Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 3 June 2019

Case Number: T 0180/17 - 3.3.03

Application Number: 11715684.4

Publication Number: 2563823

IPC: C08F10/00, C08F2/00

Language of the proceedings: EN

Title of invention:
POLYMERIZATION PROCESS

Patent Proprietor:
Ineos Sales (UK) Limited

Opponents:
Basell Polyolefine GmbH
SABIC Global Technologies B.V.

Relevant legal provisions:
EPC Art. 56
RPBA Art. 12(4), 13(1), 13(3)

Keyword:
Inventive step - (main request: yes)
Late-filed objections - admitted (no)

Decisions cited:
G 0001/99

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0180/17 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 3 June 2019

Appellant: (Opponent 2)	SABIC Global Technologies B.V. Plasticslaan 1 4612 PX Bergen op Zoom (NL)
Representative:	Sabic Intellectual Property Group Sabic Intellectual Property Department P.O. Box 3008 6160 GA Geleen (NL)
Respondent: (Patent Proprietor)	Ineos Sales (UK) Limited Hawkslease Chapel Lane Lyndhurst Hampshire SO43 7FG (GB)
Representative:	King, Alex Mathisen & Macara LLP Communications House South Street Staines-upon-Thames, Middx TW18 4PR (GB)
Party as of right: (Opponent 1)	Basell Polyolefine GmbH Brühler Strasse 60 50389 Wesseling (DE)
Representative:	Seelert, Stefan Basell Polyolefine GmbH Intellectual Property Bldg. C657, 2nd floor Industriepark Höchst 65926 Frankfurt am Main (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on**

11 November 2016 concerning maintenance of the European Patent No. 2563823 in amended form.

Composition of the Board:

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

Summary of Facts and Submissions

I. The appeal by opponent 2 lies against the interlocutory decision of the opposition division concerning maintenance of European patent No. 2 563 823 in amended form according to the claims of the third auxiliary request filed with letter of 22 August 2016 and an amended description.

II. A notice of opposition to the patent was filed requesting revocation of the patent in its entirety.

III. The contested decision was based on the claims of the **main request filed with letter of 21 October 2015** and a first and second auxiliary requests (the latter auxiliary requests being not relevant for the present decision) as well as on the claims of the **third auxiliary request filed with letter of 22 August 2016**.

Claim 1 of said **main request** read as follows:

"1. Process for the transition T1 between an ethylene or a propylene polymerization process carried out in a polymerization reactor in the presence of a catalyst a1, ethylene or propylene and optionally an olefin co-monomer A1 to produce an ethylene polymer or a propylene polymer P1 into an ethylene or a propylene polymerization process carried out in the same polymerization reactor in the presence of a catalyst a2, ethylene or propylene and optionally an olefin co-monomer A2 to produce an ethylene polymer or a propylene polymer P2 **characterised in that**

- the reactor is a gas phase fluidised bed reactor;

- catalyst a1 and a2 are different and compatible, and

(i) where a chromium catalyst a1 is used as the catalyst for producing P1, the catalyst a2 for producing P2 will also be a chromium catalyst;

(ii) if a Ziegler-Natta catalyst is used as the catalyst for producing P1, the catalyst for producing P2 will also be a Ziegler-Natta catalyst; and

(iii) if a metallocene catalyst is used as the catalyst for producing P1, the catalyst for producing P2 will also be a metallocene catalyst;

- catalyst a1 and catalyst a2 are both active and present in the reactor during at least part of the transition T1 from P1 to P2; and

- the transition T1 is performed continuously."

Claim 1 of said **third auxiliary request** differed from claim 1 of the above main request in that the features

"and further the transition from P1 to P2 comprises a period during which both fresh catalyst a1 and fresh catalyst a2 are fed simultaneously in the reactor;"

were added between "during at least part of the transition T1 from P1 to P2" and "the transition T1 is performed continuously" (see end of the wording of claim 1 of the main request).

Claims 2 and 3 of said third auxiliary request read as follows:

"2. Process according to claim 1 wherein the polymerisation production rate ("R"), defined as the amount of polymer produced by unit of time (e.g. tons/hour), must fulfil the following equation

$$0.55 \times R_{P1} < R_{T1} < 1.45 \times R_{P1}$$

wherein R_{P1} is the steady state production rate of the polymer P1 just before the start of the transition T1, and R_{T1} is the production rate of the polymer during the transition T1."

