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Datasheet for the decision of 26 November 2021

Case Number:	T 0472/18 - 3.3.03
Application Number:	09777029.1
Publication Number:	2310426
IPC:	C08F2/00, C08F10/02, C08L23/06, H01B3/44, C08F2/38, C08F210/16, C08F210/06, C08F210/02, C08F218/08
Language of the proceedings:	EN

Title of invention:

PROCESS FOR PRODUCING A POLYMER AND A POLYMER FOR WIRE AND CABLE APPLICATIONS

Patent Proprietor:

Borealis AG

Opponents:

Clariant Produkte (Deutschland) GmbH
Basell Polyolefine GmbH

Relevant legal provisions:

EPC Art. 56, 100(b)
EPC R. 103(4)(a)
RPBA Art. 12(4)

Keyword:

Late-filed objections - admitted (no)
Grounds for opposition - insufficiency of disclosure (no)
Inventive step - (yes)
Reimbursement of appeal fee - withdrawal of appeal

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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 0472/18 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 26 November 2021

Respondent: (Patent Proprietor)	Borealis AG IZD Tower Wagramerstraße 17-19 1220 Vienna (AT)
Representative:	Dehns St. Bride's House 10 Salisbury Square London EC4Y 8JD (GB)
Appellant: (Opponent 2)	Basell Polyolefine GmbH Brühler Strasse 60 50389 Wesseling (DE)
Representative:	LyondellBasell c/o Basell Polyolefine GmbH Industriepark Hoechst, Bldg. E413 65926 Frankfurt am Main (DE)
Party as of right: (Opponent 1)	Clariant Produkte (Deutschland) GmbH Brüningstrasse 50 65929 Frankfurt am Main (DE)
Representative:	Mikulecky, Klaus Clariant Produkte (Deutschland) GmbH Patent & License Management Chemicals Industriepark Höchst, G 860 65926 Frankfurt am Main (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 18 December 2017 concerning maintenance of the European Patent No. 2310426 in amended form.**

Composition of the Board:

Chairman	D. Semino
Members:	O. Dury
	A. Bacchin

Summary of Facts and Submissions

I. The appeal of opponent 2 is against the interlocutory decision of the opposition division posted on 18 December 2017 concerning maintenance of European patent No. 2 310 426 in amended form according to the claims of auxiliary request V and an adapted description.

II. Two notices of opposition had been filed against the patent, requesting the revocation of the patent in its entirety.

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

D23: DE 1 908 962
D24: US 4 871 819

IV. The decision under appeal was based on the patent in suit as main request and on auxiliary requests I to IV filed with letter of 14 September 2017 and on auxiliary request V, the latter being the sole request which is relevant for the present decision. Said auxiliary request V comprised nine claims (claims 1-8 of auxiliary request V filed with letter of 14 September 2017 and a claim 9 as amended during the oral proceedings before the opposition division), whereby claims 1, 8 and 9 read as follows:

"1. A process for preparing a cable comprising producing a polyethylene comprising polymerising at least ethylene in the presence of a mixture of at least two chain transfer agents, which mixture comprises

- a polar chain transfer agent (polar CTA) which is an aldehyde or ketone compound, and

- a non-polar chain transfer agent (non-polar CTA) wherein the non-polar CTA is selected from one or more of an cyclic alpha-olefin of 5 to 12 carbon or a straight or branched chain alpha-olefin of 3 to 12 carbon atoms to form a polyethylene; and

applying said polyethylene in one or more layers on a conductor."

"8. A cable comprising a conductor surrounded by one or more layers wherein at least one of said layers comprises an LDPE homopolymer or copolymer with one or more comonomer(s) which has tan δ values (10^{-4}), when determined according to "Test for tan δ measurements on 10 kV cables" under Determination methods:

i) a dielectric loss at 25°C
  - of less than 6, when measured in stress range of 5 - 25 kV/mm,

ii) a dielectric loss at 130°C
  - of less than 10 when measured in the stress range 5 - 25 kV/mm,

wherein the cable is obtainable by the process as defined in any of the preceding claims 1 to 6."

"9. A process for producing an unsaturated low density polyethylene (LDPE) copolymer with one or more polyunsaturated comonomers comprising polymerising ethylene and one or more polyunsaturated comonomers in the presence of a mixture of at least two chain

transfer agents, which mixture comprises

- a polar chain transfer agent (polar CTA) which is methyl ethyl ketone or propionaldehyde, and

- a non-polar chain transfer agent (non-polar CTA) which is propylene."

