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**Datasheet for the decision
of 17 January 2020**

Case Number: T 1964/17 - 3.3.03

Application Number: 10715556.6

Publication Number: 2432809

IPC: C08F297/08, C08L23/14

Language of the proceedings: EN

Title of invention:
PROPYLENE POLYMER COMPOSITIONS

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

Opponent:
Borealis AG

Relevant legal provisions:
EPC Art. 100(b), 111(1)
RPBA Art. 12(4), 13(1), 13(3)
RPBA 2020 Art. 11, 25

Keyword:

Late-filed objection - admitted (no)

Late-filed facts or evidence - held inadmissible (no)

Grounds for opposition - insufficiency of disclosure (no)

Appeal decision - remittal to the department of first instance
(yes)

Decisions cited:

G 0003/14, T 0971/11, T 1403/13



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Case Number: T 1964/17 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 17 January 2020

Appellant: Basell Poliolefine Italia S.r.l.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 June 2017
revoking European patent No. 2432809 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appeal by the patent proprietor lies against the decision of the opposition division posted on 16 June 2017 revoking European patent No. 2 432 809.
- II. Claim 1 of the patent in suit read as follows:
- "1. A propylene composition comprising (percent by weight):
- A) 60%-90%, of a crystalline propylene copolymer containing from 4.0% to 6.5% of ethylene derived units;
- B) 10%-40%, of a copolymer of propylene containing from 18.5% to 23.5%, of ethylene derived units."
- III. An opposition against the patent was filed, in which the revocation of the patent was requested on the grounds of Article 100(a) EPC (lack of novelty and lack of an inventive step) and Article 100(b) EPC.
- IV. The following documents were *inter alia* cited in the opposition division's decision:
- D1: Technical report dated 12 October 2015,
E. Pomakhina and M. Parkinson, Borealis
- D1C: Technical report dated 17 February 2017,
E. Pomakhina, Borealis
- D1D: Declaration and technical report dated
25 April 2017, E. Pomakhina, Borealis
- D3: EP-A- 2 264 099
- E1: ASTM D3900-05a (reapproved 2010)
- E1A: ASTM D3900-95
- E2: ASTM D5576-00 (reapproved 2013)
- E3: Di Martino S. and Kelchtermans M., J. Appl.

Polym. Sci., 1995, 56, pages 1781-1787

E4: Technical report filed with letter of
17 October 2017, I. Camurati, Basell
Poliolfine Italia S.r.l.

V. The contested decision was based on a main request (patent in suit) and on five auxiliary requests, all filed with letter of 27 May 2016.

VI. In the contested decision the opposition division held *inter alia* that neither the patent in suit, nor any of the operative auxiliary requests, satisfied the requirements of sufficiency of disclosure. That conclusion was reached considering that (see section 3.10 of the reasons of the contested decision):

- there was no recognised standard method for the measure of ethylene content in polypropylene copolymers in the range of granted claim 1;
- the ranges of ethylene content for copolymers A) and B) as defined in granted claim 1 were very narrow and were associated with an error which was likely to become bigger than the range itself.

Therefore, the opposition division was of the opinion that there was an undue burden which the skilled person wishing to reproduce the teaching of granted claim 1 would encounter when trying to find the correct method for measuring the ethylene content in the patent in suit. In particular, the skilled person would need to clearly identify a standard method for the determination of ethylene in the range required by the patent in suit. The same conclusion was valid for each of the operative auxiliary requests.

VII. The patent proprietor (appellant) appealed the above decision. With the statement setting out the grounds for the appeal, the appellant requested that the decision of the opposition division be set aside and that the case be remitted to the department of first instance for further prosecution on the basis of the patent as granted or, alternatively, on the basis of any of the first to fifth auxiliary requests filed with the statement of grounds of appeal (which are not relevant for the present decision).

VIII. With their rejoinder to the statement of grounds of appeal the opponent (respondent) requested that the appeal be dismissed or that, should the Board conclude that the patent in suit or any of the appellant's auxiliary requests satisfied the requirements of sufficiency of disclosure, the case be remitted to the department of first instance for further prosecution.

