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Datasheet for the decision of 5 September 2025

Case Number: T 1319/23 - 3.3.03

Application Number: 16873356.6

Publication Number: 3305815

IPC: C08F210/16, C08F4/659, C08F4/6592

Language of the proceedings: EN

Title of invention:
OLEFIN-BASED POLYMER

Patent Proprietor:
LG Chem, Ltd.

Opponent:
The Dow Chemical Company

Relevant legal provisions:
EPC Art. 100(b), 111(1)
RPBA 2020 Art. 11, 12(4), 12(6)

Keyword:
Late-filed lines of defence - admitted (yes)
Grounds for opposition - insufficiency of disclosure (main request: no)
Remittal - (yes)

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Case Number: T 1319/23 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 5 September 2025

Appellant: (Patent Proprietor)	LG Chem, Ltd. 128 Yeoui-daero Yeongdeungpo-gu Seoul 07336 (KR)
Representative:	Hoffmann Eitle Patent- und Rechtsanwälte PartmbB Arabellastraße 30 81925 München (DE)
Respondent: (Opponent)	The Dow Chemical Company 2211 H.H. Dow Way Midland MI 48674 (US)
Representative:	Boult Wade Tennant LLP Salisbury Square House 8 Salisbury Square London EC4Y 8AP (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 18 April 2023 revoking European patent No. 3305815 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	D. Semino
Members:	O. Dury
	L. Basterreix

Summary of Facts and Submissions

I. The appeal by the patent proprietor lies from the decision of the opposition division revoking European patent No. 3 305 815.

II. The following documents were, among others, cited in this decision:

D4: Declaration by Brayden Edward Glad dated 13 December 2021

D11: Declaration by Rongjuan Cong dated 5 January 2023

III. The decision under appeal was based on the patent in suit as main request as well as on auxiliary request 1 filed with letter of 19 May 2022. According to this decision, neither the main request, nor auxiliary request 1 met the requirements of sufficiency of disclosure. Therefore, none of the patent proprietor's requests was allowable and the patent was revoked.

IV. With the statement setting out the grounds of appeal the patent proprietor (appellant) filed three sets of claims as auxiliary requests 1 to 3 as well as various documents (which are not relevant to the present decision).

V. The opponent (respondent) replied to the statement of grounds of appeal.

VI. The parties were summoned to oral proceedings and a communication pursuant to Article 15(1) RPBA (dated

27 February 2025) was then issued by the Board.

VII. Oral proceedings were held on 5 September 2025 in the presence of both parties.

VIII. **The final requests of the parties were as follows**:

The appellant requested that the decision under appeal be set aside and the case be remitted to the opposition division for further prosecution. Alternatively, the appellant requested that the patent be maintained as granted or in amended form on the basis of any of auxiliary requests 1 to 3 filed with the statement of grounds of appeal.

The respondent requested that the appeal be dismissed. Alternatively, should the appellant's appeal be successful and any of the appellant's requests be found to satisfy the requirements of sufficiency of disclosure, the respondent requested that the case be remitted to the opposition division for further prosecution.

IX. Claim 1 of the **main request (patent as granted)** is the only claim relevant to the present decision. It reads as follows:

"1. An olefin-based polymer satisfying the following conditions of (1) to (4):

(1) density (d): from 0.850 to 0.910 g/cc,

(2) melting index (MI, 190°C, 2.16 kg load conditions): from 0.1 to 100 g/10 min,

(3) molecular weight distribution (MWD): from 1.5 to

3.0, and

(4) two peaks are shown in a temperature range of -20°C to 120°C when taking measurements of temperature rising elution fractionation (TREF), and a relation of T(90)-T(50)≥60°C is satisfied (where T(90) is a temperature at which 90 wt% of the olefin-based polymer is eluted, and T(50) is a temperature at which 50 wt% of the olefin-based polymer is eluted)."

