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**Datasheet for the decision  
of 24 October 2023**

**Case Number:** T 0818/21 - 3.3.03

**Application Number:** 16725494.5

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**IPC:** B29C47/00, B65D53/06,  
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B29C47/08, B29C47/30

**Language of the proceedings:** EN

**Title of invention:**  
POLYOLEFIN GASKETS FOR CLOSURES

**Patent Proprietor:**  
Basell Poliolefine Italia S.r.l.

**Opponent:**  
ACTEGA DS GmbH

**Relevant legal provisions:**  
EPC Art. 100(b), 54, 56  
EPC R. 4(5), 101(1)  
RPBA 2020 Art. 12(6), 13(1), 15a(1)

**Keyword:**

Admissibility of appeal (yes)

Late-filed evidence - should have been submitted in first-  
instance proceedings (yes) - admitted (no)

Late-filed objection - admitted (no)

Grounds for opposition - insufficiency of disclosure (no)

Novelty - (yes)

Inventive step - (yes)

Language in oral proceedings - interpretation requested but  
not needed - unnecessary costs and loss of resources - need to  
observe technical guidelines for oral proceedings by  
videoconference



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Case Number: T 0818/21 - 3.3.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.03**  
**of 24 October 2023**

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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 25 May 2021  
rejecting the opposition filed against European  
patent No. 3302918 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** D. Semino  
**Members:** O. Dury  
R. Cramer

## Summary of Facts and Submissions

I. The appeal of the opponent is against the decision of the opposition division rejecting the opposition filed against European patent No. 3 302 918.

II. The following documents were *inter alia* cited in the decision under appeal:

D3: EP 0 306 777 B1

D4: EP 2 270 089 B1

D5: CN 2013 8004 7247

D5a: English translation of D5

D6: EP 2 631 271 A1

D7: JP 49 23 330 B2

D7a: German translation of D7

D8: C. De Rosa et al., *Macromolecules*, 2014, 47, pages 4317-4329

D9: Declaration by Dr. Rüdiger Wittenberg, dated 27 January 2021

D10: Declaration by R. Marchini, dated 19 March 2021

III. In the decision under appeal, the following conclusions, which are relevant for the present case, were reached in respect of the patent as granted:

- The requirements of sufficiency of disclosure were met;
- The subject-matter being claimed was novel over the disclosure of each of D3, D4 and D5/D5a;

- D6 was the document to be taken as the closest prior art and an inventive step was acknowledged starting from D6.

For these reasons, the opposition was rejected.

IV. The opponent (appellant) filed an appeal against the above decision and filed a statement of grounds of appeal with letter of 24 September 2021, completed by submissions made with letter of 30 September 2021. Together with the latter, the following document was filed:

D11: Second declaration by Dr. Rüdiger Wittenberg,  
dated 27 September 2021

V. With their rejoinder to the statement of grounds of appeal (submission dated 4 February 2022) the patent proprietor (respondent) filed five sets of claims as auxiliary requests I to V.

VI. With letters of 15 March 2022 and 12 April 2022, the appellant filed two technical reports, respectively dated 7 February 2022 and 28 February 2022 as well as datasheets of various "Koattro" polymers used in these reports. In addition, the following document was filed:

D12: DIN EN ISO 11357-3

VII. The parties were summoned to oral proceedings and a communication pursuant to Article 15(1) RPBA was then issued by the Board.

VIII. Further submissions were made by the appellant with letter of 6 June 2023 and by the respondent with letter

of 14 July 2023.

IX. Oral proceedings were held on 24 October 2023 in the presence of both parties (videoconference).

X. **The final requests of the parties were as follows:**

(a) The appellant requested that the decision under appeal be set aside and that the patent be revoked.

(b) The respondent requested that the appeal be rejected as inadmissible. Should the appeal be held admissible, the respondent requested that it be dismissed or, in the alternative, that the patent be maintained in amended form according to the claims of any of auxiliary requests I to V filed with their rejoinder to the statement of grounds of appeal.

XI. Claims 1 and 8 to 10 of the **patent as granted (i.e. the operative main request)**, which are the sole claims relevant for the present decision, read as follows:

"1. A gasket for closures comprising a polyolefin composition (I) containing:

A) from 25 to 62% by weight, preferably from 30 to 61% by weight, of a copolymer of butene-1 with ethylene having a copolymerized ethylene content of up to 18% by mole and no melting peak detectable at the DSC at the second heating scan;

B) from 38 to 75% by weight, preferably from 39 to 70% by weight, of (i) a propylene homopolymer, or (ii) a propylene copolymer, or (iii) a mixture of two or more of (i) and (ii), having a melting

temperature  $T_m$ , measured by DSC at the second heating scan, of from 130°C to 165°C, preferably from 131 to 165°C, more preferably from 131 to 160°C;

wherein the amounts of A) and B) are referred to the total weight of A) + B) and the DSC second heating scan is carried out with a heating rate of 10°C per minute."

"8. A twist closure comprising the gasket of claim 1."

"9. The twist closure of claim 8, for use in food containers."

"10. The twist closure of claim 9, in form of Press-on/Twist-off cap."

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

- (a) The appeal was admissible;
- (b) Document D11 as well as the technical reports dated 7 and 28 February 2022 should be admitted into the proceedings;
- (c) The patent in suit did not meet the requirements of sufficiency of disclosure;
- (d) The subject-matter of claim 1 as granted was not novel over the disclosure of any of D3, D4 and D5/D5a;
- (e) The subject-matter of claim 1 as granted was not inventive starting from document D6 as the closest

prior art and in view of the disclosure of either D7/D7a or any of D3, D4 and D5/D5a;

- (f) The subject-matter of claims 9 or 10 as granted was not inventive starting from document D7 as the closest prior art.

