. patent to be maintained in amended form according to auxiliary request V allowed by the opposition division). From a procedural point of

view, auxiliary request V is thus the only operative request for the present appeal proceedings.

There is no legal basis in the EPC for interpreting the respondent's requests as a cross-appeal, as suggested by the appellant. Any request for maintaining the patent in the form of a higher ranking request than the present auxiliary request V would therefore be inadmissible.

This immediately follows from the principle of prohibition of *reformatio in peius* as acknowledged by the jurisprudence of the Boards of Appeal. If the opponent is the sole appellant, the proprietor in appeal proceedings is primarily restricted to defending the patent as thus maintained (see G 9/92 and G 4/93, in OJ EPO 1994, 875). Any other amendment could be rejected as inadmissible if neither appropriate nor necessary. In the present case, since the proprietor has not filed an appeal within the prescribed time limit, they cannot file requests as if they had that status. This is due to the fact that the EPC does not provide for the possibility of a cross-appeal by a respondent (see G 9/92 and G 4/93, cited above, reasons 10 and 16).

Neither does the Board find that an exception to the principle of *reformatio* within the meaning of decision G 1/99 (in OJ EPO 2001, 381) would be justified under the present circumstances, since the amended claims, as maintained by the opposition division, are not the consequence of an inadmissible amendment being held allowable by the opposition division.

The appellant referred to decisions R 14/10 and R 7/14, which held that in cases where a request of a party is

considered unclear, it is the duty of the deciding body to ask for clarification before deliberation. Since under the present circumstances, even an interpretation of the requests as suggested by the appellant would not have led to a different procedural consequence, i.e. there is no other admissible request than auxiliary request V, the Board found that there was no ambiguity in the respondent's requests, which would have required clarification.

- 1.4 Consequently, since the sole operative request in the appeal proceedings is auxiliary request V, dealt with in the decision under appeal, the Board saw no need to postpone oral proceedings in order to clarify the respondent's requests. On that basis the request of postponement of the appellant is rejected.

Auxiliary request V

2. Appellant's request to overturn the opposition division's decision to admit auxiliary request V
 - 2.1 The appellant requested that the opposition division's decision to admit auxiliary request V into the proceedings be overturned because the opposition division did not exercise correctly its discretion and violated the principle of equality of arms.
 - 2.1.1 In principle, a decision taken by a department of first instance in the exercise of its discretion may be overruled by a Board of Appeal only if it is concluded that the department exercised its discretion in accordance with the wrong principles, without taking the right principles into account or in an arbitrarily or unreasonable way, thereby exceeding the proper limits of its discretion (Case Law of the Boards of

Appeal of the EPO, 9th edition, 2019, in the following "Case Law", V.A.3.5.1.b), see in particular decision G 7/93 in OJ EPO 1994, 775, reasons 2.6).

2.1.2 In that respect, the opposition division has duly provided in its decision the reasons for the exercise of its discretion to admit auxiliary request V into the proceedings. It is derivable from section 1 (at the bottom of page 7 and at page 8) of the reasons of the decision that the opposition division held that auxiliary request V was filed as a *bona fide* reaction to the objections of lack of novelty and of clarity retained against the higher-ranking requests and that it met the requirements of Rule 80 EPC. The opposition division further explained why they considered that auxiliary request V should not take the opponent by surprise. It is further indicated in the minutes of the oral proceedings that the proceedings were interrupted and time was given to the opponent to consider said auxiliary request V (see point 3.2.2 of the minutes), whereby objections pursuant to Articles 123(2), 54 and 56 EPC were raised against it and dealt with at the oral proceedings. In that respect, and upon explicit request of the Board during the oral proceedings, the appellant confirmed that they did not ask for more time or for a postponement of the oral proceedings to deal with auxiliary request V.