X. The parties' arguments, in so far as they are pertinent for the present decision, may be derived from the reasons for the decision below. The main points of dispute concerned the following issues:

- The admittance of arguments that were put forward by the appellant in sections C.1 and C.4 of the statement of grounds of appeal.

- The question if claim 1 of the main request met the requirements of sufficiency of disclosure (Article 100(b) EPC).

Reasons for the Decision

Main request (patent as granted)

1. Sufficiency of disclosure

1.1 In order to meet the requirements of sufficiency of disclosure, an invention has to be disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person, without undue burden, on the basis of the information provided in the

patent specification, if needed in combination with the skilled person's common general knowledge. This means in the present case that the skilled person should in particular be able to prepare an olefin-based polymer satisfying the combination of features (1) to (4) according to claim 1 as granted, which was contested by the respondent in respect of feature (4).

1.2 The objection of lack of sufficiency of disclosure pursued in appeal by the respondent was only related to the (im)possibility to determine feature (4) according to claim 1, which requires that "two peaks are shown in a temperature range of -20°C to 120°C when taking measurements of temperature rising elution fractionation (TREF)", in view of the alleged impossibility to carry out TREF measurements with o-dichlorobenzene (oDCB) as solvent, which was the solvent specified in the patent specification, at temperatures below the crystallisation point of oDCB (-17.03°C; the crystallisation point remained undisputed). This objection was eventually retained by the opposition division (points 13 to 13.9 of the reasons of the decision under appeal). A further objection of lack of sufficiency of disclosure related to the number of peaks, which had been rebutted by the opposition division (points 15 to 15.2 of the reasons of the decision under appeal), was not pursued and is, therefore, not the object of the appeal proceedings.

1.3 Admittance of arguments put forward by the appellant

1.3.1 The respondent requested that the arguments put forward by the appellant in sections C.1 and C.4 of the statement of grounds of appeal regarding sufficiency of disclosure be not admitted into the proceedings.

1.3.2 In section C.1 of the statement of grounds of appeal, the appellant submitted that the arguments retained by the opposition division to reach their decision of lack of sufficiency of disclosure were rather related to a potential clarity issue but not to sufficiency of disclosure (statement of grounds of appeal: points 14-20).

In section C.4 of the statement of grounds of appeal, the appellant submitted that even if the Board considered that the issue regarding the impossibility to perform TREF measurements with oDCB as solvent at temperatures below -17°C (particularly between -20°C and -17°C, as indicated in the patent specification) was related to sufficiency of disclosure and the evidence on file provided verifiable facts that the measurement could not be carried out in that range, the requirements of Article 100(b) EPC would still be met. According to the appellant, these concerns were irrelevant for most polymers and, if an issue existed, it would only affect the extreme boundaries of the claim (statement of grounds of appeal: points 28-37).

In view of the file history, the Board concluded that it was correct that the appellant did not put forward these arguments specifically in this form during the opposition proceedings and informed the parties accordingly (communication: point 6.3.2.a). Since this view remained uncontested, the Board has no reason to deviate therefrom. Therefore, the arguments in sections C.1 and C.4 of the statement of grounds of appeal constitute an amendment to the appellant's case (Article 12(2) and (4) RPBA) and their admittance underlies the stipulations of Article 12(4) to (6) RPBA.

1.3.3 Considering that the main request is the patent as granted, the Board agrees with the respondent that these arguments could have been submitted earlier.

1.3.4 However, it can be inferred from the appellant's submissions that they are following with these arguments a line of defence close and parallel to that submitted during the opposition proceedings. In other words, they are not using these arguments to build a "fresh case" in appeal. Indeed, the core issue addressed by the appellant in sections C.1 and C4 of the statement of grounds of appeal is still related to the consequences of the question whether a TREF measurement can be carried out with oDCB as solvent at temperatures between -20°C and -17°C, which was one of the main points of dispute between the parties during the opposition proceedings (decision under appeal: page 6, last paragraph and points 13.2 to 13.9 of the reasons). On that basis, the Board considers that the appellant's arguments in sections C.1 and C.4 of the statement of grounds of appeal constitute a reaction to the conclusion reached by the opposition division in the decision under appeal, which was negative for the appellant, and only a development of the case in view of that, which remains in the same framework of the line of defence adopted in opposition proceedings.