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

- (a) The appeal should be rejected as inadmissible;
- (b) Document D11 as well as the technical reports dated 7 and 28 February 2022 should be not admitted into the proceedings;
- (c) The patent in suit met the requirements of sufficiency of disclosure;
- (d) The subject-matter of claim 1 as granted was novel over the disclosure of any of D3, D4 and D5/D5a;
- (e) The subject-matter of claim 1 as granted was inventive starting from document D6 as the closest prior art in combination with the teaching of D7/D7a;
- (f) The appellant had not explained why they considered that the conclusion of the opposition division according to which D6, and not D7, was the document to be taken as the closest prior art, would be wrong.



## Reasons for the Decision

1. Admissibility of the appeal
  - 1.1 The respondent requested that the appeal be held inadmissible because the submissions made by the appellant in their statement of grounds of appeal were an almost literal copy of their letter dated 16 February 2021 (rejoinder: section II), the only exception being the passage starting on page 10 in the second paragraph after the title "3. Erfinderische Tätigkeit" and ending with the second paragraph on page 11. However, also this additional passage did not discuss the decision under appeal but dealt with additional arguments, which were filed for the first time in appeal, so the respondent.
  - 1.2 According to Rule 101(1) EPC an appeal is to be rejected as inadmissible if it does not satisfy the provisions of *inter alia* Article 108 and Rule 99(2) EPC.
    - 1.2.1 According to established case law (Case Law of the Boards of Appeal of the EPO, 10th Edition, 2022, V.A. 2.6.3.a), in order to comply with Article 108 EPC, the written statement setting out the grounds of appeal should set out fully the reasons why the appeal should be allowed and the decision under appeal should be set aside. In that respect, the statement setting out the grounds of appeal must enable the Board to understand immediately why the decision is alleged to be incorrect and on what facts the appellant bases its arguments (Case Law, *supra*, V.A.2.6.3.e). In that respect, although the points made in the statement of grounds of

appeal do not mandatorily need to be new, arguments which are a mere repetition of arguments presented before the opposition division do not and can not provide reasons why the decision under appeal is to be set aside (Case Law, *supra*, V.A.2.6.3.h and V.A.2.6.6).

1.2.2 In addition, regarding the requirements to be met by the statement of grounds of appeal, Article 12(3) RPBA, although it is not directly related to the (in)admissibility of the appeal, further requires that the statement of grounds of appeal "shall 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 on".

1.2.3 Finally, in the case of an appeal by an opponent - as it is the case here - the appeal is sufficiently reasoned if it makes a substantiated case for the decision under appeal being wrong **on at least one** of the objections or grounds for opposition (Case Law, *supra*, V.A.2.6.3.d).

1.3 In the present case, it was common ground that at least the passage on pages 10 and 11 of the statement of grounds of appeal relied upon by the respondent (see section 1.1 above) is not a mere repetition of arguments contained in the opponent's letter dated 16 February 2021. Also the Board has no reason to be of a different opinion.

In addition, it is derivable from the passage starting at the penultimate paragraph on page 10 to the first full paragraph on page 11 of the statement of grounds of appeal that the appellant contests that the effect relied upon by the opposition division is present on

the whole scope of the claims ("mag das für die dort offenbaren ... eventuell der Fall sein"; "Falsch ist jedoch, ... zu hart für Gefässrichtungen") and further considers that said effect is obvious (see indications: "ist es also nicht überraschend, sondern vielmehr zu erwarten...", "erwartungsgemäss"). In view of that passage, the Board is satisfied that the appellant at least contested in their statement of grounds of appeal the findings reached by the opposition division in sections 4.3 to 4.6 of the decision under appeal regarding inventive step of the claims as granted, which is - as indicated in section 1.2.3 above - sufficient to render the appeal admissible.

- 1.4 For those reasons, the requirements of Article 108 EPC, Rule 99(2) EPC and Article 12(3) RPBA are satisfied and the appeal is admissible.

**Main request (patent as granted)**

2. Admittance of documents

- 2.1 Document D11

- 2.1.1 With their statement of grounds of appeal, the appellant filed for the first time document D11 as well as submissions based thereon. However, the respondent requested that these submissions be not admitted (rejoinder: page 8, first paragraph; page 16, starting at "The second new argument ..." to page 17, first paragraph).

- 2.1.2 In that respect, the filing of D11 and of the submissions based thereon with the statement of grounds of appeal constitute an amendment to the opponent's case (Article 12(2) and (4) RPBA), the admittance of

which underlies the stipulations of Article 12(4) to (6) RPBA. Therefore, the appellant's argument put forward at the oral proceedings before the Board that the question of the admittance of D11 did not arise because it was filed with the statement of grounds of appeal is rejected.

- 2.1.3 In addition, it is derivable from the appellant's submissions that D11 and the submissions based thereon were filed in support of their objections regarding lack of sufficiency of disclosure and lack of inventive step raised against the main request, in particular regarding the alternative of claim 1 as granted related to component B) being a propylene homopolymer. However, considering that the main request is the patent as granted and that the objections of lack of sufficiency of disclosure and inventive step were raised by the opponent at the outset of the opposition proceedings (namely with the notice of opposition), there are no compelling reasons justifying the filing of D11 and of the submissions based thereon only with the statement of grounds of appeal.

