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**Datasheet for the decision
of 6 February 2025**

Case Number: T 0441/23 - 3.3.03

Application Number: 07732883.9

Publication Number: 2021124

IPC: B01J19/18, B01J19/24, C08F2/14,
C08F10/00, C08F210/16

Language of the proceedings: EN

Title of invention:
LOOP TYPE REACTOR FOR POLYMERIZATION

Patent Proprietor:
INEOS Manufacturing Belgium NV

Opponents:
Chevron Phillips Chemical Company LP
Basell Poliolefine Italia S.r.l.

Relevant legal provisions:
EPC Art. 123(2)
RPBA 2020 Art. 12(1)(a), 12(4)
EPC R. 103(4)(c)

Keyword:

Extension beyond the content of the application as filed (yes)
(main request and auxiliary requests in part)

Auxiliary requests corresponding to auxiliary requests
admitted before the opposition division - to be taken into
account (yes)

New auxiliary requests not suitable to address the issue which
led to the decision - admitted (no)

Withdrawal of request for oral proceedings - Decision in
written procedure (yes) - Reimbursement of appeal fee at 25%

Decisions cited:

G 0009/91, G 0002/10, G 0001/16, T 0517/17, T 0488/18,
T 3142/19



Beschwerdekammern

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Case Number: T 0441/23 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 6 February 2025

Appellant 1: Chevron Phillips Chemical Company LP
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
3 January 2023 concerning maintenance of the
European Patent No. 2021124 in amended form.**

Composition of the Board:

Chairman	O. Dury
Members:	F. Rousseau
	L. Basterreix

Summary of Facts and Submissions

I. The appeals lie from the interlocutory decision of the opposition division according to which European patent No. 2 021 124 as amended according to the claims of the second auxiliary request submitted with letter of 25 August 2022, a description adapted thereto and drawing sheets 1/3 to 3/3 met the requirements of the EPC.

II. The contested decision was also based on the patent as granted, as the main request, whose claims 1 and 3 read as follows:

"1. Process which comprises polymerising an olefin monomer in at least one continuous tubular loop reactor of a multiple reactor system, optionally together with an olefin comonomer, in the presence of a polymerisation catalyst in a diluent, to produce a slurry comprising solid particulate olefin polymer and diluent, and a high molecular weight (HMW) polymer is made in a first reactor and a low molecular weight (LMW) polymer is made in a second reactor, the first reactor being upstream of the second reactor, and one or both of the reactors being a continuous tubular loop reactor and having both an internal diameter of at least 700mm along at least 50% of its length and the solids concentration in said reactor is at least 20 volume %, the first (HMW) reactor having a space time yield (defined as production of polymer in kg/h per unit volume of reactor) greater than 100 kg/m³/h, and the ratio of space time yield in the first (HMW) reactor to the second (LMW) reactor being greater than 1."

"3. Process according to claim 1 wherein the first and second reactors differ in volume by no more than 10%, and: either the temperature of the first reactor is maintained between 60°C and 80°C, or the ratio of solids concentration in the first reactor to that in the second reactor is maintained at less than 1.0."

III. According to the reasons for the contested decision which are pertinent in the appeal proceedings:

- (a) The second to eighth auxiliary requests filed with letter of 25 August 2022 were admitted into the proceedings.
- (b) The added features of claim 1 of the second auxiliary request (as compared to claim 1 as granted) "further wherein the first and second reactors differ in volume by no more than 10%" and "the ratio of solids concentration in the first reactor to that in the second reactor is maintained at less than 1.0" were held "*to find support in page 10, lines 21-27*" of the application as filed, the general teaching of which, in particular page 2, lines 19-21, page 8, line 19 to page 9, line 4, page 10, lines 6-12 and 21-27 was considered to provide "*support for the combination of the added features with the rest of the features of claim 1.*"

In the opposition division's view, the solid concentration in the final reactor, as described after "generally" in lines 27-28 of page 10, was not inextricably linked to the rest of the features of the embodiment disclosed in the last paragraph of said page.

The second paragraph of page 11 of the application as filed was viewed to describe a preferred embodiment. The inconsistency between this paragraph and claim 1 was seen as a question of clarity rather than of Article 123(2) EPC.

On that basis, it was concluded that claim 1 of the second auxiliary request did not extend beyond the content of the application as filed.