1.3.5 The respondent disagreed with that view, which had been communicated to the parties in the Board's communication (section 6.3). According to the respondent, the issues addressed in sections C.1 (clarity vs. sufficiency of disclosure) and C.4 (impossibility of carrying out the TREF measurement according to the patent specification at most present at the extreme boundaries of the claim) of the statement of grounds of appeal eventually constituted a

fresh case (letter of 15 July 2025: page 2, last paragraph).

a) Regarding section C.1 of the statement of grounds of appeal, the respondent considered that the appellant's arguments related to a new and fundamental issue that was related to a different legal case (as opposed to the one in opposition proceedings). Also, the appellant had not justified why this issue had only been raised in appeal. In addition, raising this new issue increased the complexity of the case without addressing the arguments retained by the opposition division. Therefore, these arguments should not be admitted into the proceedings pursuant to Article 12(4) RPBA, so the respondent (letter of 15 July 2025: page 3 and first paragraph on page 4; oral proceedings before the Board).

However, since the question whether an objection relates to clarity or sufficiency of disclosure is a purely legal issue, the Board considers that, contrary to the respondent's view, it cannot be disregarded since it is (one of) the Board's duty to ensure that the parties address the correct legal basis during the proceedings and that this legal basis is the one eventually considered when reaching a decision on the disputed issue. In this regard, the Board agrees with the appellant that the arguments in section C.1 concern the correct application of the law to the underlying facts and are not directed to the presentation of new facts (appellant's letter of 26 March 2024: point 19; oral proceedings before the Board). For this reason, the Board considers that the appellant's arguments set out in section C.1 of the statement of grounds of appeal do not expand the legal and factual framework of the present case. Additionally, the Board shares the

appellant's view that the arguments set out in section C.1 of the statement of grounds of appeal are consistent with the appellant's line of argument during the opposition proceedings (letter of 26 March 2024: point 25). Therefore, these arguments do not lead to a change of case.

Furthermore, the Board considers that the appellant's arguments in section C.1 of the statement of grounds of appeal are closely related to point 13.2 of the reasons of the decision under appeal, in which the opposition division indicated that, when assessing sufficiency of disclosure, the skilled person had to know whether s/he was working within the scope of claim 1 as granted, which is however, according to the predominant case law to which the present Board agrees, a matter of clarity (Case Law, *supra*, II.C.8.2.2.a). Therefore, these arguments are also considered to have been submitted in reaction to the impugned decision.

The Board further notes that admitting at the appeal stage additional arguments that constitute a further development of the case will inherently increase its complexity. However, the stipulations of Article 12(4) RPBA, which state that the Board should, when exercising its discretion to admit new arguments, take into account the complexity of the amendment, cannot be interpreted as meaning that such additional arguments should be disregarded automatically because of this inherent increased complexity, as the respondent seems to propose.

b) With regard to the arguments set out in section C.4 of the statement of grounds of appeal, the respondent argued that the appellant had not justified why this issue had only been raised in appeal. In addition, also

this issue increased the complexity of the case without addressing the arguments retained by the opposition division. Therefore, these arguments should not be admitted into the proceedings pursuant to Article 12(4) RPBA, so the respondent (letter of 15 July 2025: page 4, second paragraph to page 6, first paragraph).

However, the Board considers that the arguments in section C.4 that the respondent's concerns are at most relevant at the extreme boundaries of the claim are closely related to one of the core issues of the decision under appeal, which concerned whether a TREF measurement could be carried out using oDCB as solvent at temperatures between -20°C and -17°C. Therefore, being strictly linked to a central point of the decision under appeal, these arguments merely represent a further development of an existing line of argument. In view of this, they do not constitute a change of case.