"3. Process according to claim 2 wherein the polymerisation production rate must fulfill the following equation

$$0.80 \times R_{P1} < R_{T1} < 1.20 \times R_{P1}$$ "

Claims 4-11 of said third auxiliary request were dependent on claim 1.

IV. In that decision the following documents were *inter alia* cited:

D1: WO 2011/073368
D2: WO 00/50466
D3: WO 95/26370
D4: WO 96/39450
D6: Direct Synthesis of Linear Low-Density Polyethylene of Ethylene/1-Hexene from Ethylene with a Tandem Catalytic System in a Single Reactor, J. Pol. Sci.: Part A: Polymer Chemistry, Vol. 42, 4327-4336, 2004
D9: EP 1 182 216
D10: EP 0 798 318
D11: On-line Parameter Estimation in a Continuous

Polymerization Process, Ind. Eng. Chem. Res., 1996, 35, 1332-1343

V. In the contested decision, the opposition division held *inter alia* that the operative main request, as well as the first and second auxiliary requests, were not inventive starting from either D10 or D11 as closest prior art. However, the operative third auxiliary request was found to fulfil the requirements of Rule 80 EPC, sufficiency of disclosure as well as of Article 123 (2) and (3), 84, 54 and 56 EPC, whereby the inventive step was acknowledged starting from either D10 or D11 as closest prior art.

In respect of the inventive step of the third auxiliary request, the subject-matter of operative claim 1 differed from the processes according to either example 1 of D10 or to D11 in the following three features (see beginning of section 5.4 of the contested decision):

i) the two catalysts were different but compatible;

ii) the transition was carried out between catalysts of the same family;

iii) fresh catalysts a1 and a2 were fed simultaneously in the reactor for a period of time during the transition.

The problem effectively solved over either D10 or D11 as closest prior art resided in the provision of an alternative process for transitioning among similar polymerisation catalysts (section 5.4 of the reasons of the decision).

The process according to claim 1 of the third auxiliary request was not obvious in the light of D10/D11, even in combination with any of D2, D3, D4 and/or D9. In particular, above distinguishing feature iii) was not disclosed in any of the cited prior art documents (decision: section 5.4 at the bottom of page 16 and top of page 17).

VI. Opponent 2 (appellant) lodged an appeal against the above decision and requested that the decision of the opposition division be set aside and the patent be revoked. A referral to the Enlarged Board of Appeal was requested in case the Board considered that there were competing/different standards for assessing the inventive step of an alternative in the Case Law.

VII. In its rejoinder to the statement of grounds of appeal the patent proprietor (respondent) requested that the appeal be dismissed (**main request**) or, in the alternative, that the patent be maintained in amended form according to any of the **first to third auxiliary requests** filed therewith (these auxiliary requests are not relevant to the present decision). Also, it was requested that the appellant's objection of lack of sufficiency raised for the first time in the statement of grounds of appeal not be admitted into the proceedings.

VIII. In a communication accompanying the summons to oral proceedings issued by the Board, issues to be discussed at the oral proceedings were specified. The following points were in particular identified:

- In view of the parties' submissions, it would have to be discussed whether or not it would be justified for the Board to make use of its power to

hold the appellant's objection pursuant to Article 100(b) EPC put forward in the statement of grounds of appeal inadmissible pursuant to Article 12(4) RPBA (section 5.2.3 of the communication).

- Considering that the Board did not consider that there were competing different standards for assessing the inventive step of an alternative (here: alternative process to the one of the closest prior art), it seemed that there was no need for a referral to the Enlarged Board of Appeal, as requested by the appellant (see section 7 of said communication and paragraph bridging pages 9 and 10 of the statement of grounds of appeal).

IX. With letter of 19 April 2019 the appellant submitted a new objection pursuant to Article 123(2) EPC against the operative main request and requested that the first to third auxiliary requests filed with the rejoinder to the statement of grounds of appeal not be admitted into the proceedings. Also, a new objection of lack of inventive step based on the combination of D10 with D1 was put forward (see page 5 of said letter).

