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# Datasheet for the decision of 8 September 2022

**Case Number:** T 1190/19 - 3.3.03

**Application Number:** 11837740.7

**Publication Number:** 2637217

**IPC:** H01L31/042, C08F210/16, C08K5/00, C08K5/14, C08K5/54, C08L23/08, C09K3/10

**Language of the proceedings:** EN

**Title of invention:**
SOLAR BATTERY ENCAPSULANT AND SOLAR BATTERY MODULE

**Patent Proprietors:**
Mitsui Chemicals, Inc.
Mitsui Chemicals Tohcello, Inc.

**Opponents:**
The Dow Chemical Company
Borealis AG

**Relevant legal provisions:**
EPC Art. 69(1), 123(2), 123(3)
EPC Prot. Interpretation Article 69
EPC R. 139

**Keyword:**
Amendments - inescapable trap (yes) - correction of errors (no)



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It can be changed at any time and without notice

**Decisions cited:**
G 0002/88, G 0003/89, G 0001/93, G 0001/10, T 0190/99, T 0235/08, T 1746/10, T 1993/12


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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 1190/19 - 3.3.03**

# D E C I S I O N
# of Technical Board of Appeal 3.3.03
# of 8 September 2022

| | |
|---|---|
| **Other party:**<br>(Opponent 1) | The Dow Chemical Company<br>2030 Dow Center<br>Midland, MI 48674 (US) |
| **Representative:** | Boult Wade Tennant LLP<br>Salisbury Square House<br>8 Salisbury Square<br>London EC4Y 8AP (GB) |
| **Appellant:**<br>(Opponent 2) | Borealis AG<br>Trabrennstrasse 6-8<br>1020 Vienna (AT) |
| **Representative:** | Dehns<br>St. Bride's House<br>10 Salisbury Square<br>London EC4Y 8JD (GB) |
| **Respondent:**<br>(Patent Proprietor 1) | Mitsui Chemicals, Inc.<br>5-2, Higashi-Shimbashi 1-chome<br>Minato-ku<br>Tokyo 105-7117 (JP) |
| **Respondent:**<br>(Patent Proprietor 2) | Mitsui Chemicals Tohcello, Inc.<br>7, Kanda Mitoshiro-cho<br>Chiyoda-ku<br>Tokyo 101-8485 (JP) |
| **Representative:** | Hoffmann Eitle<br>Patent- und Rechtsanwälte PartmbB<br>Arabellastraße 30<br>81925 München (DE) |

**Decision under appeal:** **Interlocutory decision of the Opposition Division of the European Patent Office posted on 12 February 2019 concerning maintenance of the European Patent No. 2637217 in amended form.**

**Composition of the Board:**

**Chairman** D. Semino
**Members:** F. Rousseau
A. Bacchin

## Summary of Facts and Submissions

I. The appeal lies from the interlocutory decision of the opposition division according to which European patent No. 2 637 217 as amended according to auxiliary request 1 submitted with letter of 14 September 2018 and a description adapted thereto met the requirements of the EPC. The contested decision was also based on a main request also submitted with letter of 14 September 2018.

II. Claim 1 of the main request read as follows (deletions compared to claim 1 as granted being indicated by the Board in strike through and additions in bold and underlined):

"1. An encapsulating material for solar cell comprising an ethylene/α-olefin copolymer satisfying the following requirements (a1) to (a~~5~~**6**):

(a1) the content ratio of structural units derived from ethylene is from 80 to 90 mol% and the content ratio of structural units derived from α-olefin having 3 to 20 carbon atoms is from 10 to 20 mol%;

(a2) MFR is equal to or more than 2 g/10 minutes and less than 10 g/10 minutes as measured under the conditions of a temperature of 190 degrees centigrade and a load of 2.16 kg in accordance with ASTM Dl238;

(a3) the density is from 0.865 to 0.884 g/cm$^3$ as measured in accordance with ASTM D1505;

(a4) the shore A hardness is from 60 to 85 as measured in accordance with ASTM D2240; ~~and~~

(a5) the volume resistivity is from 1.0xl0$^{13}$ to l.0xl0$^{18}$ Ω·cm as measured at a temperature of 100

degrees centigrade with an applied voltage of 500V in accordance with JIS K6911**; and**

**(a6) the content of aluminum element in said ethylene/α-olefin copolymer is from 10 to 500 ppm, wherein the material is in a sheet form**."