In particular, the opposition division had already indicated in their preliminary opinion that the opponent's objection of lack of sufficiency of disclosure regarding the alternative of claim 1 as granted related to component B) being a propylene homopolymer was not supported by any evidence and amounted to a mere allegation (preliminary opinion: page 2, first paragraph). Therefore, the appellant would have had good reasons to file D11 earlier.

In the statement of grounds of appeal, D11 was further - implicitly - relied upon by the appellant regarding inventive step, in order to argue that the effects

relied upon by the respondent were not credibly achieved over the whole scope of the claims, in particular when component B) was a propylene homopolymer. However, the Board's view that such an objection was not put forward in writing during the opposition proceedings (Board's communication: section 5.2.2, third paragraph) was not contested by the appellant (either in their last written submission of 6 June 2023 or at the oral proceedings before the Board). The same is valid regarding the Board's view that an objection putting into question that the effect shown in the patent in suit was effectively achieved over the whole scope of the claims was raised for the first time at the oral proceedings before the opposition division (Board's communication: section 5.2.2, third paragraph; Reference was made therein to the minutes of the oral proceedings before the opposition division: page 8, last paragraph; page 9, second paragraph). In the absence of any evidence filed by the opponent in support of that objection at the oral proceedings before the opposition division, the Board considers that it is not surprising that that objection did not succeed (see decision under appeal: page 12, first paragraph, last sentence). Under these circumstances, the Board cannot recognise that the appellant was unexpectedly confronted at a late stage of the opposition proceedings with a new procedural situation, apart from a situation that they created themselves, which could have justified the filing of D11 with the statement of grounds of appeal. Therefore, the Board considers that D11 and the arguments based thereon could and should have been submitted during the opposition proceedings.

2.1.4 In their last written submission and at the oral proceedings before the Board, the appellant argued that

D11 should be admitted into the proceedings in view of its relevance and because it was filed in reaction to the interpretation of claim 1 made by the Board in its communication according to which "no prolonged ageing" should take place between the first and second DSC heating scans (see letter of 6 June 2023: page 3, section 2, third and fourth paragraphs; page 6, first full paragraph).

a) However, it is derivable from the wording of both Article 12(4) RPBA (third sentence) and Article 12(6) RPBA that the primary considerations to be taken into account when deciding on the admittance of e.g. a late-filed document such as D11 are of a procedural nature. In that regard, the Board considers for the reasons already indicated in section 2.1.3 above that the circumstances of the present case do not justify the filing of D11 with the statement of grounds of appeal.

b) In addition, the appellant's argumentation regarding the relevance of D11 is related to the fact that components as defined by the structural definition of component A) according to claim 1 as granted may exist which do not meet the additional requirement of said claim 1 regarding the absence of a melting peak detectable at the DSC at the second heating scan (letter of 6 June 2023: page 4, last paragraph to page 5, second paragraph). However, the experimental data in support of that argument are not contained in D11 but in technical reports filed at a later stage, namely with letters of 15 March 2022 and/or 12 April 2022. Therefore, that argument fails to convince.

c) Also, since the Board's communication was

established at a later stage, its content cannot justify the filing of D11 at the outset of the appeal proceedings. In addition, it was neither argued, nor shown by the appellant that the issue of "prolonged ageing" on which they relied was raised for the first time by the Board in said communication. In the Board's view, this is also not the case since it is derivable from section 6.3.1 of that communication that the issue of the time span between the first and second DSC heating scans was related to the appellant's own line of arguments in respect of lack of sufficiency of disclosure. Therefore, also that argument is not persuasive.

d) For these reasons, the appellant's arguments are rejected.

2.1.5 In view of the above, the Board found it appropriate that D11 and the arguments based thereon be not admitted into the proceedings pursuant to Article 12(6) RPBA.

2.2 Technical reports dated 7 and 28 February 2022

2.2.1 With letters of 15 March 2022 and 12 April 2022, the appellant filed two technical reports dated 7 and 28 February 2022 as well as datasheets of various "Koattro" polymers used in these reports. The respondent requested that the arguments based on these reports be not admitted into the proceedings (letter of 24 May 2022: page 1).

2.2.2 In that respect, the admittance of the technical reports dated 7 and 28 February 2022, the accompanying datasheets and of the submissions based thereon is subject to the stipulations of Article 13(1) RPBA,

whereby Articles 12(4) to 12(6) RPBA apply *mutatis mutandis*.

a) In the present case, for the same reasons as indicated in sections 2.1.3 and 2.1.4 above, the Board considers that there are no reasons justifying the admittance of these technical reports at such a late stage of the proceedings. In particular, it is agreed with the respondent that the appellant's argument that these experiments could not be carried out earlier due to difficulty to obtain the materials used therein is not backed up by any evidence and is, for that reason, not convincing (appellant's letter of 12 April 2022: page 1, first paragraph; respondent's letter of 24 May 2022: page 1, third paragraph). In addition, considering that these technical reports were filed in support of objections already raised in the statement of grounds of appeal, these documents could and should have been filed at that stage already and there can be no reasons justifying their filing later on.

b) It is further agreed with the respondent's argument put forward at the oral proceedings before the Board that admitting these technical reports into the proceedings would be contrary to the stipulations of Article 12(3) RPBA according to which the appellant should submit their complete case with the statement of grounds of appeal.

