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**Datasheet for the decision  
of 5 October 2022**

**Case Number:** T 0448/20 - 3.3.03

**Application Number:** 14802774.1

**Publication Number:** 3074462

**IPC:** C08K5/14, C08L23/00, C08L23/26,  
H01B1/00, H01B3/44

**Language of the proceedings:** EN

**Title of invention:**

MOISTURE-AND PEROXIDE-CROSSLINKABLE POLYMERIC COMPOSITIONS

**Patent Proprietor:**

Dow Global Technologies LLC

**Opponent:**

Borealis AG

**Relevant legal provisions:**

RPBA 2020 Art. 13(2)

**Keyword:**

Late-filed objection raised after summons - exceptional  
circumstances (no)

**Decisions cited:**

T 2920/18, T 2988/18, T 0247/20



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Case Number: T 0448/20 - 3.3.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.03**  
**of 5 October 2022**

**Appellant:** Borealis AG  
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**Respondent:** Dow Global Technologies LLC  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
10 December 2019 concerning maintenance of the  
European Patent No. 3074462 in amended form.**

**Composition of the Board:**

**Chairman** D. Semino  
**Members:** M. Barrère  
A. Bacchin

## Summary of Facts and Submissions

- I. The appeal of the opponent lies against the interlocutory decision of the opposition division concerning maintenance of European Patent number 3 074 462 in amended form on the basis of the claims of the main request filed with letter of 15 February 2019 and an adapted description.
- II. The following document was *inter alia* cited in the opposition division's decision:

D1: US 4,252,906
- III. In that decision the opposition division held, among others, that the subject-matter of claim 1 of the main request, which related to a crosslinkable polymeric composition, involved an inventive step over D1 as the closest prior art. The same applied to all further claims, including in particular claim 5 and claims 6-8 dependent thereon, which related to a process for producing a crosslinked polymeric composition. No detailed analysis was performed for any of these further claims.
- IV. The opponent (appellant) filed an appeal against said decision.
- V. With the rejoinder to the statement of grounds of appeal, the patent proprietor (respondent) filed a main request, which corresponded to the main request on which the decision under appeal was based, as well as auxiliary requests 1, 1A, 1B, 1C, 2, 2A, 2B, 2C, 3, 3A, 3B, 3C, 4, 4A, 4B, 4C, 5, 5A, 5B, 5C, 6, 6A, 6C, 7, 7A,

7C, 8, 8A, 8C, 9, 9A, 9C, 10, 10A, 10C, 11, 11A, 11C, 12, 12A, 12B and 12C.

- VI. The parties were summoned to oral proceedings with the notification of 6 December 2021 and a communication pursuant to Article 15(1) RPBA 2020 was sent to the parties, where among others it was noted that no objections had been raised against auxiliary request 6, which included only process claims (point 8 of the communication).
- VII. With letter of 25 July 2022, the respondent filed a new main request corresponding to previous auxiliary request 6 and reordered the remaining requests filed with the rejoinder.
- VIII. With letter dated 5 September 2022, the appellant raised an objection under Article 56 EPC against claim 1 of the new main request over document D1 as the closest prior art.
- IX. Oral proceedings were held before the Board on 5 October 2022.
- X. The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested that the appealed decision be set aside and the patent be maintained on the basis of the claims of the new main request filed with letter of 25 July 2022 or of one of the following requests, filed with the reply to the statement of grounds of appeal, in the following order: auxiliary requests 6A, 6C, 7, 7A, 7C, 8, 8A, 8C, 9, 9A, 9C, 10, 10A, 10C, 11, 11A, 11C, 12, 12A, 12B, 12C, the main request (new auxiliary

request 7), auxiliary requests 1, 1A, 1B, 1C, 2, 2A, 2B, 2C, 3, 3A, 3B, 3C, 4, 4A, 4B, 4C, 5, 5A, 5B, 5C.

