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**Datasheet for the decision  
of 9 February 2024**

**Case Number:** T 1406/21 - 3.3.03

**Application Number:** 15747187.1

**Publication Number:** 3174937

**IPC:** C08L71/12, C08L81/06,  
C08G65/40, C08L71/00, C08G75/23

**Language of the proceedings:** EN

**Title of invention:**  
POLYMERIC MATERIALS

**Patent Proprietor:**  
Victrex Manufacturing Limited

**Opponent:**  
Solvay Specialty Polymers USA, LLC

**Relevant legal provisions:**  
EPC 1973 Art. 54(2), 56  
RPBA 2020 Art. 12(4), 12(6), 13(2)

**Keyword:**

Novelty - main request (no) - auxiliary request (yes)

Auxiliary request - admitted into the proceedings (yes)

Inventive step - auxiliary request (yes) non obvious  
improvement

New objections raised during the oral proceedings - admitted  
into the proceedings (no)



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Case Number: T 1406/21 - 3.3.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.03**  
**of 9 February 2024**

**Appellant:** Solvay Specialty Polymers USA, LLC  
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**Respondent:** Victrex Manufacturing Limited  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
30 June 2021 concerning maintenance of the  
European Patent No. 3174937 in amended form.**

**Composition of the Board:**

**Chairman** D. Semino  
**Members:** F. Rousseau  
W. Ungler

## Summary of Facts and Submissions

- I. The appeal of the opponent lies from the interlocutory decision of the opposition division according to which European patent No. 3 174 937 as amended according to the claims of auxiliary request 1 submitted during the oral proceedings on 17 March 2021 and a description adapted thereto met the requirements of the EPC.
- II. The following documentary evidence was *inter alia* submitted before the opposition division:
- D3: EP 0 225 750 A2  
D4: WO 85/01510 A1  
D5: EP 0 184 458 A2  
D11: Thieme Römpp Lexicon der Chemie, entry "Polymerblends", <https://roempp.thieme.de/lexicon/RD-16-03376?>  
D12: English version of D11  
D13: IUPAC Gold Book, entry "Polymer blend", <https://doi.org/10.1351/goldbook.P04736>  
D14: Polymer blend, Wikipedia, [https://en.wikipedia.org/wiki/Polymer\\_blend](https://en.wikipedia.org/wiki/Polymer_blend), accessed 17/3/2021
- III. According to the reasons for the contested decision which are pertinent for the appeal proceedings:
- (a) Documents D11 to D14 were admitted into the proceedings.
- (b) The subject-matter of claim 1 of auxiliary request 1 was novel over the polymer mixtures described in D3 taking into account documents D11

to D14 according to which the terms "blend" and "mixture" had a different meaning.

- (c) Regarding inventive step the thermoplastic poly(aryl ether) blends disclosed in D4, which blends included PEEK in combination with PEEKK, PEKK or PEK represented the closest prior art. The blends in accordance with auxiliary request 1 differed therefrom in that they concerned a blend of PEEK and PEEK-PEDEK.

Having regard to a comparison between inventive examples 9, 10 and 11 and comparative example 8, as well as a comparison between inventive example 19 and comparative example 17, the objective technical problem solved by the blends defined in auxiliary request 1 could be formulated as the provision of a polyaryletherketone blend having better mechanical properties while being processable at lower temperatures than for PEEK.

None of the prior art documents cited by the opponent, including D3 and D5, dealt with the objective technical problem derivable from the examples and comparative examples of the opposed patent. On that basis, the claimed subject-matter was inventive.

- IV. An appeal against that decision was lodged by the opponent (appellant).
- V. With their response to the statement of grounds of appeal, the patent proprietor (respondent) filed twelve sets of claims labelled main request and auxiliary requests I to XI.

VI. Oral proceedings before the Board were held on 9 February 2024 by videoconference with the participation of both parties.

VII. The final requests of the parties were as follows:

The appellant requested that the contested decision be set aside and that the patent be revoked.

The respondent requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request, or in the alternative on the basis of claim 1 of auxiliary request XI, both requests filed with the reply to the statement of grounds of appeal.