2.2.3 In view of the above, the Board made use of its discretion pursuant to Article 13(1) RPBA by not admitting into the proceedings the technical reports dated 7 and 28 February 2022.

2.2.4 Document D12



The respondent expressed no concerns regarding the admittance of document "DIN EN ISO 11357-3" (D12) which was filed by the appellant with their statement of grounds of appeal. Also, both parties relied on the disclosure of that document in their written submissions. Further taking into account that said document is a standard concerning an experimental method for the determination of a feature which is present in claim 1 as granted (DSC - Differential Scanning Calorimetry - determination method), whereby the details of that method were central to issues in dispute between the parties (see respective argumentations hereinafter regarding the "no second Tm" issue either in respect of sufficiency of disclosure, novelty or inventive step), also the Board sees no reasons to disregard D12.

3. Sufficiency of disclosure

3.1 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, 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 gasket for closures according to operative claim 1, which is contested by the appellant.

3.2 In section 2 of the reasons of the decision under appeal the opposition division rebutted, among others, the objections raised by the appellant regarding sufficiency of disclosure and identified therein as "no second Tm", "the absence of examples for some variants

of claim 1" and "Shore A /Shore D values". In that respect, the Board's view that it was derivable from the statement of grounds of appeal that only these objections were pursued in appeal by the appellant remained undisputed (Board's communication: section 6.2). These objections are addressed hereinafter using the same denomination as in the decision under appeal.

3.3 Feature "no second Tm"

3.3.1 The gasket for closures defined in claim 1 as granted comprises a polyolefin composition (I) containing A) a copolymer of butene-1 with ethylene having "no melting peak detectable at the DSC at the second heating scan" (hereinafter referred to as the "no second Tm" feature). The appellant's objection is that the gasket according to claim 1 as granted cannot be prepared because said "no second Tm" feature is not permanent and will always be satisfied if the skilled person waits long enough between two DSC measurements. Also, neither claim 1 as granted, nor the patent specification contained any information regarding when the second DSC measurement should be done.

3.3.2 In that respect, said arguments were already rebutted by the opposition division (decision under appeal: page 4, second paragraph), in particular considering the information provided in paragraphs 31 and 90 of the patent in suit and the knowledge of the skilled person carrying out DSC measurements. On the basis of that information, the opposition division held that the skilled person knew in particular that DSC measurements were made by carrying out two heating scans done one after the other, without ageing, whereby the first heating scan was necessary to cancel the thermal

history of the sample.

3.3.3 The Board cannot identify in the appellant's submissions any reasons why they consider that the decision of the opposition division would be deficient and should be overturned (apart from repeating the arguments put forward during the opposition proceedings, which did not convince the opposition division). In particular, a passage of the statement of grounds of appeal directed to that issue which was not put forward during opposition is the penultimate paragraph on page 3 of the statement of grounds of appeal, according to which insufficient information was provided in the patent specification when exactly the DSC measurements should be carried out. However, said passage does not explain why the opposition division was wrong to consider that sufficient information was provided in paragraphs 31 and 90 of the patent in suit, if necessary complemented by the knowledge of the skilled person carrying out DSC measurements. The sole other passage of the statement of grounds of appeal directed to that issue which was not put forward during opposition is the third paragraph on page 4 of the statement of grounds of appeal. However, said passage is directed to the fact that the opposition division relied on documents D6 and D8, although said documents were not mentioned in the patent in suit. Although this may be correct, said argument does not explain why the requirements of sufficiency of disclosure would not be met in view of the disclosure of paragraphs 31 and 90 of the patent in suit in combination with the skilled person's knowledge. Therefore, the appellant's arguments are not convincing.

3.3.4 At the oral proceedings before the Board, the appellant further argued that, in the absence of any indication

in claim 1 as granted as to how long it should be waited between the first and the second DSC heating scans, the feature "no second T<sub>m</sub>" was so unclear that the skilled person was neither in the position to determine said feature - and, thus, to carry out the invention -, nor to know when one was working within or outside the scope of the claims.

a) In that regard, it is established case law that sufficiency of disclosure is assessed on the basis of the information provided in the patent in suit, if needed complemented by common general knowledge. Therefore, the appellant's objection regarding an alleged lack of information in claim 1 as granted regarding the time span between two DSC heating scans is rejected.

b) Also, the Board shares the respondent's view that the appellant's objection is based on a reading of claim 1 as granted either with a mind not willing to understand or in an unreasonable manner, which is not allowable. Indeed, considering that DSC measurements are well known in the art and for which it was shown that at least a recognised standardised method exists (D12), the Board is satisfied that the skilled person, e.g. by relying on common general knowledge, would read the requirement of claim 1 as granted that "no melting peak detectable at the DSC at the second heating scan" as meaning that a second heating scan is carried out in a conventional manner after cooling down the sample from the first heating scan, i.e. a second heating scan is carried out directly after the first one, i.e. as indicated in paragraph 31 of the patent in suit, last sentence (and not after waiting so long that the polymer crystallises as derivable from paragraph 31, first sentence, and paragraph 90 of the patent in

suit). That conclusion is in particular in line with the statements found in D12 (sections 9.4.3, 9.4.6, 9.4.7), whereby explicit indications of two time periods (5 minutes each) taking place between both heating scans for specific stages is even explicitly indicated (D12: sections 9.4.4 and 9.4.6). In that regard, it is noted that it was common ground that the disclosure of D12 reflects common general knowledge regarding DSC determination methods. In view of the above, it makes no doubt that the skilled person would avoid waiting too long between the first and the second DSC heating scans, especially because s/he is well aware that the polymers under scrutiny - as defined as component A) of claim 1 as granted - are not stable (paragraph 31 of the patent in suit). Carrying out DSC measurements in such a manner that an ageing stage takes place between the first and second heating scans as contemplated by the appellant (see e.g. letter of 15 March 2022: page 3, first two paragraphs) would be unreasonable from a technical point of view and, for that reason, would be disregarded by the skilled person.