III. Claim 1 of auxiliary request 1 underlying the contested decision read as follows, wherein the difference vis-à-vis the main request is highlighted by the Board in bold and underlined:

"1. An encapsulating material for solar cell comprising an ethylene/α-olefin copolymer satisfying the following requirements (a1) to (a6):

(a1) the content ratio of structural units derived from ethylene is from 80 to 90 mol% and the content ratio of structural units derived from α-olefin having 3 to 20 carbon atoms is from 10 to 20 mol%;

(a2) MFR is equal to or more than 2 g/10 minutes and less than 10 g/10 minutes as measured under the conditions of a temperature of 190 degrees centigrade and a load of 2.16 kg in accordance with ASTM D1238;

(a3) the density is from 0.865 to 0.884 g/cm$^3$ as measured in accordance with ASTM D1505;

(a4) the shore A hardness is from 60 to 85 as measured in accordance with ASTM D2240;

(a5) the volume resistivity **of the encapsulating material for solar cell** is from 1.0x10$^{13}$ to 1.0x10$^{18}$ Ω·cm as measured at a temperature of 100 degrees centigrade with an applied voltage of 500V in accordance with JIS K6911; and

(a6) the content of aluminum element in said ethylene/α-olefin copolymer is from 10 to 500 ppm, wherein the material is in a sheet form."

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

*Main request*

(a) Claim 1 of the main request extended beyond the content of the application as filed, since claim 1 defined that the volume resistivity values (a5) related to the ethylene/α-olefin copolymer, contrary to the application as filed which disclosed that those values related to the encapsulating material for solar cell comprising said ethylene/α-olefin copolymer. The main request was therefore rejected.

*Auxiliary Request 1*

(b) Claim 1 of auxiliary request 1 was amended by defining, as in claim 2 as originally filed, that the volume resistivity values (a5) was the one of the encapsulating material for solar cell comprising said ethylene/α-olefin copolymer. Auxiliary request 1 met therefore the requirements of Article 123(2) EPC.

(c) As regards the requirements of Article 123(3) EPC, the expression "An encapsulating material for solar cell comprising an ethylene-α-olefin copolymer satisfying the following requirements (a1) to (a6)" in granted claim 1 was ambiguous as to whether any of (a1) to (a6) referred to the encapsulation material or to the ethylene copolymer. However, in claim 2 as originally filed, (a5) was clearly referred to the encapsulation material. This was confirmed by the description and examples, where (a5) was always disclosed in relation to the

encapsulation material and measured on the encapsulation material. The amendment therefore corrected "*an error made during prosecution in as so far, that claim 2 was incompletely incorporated into claim 1. The missing reference of original claim 2 to the encapsulation material for a solar cell was now reestablished*." This correction fulfilled therefore the requirements of Article 123(3) EPC.

(d) The claimed invention was also found to meet the requirements of sufficiency of disclosure, novelty and inventive step. The patent could be therefore maintained on the basis of auxiliary request 1.

V. An appeal against that decision was lodged by opponent 2 (appellant).

VI. An additional appeal filed by opponent 1 was withdrawn with letters dated 5 and 6 January 2022. Opponent 1 is therefore party as of right to the appeal proceedings pursuant to Article 107, second sentence, EPC (hereafter other party).

VII. The patent proprietors (respondents) submitted with their reply to the statement of grounds of appeal (letter of 28 October 2019) auxiliary requests 1 to 15.

VIII. Oral proceedings before the Board were held on 8 September 2022 in the announced absence of the other party.

IX. The appellant requested that the decision under appeal be set aside and that the European patent be revoked.

X. The respondents requested that the appeal be dismissed, or alternatively that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of any of auxiliary requests 1 to 15 filed with the reply to the statement of grounds of appeal.