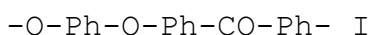
VIII. The claims of the claim requests underlying the present decision which are relevant for the present decision are:

*Main request*

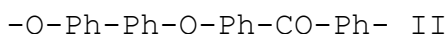
Claim 1 which is identical to claim 1 of auxiliary request 1 on which the contested decision is based and reads as follows :

"1. A blend comprising thermoplastic polymers in the absence of filler, wherein the blend is in the form of pellets or granules, wherein the pellets or granules comprise at least 99wt% thermoplastic polymers, wherein the blend comprises:

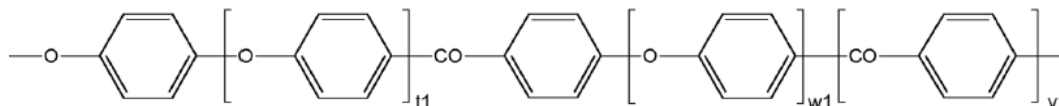
(i) a polymeric material (A) having a repeat unit of formula



and a repeat unit of formula



wherein Ph represents a phenylene moiety; and  
 (ii) a polymeric material (B) having a repeat unit of  
 formula (XX)

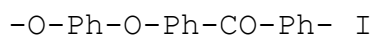


wherein  $t1=1$ ,  $v1=0$  and  $w1=0$ ."

*Auxiliary request XI*

"1. A component which is injection moulded or extruded from a blend comprising thermoplastic polymers in the absence of filler, wherein the blend is in the form of pellets or granules, wherein the pellets or granules comprise at least 99wt% thermoplastic polymers, wherein the blend comprises:

(i) 50 to 80 wt% of a polymeric material (A) having a repeat unit of formula

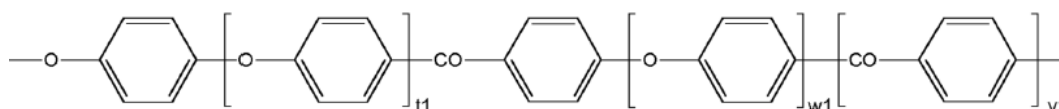


and a repeat unit of formula



wherein Ph represents a phenylene moiety; and

(ii) 20 to 50 wt% of a polymeric material (B) having a repeat unit of formula (XX)



wherein  $t1=1$ ,  $v1=0$  and  $w1=0$ ;

wherein the injection moulded or extruded component consists essentially of the blend."

IX. The parties' submissions, in so far as they are pertinent to the present decision, may be derived from the reasons for the decision below. The contentious points essentially concerned the question whether the

claimed blend or component was anticipated by D3 and involved an inventive step over the disclosure of D4.

## **Reasons for the Decision**

### *Introductory remark*

1. In what follows, the Board adopts the nomenclature used by the parties to designate polymeric materials (A) and (B) defined in claim 1 of the present requests, namely PEEK-PEDEK and PEEK, respectively.

### *Main Request*

#### *Novelty over D3*

2. The appellant submits that the subject-matter of operative claim 1 is anticipated by D3, reference being made to the mixture of polyketones described on page 2, lines 27-28, which passage must be read in the light of the preceding paragraph. Said passage undisputedly discloses a mixture of PEEK-PEDEK and PEEK materials in accordance with the definition of operative claim 1, but does not describe the features relating to the absence of filler or to the mixture in form of pellets or granules. Said mixture of PEEK-PEDEK and PEEK is also disclosed in dependent claim 3 of D3, however, in the context of a composition comprising a fibrous reinforcing agent, as required in claim 1 of that document to which dependent claim 3 refers. Said mixture of PEEK-PEDEK and PEEK disclosed in D3 constitutes the preferred mixture of polyketones in accordance with the teaching of D3, as indicated on page 2, lines 27-28 of that document.