c) In view of the above, the Board further shares the respondent's view that the appellant's objection is at most related to an issue of clarity pursuant to Article 84 EPC (which could not be addressed at the present stage of the proceedings since the feature at stake is already present in the claims as granted) but not of sufficiency of disclosure. Indeed, the question if the skilled person knows if s/he is working within or outside the operative claims is an issue which is at most related to the scope of the claims, which is a matter of clarity. In addition, the appellant has not shown that the alleged ambiguity resulting from the lack of information they considered to exist in respect

of the determination of the "no second Tm" feature 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 gaskets for closures being claimed.

c2) For these reasons, the appellant's arguments did not convince.

3.3.5 The Board further agrees with the respondent (letter of 14 July 2023: paragraph bridging pages 3 and 4) that some information is provided in paragraph 33 to 43 of the patent in suit how copolymers A) as defined in claim 1 as granted (which should satisfy the "no second Tm" feature) may be prepared. Therefore, in the absence of any counter-arguments in that regard, the Board is satisfied that the skilled person is in the position, on the basis of the information provided in the patent in suit, to prepare copolymers A) according to claim 1 as granted.

3.3.6 For these reasons, the appellant's arguments provide no cause for the Board to overturn the opposition division's conclusion in respect of the "no second Tm" feature.

3.4 Regarding "the absence of examples for some variants of claim 1"

3.4.1 It was common ground that, as indicated in the decision under appeal (page 5, first full paragraph), claim 1 as granted contains three variants depending on the nature of polymer B): either (i) a homopolymer of propylene is used (variant 1), or (ii) a propylene copolymer is used (variant 2) or (iii) "a mixture of two or more of (i) and (ii)" is used (variant 3). The appellant considered

that the patent in suit failed to illustrate each of these three embodiments.

3.4.2 Regarding that objection, the Board's view (Board's communication: section 6.4.1) that the appellant's arguments were mostly the same as the ones put forward during the opposition proceedings (notice of opposition, section III; letter of 23 September 2020, section "Zu III.", letter of 16 February 2021, section 1.a)) remained uncontested. However, these arguments were already rebutted by the opposition division (decision under appeal: section 2.b, starting from the third paragraph), in particular considering that the opponent did initially not understand properly the correspondence between claim 1 as granted and the examples of the patent in suit, the manner in which claim 1 as granted should be read, the fact that at least one example of the patent in suit illustrated the subject-matter being claimed and the lack of convincing evidence supporting the opponent's allegations.

3.4.3 The Board cannot identify in the appellant's submissions any reasons why they consider that the decision of the opposition division would be deficient and should be overturned.

3.4.4 The sole passage of the statement of grounds of appeal directed to that issue which was not already put forward during opposition is the penultimate paragraph on page 5:

"Bei Verwendung eines Gehaltes an homo-PP würden die beanspruchten Materialien zudem wenigstens überwiegend so hart, dass sie jedenfalls im Sinne der Ansprüche 3 ff. nicht mehr brauchbar wären."

a) However, the meaning of that passage (in particular the statement "the use of a content of an homo-PP"; see also the reference to claim 3ff.) remains, in the absence of any further explanation from the appellant (Board's communication: point 6.4.3.a), obscure to the Board.

b) In addition, it was not explained how said passage, which is also not supported by any evidence, may show why the conclusion reached by the opposition division (page 6, first paragraph) is wrong.

3.4.5 In view of the above, the appellant's arguments provide no cause for the Board to overturn the opposition division's conclusion in respect of "the absence of examples for some variants of claim 1".

3.5 Regarding the "Shore A/Shore D values"

3.5.1 In the decision under appeal (page 6, point "c) Shore A /Shore D values", first full paragraph), it was indicated that the opponent raised an objection of lack of sufficiency of disclosure related to the shore A value displayed in examples 1 to 3 of the patent in suit: it was alleged to be physically impossible that these three examples exhibited the same shore A value (i.e. 91) when they had been carried out using different amounts of butene copolymer A) and of propylene copolymer B). The opponent had further argued that the relationship between shore A and shore D was not mirrored in table 1 (with reference to the declaration of Dr Wittenberg in D9).

3.5.2 Regarding the objection "Shore A/Shore D values", the Board's view that the appellant's arguments put forward in appeal were exactly the same as the ones put forward



during the opposition proceedings remained undisputed (Board's communication: section 6.5.1).

- 3.5.3 However, these arguments were already rebutted by the opposition division, in particular considering that, Shore A values being scarcely meaningful, there was no contradiction between paragraph 28 of the patent in suit and D10. Also, the opposition division held that the lack of explanation concerning the meaning of the value "91" disclosed for each of examples 1 to 3 did not deprive the skilled person from carrying out the invention (reasons of the decision under appeal: point 2.c), page 6, last paragraph).
- 3.5.4 In their statement of grounds of appeal, the appellant merely stated that they considered that the decision under appeal did not adequately address the essential aspects of their objection (statement of grounds of appeal: page 7, penultimate paragraph). However, the appellant neither explained which "essential aspects" were meant, nor why the reasons indicated in the decision under appeal were not correct, in particular in view of the arguments indicated in section 3.5.3 above. Under these circumstances, the Board cannot identify in the appellant's submissions any reasons why they consider that the decision of the opposition division would be deficient and should be overturned.
- 3.5.5 Therefore, the appellant's arguments provide no cause for the Board to overturn the opposition division's conclusion in respect of the "Shore A/Shore D values" objection.
- 3.5.6 In view of the above, the appellant's objections regarding lack of sufficiency of disclosure are

rejected.

