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**Datasheet for the decision  
of 25 November 2022**

**Case Number:** T 0907/20 - 3.3.03

**Application Number:** 13713186.8

**Publication Number:** 2831167

**IPC:** C08L23/08, C08F2/00,  
C08F210/16, C08J5/18

**Language of the proceedings:** EN

**Title of invention:**  
MULTIMODAL POLYMER

**Patent Proprietor:**  
Borealis AG

**Opponent:**  
Basell Polyolefine GmbH

**Relevant legal provisions:**  
EPC Art. 54, 123(2), 56  
RPBA 2020 Art. 13(2)

**Keyword:**  
Novelty - main request (no)  
Amendment after summons - exercise of discretion  
Amendments - extension beyond the content of the application  
as filed (no)  
Inventive step - auxiliary request (yes)

**Decisions cited:**

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



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Case Number: T 0907/20 - 3.3.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.03**  
**of 25 November 2022**

**Appellant:** Basell Polyolefine GmbH  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
7 February 2020 concerning maintenance of the  
European Patent No. 2831167 in amended form.**

**Composition of the Board:**

**Chairman** D. Semino  
**Members:** M. Barrère  
W. Ungler

## 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 2 831 167 in amended form on the basis of the claims of auxiliary request 4 filed with letter of 4 October 2019 and an adapted description.
- II. The following documents were *inter alia* cited in the opposition division's decision:
- D2: WO2006/092378 A1  
D3: WO2006/092377 A1  
D4: WO2010/139419 A2
- III. In that decision the opposition division held, among others, that:
- The subject-matter of auxiliary request 4 was novel over D2.
  - The subject-matter of auxiliary request 4 involved an inventive step over D2 or D3 as the closest prior art, even in the light of D4.
- 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 five sets of claims as auxiliary requests 1 to 5.

- VI. A communication under Article 15(1) RPBA 2020 was issued which contained the preliminary opinion of the Board.
- VII. With letter of 8 July 2022 the respondent filed five further sets of claims as auxiliary requests 1 to 5 replacing the previous auxiliary requests. In particular auxiliary request 1 corresponded to auxiliary request 3 filed with the rejoinder to the statement of grounds of appeal.
- VIII. Oral proceedings were held before the Board on 25 November 2022.
- IX. The final requests of the parties were as follows:
- (a) The appellant requested that the decision under appeal be set aside and the patent be revoked.
  - (b) The respondent 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 to 5 filed with letter of 8 July 2022.
- X. Claim 1 of auxiliary request 4 dealt with by the opposition division (main request of the respondent) read as follows:
- "1. A multimodal ethylene copolymer with a density of at least  $940 \text{ kg/m}^3$  having an  $\text{MFR}_{21}$  in the range of 1 to 30 g/10min, an  $\text{MFR}_5$  in the range of 0.6 to 2 g/10min and a  $F_{\text{max}}/\lambda_I$  ratio of less than 60 cN/s;
- said ethylene copolymer comprising at least three components

(I) an ethylene and optionally at least one C3-20 alpha olefin comonomer component forming 30 to 60 wt% of said ethylene copolymer;

(II) an ethylene and optionally at least one C3-20 alpha olefin comonomer second component forming 30 to 60 wt% of said ethylene copolymer;  
and

(III) an ethylene and at least one C3-20 alpha olefin comonomer third component forming 3 to 20 wt% of said ethylene copolymer."

Claim 1 of auxiliary request 1 differed from claim 1 of the main request in that the copolymer had:

"an MFR<sub>5</sub> in the range of 0.6 to 2 g/10min (**measured on pellets**)" (addition compared to claim 1 of the main request in **bold**).

The remaining claims of these requests are not relevant to this decision. It is merely pointed out that they all referred to claim 1.

Auxiliary requests 2 to 5 are not relevant to this decision.

XI. 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) Main request

(i) Novelty

The subject-matter of claim 1 of the main request lacked novelty over D2.

(b) Auxiliary request 1

(i) Article 123(2) EPC

- Admittance

The objection under Article 123(2) EPC was not an amendment of the appellant's case.

- Objection

Claim 1 of auxiliary request 1 did not comply with the requirement of Article 123(2) EPC.

(ii) Inventive step

The subject-matter of claim 1 of auxiliary request 1 did not involve an inventive step over D2 or D3 as the closest prior art.

XII. 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) Main request

(i) Novelty

The subject-matter of claim 1 of the main request was novel over D2.

(b) Auxiliary request 1

(i) Article 123(2) EPC

- Admittance

The objection under Article 123(2) EPC was late-filed and should not be admitted into the proceedings.