2.1.3 The appellant argued that, before the oral proceedings in opposition took place, the sole requests defended in writing by the patent proprietor were the main request and the four auxiliary requests filed with letter of 5 January 2017, which were all refused by the opposition division during the oral proceedings. On that basis, the patent should have been revoked. However, it was derivable from the minutes of the oral

proceedings that the Chairman of the opposition division pro-actively asked the patent proprietor to file an additional request, which was done, said request being further admitted. In doing so, according to the appellant the opposition division went against the principle of equality of arms, which was a general principle at least partially applied by the EPO (T 2541/11; section 4.3 of the reasons).

The Board notes that, in principle, the minutes of the oral proceedings are the only means of ascertaining what had actually occurred during oral proceedings (cf. R 15/09, reasons 4.1.1 and R 7/11, reasons 2.3 and 2.4). Any deficiency in the minutes must be promptly pointed out upon their receipt (see also T 162/09, reasons 11.3, R 11/08, reasons 16 and R 6/14, reasons 7). In the present case the correctness of said minutes has not been questioned by the appellant. Thus in order to establish the relevant facts the Board may only rely on the minutes. The wording of the minutes (section 3.1.5: "The chairman asked the patent proprietor to present any further requests") merely reflects the usual course of oral proceedings, whereby the patent proprietor is asked if they intend to defend/present any additional auxiliary requests. In that respect, the wording "any" in particular indicates a mere possibility, i.e. it was enquired whether the patent proprietor wanted to submit further requests. Further taking into account that the opposition division thereafter undoubtedly heard the parties on the issue of the admittance of that request both in respect of its late filing and of its *prima facie* allowability (minutes of the proceedings: sections 3.2.1 to 3.2.4), it cannot be concluded that the principle of equality of arms was not respected, as put forward by the appellant. In particular, the conduct of

the oral proceedings is in line with the findings of T 2541/11 (section 4.3 of the reasons, last two sentences) according to which the opposition division should exercise its discretion by weighing factors such as justification and significance, whereby the parties should be given an opportunity to comment thereon.

2.1.4 Under these circumstances, the Board considers that the opposition division, in deciding to admit auxiliary request V into the proceedings, did not violate the principle of equality of arms and did not exercise its discretion in accordance with the wrong principles or in an unreasonable way.

2.2 In view of the above, considering that auxiliary request V was submitted during the opposition proceedings before the opposition division, admitted into the proceedings by the opposition division by a proper exercise of discretion and decided upon in the decision under appeal, it is not clear to the Board on which legal basis the appellant's request to overturn the opposition division's decision to admit auxiliary request V into the proceedings could be granted (see also Case Law, *supra*, V.A.3.5.4, in particular decisions T 1227/14, reasons 1.1; T 1201/14, reasons 2 and T 1852/11, reasons 1.3). It follows that since the aim of appeal proceedings is to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020), auxiliary request V is part of the appeal proceedings.

2.3 For these reasons, the appellant's request to overturn the opposition division's decision to admit auxiliary request V into the proceedings is rejected.

3. Article 123(2) EPC

3.1 For the assessment of Article 123(2) EPC, the question to be answered is whether or not the subject-matter being claimed extends beyond the content of the application as filed, i.e. whether after the amendment the skilled person is presented with new technical information (see G 2/10, OJ EPO 2012, 376, point 4.5.1 of the reasons and Case Law, *supra*, II.E.1.1 and 1.3.1). In that respect, it has to be assessed if a direct and unambiguous basis for the subject-matter being claimed may be found in the application as filed.

3.2 The appellant's objection is directed to the amendment made in respect of the upper limit of 14 wt.% of the amount of ethylene/1-butene elastomer (component c) according to operative claim 1), whereby it is contested that the first paragraph on page 8 of the application as filed, which was retained by the opposition division, constitutes a valid basis for the amendment made. The appellant's objection is primarily based on the fact that the first paragraph on page 8 of the application as filed should be read together with some additional requirements of the preceding passage at page 7, lines 25-30 of the application as filed, which were not reflected in operative claim 1.