XI. Only the wording of claim 1 according to auxiliary requests 1 to 15 is relevant for the present decision and is specified in what follows.

*Auxiliary request 1*

Claim 1 of auxiliary request 1 is identical to claim 1 of the main request underlying the contested decision and whose wording is indicated in above point II.

*Auxiliary requests 2 and 3*

Claim 1 according to auxiliary request 2 and 3 corresponds to claim 1 according to the main request and auxiliary request 1, respectively, whereby the method to determine the content of aluminum is specified. The wording of that method is not relevant to the decision.

*Auxiliary requests 4 to 7*

Claim 1 according to auxiliary requests 4, 5, 6 and 7 corresponds to claim 1 according to the main request and auxiliary requests 1, 2 and 3, respectively, with the additional specification that the melt flow rate (MFR) is not from 9.5 to less than 10 g/10 minutes.

*Auxiliary requests 8 to 10*

Claim 1 according to auxiliary requests 8 to 10 corresponds to claim 1 according to the main request and auxiliary requests 1 and 2, respectively, wherein in addition the content ratio of chlorine ion in the ethylene/α-olefin copolymer is defined to be equal to or less than 2 ppm as detected by a specific method whose wording is not relevant to the decision.

*Auxiliary requests 11 and 12*

Claim 1 of auxiliary request 11 and 12 corresponds to claim 1 of auxiliary request 4 with the specification of the content ratio of chlorine ion as in auxiliary requests 8 to 10.

*Auxiliary requests 13 to 15*

Claim 1 according to auxiliary requests 13 to 15 which corresponds to claim 1 according to auxiliary requests 5 to 7, respectively, wherein in addition the content of chlorine ion in the ethylene/α-olefin copolymer is defined in the same manner as for auxiliary request 8 to 10.

XII. The parties' submissions, in so far as they are pertinent, may be derived from the reasons for the decision below. The disputed issues essentially concerned whether defining after grant that the requirement (a5) present in granted claim 1 related to the encapsulating material resulted in an extension of the protection conferred by the patent in suit and whether the presence of requirement (a5) in claim 1 without specifying that it related to the encapsulating

material was to be seen as an extension of the claimed subject-matter beyond the content of the application as filed.

## Reasons for the Decision

*Main Request (claims upheld by the opposition division)*

*Article 123(3) EPC*

1. Article 123(3) EPC precludes amending the claims during opposition proceedings in such a way as to extend the protection conferred by the patent as granted. The protection conferred by the patent as granted is, according to the established jurisprudence of the Boards of Appeal (see in particular G 1/93, OJ EPO 1994, 541, point 11 of the reasons), assessed taking into account the provisions of Article 69(1) EPC and the Protocol on its interpretation, although said provisions are primarily intended to be applied by the national Courts responsible for deciding on infringement cases.

Article 69(1) EPC stipulates that the extent of the protection conferred by a European patent or a European patent application shall be determined by the claims. Nevertheless, the description and drawings shall be used to interpret the claims. According to Article 1 of the Protocol on the Interpretation of Article 69 EPC, Article 69 EPC should not be interpreted as meaning that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in

the claims. Nor should it be taken to mean that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patent proprietor has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.

When considering whether a proposed amendment to the claims is such as to extend the protection conferred, it must first be determined the extent of protection which is conferred by the patent before the amendment (cf. G 2/88, OJ EPO 1990, 93, point 3.3 of the reasons and G 1/93, cited above, point 11 of the reasons).

2. The definition of the subject-matter of operative claim 1 as amended differs from that of the subject-matter of claim 1 as granted in that:

(i) the content of aluminum element in said ethylene/α-olefin copolymer is from 10 to 500 ppm,

(ii) the material is in a sheet form, and

(iii) the volume resistivity from $1.0 \times 10^{13}$ to $1.0 \times 10^{18}$ Ω·cm as measured at a temperature of 100 degrees centigrade with an applied voltage of 500 V in accordance with JIS K6911 defined in granted claim 1 is specified to be the one of the encapsulating material for solar cell.