- Objection

Claim 1 of auxiliary request 1 met the requirement of Article 123(2) EPC.

(ii) Inventive step

The subject-matter of claim 1 of auxiliary request 1 involved an inventive step over D2 or D3 as the closest prior art.

## **Reasons for the Decision**

### **Main request (auxiliary request 4 before the opposition division)**

1. Novelty over D2

1.1 Claim 1 is directed to a multimodal ethylene copolymer characterised *inter alia* by the following properties:

(i) an MFR<sub>21</sub> (melt flow rate measured under 21.6 kg load) in the range of 1 to 30 g/10min,

(ii) an MFR<sub>5</sub> (melt flow rate measured under 5 kg load) in the range of 0.6 to 2 g/10min and



(iii) a  $F_{\max}/\lambda_I$  ratio of less than 60 cN/s.

1.2 In the contested decision, the opposition division held that example 1 of D2 did not disclose a multimodal copolymer characterised by a  $MFR_5$  of the pellets of 0.6 to 2 g/10min (emphases here and below added by the Board). On that basis the subject-matter of claim 1 was novel over D2. However, all other features of claim 1 were considered to be disclosed in example 1 of D2.

The appellant contests the findings of the opposition division in view of property (ii) (i.e.  $MFR_5$ ) while the respondent holds that properties (i) and (iii) are not disclosed in example 1 of D2.

1.3 Properties (i) and (iii)

The opposition division considered that the multimodal copolymer of example 1 of D2 was implicitly characterised by properties (i) and (iii).

The respondent contests the findings of the opposition division but does not provide any factual argument why the decision in this respect was not correct (see rejoinder to the statement of grounds of appeal, points 11 and 12).

In the absence of any factual argument, the respondent's submissions do not give the Board any reason to deviate from the conclusions of the opposition division with regard to properties (i) and (iii) (see contested decision, points 11.3.4 and 11.3.5 of the reasons).

1.4 Property (ii)

- 1.4.1 According to the appellant, claim 1 does not specify that the MFR<sub>5</sub> has to be measured on pellets. In view of the fact that example 1 of D2 discloses a multimodal copolymer having a MFR<sub>5</sub> of 0,65 g/10min (when leaving the third reactor), a multimodal copolymer characterised by property (iii) would be disclosed in this document.
- 1.4.2 The respondent takes the view that the MFR<sub>5</sub> as defined in claim 1 is the MFR of a pelletised copolymer and not the MFR of a copolymer leaving the reactor. Indeed claim 1 should be construed in the light of the description and in the light of the common general knowledge of the skilled person. The MFR of commercial ethylene copolymers is conventionally measured after extrusion and pelletisation. Likewise it would be clear in table 1 of the opposed patent that the MFR of the copolymer is measured after pelletisation and not directly after the last polymerisation step. The same would apply to D2 (see claim 1). Moreover, this would be the only technically sensible interpretation of present claim 1.
- 1.4.3 In the Board's view, claim 1 does not specify whether the MFR<sub>5</sub> is to be measured on the pelletised copolymer or on the copolymer in any other form. Already for that reason, the Board does not consider, based on the wording of claim 1 alone, that the MFR<sub>5</sub> should necessarily be measured on the polymer after pelletisation.

The respondent contended that claim 1 should be interpreted in the light of the description which would teach that the MFR<sub>5</sub> is to be measured on pellets. In the present case, it was not contested by the parties

that the MFR<sub>5</sub> parameter was clear. According to established case law, if a term used in a claim has a clear technical meaning, the description cannot be used to interpret such a term in a different way (see Case Law of the Boards of Appeal, 10th edition 2022, II.A.6.3.1). Nevertheless even if the description could be used to interpret the MFR<sub>5</sub> feature (which is not the Board's position), the specification of the MFR method in the opposed patent is not restricted to the pelletised material (see paragraph [0113]).

The respondent argued that the skilled person would only construe claim 1 as requiring that the MFR measurement be carried out after extrusion and pelletisation. This is however in clear contradiction with D2 and the opposed patent which both show that the MFR properties are also measured on (intermediate) copolymers before pelletisation (see table 1 of D2 and of the opposed patent). The Board does not dispute that the pelletised copolymer (as the final commercial product) is usually the product of interest. However, claim 1 is not limited to a final product and it is not uncommon for intermediate products to be claimed. Therefore, the Board has no reason to consider that the MFR<sub>5</sub> of claim 1 should only be measured on pelletised material.