2.1 The only passage of D3 cited by the appellant which discloses the features of operative claim 1 as far as the absence of filler and the form of pellets or granules are concerned, is from page 2, line 57 to page 3, line 3 which relates to the preparation of the composition of D3, i.e. those comprising a fibrous reinforcing agent. It reads *"The composition may be made by mixing the polyketone or mixture with the fibrous reinforcing agent and with, if required, the said other materials, for example by particle or melt blending. More specifically the polyketones or mixture, in the form of a dry powder or granules, can be mixed with the fibrous reinforcing agent and, if required, the said other materials, using a technique such as tumble blending or high speed mixing"*.

In the Board's opinion, the mixture of polyketones *"in the form of a dry powder or granules"* addressed in that passage would be read by the skilled person having in mind the preferred mixture of polyketones taught in D3, i.e. the mixture of PEEK-PEDEK and PEEK described on page 2, lines 27-28 and in claim 3.

Whereas the appellant understands the above mentioned passage bridging pages 2 and 3 to describe granules of the mixture of PEEK-PEDEK and PEEK, the respondent interprets this passage as referring to a mixture of granules of PEEK-PEDEK and granules of PEEK, which could only lead to granules of a blend of PEEK-PEDEK and PEEK, if said granules of PEEK-PEDEK, granules of PEEK and the reinforcing material, obligatory used in accordance with the teaching of D3, were processed in a certain way allowing a blend of PEEK-PEDEK and PEEK to be formed before adding said reinforcing material (letter of 16 January 2024, section "Novelty and D3").

2.2 The semantic interpretation of the wording "*the polyketones or mixture, in the form of a dry powder or granules*" on page 3, line 1 of D3 is that each granule must comprise PEEK-PEDEK and PEEK in admixture, i.e. a preexisting chemical mixture of PEEK-PEDEK and PEEK polyketones has been prepared, before said mixture is formed into granules. Contrary to the respondent's opinion, it does not therefore define the result of mixing granules of polyketones being chemically distinct, i.e. granules of PEEK-PEDEK and granules of PEEK. This interpretation is also consistent with the undisputed meaning of the expression "the blend is in the form of pellets or granules" in operative claim 1 which defines that each pellet or granule is made of that blend.

As pointed out by the appellant at the oral proceedings, this interpretation of that passage of D3 is also consistent with the indication on page 2, line 36 of D3 of viscosity values for the polyketone mixture, i.e. a wording relating to a chemical mixture of polymeric materials, but not to a mixture of granules.

2.3 Moreover, agreeing with the opposition division's view, the respondent submits that the term blend would be more specific than mixture, meaning that even taking the appellant's understanding of the term "mixture" as referring to a chemical mixture of PEEK-PEDEK and PEEK, that mixture would not describe a blend and therefore could not form the basis for an anticipation of the subject-matter of operative claim 1. In this respect, the opposition division relied on three excerpts of dictionaries (documents D11 to D13) and an entry in

Wikipedia D14, which all concern the meaning of the wording "polymer blend".

Based on the same documents, the Board is, however, of the opinion that the term "blend" in the context of operative claim 1 and the term "mixture" in the context of D3 cannot be given a different technical meaning. From the first paragraph of the entry "Polymerblends" in the Römpp Lexicon (D11/D12) which reads "*Polymer blends (Polyblends, PB). From English blend = mixture, blend derived designation for mixtures of two or more Polymers or Copolymers (polymer blends)*" it is immediate that the wordings "polymer blend" and "polymer mixture" are synonyms. Moreover, according to the IUPAC Compendium of Chemical Terminology (D13), a polymer blend is defined as a "*macroscopically homogeneous mixture of two or more different species of polymer*", whereby "*no account is taken of the miscibility or immiscibility of the constituent macromolecules, i.e., no assumption is made regarding the number of phase domains present*". That equivalence of terminology between "blend" and "mixture" in the context of polymers is also confirmed in D14 (first paragraph and section "Basic concepts"). It was undisputed that in the context of D3, it would be technically unreasonable to prepare granules of a mixture of PEEK-PEDEK and PEEK which would appear inhomogeneous at the macroscopical level or with the bare eyes. Moreover, no technical reason was provided as to why the additional criteria considered by the opposition division to define a blend, such as (i) the ability to be prepared by mixing in the melt or dissolution, (ii) differences in properties compared to the individual polymer components of the blend or (iii) the ability to be separated should result in the

mixture of polymers described in D3 not qualifying as a blend.