X. With letter of 25 April 2019 the respondent filed new **fourth to seventh auxiliary requests** (which are not relevant for the present decision) and requested that the appellant's objection pursuant to Article 123(2) EPC raised in the letter of 19 April 2019 not be admitted into the proceedings.

XI. During the oral proceedings which were held on 3 June 2019 in the presence of all parties, the appellant withdrew the request submitted in its statement of grounds of appeal according to which a

referral to the Enlarged Board of Appeal should be filed if the Board considered that there were different standards in the case law for assessing the inventive step of an alternative.

Also, the objection of lack of inventive step based on the combination of D10 with D1, which had been put forward in the appellant's last submission, was not pursued, whereby it was agreed with the Board that D1 was a prior art pursuant to Article 54(3) EPC, which could not be used in the assessment of the inventive step.

XII. The appellant's and opponent 1's arguments, as far as relevant to the present decision, were essentially as follows:

Main request - Inventive step

(a) It was agreed with the opposition division's conclusions regarding the selection of either D10 or D11 as closest prior art documents (see section V above).

(b) The subject-matter of claim 1 of the main request only differed from the process according to example 1 of D10 or D11 in that the transition should comprise a period during which fresh catalysts a1 and a2 were fed simultaneously. In that respect, it was derivable from the information provided in said example 1 that the process was carried out continuously and that both catalysts had to be compatible and to belong to the same catalyst family. It was further to be taken into account that the wording of operative claim 1 was not limited to the sole embodiments (i)-(iii)

regarding the definition of the catalysts a1 and a2 and did not impose that polymers P1 and P2 had to be different.

(c) It was agreed with the opposition division's conclusion according to which the problem effectively solved resided in the provision of a further process for transitioning among similar polymerisation catalysts. The alleged advantages referred to by the respondent, in particular during the oral proceedings before the Board, were neither supported by any evidence nor in any way surprising and should, for these reasons, not be taken into account.

(d) Starting from a process according to either D10 or D11, it was obvious to solve that problem in view of the teaching of either D2 or D6. Regarding example 1 of D10, it had in particular to be taken into account that there were only two possibilities to carry out that process: either by feeding both catalysts simultaneously, as required by operative claim 1, or one after the other. Choosing one of only two possibilities was insufficient to confer an inventive step. It was also to be noted that various processes for transitioning between different catalysts were known in the art, as shown by D2 to D4, D6 and D9 to D11. During the oral proceedings before the Board, the subject-matter of claim 1 of the main request was further held to be obvious over the closest prior art in the light of the teaching of the sentence at page 4, lines 20-21 of D3.

(e) In addition, if the second catalyst a2 was to be added after the first catalyst a1 and using the

same feeding means, it was in practice inevitable that at least some traces of the first catalyst would still be present in said feeding means and, therefore, traces of the fresh catalyst a1 would be fed simultaneously with the fresh catalyst a2. In that respect, none of the documents cited disclosed to avoid the use of the same feeding means for both catalysts.

(f) The same standards were to be applied when assessing sufficiency of disclosure and obviousness of the solution provided by the operative claims. Therefore, should the lack of information provided in the patent in suit in respect of the simultaneous feeding of catalysts be held to be sufficient to carry out the process being claimed in view of common general knowledge, the same common general knowledge would render the subject-matter obvious.

(g) In view of the above, the subject-matter of claim 1 of the main request was not inventive.

Admittance of the objections concerning sufficiency of disclosure and pursuant to Article 123(2) EPC

(h) The objection concerning sufficiency of disclosure raised in the statement of grounds of appeal was directed to operative claims 2 and 3 of the main request and arose due to the amendments made in the third auxiliary request dealt with in the contested decision (operative main request) as compared to the main request which was held to be not inventive by the opposition division. The objection was raised in the statement of grounds of appeal at the moment it was recognised, when preparing the appeal

case.

(i) The objection pursuant to Article 123(2) EPC had only been raised in the appellant's last submission for the sole reason that it had only been then firstly recognised. Although that objection had been filed at a very late stage, it should be admitted into the proceedings because it was highly relevant and not complicated to understand.

(j) For these reasons, the appellant's objections concerning sufficiency of disclosure and pursuant to Article 123(2) EPC should be admitted.