3.3 However, in the Board's view, it makes no doubt that the first paragraph on page 8 of the application as filed refers to preferred embodiments regarding the upper limit of the range defining the amount of ethylene/1-butene elastomer defined either at page 7, lines 21-22 of the application as filed or present as component c) in claim 1 of the application as filed, wherein the upper limit for that range is defined in the application as filed as being 25 wt.%. Although it

is correct that the passage at page 7, lines 25-30 of the application as filed contains some requirements in terms of bimodality which are not mandatorily satisfied by all the compositions according to claim 1 of the application as filed, there is no reason to consider that the first paragraph on page 8 is intrinsically linked thereto and can only be read in combination therewith.

- 3.4 The appellant further argued that in view of the application as filed as a whole (page 1, lines 2-3; page 2, lines 1-2, 4-25 and 26-29; page 3, lines 12-15; page 4, lines 17-18; page 5, lines 28-32; page 7, lines 25-30; examples), the skilled person would read the passage at page 7, lines 25-30 of the application as filed, which contained some requirements in terms of bimodality and/or to the presence of ethylene-propylene rubbers as being intrinsically linked to the first paragraph on page 8, i.e. these passages could only be read in combination one with the other. Since these requirements were not reflected in operative claim 1, the amendment amounted to an unallowable intermediate generalisation, so the appellant.

However, in the Board's view, there are no reasons why the passage at page 8, lines 1-4 of the application as filed cannot be read in combination with the most general teaching of claim 1 or at page 7, lines 21-22 of the application as filed. In particular, the effects mentioned in the passages of the application as filed which were relied upon by the appellant are not reflected in claim 1 or at page 7, lines 21-22 of the application as filed. For that reason, the appellant's arguments failed to convince.

3.5 Under these circumstances, the appellant's arguments provide no reason for the Board to overturn the opposition division's that in respect of Article 123(2) EPC.

4. Article 100(b) EPC

4.1 In order to meet the requirements of sufficiency of disclosure, an invention has to be disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person over the whole range that is claimed, without undue burden, on the basis of the information provided in the patent specification, if needed in combination with the skilled person's common general knowledge. This means in the present case that the skilled person should in particular be able to prepare a composition according to operative claim 1, which is contested by the appellant.

4.2 The appellant argues that whereas the patent in suit was only related to xylene cold soluble fractions of ethylene-propylene rubber, operative claim 1 contained no limitations in respect of a second or further component(s) which modify the homopolymer matrix to become a heterophasic polypropylene composition. Therefore, it remained mere speculation whether the claimed teaching could be put into practice on the basis of the information of the patent in suit for each and every conceivable combination of propylene homopolymer with something else chosen in an arbitrary way so as to arrive at a heterophasic polypropylene composition as claimed.

4.2.1 However, it is accepted case law that the assessment of sufficiency of disclosure should not be made in view of the claims only but rather considering the whole patent

specification and, if needed, common general knowledge. Also, the normal rule of claim construction is that the terms used in a claim should be given their broadest technically sensible meaning in the context of the claim in which they appear.

In view of the latter principle, the xylene cold soluble fractions mentioned in operative claim 1 encompasses those components which the skilled person would understand as being possibly present in heterophasic polypropylene compositions without limitation, as long as it makes sense from the technical point of view. In that respect, it was not contested, in particular in reaction to the Board's communication in which said view was indicated (section 8.2.1, second paragraph), that such compositions may be prepared using common procedures (see e.g. paragraphs 76, 77, 79-92, whereby reference is made in paragraph 79 to WO 97/40080; D1: see in particular page 18, lines 16-27; page 20, line 8ff). On the basis of these information, the Board is satisfied that the skilled person would know how to prepare a composition according to operative claim 1, whereby the skilled person also knows which components may suitably be used together with a polypropylene homopolymer in order to prepare a heterophasic polypropylene compositions such as those defined in operative claim 1.