Also, document D4D, which had not been admitted by the opposition division, was resubmitted, together with, *inter alia*, the following document:

D12: Declaration dated 7 February 2018, F. Berger,
Borealis

IX. In a communication dated 11 November 2019 sent in advance of the oral proceedings, the Board set out its preliminary view of the case. Sections 6.2 and 6.3 (part) of said communication read as follows:

"6.2 However, 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 propylene composition according to claim 1.

6.3 In the Board's view, the opposition division's conclusion, which forms the basis of the respondent's objections in its reply to the statement of grounds of appeal on the basis of the information provided in E1/E1A, E2, E4, D1, D1C and D1D, is directed to a possible ambiguity regarding the determination of the ethylene content of propylene copolymers A) and B) according to paragraph 36 of the patent in suit, in which it is merely indicated that these ethylene contents were determined "by IR spectroscopy".

However, even if the opposition division's and respondent's arguments were to be followed, it appears that they constitute no evidence that, carrying out the teaching of the patent in suit, in particular concerning the preparation process (paragraphs 16 and 26-30; examples 1-2) and the catalyst system (paragraphs 17-25) to be used, the skilled person would not be in a position to prepare a propylene composition according to granted claim 1, in particular satisfying the ethylene contents of polypropylene copolymers A) and B) defined therein."

- X. With letter dated 17 December 2019 the respondent made a further submission regarding sufficiency of disclosure. In particular, the repeatability of the examples of the patent in suit was objected to in view of the examples of document D3.

XI. With letter of 13 January 2020 the appellant requested that the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit raised with letter of 17 December 2019 not be admitted into the proceedings.

XII. Oral proceedings before the Board were held on 17 January 2020 in the presence of both parties.

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

Admittance of the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit

(a) The objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit was raised for the first time in the respondent's last submission, which was filed one month before the oral proceedings before the Board. Said objection was completely new and unrelated to the objection of lack of sufficiency of disclosure related to the accuracy of the method of determination of the ethylene content of fractions A) and B) defined in granted claim 1, which had been dealt with until then.

(b) No justification was provided by the respondent why said objection had not been raised earlier.

(c) Should said objection be admitted, it would raise new discussions and put the appellant in an unfair position, in particular in view of the short period of time available to react. Also, completely new issues would have to be dealt with for the first

time during the oral proceedings, which should not be allowed.

- (d) The second paragraph of section 6.3 of the Board's communication was based on the parties' submissions and merely constituted the opinion of the Board in respect of the objections made. It was not a request to react and/or to provide new arguments or objections.
- (e) For these reasons, the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit should not be admitted into the proceedings.

Main request - Sufficiency of disclosure

- (f) Methods for the determination of the ethylene content for fractions A) and B) as defined in granted claim 1 were known in the art (e.g. E1, E2) and were even used by the respondent (see e.g. D1C).
- (g) In D1-D1D the respondent showed that several methods could be used to determine said ethylene content but that these methods led to different results. However, said documents contained inconsistencies and/or provided insufficient information. Besides, it was indicated in E4 that the skilled person would not consider at least some of these methods. In view of this conflicting information, the benefit of the doubt should be given to the patent proprietor, here the appellant.
- (h) No information regarding the determination method of the ethylene content defined in granted claim 1

and/or its accuracy could be derived from E1/E1A, because the method disclosed therein was indicated to be only suitable for the determination of much higher ethylene contents. Nevertheless, should said method be considered, the reproducibility "r" within a laboratory and not the reproducibility "R" between laboratories should be considered, contrary to what was done by the respondent. Since r was smaller than R, the calculations made by the respondent were flawed. Besides, should r be considered, the measurement error would be smaller than the ranges specified in the granted claims.

- (i) The error in measurement indicated in the Table on page 4 of D1C for the six different methods of determination of the ethylene content contemplated by the respondent were smaller than the range of ethylene of fractions A) and B) defined in granted claim 1. Besides, the calibration curves used in D1C extended far outside the range in which the ethylene contents were to be determined, which was likely to increase the measurement error. Therefore, the respondent's argument, which was retained by the opposition division, that the error of measurement was larger than the range of ethylene content to be determined, was not correct.