4. Article 54 EPC

4.1 In respect of novelty, the appellant pursued in appeal their objections in respect of each of D3, D4 and D5/D5a. In that regard, the Board's view that the appellant's arguments put forward in appeal were exactly the same as the ones put forward during the opposition proceedings remained undisputed (Board's communication: section 7.1).

4.2 However, these arguments were already rebutted by the opposition division, in particular considering that:

- The term "gasket" was a limiting feature and was not disclosed in any of D3, D4 or D5a;
- The copolymer butene/ethylene of D3 showed two melting points and therefore did not meet the "no second T<sub>m</sub>" feature according to claim 1 as granted;
- The criteria of selection inventions did not apply to disclosures comprising more than one distinguishing feature, such as the ones of D3 and D5a;
- Document D4 did not disclose a copolymer butene/ethylene (where butene is in majority) but an ethylene/butene copolymer (where ethylene is in majority);
- It had not been shown that the copolymers butene/ethylene of D5a met the "no second T<sub>m</sub>" feature according to claim 1 as granted;

- The subject-matter of claim 1 as granted could only be arrived at after performing several selections within the disclosure of D5a and was, therefore, not directly and unambiguously disclosed therein.

Although it was indicated in the Board's communication (section 7.2) that it was not derivable from the appellant's submissions why they considered that these findings of the opposition division were wrong and why novelty over any of D3, D4 and D5/D5a was not given, no further arguments were put forward, in particular at the oral proceedings before the Board. Under these circumstances, there are no reasons for the Board to deviate from its preliminary considerations.

- 4.3 It is in particular noted that the appellant argued that the materials defined in claim 1 as granted to have "no second T<sub>m</sub>" would - under the same conditions as in D3 - also have two DSC peaks (statement of grounds of appeal: section 2.b.1; letter of 16 February 2021: page 8, section 2.b.a). However, said argument does not explain why the decision of the opposition division that the copolymer butene/ethylene of D3 did not meet the "no second T<sub>m</sub>" feature according to claim 1 as granted is not correct. In addition, said argument is based on the same argument as the one addressed above in respect of sufficiency of disclosure regarding the "no second T<sub>m</sub>" feature. For the same reasons as outlined above (section 3.3), the Board considers that there is no reason to consider that the second DSC heating scan indicated in claim 1 as granted (corresponding to the second heating stage of the DSC measurement) should be made with any kind of ageing period after the first DSC heating scan (i.e. the first heating scan, which is known in the art to be carried out in order to cancel the thermal history of the

polymer under scrutiny). Rather, on the basis of the knowledge of the skilled person carrying out DSC measurements and of the information provided in the patent in suit (paragraphs 31 and 90) and in D3 (page 3, lines 33-52; no prolonged ageing mentioned), both DSC measurements should be made under similar conditions, one after the other (without any kind of ageing in-between).

- 4.4 In view of the above, the appellant's arguments provide no cause for the Board to overturn the opposition division's conclusions regarding novelty of claim 1 as granted over each of D3, D4 and D5/D5a. Further considering that each of claims 2 to 11 as granted are either dependent on claim 1 as granted (claims 2 to 7 as granted) or are directed to articles comprising a gasket as defined in said claim 1 (claims 8 to 10 as granted) or to a process for preparing such a gasket (claim 11 as granted), the same conclusion is valid for all the claims of the patent in suit.
5. Article 56 EPC - Admittance of arguments put forward in the statement of grounds of appeal
- 5.1 The respondent requested that two new arguments in respect of inventive step that were put forward by the appellant for the first time in their statement of grounds of appeal not be admitted into the proceedings (rejoinder: page 17, first paragraph).
- 5.2 As outlined above, the admittance of such amendments to a party's case is subject to the stipulations of Article 12(4) to (6) RPBA.
- 5.3 The first argument is related to the question if gaskets as defined in claim 1 as granted generally

consist of compounds, as put forward by the appellant (statement of grounds of appeal: page 10, section 3, third paragraph). That argument is based on very general considerations and merely reflects common general knowledge regarding the fact that the properties of a polymeric material is generally affected by the addition of another polymeric material thereto. The Board's view (section 8.3 of the communication) that the fact that such considerations would also apply to compositions used to make gaskets did not appear to be of any particular relevance remained uncontested. Therefore, the conclusion on inventive step cannot depend on the admittance of that argument and that issue can remain unanswered.

- 5.4 The second argument is related to the question whether, should an effect be held to be shown in the examples of the patent in suit, that effect would be credible for the propylene homopolymer embodiments of component B) in claim 1 as granted because the compositions so prepared would be too hard to be usable as gaskets for closures (see statement of grounds of appeal: sentence bridging pages 10 and 11; page 11, first full paragraph). In that respect, it was not shown that such an objection was already put forward during the opposition proceedings. Therefore, and for the same reasons as already indicated in section 2.1.3, third paragraph, above, the circumstances of the present case do not justify that such an objection be put forward for the first time in the statement of grounds of appeal.