In addition, the Board agrees with the appellant that the arguments in section C.4 of the statement of grounds of appeal are, at least in part, related to the question of the impact of the lowest temperature used for TREF measurements on the subsequent analysis, and can therefore be considered a response to the concerns expressed by the opposition division in point 13.7.5 of the impugned decision.

The respondent's arguments regarding the inherent increased complexity of the case also fail to convince for the same reasons as those indicated above in relation to section C.1.

c) For these reasons, the respondent's considerations that the arguments in sections C.1 and C.4 of the

statement of grounds of appeal constituted a fresh case as set out in their letter of 15 July 2025 are rejected.

1.3.6 In view of the above, the Board decided to exercise its discretion pursuant to Article 12(4) RPBA to admit into the proceedings the arguments put forward by the appellant in sections C.1 and C.4 of the statement of grounds of appeal.

2. Sufficiency of disclosure

2.1 Claim 1 as granted is directed to an olefin-based polymer satisfying a combination of conditions related to (1) density, (2) melt index, (3) molecular weight distribution and (4) requirements in terms of TREF. The issue of sufficiency of disclosure in dispute between the parties is related to the requirement that the olefin-based polymer being claimed should satisfy condition (4), which reads as follows:

"(4) two peaks are shown in a temperature range of -20°C to 120°C when taking measurements of temperature rising elution fractionation (TREF), and a relation of $T(90)-T(50)\geq 60°C$ is satisfied (where T(90) is a temperature at which 90 wt% of the olefin-based polymer is eluted, and T(50) is a temperature at which 50 wt% of the olefin based polymer is eluted)."

2.2 As pointed out by the appellant (statement of grounds of appeal: point 38) when summarising their position, there were four main points of contention between the parties, which may be summarised as follows:

(a) Does the respondent's objection concerning the (im)possibility of performing a TREF measurement

with oDCB as solvent at temperatures between -20°C and -17°C (i.e. below the melting point of oDCB) and followed by the opposition division amount to an issue of sufficiency of disclosure or is it rather an objection of (lack of) clarity?

(b) If the objection of the respondent is considered to amount to an issue of sufficiency of disclosure, is the evidence on file sufficient to conclude that a TREF measurement using oDCB cannot be performed in the range of -20°C to -17°C, which corresponds to the lower part of the range specified in feature (4) according to claim 1 as granted?

(c) Does the appellant or the respondent bear the burden of proof in respect of point (b)?

(d) Even if, to the respondent's benefit, it were to be held that the objection put forward by the respondent may be related to a question of sufficiency of disclosure and that the opposition division was correct in deciding that the TREF measurement according to feature (4) of claim 1 as granted could not be carried out in the range of from -20°C to -17°C, does this fact effectively amount to a lack of sufficiency of disclosure pursuant to Article 100(b) EPC?

Having considered the parties' submissions in respect of all these issues, the Board indicated in its communication (section 7.2, last paragraph; see also section 7.3.3) that the last one (point (d) as indicated above) appeared to be highly relevant to the outcome of the present case. Indeed, should the Board conclude that the issue at stake does not amount to a lack of sufficiency of disclosure, the respondent's

entire case would fail, regardless of the Board's decision on the remaining points (a) to (c). This view remained undisputed, particularly during the oral proceedings before the Board, during which above point (d) was the only substantive issue discussed (minutes: page 2, fourth and fifth paragraphs). Therefore, the Board has no reason to deviate from this preliminary consideration. In these circumstances, and given that the Board ultimately concluded that the issue in question does not amount to a lack of sufficiency of disclosure, it is only this point of dispute that needs to be addressed in the present decision.

Regarding issue (d): are the requirements of sufficiency of disclosure satisfied, even if the TREF measurement according to feature (4) of claim 1 as granted cannot be carried out in the range of from -20°C to -17°C?