Example 1 of D2 (see table 1) discloses a copolymer having a MFR<sub>5</sub> value of 0.65 g/10 min (measured on the non pelletised copolymer leaving the third reactor) corresponding to a MFR<sub>5</sub> as defined in claim 1. Property (iii) is therefore disclosed in example 1 of D2 as well.

As the remaining features of claim 1 are not contested, the Board comes to the conclusion that claim 1 lacks

novelty over the non pelletised material of example 1 of D2.

### **Auxiliary request 1**

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the MFR<sub>5</sub> is measured on pellets.

#### 2. Article 123(2) EPC

With letter of 23 September 2022, the appellant raised an objection under Article 123(2) EPC against claim 1 of auxiliary request 1. In summary, it was argued that the opposed patent provided no basis for a composition according to claim 1 wherein the MFR<sub>5</sub> (in the range of 0.6 to 2 g/10min) was measured on pellets.

#### 2.1 Admittance

2.1.1 The respondent considers that the objection under Article 123(2) EPC was raised for the first time after notification of the summons to oral proceedings. Hence this objection should not be admitted as no reason had been provided for raising it at this stage of the appeal proceedings.

2.1.2 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 affirmative, then the Board needs to decide whether there are exceptional circumstances, justified by cogent reasons (second step).

- 2.1.3 The first question to be answered by the Board is therefore whether the objection under Article 123(2) EPC against auxiliary request 1 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)).

As pointed out previously, the appellant takes the view that the opposed patent provides no basis for a composition according to claim 1 wherein the MFR<sub>5</sub> in the range of 0.6 to 2 g/10min is measured on pellets.

- (a) According to the appellant, the present objection is not an amendment of the appeal case because it

can be derived from the statement of grounds of appeal.

- (b) The Board notes that the appellant put forward the following argument in its statement of grounds of appeal:

*"In conclusion, given that it is known and justified to measure the MFR on polymer powders, and that the opposed patent does not provide any express or implicit limitation to a measurement made on pellets, there is no substantive reason to conclude that the claims of the opposed patent should be limited to MFR values exclusively measured on pellets."* (see page 7, second paragraph)

Although the above argument was presented in the context of novelty of the main request, the Board can derive therefrom that the appellant disputed that the patent provided any basis for the measurement of MFR<sub>5</sub> on pellets as now present in claim 1 of auxiliary request 1. For this reason, the objection put forward by the appellant in their letter dated 23 September 2022 can be inferred from the statement of grounds of appeal.

Consequently the objection under Article 123(2) EPC against auxiliary request 1 does not constitute a change of the factual and legal framework of the appeal and is therefore not an amendment of the appellant's case within the meaning of Article 13(2) RPBA 2020.

The Board has therefore no discretion not to take the present objection into account.

2.2 Merit of the objection

2.2.1 According to the appellant the only reference that the  $MFR_5$  is measured on pellets is in table 1 of the application as filed which relates to specific examples. However this specific disclosure could not be generalised to any composition as set out in claim 1 of auxiliary request 1. Moreover the examples would disclose at least two ways of measuring the  $MFR_5$ : either before or after pelletisation. Thus the application as filed would provide no direct and unambiguous basis for a composition according to claim 1 wherein the  $MFR_5$  is measured on pellets, contrary to the requirement of Article 123(2) EPC.

2.2.2 Albeit the contested feature (measurement on pellets) is only disclosed in the examples, the respondent holds that the said feature is not linked to other features and can be applied to any part of the application as filed.

2.2.3 The Board notes that the  $MFR_5$  of the final multimodal copolymer disclosed in the examples of the application as filed is measured only on pellets (see table 1). Contrary to the appellant's view, the other  $MFR_5$  data provided in table 1 concern an intermediate material obtained after the first gas phase reactor (GPR1) but not the claimed multimodal copolymer.

Furthermore, the Board agrees with the respondent that the measurement of the  $MFR_5$  on pellets is a feature which is not linked to any other specific feature of the multimodal ethylene copolymer of the examples. Hence the skilled person directly derives from the examples that the  $MFR_5$  of any polymer described in the

the application as filed can generally be measured on pellets. In other words, the new feature of operative claim 1 is not limited to the examples but can be generalised to the whole disclosure of the application as filed.

2.2.4 Consequently, the appellant's objection gives no reason for the Board to hold that claim 1 of auxiliary request 1 does not comply with Article 123(2) EPC.

### 3. Inventive step

The appellant submitted that claim 1 of auxiliary request 1 lacked an inventive step over D2 or D3 as the closest prior art.