- (j) The objections of the respondent were related to the reliability of the method of determination of the ethylene content and not to the possibility to measure said ethylene content. Therefore, the objection was an issue of clarity (which could not be dealt with in the present case), which could have to be taken into account when determining the scope of the claims for the assessment of novelty and inventive step, but not a matter of sufficiency

of disclosure.

- (k) Controlling the comonomer content of a polymerisation process was well within the possibility of the skilled person without any undue burden. Comonomer contents were commonly controlled in industrial plants and the specification of a commercial polymer grade were more restricted than the ranges defined in granted claim 1.
- (l) It was further indicated in paragraph 30 of the patent in suit that the compositions according to granted claim 1 could be prepared by mere blending, which was not shown to present any difficulty.
- (m) For those reasons, the requirements of sufficiency of disclosure were satisfied.

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

Admittance of the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit

- (a) Considering that in order to verify if one had correctly reworked the examples of the patent in suit, it was necessary to determine the ethylene content of copolymers A) and B) defined in granted claim 1, the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit (which was raised in the appellant's submission of 17 December 2019) and the objection of sufficiency of disclosure related to the undue burden to find an appropriate method of measurement for the feature "ethylene content"

specified in the granted claims (which was dealt with in the contested decision) were interrelated.

- (b) Since the objection related to the repeatability of the examples of the patent in suit had been addressed for the first time by the Board in the first sentence of the second paragraph of section 6.3 of the preliminary opinion, the respondent should be given an opportunity to reply on that matter.
- (c) It had been constantly argued during the proceedings that there was a lack of sufficiency of disclosure related to the inaccuracy of the method of measurement of the feature "ethylene content", which resulted from a lack of sufficient information regarding which method should be used and how it had to be carried out. As a consequence, there was no need for the respondent to address the issue of repeatability in the rejoinder to the statement of grounds of appeal, in particular because it had not been dealt with by the opposition division or by the appellant.
- (d) For these reasons, the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit should be admitted into the proceedings.

Main request - Sufficiency of disclosure

- (e) The subject-matter of granted claim 1 was *inter alia* defined by very narrow ranges of the ethylene content of fractions A) and B) defined therein, whereby the distinction with the prior art was allegedly achieved owing to these ranges. To be in

a position to assess whether or not the subject-matter being claimed was novel over the cited prior art, one had to be able to determine unambiguously such an ethylene content, which was only possible if the patent in suit, if needed complemented by common general knowledge, provided precise information about how to proceed.

- (f) However, the only information of the patent in suit in that respect was that the ethylene content should be determined by IR-spectroscopy.
- (g) The lack of information of the patent in suit in that respect could not be complemented by common general knowledge for the following reasons:
 - It could not be derived from common general knowledge how to measure such an ethylene content with the accuracy needed for the ranges defined in granted claim 1. E2 was not suitable for ethylene propylene copolymers. E1/E1A was explicitly indicated as being not suitable for determining ethylene contents in the ranges according to granted claim 1. D1, D1C, D1D and E4 showed that at least 9 different methods could be contemplated by the skilled person. However, for each of these methods, an appropriate calibration curve was needed, but, as shown in D1C and E4, depending on which calibration curve and on which mathematical model was used for analysing the NMR spectra, significantly different results were obtained.
 - If E1/E1A was used, the error of measurement (reproducibility "R" among laboratories) reported therein was so large that said method was not

appropriate, in particular to assess whether or not a given sample fell in the claimed range. In that respect, it was contested that the reproducibility "r" within laboratories should be considered, as argued by the appellant.

- The inaccuracy in the determination of the ethylene content was even higher for fraction B) as defined in granted claim 1 because an additional inaccuracy in the determination of the split between fractions A) and B) had to be taken into account, as indicated in D12.