- 2.4 For the above reasons, it is concluded that claim 1 of the main request has not been shown to comprise a feature which would render its subject-matter distinguishable from the disclosure of D3 relied upon by the appellant. It is therefore concluded that claim 1 of the main request does not meet the requirements of Article 54(2) EPC and that for this reason the main request is not allowable.

*Auxiliary request XI*

*Admittance*

3. The admittance of auxiliary request XI submitted with the reply to the statement of grounds of appeal is subject to the stipulations of Article 12(4) RPBA. As pointed out by the respondent during the oral proceedings, auxiliary request XI is limited among others by the amounts of polymeric materials (A) and (B) in the blend and the definition that the claimed object is a component which is injection moulded or extruded and consists essentially of the blend. Although it was not specified in writing which objections the amendments contained in this auxiliary request were meant to overcome, it could be agreed with the respondent's submissions at the oral proceedings that the introduction of these limitations could be seen as a self-evident attempt to counter the objection that the subject-matter of claim 1 of the main request lacks novelty over D3. Moreover, it did not in the Board's opinion represent a changement of the case with respect to inventive step. Consequently, the Board exercises its discretion under Article 12(4) RPBA and

admits auxiliary request XI into the appeal proceedings.

*Novelty*

4. The appellant submitted at the oral proceedings that claim 1 was still anticipated by D3, since the granules of mixtures of PEEK-PEDEK and PEEK disclosed on page 3, line 1 of D3 were components obtainable by an extrusion step, i.e. the granules disclosed in D3 would constitute a component within the meaning of operative claim 1.

While it is true that making abstraction of the context of operative claim 1 granules can be produced by an extrusion step, this argument is not convincing, as far as operative claim 1 is concerned. Even, if to the benefit of the appellant, one considered that the term "component" would generally encompass "granule", this would not constitute an appropriate reading of that term in the context of operative claim 1. In the Board's opinion, according to a technical sensible reading of claim 1, i.e. taking into account of the implicit purpose of such injection or extrusion step, the granules or pellets are not injection moulded or extruded to form granules or pellets, but to produce an article or a part which has a different form.

On that basis, the appellant's objection is not convincing and novelty over D3 is acknowledged (Article 54(2) EPC).

*Inventive step*

5. As regards the main request, the objection of lack of inventive step over D4 was discussed at the oral

proceedings before the parties were heard on the separate issue of novelty over D3. Regarding auxiliary request XI, the appellant stated that their submissions concerning inventive step over D4 were the same as for the main request and that they had no further arguments in this respect. The appellant accepted that the Board's conclusion concerning inventive step over D4 for the main request which had been announced following deliberation would equally apply to auxiliary request XI. The following reasoning concerning inventive step of auxiliary request XI is therefore based on the parties' submissions provided in respect of the main request.

*Closest state of the art*

6. The opposition division assessed inventive step starting from the disclosure of D4, reference being made to claims 8 to 11 held to define blends of PEEK with PEEKK, PEKK or PEK (reasons for the decision, point 9.2.2). Reference was made to various poly(aryletherketone)s that can be used to prepare a blend which are shown on pages 19-21 of that document. It is undisputed that D4 discloses such blends (rejoinder, page 6, section inventive step, third paragraph).

Blends of PEEK with various poly(arylketone)s are described with examples 1 to 5 (blends with PEEKK), example 6 (blend with PEK) and examples 7 and 8 (blends with PEKK). These constitute specific blends within the general definition of the invention given in claim 1 of D4. As noted by the appellant, the preparation of the blends of D4 in the form of pellets is described in the paragraph bridging pages 24 and 25. These pellets are then moulded into the desired article.

