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Datasheet for the decision of 20 April 2026

Case Number: T 0645/24 - 3.3.03

Application Number: 18215461.7

Publication Number: 3670588

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Language of the proceedings: EN

Title of invention:
CROSSLINKING ACCELERATORES FOR SILANE-GROUP CONTAINING POLYMER COMPOSITIONS

Patent Proprietor:
Borealis GmbH

Opponent:
The Dow Chemical Company

Relevant legal provisions:
EPC R. 80, 101(1)
EPC Art. 54, 56, 100(b), 111(1), 123(2)
RPBA 2020 Art. 11

Keyword:

Admissibility of appeal - (yes)
Novelty - Main request- (no) - Auxiliary request 4 - (yes)
Grounds for opposition - insufficiency of disclosure - Auxiliary request 1 (yes) - Auxiliary request 4 (no)
Inventive step - Auxiliary requests 2 and 3 (no)
Amendment occasioned by ground for opposition - Auxiliary request 4 - (yes)
Amendments - added subject-matter - Auxiliary request 4 - (no)
Remittal - (yes)

Decisions cited:

G 0003/89, G 0011/91, G 0001/03, G 0002/10, G 0001/16, T 0939/92

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Case Number: T 0645/24 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 20 April 2026

Appellant: (Patent Proprietor)	Borealis GmbH Trabrennstrasse 6-8 1020 Vienna (AT)
Representative:	Kador & Partner Part mbB Corneliusstraße 15 80469 München (DE)
Respondent: (Opponent)	The Dow Chemical Company 2211 H.H. Dow Way Midland MI 48674 (US)
Representative:	Beck Greener LLP Fulwood House 12 Fulwood Place London WC1V 6HR (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted/ electronically transmitted on 7 March 2024 concerning maintenance of the European Patent No. 3670588 in amended fo rm.**

Composition of the Board:

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

Summary of Facts and Submissions

I. The appeal of the patent proprietor lies from the interlocutory decision of the opposition division regarding maintenance of European patent No. 3 670 588 in amended form on the basis of the claims of auxiliary request 5 filed during the oral proceedings before the opposition division and an adapted description.

II. The following documents were, among others, cited in the decision under appeal:

D5: US 6 197 864 B1
D6: WO 2017/218280 A1
D8: US 8 378 009 B2
D9: US 5 266 627
D10: US 7 232 604 B2
D11: US 4 549 041

III. The decision under appeal was based on the patent as granted as main request and on auxiliary requests 1 to 5. While auxiliary requests 1 to 4 corresponded to auxiliary requests 3, 4, 5 and 1 respectively, filed with letter of 6 December 2022, auxiliary request 5 was filed as auxiliary request 4a during the oral proceedings and then renumbered (point 9 of the Facts and Submissions in the decision under appeal; points 1.6, 2.84, 2.87 and 2.110 of the minutes of the oral proceedings before the opposition division). As far as relevant to the present case, the following conclusions were reached by the opposition division in this decision:

- The subject-matter of independent claims 1, 10, 11 and 13 of the main request was not novel over the

disclosure of several documents (D5, D9 and D10 for claim 1; D6, D8 and D11 for claim 10; D5, D6, D8 to D11 for claim 11; D5 for claim 13).

- Claim 1 of auxiliary request 1 did not meet the requirements of sufficiency of disclosure.

- The subject-matter of the claims of auxiliary request 2 was novel, in particular over the disclosure of D5. However, the subject-matter of claim 1 of auxiliary request 2 did not involve an inventive step when document D5 was taken as the closest prior art.

- The subject-matter of claims 1 and 10 of auxiliary request 3 did not involve an inventive step when document D5 was taken as the closest prior art.

- Claim 9 of auxiliary request 4 did not meet the requirements of Rule 80 EPC.

- None of the objections raised against auxiliary request 5 was successful.

Accordingly, the patent as amended on the basis of the claims of auxiliary request 5 was held to meet the requirements of the EPC.

IV. The patent proprietor (appellant) appealed against the above decision. In the statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and the opposition be rejected or, alternatively, that the patent be maintained in amended form on the basis of any of auxiliary requests 1 to 4 filed therewith.

V. In the rejoinder to the statement of grounds of appeal, the opponent (respondent) requested that the appeal be rejected as inadmissible or, alternatively, that it be dismissed.

VI. The parties were summoned to oral proceedings to be held on 22 April 2026 and a communication pursuant to Article 15(1) RPBA dated 6 October 2025 and indicating specific issues to be discussed at the oral proceedings was subsequently sent to the parties. In this communication, it was in particular indicated that the Board was of the preliminary view that:

- The appeal appeared to be admissible.

- Neither the main request nor any of auxiliary requests 1 to 3 on file appeared allowable.

- Operative auxiliary request 4 corresponded to auxiliary request 4 dealt with in the decision under appeal and it seemed justified that the opposition division's decision that said auxiliary request 4 did not meet the requirements of Rule 80 EPC be overturned.

- Regarding auxiliary request 4, the respondent had only put forward objections against claim 9.

- The Board intended to deal itself with the objections pursuant to Article 123(2) EPC, sufficiency of disclosure and novelty raised by the respondent against claim 9 of auxiliary request 4. However, none of these objections appeared persuasive.

- The respondent had argued in the rejoinder that the subject-matter of claim 9 of auxiliary request 4 did not involve an inventive step when any of documents D6 or D8 to D11 was taken as the closest prior art. In light of the circumstances of the present case, it appeared appropriate to remit the case to the opposition division to deal with the issue of inventive step of claim 9 of auxiliary request 4.

- In view of the above, the case was likely to be remitted to the opposition division for further prosecution on the basis of auxiliary request 4 (point 25.1 of the communication).

VII. With letter of 19 March 2026, the respondent requested that no remittal take place and that the Board make a final decision in the present case.

VIII. With letter of 10 April 2026, the appellant agreed with a remittal of the case as contemplated by the Board and indicated that "under the proviso that the case is remitted to the opposition division for further consideration of auxiliary request 4, the request for oral proceedings in appeal is withdrawn".