2.3 The appellant argued that, even if the Board were to agree with the opposition division and the respondent that i) the question of whether the skilled person would be able to determine feature (4) according to claim 1 as granted was a question of sufficiency of disclosure and that ii) the evidence on file showed that the skilled person would not be able to carry out a TREF measurement according to feature (4) of claim 1 as granted in the range of from -20°C to -17°C on the basis of the information provided by the patent in suit and common general knowledge, the requirements of sufficiency of disclosure would still be met (statement of grounds of appeal: points 28-38).

2.3.1 In that respect, the Board finds it appropriate to recall that, as indicated by the appellant (point 5 of

the statement of grounds of appeal), the TREF method specified in feature (4) of claim 1 as granted is an analysis method that allows fractionating a polymer according to its crystallinity, thereby monitoring the amount of polymer eluted as a function of temperature. The TREF technology is based on the following principle: after the composition to be analysed is dissolved in a solvent at high temperature, it is cooled at a defined rate in a column containing an inert support (usually metal beads) to allow a controlled crystallization of the different crystal structures in the polymer. In this way, the different polymer species are deposited on the support one after the other, starting with those polymers that crystallize first (i.e. at higher temperatures). This temperature dependent deposition of the different species results in a layered deposition structure of the polymer on the surface of the inert support when cooling the sample. Afterwards, the temperature is increased again at a defined rate allowing a solvent to elute the different polymer components at different temperatures according to their solubility/dissolution behaviour at the respective temperature. An example of suitable experimental conditions is provided in paragraphs 113 and 114 of the patent in suit.

2.3.2 In view of the physical principles underlying the TREF technique, it is evident that it can only be carried out if the solvent flows through the separation column. In other words, the TREF measurement can only be carried out at temperatures higher than the solvent's crystallisation/solidification point (unless quite special conditions of supercooling arise). In the present case, given that the sole method indicated in the patent specification uses oDCB as solvent (paragraph 113 of the patent in suit), which has a

crystallisation temperature of -17°C, the question arose if feature (4) according to claim 1 as granted, which requires that two peaks are shown in a temperature range of -20°C to 120°C when taking measurements of TREF, can be met considering that the temperature range between -20°C and -17°C is below the crystallisation temperature of oDCB.

2.3.3 In view of the parties' submissions and the evidence on file, the Board concluded that it is reasonable to consider that, if, as put forward by the respondent, the skilled person had any concerns about carrying out a TREF measurement within the range of temperature specified in feature (4) according to claim 1 as granted (-20°C to 120°C) using oDCB as the solvent, particularly with regard to carrying out TREF at temperatures below the crystallisation point of this solvent (i.e. within the range from -20°C to -17°C), s/he would consider performing said measurement within the range of -17°C (instead of -20°C) to 120°C, where no issues would be expected, to check whether the conditions in claim 1 are met.

a) As the appellant argued (statement of grounds of appeal: point 32), this is reasonable, in view of the small temperature range in which the potential problem could at most occur (from -17°C to -20°C) as compared to the entire temperature range specified in claim 1 as granted (from -20°C to 120°C). It is also reasonable in view of the respective positions and widths of the two crystallisation peaks shown in figures 1 to 7 of the patent in suit which relate to polymers according to claim 1 as granted. These peaks occur at temperatures that are sufficiently different from the critical range of from -20°C to -17°C. In this respect, it was common ground between the parties that the peak shown at the

beginning of the TREF graphs (so-called "purge peak") is not to be considered as a crystallisation peak (statement of grounds of appeal: point 29; rejoinder: page 16, last full paragraph) and the Board has no reason to be of a different opinion.