Claims 2 to 7 were dependent on claim 1. In particular, claim 7 was directed to a process as claimed in claim 1 wherein the polyethylene was defined as a LDPE homopolymer or copolymer with one or more comonomer(s) which has tan δ values defined in the same manner as in claim 8.

V. In the decision under appeal, the opposition division held *inter alia* that:

(a) The subject-matter of claim 1 of the main request and of each of auxiliary requests I to IV was not novel over D23.

(b) Auxiliary request V met the requirements of Article 123(2) EPC, Article 84 EPC and of sufficiency of disclosure. The subject-matter claimed was further novel (no objections were raised).

Regarding inventive step, D24 was the closest prior art document.

The subject-matter claimed differed from the one of D24 in that it required the use of two chain transfer agents (hereinafter referred to as "CTA").

The objective problem resided in the provision of a

new polymer for wiring applications which had low tan δ values not only at high temperatures but in the whole temperature range from 25 to 130°C and in the whole electric stress range from 5 to 25 kV/mm. Table 1 of the patent in suit showed that that problem was effectively solved. Considering that the opponents' objection according to which the claims were too broad in the light of the examples was not backed up by any evidence, it could not be retained.

The opponents' objection regarding the obviousness of the solution was based on the combination of D24 with D23. However, D23 was not directed to wiring applications as D24 (and the patent in suit). Therefore, the skilled person would have had no incentive to combine D24 with D23 and the objection was rejected.

In view of the above, the patent could be maintained in amended form on the basis of auxiliary request V.

VI. Both the patent proprietor and opponent 2 lodged an appeal against that decision. However, the patent proprietor withdrew their appeal shortly before the oral proceedings before the Board (see sections XII and XIII, second paragraph, below). Therefore, opponent 2 remained the sole appellant, while the patent proprietor and opponent 1 became respondent and party as of right within the meaning of Article 107 EPC, respectively.

VII. With their statement setting out the grounds of appeal the appellant requested that the decision of the opposition division be set aside and that the patent be

revoked.

VIII. With their statement of grounds of appeal, the patent proprietor (originally also appellant, now respondent) requested that the patent be maintained in amended form according to any of the main request or auxiliary requests I to IV filed therewith, whereby auxiliary request IV corresponded to auxiliary request V dealt with in the decision under appeal (the other requests are not relevant to the present decision). Reference was further made to their experimental data filed during the opposition proceedings on 14 September 2017(statement of grounds of appeal: end of section 16).

IX. With letter of 19 September 2018, the patent proprietor (still appellant at that time, now respondent) filed further auxiliary requests V to XVI (which are not relevant for the present decision).

X. With letter of 13 November 2020, the parties were summoned to oral proceedings. In a communication dated 3 May 2021, the Board indicated specific issues to be discussed at the oral proceedings. It was in particular indicated therein that the experimental data referred to by the patent proprietor in its statement of grounds of appeal were the ones they filed with letter of 14 September 2017 (point 8.3.2 in the communication).

XI. With letter of 14 May 2021, opponent 1 (party as of right) indicated that they would not attend the oral proceedings and withdrew their previously filed request for oral proceedings.

XII. With letter of 9 November 2021 the patent proprietor withdrew the then pending main request and auxiliary

requests I to III. The patent proprietor further indicated that they now requested dismissal of opponent 2's appeal and that their own appeal was moot.

XIII. With the explicit agreement of the appellant and of the respondent, oral proceedings were held on 26 November 2021 in the form of a videoconference.

At the beginning of the oral proceedings the patent proprietor confirmed to the Board that with their letter of 9 November 2021 they effectively withdrew their appeal. During the oral proceedings, the appellant further unambiguously withdrew all their objections of lack of novelty.

XIV. The appellant's arguments, in so far as relevant to the present decision, may be summarised as follows:

Main request - Admittance of late filed objections

(a) The objection of lack of sufficiency of disclosure related to the fact that the patent in suit lacked information what measures had to be taken in order to arrive at a low density polyethylene (LDPE) having the defined dielectric loss properties was already put forward in the notice of opposition. Therefore, that objection was not raised for the first time in appeal and should be dealt with.

(b) During the oral proceedings before the Board, it was agreed that the objection of lack of sufficiency of disclosure related to the lack of information in order to allow the reproduction of the examples of the patent in suit was raised for the first time in the statement of grounds of appeal. Nevertheless, it was asked that the Board

exercised its discretion to admit this objection.