IX. With letter of 13 April 2026, the respondent stated: "The respondent hereby withdraws its request for appeal oral proceedings conditional on remittal of the case to the Opposition Division to consider Auxiliary Request 4".

X. With a communication dated 14 April 2026 the Board invited both parties to provide information regarding the following points:

- Whether the respondent maintained their objection that the appeal be rejected as inadmissible.

- Whether the appellant maintained the operative main request and auxiliary requests 1 to 3.

- Whether the respondent maintained their objections raised pursuant to Article 123(2) EPC, sufficiency of disclosure and novelty against auxiliary request 4.

XI. With letter of 14 April 2026, the respondent indicated that the objection that the appeal be rejected as inadmissible and the objections to auxiliary request 4 based on Article 123(2) EPC, sufficiency of disclosure and novelty were all maintained.

XII. With letter of 16 April 2026, the appellant indicated that the operative main request and auxiliary requests 1 to 3 were maintained.

XIII. The oral proceedings were then cancelled.

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

(a) The appellant requested in writing that the decision under appeal be set aside and the opposition be rejected. Alternatively, the appellant requested that the patent be maintained in amended form on the basis of any of auxiliary requests 1 to 4 filed with the statement of grounds of appeal.

(b) The respondent requested in writing that the appeal be rejected as inadmissible or, alternatively, that it be dismissed.

XV. The **main request** (granted patent) comprised 13 claims, whereby claims 1, 10, 11 and 13 read as follows:

"1. A cross-linkable polymer composition comprising

(A1) a cross-linkable, non-grafted copolymer containing hydrolysable silane groups,

(B) a condensation catalyst, and

(C) a cross-linking accelerator,

wherein the cross-linkable, non-grafted copolymer containing hydrolysable silane groups (A1) is obtained by copolymerizing one or more olefin monomers with an unsaturated silane compound,

wherein the condensation catalyst (B) comprises a metal carboxylate, and

wherein the cross-linking accelerator (C) is present in an amount of 6 to 75 wt.% based on the total cross-linkable polymer composition."

"10. A cross-linkable polymer composition comprising

(A2) a cross-linkable, grafted copolymer containing hydrolysable silane groups,

(B) a condensation catalyst, and

(C) a cross-linking accelerator,

wherein the condensation catalyst (B) comprises a metal carboxylate, and

wherein the cross-linking accelerator (C) comprises a metal hydroxide, an alkaline metal hydroxide, an alkaline earth metal hydroxide or mixtures thereof, and

wherein the cross-linking accelerator (C) is present in an amount of 6 wt.% to 75 wt.% based on the total cross-linkable polymer composition."

"11. Crosslinked polymer composition obtained by cross-linking the cross-linkable polymer composition according to any one of the preceding claims."

"13. Use of one or more cross-linking accelerators (C) selected from the group consisting of a metal hydroxide, an alkaline metal hydroxide, an alkaline earth metal hydroxide or mixtures thereof for accelerating the crosslinking of a crosslinkable, non-grafted copolymer containing hydrolysable silane groups (A1) in the presence of a condensation catalyst (B), wherein the condensation catalyst (B) comprises a metal carboxylate, wherein the cross-linkable, nongrafted copolymer containing hydrolysable silane groups (A1) is obtained by copolymerizing one or more olefin monomers with an unsaturated silane compound, and wherein the cross-linking accelerator (C) is present in an amount of 6 wt.% to 75 wt.% based on the total cross-linkable polymer composition."

XVI. Claim 1 of **auxiliary request 1** differed from claim 1 of the main request in that it was further indicated that the cross-linkable, non-grafted copolymer containing hydrolysable silane groups (A1) is obtained by copolymerizing one or more olefin monomers with an unsaturated silane compound **"in the presence of one or more other comonomers"** (addition as compared to granted

claim 1 in **bold**).

Claims 4 and 5 of auxiliary request 1 read as follows:

"4. The cross-linkable polymer composition according to any one of the preceding claims, wherein the cross-linking accelerator (C) comprises a metal hydroxide, an alkaline metal hydroxide, an alkaline earth metal hydroxide or mixtures thereof."

"5. The cross-linkable polymer composition according to any one of the preceding claims, wherein the cross-linking accelerator (C) comprises $Al(OH)_3$, $Mg(OH)_2$ or mixtures thereof."

XVII. Claim 1 of **auxiliary request 2** differed from claim 1 of auxiliary request 1 in that the following feature was added at the end of the claim:

"wherein the cross-linking accelerator (C) comprises a metal hydroxide, an alkaline metal hydroxide, an alkaline earth metal hydroxide or mixtures thereof".

XVIII. Claim 1 of **auxiliary request 3** differed from claim 1 of auxiliary request 2 in that it was further indicated that the cross-linkable, non-grafted copolymer containing hydrolysable silane groups (A1) is obtained by copolymerizing one or more olefin monomers with an unsaturated silane compound in the presence of one or more other comonomers "**selected from the group consisting of methyl acrylate, ethyl acrylate and butyl acrylate**" (addition as compared to claim 1 of auxiliary request 2 in **bold**).

Claim 10 of **auxiliary request 3** differed from claim 13 of the main request in that it was further indicated

that the cross-linkable, non-grafted copolymer containing hydrolysable silane groups (A1) is obtained by copolymerizing one or more olefin monomers with an unsaturated silane compound **"in the presence of one or more other comonomers"** (addition as compared to granted claim 13 in **bold**).

XIX. Claim 1 of **auxiliary request 4** read as follows (additions as compared to granted claim 1 in **bold**, deletions in ~~strikethrough~~):

"1. A cross-linkable polymer composition comprising

(A1) a cross-linkable, non-grafted copolymer containing hydrolysable silane groups,

(B) a condensation catalyst, and

(C) a cross-linking accelerator,

wherein the cross-linkable, non-grafted copolymer containing hydrolysable silane groups (A1) is obtained by copolymerizing one or more olefin monomers with an unsaturated silane compound,

wherein the condensation catalyst (B) comprises a metal carboxylate, ~~and~~

wherein the cross-linking accelerator (C) is present in an amount of ~~6~~ **60** to 75 wt.% based on the total cross-linkable polymer composition; **and**

wherein the cross-linking accelerator (C) comprises a metal hydroxide, an alkaline metal hydroxide, an alkaline earth metal hydroxide or mixtures thereof."