3. It is not contested that amendments (i) and (ii) do not result in an extension of the protection conferred by

the patent in suit, since they consist in the insertion of two features corresponding to two preferred embodiments of the patent in suit defined in claims 2 and 13, respectively, which are dependent claims of claim 1. However, the parties are in dispute as to whether the amendment consisting in defining that the volume resistivity value defined in claim 1 as granted is the one of the encapsulating material for solar cell results in an extension of the scope of protection.

In this respect, should granted claim 1, having regard to the whole patent specification, be understood to define that this range of values concerns the volume resistivity of the ethylene/α-olefin copolymer, it is undisputed that the subject-matter of claim 1 of the main request would result in an extension of the scope of protection. This is because claim 1 of the main request would allow for the use of a first ethylene/α-olefin copolymers having a volume resistivity higher than that defined in claim 1 as granted, i.e. outside the scope of protection of the granted patent, if the encapsulating material comprises a second additional ethylene/α-olefin copolymer, which in combination with the first one results in the overall volume resistivity of the encapsulating material as defined in claim 1. This is illustrated by the examples provided in the submissions of the other party (letter of 13 June 2019, page 4, last full paragraph).

4. The respondents, however, submit that a technical sensible reading of the language of granted claim 1, which is alleged to be linguistically ambiguous and would require interpretation, would reveal what is now defined in claim 1 of the main request, namely that the the range of volume resistivity values defined in granted claim 1 as requirement (a5) is not the one of

the ethylene/α-olefin copolymer, but is in fact the one of the encapsulating material comprising said copolymer.

*Linguistic aspects*

4.1 First of all, as submitted by the appellant and the other party, a normal reading of granted claim 1 would assign all requirements (a1) to (a5) to the copolymer, as linguistically the expression "satisfying the following requirements (a1) to (a5)" which immediately follows the terms "an ethylene/α-olefin copolymer" must refer to that copolymer. If claim 1 was meant to define that some of the requirements (a1) to (a5) refer instead to the encapsulating material, claim 1 would have been undoubtedly worded differently. The Board therefore disagrees with the respondents' position that it is not at all clear from the semantic of the claim language whether requirement (a4) or (a5) shall relate to the overall encapsulating material or the ethylene/ α-olefin copolymer comprised therein.

4.2 Moreover, as outlined by the appellant and the other party, the language of granted claim 15, which uses a different wording than claim 1, namely

"Use of a material comprising an ethylene/α-olefin copolymer satisfying the following requirements (a1) to (a5):

(a1) the content .....
(a5) the volume resistivity is from $1.0x10^{13}$ to $1.0x10^{18}$ Ω·cm as measured at a temperature of 100 degrees centigrade with an applied voltage of 500V in accordance with JIS K6911

as encapsulating material for solar cell."

confirms the linguistic analysis of granted claim 1, according to which requirement (5) refers to the ethylene/α-olefin copolymer, but not to the encapsulating material comprising the ethylene/α-olefin copolymer.

*Technical considerations*

4.3 It is undisputed that granted claim 1 must be read with the eyes of the skilled person, i.e. taking into account technical reality and the context of that claim. While it is correct that it might be appropriate to define a volume resistivity for the overall encapsulating material, because, as argued by the respondents, it determines the properties of the latter during use, it cannot be held that defining a volume resistivity for the ethylene/α-olefin copolymer does not make technical sense. On the contrary, it appears meaningful to specify for the ethylene/α-olefin copolymer a certain volume resistivity, in line with the above linguistic analysis, given that the volume resistivity of the encapsulating material obviously depends among others on the corresponding property of that copolymer. Moreover, contrary to the respondents' additional argument, the absence of a limit on the amount of polymer does not seem to suggest for the skilled person that the volume resistivity must relate to the overall material, at least because claim 1 through the functional feature "*for solar cell*" implicitly defines a certain level of volume resistivity for the encapsulating material which renders that material suitable for that use.