XIII. The respondent's arguments, as far as relevant to the present decision, may be summarised as follows:

Main request - Inventive step

(a) It was agreed with the opposition division's conclusions regarding the selection of either D10 or D11 as closest prior art documents and the distinguishing features of operative claim 1 (as indicated in section V above). In particular there was no indication in D10 that the titanium catalysts used in example 1 thereof were compatible and/or of the same family, as defined in operative claim 1.

(b) Regarding the formulation of the problem effectively solved, although no direct comparison with the closest prior art documents had been done, it was derivable from the wording of the claim itself that simultaneous addition of two catalysts provided some advantages in terms of process

control.

(c) None of the documents cited in the proceedings disclosed explicitly the simultaneous addition of two catalysts as defined in claim 1 of the main request. To the contrary, it was derivable from the cited documents that, prior to the patent in suit, the addition of the first catalyst was stopped before the addition of the second catalyst was started. In that respect, the objection of the appellant based on the combination of D10 with the sentence at page 3, lines 20-21 of D3 was not only late-filed but also based on a wrong interpretation and hindsight. Also, D2 and D6 were not related to processes for the transition between two polymers and were *prima facie* not relevant.

(d) In view of the above, the subject-matter of operative claim 1 was inventive.

Admittance of the objections concerning sufficiency of disclosure and pursuant to Article 123(2) EPC

(e) The objection concerning sufficiency of disclosure submitted in the statement of grounds of appeal amounted to a complete different objection than the one put forward during the opposition proceedings.

(f) In addition, considering that the claims of the operative main request were identical to the ones of the third auxiliary request dealt with in the contested decision, there were no reasons justifying the filing of an objection concerning sufficiency of disclosure for the first time in the statement of grounds of appeal and/or an objection pursuant to Article 123(2) EPC only about six weeks

before the oral proceedings before the Board.

(g) Also, should the objection pursuant to Article 123(2) EPC be admitted, it would raise some new and complicated issues from a procedural point of view in relation to the exceptions to the rule against *reformatio in peius*, whereby the conclusions drawn in decision G 1/99 (OJ EPO 2001, 381) would have to be considered. In such a case, the respondent would request a postponement of the oral proceedings in order to allow the parties to have sufficient time to deal with that issue.

(h) For these reasons, the appellant's objections concerning sufficiency of disclosure raised in the statement of grounds of appeal and pursuant to Article 123(2) EPC raised in their latest written submission should not be admitted.

XIV. The appellant requested that the decision under appeal be set aside and that the patent be revoked. It further requested that the first to third auxiliary requests filed with the rejoinder to the statement of grounds of appeal not be admitted into the proceedings.

The respondent requested that the appeal be dismissed, or alternatively that the decision under appeal be set aside and the patent be maintained on the basis of the claims of one of the first to third auxiliary requests filed with the rejoinder to the statement of grounds of appeal, or of one of the fourth to seventh auxiliary requests filed with the letter of 25 April 2019. It further requested that the appellant's objection concerning sufficiency of disclosure raised in the statement of grounds of appeal and the appellant's objection pursuant to Article 123(2) EPC raised in the

letter of 19 April 2019 not be admitted into the proceedings.

The other party (opponent 1) did not present any requests.

Reasons for the Decision

Main request

1. Inventive step

1.1 Closest prior art

The opposition division's conclusion according to which D10 constituted a suitable closest prior art document, whereby the process according to example 1 of D10 constituted the most promising starting point, is not contested by the parties. There is no reason for the Board to deviate from that view.

1.2 Distinguishing features

The parties agreed with the opposition division's finding according to which the subject-matter of operative claim 1 differed from that closest prior art at least in that it was defined by the fact that the fresh catalysts a1 and a2 were fed simultaneously in the reactor for a period of time during the transition, which was not disclosed in example 1 of D10.

1.3 Problem effectively solved

1.3.1 The opposition division's finding according to which the problem effectively solved over example 1 of D10 resided in the provision of a further process for transitioning among similar polymerisation catalysts was adhered to by the parties.