Claim 9 of **auxiliary request 4** read as follows (additions as compared to granted claim 10 in **bold**, deletions in ~~strikethrough~~):

"9. A cross-linkable polymer composition comprising

(A2) a cross-linkable, grafted copolymer containing hydrolysable silane groups,

(B) a condensation catalyst, and

(C) a cross-linking accelerator,

wherein the cross-linkable, grafted copolymer containing hydrolysable silane groups (A2) is present in an amount of 22 wt.% to 94 wt.%,

wherein the condensation catalyst (B) comprises a metal carboxylate, ~~and~~

wherein the cross-linking accelerator (C) comprises a metal hydroxide, an alkaline metal hydroxide, an alkaline earth metal hydroxide or mixtures thereof, and

wherein the cross-linking accelerator (C) is present in an amount of 6 wt.% to ~~75~~ **20** wt.% based on the total cross-linkable polymer composition."

The other claims of auxiliary request 4 are not relevant for the present decision.

XX. The parties' submissions, insofar they are pertinent to the present decision, can be derived from the reasons for the decision below. The relevant points of dispute were:

- The admissibility of the appeal.

- Novelty of the subject-matter of the main request.

- The question if the subject-matter of claim 1 of auxiliary request 1 met the requirements of sufficiency of disclosure.

- The issue of inventive step of the subject-matter of claim 1 of auxiliary request 2 as well as of claims 1 and 10 of auxiliary request 3.

- The issues whether the subject-matter of claim 9 of auxiliary request 4

  - met the requirements of Rule 80 EPC as well as the ones of sufficiency of disclosure and Article 123(2) EPC;

  - was novel over the disclosure of D10;

  - involved an inventive step when any of D6 or D8 to D11 was taken as the closest prior art.

Reasons for the Decision

1. Both parties stated in writing that, under the proviso that the case is remitted to the opposition division for further consideration of auxiliary request 4, their request for oral proceedings in appeal was withdrawn (see points VIII. and IX. above). Considering that the Board arrived at the conclusion that the appeal was admissible and allowable for the reasons outlined below and that the circumstances of the present case justified that the case be remitted to the opposition division for further prosecution on the basis of auxiliary request 4, the present decision can be issued in written proceedings in accordance with Article 12(8) and 15(3) RPBA.

2. Admissibility of the appeal

2.1 The respondent requested that the appeal be rejected as inadmissible because the submissions made by the appellant in the statement of grounds of appeal did not address the decision under appeal and were mostly a repetition of arguments submitted to the opposition division without explaining why the appellant disagreed with the findings of the opposition division in this regard (rejoinder: pages 1-2, section "Admissibility of Appeal").

2.2 According to Rule 101(1) EPC an appeal is to be rejected as inadmissible if it does not satisfy the provisions of *inter alia* Article 108 and Rule 99(2) EPC.

2.2.1 According to established case law (Case Law of the Boards of Appeal of the EPO, 11th Edition, 2025,

V.A.2.6.3.a), in order to comply with Article 108 EPC, the statement setting out the grounds of appeal must enable the Board to understand immediately why the decision is alleged to be incorrect and on what facts the appellant bases its arguments. Although the points made in the statement of grounds of appeal do not mandatorily need to be new, arguments which are a mere repetition of arguments presented before the opposition division do not and can not provide reasons why the decision under appeal is to be set aside (Case Law, *supra*, V.A.2.6.3.i and V.A.2.6.6).

2.2.2 In addition, regarding the requirements to be met by the statement of grounds of appeal, Article 12(3) RPBA, although it is not directly related to the (in)admissibility of the appeal, further requires that the statement of grounds of appeal "shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the facts, arguments and evidence relied on" (Case Law, *supra*, V.A.2.6.3.h and V.A.3.2.2).

2.2.3 Finally, it is established case law that the admissibility of an appeal can only be assessed as a whole and that there is no support in the EPC for a notion of "partial admissibility" of an appeal (Case Law, *supra*, V.A.2.6.8). In addition, if the admissibility requirements of Article 108, third sentence, EPC are fulfilled in respect of at least one request, let alone of several requests, the appeal as a whole is admissible (Case Law, *supra*, V.A.2.6.3.a, fourth paragraph).

2.3 It remained undisputed that, as indicated in point 5.3 of the Board's communication pursuant to

Article 15(1) RPBA, the main request (patent as granted) and auxiliary requests 1 to 4 filed with and defended in the statement of grounds of appeal are identical to the main request and auxiliary requests 1 to 4 dealt with in the decision under appeal. Therefore, it has to be assessed whether or not the appellant adequately substantiated in the statement of grounds of appeal the legal and/or factual reasons which constitute the basis of their challenge to the validity of the impugned decision for at least one of the operative main request and auxiliary requests 1 to 4.

2.4 In that respect, the Board fully agrees with the respondent that the mere statement in point 3.1 of the statement of grounds of appeal that the patent proprietor agreed with the conclusion reached by the examining division when granting the patent that the subject-matter of the claims as granted (operative **main request**) was novel does not constitute a valid substantiation and does not allow the Board to understand why they disagree with the findings of the opposition division regarding lack of novelty of the main request.

2.5 For the same reasons, the same conclusion is valid regarding the substantiation put forward in point 6.2 (by reference to point 2.2) of the statement of grounds of appeal regarding sufficiency of disclosure of claim 1 of **auxiliary request 1**. In particular, the arguments put forward by the appellant therein are a mere repetition of the ones put forward during the opposition proceedings and do not address the findings of the opposition division that the patent specification does not provide sufficient information how to carry out the invention defined in claim 1 as

granted in at least a substantial proportion with regard to its breadth, i.e. for cross-linking accelerators as defined in claim 1 that are different from the ones defined in claims 4 and 5.