(c) For this reason and since the further objection pursuant to Article 56 EPC was not successful, the patent amended on that basis was held to meet the requirements of the EPC.

- IV. Appeals were filed by opponents 1 and 2 (appellants 1 and 2, respectively). With their statement of grounds of appeal, oral proceedings were requested by both appellants, should the Board envisage not revoking the patent.
- V. With the reply to the statements of grounds of appeal, the patent proprietor (respondent) submitted thirteen auxiliary requests. In the event that their main request to reject the appeals could not be granted, oral proceedings were requested.
- VI. In preparation of the oral proceedings, a communication pursuant to Article 15(1) RPBA dated 20th January 2025 conveying the Board's provisional opinion was issued.
- VII. With a letter dated 30th January 2025 the respondent replying to the communication of the Board indicated that they maintained their main and auxiliary requests and withdrew the request for oral proceedings.

VIII. Oral proceedings were thereafter cancelled and the parties informed accordingly.

IX. The requests of the parties were as follows:

Appellant 1 and appellant 2 requested that the decision of the opposition division be set aside and that the patent be revoked.

The respondent requested that the appeals be dismissed, or, in the alternative, that the contested decision be set aside and the patent be maintained on the basis of one of the first to thirteenth auxiliary requests, all submitted with the reply to the statements of grounds of appeal.

The respondent requested that the second and seventh auxiliary requests should be replaced by the fourth and seventh auxiliary requests, filed with letter of 25 August 2022, should the former not be admitted into the proceedings (rejoinder, page 23, third paragraph and page 34, penultimate paragraph).

X. The claims relevant to the present decision are as follows (all filed with the reply to the statements of grounds of appeal, unless otherwise indicated):

Main request (second auxiliary request filed with letter of 25 August 2022)

Claim 1 reading as follows (with addition to the wording of claim 1 as filed indicated by the Board in underlined and deleted portions in ~~struck-through~~):

"1. Process which comprises polymerising an olefin monomer in at least one continuous tubular loop reactor

of a multiple reactor system, optionally together with an olefin comonomer, in the presence of a polymerisation catalyst in a diluent, to produce a slurry comprising solid particulate olefin polymer and diluent, ~~wherein the average internal diameter of at least 50% of the total length of the continuous tubular loop reactor is at least 700mm~~ and a high molecular weight (HMW) polymer is made in a first reactor and a low molecular weight (LMW) polymer is made in a second reactor, the first reactor being upstream of the second reactor, and one or both of the reactors being a continuous tubular loop reactor and having both an internal diameter of at least 700mm along at least 50% of its length and the solids concentration in said reactor is at least 20 volume %, the first (HMW) reactor having a space time yield (defined as production of polymer in kg/h per unit volume of reactor) greater than 100 kg/m³/h, and the ratio of space time yield in the first (HMW) reactor to the second (LMW) reactor being greater than 1 and further wherein the first and second reactors differ in volume by no more than 10%, and the ratio of solids concentration in the first reactor to that in the second reactor is maintained at less than 1.0."

First auxiliary request

Claim 1 corresponding to claim 1 of the main request with the additional feature that "the temperature of the first reactor is maintained between 60°C and 80°C".

Second auxiliary request

Claim 1 corresponding to claim 1 of the main request with the additional feature that "the density span of the polymer powder particles (defined as the absolute

value of the density difference in g/cm^3 between the average density of the polymer particles exiting the reactor with particle size above D90 and the average density of the material with particle size below D10) is below 0.005, in which D10 and D90 are the diameters under which 10% and 90% by weight respectively of the particles are collected".

Alternative second auxiliary request (fourth auxiliary request filed with letter of 25 August 2022)

Claim 1 corresponding to claim 1 of the second auxiliary request with the deletion of the features "and further wherein the first and second reactors differ in volume by no more than 10%, the ratio of solids concentration in the first reactor to that in the second reactor is maintained at less than 1.0".

Third auxiliary request

Claim 1 corresponding to claim 1 of the main request with the additional feature that "the multiple reactor system is used to make a bimodal polymer in two reactors in series".

Fourth auxiliary request

Claim 1 corresponding to claim 1 of the main request with the additional features "wherein the polymer is a bimodal polymer made in two reactors in series" and "further wherein the solids concentration in the second reactor is between 45wt% and 60wt% and the solids concentration in the first (HMW) reactor is between 25wt% and 35wt%".