b) This view is further supported by the fact that it was not shown that any polymer as otherwise defined in claim 1 as granted eventually exhibit a crystallisation peak in the critical range of from -17°C to -20°C, in particular polymers prepared according to the teaching of the patent in suit. In addition, it is agreed with the appellant that, in view of the physical principles underlying TREF measurements (see point 2.3.1 above), the skilled person would expect that, if two peaks are shown in the range of -17°C to 120°C, the same would be true in the range from -20°C to 120°C that is indicated in feature (4) according to claim 1 as granted (statement of grounds of appeal: points 32 and 34). In addition, the Board shares the appellant's view that, if a polymer had two peaks, one of which being in the critical range of -20°C to -17°C and such as to be hidden by the purge peak, the only consequence would be that this polymer would wrongly not be recognised as being in accordance with claim 1 as granted (statement of grounds of appeal: points 30 and 31). However, this would not prevent the skilled person from preparing a polymer according to claim 1 as granted, i.e. it would not amount to a lack of sufficiency of disclosure pursuant to Article 100(b) EPC. For these reasons, it cannot be concluded that, in order to determine feature (4) of claim 1 as granted, the skilled person must carry out a TREF test down to a temperature of -20°C, as put forward by the respondent (rejoinder: page 17, second and third lines).

c) The respondent argued that they were not aware of any case law suggesting that the skilled person, when confronted with a test which could not be carried out as specified in the patent specification, would be entitled to rewrite that test in a way such that it could be carried out (letter of 15 July 2025: page 9, last full paragraph).

However, above sections 2.3.3, 2.3.3.a and 2.3.3.b explain why, in the specific circumstances of the present case, the Board arrived at a different conclusion. This preliminary view was communicated to the parties well ahead of the oral proceedings before the Board (Board's communication dated 27 February 2025 vs. oral proceedings held on 5 September 2025), yet the respondent filed no evidence to show that these considerations were incorrect, not even unreasonable. In these circumstances, the respondent's arguments provide no reason for the Board to deviate from its preliminary considerations and are therefore rejected.

d) The respondent further argued that carrying out the TREF measurement within the temperature range of -17°C to 120°C rather than -20°C to 120°C would impact the entire TREF curve, particularly affecting the value of the feature T(90)-T(50), for which a specific requirement was also imposed in feature (4) according to claim 1 as granted ("T(90)-T(50)≥60°C"). This had even been previously acknowledged by the appellant (letter of 19 May 2022: paragraph bridging pages 7 and 8). According to the respondent, therefore, in order to assess whether a polymer met the T(90)-T(50)≥60°C requirement of feature (4) according to claim 1 as granted, it was essential to perform the TREF measurement starting at -20°C and continuing up to 120°C (rejoinder: page 17, first paragraph, sentence

starting with "More importantly...").

d1) However, the Board is not convinced by these arguments. As argued by the appellant, the skilled person would expect, on the basis of the processes involved in the TREF measurement (see section 2.3.1 above), that material present in the polymers on which the TREF measurement is carried out which dissolves and elutes at -20°C would also do so at -17°C. Therefore, for the vast majority of polymers (namely those for which T(50) is above -17°C), this material would be expected to contribute to T(50) in the same way whether the measurement starts at -17°C or -20°C. In addition, T(90) would not be affected (this was not disputed, in particular at the oral proceedings before the Board). In these circumstances, the Board agrees with the appellant (statement of grounds of appeal: point 34) that the potential criticality of the temperature range from -20°C to -17°C addressed by the respondent is possibly relevant at most for a small number of polymers, namely those with T(50) between -17°C and -20°C. Indeed, for these polymers the value of T(50) would be impacted, which could lead to a wrong determination of the T(90)-T(50) feature that is also specified in feature (4). However, considering that this requirement is defined as "T(90)-T(50)≥60°C", this potential problem would only arise for polymers with a T(50) between -20°C and -17°C and a T(90) between 40°C and 43°C (see appellant's letter of 26 March 2024: point 37).

d2) While it is true that a potential problem may arise for polymers with a T(50) between -20°C and -17°C and a T(90) between 40°C and less than 43°C, as even acknowledged by the appellant (letter of 26 March 2024: point 37, last paragraph), the respondent did not

demonstrate the existence of such polymers, nor that they could be produced based on the teachings of the patent specification. It is noted in this respect that the polymers according to claim 1 as granted as exemplified in the patent in suit (see TREF graphs given as figures 1-7) are not affected by the aforementioned potential problem. Therefore, based on the evidence on file, the question arose whether the respondent's concerns were purely theoretical. However, although no experimental evidence in support of this consideration is on file, the Board agrees with the respondent that it cannot be excluded that such polymers may exist and that they could be prepared without undue burden e.g. by known blending or sequential polymerisation techniques (letter of 15 July 2025: paragraph bridging pages 9 and 10).