2.6 Regarding inventive step of claim 1 of **auxiliary request 2**, it can be inferred from the statement of grounds of appeal that the appellant disagreed with the findings of the opposition division that the subject-matter of said claim 1 only differed from the disclosure of the composition according to example I of D5 constituting the closest prior art in the specific selection of component (A1) (statement of grounds of appeal: section 12 in full; see also points 3.3.1 and 5.4.1.2 of the reasons of the contested decision). Rather, according to the appellant, the nature of component (C) as defined in said claim 1 constituted an additional distinguishing feature (statement of grounds of appeal: points 12.2, 12.4 and 12.5). Although the Board has some difficulties to understand the reasoning of the appellant, it remains that the appellant then further argued that the subject-matter of claim 1 as granted was not obvious. In this regard, it was not shown by the respondent that this line of defence was a mere repetition of arguments put forward during the opposition proceedings. Also, it was not argued by the respondent that this line of defence did not address the findings of the opposition division regarding inventive step of claim 1 of auxiliary request 2. Therefore, the Board is satisfied that, for this reason alone, this reasoning is sufficient to render the appeal (as a whole) admissible.

2.7 In addition, the Board considers that:

- The appellant put forward in sections 16.4 and 16.7 of the statement of grounds of appeal at least some arguments to explain why they disagreed with the findings of the opposition division regarding inventive step of claims 1 and 10 of **auxiliary request 3**;

- The appellant explained in points 18.1 to 18.11 of the statement of grounds of appeal why they disagreed with the conclusion reached by the opposition division that claim 9 of **auxiliary request 4** infringed Rule 80 EPC.

In these circumstances, the same conclusion as the one indicated above for auxiliary request 2 is also valid for auxiliary requests 3 and 4.

2.8 For these reasons, the requirements of Article 108 EPC, Rule 99(2) EPC and Article 12(3) RPBA are satisfied and the appeal is admissible.

Main request (patent as granted)

3. For the reasons indicated in point 2.4 above, in the absence of any argument on the matter by the appellant, the Board sees no reason justifying to overturn the decision of the opposition division that at least some of the claims of the main request were not novel, which appears reasonable. For that reason, the main request is not allowable.

Auxiliary request 1

4. Sufficiency of disclosure

4.1 As indicated in point 2.3 above, operative auxiliary request 1 is identical to auxiliary request 1 that was dealt with in the decision under appeal.

4.2 For the reasons indicated in point 2.5 above, in the absence of arguments addressing the findings of the opposition division, the Board sees no reason justifying to overturn the decision of the opposition division that claim 1 of auxiliary request 1 does not meet the requirements of sufficiency of disclosure. In particular, the Board understands the objection of the opposition division to be that the scope of claim 1 of auxiliary request 1 is not commensurate to the technical contribution of the patent in suit, which is reasonable for the reasons indicated by the opposition division (reasons: points 4.2.3 to 4.2.5). In particular, the Board agrees that the opposed patent does not provide sufficient guidance how to select, in a reliable manner and with a good chance of success of meeting the functional definition implied by the term "cross-linking accelerator", a suitable component that is different from the ones indicated in dependant claims 4 and 5 of auxiliary request 1.

Auxiliary request 2

5. As indicated in point 2.3 above, operative auxiliary request 2 is identical to auxiliary request 2 that was dealt with in the decision under appeal. The appellant disagreed with the conclusion reached by the opposition division that the subject-matter of claim 1 of auxiliary request 2 did not involve an inventive step when example I of D5 was taken as the closest prior art (statement of grounds of appeal: point 12).

6. Article 56 EPC

6.1 Closest prior art and distinguishing feature(s)

6.1.1 In respect of claim 1 of auxiliary request 2, it is common ground that, as already held by the opposition division, D5 is a suitable document to be taken as the closest prior art and that example I thereof is particularly relevant and may be taken as starting point for the assessment of inventive step.

6.1.2 As indicated in the decision under appeal (reasons: point 3.3.1), example I of D5 (column 11, line 58 to column 12, line 53) discloses a composition comprising:

- 60 wt.-% "EVTEOS" (ethylene-vinyltriethoxysilane copolymer; see D5: column 11, line 16) which is a cross-linkable, non-grafted copolymer containing hydrolysable silane groups;

- 0.3 wt.-% dibutyltin dilaurate, which is a condensation catalyst comprising a metal carboxylate according to component (B) of operative claim 1 (see paragraph 39 of the patent in suit and D5: column 6, lines 28-32 and 36);

- 8 wt.-% magnesium hydroxide, which is a component that is a cross-linking accelerator according to component (C) of operative claim 1 (operative claim 4 and paragraph 43 of the patent in suit).

6.1.3 It was undisputed (see in particular the respondent's statement in the first paragraph on page 9 of the rejoinder) that the subject-matter of claim 1 of auxiliary request 2 differs from the disclosure of example I of D5 at least in that component (A1) must be

obtained by copolymerising at least three monomers as defined therein (one or more olefin monomers, an unsaturated silane compound and one or more other comonomers) whereas the cross-linkable polymer present in the composition according to example I of D5 only comprises two monomers (since EVTEOS is a copolymer of ethylene and vinyltriethoxysilane).

6.1.4 The Board sees no reason to deviate from these views.

6.1.5 In addition, the disclosure of example I of D5 is a specific disclosure in itself and D5 contains no indication to modify said example I, in particular by using a copolymer comprising at least three comonomers. In these circumstances, a modification of example I of D5 on the basis of the disclosure of D5 related to the possibility to use a copolymer comprising an additional - third - comonomer (D5: column 3, line 62 to column 4, line 13) is not directly and unambiguously derivable from the disclosure in the document. For that reason, the respondent's argument in that regard (page 9, second paragraph to page 10, third paragraph of the rejoinder, in respect of novelty over D5) is not convincing and it is considered hereinafter that the presence of an additional comonomer other than an olefin (ethylene in example I of D5) and an unsaturated silane compound (vinyltriethoxysilane in example I of D5) is a feature that effectively distinguishes the subject-matter of operative claim 1 from the disclosure of example I of D5.