Fifth auxiliary request

Claim 1 corresponding to claim 1 of the main request with the features inserted in claim 1 of the first auxiliary request and claim 1 of the third auxiliary request.

Sixth auxiliary request

Claim 1 corresponding to claim 1 of the first auxiliary request with the following additional features "wherein the solid particulate olefin polymer is a bimodal polymer made in two reactors in series" and "further wherein the solids concentration in the second reactor is between 45wt% and 60wt% and the solids concentration in the first (HMW) reactor is between 25wt% and 35wt%".

Seventh auxiliary request

Claim 1 corresponding to claim 1 of the main request with the additional features inserted in claim 1 of the second auxiliary request and claim 1 of the third auxiliary request.

Alternative seventh auxiliary request (seventh auxiliary request filed with letter of 25 August 2022)

Claim 1 corresponding to claim 1 of the alternative second auxiliary request with the additional feature that "the multiple reactor system is used to make a bimodal polymer in two reactors in series".

Eighth to thirteenth auxiliary requests

Claim 1 of each of these requests corresponding to claim 1, in this order, of the main request, the first

auxiliary request and the third to sixth auxiliary requests, respectively.

- XI. The parties' submissions, in so far as they are pertinent to the present decision, may be derived from the reasons for the decision below. The contentious point essentially concerned the question whether the subject-matter of claim 1 of each of the claim requests extended beyond the content of the application as filed.

Reasons for the Decision

Decision in written proceedings

1. The present decision is taken in written proceedings without holding oral proceedings, since the respondent withdrew their request for oral proceedings (see point VII above) and the condition underlying the request for oral proceedings of the appellants (see point IV above) are not met.

In addition, the parties have been informed of the Board's preliminary assessment of the case, in which their whole submissions have been duly taken into consideration and have been given the opportunity to make further submissions. Thus, the principle of the right to be heard according to Article 113(1) EPC has been observed.

In view of the fact that the case is ready for decision on the basis of the parties' extensive written submissions, the Board issues this decision in written proceedings in accordance with Article 12(8) RPBA.

Main request

Article 123(2) EPC

2. In accordance with the established Case Law of the Boards of Appeal of the EPO, the relevant question to be decided in assessing whether the subject-matter of an amended claim extends beyond the content of the application as filed, is whether after the amendment the skilled person is presented with new technical information (see G 2/10, point 4.5.1 of the Reasons and Case Law of the Boards of Appeal of the EPO, 10th edition 2022, hereafter "Case Law", II.E.1.3.1). In other words, the above mentioned amendment is only allowable if the skilled person would derive the resulting claimed subject-matter directly and unambiguously, using common general knowledge, from the application as filed. This test referred to as the "gold standard" was confirmed in the context of disclosed disclaimers in decision G 1/16 (points 17 and 18 of the Reasons).

Whether new technical information results from an amendment in a particular case requires a technical assessment of the overall technical circumstances of the individual case under consideration, taking into account the nature and extent of the disclosure in the application as filed.

- 2.1 The appellants submit as a first argument that the combination of features defined in claim 1 of the main request involves multiple selections and that the combination of features of claim 1 is therefore not discernible to the skilled reader from the original application, the application as filed providing no pointer towards that combination (appellant 1,

statement of grounds of appeal, last paragraph of page 4; appellant 2, statement of grounds of appeal, page 2, second paragraph and page 4, last paragraph).

It is in particular pointed out that some of the features inserted in claim 1 as filed, namely those concerning (i) the feature of the high molecular weight (HMW) polymer being made in a first reactor and the low molecular weight (LMW) polymer being made in a second reactor, the first reactor being upstream of the second reactor, (ii) the first (HMW) reactor having a space time yield (hereafter STY) greater than $100 \text{ kg/m}^3/\text{h}$, (iii) the first and second reactors differing in volume by no more than 10% and (iv) the ratio of space time yield in the first (HMW) reactor to the second (LMW) reactor being greater than 1 are disclosed in the application as filed in a particular context which is not defined in operative claim 1, i.e. together with features which have been left out in present claim 1 (appellant 1, statement of grounds of appeal, paragraph bridging pages 3 and 4 and following four full paragraphs; appellant 2, statement of grounds of appeal, passage starting at page 5, second paragraph and ending with the second paragraph of page 6).