That finding was communicated to the parties in the Board's communication (section 8.4), whereby it was in particular indicated that, for these reasons, the Board intended not to admit the appellant's submissions made

on page 10 and 11 of the statement of grounds of appeal, which were putting into question the presence of any technical effect for the propylene homopolymer embodiments defined in claim 1 as granted. In the absence of any counter-arguments, in particular at the oral proceedings before the Board, there is no reason for the Board to deviate from its preliminary consideration. Therefore, that argument is not admitted into the proceedings.

6. Inventive step - Claims 1 to 8 and 11 as granted

6.1 Closest prior art

6.1.1 It was common ground that D6 constituted a suitable document to be taken as the closest prior art for the subject-matter of claims 1 to 8 and 11 as granted, as was already concluded by the opposition division (reasons of the decision under appeal: sections 4.1 and 4.2; statement of grounds of appeal: section 3.a), first six paragraphs; rejoinder: page 12, section VI, first four paragraphs). The Board has no reason to deviate from that view, which was also indicated in its communication (section 9.1.1) and remained undisputed.

6.1.2 In reply to a question posed in the Board's communication regarding which precise passage of D6 was taken by the appellant as starting point for their objection (section 9.1.2), the appellant pointed to paragraph 13 of D6 (letter of 6 June 2023: page 8, second sentence), which indeed may be seen as particularly relevant.

6.2 Distinguishing feature(s)

6.2.1 It was common ground that the subject-matter of claim 1 as granted differs from the disclosure of D6 in general, and from paragraph 13 thereof in particular, at least in that the amount of propylene copolymer according to component B) ranges between 38 and 75 wt%, while it is up to 15 wt% in D6 (paragraph 13: page 3, line 9; claim 1, whereby components A) and B) thereof correspond to components A) and B) according to claim 1 as granted, respectively; claim 4).

6.2.2 In that respect, it is agreed with the respondent (letter of 14 July 2023: page 5, section 4, second paragraph) that in view of the disclosure of D6 as a whole, the skilled person would understand the disclosure of paragraph 13 of D6 regarding the amount of component B) ("optionally but preferably up to 15% by weight") to mean that component B) is optional but, if present, its amount is at most 15 wt.% (see D6: claim 1; paragraph 15: "B) is an optional but preferred further component"; see also the examples illustrative of the teaching of D6 mentioned in table 1 read in combination with paragraph 56 of D6). In that regard, the Board does not share the appellant's view that the skilled person would read paragraph 13 of D6 so that component B) is a mere optional component, meaning that it can be present in any amount. In particular, such a reading would not be in line with claim 1 of D6, nor with paragraph 32 of D6 according to which component A) is the major component. Also, paragraph 3 of D6, which was relied upon by the appellant (letter of 6 June 2023: page 8, second paragraph), is not directed to the invention of D6 but merely describes the prior art and further contains no information regarding the amounts of components A) and/or B) according to D6. For these reasons, the Board considers that the disclosure of D6 is specifically limited to compositions

comprising a maximum amount of 15 wt.% of propylene copolymer(s) (component B) according to claim 1 as granted and component B) according to D6).

6.3 Problem effectively solved over the closest prior art

6.3.1 As indicated in the Board's communication (section 9.3.1), the respondent endorsed the formulation of the problem to be solved over D6 considered by the opposition division, which was to provide a gasket for closures which is soft and elastic enough to ensure a tight seal even after long use, has a good balance of flexibility, softness and thermoplastic behaviour, and is sterilisable (reasons: section 4.4), and there was no reason for the Board to deviate from that view (section 9.3.2 of the communication).

6.3.2 In the absence of any counter-arguments submitted by the appellant in that respect, in particular at the oral proceedings before the Board, there is no reason for the Board to deviate from its preliminary view.

6.4 Obviousness

6.4.1 The question remains to be answered if the skilled person, desiring to solve the problem defined in above section 6.3.1, would, in view of the closest prior art, possibly in combination with other prior art or with common general knowledge, have modified the disclosure of the closest prior art in such a way as to arrive at the claimed subject matter.

6.4.2 In that respect, the appellant's objection is based on the combination of D6 with either D7/D7a or any of D3, D4 and D5a.



6.4.3 However, the appellant's arguments were already rebutted by the opposition division considering that:

- In view of the different natures of the polymers disclosed in D7a and D6, the skilled person would only have combined both documents with hindsight (section 4.5 of the reasons: page 12, last paragraph; page 13, second and third paragraphs);
- D3 to D5 neither disclosed "gaskets", nor copolymers butene/ethylene as defined in claim 1 as granted. Also, these documents did not contain any pointers to solve the problem posed by modifying the amount of polypropylene polymer (component B) according to claim 1 as granted and component B) according to either claim 1 or paragraph 13 of D6).

The arguments put forward by the appellant in appeal (statement of grounds of appeal: page 12, first paragraph; bottom of page 13 to page 14) did not show why these findings of the opposition division, which were indicated to be relevant for the Board (section 9.4.3 of the communication), are not correct.

6.4.4 In addition, as outlined in section 6.2.2 above, the Board is of the opinion that the disclosure of D6 is specifically limited to compositions comprising a maximum amount of 15 wt.% of propylene copolymer(s). Therefore, in order to arrive at the subject-matter being claimed, the skilled person would have to go against that clear teaching of D6. Such a modification cannot be held to be obvious since D6 clearly teaches away from it.