- (h) Under these circumstances, the skilled person was not in a position to determine whether or not a given composition fell within the claimed range, which was, for the reasons given above, not only a matter of clarity but also of sufficiency of disclosure.
- (i) The main focus of the patent in suit regarding the preparation of the claimed compositions was the sequential polymerisation process (as could be seen from the examples and from the numerous passages of the description dealing with that preparation process) and not a mechanical blending as only briefly mentioned in a single paragraph of the patent in suit. In any case, the patent in suit also provided insufficient information regarding how such a blending process should be carried out to prepare the claimed composition.
- (j) For those reasons, the requirements of sufficiency of disclosure were not satisfied.

XV. The appellant requested that the decision under appeal be set aside and the case be remitted to the department of first instance for further prosecution on the basis of the patent as granted or, alternatively, on the basis of one of the first to fifth auxiliary requests filed with the statement of grounds of appeal.

The respondent requested that the appeal be dismissed or that, should the board conclude that the patent as granted or any of the appellant's auxiliary requests satisfies the requirement of sufficiency of disclosure, the case be remitted to the department of first instance for further prosecution.

Reasons for the Decision

Main request (patent in suit)

1. Admittance of the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit
- 1.1 The objection was made in the respondent's letter of 17 December 2019, after notification of the summons to oral proceedings and therefore at the stage covered by Article 13(2) RPBA 2020. The RPBA 2020 entered into force on 1 January 2020 and is applicable to all appeals pending on that date, subject to the transitional provisions in Article 25 RPBA. In the present case, the summons to oral proceedings was notified to the parties before the date of entry into force of the RPBA 2020. Therefore, according to Article 25(3) RPBA 2020, Article 13(2) RPBA 2020 does not apply to submissions filed after notification of the summons,

but Article 13 RPBA 2007 continues to apply to these.

- 1.2 In its last submission dated 17 December 2019 (section B.II), the respondent argued that the requirements of sufficiency of disclosure were not satisfied because the skilled person would not be in a position to prepare fractions A) and B) as defined in granted claim 1 on the basis of the information provided in the patent in suit in respect of example 2. In that respect, reference was made to the examples of D3, which were said to be similar to the ones of the patent in suit and contained more information regarding the experimental conditions used.
- 1.3 During the oral proceedings before the Board, the respondent admitted that said objection had never been raised before (neither during the opposition, nor during the appeal proceedings).
- 1.4 In addition, whereas the objection of lack of sufficiency of disclosure put forward during the opposition proceedings and retained by the opposition division (see section VI above) is related to the accuracy of the method of measurement of the ethylene content of the copolymers defined in granted claim 1, the objection related to the repeatability of the examples of the patent in suit rather addresses the question whether or not the information provided in the patent in suit is sufficient in order to obtain the copolymers as claimed, in particular by following the examples of the patent in suit. In that respect, the latter objection relied on the comparison of the information provided for the examples in the patent in suit with the one provided for the examples of D3, whereby it was held that some information was missing in the patent in suit. In the Board's view, the

question of the accuracy of the method of determination of the ethylene content of the fractions of the heterophasic polypropylene copolymer is clearly independent and unrelated to the issue of the repeatability of the examples of the patent in suit. Therefore, the submission of the respondent according to which both objections were interrelated is rejected.

Besides, although document D3 was cited during the opposition proceedings, that document had never been cited until then in the appeal proceedings.

Under these circumstances, the Board considers that the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit in view of the examples of document D3 constitutes a completely new objection ("fresh case").

- 1.5 During the oral proceedings before the Board, the respondent argued that, since the issue had been raised by the Board (section 6.3, second paragraph, first sentence of its communication: see section IX above), he should be allowed to comment and reply on that matter.

However, the passage of the Board's communication relied upon by the respondent does not constitute a new issue raised *ex officio* by the Board. Rather, said passage reflects the preliminary opinion of the Board that the respondent's objections were only related to the accuracy of the method of measurement of the ethylene content of the copolymers defined in granted claim 1 but not to a lack of information regarding how to prepare copolymers A) and B) as defined in the granted claims, which is an issue which may have to be taken into account when assessing sufficiency of

disclosure (as indicated in section 6.2 of said communication: see section IX above). In addition, said statement of the Board is in line with the argument put forward by the appellant in its statement of grounds of appeal (page 7: first sentence of the second full paragraph), according to which the reproducibility of the invention had never been objected to during the opposition proceedings. Therefore, section 6.3 of the Board's communication cannot justify the submission of a new objection by the respondent. In that respect, a preliminary opinion expressed by the Board in its communication and which is based solely on submissions made by the parties is not to be seen as an invitation to submit new requests or new objections that the parties could (and should) have filed earlier.