(c) During the oral proceedings before the Board, it was also not contested that the objection of lack of inventive step starting from D23 as closest prior art was raised for the first time in the statement of grounds of appeal. The objection was nevertheless maintained but no further arguments put forward, i.e. it was only relied on the written submissions.

Main request - Sufficiency of disclosure

(d) The tan δ feature specified in the operative claims was an unusual parameter which could not be determined without undue burden and there were serious doubts that it could be achieved over the whole scope of the claims. For these reasons, the requirements of sufficiency of disclosure were not satisfied.

Main request - Inventive step

(e) D24 was the closest prior art.

The subject-matter of operative claim 1 differed from D24, in particular its examples, in the combination of a polar and non-polar chain transfer agents (CTAs) as defined in the operative claims (whereas only propylene, which is a non-polar CTA according to paragraph 31 of the patent in suit, is used in the examples of D24).

Although it was not contested that the data relied upon by the respondent demonstrated that reduced tan δ values were effectively achieved over a

range of temperature and stresses in particular cases, it was not credible that these effects were effectively present over the whole breadth of the claims. Therefore, the problem solved resided in the provision of a further process for preparing an electric cable, in alternative to the one of D24.

Although D24 did not disclose mixtures of CTA, it disclosed a process using a single non-polar CTA (propylene) and further taught that either a polar CTA or a non-polar CTA could be suitably used. In addition, the combination of polar and non-polar CTAs as defined in operative claim 1 was disclosed in D23. Although D23 was not related to the preparation of cables, it was directed to a similar technology to the one of D24. Also, D24 taught that the compositions prepared therein could be used for the same application as the one of D23, namely coating on films. Therefore, the skilled person would consider combining the teaching of D23 with the one of D24.

For these reasons, the subject-matter of claim 1 of the main request was not inventive in view of the combination of D24 with D23.

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

Main request - Admittance of late filed objections

(a) The objection of lack of sufficiency of disclosure related to the fact that the patent in suit lacked information what measures had to be taken in order to arrive at an LDPE having the defined dielectric loss properties was only briefly mentioned in the

notice of opposition but was not duly substantiated. In particular, that objection was never discussed in details and no precise arguments were provided during the opposition proceedings. Admitting that objection would require to deal with a fresh case in appeal, which was not allowable.

(b) The objection of lack of sufficiency of disclosure related to the lack of information in order to allow the reproduction of the examples of the patent in suit was not raised during the opposition proceedings. In particular, it was never contested that the examples of the patent in suit could be reproduced, as was put forward by the patent proprietor in its reply to the notice of opposition. As shown in the decision under appeal, this was also the conclusion of the opposition division, which was not contested by the appellant at that stage. For these reasons, that objection should also not be admitted.

(c) During the opposition proceedings, both opponents agreed that D24 was the closest prior art document. Starting from D23 as closest prior art amounted to a change of case in appeal. Considering that there were no reasons justifying raising an objection of lack of inventive step starting from D23 as closest prior art for the first time in the statement of grounds of appeal, that objection should not be admitted.

Main request - Sufficiency of disclosure

(d) The objection of lack of sufficiency of disclosure related to the tan δ feature mentioned in the operative claims was not supported by any evidence.

In particular, it was not shown that the information provided in that respect in paragraphs 72-82 of the patent in suit would not be sufficient to carry out tan δ measurements. For these reasons, the objection should be rejected.

Main request - Inventive step

(e) It was agreed with the appellant that the subject-matter of operative claim 1 differed from the closest prior art document D24, in particular its examples, in the combination of a polar and non-polar chain transfer agents (CTAs).

The examples of the patent in suit and the ones filed during the opposition proceedings showed that such a combination of CTAs led, as compared to the use of either a polar CTA alone or a non-polar CTA alone, to reduced tan δ values over a range of temperature and stresses. The appellant's argument that that effect would not be present over the whole breadth of the claims was not supported by any evidence and this was the case, although that objection had already not been retained by the opposition division. Therefore, that objection should be rejected and the problem solved be held to reside in the provision of a process for preparing a cable that exhibited reduced tan δ values over a range of temperature and stresses. The appellant's objection was based on the combination of D24 with D23. However, these documents were related to the preparation of different types of polymers (homopolymers in D23; specific copolymers in D24) and different uses (cables with good electrical insulation in D24; film coatings in D23). Under these circumstances,

the combination of D23 with D24 was based on hindsight, which was not allowable. In addition, D23 did not teach to use a combination of polar and non-polar CTAs to solve the technical problem defined above.