#### 3.1 Closest prior art and distinguishing feature

The parties agreed that:

D2 or D3 may be selected as the closest prior art for the subject-matter of present claim 1 and

claim 1 differs from example 1 of D2 or D3 in that

i) the  $MFR_5$  (measured on pellets) of the copolymer is in the range of 0.6 to 2 g/10min (instead of 0.39 and 0.19 g/10min respectively for example 1 of D2 and D3).

The Board has no reason to deviate from the view of the parties.

#### 3.2 Objective problem to be solved



3.2.1 According to the appellant, D2 and D3 suggested that the MFR<sub>5</sub> of the copolymer may be increased to 0.50 g/10min (see claim 1 of D2 and D3). The opposed patent did not show an effect linked to the difference of the MFR<sub>5</sub> between 0.50 and 0.6 g/10min (lower limit in present claim 1). Instead the only relevant comparative example of the opposed patent was characterised by a MFR<sub>5</sub> of 0,1 g/10min which was not suitable to demonstrate a technical effect over D2 or D3 (see example E1 of the patent in suit).

The appellant further pointed out that the subjective problem to be solved in the opposed patent was to provide a film forming copolymer having a good bubble stability during film blowing. However the opposed patent would provide no evidence that the bubble stability is improved if a copolymer according to claim 1 is used.

Therefore the objective problem to be solved should be formulated as the provision of an alternative copolymer having good processability.

3.2.2 According to the respondent, the examples of the opposed patent are suitable to show that copolymers according to claim 1 exhibit a high throughput and bubble stability without the need to increase the temperature and pressure during film blowing.

3.2.3 For the Board the first question to be answered is whether the examples of the opposed patent are suitable to show an effect over D2 or D3 as the closest prior art.

As noted by the appellant, the copolymer of example E1 of the opposed patent is characterised by a MFR<sub>5</sub> of

0.12 g/10min. Both D2 and D3 cover copolymers having a MFR<sub>5</sub> of 0.10 to 0.50 g/10min. Therefore, example E1 is representative of the disclosure of D2 and D3.

Conversely examples E2 and E3 of the patent concern multimodal copolymers with an MFR<sub>5</sub> of respectively 0.76 and 0.7 g/10min. The Board is thus of the opinion that these two examples are representative of the copolymers as defined in present claim 1. Therefore, the comparison between example E1 on one side and examples E2 and E3 on the other side is suitable to show an effect over D2 and D3 which is linked to the above distinguishing feature.

- 3.2.4 The second question to be answered is whether a technical effect can be derived from the comparison of example E1 (representative of D2 and D3) with examples E2 and E3 (representative of a copolymer according to claim 1 of auxiliary request 1).

In the present case, it can be derived from table 3 of the opposed patent that the copolymers of examples E2 and E3 can be processed at lower pressure and temperature than the copolymer of example E1. Furthermore, the material output can be increased to 120 kg/hour in examples E2 and E3 (but not in example E1 because the processing pressure would be too high).

Consequently based on examples E1 to E3 of the patent, it is credible that the effects of increasing the MFR<sub>5</sub> to the range of 0.6 to 2 g/10 min are a reduction of the processing temperature and pressure and an increase of the film blowing throughput.

- 3.2.5 The objective problem solved is therefore the provision of a multimodal ethylene copolymer which allows a

reduction of the processing temperature and pressure and an increase of the film blowing throughput.

### 3.3 Obviousness

It remains to evaluate whether it was obvious for a man skilled in the art wishing to reduce the processing temperature and pressure and to increase the film blowing throughput to increase the MFR<sub>5</sub> of the copolymer of D2 or D3 within a range of 0.6 to 2 g/10 min.

3.3.1 The appellant is of the opinion that, in view of D2 to D4, it was obvious for the skilled person to slightly increase the MFR<sub>5</sub> (pellets) of the copolymers of D2/D3. In particular, based on the comparison between examples 2 and 3 of D2, it would be clear that increasing the MFR<sub>5</sub> leads to a reduction of the processing temperature and pressure as well as an increased output. The same conclusion would be reached by comparing example 2 of D2 with example 2 of D3. Furthermore, the relationship between MFR, processing conditions and film blowing output was part of the skilled person's common general knowledge.

3.3.2 In the respondent's view, D2 and D3 taught an MFR<sub>5</sub> range which is completely outside the range recited in claim 1. Hence the above distinguishing feature could not be obvious in view of D2 or D3. In fact D2 and D3 would teach away from the present invention. Indeed a problem to be solved in D2 and D3 was to improve the film mechanical properties and in particular the Dart Drop Impact strength (DDI). The comparison between D2 and D3 would lead the skilled person towards the examples of D3 having improved DDI which are the ones with a lower MFR<sub>5</sub>.