- 1.6 In addition, admitting a new objection raised for the first time shortly before the oral proceedings before the Board would go against the stipulations of Article 12(3) RPBA 2020 (corresponding to Article 12(2) RPBA 2007), according to which the respondent should submit its complete case in its rejoinder to the statement of grounds of appeal.
- Besides, 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 of the Boards of Appeal of the EPO, 9th edition, 2019, V.A.4.1.2, 4.2.1 and 4.4.1). For that reason, the argument of the respondent according to which he had no reason to address that issue before having received the Board's communication is rejected.

- 1.7 Admitting said new objection of lack of sufficiency of disclosure would also not satisfy the requirements of due process (efficient conduct of the proceedings) and the need for economy of the proceedings (Article 13(1) RPBA 2007).
 - 1.8 Finally, it is true that, as argued by the appellant during the oral proceedings before the Board, admitting into the proceedings the new objection of lack of sufficiency of disclosure could have required a postponement of the oral proceedings in order to give sufficient time to the appellant to prepare a suitable line of counter-arguments, which is contrary to the stipulations of Article 13(3) RPBA 2007.
 - 1.9 For those reasons, the Board finds it appropriate to exercise its discretion under Article 13(1) RPBA 2007 and its power under Article 13(3) RPBA 2007 by not admitting into the proceedings the objection of lack of sufficiency of disclosure related to the repeatability of the examples of the patent in suit raised for the first time by the respondent in its letter of 17 December 2019.
2. Cited documents
 - 2.1 In the present case, the statement of grounds of appeal was filed before the date of entry of the RPBA 2020 (1 January 2020) and the reply thereto was filed in due time. Therefore, according to Article 25(2) RPBA 2020, the basis of the proceedings is governed by the stipulations of Article 12(4) RPBA 2007.
 - 2.2 Document D1D was not admitted into the proceedings by the opposition division (section 2 of the reasons of the contested decision). However, D1D was submitted

anew by the respondent together with its rejoinder to the statement of grounds of appeal. In that respect, the mere fact that the opposition division did not admit a late-filed document (here, D1D) and did not exceed the proper limits of its discretion by not admitting it does, in principle, not prevent the Board from admitting the document (T 971/11, of 4 March 2016, sections 1.1 to 1.3 of the reasons; T 1403/13, of 25 June 2018, sections 2.3 of the reasons). In particular, a submission which would have been admitted into the appeal proceedings, if it had been filed for the first time at the outset of those proceedings, should not be held inadmissible pursuant to Article 12(4) RPBA 2007 for the sole reason that it was already filed before the department of first instance and not admitted (T 971/11, section 1.3 of the reasons). Therefore, in the absence of any request by the appellant not to admit D1D, nor any compelling reasons by the Board, there is no reason to hold D1D inadmissible pursuant to Article 12(4) RPBA 2007.

- 2.3 Document E4, which was late-filed during the opposition proceedings, was also cited but not referred to in the reasons of the contested decision (due to the numbering "E4" given to two different documents in section 7 of the section "Facts and Submissions" of the decision, namely documents E1A and E4 as identified in above section IV, the document E4 referred to in section 3.9 of the reasons of the decision is in fact said document E1A). In particular, no decision was taken regarding its admittance. However, in the absence of any objection in that respect during the appeal proceedings and further considering that both parties relied on that document (statement of grounds of appeal: page 4, third paragraph; rejoinder to the statement of grounds of appeal: section 5.34; oral proceedings before the

Board), nor any compelling reasons by the Board, there is no reason to hold E4 inadmissible pursuant to Article 12(4) RPBA 2007.

2.4 In the absence of any objection regarding the admittance of document D12, which was filed together with the rejoinder to the statement of grounds of appeal, nor any compelling reasons by the Board, there is no reason to hold D12 inadmissible pursuant to Article 12(4) RPBA 2007.