XI. Claim 1 of the new main request, which included only process claims, read as follows:

"1. A process for producing a crosslinked polymeric composition, said process comprising:

(1) forming a crosslinkable polymeric composition comprising (a) a polyolefin having hydrolyzable silane groups, (b) an organic peroxide, and (c) a silanol condensation catalyst selected from the group consisting of Bronsted acids;

(2) subjecting said crosslinkable polymeric composition to conditions sufficient to induce crosslinking in at least a portion of said crosslinkable polymeric composition via said organic peroxide; and

(3) subjecting said crosslinkable polymeric composition to conditions sufficient to induce crosslinking in at least a portion of said crosslinkable polymeric composition via said hydrolyzable silane groups and said silanol condensation catalyst, thereby producing said crosslinked polymeric composition;

wherein said polyolefin having hydrolyzable silane groups is present in an amount in the range of from 96 to 99.49 weight percent based on the entire weight of components (a) through (c); wherein said organic peroxide is present in an amount in the range of from 0.5 to 3 weight percent based on the entire weight of components

(a) through (c); wherein said crosslinkable polymeric composition comprises said silanol condensation catalyst; wherein said silanol condensation catalyst is present in an amount in the range of from 0.01 to 1 weight percent based on the entire weight of components (a) through (c); wherein said crosslinkable polymeric composition further comprises (d) up to 5 parts per hundred of one or more additives selected from the group consisting of cure boosters, scorch retardants, tree retardants, heat and light stabilizers, fillers, pigments, and antioxidants, based on 100 weight parts of said polyolefin;

wherein said conditions sufficient to induce crosslinking via said hydrolyzable silane groups and said silanol condensation catalyst include contacting at least a portion of said crosslinkable polymeric composition with water, wherein said water is generated in situ." (emphases here and below added by the Board)

Dependent claim 7 of new auxiliary request 7 (corresponding to the main request on which the decision was based) read as follows:

"7. The process of either claim 5 or claim 6, wherein said conditions sufficient to induce crosslinking via said hydrolyzable silane groups and said silanol condensation catalyst include contacting at least a portion of said crosslinkable polymeric composition with water, wherein said water is either generated in situ or provided from an external environment."

The other claims of the new main request as well as the claims of the auxiliary requests are not relevant to this decision.

XII. The appellant's submissions, in so far as they are pertinent to the present decision, may be derived from the reasons for the decision below. They were essentially as follows:

**(a) New main request**

**(i) Objection of lack of inventive step**

The objection of lack of inventive step against claim 1 over document D1 as the closest prior art was already present in the statement of grounds of appeal and should therefore be admitted into the proceedings.

XIII. The respondent's submissions, in so far as they are pertinent to the present decision, may be derived from the reasons for the decision below. They were essentially as follows:

**(a) New main request**

**(i) Objection of lack of inventive step**

The objection of lack of inventive step against claim 1 over document D1 as the closest prior art was a new objection raised after notification of a summons to oral proceedings and should therefore not be admitted into the proceedings.

## **Reasons for the Decision**

### **New main request**

It was not disputed that the only objection raised by the appellant against the new main request was an objection of lack of inventive step against claim 1 over document D1 as the closest prior art.

1. Admittance of the objection of lack of inventive step
  - 1.1 The respondent considers that the objection of lack of inventive step was raised for the first time after notification of a summons to oral proceedings. Hence this objection should not be admitted as no reason had been provided for raising this objection at this stage of the appeal proceedings.
  - 1.2 Article 13(2) RPBA 2020 provides that amendments to a party's case made after notification of oral proceedings are not to be taken into account unless exceptional circumstances, justified by cogent reasons, exist.

The Board concurs with the approach taken in several decisions (T 247/20, point 1.3 of the Reasons; T 2988/18, point 1.2 of the Reasons; T 2920/18, point 3.4 of the Reasons), according to which the examination under Article 13(2) RPBA 2020 is carried out in two steps. The question to be answered in the first step is whether the submission objected to is an amendment to a party's appeal case. If that question is answered in the negative, then the Board has no discretion not to take the submission into account. If, however, that question is answered in the positive, then the Board needs to decide whether there are exceptional



circumstances, justified by cogent reasons (second step).

- 1.3 The first question to be answered by the Board is therefore whether the objection of lack of inventive step against the present main request constitutes an amendment of the appellant's case.

An amendment to a party's appeal case under Article 13 RPBA 2020 is in analogy with Article 12(4) RPBA 2020 (with reference to Article 12(2) RPBA 2020) a submission which is not directed to the requests, facts, objections, arguments and evidence relied on by the party in its statement of grounds of appeal or its reply. In other words: it goes beyond the framework established therein (see T 247/20, point 1.3 of the Reasons; see also Case Law of the Boards of Appeal, 10th edition 2022, V.A.4.2.2 m)).

The appellant considered that claim 1 of the new main request was obvious in view of D1 as the closest prior art.

- (a) In the appellant's view this objection is not an amendment of the appeal case. Objections of lack of inventive step over D1 were raised in the statement of grounds of appeal (see paragraphs 83 to 136). The appellant's position is unchanged. The closest prior art, the experimental data and the arguments are the same. While the statement of grounds of appeal mainly focused on the product claims, it is clear that the objections raised therein also apply to the process claims of the new main request. The appellant finally added that in paragraphs 125 to 128 of the grounds of appeal, the process claims of the main request as maintained by the opposition

division including in particular claim 7 were addressed.