- 4.2.2 The appellant further argued that the xylene cold soluble contents specified in operative claim 1 were only defined in the patent in suit for ethylene-propylene rubbers. Considering that the mandatory presence of ethylene was not reflected in claim 1 of auxiliary request V, the skilled person was not in a position to prepare a composition according to claim 1

over the whole scope of the claim (i.e. when ethylene is not present), so the appellant.

However, an objection of insufficient disclosure presupposes that there are serious doubts, substantiated by verifiable facts, and the burden of proof is primarily on the opponent, here the appellant (Case Law, *supra*, II.C.9). In the present case, the appellant's objection that the patent in suit did not provide sufficient information how to prepare a composition according to claim 1 which does not comprise ethylene-propylene rubber as xylene cold soluble fractions is not supported by any evidence. Under these circumstances, that objection can only be seen as being at most directed to the question of the determination of the scope of the claims, which is a matter of clarity (which cannot be addressed here since features XS1 and XS2 in question are present in granted claim 1; see G 3/14, OJ EPO 2015, 102) rather than sufficiency of disclosure.

4.2.3 For these reasons, the appellant's objection is rejected.

4.3 The appellant further "maintained" its arguments regarding the determination of the MFR_2 and the intrinsic viscosity parameters specified in operative claim 1 which were put forward during the opposition proceedings (statement of grounds of appeal: last two paragraphs of section 3).

However, the appellant has not indicated why they considered that the conclusions of the opposition division in that respect (reasons of the decision: sections 1.3 to 1.5 on pages 3 and 4) were not correct. In addition, the Board also considers that there are no

compelling reasons to deviate from the conclusions of the opposition division in that respect, in particular because the appellant has not shown that the alleged lack of information in respect of the determination of the MFR_2 and the intrinsic viscosity parameters was not a mere issue of clarity (i.e. determination of the scope of the claims) but that it was so severe as not to allow the skilled person to prepare the polyolefin compositions being claimed. Therefore, the appellant's objection is rejected.

4.4 In view of the above, the appellant's arguments provide no reason for the Board to overturn the decision of the opposition division regarding sufficiency of disclosure.

5. Article 54 EPC - Scope of the subject-matter in appeal
- Competence of the Board

5.1 As mentioned in section VII above, the Board indicated in its communication sent in preparation of the oral proceedings why it considered that the criteria of "selection invention" used by the opposition division in the decision under appeal to assess novelty over D1 of claim 1 of auxiliary request V were not the ones to be applied in the present case and further indicated its preliminary view regarding which criteria should be applied in the present case.

5.1.1 The appellant held that the Board's considerations went beyond the subject of the present appeal case (letter of 9 July 2021: section 6 and further arguments provided at the oral proceedings). Since the lack of novelty of the feature combination of claim 1 had not been contested, it was not under appeal and consequently also nothing the Board would be entitled

to decide upon anew. In this respect the appellant referred to the devolutive effect of an appeal, whereby reference was made to decisions G 2/08 (OJ EPO 2010, 456) and G 3/08 (OJ EPO 2011, 10), as well as to the principle of party disposition with reference to decision G 8/91 (OJ EPO 1993, 346: reasons 10.2).

- 5.1.2 However, the Board considers itself entitled to decide on the question of novelty of the present claim 1 over document D1 as a whole and not only on part of that question.

In accordance with the principle of party disposition, as referred to by the appellant, the power of a board to decide a certain matter depends on the extent of the appeal and covers only that part of the impugned decision which is indicated in the statement of grounds as actually challenged by the appeal. The extent of an appeal is simultaneously the limit of the devolutive effect, the latter indicating that the first instance loses its competence for the further prosecution of the matter (see also Case Law, *supra*, V.A.1.4).