4.4 Having regard to the definition of requirement (a5) that the volume resistivity is measured at a temperature of 100 °C, the respondents also submit that the skilled person would, upon a first reading of claim 1, immediately associate requirement (a5) not with the polymer as such, but rather with the encapsulating material comprising it, since measuring the volume resistivity of a copolymer which typically has a melting point of below 100°C would be technically impractical at the temperature specified for a measure of the volume resistivity. It would rather require to crosslink the polymer, the use of a crosslinking agent being known to decrease the volume resistivity.

However, the encapsulating material is defined to comprise the ethylene/α-olefin copolymer and in addition, like the ethylene/α-olefin copolymer, is not to be understood to be in a crosslinked state. The latter is confirmed by a reading of claims 3, 7 and 8 dependent on claim 1, according to which the encapsulating material comprises specific organic peroxides and crosslinking aids (i.e. materials present in the encapsulating material before crosslinking) and is melt kneaded (which step cannot be performed after crosslinking).

The respondents' argument that the volume resistivity of an ethylene/α-olefin copolymer measured at a temperature of 100 °C can only be performed after a crosslinking step is therefore also valid for the encapsulating material comprising said ethylene/α-olefin copolymer.

This argument therefore does not support the view that the skilled person would immediately associate requirement (a5) in granted claim 1 with the

encapsulating material rather than with the ethylene/α-olefin copolymer comprised therein.

4.5 On that basis, it is concluded that the skilled person, based on a technical reading of claim 1, has no reason to put into question the clear linguistic meaning of that claim as granted according to which requirement (a5) concerns the ethylene/α-olefin copolymer and to assign requirement (a5) to the encapsulating material, as now defined in claim 1 as amended in the present main request.

The board therefore concludes that the extent of protection which is conferred by claim 1 as granted is different from the one of the now amended claim and the first does not encompass the latter.

*Alleged inconsistency between claim 1 and the description in the granted patent*

5. It is also the respondents' view that any sensible interpretation of claim 1 in light of the description would lead to the conclusion that requirement (a5) relates to the encapsulating material, not to the copolymer, as the skilled person in addition to the fact that an indication of the volume resistivity is technically more sensible, would immediately recognize that in no part of the entire patent reference is made to the volume resistivity of the polymer, while the other requirements (a1) to (a4) are linked to the copolymer as such. Reference was made by the respondent to paragraphs [0027], [0030], [0036], [0040] and [0045]. The respondent relying upon decision T 0190/99 of 6 March 2001 submits that "*the amendments of the granted claim to replace an inaccurate technical statement, which is evidently inconsistent with the*

*totality of the disclosure of the patent, by an accurate statement of the technical features involved does not infringe Article 123(3) EPC*". This statement is to be found in the second paragraph of point 2.3.4 of the Reasons for decision T 0190/99.

5.1 While it is true that paragraphs [0040] to [0044] in the general teaching about the "*Encapsulating Material for Solar Cells*" (paragraphs [0024] to [0125]) and paragraphs [0175], [0202] and [0203] in the experimental part (paragraphs [0162] to [0213]) address a requirement (a5) and/or a volume resistivity concerning the encapsulating material for solar cell, but do not explicitly mention a volume resistivity for the ethylene/α-olefin copolymer, it cannot, however, be held that the technical information provided by paragraphs [0040] to [0044], [0175], [0202] and [0203] is inconsistent with the definition in claim 1 as granted that the ethylene/α-olefin copolymer has a volume resistivity of from $1.0 \times 10^{13}$ to $1.0 \times 10^{18}$ Ω·cm.