1.3.2 In that respect, it is agreed with the appellant and opponent 1 that, in the absence of any comparison between a process according to operative claim 1 and the one according to example 1 of D10, an advantage in terms of control of the process, which was advanced by the respondent albeit without relying upon these advantages for the formulation of the problem effectively solved, was not demonstrated and cannot be retained by the Board. In particular, the arguments put forward in appeal by the respondent provide no reason for the Board to deviate from the conclusion in that respect already reached by the opposition division (contested decision: top of page 11).

1.3.3 The Board is further satisfied that it may be derived from paragraph 86 of the patent in suit (transition from one catalyst to another one; gradually decreasing one catalyst and gradually increasing another one) that the examples of the patent in suit effectively illustrate the subject-matter of the operative claims, in particular regarding the simultaneous feeding of both fresh catalysts a1 and a2, and, therefore, show that the problem formulated by the opposition division is indeed solved by a process according to operative claim 1.

1.3.4 Under these circumstances, there is no reason for the Board to deviate from the formulation of the problem

effectively solved retained by the opposition division (section 1.3.1 above).

1.4 Obviousness

1.4.1 The question remains to be answered if the skilled person, desiring to solve the problem identified as indicated in section 1.3.1 above, 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.

1.4.2 In that respect, the appellant's and opponent 1's objections were in particular based on the combination of example 1 of D10 with either D2, D6, D3 or any of D4, D9 and D11.

1.4.3 However, it is agreed with the opposition division and with the respondent that D2 does not deal with a transition between two different polymers but, to the contrary, proposes a process which is suitable to avoid differences in the properties of a given polymer during its production process (D2: page 1, lines 21-23 and 29-34; page 3, lines 9-18; page 6, lines 14-20; page 21, lines 1-35; page 27, lines 24-32).

In that respect, the Board is further convinced that operative claim 1 effectively defines that polymers P1 and P2 must be different, contrary to the appellant’s view: indeed, although P1 and P2 as defined in operative claim 1 may be made up from the same monomers, the wording “Process for the transition between … P1 into … P2…” would not make sense if P1 and P2 were identical. In addition, the wording of operative claim 1 at the end of the claims explicitly

states "transition (T1) from P1 to P2", which unambiguously indicates that said transition takes place between two polymers P1 and P2, and not between two processes for making polymers P1 and P2 as argued by the appellant, which also only makes sense if polymers P1 and P2 are different.

Therefore, the combination of example 1 of D10 with D2 is not obvious *per se* and, in the Board's view, would only be contemplated by the skilled person with hindsight, which is not allowable. For that reason, the appellant's and opponent 1's objection based on the combination of example 1 of D10 with D2 is rejected.

1.4.4 D6 deals with a tandem catalyst for producing an ethylene/1-hexene copolymer from an ethylene stock monomer as the sole monomer, in which one catalyst of the tandem combination leads to trimerisation of ethylene, while the other one leads to copolymerisation of the hexene thus produced with ethylene (abstract; section “Conclusions”). Also, D6 neither explicitly discloses a gas phase fluidised bed reactor, nor is directed to a “transition” process between two different polymers. Under such circumstances, the combination of the teachings of example 1 of D10 and D6 is not *per se* obvious and would only be contemplated by the skilled person with hindsight, which is not allowable. For that reason, the appellant's and opponent 1's objection based on the combination of example 1 of D10 with D6 is also rejected.

1.4.5 The objection of the appellant in respect of D3 was directed to the single sentence at page 4, lines 20-21 of D3, which reads as follows:

"For compatible catalysts, the transition normally

occurs by interrupting the feed of the first catalyst while introducing the feed of the second.".

In the Board's view, that sentence would be understood by the skilled person as meaning that the second catalyst is first fed when the feeding of the first catalyst is stopped. Interpreting that sentence as meaning that the first catalyst is only stopped after the feeding of the second catalyst has already started, which means that both catalysts are fed at some stage simultaneously, as argued by the appellant, would only be made with hindsight, knowing the solution proposed by the patent in suit. In that respect, it is conspicuous that not a single prior art document was submitted by the appellant to show that a simultaneous feeding of compatible catalysts during a transition was effectively usual in the art according to its own interpretation of the sentence at page 4, lines 20-21 of D3.