d3) However, even if the issue raised by the respondent and retained by the opposition division concerning the critical temperature range of -17°C to -20°C may effectively be relevant for some polymers, the Board agrees with the appellant that, at most, this issue would only concern a possible ambiguity at the boundaries of claim 1 as granted (statement of grounds of appeal: points 34 and 35). More importantly, the Board agrees with the appellant that, even if this issue arose, the only consequence would be that a polymer would be incorrectly identified as not satisfying the T(90)-T(50) requirement specified in claim 1 as granted, although it effectively does (appellant's letter of 26 March 2024: page 10, first full paragraph). In other words, such a polymer would, at most, possibly constitute what is called "a false negative", as it would be falsely considered not to fulfil feature (4), even though it could actually do so. Nevertheless, this potential ambiguity at the claim

boundaries would not prevent the skilled person from preparing a polymer according to claim 1 as granted, which would have been necessary to be shown in order to demonstrate a lack of sufficiency of disclosure pursuant to Article 100(b) EPC.

d4) It is pointed out that the above conclusion is not reached on the basis that non-working embodiments at the edges of a claim may be ignored when assessing sufficiency of disclosure, as put forward by the respondent (letter of 15 July 2025: page 4, last paragraph). Instead, the Board considers that the respondent's concerns about the impossibility to carry out the TREF method according to the patent specification within the critical temperature range of -20°C to -17°C, even when duly considered, does not prevent the skilled person from preparing and identifying an olefin-based polymer according to claim 1 as granted.

d5) It is true that, during the opposition proceedings, the appellant stated that starting the TREF measurement at -15°C (as was done by the respondent in D4 and D11) rather than at -20°C could impact the value of T(90)-T(50) specified in feature (4) according to claim 1 as granted (paragraph between pages 7 and 8 of their letter of 19 May 2022). However, the appellant did not pursue this argument further (letter of 26 March 2024: point 37). In addition, the Board does not find this argument convincing because, as outlined above, when carrying out a TREF measurement, material that would elute at -20°C would also elute at -15°C (notice of opposition: point 18; opponent's letter of 13 January 2023: paragraph bridging pages 6 and 7). For this reason, the Board is satisfied that the value of the T(90)-T(50) feature specified in feature (4)

according to claim 1 as granted would not be affected for the vast majority of polymers if the TREF measurement were performed from -17°C to 120°C rather than from -20°C to 120°C as specified in claim 1 as granted. For the minority of polymers that may be affected, the considerations set out in sections 2.3.3.a to 2.3.3.d5 above would apply.

e) The Board did not fully understand the respondent's argument regarding lack of sufficiency of disclosure in case a polymer would have an "additional peak between -17°C and -20°C" because claim 1 as granted required that there are "two peaks", not "more than two peaks" (rejoinder: page 17, fourth and fifth lines). However, if the appellant is correct in stating that the respondent argued that a polymer with three peaks, one of which being located in the critical range of from -20°C to -17°C and therefore not visible on the TREF graph, would be incorrectly identified as falling within the scope of claim 1 as granted (appellant's letter of 26 March 2024: point 36), the Board would agree with the appellant that claim 1 as granted only requires that two peaks are visible on the TREF graph as defined therein and does not impose that the polymer has only two peaks. In addition, the Board agrees with the appellant that the existence of such polymers with three peaks in such a TREF graph appears to be speculative. Therefore, the respondent's considerations in this respect not only appear to be purely theoretical but have also not been shown to amount to a lack of sufficiency of disclosure pursuant to Article 100(b) EPC. This preliminary view was communicated to the parties in the Board's communication (point 7.3.1.e) and was not commented upon. Therefore, the Board sees no reason to deviate

from its preliminary consideration.