5.2 As pointed out by appellant, paragraph [0040] states that the encapsulating material for solar cell of the present invention has a volume resistivity which is preferably $1.0 \times 10^{13}$ to $1.0 \times 10^{18}$ Ω·cm, i.e. preferably, but not necessarily that defined in granted claim 1, which could well be interpreted by the skilled person as an implicit indication of the proportion and volume resistivity of the ethylene/α-olefin copolymer comprised in the encapsulating material, in line with the remark in above point 4.3. Such an interpretation would be in fact reinforced by the statement in paragraph [0203] highlighted by the appellant, according to which "*in sheets of the encapsulating material for solar cell of Examples 8 to 13 containing Synthesis Examples 1 to 3, 8, 9, and 10 satisfying the*

*requirements (a1) to (a5) specified in the present application, excellent results were achieved such that the sheet blocking properties of all of them were high and the volume resistivity of the encapsulating materials for solar cell were 1.0x10$^{13}$ to 1.0x10$^{18}$ Ω·cm*". Even if a volume resistivity is not indicated in the patent in suit for the synthesis examples 1 to 3, 8, 9, and 10, which all describe the preparation of ethylene/α-olefin copolymers (paragraphs [0183] to [0185] and [0190] to [0192]), a logical interpretation of that statement is that the excellent results obtained for the encapsulating materials for solar cell (including its volume resistivity) are due to requirements (a1) to (a5) being satisfied by the ethylene/α-olefin copolymers.

5.3 Such an interpretation is also not only in agreement with the meaning to be attributed to claims 1 and 15 of the granted patent (see above points 4.1 and 4.2), but also in accordance with information provided elsewhere in the description, starting with paragraph [0018] which mirrors the wording of claim 1.

It is also in line with paragraph [0019] describing "*the effect of the invention*", according to which "*there is provided an encapsulating material for solar cell excellent in a balance among general properties such as transparency, flexibility, adhesiveness, heat resistance, appearance, crosslinking properties, electrical properties and calender moldability by the use of a specific ethylene/α-olefin copolymer*" (passage highlighted by the Board).

Said interpretation is also supported by the way the general teaching regarding the encapsulating material for solar cell starting with paragraph [0024] is

structured in the description of the patent in suit, namely the information concerning the ethylene/α-olefin copolymer in paragraphs [0025] to [0069] (see heading Ethylene/α-olefin Copolymer before paragraph [0025]), the teaching concerning the production of the copolymers in paragraphs [0070] to [0090] (see heading Method for Producing Ethylene/α-olefin Copolymer before paragraph [0070]) and the information concerning the encapsulating material in paragraphs [0091] to [0125] (cf. heading Ethylene Resin Composition before paragraph [0091]).

5.4 Therefore, even if some passages of the description concerning requirement (a5) could be seen as not being in line with the linguistically and technically unambiguous definition of granted claim 1, so that suspicion could arise as to the true meaning of these passages, the latter cannot, neither in isolation, nor in the context of the rest of the description which confirms the interpretation of claim 1, be reasonably interpreted as to indicate that it was the real intention of the proprietor to obtain protection for what is now defined in claim 1 of the main request.

6. Under these circumstances, having an interpretation of granted claim 1 which departs from its linguistically and technically clear meaning would go against the second condition of the principle enshrined in Article 1 of the Protocol on the Interpretation of Article 69 EPC according to which a claim should be interpreted as to result in a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties. Indeed Article 1 of the Protocol on the Interpretation of Article 69 EPC cannot be relied upon to read into the claims limiting

features mentioned in the description, but not suggested by the explicit wording of the claims.

7. Decision T 1993/12 of 24 March 2015 and T 0235/08 of 8 April 2009, relied upon by the respondents, concern a situation in which an ambiguous claim required interpretation in the light of the description. Decision T 1746/10 of 12 Mai 2017, also referred to by the respondents, deals with a case where a claim was open to two different interpretations. Having regard to the above conclusion that claim 1 is to be assigned a clear meaning, these decisions are not relevant to the present case.

8. Consequently, having regard to the remark in second paragraph of above point 3, it is concluded that the main request is not allowable, as its subject-matter is in breach of Article 123(3) EPC.

*Request for correction according to Rule 139 EPC*

9. The respondents also submit that the amendment made in granted claim 1 by assigning requirement (a5) to the encapsulating material rather than to ethylene/α-olefin copolymer is a correction of an obvious mistake under the provision of Rule 139 EPC.