6.1.6 Although the appellant seemed to acknowledge that magnesium hydroxide falls under the definition of component (C) according to operative claim 1 (statement of grounds of appeal: first four lines of point 12.5), they nevertheless appeared to consider that the

subject-matter being claimed was further distinguished from the disclosure of example I of D5 due to the definition of component (C) as a "cross-linking accelerator" in operative claim 1, which according to the appellant was not reflected in D5 (statement of grounds of appeal: points 12.2 and 12.4).

a) However, the subject-matter of claim 1 of auxiliary request 2 is the composition *per se*, which, as such, is defined by its constituents. Even if D5 were not to disclose the function of magnesium hydroxide as a cross-linking accelerator, it would remain that the composition according to example I of D5 would still contain a component (C) according to operative claim 1. In addition, it is even derivable from D5 that magnesium hydroxide is disclosed therein to facilitate curing and therefore as a crosslinking accelerator (column 2, lines 23-25 and 32-34; column 6, lines 42-49).

b) In view of the above, the argument of the appellant that "a person skilled in the art would not seriously contemplate the use of $Mg(OH)_2$ as a cross-linking accelerator in a polymer composition in accordance with the present invention" (statement of grounds of appeal: point 12.5) is not clear to the Board. The same is valid regarding the appellant's considerations regarding the additional passages of D5 relied upon (statement of grounds of appeal: points 12.6 to 12.8).

c) In these circumstances, the definition of component (C) in operative claim 1 does not distinguish the subject-matter of claim 1 of auxiliary request 2 from the disclosure of example I of D5.

6.1.7 For these reasons, the Board agrees with the opposition division that the subject-matter of claim 1 of auxiliary request 2 only differs from the disclosure of example I of D5 in the definition of component (A1) (at least three comonomers as defined therein vs. only two monomers).

6.2 Technical problem solved over the closest prior art

6.2.1 The appellant did not dispute the conclusion reached by the opposition division, which was shared by the respondent, that in the absence of a fair comparison, the examples of the patent in suit do not allow to show that the above indicated distinguishing feature is related to any effect (reasons: points 5.4.1.3 and 5.4.1.4; statement of grounds of appeal: section 12 in full; rejoinder: page 12, third, fourth and last paragraphs). The Board sees no reason to be of a different opinion.

6.2.2 Therefore, the technical problem effectively solved by the subject-matter of claim 1 of auxiliary request 2 can only be seen to reside in the provision of another cross-linkable polymer composition, in alternative to the one according to example I of D5.

6.3 Obviousness

6.3.1 The question remains to be answered if the skilled person, desiring to solve the problem(s) identified as indicated above, would, in view of the closest prior art, possibly in combination with other prior art or with common general knowledge, have modified the disclosure of the closest prior art in such a way as to arrive at the claimed subject matter.

6.4 In that respect, the Board shares the view of the opposition division (reasons: point 5.4.1.5) and of the respondent that it is obvious to solve the problem posed as defined in above point 6.2.2 by using a cross-linkable, non-grafted copolymer containing hydrolysable silane group comprising three comonomers as defined by component (A1) of operative claim 1 by following the teaching of D5 itself (paragraph bridging columns 3 and 4).

6.5 In that regard, since the problem solved is to provide a mere alternative to the cross-linkable polymer composition according to example I of D5, no incentive in the prior art is needed in order to render the subject-matter claimed obvious (see statement of grounds of appeal: points 12.3 in combination with points 8.7 to 8.9 that are directed to the question of inventive step of claim 1 of auxiliary request 1). Indeed, it is an established principle in the analysis of obviousness that the answer to the question as to what a person skilled in the art would have done depends on the result they wished to obtain (T 939/92: point 2.5.3 of the reasons).

6.6 In addition, it is agreed with the respondent (rejoinder: page 12, last paragraph directed to auxiliary request 1 and mentioning point 8.9 of the statement of grounds of appeal) that the fact that all the exemplary compositions of D5 illustrate ethylene-vinylalkoxysilane copolymers (i.e. a copolymer of only two monomers) is not sufficient for the skilled person to disregard the clear teaching in the paragraph bridging columns 3 and 4 of D5 that additional comonomers can be used, i.e. the disclosure of D5 does not teach away from modifying the composition of example I of D5 in a manner suitable to arrive, in an

obvious manner, at the subject matter of claim 1 of auxiliary request 2.

6.7 In view of the above, the Board agrees with the opposition division that the subject-matter of claim 1 of auxiliary request 2 does not involve an inventive step when D5 is taken as the closest prior art.

Auxiliary request 3

7. As indicated in point 2.3 above, operative auxiliary request 3 is identical to auxiliary request 3 that was dealt with in the decision under appeal. The appellant disagreed with the conclusion reached by the opposition division that the subject-matter of claims 1 and 10 of auxiliary request 3 did not involve an inventive step when example I of D5 was taken as the closest prior art (statement of grounds of appeal: points 16.1 to 16.5 for claim 1 and points 16.6 to 16.7 for claim 10).

8. Article 56 EPC - Claim 1

8.1 The subject-matter of claim 1 of auxiliary request 3 only differs from the one of claim 1 of auxiliary request 2 in that it is further specified that the one or more other comonomer is to be selected from the group consisting of methyl acrylate, ethyl acrylate and butyl acrylate.

8.2 However, since these additional comonomers are disclosed in the paragraph bridging columns 3 and 4 of D5 (this is even acknowledged by the appellant in point 16.4 of the statement of grounds of appeal), claim 1 of auxiliary request 3 can only share the same fate as claim 1 of auxiliary request 2, i.e. it does not involve an inventive step when D5 is taken as the

closest prior art.

8.3 Therefore, for that reason alone, auxiliary request 3 as a whole is not allowable.

9. Article 56 EPC - Claim 10

9.1 As indicated in point 6.1.6.a above, it is derivable from D5 itself that magnesium hydroxide is disclosed therein as a component that accelerates the crosslinking of a cross-linkable, non-grafted copolymer containing hydrolysable silane group disclosed therein (column 2, lines 23-25 and 32-34; column 6, lines 42-49). Further considering that, for the reasons indicated above, the teaching of D5 encompasses such copolymers comprising a combination of comonomers as defined in claim 1 of auxiliary request 3, the Board agrees with the conclusion of the opposition division (reasons: point 6.4.2.2) that claim 10 of auxiliary request 3 does not involve an inventive step in view of the disclosure of D5 alone.