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 propylene composition according to claim 1.

3.2 In the Board's view, the opposition division's conclusions (see section VI above), which form the basis of the respondent's objections in relation to the information provided in E1/E1A, E2, E4, D1, D1C, and D1D, is directed to a possible ambiguity regarding the determination of the ethylene content of propylene copolymers A) and B) according to paragraph 36 of the patent in suit, in which it is merely indicated that these ethylene contents were determined "by IR spectroscopy".

However, even if the opposition division's and

respondent's arguments were to be followed, they constitute no evidence that, carrying out the teaching of the patent in suit, in particular concerning the preparation process (paragraphs 16 and 26-30; examples 1-2) and the catalyst system (paragraphs 17-25) to be used, the skilled person would not be in a position to prepare a propylene composition according to granted claim 1, in particular satisfying the ethylene contents of polypropylene copolymers A) and B) defined therein. In that respect, it was never argued by the respondent that there were no known methods in the art to determine such ethylene contents. In addition, the respondent was even able to determine ethylene contents in the range specified in granted claim 1 using different methods known in the art, albeit obtaining different results with the various methods (see D1, D1C and D1D). Therefore, the evidence put forward by the respondent shows that the determination method of the ethylene content may be ambiguous, but fails to demonstrate that the skilled person is not in a position of preparing a composition according to granted claim 1. Therefore, the respondent's arguments also for that reason are at most related to the issue of clarity pursuant to Article 84 EPC, but not to sufficiency of disclosure.

In view of the above, it makes no doubt that the arguments of the respondent are related to the question whether or not the skilled person knows whether he is working within or outside the scope of the granted claims, which, in the circumstances of the present case, is at most a matter of clarity pursuant to Article 84 EPC (which cannot be dealt with here at the appeal stage: see decision G 3/14, OJ EPO 2015, 102), as put forward by the appellant.

It is additionally noted that the above conclusion applies to all the objections made by the respondent regarding the determination method of the ethylene content in both fractions A) and B) defined in operative claim 1, i.e. it applies to the arguments related to both the determination method of ethylene content in each of fraction A) or B), as well as to the impact of the split of A) and B) and of the determination thereof.

- 3.3 The respondent and the opposition division considered additionally that the requirements of sufficiency of disclosure were not satisfied because the error of measurement made when determining the ethylene contents specified in granted claim 1 was larger than the breadth of the range specified in said claim. Therefore, the skilled person was not able to carry out such measurement, so the respondent.

However, the respondent's objection (which was retained by the opposition division) relies on calculations of the error of measurement made taking into account the information regarding the reproducibility indicated in E1/E1A (repeatability indicated in Table 1; the fact that the appellant considered the repeatability "r" within a laboratory whereas the respondent considered the repeatability "R" among laboratories does not play a role hereinafter). Since E1/E1A, as agreed by the parties, is directed to a method of determination of ethylene contents in a range of 35-85 % ethylene (see e.g. E1: section 1.1), which is outside both ranges of interest as defined in granted claim 1 (4.0% to 6.5% for fraction A) and 18.5% to 23.5% for fraction B)), it makes no doubt that said method would not be considered by the skilled person to determine ethylene contents in the ranges defined in granted claim 1. Therefore, the

information on reproducibility indicated in E1/E1A is not relevant for the present case, contrary to the respondent's view.

In addition, the calculations related to the accuracy of the methods of determination of ethylene known in the art made by the respondent were derived from information obtained from calibration curves made upon a range of ethylene contents which either encompass samples with ethylene contents ranging from close to zero to up to almost 80% (see Figure 1 of D1C), i.e. which extend far outside both ends of the ranges of interest, or which are even limited to ethylene contents far outside the ranges of interest (Table 3 of D1C and paragraph above it: ethylene contents as indicated in E1/E1A, namely between 40 and 75 %). Such calibrations, in the Board's view, are not in line with usual laboratory practice, whereby calibration curves are determined around the range of interest, as argued by the appellant. The fact that the calibration curves of Figure 1 of D1C encompass the ranges of interest also does not convince because using a calibration range extending so far outside both upper ends of the ranges of interest is likely to increase the inaccuracy of the determination method, especially in the lower end of the range, which is even more important in respect of fraction A) as defined in granted claim 1 (which is defined with lower ethylene contents and over a smaller range).