Finally, D4 would not address the same problem as the technical problem underlying the opposed patent. Thus, there would be no reason to use D4 in order to bridge the gap between the technical teaching of D2 (or D3) and the subject-matter of claim 1.

3.3.3 For the Board, it needs to be evaluated whether the skilled person starting from D2 or D3 would have increased the MFR<sub>5</sub> (pellets) to at least 0.6 g/10 min in order to solve the above problem.

(a) Obviousness of the solution in view of D2 and D3:

Firstly, as pointed out by the respondent, the copolymers of D2 and D3 are limited to those having an MFR<sub>5</sub> (pellets) of at most 0.50 g/10 min (see claim 1 of D2 and D3).

Secondly, contrary to the appellant's view, the comparison of examples 2 and 3 of D2 does not allow to come to the conclusion that the MFR<sub>5</sub> of the copolymer should be increased. Indeed example 3 of D2 is a commercial product with the reference FS1560 which is, according to the opposed patent, a bimodal copolymer characterised by an MFR<sub>5</sub> (pellets) of 0,3 g/10min (see paragraph [0149] and table 2 of the opposed patent). However, considering that the copolymer of example 2 of D2 is trimodal, the Board considers that a direct comparison with the bimodal commercial product FS1560 is not possible (at least not to draw a conclusion on the effect of the MFR alone).

Thirdly, the comparison between example 2 of D2 and example 2 of D3 does not lead to a different conclusion. Should a direct comparison between D2 and

D3 be possible (which is not necessarily the Board's position), it is pointed out that the comparison shows that the DDI of the film drops significantly when the MFR<sub>5</sub> of the copolymer increases (see tables 1 and 2 of D2 and D3). As both D2 and D3 focus on films with good mechanical strength (particularly in terms of DDI), the comparison of D2 and D3 teaches away from further increasing the MFR<sub>5</sub> of the copolymer (see D2, page 1, lines 30 to 32 and D3, page 1, lines 31 and 32).

Therefore, based on D2 and D3 alone, the skilled person would have no incentive to increase the MFR<sub>5</sub> above 0.6 g/10min in order to solve the above problem.

(b) Obviousness of the solution in view of D4:

D4 relates to polyethylene composition having a MFR<sub>5</sub> of 0.25 to 3 g/10 minutes (see claim 1 of D4). However it is not mentioned whether the MFR<sub>5</sub> is measured on pellets or not. Furthermore, D4 neither addresses the above technical problem nor gives a hint at the technical solution (MFR<sub>5</sub> (pellets) between 0.6 and 2 g/10min).

Thus, D4 provides no reason for the skilled person to increase the MFR<sub>5</sub> (while maintaining the other properties of the copolymers of D2 and D3) in order to solve the above problem.

(c) Obviousness based on common general knowledge

The parties do not contest that the effect of the an MFR increase on the processing properties of a copolymer or the output of a blown film process was known in the present technical field (see opposed patent, paragraph [0004]). However the skilled person

is also aware that the MFR cannot be freely increased without experiencing adverse effects. As a matter of example, it is notorious that a polymer with a high MFR (i.e. a low viscosity) should be easy to process in an extruder however the mechanical properties of the final product will be negatively affected. This is why the prior art teaches that there is a trade-off between for instance the processability and the mechanical properties (see D2, page 1, lines 22 to 25).

The opposed patent shows that the MFR<sub>5</sub> may be increased to at least 0.6 g/10min while providing a copolymer which can be easily processed by film blowing. Furthermore films obtained from copolymers according to claim 1 have acceptable properties (see opposed patent, table 4).

In view of the common general knowledge, the Board considers that the skilled would have no reason to expect that an increase of the MFR going beyond the range of 0.1 to 0.5 g/10min disclosed in D2 and D3, could still lead to a copolymer which is at the same time processable and leads to an acceptable film.

- 3.4 For these reasons, the subject-matter of claim 1 of auxiliary request 1 involves an inventive step over D2 or D3 as the closest prior art.
4. As all of the objections of the appellant against auxiliary request 1 fail, the patent is to be maintained on the basis of the said request.

## 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 auxiliary request 1 filed with letter of 8 July 2022 and after any necessary consequential amendments of the description.

The Registrar:

The Chairman:



D. Hampe

D. Semino

Decision electronically authenticated