9.2 It is not clear to the Board how the appellant's considerations regarding the additional passages of D5 relied upon (in particular with reference to aluminium hydroxide) could be of any relevance in this respect (statement of grounds of appeal: points 16.6 and 16.7).

9.3 Therefore, also for that reason, auxiliary request 3 as a whole is not allowable.

Auxiliary request 4

10. As indicated in point 2.3 above, it was common ground that operative auxiliary request 4 is identical to auxiliary request 4 that was dealt with in the decision under appeal.

11. Rule 80 EPC

11.1 The appellant contests the decision of the opposition division that claim 9 of auxiliary request 4 infringed the requirements of Rule 80 EPC, whereby, as indicated at the top of page 14 of the decision under appeal, said claim 9 corresponds to claim 10 as granted in which it was further specified that

(a) the cross-linkable, grafted copolymer containing hydrolysable silane groups (A2) is present in an amount of from 22 to 94 wt.-% (whereas no limitation of this amount is present in claim 10 as granted); and

(b) the cross-linking accelerator (C) is present in an amount of 6 to 20 wt.-% (instead of 6 to 75 wt.-% in claim 10 as granted).

The opposition division justified their decision due to the fact that they did not recognise which objection could actually be addressed by above amendment (a), in particular since it appeared that novelty over D6, D8 and D11 had been established by restricting the amount of the accelerator and the feature of amendment (a) had not been used in any argumentation in favour of inventive step.

11.2 Pursuant to Rule 80 EPC the claims of a granted patent may be amended, provided that the amendments are occasioned by a ground for opposition under Article 100 EPC, even if that ground has not been invoked by the opponent. In that regard, according to established case law, such amendments are formally admissible as long as they can be regarded as a serious attempt to overcome a ground for opposition, thereby possibly avoiding revocation of the patent (Case Law, *supra*, IV.C.5.1.2.a, see in particular the fourth and fifth paragraphs). It is further established that an amendment further limiting the subject-matter of an independent claim complies with Rule 80 EPC in formal terms. Also, Rule 80 EPC is generally interpreted as requiring at least a *bona fide* attempt to overcome a ground of opposition, i.e. where it appears at least plausible that the amendment may well change the claim scope and thus may potentially address objections under one or more grounds for opposition. In this respect, whether the amendment actually overcomes any ground for opposition is a separate matter to be settled as part of the ensuing substantive examination.

11.3 In the present case, it makes no doubt that above amendment (a) effectively limits the scope of claim 10 as granted (since it restricts the amount of component (A2)). For that reason alone, the Board is satisfied that this amendment is conform to the (formal) requirements underlying Rule 80 EPC, in particular the ones indicated in above point 11.2, starting from the second sentence. As indicated in the last sentence of this paragraph, the fact that the amendment made may not be suitable to overcome the objections put forward by the respondent/opponent does not justify to consider that the (formal) requirements of Rule 80 EPC are not met. Therefore, the concerns of

the opposition division in that regard are not persuasive.

11.4 For these reasons, the decision of the opposition division that auxiliary request 4 is not allowable pursuant to Rule 80 EPC is to be overturned and the respondent's objection in that respect is rejected.

12. Other objections raised against auxiliary request 4

12.1 The respondent put forward additional objections only against claim 9 of auxiliary request 4, i.e. the patentability of the other claims of auxiliary request 4 is not the object of the present appeal proceedings.

12.2 In addition, the objections that were put forward by the respondent against said claim 9 were raised pursuant to Article 123(2) EPC, sufficiency of disclosure, novelty (in view of D10) and inventive step (taking either D6, D8, D9 or D11 as the closest prior art; regarding D10 as the closest prior art, no substantive argumentation was given considering that the subject-matter of claim 9 of auxiliary request 4 was held to be not novel over D10: see page 17 of the rejoinder, third paragraph on inventive step of claim 9). Since the decision under appeal did not address any of these objections, the question arose if it would be appropriate to remit the case to the opposition division to deal with any of these issues (see point 19.2 of the Board's communication pursuant to Article 15(1) RPBA).

12.3 However, it is established case law that there is no absolute right for a party to have an issue decided upon by two instances (Case Law, *supra*, V.A.9.2.1). On

that basis, the parties were informed that it was the Board's intention to deal itself with the appellant's objections pursuant to Article 123(2) EPC, sufficiency of disclosure and novelty that had been raised against claim 9 of auxiliary request 4 (Board's communication pursuant to Article 15(1) RPBA: point 19.2; Board's communication of 14 April 2026: point 2, last subparagraph). Also, the Board's preliminary view in respect of these objections was communicated to the parties well in advance of the date on which oral proceedings were originally scheduled (see Board's communication pursuant to Article 15(1) RPBA dated 6 October 2025: points 20 to 23; oral proceedings originally scheduled on 22 April 2026). However, no additional submissions were made by the parties in writing in this regard and, by withdrawing their request for oral proceedings, both parties eventually decided to rely on their written cases. In these circumstances, the Board considers that all arguments in view of these objections pursuant to Article 123(2) EPC, sufficiency of disclosure and novelty had been exchanged by the parties and that it is in the position to take a final decision on these issues. Therefore, these objections are dealt with hereinafter.

13. Article 123(2) EPC

13.1 The respondent argued that claim 9 of auxiliary request 4 infringed the requirements of Article 123(2) EPC.

13.2 For the assessment of Article 123(2) EPC, the question to be answered is whether or not the subject-matter of an amended claim extends beyond the content of the application as filed, i.e. whether after the amendments

made the skilled person is presented with new technical information (see G 2/10: point 4.5.1 of the Reasons and Case Law, *supra*, II.E.1.1). To be allowable the amendments can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the documents as filed (G 3/89; G 11/91).

13.3 In this respect, the valid text for assessing Article 123(2) EPC is neither the one of the patent as granted (as was done in part by the appellant in points 18.14 and 18.15 of the statement of grounds of appeal), nor the one of the A1 publication (which was considered by the respondent on page 14 of the rejoinder) but only the one of the application as filed (here the documents that were filed on 21 December 2018). Therefore, in the present decision, reference is made to said application as filed.