In the present case, the decision has been appealed in respect of novelty with regard to the finding of the opposition division that novelty over D1 was given ("extent of the appeal"). The opposition division found that the criteria for selection inventions apply and that the range 5-14 wt% of an ethylene/1-butene elastomer of claim 1 of auxiliary request V met those criteria. This finding has been impugned by the appellant on the argument that the criteria for selection invention were not met. Since the Board was of the opinion that the opposition division did not apply the correct criteria for assessing novelty, it was within its power to mention it and to indicate

which criteria should be applied. Contrary to the appellant's argument, the Board in doing so is not carrying out a general review (*de novo*) of the first instance decision, regardless of what has been sought by the parties, in contrast to the teaching of G 8/91 (point 10.2 of the reasons). Indeed, considering that the appellant sought the review of the first instance decision to the extent that novelty over D1 was given, the Board has the power to review that part of the decision in full without any limitation. This is also in line with the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (as now explicitly stated in Article 12(2) RPBA 2020), in the sense that they primarily serve to verify the correctness of the result of the decision under appeal, i.e. the legal effect of that decision.

5.1.3 For these reasons, the appellant's objection is rejected.

6. Article 54 EPC - Novelty over D1

6.1 The sole novelty objection put forward by the appellant in appeal is in respect of document D1, whereby the appellant contested the finding of the opposition division according to which operative claim 1 was novel because it met the criteria of a selection invention (paragraph 4.2 of the reasons), whereby reference was made to the concept of "selection inventions" as developed by accepted case law (see e.g. Case Law, *supra*, I.C.6.3.1), according to which novelty may be acknowledged in view of the selection of a sub-range of numerical values from a broader disclosed range (here the amount of component c) according to claim 1, namely

the ethylene/1-butene elastomer).

- 6.2 However, in the Board's view, the criteria for "selection inventions" were developed for a so-called selection of a specific numerical range related to a *single* parameter. In the Board's communication (section 9.3), it was in particular indicated that it was not clear to the Board to which passage of D1 the appellant actually uses the criteria of selection invention, whereby such a passage should concern a direct and unambiguous disclosure of all features of operative claim 1 in combination, whereby the sole difference would be that a broader range for component c) would be disclosed. No answer to that question was given by the appellant in its further written submissions or at the oral proceedings before the Board. There is, thus, no reason to deviate from the Board's preliminary view.
- 6.3 In that respect, in view of e.g. the analysis of novelty made by the opposition division in respect of claim 1 of the then operative main request/patent in suit (whereby several "clear overlaps" were identified in sections 2.2 to 2.5 on pages 4 and 5 and a further selection for using butene as comonomer for the elastomer is indicated in sections 2.6 and 2.7 on pages 5 and 6), the combination of features according to operative claim 1 may only be arrived at after making a series of selections within the ambit of D1. Starting e.g. from the general disclosure at page 2, line 26 to page 3, line 20 of D1 (which was considered in section 2.2 of the reasons in the contested decision for the assessment of novelty of granted claim 1), one further has to select at least:

- (a) an appropriate MFR₂ for the first and second polypropylene homopolymers within the various ranges mentioned at page 9, lines 16-22 and page 14, lines 23-27, whereby some of these ranges overlap with the corresponding ranges specified in operative claim 1;
- (b) an appropriate intrinsic viscosity for the first xylene cold soluble fraction among the various ranges specified at page 11, lines 20-26 of D1, whereby some of these ranges overlap with the corresponding range specified in operative claim 1 and the most preferred range is outside the range indicated in operative claim 1, (iii);
- (c) an appropriate amount of second xylene cold soluble fraction within the various ranges indicated at page 14, lines 15-17 of D1 (read in combination with the amount of heterophasic polypropylene H-PP2 disclosed e.g. at the bottom of page 2 of D1), whereby some of these ranges overlap with the corresponding range specified in operative claim 1;
- (d) an appropriate intrinsic viscosity for the second xylene cold soluble fraction among the various ranges specified at page 16, lines 25-27 of D1, whereby all these ranges overlap with the corresponding range specified in operative claim 1;
- (e) an appropriate amount of plastomer (corresponding to component c) according to operative claim 1) within the ranges disclosed at page 2, line 31 of D1, whereby the first of these ranges overlaps with the corresponding range specified in operative claim 1 and the second range is outside it;

(f) select 1-butene as comonomer within the list of alternatives indicated at page 17, lines 20-24 of D1, whereby 1-octene is indicated as being especially preferred.