2.3.4 In the Board's view, the above considerations are confirmed by the fact that, in the context of their novelty objection, the respondent, when confronted with the issue of the critical temperature range of -20°C to -17°C for carrying out the TREF measurement specified in claim 1 as granted, considered it reasonable to carry out the measurements in the range of -15°C to 120°C instead of the range of -20°C to 120°C specified in claim 1 as granted (see appellant's letter of 26 March 2024: point 34). This shows that even if the skilled person encounters practical difficulties when carrying out a TREF measurement in the temperature range of -20°C to -17°C, s/he would still be able to verify whether a polymer satisfies feature (4) according to claim 1 as granted, based on her/his experimental skills.

2.3.5 The respondent argued that feature (4) was an unusual parameter and that, for this reason, the appellant had the duty to provide full information regarding the means and procedures for implementing the test method, which had not been done (respondent's letter of 15 July 2025: page 7, second full paragraph to page 9, last full paragraph).

However, in the present case, the TREF method, which is central to the respondent's objection, is a well-known analysis technique in the art. While it is true that the T(90)-T(50) requirement specified in claim 1 as granted *per se* was not shown to be usual in the art, the Board considers that determining elution times T(90) and T(50) using TREF poses no significant challenge to the skilled person (this was not disputed, in particular at the oral proceedings). Therefore, the

present case does not relate to the question of determining an unusual parameter using an unknown method and for which it is alleged that the patent, even if complemented by common general knowledge, would fail to provide essential technical information on how to carry out this method. Rather, the present case concerns an established experimental method - TREF - that is well known in the art, for which there are concerns about its full implementation within a limited temperature range contained within the full range to be used that is specified in the patent in suit (paragraph 113). As it has not been shown that any of the decisions cited by the respondent on pages 7 to 9 of their letter of 15 July 2025 is relevant to this issue, the Board has no reason to conclude that the findings of any of these decisions must apply to the present case. On that basis, the respondent's arguments related to feature (4) being an unusual parameter are rejected.

2.3.6 The Board further notes that, as was pointed out by the appellant during the oral proceedings before the Board, the subject-matter of claim 1 as granted is an olefin-based polymer, i.e. a product *per se*. The TREF method, which is central to the respondent's line of argument, is neither part of a method being claimed, nor a step defining the subject-matter of claim 1. Also, the subject-matter of claim 1 is not directed to a method of measurement by TREF. Therefore, the respondent's concerns regarding the impossibility to carry out TREF measurements within the temperature range of -20°C to -17°C using oDCB as solvent do not justify the conclusion that the olefin-based polymers according to claim 1 as granted cannot be prepared.

2.3.7 In view of the above, the Board concludes that the (potential) problem addressed by the respondent (and retained by the opposition division) that the TREF measurement according to feature (4) of claim 1 as granted could not be carried out in the range of -20°C to -17°C when using oDCB as solvent as indicated in the patent in suit, does not amount to a lack of sufficiency of disclosure pursuant to Article 100(b) EPC. The opposition division's decision regarding (lack of) sufficiency of disclosure of claim 1 as granted is therefore to be overturned on this basis alone, and the additional points of dispute between the parties regarding Article 100(b) EPC (points (a) to (c) indicated in section 2.2 above) do not need to be addressed.

3. Remittal

In the decision under appeal, the grounds of opposition of novelty and inventive step, as set out in the notice of opposition, were not dealt with. In addition, both parties requested that, under the present circumstances, the case be remitted for further prosecution. This is seen by the Board to constitute "special reasons" within the meaning of Article 11 RPBA to remit the case for further prosecution to the department whose decision was appealed. Accordingly, exercising its discretion under Article 111(1), second sentence, EPC, the Board decides to remit the case to the opposition division for further prosecution.

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 for further prosecution.

The Registrar: The Chairman:

D. Hampe D. Semino

Decision electronically authenticated