*Distinguishing feature*

7. It is undisputed that the blends as defined in operative claim 1 differs from the blends described in D4 in that they contain PEEK-PEDEK. Accordingly, the component of operative claim 1 which is injection moulded or extruded from said blend differs from the articles described in D4 in that it is made of a blend containing PEEK-PEDEK.

*Problem successfully solved*

8. Having regard to the closest prior art, the respondent and the appellant took differing positions as to which problem could be considered to be successfully solved by the subject-matter of operative claim 1. Relying on the experimental results described in the patent in suit, the respondent argued that the technical problem solved by the subject-matter of claim 1 (of the main request) with respect to the closest prior art was the provision of a blend with better mechanical properties whilst being processable at lower temperatures than PEEK, i.e. (for auxiliary request XI) the provision of a component which can be injection moulded or extruded at lower temperatures than PEEK and has better mechanical properties.
  - 8.1 The appellant contested that the experimental data of the patent in suit could demonstrate that the blends of operative claim 1 exhibit improved mechanical properties and processability vis-à-vis the closest prior art, the latter being represented by comparative example 8 of the patent in suit.

It is the appellant's position that examples 9, 10 and 12 to 14 cannot prove said effect, since the nature of

the PEEK-PEDEK, especially with respect to the molecular weight or the melt viscosity have an influence on certain mechanical properties, like toughness (statement of grounds of appeal, page 18, first paragraph).

- 8.2 The appellant nevertheless acknowledged that the patent provides information regarding the polymers which make up the composition of example 11, notably Victrex® PEEK 650G and the PEEK-PEDEK copolymer of example 1 (statement of grounds of appeal, page 18, third paragraph).

Having regard to (i) paragraph [0091] of the specification in which it is stated that blends made using Victrex® 650G and the PEEK-PEDEK copolymer of example 1 were tested and (ii) paragraph [0093] in which the advantages of using the blends of PEEK and PEEK-PEDEK in examples 9 to 11 instead of PEEK alone, are discussed, it is implicit that the same PEEK material is meant to be used for all experiments reported in table 1 of the specification namely Victrex® PEEK 650G.

Moreover, as pointed out by the respondent at the oral proceedings, the viscosity of Victrex® PEEK 650G given in paragraph [0076] of the specification with a value of  $0.65 \text{ kNs.m}^{-2}$  and that of the PEEK-PEDEK copolymer of example 1, which is used in example 11, namely  $0.60 \text{ kNs.m}^{-2}$ , as indicated at the end of paragraph [0079], are similar, and even lower for the PEEK-PEDEK copolymer, as noted by the Board. On that basis, the improvement in fracture energy, i.e. fracture toughness, obtained in example 11 by the addition of the PEEK-PEDEK copolymer can be attributed to the chemical nature of the PEEK-PEDEK copolymer and not to



its viscosity or molecular weight. There is, however, no evidence that other mechanical properties are in general improved by the addition of a PEEK-PEDEK copolymer.

The appellant's argued in relation to the main request that no evidence had been provided that a technical effect was achieved when the amount of PEEK-PEDEK in the blend was 25 wt%, as allegedly shown by a comparison of the results for examples 8 and 9, or when a small amount of PEEK-PEDEK such as 0.1 wt% was used. This argument, however, does not concern blends in accordance with claim 1 of auxiliary request XI which requires a minimum amount of PEEK-PEDEK in the blend of 50 wt%. Independently of its possible relevance for the main request, in view of this there can be no doubt that it cannot be persuasive for auxiliary request XI.

8.3 As to the achievement of a composition which can be injection moulded or extruded at lower temperatures, it was undisputed that the addition of PEEK-PEDEK copolymers would reduce the melting point, reference being also made by the appellant during the oral proceedings to D3 showing PEEK-PEDEK copolymers having a melting point below that of PEEK.

8.4 On that basis, the problem successfully solved by the claimed components over the closest prior art is to be formulated as the provision of a component which can be injection moulded or extruded at lower temperatures than for PEEK and has better fracture toughness.