In view of the above, the appellant's objection based on the combination of D10 with D3 is rejected and it is not necessary for the Board to address the issue of the late-filing of that objection, which was put forward by the respondent at the oral proceedings before the Board.

1.4.6 The appellant argued additionally that feeding a second catalyst through the same feeding system as the first catalyst would in practice mandatorily lead to both catalysts being fed simultaneously (at least for a limited period of time) since traces of the first catalyst would always be present in the feeding system.

However, in the absence of any indication in example 1 of D10 that a single feeding system was used for both

catalysts, that argument cannot succeed. In particular, the appellant has not shown how the transition between the catalysts of example 1 of D10 was effectively carried out and why it would have been obvious to modify such a process in a manner according to operative claim 1.

1.4.7 It was also not shown in appeal that there was any reason for the Board to deviate from the opposition division's conclusion according to which in all of the other documents relied upon by the appellant and by opponent 1 relating to a transition, the feeding of the first catalyst was interrupted before introducing the second one (contested decision: top of page 17). Therefore, there is also no reason for the Board to arrive at a different conclusion, namely that it was not shown that the distinguishing feature "fresh catalysts a1 and a2 are fed simultaneously in the reactor for a period of time during the transition" according to operative claim 1 was obvious in view of the cited prior art documents. In that respect, the fact that the solution proposed by operative claim 1 is one of only two possible alternatives, as argued by the appellant, does not alter that conclusion because, what is relevant here, is that the simultaneous feed of both catalysts a1 and a2 was not shown to be known in the art for a polymerisation process as otherwise defined in objective claim 1. Under such circumstances, the evidence on file neither allows the Board to conclude that the feature distinguishing the process being claimed from the closest prior art is obvious, nor to deviate from the conclusion reached in that respect by the opposition division.

1.4.8 In view of the above, at least the distinguishing feature of operative claim 1 over the closest prior art

according to which both fresh catalyst a1 and fresh catalyst a2 are fed simultaneously in the reactor for a period of time during the transition, is not obvious in the light of the prior art documents cited in the proceedings. Therefore, the arguments provided in appeal by the appellant and opponent 1 don't render the subject-matter of operative claim 1 as a whole obvious.

1.4.9 In view of that conclusion, there is no need for the Board to address in the present decision the issues related to the nature of the catalysts used in example 1 of D10, which was in dispute between the parties (see e.g. features i) and ii) as identified in section V above). Also, the appellant's and opponent 1's objection according to which the solution provided in operative claim 1 had to be obvious in view of common general knowledge (see section XII f) above) is, in the absence of further documentary evidence, rejected.

1.4.10 For these reasons, the subject-matter of claim 1 of the main request is inventive over D10 as closest prior art. In the absence of any additional arguments, the same conclusion also applies to claims 2-11 of the main request, which are dependent on said claim 1.

1.5 A similar objection of lack of inventive step as the one discussed in section 1.4 starting from example 1 of D10 as closest prior art was put forward by the appellant in writing (but not pursued at the oral proceedings before the Board) starting from D11 as closest prior art, whereby a process run in a continuous polymerisation reactor according to Figure 1 and to the paragraph starting with “To start the grade transition, …” on page 1333, left hand side of D11 was chosen as starting point. However, considering that the

arguments of the parties put forward in that respect were identical to the ones submitted when starting from example 1 of D10 as closest prior art, the Board is bound to arrive at the same conclusion in both cases. Therefore, the subject-matter of claim 1 of the main request, and of its dependent claims 2-11, is inventive over D11 as closest prior art.

1.6 For these reasons, the appellant's and opponent 1's objections pursuant to Article 56 EPC are rejected.

Admittance of the objection concerning sufficiency of disclosure

2. The respondent requested that the objection concerning sufficiency of disclosure submitted by the appellant in its statement of grounds of appeal not be admitted into the proceedings.

2.1 In that respect, it may be derived from paragraph 5.3 of the reasons of the contested decision that the opposition division’s decision concerning sufficiency of disclosure of the third auxiliary request filed with letter of 22 August 2016, the claims of which are identical to the claims of the operative main request defended in the appeal proceedings, was based on the decision on the same topic taken in respect of the main request defended in front of the opposition division, whereby the issue of the feeding rates of catalysts a1 and a2 was effectively addressed (page 5 of the decision, paragraph starting with “i) …” and paragraph bridging pages 5 and 6).

