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**Datasheet for the decision
of 25 June 2021**

Case Number: T 1573/18 - 3.3.03

Application Number: 09013267.1

Publication Number: 2157104

IPC: C08F10/02, C08F2/14, C08F4/02,
C08F4/654, C08F4/655,
C08F210/16

Language of the proceedings: EN

Title of invention:
Ethylene polymer compositions

Patent Proprietor:
Dow Global Technologies LLC

Opponent:
Borealis AG

Relevant legal provisions:

Keyword:
Absence of contentious issues concerning the new Main Request

Decisions cited:
G 0007/91, G 0008/91, G 0009/91, G 0010/91, G 0001/99



Beschwerdekammern

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Case Number: T 1573/18 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 25 June 2021

Appellant:

(Opponent)

Borealis AG
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Wagramerstrasse 17-19
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Representative:

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Respondent:

(Patent Proprietor)

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Representative:

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 18 April 2018
rejecting the opposition filed against European
patent No. 2157104 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman

D. Semino

Members:

F. Rousseau

C. Brandt

Summary of Facts and Submissions

- I. The appeal by the opponent (appellant) lies against the decision by the opposition division, posted on 18 April 2018, rejecting the opposition against European patent No. 2 157 104.
- II. The patent proprietor (respondent) requested in the reply to the statement of grounds of appeal (letter of 28 December 2018) that the appeal be dismissed (i.e. the opposition be rejected), or alternatively that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of any of Auxiliary Requests 1 to 6 filed with said reply to the statement of grounds of appeal. Contrary to all requests of higher order which included a claim 1 directed to a composition, Auxiliary Request 4 consisted only of process claims 1 and 2.
- III. In its communication of 4 March 2021 issued in preparation for oral proceedings the Board noted, among others, that Auxiliary Request 4 submitted with letter of 28 December 2018 had not been objected to. Accordingly, the Board did not provide any provisional opinion or analysis concerning that request.
- IV. With letter of 21 May 2021 the appellant made additional submissions taking position on the Board's preliminary analysis of the case, but again did not raise any objection against the subject-matter defined in said Auxiliary Request 4 consisting of process claims 1 and 2.
- V. In an additional submission by the respondent made with letter of 16 June 2021, all requests submitted with the

reply to the statement of grounds of appeal were maintained, albeit in a different order, former Auxiliary Request 4 becoming the new Main Request. The correspondence between the auxiliary requests submitted with letter of 16 June 2021 and the claims requests submitted with the reply to the statement of grounds of appeal is not relevant for the present decision.

- VI. The Board in a further communication dated 22 June 2021, but sent in advance by email on 17 June 2021, informed the parties that the Board had no reason to hold the new Main Request inadmissible or unallowable, since the new Main Request was in substance identical to former Auxiliary Request 4 and no objection had been raised against its subject-matter. On that basis the parties were informed of the Board's preliminary view according to which the decision under appeal should be set aside and the case remitted to the department of first instance with an order to maintain the patent on the basis of the Main Request filed with letter of 16 June 2021, after any necessary consequential amendment of the description.
- VII. With a letter of 18 June 2021 and in response to the Board's additional communication, the respondent withdrew their request for oral proceedings on the conditions that the appellant would also withdraw their request for oral proceedings and the case be remitted to the department of first instance with an order to maintain the Patent on the basis of the Main Request of 16 June 2021, after any necessary consequential amendment of the description.
- VIII. With letter of 18 June 2021 and also in response to the Board's additional communication the appellant withdrew their request for oral proceedings under the proviso

that the respondent would maintain the order of their requests.

- IX. Oral proceedings were thereafter cancelled by the Board.

Reasons for the Decision

1. In conformity with the requirements of Article 12(3) RPBA 2020 (transitional provisions in Article 25 RPBA 2020) the respondent explained in detail with their reply to the statement of grounds of appeal (letter of 28 December 2018) why the subject-matter of Auxiliary Request 4 submitted with said letter met the requirements of the EPC (page 18, sections 7.10 to 7.15).

2. The appellant did not raise any objection against the subject-matter of said Auxiliary Request 4 throughout the whole appeal procedure, even after the Board had indicated in its communication sent in preparation for oral proceedings the absence of such objection, or had informed the parties with letter of 22 June 2021, sent in advance by email on 17 June 2021, that it had no reason in the absence of such objections to hold the new Main Request, identical in substance to that former Auxiliary Request 4, inadmissible or unallowable (see above points VI to VIII). In addition, in view of the rejection of the opposition there is no objection accepted by the opposition division which could possibly be equally valid for Auxiliary Request 4, all the more as this request includes only process claims which were never specifically objected to in opposition and appeal proceedings.

3. In view of the judicial character of the *inter partes* appeal procedure proper to an administrative court (G 7/91 and G 8/91 (OJ EPO 1993, 356, 346, point 7 of the Reasons), G 9/91 and G 10/91 (OJ EPO 1993, 408, 420, point 18 of the Reasons) and G 1/99 (OJ EPO 2001, 381, point 6.6 of the Reasons)), which by its very nature is less investigative than an administrative procedure and in which opposing parties should be given equally fair treatment (see G 10/91, loc. cit., point 2), it cannot be expected that the Board investigates whether objections raised against the former Main Request would be likely to prejudice maintenance of the patent on the basis of the new Main Request, corresponding in substance to former Auxiliary Request 4 submitted in reply to the statement of grounds of appeal, and if so provide on its own, an elaborate and full reasoning, substituting itself for the appellant which remained passive as far as the subject-matter of that former Auxiliary Request 4 / new Main Request was concerned, all the more as the opposition was rejected, so that there was no objection against the patent as granted which was considered successful by the opposition division. In the absence of contentious issues concerning the subject-matter of the new Main Request submitted with letter of 16 June 2021 the Board concludes that the new Main Request is allowable.
4. Since the Board was in the position to allow the respondent's Main Request as submitted with letter of 16 June 2021, there was no need to hold oral proceedings as conditionally requested by the parties and to decide on any other issue.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in amended form on the basis of claims 1 and 2 according to the Main Request submitted with letter of 16 June 2021 and after any necessary consequential amendment of the description.

The Registrar:

The Chairman:



B. ter Heijden

D. Semino

Decision electronically authenticated