For these reasons, an inventive step starting from D24 as the closest prior art should be acknowledged for claim 1 of the main request, even taking the teaching of D23 into consideration.

XVI. The appellant (opponent 2) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or, in the alternative, that the patent be maintained in amended form according to any of auxiliary requests V to XVI filed with the rejoinder to the statement of grounds of appeal.

Reasons for the Decision

Main request

1. In view of the respondent's submission of 9 November 2021, the operative main request is auxiliary request V dealt with in the decision under appeal and allowed by the opposition division (see sections IV and XII above). This request will be indicated in what follows as the main request.

2. Admittance of objections filed for the first time with the statement of grounds of appeal

2.1 The respondent requested that the objection(s) of lack of sufficiency of disclosure which were put forward in the appellant's statement of grounds of appeal, but which were not presented in the first instance proceedings, be not admitted.

2.1.1 Considering that these objections were submitted with the appellant's statement of grounds of appeal, the (non)admittance of these objections is subject to the stipulations of Article 12(4) RPBA 2007 (see Article 25(2) RPBA 2020), according to which the Board has the power to hold inadmissible facts and evidence which could have been presented in the first instance proceedings. In that respect, the aim of an opposition-appeal proceedings is to obtain judicial review of the opposition decision and not to bring a "fresh case", so that parties have only limited scope to amend the subject of the dispute in appeal (Case Law of the Boards of Appeal of the EPO, 9th edition, 2019, V.A.4.11.1 and 4.11.3.a), as now explicitly indicated in Article 12(2) RPBA 2020.

2.1.2 During the oral proceedings before the Board the parties present agreed that the objections related to sufficiency of disclosure, the admittance of which was in dispute, were the ones which were related to the issues identified in the Board's communication (section 6.1.3) as follows:

(a) Apart from the requirement to use a combination of CTAs as defined in the operative claims, the patent in suit lacked information (e.g. regarding reactor type, nature of the catalyst/initiator system,

nature of suitable additives) concerning what measures had to be taken in order to arrive at a LDPE having the defined dielectric loss properties.

(b) The patent in suit, in particular the examples, contained no indication regarding the concentration of CTAs to be used to achieve the alleged advantages. In particular, information was missing to allow these examples to be reproduced.

2.1.3 Regarding objection (a), although it is correct that a general statement in that regard was given at page 5, fourth paragraph (see in particular the last sentence) of the notice of opposition, that objection was not substantiated any further during the opposition proceedings. In addition, although no argument in that respect was indicated in the decision under appeal, the Board found no trace in the file history that the appellant complained at any time that the decision was deficient in that respect, nor was any argument in that sense put forward in appeal. Under these circumstances, that objection was effectively substantiated for the first time in the appellant's statement of grounds of appeal, which amounts to filing a new objection at the appeal stage, albeit without providing any justification for such a late filing.

2.1.4 Regarding objection (b), the appellant agreed during the oral proceedings before the Board that no argument in that respect were put forward during the first instance proceedings. Further considering that the issue appears to raise completely new concerns regarding e.g. the reproduction of the examples of the patent in suit, admitting said objection in the proceedings would require that completely new issues would have to be discussed for the first time in

appeal, which is not in line with the main aim of the appeal procedure, as indicated above. In addition, considering that the patent proprietor already argued that it was uncontested that the examples of the patent in suit could be reproduced without undue burden in its reply to the notice of opposition (section 21), it would have been the appellant's duty to raise any objections in that respect already during the opposition proceedings.

2.1.5 In view of the above, the Board considers that the appellant had cause to raise and properly substantiate both objections before the opposition division and that it is appropriate to make use of its power pursuant to Article 12(4) RPBA 2007 to hold objections (a) and (b) as identified in section 2.1.2 above inadmissible.

2.2 In their reply to the appellant's statement of grounds of appeal (letter of 19 September 2018: section 83, last three sentences), the respondent put forward that the objection of lack of inventive step starting from D23 as the closest prior art amounted to a change of case as compared to the first instance proceedings and that no explanation had been given why the appellant changed their mind in that respect. That finding was not contested by the appellant in their subsequent submission (letter of 21 April 2020: see in particular pages 7 and 8). During the oral proceedings before the Board, the appellant further did not contest that the objection of lack of inventive step starting from document D23 as closest prior art was raised against the operative main request for the first time in the appellant's statement of grounds of appeal. No reasons were provided as to why this was the case. In the absence of any justification for the filing of that objection only with the statement of grounds of appeal,

despite having reason to do that already during opposition proceedings, the Board finds it appropriate to hold it inadmissible (Article 12(4) RPBA 2007).