In that respect, the Board adheres to accepted case law according to which in such a case the criteria to be applied for assessing novelty are not those of a selection invention (see Case Law, *supra*, I.C.6.3.3, in particular the passage related to decision T 653/93 and point 3.6 of the reasons of this decision). Rather, the question to be answered is whether or not the prior art, here D1, provides a direct and unambiguous disclosure for the combination of parameters specified in the subject-matter being claimed, i.e. if said combination emerges from the prior art document.

In the present case, the arguments put forward by the appellant do not allow to conclude that this is the case. Therefore, the Board can only conclude that the above identified combination of features of operative claim 1 is not directly and unambiguously derivable from D1.

6.4 In view of the above, the subject-matter of operative claim 1 is novel over D1.

7. Article 56 EPC

7.1 Objection raised in the statement of grounds of appeal

7.1.1 In the statement of grounds of appeal (section 5), the appellant argued that auxiliary request V was not inventive because it was not novel over D1. The appellant merely referred to the submissions made in the notice of opposition with regard to the patent as

granted, without however giving any reasons why the decision of the opposition division with respect to inventive step of auxiliary request V was incorrect. Under these circumstances, the Board indicated in its preliminary opinion (section VII above) that there was no need for it to revise that part of the decision.

- 7.1.2 That view was contested by the appellant in its letter of 9 July 2021 (section 2) and in a similar manner at the oral proceedings before the Board (section XI k) above). However, the appellant's arguments are not convincing for the following reasons:
- 7.1.3 Article 12(1) RPBA 2020 states that appeal proceedings are based, *inter alia*, on the statement of grounds of appeal. Furthermore, under Article 12(3) RPBA 2020 (the content of which substantially corresponds to Article 12(2) RPBA 2007) the statement of grounds of appeal must comprise the appellant's complete case, whereby it must set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the facts, arguments and evidence relied upon (i.e. the substantiation). The substantiation requirements expressed in Article 12(3) RPBA 2020 reflect the provisions of Article 108, third sentence, and Rule 99(2) EPC. It serves the purpose of giving the Board all the elements needed to decide whether or not the appealed decision has to be set aside (cf. G 1/95, OJ EPO 1996, 615 and G 7/95, OJ EPO 1996, 626, reasons 3.1). According to established case law, a mere reference to submissions made at first instance, without dealing with the reasons given in the decision under appeal, as a rule, cannot replace an explicit account of the legal and factual reasons for the appeal (see Case Law, *supra*, V.A.2.6.4.a) and V.A.3.2.1.j)).

It is not for the Board to identify issues which arose in opposition proceedings and may (or may not) still be a matter of dispute in appeal proceedings, but for the appellant to put forward in the statement of grounds of appeal its line(s) of argument and each of the facts and evidence on which it relies in appeal proceedings.

Thereby, should the appellant have contemplated arguing that the subject-matter of operative claim 1 of auxiliary request V was not inventive over D1 as closest prior art, it would have been its duty to provide a full substantiation in that respect already in its statement of grounds of appeal. In particular, it should have been clearly explained why it was considered that the opposition division's decision in that respect (section 5 of the reasons on pages 9 to 11) was not correct. This is particularly relevant in the present case, as the opposition division had taken a reasoned decision on both issues, novelty and inventive step, by finding that, contrary to the appellant's objections in opposition, both requirements were fulfilled. In view of this fact, the Board cannot see on which basis an exception to the general requirement for substantiation of Article 12(3) RPBA 2020 could apply. The mere allegation in the statement of grounds of appeal that since claim 1 was not novel it was also not inventive, does not constitute a substantiated submission on the issue of inventive step and is therefore not sufficient to comply with Article 12(3) RPBA 2020.