2.2 However, although the third auxiliary request allowed by the opposition division was filed about two months before the oral proceedings before the opposition

division, no separate objection of lack of sufficiency was raised against it during the opposition proceedings, in particular not at the oral proceedings before the opposition division.

2.3 In addition, whereas the objections dealt with in the contested decision were directed to the subject-matter of claim 1 as defined in the main request then pending, the objection put forward in the statement of grounds of appeal concerns the processes according to operative claims 2 and 3 together with the simultaneous feeding of catalysts a1 and a2. In that respect, it was never shown, not even argued, that the objection put forward in appeal constituted a direct reaction to the contested decision. To the contrary, in the Board's view, said objection constitutes a fresh case, i.e. it is related to a completely new issue which would certainly expand the scope of discussion to matters which have never been addressed during the first instance proceedings.

2.4 Finally, the appellant’s main objection is related to an alleged lack of sufficient guidance regarding the feeding rates of catalysts a1 and a2 in order to ensure that the requirements in terms of polymerisation production rate specified in operative claims 2 and 3 be satisfied when both catalysts a1 and a2 are fed simultaneously in the reactor (see statement of grounds of appeal: page 1 to top of page 5).

However, according to EPO case law, an objection of insufficient disclosure presupposes that there are serious doubts, substantiated by verifiable facts and the burden of proof is primarily on the opponent, here the appellant (Case Law of the Boards of Appeal of the EPO, 8th edition, 2016, II.C.8). Considering that, in

the present case, there is no evidence on file that working according to the teaching of paragraphs 85 and 86 of the patent in suit and using conditions usual in the art do not allow to carry out a process according to operative claims 2 and 3, the appellant's objection is not supported by facts and, therefore, it is unlikely that it would have succeeded.

2.5 Under such circumstances, in the absence both of a justification for the late filing and of supporting evidence, the Board finds it appropriate to make use of its power to hold the appellant's objection pursuant to Article 100(b) EPC put forward in the statement of grounds of appeal inadmissible pursuant to Article 12(4) RPBA.

3. **Admittance of the objection pursuant to Article 123(2) EPC**

3.1 The respondent requested that the objection pursuant to Article 123(2) EPC submitted by the appellant in its latest written submission, about six weeks before the date scheduled to hold the oral proceedings, not be admitted into the proceedings.

3.2 According to the case law, it is a matter for each party to submit all facts, evidence, arguments and requests relevant for the enforcement or defence of his rights as early and completely as possible, in particular in *inter partes* proceedings in order to act fairly towards the other party and, more generally, to ensure due and swift conduct of the proceedings (Case Law, *supra*, IV.E.4.1.2 and 4.2.1).

3.3 In the present case, it was not contested by the appellant that the objection pursuant to

Article 123(2) EPC submitted in its last submission is directed to claims which were already submitted in writing by the respondent about two months before the oral proceedings before the opposition division. Therefore, there are no compelling reasons why said objection could not have been filed earlier, as indeed acknowledged by the appellant during the oral proceedings before the Board.

3.4 In addition, the Board agrees with the respondent that admitting said objection pursuant to Article 123(2) EPC would complicate the case from a procedural point of view, in particular as the issues of the exceptions to the rule against *reformatio in peius*, see e.g. decision G 1/99 (OJ EPO 2001, 381), would have to be taken into account, which complications are not in line with the need for procedural economy (Article 13(1) RPBA) and would, according to the Board, have necessitated to postpone the oral proceedings in order to provide sufficient time for the respondent to address that issue (Article 13(3) RPBA).

3.5 For those reasons, the Board finds it appropriate to exercise its discretion under Article 13(1) RPBA and its power under Article 13(3) RPBA by not admitting into the proceedings the objection pursuant to Article 123(2) EPC submitted by the appellant in its last written submission.

4. Considering that the appellant's and opponent 1's objections pursuant to Article 56 EPC against the respondent's main request are not successful and that the appellant's objections concerning sufficiency of disclosure and pursuant to Article 123(2) EPC are not admitted into the proceedings, the appeal is to be

dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

B. ter Heijden D. Semino

Decision electronically authenticated