- 2.2 The respondent submits that the argument that the combination of the features defined in claim 1 of the present main request, corresponding to the second auxiliary request on which the contested decision is based, should have been raised in relation to claim 3 of the claims as granted, since the subject-matter of claim 1 of the second auxiliary request corresponded to one of the options defined in granted claim 3, i.e. the embodiment in which the first and second reactors differ in volume by no more than 10%, and the ratio of

solids concentration in the first reactor to that in the second reactor is maintained at less than 1.0.

The respondent submits that no objection under Article 100 (c) EPC was raised against claim 3 of the granted patent, which granted patent formed the main request of the respondent and that the main request was found to not add matter. This, in the respondent's opinion, inherently means that all claims in the granted claim set had a basis in the application as filed. A subsequent objection to an amendment based on claim 3 from a claim set considered to have basis is a new objection that should have been rejected by the opposition division. It is therefore requested that the argument concerning the absence of basis for the combination of features recited in operative claim 1 not be admitted on appeal (rejoinder, page 6, second to fourth full paragraphs).

This is in the Board's opinion not convincing.

First of all, the second auxiliary request underlying the contested decision was a new claim request whose patentability had to be assessed independently from that of the main request. Furthermore, the contested decision does not contain any consideration as to whether the subject-matter of claim 3 of the main request would not extend beyond the content of the application as filed. In any event, claim 3 of the main request itself was not inserted into claim 1 of the main request, but only one of the two embodiments described in said claim. Hence, the subject-matter defined in operative claim 1 of the second auxiliary request was not subject of the main request (granted patent) and could be fully examined as to its

compliance with the requirements of Article 123(2) EPC (G 9/91, point 19 of the Reasons).

Moreover, the opposition division considered the argument that the combination of features defined in operative claim 1 would result from multiple selections within the teaching of the application as filed. That argument had been made with letter of 4 October 2022 of appellant 1. According to appellant 1, it had to be asked whether such a combination was disclosed in the original application, not merely that the combination was obvious. Opponent 1 believed that the combination of features was not disclosed.

That argument was pursued during the oral proceedings, the appellants pointing out that claim 1 had been amended by taking several features of the description and that the combination of these features in claim 1 was not in keeping with the requirements of Article 123(2) EPC (point 8 of the minutes).

The opposition division considered the argument of opponent 1 that the combination of the features of claim 1 was a non obvious multiple selection of features from the description of the application as filed (decision, point 19.3 of the Reasons), which is to be understood to refer to the argument concerning the absence of basis in the application as filed for the combination of features defined in claim 1 of the then pending second auxiliary request.

The opposition division, however, decided that the general teaching of the application as filed, in particular page 2, lines 19-21, page 8, line 19 to page 9, line 4, page 10, lines 6-12 and 21-27 would provide support for the combination of the added features with

the rest of the features of claim 1 (Reasons for the decision, point 19.4).

The Board also notes that the respondent did not object to the admittance of such argument against claim 1 of the second auxiliary request.

That argument is therefore also part of the appeal proceedings and there is no legal basis for retroactively rejecting it on appeal. Under Article 12(1)(a) RPBA, any such argument, having become part of the contested decision, is part of the appeal proceedings too. It is also referred to the section V.A.3.4.4 of the Case Law, according to which the EPC does not provide any legal basis for excluding on appeal documents, requests or evidence correctly admitted by the department of first instance, particularly if the contested decision was based on them. This is even more true for arguments considered in the contested decision.

Accordingly, the argument of the appellants concerning the absence of basis for the combination of features recited in operative claim 1 is to be taken into account in the appeal proceedings.

- 2.3 The respondent also requests that the objection of appellant 1 that the ratio of STY being greater than 1 would not be disclosed in conjunction with the feature that the reactors differ in volume by less than 10% not be admitted into the proceedings (rejoinder, page 5, section 4.1, 5th and 6th full paragraphs). Irrespective of whether this exact argument had been put forward by one of the appellants, the Board is of the view that it constitutes at most a legitimate elaboration of the original argument of the appellants submitted before

the opposition division that the combination of features defined in operative claim 1 had not been shown to have a basis in the application as filed.