The Board also does not agree that providing a substantiated objection of lack of inventive step as a precautionary measure would have weakened the appellant's case regarding novelty. On the contrary, since the opposition division provided a complete

reasoning based on the problem-solution approach (from bottom of page 9 to page 11 of the decision), it would have been possible for the appellant to argue against said decision, as for instance vis-à-vis the formulation of the technical problem, or to provide reasons as to why, even accepting the presence of the distinguishing feature identified by the opposition division, the claimed subject-matter was considered obvious. This was not only possible, but would have indeed been the duty of the appellant, since the opposition division found that the requirement of inventive step was fulfilled.

For the sake of completeness, the Board observes that the arguments of the appellant, albeit without explicitly referring to any decision of the Boards of Appeal, seem to rely on the consideration that a finding of lack of novelty in view of the closest prior art document inevitably results in such subject-matter being unallowable on the ground of inventive step (cf. G 1/95, in OJ EPO 1996, 615, reasons 7.2). However in the present case there is no such finding on lack of novelty. On the contrary novelty has been explicitly acknowledged by the opposition division, as well as inventive step.

- 7.1.4 Further, it is correct that, as argued by the appellant, according to Article 12(1)(a) RPBA 2020 the minutes of the oral proceedings before the opposition division are part of the appeal proceedings. However, the arguments provided before the opposition division, including those reported in the minutes of the oral proceedings before that instance, cannot have taken position on the reasons later provided in the appealed decision. As indicated above (point 7.1.3), pursuant to Article 12(3) RPBA 2020, it would have been the duty of

the appellant to indicate in its statement of grounds of appeal which arguments - including which of the ones already put forward during the first instance proceedings - were relied upon in appeal proceedings and why they disagreed with the opposition division's findings.

- 7.1.5 The appellant's arguments related to the fact that its objection of lack of inventive step was not complicated is, in the Board's view, rather related to the issue of the admittance of the objection effectively raised in its letter of 9 July 2021 than with the question if an objection of inventive step was effectively substantiated in the statement of grounds of appeal. This issue is dealt with below (section 7.3).
- 7.1.6 In view of the above, no case was made by the appellant in its statement of grounds of appeal in order to refute the conclusion reached by the opposition division in the decision under appeal (section 5) that the subject-matter of operative claim 1 of auxiliary request V was inventive and the Board does not need to revise the part of the decision on inventive step in view of the statement of grounds.
- 7.2 Request for a referral to the Enlarged Board of Appeal
 - 7.2.1 Pursuant to Article 112(1) (a) EPC a Board of Appeal shall refer a question to the Enlarged Board of Appeal if it considers that a decision is required in order to ensure uniform application of the law, or if a point of law of fundamental importance arises.
 - 7.2.2 The appellant argued that the question of the extent of substantiation of the ground of lack of inventive step if the ground of lack of novelty was already

substantiated was one of fundamental importance, also on account of the increased relevance gained by the new rules of procedure of the Boards of Appeal in force since January 2020. Therefore a question of law (see point XI 1) above) should be referred to the Enlarged Board of Appeal.

7.2.3 A point of law of fundamental importance is present if the question is relevant for a substantial number of similar cases and is therefore of great interest not only to the parties to the specific appeal proceedings in question (cf. G 1/12 in OJ EPO 2014, A114, point 11 of the reasons). The Board does not dispute that the question of substantiation provided in the statement of grounds of appeal is relevant to a number of similar cases beyond the present one. Nevertheless even in such a case the Board maintains discretionary power to refer any question to the Enlarged Board of Appeal (cf. T 390/90, OJ EPO, 1994, 808, reasons 2.1). In this context, one of the criteria to be considered by the Board is whether the question can be answered beyond all doubt by the Board itself by reference to the EPC (cf. T 1242/04, reasons 10.3). In this case the question of substantiation of the statement of grounds of appeal is answered by the present Board by applying Article 12(3) RPBA 2020. Turning to the specific facts at stake, the Board has come to the conclusion that the requirements of Article 12(3) RPBA 2020 were not met and non-admission of late filed submissions (point 7.3) follows from the application of the usual procedural principles as a consequence of the facts of the case. As indicated above (point 7.1.3), the Board sees no basis for invoking an exception to the general substantiation requirements of Article 12(3) RPBA 2020 especially because the opposition division in the present case has taken a decision on both novelty and