3. Sufficiency of disclosure

3.1 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. In that respect, it is noted that, 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 opponents, here the appellant and the party as of right.

3.2 In view of the conclusion reached in section 2.2 above the sole objections regarding sufficiency of disclosure to be decided upon are related to the argument that the tan δ feature mentioned in operative claims 7 and 8 was an unusual parameter which could not be determined without undue burden and there were serious doubts that it could be achieved over the whole scope of the claims (as identified in section 6.1.3.(c) of the Board's communication).

3.3 However, no argument was provided by the appellant to show that the skilled person would have any difficulty to determine said tan δ feature on the basis of the information provided in paragraphs 72-82 of the patent in suit, as argued by the respondent. In particular, the appellant's arguments (statement of grounds of

appeal: page 8, last paragraph) provide no reason for the Board to overturn the opposition division's conclusion according to which the patent in suit provided sufficient information for the determination of the tan δ feature in particular in view of the detailed information in the above cited paragraphs. In that respect, no evidence was further provided by the appellant in support of the "serious doubts that these effects can be achieved over the whole scope of the claims" mentioned. In particular, no argument was put forward by the appellant to refute these conclusions which were identified in the Board's communication (sections 6.4 and 6.5).

3.4 In view of the above, the arguments put forward in appeal by the appellant in respect of sufficiency of disclosure do not provide any reasons for the Board to overturn the opposition division's decision in that respect. Thus the invention according to the main request meets the requirements of sufficiency of disclosure.

4. Article 54 EPC

Considering that all the objections of lack of novelty raised in writing by the appellant were explicitly withdrawn during the oral proceedings before the Board, there is no need for the Board to address that issue in the present decision.

5. Article 56 EPC

5.1 Closest prior art

5.1.1 According to the decision under appeal (reasons: section 12.1), both parties considered that document

D24 constituted the closest prior art document. There is no reason for the Board to deviate from that view.

5.1.2 In that respect D24 is, as the patent in suit (paragraphs 1, 5-14, 16-21, 54-68), directed to the preparation of ethylene copolymers suitable for cable applications requiring good electrical properties (D24: claims 1 and 5; column 1, lines 6-9; column 2, lines 3-10; column 5, lines 41-55; examples). In particular, examples 1 and 2 of D24, which are directed to the preparation of polyethylene copolymer compositions prepared using propylene as CTA (see D24: column 5, lines 47-54; column 6, line 47; column 7, line 1) are particularly relevant.

5.2 Distinguishing feature(s)

It was undisputed that the subject-matter of operative claim 1 differs from the process according to examples 1 or 2 of D24 in the combination of a polar and non-polar CTAs defined therein (whereas only propylene, which is a non-polar CTA according to paragraph 31 of the patent in suit, is used in examples 1 and 2 of D24).

5.3 Problem effectively solved over the closest prior art

5.3.1 The parties did not agree on how the problem effectively solved over D24 should be formulated (alternative or improvement). Whereas the respondent argued that the problem solved over D24 was to provide reduced tan δ values over a range of temperature and stresses (section 20 of the patent proprietor's statement of grounds of appeal), the appellant held that it was not credible that that effect was effectively present on the whole breadth of the claims

(appellant's statement of grounds of appeal: section V). Therefore, the technical problem effectively solved by the subject-matter of operative claim 1 could only reside in the provision of an alternative process for making a cable, so the appellant.

5.3.2 Although the Board is satisfied that the examples of the patent in suit and the experimental data filed by the patent proprietor with letter of 14 September 2017 render credible that the problem effectively solved over D24 could be formulated in the form of an improvement as proposed by the respondent, the Board also concluded that an inventive step is present if the problem solved over D24 resides in the mere provision of an alternative process (see section 5.4 below), as argued by the appellant. Therefore, it is hereinafter considered, to the appellant's benefit, that the problem effectively solved resides in the provision of a further process for making an electric cable, in alternative to the one(s) of D24.

5.4 Obviousness

5.4.1 The question has to be answered if the skilled person, desiring to solve the problem(s) identified as indicated 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.