6.4.5 In their last written submission (letter of 6 June 2023: page 8, end of first paragraph) and at the

oral proceedings before the Board the appellant put forward that the skilled person would understand that the disclosure of D6 concerning the amount of component B) would only be valid when the polyolefin composition defined therein was intended to be used for making window profiles. However, the skilled person aiming at providing gaskets for closures according to claim 1 as granted would not be bound by that disclosure of D6 and would obviously contemplate using higher amounts of propylene copolymer(s) B).

However, it is derivable from D6 as a whole (D6: claims 1, 3 and 4; paragraphs 1, 2 and 13) that said document is directed to compositions that are in particular suitable for making extruded or molded profiles, such as window profiles or gaskets, whereby no distinction between the different applications is made. In addition, while claim 1 of D6 is directed to extruded or molded profiles in general, claims 3 and 4 of D6 are directed to window profiles and gaskets in particular, whereby each of these claims 1, 3 and 4 make reference to the same composition comprising "up to 15% by weight" of a propylene copolymer (component B)). Under these circumstances and further noting that no further passages of D6 were shown to make a distinction between compositions to be used for making gaskets or window profiles, the skilled person would have no reason to deviate from the teaching of D6 regarding the maximum amount of propylene polymer according to component B) thereof, also for the preparation of gaskets. In the Board's view, the appellant's argument that the skilled person aiming at making gaskets would contemplate using higher amounts of component B) can only be based on hindsight, which is not allowable. For that reason the argument is

rejected.

6.4.6 Under these circumstances, the Board sees no reasons to deviate from the conclusion of the opposition division regarding inventive step of claims 1 to 8 and 11 as granted.

7. Inventive step - Claims 9 and 10 as granted

7.1 As confirmed during the oral proceedings before the Board, the appellant raised in their statement of grounds of appeal an inventive step objection against claims 9 and 10 as granted considering document D7/D7a as the closest prior art (statement of grounds of appeal: pages 12-13, section 3.b).

7.2 However, the appellant did not explain why the decision of the opposition division according to which D6 was the closest prior art, and not D7, which was indicated by the Board to be reasonable (Board's communication: section 10.2), was not correct (see reasons of the decision under appeal: section 4, first paragraph and section 4.1).

7.3 In addition, since claims 9 and 10 are dependent on claim 8, there is no reason why the inventive step should be assessed differently for these claims. Also, since the subject-matter defined in said claims 9 and 10 is an article comprising a gasket according to claim 1 as granted, an inventive step is to be given if it is already acknowledged for claim 1.

7.4 Therefore, the appellant's objections provide no cause for the Board to overturn the decision of the opposition division regarding the selection of D6 as the document to be taken as the closest prior art, also

for claims 9 and 10 as granted.

- 7.5 In view of the above, the appellant's objection of lack of inventive step raised against claims 9 and 10 as granted considering document D7/D7a as the closest prior art is rejected.
8. As none of the objections put forward by the appellant is successful, the appeal is to be dismissed.
9. *Obiter dictum* - Simultaneous interpretation provided by the EPO for the oral proceedings - Unnecessary costs and loss of work resources
- 9.1 The respondent requested interpretation into English should any party speak any different language at the oral proceedings before the Board (letter of 20 April 2023: page 1, first paragraph). Subsequently, the appellant informed the Board that they would speak German at said oral proceedings (letter of 25 April 2023). Simultaneous interpretation from German to English was organised by the Board pursuant to Rule 4(5) EPC for the oral proceedings held on 24 October 2023 and the parties were informed accordingly (EPO Form 3018, dated 6 September 2023: confirmation that translation from German to English had been arranged).
- 9.2 At the beginning of the oral proceedings before the Board, the interpreters informed the Board that they were not in a position to provide interpretation as the appellant's representative did not have a microphone of the standard required by the Technical guidelines for oral proceedings held by videoconference ([www.epo.org/en/applying/european/oral-proceedings/proceedings/technical-guidelines](http://www.epo.org/en/applying/european/oral-proceedings/proceedings/technical-guidelines)). Reference to these guidelines is

made in Form 3011.2 as well as in a communication from the Registrar sent prior to the oral proceedings. The representative thereupon declared that he could speak either German or English and that this would make no difference to him. Questioned by the Chairman, the representative further confirmed that he would not suffer from any disadvantage if he were to speak English and agreed to present his full case in English.

9.3 It is indicated at the bottom of EPO Form 3018 that **the parties are requested to inform the Board as soon as possible if there is any change that could affect the arrangements made, in particular if interpreting is no longer needed. By doing so, the parties further follow the EPI recommendations** (see "Recommendations of Council - Attendance and Use of Simultaneous Translation at Oral Proceedings", section (2), revised at the C82 meeting held in Munich on 24 and 25 April 2017, currently available under: <https://patentepi.org/en/epi-papers/recommendations-of-council.html>). If the Board is informed well in time unnecessary expenses can be avoided as well as an unnecessary preparation on the side of the interpreters who need to study the documents on file in advance. Arrangement of interpretation also involves further work for the EPO as the pool of available interpreters is limited and it can not always be guaranteed that interpreters are available on a given date, with the consequence that oral proceedings may need to be cancelled if no interpreters are available.

9.4 Furthermore, the fact that the representative did not have the required technical equipment could have involved the need to reschedule oral proceedings. Also such rescheduling would have meant a waste of (limited)

resources.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



D. Hampe

D. Semino

Decision electronically authenticated