*Obviousness of the solution*

9. It remains to be decided whether, having regard to the disclosure of D4, possibly in combination with other

prior art documents or with common general knowledge, the skilled person wishing to solve the above problem would have found the suggestion to use 50 to 80 wt% a PEEK-PEDEK copolymer in conjunction with the PEEK. The appellant referred in this respect to documents D3, D4 and D5.

- 9.1 Concerning the provision of a component which can be injection moulded or extruded at lower temperatures than PEEK, the appellant submitted during the oral proceedings that the addition of PEEK-PEDEK copolymers to PEEK in order to obtain a composition having a melting point lower than that of PEEK would be taught in D3. This was not contested.

However, that document does not suggest that the addition of a PEEK-PEDEK copolymer would result in an improved fracture toughness.

The appellant referred to the teaching on page 3, lines 12-16, according to which "*In the process of shaping the composition including any annealing stage the crystallinity of the polyketone should be developed as far as possible. This is important because otherwise crystallisation could continue during subsequent use of an article result in dimensional changes, warping or cracking and general change in physical properties. Furthermore, increased crystallinity results in improved environmental resistance and modulus*". While the word polyketone in this statement can be understood to generally refer the polyketones of the invention of D3, including the preferred mixture of PEEK-PEDEK and PEEK (point 2 above, first paragraph), this statement does not provide any link between said improved crystallisation or improved mechanical properties and the presence or addition of a PEEK-PEDEK copolymer.

The passage on page 3, lines 52-53 of D3, also referred to by the appellant during the oral proceedings, according to which a laminate of a polymer composition of the invention retained "*considerable strength even after being subjected to an impact of 4.5 J/mm (1000 in lb/in)*" concerns a composition comprising carbon fibres. It provides therefore no indication as to the contribution of the PEEK-PEDEK in the admixture comprising PEEK and the reinforcing agent. The same holds true for the values of residual compression strength obtained using various impact energy values which are indicated in the first paragraph on page 4.

Moreover, although in Table One on page 6 of D3 impact resistance values are given for a laminate comprising a copolymer of PEEK-PEDEK and a laminate comprising PEEK, no conclusion can be drawn with respect to the relative impact strengths of both polymeric materials, since there is not the slightest indication that the laminates tested were otherwise identical, in particular with regard to the type of fibres used, their amount and orientation.

9.2 The invention of D4 mainly concerns blends of polyaryether homopolymers. That document, however, does not teach the preparation of copolymers of PEEK-PEDEK. Contrary to the appellant's opinion the polymer defined on page 20, line 1 of D4 is not a copolymer, but a PEDEKEEK homopolymer, as pointed out by the respondent.

Referring to the experimental results in table V, on page 46 of D4, the appellant pointed out at the oral proceedings that the toughness of a blend of a random PEEKK-PEKKEKK copolymer and PEEK, as measured in terms of pendular impact strength (page 26, line 14 ff.), was

between the value obtained for each of the constituents, the value for PEEK being the lowest. This argument refers to example 12 in table V which concerns a mixture of polymers "PAEK VII" and "PEAK I", whose formula is indicated on pages 36 and 26, respectively. It does not, however, concern a PEEK-PEDEK copolymer and for this reason does not provide any indication of the relative fracture toughness of PEEK-PEDEK and PEEK. In any event, example 12 cannot indicate that copolymers of polyaryletherketone in general would provide in comparison to PEEK better pendulum impact values, let alone better fracture toughness within the meaning of the patent in suit, which is all the more the case since contrary to the appellant's observation the pendulum impact strength measured for this example 12 is much higher for PEEK (value of 130 000 in foot-pounds per cubic inch) than for the random PEEKK-PEKKEK copolymer (value of 30 000).

The appellant also submitted that the poly(aryl ether ketone) polymers of D4 would improve the crystallization rate, as allegedly taught on page 17, lines 7-25 of that document. According to that passage of D4, the enhanced rates of crystallization allows to increase the speed of the moulding cycle or to increase the degree of crystallization without annealing. The appellant, however, did not explain for which reasons such an improvement of the crystallization rate brought about by the polymers of D4 would necessarily be correlated with an improvement of the fracture toughness, let alone why this would be valid for PEEK-PEDEK copolymers.