Under such circumstances, the argument of the respondent (which was retained by the opposition division) fails to convince.

3.4 Further taking into account that the features defining the composition of claim 1 and discussed during the

opposition and appeal proceedings (ethylene content and split of fractions A) and B)) are very common in the art, it is further credible that, as argued by the appellant, controlling the comonomer content of a polymerisation process is well within the possibility of the skilled person without any burden. In particular, it is agreed with the appellant that comonomer contents are commonly controlled in industrial plants and that the specifications of commercial products are usually more restricted than the ranges defined in granted claim 1.

- 3.5 It is further noted that, according to paragraph 30 of the patent in suit, the compositions according to granted claim 1 may be obtained by mere blending of polypropylene copolymers A) and B).
- 3.5.1 In that respect, it was not shown by the respondent that the skilled person would have any difficulty to carry out such a preparation process, which merely resides in the mechanical blending of two polymers as defined in granted claim 1. There is also no reason for the Board to doubt that such a process cannot be carried out on the basis of common general knowledge, since it is a routine operation for the skilled person working in the field of polymers.
- 3.5.2 The respondent was of the opinion that, in view of the large amount of information provided in the patent in suit regarding sequential polymerisation and of the scarce information regarding a blending process, the compositions of granted claim 1 had to be prepared by sequential polymerisation. Besides, since the patent in suit did not provide sufficient information in respect of said sequential polymerisation (see sections 3.1 and 3.2 to 3.5 above), the requirements of sufficiency of

disclosure were not satisfied.

However, the subject-matter of granted claim 1 was not shown to be limited, even implicitly, by the process used to prepare it. Therefore, there is no reason to reduce the question of sufficiency of disclosure to the sole preparation process by sequential polymerisation, contrary to the respondent's view. Therefore, considering that it is explicitly indicated in paragraph 30 of the patent in suit that the compositions being claimed may be prepared by mechanical blending and since it was not shown that the skilled person would have any difficulty in carrying out such a mechanical blending on the basis of the general knowledge of the skilled person working in the technical field of the patent in suit, there is no reason for the Board to consider that the skilled person is not able to prepare a composition according to granted claim 1 by first preparing each of fractions A) and B) separately and then blending these two fractions together.

For that reason, the argument of the respondent is rejected.

- 3.6 In view of the above, the arguments regarding sufficiency of disclosure put forward by the appellant and/or retained by the opposition division fail to convince and the contested decision has to be set aside.
- 4. Remittal
 - 4.1 The issues of novelty and inventive step were addressed neither in the contested decision, nor in the appeal proceedings. Further considering that the appellant and

the respondent both requested remittal to the department of first instance, the Board finds it appropriate to remit the case to the department of first instance for further prosecution (Article 111(1) EPC).

4.2 In this respect, the complete absence in the decision under appeal of an analysis of the grounds of opposition of lack of novelty and lack of inventive step together with the request of remittal of both parties are, according to the Board, special reasons in the sense of Article 11 RPBA 2020, for which a remittal of the case to the opposition division is appropriate.

4.3 Regarding the remittal to the department of first instance, it is pointed out that, in view of the above assessment of sufficiency of disclosure, it seems that possible differences between data related to the ethylene content of fractions A) and/or B) as defined in granted claim 1 may be obtained when different methods of determination are used (which appears to be an issue known in the art, as indicated in E3: page 1, right hand side column, second full paragraph). Although that variability in the results depending on the determination method considered was not found to amount to a lack of sufficiency of disclosure for the reasons indicated above, it may nevertheless play a role when assessing novelty of the subject-matter being claimed over the prior art and/or when assessing the difference(s) between said subject-matter and the closest prior art in the analysis of inventive step, as it was explicitly acknowledged by the appellant during the oral proceedings before the Board (see section XIII (j) above).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:



B. ter Heijden

D. Semino

Decision electronically authenticated