- (b) Claim 1 of the present main request is directed to a process for producing a crosslinked polymeric composition characterised *inter alia* in that the crosslinking is induced by contacting at least a portion of a crosslinkable polymeric composition with water, wherein said water is generated *in situ* (hereinafter the new process feature).

It is not disputed that the *in situ* generation of water is a limiting process feature of claim 1 which was one of two embodiments present in claim 7 of the main request decided upon by the opposition division. Indeed claim 7 of that main request included two options, namely water generated *in situ* or provided from an external environment (see point XI. above). With letter dated 5 September 2022 the appellant explained in details why, in their view, the process of claim 1 including the new process feature was obvious in view of D1 as the closest prior art (see paragraphs 19 to 49 of the appellant's submissions).

- (c) In the Board's view the objection against the new process feature finds no basis in the contested decision or in the statement of grounds of appeal. While claim 7 of the main request decided upon by the opposition division was addressed in paragraphs 28, 125 and 128 of the statement of grounds of appeal, the specific embodiment of claim 7 which is the basis for the new process feature was not discussed by the appellant. Indeed the submissions in the statement of grounds of appeal only concern the second option of claim 7 (water provided from

an external environment) and do not relate to the first option to which claim 1 of the new main request is limited (water generated *in situ*).

Furthermore, although the advantage of having no added moisture in the crosslinkable composition was briefly discussed in paragraph 111, no objection was raised against the new process feature. Indeed, as mentioned above, the statement of grounds of appeal only addresses a different embodiment of claim 7 in which water is provided from an external environment but not generated *in situ* (see in particular paragraph 28 in the discussion of novelty). Thus the objection of lack of inventive step raised on 5 September 2022 against claim 1 of auxiliary request 6 (corresponding to the new main request) necessarily involved new facts.

For these reasons, the objection put forward by the appellant in their letter dated 5 September 2022 involved new facts and cannot be inferred from the statement of grounds of appeal or from the contested decision (see point III. above). Nor is there any reason to regard this new objection as a mere development of the original objection to the process claims. Consequently the objection of lack of inventive step against the new main request constitutes a change of the factual and legal framework of the appeal and is therefore an amendment of the appellant's case within the meaning of Article 13(2) RPBA 2020.

- 1.4 The second question to be answered is whether there are exceptional circumstances, supported by cogent reasons, which justify the admittance of the present objection against claim 1 into the appeal proceedings.

- (a) According to the appellant, the new main request was introduced by the respondent with the letter of 25 July 2022. This late filing justified that the appellant raised an objection at a late stage. Furthermore, a party could not be expected to cover all possible embodiments disclosed in the set of claims maintained by the opposition division.
- (b) The Board cannot follow the justification of the appellant for the following reasons:

Contrary to the appellant's view, the new main request is not a new request since it was filed as auxiliary request 6 with the rejoinder of the respondent (letter of 8 September 2020) and furthermore corresponded to auxiliary request 7 as filed during opposition proceedings (with letter of 21 October 2019). Therefore, the appellant could not be surprised by the subject-matter of claim 1 of the new main request.

While the board accepts that, at the time of filing the statement of grounds of appeal, the appellant had no reason to address in such detail the dependent claims, as they had to attack the appealed decision, it was the appellant's duty to file a response to the rejoinder (in which the respondent defended inventive step of auxiliary request 6) soon after its receipt, if they intended to object to it, and not to do that two years later at a point in time (after the summons to oral proceedings and the communication of the Board) in which stricter rules apply (Article 13(2) RPBA 2020).

Consequently the appellant's new objection cannot be regarded as a timely reaction to a change of circumstances, as required by the Rules of Procedure of the Boards of Appeal.

(c) For these reasons, the Board cannot recognise any exceptional circumstances justifying the admittance of the new objection into the proceedings.

- 1.5 Hence, the objection of lack of inventive step is not admitted into the proceedings (Article 13(2) RPBA 2020).
2. In the absence of any further objection, the patent can be maintained on the basis of the claims of the new main request.
3. The new main request being allowable there is no need for the Board to consider any of the auxiliary requests.

## 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 the claims of the new main request filed with letter of 25 July 2022 and a description to be adapted thereto.

The Registrar:

The Chairman:



D. Hampe

D. Semino

Decision electronically authenticated