13.4 It remained undisputed that, as indicated in point 20.4 of the Board's communication pursuant to Article 15(1) RPBA, claim 9 of auxiliary request 4 differs from claim 12 of the application as filed in the following amendments:

(a) The addition that the cross-linkable, grafted copolymer containing hydrolysable silane groups (A2) has to be present in an amount of 22 to 94 wt.-% (whereas no limitation of this amount is present in original claim 12); and

(b) The limitation that the cross-linking accelerator (C) has to be present in an amount of 6 to 20 wt.-% (instead of 0.01 to 40 wt.-% in

original claim 12).

13.5 According to the appellant, while amendment (a) was based on the penultimate paragraph on page 9 read in combination with the second paragraph on page 7 of the application as filed, amendment (b) was based on the second paragraph on page 10 of the application as filed (statement of grounds of appeal: points 18.15 to 18.20).

13.6 The respondent's objection was mainly based on the consideration that the combination of above amendments (a) and (b) extended beyond the content of the application as filed because the copolymer amounts for the non-grafted copolymer embodiment (A1) specified on page 7 of the application as filed were considered to be not applicable to the grafted copolymer embodiment (A2) (rejoinder: page 14 and first paragraph on page 15).

13.7 In that regard, the Board agrees with the appellant that the application as filed provides a valid basis for the subject-matter of claim 9 of auxiliary request 4 for the following reasons:

13.7.1 It is first noted that the application as filed contains two different aspects of the cross-linkable polymer compositions being claimed (paragraph bridging pages 4 and 5; independent claims 1 and 12): while the first aspect is related to non-grafted polymers (A1) (further described from page 5, first full paragraph to page 9, second full paragraph), the second one is related to grafted polymers (A2) (page 9, third full paragraph to page 10, second paragraph).

13.7.2 Since claim 9 of auxiliary request 4 corresponds to the second aspect of the cross-linkable polymer compositions disclosed in the application as filed, it has to be assessed if the passage on page 9, third full paragraph to page 10, second paragraph provides a valid support for the amendments made.

i) Regarding amendment (a), the Board sees no reason why the penultimate paragraph on page 9 of the application as filed read in combination with the second paragraph on page 7 of the application as filed would not be considered by the skilled person to be "applicable" to define the amount of component (A2) in claim 12 as originally filed.

ii) Regarding amendment (b), it is correct that the higher end of the first range of weight amount of component (C) specified as a preferred embodiment in the second paragraph on page 10 of the application as filed is not compatible with the definition of this feature indicated in claim 12 of the application as filed. However, the Board sees no reason why the two other ranges specified in this paragraph would not be considered as valid embodiments of claim 12 of the application as filed.

iii) Regarding the combination of these amendments, the Board further sees no reason why the skilled person would consider that it would not apply to claim 12 of the application as filed. In particular such a combination does not lead to the creation of a new combination of features which is not disclosed as such in the application as filed but merely limits the amounts of components (A2) and (C) already present in the compositions according to claim 12 of the application as filed to preferred embodiments of these

features that are disclosed in the application as filed. In that regard, the Board shares the appellant's view that these amendments do not lead to any contradiction between the ranges of components (A2) and (C) (see point 18.19 of the statement of grounds).

13.7.3 Although it is correct that, as put forward by the respondent (rejoinder: page 14, third paragraph on added subject-matter), the higher ends of the preferred ranges of component (C) disclosed in the description of the application as filed for the first and second aspects of the invention are somewhat inconsistent (page 8, third paragraph vs. page 10, first and second paragraph; see in particular the higher ends of the preferred ranges specified for the first aspect of the invention - 75, 70, 65 and 60 wt.% - as compared to the higher end of the range specified in original claim 12 - 40 wt.% -), it remains that the preferred range of 6 wt.% to 20 wt.% disclosed in the second paragraph on page 10 of the application as filed is compatible with the requirement for that feature defined in original claim 12. Therefore, the Board is satisfied that this passage of the application as filed provides a valid support for above amendment (b).

13.7.4 The respondent put forward that the range of 0.1-50 wt.% disclosed for the amount of component (C) in the second paragraph on page 10 of the application as filed "does not fit" with the range of 22-94 wt.% of component (A1/A2) disclosed in the second paragraph on page 7 of the application as filed. Therefore, according to the respondent, the skilled person would not consider this combination (rejoinder: page 14, penultimate paragraph).

However, although it is also correct that all the

amounts contained in the range of 0.1-50 wt.% disclosed for the amount of component (C) in the second paragraph on page 10 of the application as filed cannot be combined with all the amounts of the range disclosed for component (A1/A2) in the second paragraph on page 7 of the application as filed (see in particular the higher ends of these ranges), the Board considers that the skilled person would consider that only compatible amounts disclosed in these passages of the application as filed for each of these components would be used.

13.7.5 The respondent's additional argument directed to the specific case of the value of 22 wt.% component (A2) (rejoinder: page 14, last paragraph) is not clear to the Board. In particular, since claim 12 as originally filed contains no limitation regarding the amount of component (A2), it is not clear which "new embodiment is claimed (...) which is not envisaged in the application as filed".

13.8 For these reasons, the Board agrees with the appellant that claim 9 of auxiliary request 4 does not infringe the requirements of Article 123(2) EPC.

14. Sufficiency of disclosure

14.1 The appellant briefly argued that claim 9 of auxiliary request 4 did not meet the requirements of sufficiency of disclosure, in particular in view of the disclosure of D9 that grafted copolymers were surprisingly found to give unacceptable cross-linking properties (rejoinder: page 15, section "Insufficiency").

14.1.1 In that respect, according to established case law, an objection of insufficiency of disclosure presupposes that there are serious doubts, substantiated by

verifiable facts, and the burden of proof is primarily on the opponent(s), here the respondent. However, in the present case, the appellant's objection is not supported by any evidence.