5.4.2 In that respect, the appellant's objection is solely based on the combination of D24 with D23.

5.4.3 However, it is agreed with the respondent that whereas D24 is related to the preparation of ethylene copolymers (letter of 19 September 2018: section 89; D24: claim 1; column 1, lines 6-10; column 2, lines 3-39), D23 is exclusively directed to making ethylene homopolymers (claim 1, lines 1-2; page 1, line 2; page 2, second and fourth paragraphs; page 3, fourth paragraph; page 4, last paragraph; example). In that respect, as indicated in paragraph 2 of the patent in suit, chain transfer agents are well known components, which are used in particular to control the molecular weight of the formed polymer. These chain transfer agents are involved in the polymerisation process and may modify the polymers so produced in a number of physical properties. Under these circumstances, considering that D24 and D23 are related to different kind of polymers, the combination of these documents cannot be held to be obvious already for that reason. In addition, that finding appears to be confirmed by the fact that D24 itself teaches both kind of chain transfer agents specified in operative claim 1 as "polar" (aldehydes and ketones are cited at column 5, lines 50-52 of D24) and "non-polar" (propylene, butene and hexene are cited at column 5, lines 47-49) but not their combination.

5.4.4 In addition, whereas D24 is directed to the preparation of ethylene copolymers suitable for cable applications requiring good electrical properties (see section 5.1.2 above), it remained uncontested that the sole uses disclosed in D23 concern coating for films on papers and fabrics (D23: page 4, last paragraph). In particular, D23 is not related to electrical properties but aims at improving the draw down in film applications, whereby the combination of CTAs taught therein serves to control molecular weight and "neck-

in" (D23: page 1, first paragraph and last two sentences; page 2, first and second paragraphs; page 6, lines 1-2). Therefore, considering the different fields of application of both documents, the combination of the teaching of D24 with the one of D23 cannot be held to be obvious, as already held by the opposition division and put forward by the respondent (letter of 19 September 2018: sections 88-89).

5.4.5 In that respect, contrary to the appellant's view, the Board considers that the combination of D24 with D23 is not obvious for the mere reason that D24 mentions as an aside that the ethylene copolymers prepared therein may also be used for preparing or coating films - including paper and cloth - (D24: column 3, lines 55-57 and 61-66), which are applications similar to the ones of D23. The Board is of the opinion that said passages of D24 are not sufficient to overcome the above concerns regarding the fact that D23 is only directed to homopolymers (and not copolymers as in D24) and is silent on electrical properties (which are relevant both for D24 and the patent in suit). Therefore, it cannot be concluded that it would be obvious for the skilled person to combine D24 with D23 in order to provide a further process for making a cable according to operative claim 1. Rather, said combination can only be based on hindsight knowledge, which is not allowable.

5.4.6 For these reasons, the subject-matter of claim 1 is inventive in view of D24 in combination with D23.

5.5 The same conclusion is also valid for claims 2 to 7, which are dependent on claim 1.

5.6 The objections of the appellant pursuant to Article 56 EPC which were substantiated in appeal were only directed to independent claim 1 of the main request and the claims depending thereon (statement of grounds of appeal: section V, see in particular the last paragraph of this section on page 14; during the oral proceedings before the Board, it was explicitly answered to a question of the Chairman that only independent claim 1 was objected to). No additional objections pursuant to Article 56 EPC were raised, either in writing or at the oral proceedings before the Board, against claims 8 and 9 of the operative main request.

5.7 For these reasons, the appellant's arguments provide no reason for the Board to overturn the findings of the opposition division in respect of inventive step.

6. Considering that all the novelty objections raised in writing were withdrawn and that the objection of lack of inventive step starting from D23 as closest prior art is not admitted into the proceedings, it is not necessary to address the issue of the admittance of any of the documents filed in these respects for the first time during the appeal proceedings (documents referred to in the parties' written submissions as "D13a", "D30" and "D31" to "D39").

7. Since none of the objections put forward by the appellant against the main request are successful, the appeal is to be dismissed.

8. Partial reimbursement of the appeal fee

8.1 Rule 103(4)(a) EPC, in its version as in force since 1 April 2020, provides for a reimbursement of the

appeal fee at 25% if the appeal is withdrawn after expiry of the period under paragraph 3(a) (within one month of notification of a communication by the Board in preparation for the oral proceedings) but before the decision is announced at the oral proceedings.

8.2 In the present case, the patent proprietor withdrew their appeal several months after notification of the Board's communication but before the decision was announced at the oral proceedings (see sections X, XII and XIII, second paragraph, above). Therefore the requirements of Rule 103(4)(a) EPC are met and the appeal fee paid by the patent proprietor is to be reimbursed at 25%.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

2. The appeal fee of the appeal of the patent proprietor is reimbursed at 25%.

The Registrar: The Chairman:

B. ter Heijden D. Semino

Decision electronically authenticated