- 9.3 The appellant also submitted that PEEK-PEDEK copolymers were known from D5 to have an excellent toughness and crystallinity, reference being made to the various

passages of that document (abstract; page 2, lines 17 and 29; page 3, line 11; page 4, line 24; page 6, line 7; page 9, lines 21 and 30; page 10, line 15 and page 11, line 34). D5, however, does not provide any indication about the relative toughness of PEEK and PEEK-PEDEK copolymers. The test method used in D5 does not even allow for a quantification of that property. According to the principle of that method, a film of 0.2 mm thickness is bended at a temperature of 180°C, the copolymer tested being considered tough, if it does not break. Otherwise, the material is deemed to be brittle (paragraph bridging pages 2 and 3). In the absence of any indication that PEEK would not pass this specific test, the skilled person would not have any indication that PEEK-PEDEK copolymers of D5 are tougher and should be added to PEEK in order to solve the objective problem set out in point 8.4 above.

- 9.4 For these reasons, the appellant's objection starting from the teaching of D4 as the closest prior art does not establish the obviousness of the subject-matter of claim 1 of auxiliary request XI. Its subject-matter involves therefore an inventive step within the meaning of Article 56 EPC.

*Admittance of additional objections*

10. At the end of the oral proceedings the appellant put forward for the first time two additional objections against auxiliary request XI. It was submitted that the subject-matter of claim 1 extended beyond the content of the application as filed and did not involve an inventive step over the disclosure of D3 taken as closest prior art. Each of these objections represented therefore an amendment to the appellant's case within the meaning of Article 13(2) RPBA which is, in

principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

- 10.1 Concerning the new inventive step objection, the appellant merely contented that it was justified by the development of the case during the hearings. However, neither did the appellant specify which development necessitated a new objection of inventive step, let alone outlined that objection so that the Board in view of that vague and unsubstantiated allegation could not discern exceptional circumstances which would justify that the appellant be given the opportunity to develop a separate and new attack of inventive step starting from D3 as the closest prior art. The objection that the subject-matter of auxiliary request XI lacked an inventive step starting from the disclosure of D3 was therefore not taken into account (Article 13(2) RPBA).
- 10.2 As regard the objection that the subject-matter of claim 1 of auxiliary request XI extended beyond the content of the application as filed, the appellant submitted that this objection was the same as already raised in relation to claim 10 of the main request and that it should therefore be admitted. The appellant's reasons as to why claim 10 of the main request would extend beyond the content of the application as filed were indicated with the statement of grounds of appeal, namely that the application documents as filed would not contain any disclosure of a component which consists essentially of granules or pellets (statement of grounds of appeal, page 9, second and third full paragraph).

However, claim 10 of the main request underlying the contested decision, i.e. as filed with letter of

15 January 2021, was already directed to a component consisting essentially of a blend as described in any of the preceding claims, which blend was defined in claim 1 to be in the form of pellets or granules. That combination of features, which was also present in auxiliary request 1 underlying the contested decision, was, however, not objected to contravene the requirements of Article 123(2) EPC.

Accordingly, even if to the appellant's benefit one considered that the objection against claim 1 of auxiliary request XI were in essence the same as that raised against claim 10 of the main request, that objection could and should have been raised against claim 10 of the main request filed with letter of 15 January 2021 and of auxiliary request 1 underlying the contested decision.

In applying Article 13(2) RPBA the Board may also rely on criteria applicable under Article 13(1) RPBA (supplementary publication 1, OJ EPO 2020, Annex 2, explanatory notes to Article 13(2) RPBA), i.e. also on those mentioned in Article 12(6) RPBA. In view of the criterion mentioned in Article 12(6), second sentence, RPBA the Board finds it appropriate to exercise its discretion under Article 13(2) RPBA by not admitting this objection into the proceedings.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in amended form on the basis of claim 1 of auxiliary request XI filed with the reply to the statement of grounds of appeal after any necessary consequential amendments to the description.

The Registrar:

The Chairman:



D. Hampe

D. Semino

Decision electronically authenticated