9.1 According to Rule 139 EPC (corresponding to former Rule 88 EPC 1973 with only some editorial changes), linguistic errors, errors of transcription and mistakes in any document filed with the EPO may be corrected on request. Rule 139 EPC provides in its second sentence that a correction of an error in documents filed with the European Patent Office that concerns the description, claims or drawings can only be allowed if the correction is obvious in the sense that it is

immediately evident that nothing else would have been intended than what is offered as correction. In point 5 of the reasons of decision G 3/89 (OJ EPO 1993, 117), the Enlarged Board of Appeal considered that, for a correction under Rule 88, second sentence EPC 1973, that concerns the disclosure of a European application or a European patent to be allowed, the respective parts of the disclosure for which a correction is requested must contain such an obvious error that a skilled person is in no doubt that this information is not correct and - considered objectively - cannot be meant to read as such. If, on the other hand, it is doubtful whether any information at all is incorrect, then a correction is ruled out.

9.2 Irrespective of the question whether Rule 139 EPC or rather Rule 140 EPC, as pointed out by the appellant, may be invoked in view of G 1/10 (OJ 2013, 194, second sentence of point 9 and third and fourth sentences of point 13 of the Reasons for the Decision), the analysis provided in above points 4 to 5.4 demonstrates that the mistake invoked by the respondent is not obvious with the consequence that a request for correction cannot be allowed even under Rule 139 EPC.

*Auxiliary request 1*

*Article 123(2) EPC*

10. Claim 1 of auxiliary request 1 comprises all features of claim 1 as granted with the additional feature that the material is in a sheet form. According to the analysis of the meaning of claim 1 as granted provided in above points 4.1 to 5.4, claim 1 of auxiliary request 1 must therefore be understood to ascribe requirement (a5) to the ethylene/α-olefin copolymer.

However, it is undisputed that the application as originally filed does not directly and unambiguously disclose the specific range of volume resistivity requirement associated with the copolymer, as it is only described for the encapsulating material comprising the ethylene/α-olefin copolymer (see in particular original claim 2). In other words, the application as filed does not disclose the use of an ethylene/α-olefin copolymer having a volume resistivity of from $1.0x10^{13}$ to $1.0x10^{18}$ Ω·cm. On that basis, it is concluded that the subject-matter of claim 1 of auxiliary request 1 extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

*Auxiliary requests 2, 4, 6, 8, 10, 11, 12 and 14*

11. The wording of claim 1 according to auxiliary requests 2, 4, 6, 8, 10, 11, 12 and 14 is based on the wording of claim 1 of the main request in which various features have been inserted. These amendments have not been shown, let alone argued, to limit, even implicitly, the subject-matter of the main request to an encapsulation material whose ethylene/α-olefin copolymer has the volume resistivity requirement (a5) of claim 1 as granted. Under these circumstances, the reasoning provided for the main request applies in the same manner to auxiliary requests 2, 4, 6, 8, 10, 11, 12 and 14 and the conclusion reached in respect of the main request is equally valid for said auxiliary requests. Accordingly, auxiliary requests 2, 4, 6, 8, 10, 11, 12 and 14 which are in violation of Article 123(3) EPC are not allowable either.

*Auxiliary requests 3, 5, 7, 9, 13 and 15*

12. Claim 1 according to auxiliary requests 3, 5, 7, 9, 13 and 15 correspond to claim 1 of auxiliary request 1 in which additional features have been inserted. These claims 1 all define the use of an ethylene/α-olefin copolymer having a volume resistivity of from $1.0x10^{13}$ to $1.0x10^{18}$ Ω·cm for which the application as filed has no basis, as shown in relation to auxiliary request 1 in above point 10. On that basis, auxiliary requests 3, 5, 7, 9, 13 and 15 are not allowable, as their subject-matter, in violation of Article 123(2) EPC, extends beyond the content of the application as filed.

13. It is therefore concluded that none of the respondent's request is allowable.

**Order**

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

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:


D. Hampe D. Semino

Decision electronically authenticated