inventive step of the claims at stake, confirming the presence of both patentability requirements. The argument that the question is of fundamental importance because it involves application of the new rules of procedure does also not justify a referral, in particular because the answer to the relevant question is not triggered by the amended provision. The content of Article 12(3) RPBA 2020 has substantially remained identical to that of Article 12(2) RPBA 2007, as applicable at the time when the statement of grounds of appeal was filed and reflects the requirements contained in the Convention under Article 108 and Rule 99(2) EPC. Hence since the question can be answered directly and unambiguously by reference to the EPC it does not need to be referred to the Enlarged Board of Appeal.

7.2.4 The Board has also considered whether a referral in the present case would be needed because of a lack of uniform application of the law. A referral is necessary to ensure uniform application of the law if the Board intends to diverge from a previous interpretation of the EPC provided in a decision of the Boards of Appeal. However in the present case the question proposed for referral does not concern a lack of uniform application of the law by the Boards. The appellant has also not argued that there is divergent case law. The jurisprudence considered above in respect of the requirements of substantiation of an appeal (see point 7.1.3) is consistent and the Board does not intend to deviate from it.

7.2.5 Since none of the conditions set by Article 112(1)(a) EPC is fulfilled, the Board sees no reason to refer the proposed question to the Enlarged

Board of Appeal.

7.3 Objection of lack of inventive step raised with letter of 9 July 2021

7.3.1 The substantiation of the objection of lack of inventive step based on D1 as closest prior art, submitted for the first time by the appellant with letter of 9 July 2021 (section 7), constitutes an amendment of the appellant's appeal case, the admittance of which is subject to the discretion of the Board under Article 13(2) RPBA 2020.

According to this provision an amendment to a party's case shall in principle not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

In the present case, considering that auxiliary request V was dealt with in the decision under appeal and that D1 was also at stake for the opposition proceedings, the Board cannot devise any exceptional circumstance which may justify the submission of that objection at such a late stage, nor did the appellant argue that there were any. In particular, the fact that the appellant's objection would not be complicated constitutes no valid reason to allow the submission of that objection at such a late stage of the proceedings. In addition, although that objection is in disagreement with the opposition division's finding e.g. in respect of the formulation of the problem effectively solved or of the obviousness of the solution, it was not explained why the opposition division would not be correct. Also, no arguments were put forward why such an objection was raised only two months in advance of

the oral proceedings (July 2021), whereby the summons and the Board's preliminary opinion, observing that a substantiation was lacking for that part of the appeal, had been sent to the parties already seven months before (December 2020). Under these circumstances, the appellant's arguments do not constitute cogent reasons in the sense of Article 13(2) RPBA 2020 which would have justified the admittance into the proceedings of the amendment to the appellant's case at such a late stage of proceedings.

- 7.3.2 For these reasons, there are no exceptional circumstances justifying the admittance into the proceedings of the appellant's objection of lack of inventive step starting from D1 as closest prior art which was raised with letter of 9 July 2021 (Article 13(2) RPBA 2020). The objection is therefore not admitted into the proceedings.
- 7.4 In view of the above, there is no need for the Board to revise the part of the decision dedicated to inventive step.
- 8. Since none of the appellant's objections against auxiliary request V is successful, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



H. Jenney

D. Semino

Decision electronically authenticated