This is especially the case since the respondent's submissions before the opposition division or the contested decision essentially provided an indication of the passages which have to be read in combination to arrive at the subject-matter of operative claim 1 without any explanation concerning the features concerned, the context of their disclosure and why they should necessarily be read by the skilled person in combination (letter of the respondent 25 August 2022, page 3, section 4.1; minutes of the oral proceedings, section 8 and Reasons for the decision, sections 19.3 and 19.4). The sole argument of the opposition division in this respect is that the solid concentration in the final reactor which would be described in the passage of the application as filed indicated to disclose the features taken from claim 3 as granted (and now inserted in operative claim 1) would not be inextricably linked to the other features described in that passage. This alone, however, does not allow to understand as to why the subject-matter of claim 1 finds a basis in the application as filed.

- 2.4 The respondent submits that appellant 1 simply states that they "believe" that claim 1 would involve multiple selections without providing any further substantiation. In the respondent's opinion, a substantiated objection would, however, at least require an attempt to explain why the basis given in the decision does not actually provide the combination and hence why the conclusion of the opposition division was wrong on this point. On that basis, this objection

would be clearly unsubstantiated and should not be admitted.

As pointed out in point 2.3 above, the respondent's submissions before the opposition division and the reasons for the contested decision do not explain why the features defined in operative claim 1 have to be necessarily read in combination. This, in the Board's opinion, is not apparent from the sole mention of the passages of the application as filed recited in section 19.4 of the Reasons for the decision (see point 12.6 to 12.6.6 below). In these circumstances, based on the respondent's submissions before the opposition division or the Reasons for the contested decision, the subject-matter of claim 1 had not been shown to be in keeping with the requirements of Article 123(2) EPC.

Under these circumstances, the appellants' objection is in the Board's opinion sufficiently substantiated.

2.5 In that respect, it is also established case law (Case Law, II.E.5, end of the first paragraph) that the burden of proof that amendments comply with Article 123(2) EPC rests with the party making the amendment. In the Board's opinion, it can be expected from a patent proprietor and drafter of the patent application as filed to explain how a reading of the text of the application as filed by the skilled person reveals the invention for which protection is sought by way of amendment, when this invention is meant to be directly and unambiguously disclosed therein. It is not up to the other parties or the Board to speculate as to why these features can be seen to be directly and unambiguously disclosed in combination when this is not apparent based on the sole passages of the application as filed mentioned in the patent proprietor's

submissions or the contested decision, as in the present case.

2.6 The opposition division indicated that the general teaching of the application as filed, in particular page 2, lines 19-21, page 8, line 19 to page 9, line 4, page 10, lines 6-12 and 21-27 would provide support for the combination of the added features with the rest of the features of claim 1. In this regard, whereas the "*added features*" referred to by the opposition division in point 19.4 of the Reasons for the decision were the ones that had been added to the granted claims, i.e. features ix and x as identified in the statement of grounds of appeal of appellant 2 (section 3, table, pages 2 and 3), the "*rest of the features of claim 1*" mentioned by the opposition division in point 19.4 of the Reasons are features ii-x as identified by appellant 2, which are not present in claim 1 of the application as filed.

2.6.1 The passage on page 2, lines 19-21 concerns the feature "the solids concentration in the reactor is at least 20 volume%". It does not concern any of the features of operative claim 1 regarding for example the difference in volume between the reactors, the ratio of solids concentration or the STY in the reactor(s).

2.6.2 The passage on page 8, lines 19 to 30 concerns embodiments comprising a multiple reactor system wherein one of the reactors is a loop reactor having preferably an internal diameter of at least 50% of its length greater than 700 millimetres, while the second or any subsequent loop reactor may have an internal diameter greater than 500 millimetres, for example greater than 600 millimetres, preferably greater than 700 millimetres. That passage does not provide a direct

and unambiguous basis for "*both of the reactors being a continuous tubular loop reactor and having both an internal diameter of at least 700mm along at least 50% of its length*". That passage also does not refer for example to any of the features of operative claim 1 concerning the solids concentration or the STY in the reactor(s).