14.1.2 In addition, the respondent's objection is based on the disclosure in column 4, lines 51-55 of D9 that grafted copolymers did not behave as well as random copolymers. However, this statement is not sufficient to demonstrate that there is any difficulty to prepare a cross-linkable polymer composition according to claim 9 of auxiliary request 4. In that regard, such a composition can with no doubt be prepared by mere mixing of components (A2), (B) and (C) as defined therein. In addition, claim 9 of auxiliary request 4 neither defines under which conditions cross-linking should take place, nor does it impose any level of cross-linking.

15. For these reasons, the appellant's arguments do not allow to conclude that claim 9 of auxiliary request 4 does not meet the requirements of sufficiency of disclosure.

16. Article 54 EPC

16.1 According to established case law, the concept of disclosure must be the same for the purpose of Article 54 EPC as the one for Article 123(2) EPC (see G 2/10: reasons 4.6 and 4.3; G 1/03: reasons 2.2.2; G 1/16: reasons 17). Accordingly it has to be shown that the subject-matter being claimed is directly and unambiguously disclosed in the prior art (so-called gold standard, as referred to in G 2/10).

16.2 The respondent put forward that the subject-matter of claim 9 of auxiliary request 4 was not novel over the disclosure of D10, in particular claim 9 thereof (rejoinder: bottom of page 15 to top of page 17).

16.3 Claim 9 of D10 is directed by dependence on claims 8 and 1 to a flame retardant crosslinkable composition comprising:

(a) 35 to 75 wt.%, based on the weight of the composition, of an ethylene-silane copolymer comprising silane comonomers as defined in claim 1 of D10 that are incorporated by copolymerization or grafting;

(b) 5 to 50 wt.%, based on the weight of the composition, of a plastomer as defined in claim 1 of D10;

(c) 12 to 40 wt.%, based on the weight of the composition, of an hydrated inorganic filler;

(d) 0.025 to 0.4 wt.%, based on the weight of the composition, of dibutyltin dilaurate as a silanol condensation catalyst.

16.3.1 Regarding component (c) according to claim 9 of D10, various alternatives are disclosed therefor in column 5, lines 10-14 of D10, whereby these alternatives comprise but are not limited to embodiments corresponding to the definition of component (C) according to claim 9 of auxiliary request 4. In addition, the range of the amount of component (C) according to claim 9 of auxiliary request 4 only overlaps with the one of component (c) specified in claim 9 of D10 (6 -20 wt.% vs. 12-40 wt. %).Therefore, in order to arrive at component (C) as

defined in terms of nature and amounts in claim 9 of auxiliary request 4, a double choice within the ambit of claim 9 of D10 needs to be made, namely regarding the amount and the nature of the filler (component (c) of D10). In these circumstances, the subject-matter of claim 9 of auxiliary request 4 cannot be held to be directly and unambiguously derivable from claim 9 of D10. Therefore, the respondent's objection based solely on claim 9 of D10 is not persuasive for that reason alone.

16.3.2 The respondent argued that the subject-matter of claim 9 of auxiliary request 4 was also anticipated by the disclosure of claim 9 read in combination with claim 7 of D10 (which is directed to embodiments of claim 1 of D10 in which component (c) is limited to aluminum trihydroxide or magnesium hydroxide, present in an amount from 20 to 40 weight percent).

a) However, claim 9 of D10 is only dependent on claim 1 of D10. Therefore, the combination of claims 9 and 7 contemplated by the respondent cannot be held to be directly and unambiguously disclosed in D10. In particular, the Board is of the opinion that an embodiment corresponding to the combination of claims 9 and 7 of D10 provides new technical information as compared to the subject-matter of each of these claims on its own. It was also not shown that the subject-matter defined by the combination of claims 9 and 7 was directly and unambiguously derivable from the disclosure of D10 as a whole.

b) The respondent's argument that claims 9 and 7 of D10 should be read in combination taking into account that the claims of D10 had been drafted as dependent on claim 1 alone according to American practice

(rejoinder: paragraph bridging pages 16 and 17) is not convincing. Indeed, in the Board's view, the question whether a combination of claims is effectively disclosed in a prior art document cannot depend from the origin of this document, in particular cannot depend if it is from the US or e.g. from Europe.

c) For this reason, the respondent's argument based on the combination of claims 9 and 7 of D10 did not succeed.

16.4 In view of the above, the respondent's objection that claim 9 of D10 lacked novelty over the disclosure of D10 is rejected.

17. Article 56 EPC - Remittal

17.1 The respondent argued that the subject-matter of claim 9 of auxiliary request 4 did not involve an inventive step when any of D6 or D8 to D11 was taken as the closest prior art (rejoinder: pages 17 to 19).

17.2 In that respect, in view of its novelty objection over D10, the respondent has not provided a full analysis of inventive step in view of D10 as the closest prior art yet (rejoinder: page 17, third paragraph on inventive step of claim 9). Also, the question of inventive step of auxiliary request 4 was neither dealt with in the decision under appeal, nor was it addressed in much details by the appellant in appeal (statement of grounds of appeal: section 20). In addition, inventive step was only addressed in the decision under appeal in view of D5 as the closest prior art, i.e. a document different from the ones relied upon by the respondent for their objection against claim 9 of auxiliary request 4. In this regard, the Board further considers

that the reasoning that would be required for claim 9 of auxiliary request 4 would be possibly significantly different from the one considered for higher ranked requests. These specific circumstances of the case constitute, in the Board's view, "special reasons" within the meaning of Article 11 RPBA to remit the case for further prosecution to the department whose decision was appealed. This view was eventually shared by both parties (see points VIII. and IX. above). 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.

18. It it noted that all the conclusions reached in the present decision were already indicated in the Board's communication pursuant to Article 15(1) RPBA that was sent to the parties well in advance of the date on which it was originally scheduled that oral proceedings take place. However, neither the appellant, nor the respondent, made any additional substantive submissions in reaction to this communication. By (conditionally) withdrawing their request for oral proceedings, the parties eventually decided to rely on their written case, as explicitly acknowledged by the appellant (letter of 16 April 2026: end of last paragraph). In these circumstances, there was no reason for the Board to deviate from its preliminary considerations.

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 on the basis of auxiliary request 4 filed with the statement of grounds of appeal.

The Registrar: The Chairman:

D. Hampe D. Semino

Decision electronically authenticated