2.6.3 The paragraph bridging pages 8 and 9 which constitutes the second part of the passage on page 8, line 19 to page 9, line 4 cited in the contested decision discloses that one or both of the reactors may have an internal diameter of at least 700 mm along at least 50% of its length. This sentence does not refer to the process of polymerising an olefin monomer in general, as defined in operative claim 1, in particular comprising the solids concentration in the reactor(s), the ratio of solids concentration or the STY in the first reactor or the ratio of STY in the first and second reactors. In addition, this sentence refers to a preferred embodiment in which a bimodal ethylene polymer is prepared.

2.6.4 Concerning the passage on page 10, lines 6-12, it can be agreed with appellant 1 that this passage is to be read in the light of the preceding paragraph bridging pages 9 and 10, i.e. concerning the preparation of a bimodal polymer made in two reactors in series. As noted by appellant 1, this passage therefore does not provide a basis for a more general disclosure of the HMW/LMW embodiment in the context of a generic "multiple reactor system" as recited in operative claim 1. Moreover, since this passage describes various open ranges for the STY of the first reactor or various ratios of STY in the first to second reactor, it cannot provide a direct and unambiguous basis for the

combination of STY and ratio of STY in the first and second reactor now defined in operative claim 1. Moreover, this passage does not concern some of the features defined in operative claim 1, such as the solids concentration in the reactor(s) or the ratio of solids concentration between the two reactors.

- 2.6.5 As regard the passage on page 10, lines 21-27, it is undisputed that this passage has been cited as the basis for the feature defining the ratio of solids concentration in the first reactor to that in the second reactor. The passage concerning this feature reads "*It is also preferred that the ratio of solids concentration in the first reactor to that in the second reactor is maintained less than 1.0, preferably between 0.6 and 0.8, as this also assists in maintaining the activity balance between the two reactors within the desired range" (emphasis added by the Board). The Board, in agreement with the position of appellant 2, considers that this sentence unambiguously indicates that those means to assist in maintaining the activity balance between the two reactors concern embodiments in which the reactors differ in volume by no more than 10%, as defined in the introducing sentence of the passage on page 10, lines 21-27.*

It can also be agreed with appellants 1 and 2 that the passage on page 10, lines 6-21 concerns embodiments for which preferably the first (HMW) reactor with a volume that is no more than 90%, preferably between 30-70%, and more preferably approximately 40-60%, of the volume of the second (LMW) reactor. This passage does not concern an embodiment in which the two reactors differ in volume by no more than 10%, as is disclosed on page 10, lines 21-27. Accordingly, the passages on page 10,

lines 6-12 and page 10, lines 21-27 whose features have been combined by the respondent rather lack compatibility, should the skilled person be guided by the preferences expressed in said passages. On that basis, their combination has not been shown to be directly and unambiguously derivable from the application as filed.

- 2.6.6 Finally, the respondent did not explain as to why the skilled person reading the application as filed would consider the subject-matter defined in operative claim 1 to emerge in an unambiguous and direct manner. In particular, the respondent has not indicated any pointer in the application as filed towards the combination of features defined in operative claim 1.

This is in view of the structure of the text of the application as filed not apparent.

In this respect, the subject-matter defined in operative claim 1 is the result of selecting various parameters from a larger group of features used in the description in order to define various embodiments of the invention generally defined in the application as filed, i.e. HMW and LMW fractions, "the solids concentration in the reactor", the STY in the first reactor, the ratio of STY in the first to the second reactor and the solids concentration in "said reactor".

In addition, arriving at the subject-matter of operative claim 1 also necessitates to select for each of these parameters certain ranges of values or possibilities.

It is not apparent how the skilled reader would understand that this particular combination of

parametric definitions was disclosed in the application as filed, all the more when a large number of other parameters defining the process and/or its resulting products are also taught therein. It can be for example referred to the average internal diameter of the loop reactor (claims 3 to 5 and page 4), Froude numbers (claim 6 and page 4), the size of the reactors (page 5), the density span of the polymer particles (claim 9 and page 6) and their size distribution (claims 10 and 11 and page 7), various parameters defining the polymer obtained (claim 13 and page 9) and various conditions or measures used for the polymerization (pages 11 to 16).

- 2.7 In this regard, it is recalled that according to established case law, the content of an application must not be considered to be a reservoir from which features pertaining to separate embodiments of the application could be combined in order to artificially create a particular embodiment (Case Law, II.E.1.6.1.a, in particular decision T 3142/19, points 6.4 and 6.5 of the Reasons).
- 2.8 Consequently the Board concludes that the combination of features present in claim 1 of the main request does not emerge from the disclosure of the application as filed either explicitly or implicitly and constitutes new technical information. On that basis, the main request whose claim 1 extends beyond the content of the application as filed contrary to the requirements of Article 123(2) EPC is not allowable.

First to thirteenth auxiliary requests

3. Appellant 1 requests that the first, third, fifth and sixth auxiliary requests submitted with the rejoinder

not be admitted into the proceedings. Those correspond to the third, fifth, sixth and eighth auxiliary requests submitted before the opposition division with letter of 25 August 2022 which were admitted into the proceedings before the opposition division. The same is valid for the alternative second and seventh auxiliary requests, corresponding to the fourth and seventh auxiliary requests submitted before the opposition division with letter of 25 August 2022, respectively. There is therefore no reason not to take them into account (Case Law, V.A.3.4.4). In such situation the question arises whether those auxiliary requests which were admitted by the opposition division without any decision on their merit should be examined by way of a remittal. However, the questions addressed above in respect of the main request also arise in respect of those auxiliary requests so that it is appropriate for the Board in the present case to exercise their discretion under Article 111(1) EPC and examine whether said auxiliary requests comply with the requirements of Article 123(2) EPC.

4. The second, fourth and seventh to thirteenth auxiliary requests are new auxiliary requests which are to be regarded as an amendment to the respondent's case within the meaning of Article 12(4) RPBA whose admittance is subject to the discretionary power of the Board in accordance with Article 12, paragraphs (4) to (6) RPBA.

Pursuant to Article 12(4) RPBA, the Board shall exercise its discretion in view of, *inter alia*, the suitability of the amendment to address the issues which led to the decision under appeal, in the present case their suitability to overcome the objection that

the claimed subject-matter does not comply with the requirements of Article 123(2) EPC.

5. The additional amendments inserted in the auxiliary requests submitted with the reply to the statements of grounds of appeal and the fourth and seventh auxiliary requests submitted with letter of 25 August 2022 (which have been conditionally requested to replace the second and seventh auxiliary request submitted with the reply to the statements of grounds of appeal), have not been shown to overcome the objection that the subject-matter of claim 1 of the main request extends beyond the content of the application as filed. In view of the analysis given in points 2.6 to 2.7 above, it is not apparent how the features inserted in each of these auxiliary requests would lead to a different conclusion regarding the requirements of Article 123(2) EPC. In particular, the respondent merely stated the basis in the application as filed for the additional features inserted, but did not explain for each of these auxiliary requests how the resulting combination of features defined in claim 1 would emerge from the application as filed in a direct and unambiguous manner. This is in particular the case, since a corresponding explanation was not provided for the main request (see in particular point 2.6.6). On that basis, the mere insertion of additional features (with the deletion of features for the alternative second and seventh auxiliary requests) and the indication of the basis for the sole features inserted, cannot lead to the conclusion that the subject-matter claimed finds a basis in the application as filed.
6. In view of the foregoing, the second, fourth and seventh to thirteenth auxiliary requests are not admitted in the proceedings in exercise of the Board's

discretion pursuant to Article 12(4) RPBA and the first, alternative second, third, fifth, sixth and alternative seventh auxiliary requests are not allowable, as they do not comply with the requirements of Article 123(2) EPC, whereby all auxiliary requests referred to are those submitted with the reply to the statements of grounds of appeal, with the exception of the alternative second and seventh auxiliary requests corresponding to the fourth and seventh auxiliary requests submitted with letter of 25 August 2022.

7. In view of the foregoing, the appeals of appellants 1 and 2 are allowed.

8. Since the respondent's withdrawal of the request for oral proceedings was made within one month of notification of the communication issued by the Board in preparation for the oral proceedings, both conditions of Rule 103(4)(c) EPC, that any request for oral proceedings is withdrawn within one month of notification of the communication issued by the Board of Appeal in preparation for the oral proceedings and no oral proceedings take place, are met. It makes no difference that the withdrawing party and the appealing parties are not the same (cf. T 517/17, reason 6; T 488/18, reason 8). Hence, 25% of the appeal fee is to be reimbursed to each appealing party.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The appeal fees are reimbursed at 25%.

The Registrar:

The Chairman:



D. Hampe

O. Dury

Decision electronically authenticated