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D E C I S I O N
of 17 December 1997

Case Number: T 0253/95 - 3.3.3

Application Number: 85105602.8

Publication Number: 0160974

IPC: C08F 279/04

Language of the proceedings: EN

Title of invention:

Modified impact-resistant vinyl-aromatic polymers

Patentee:

Montedison S.p.A.

Opponent:

BASF Aktiengesellschaft, Ludwigshafen

Headword:

-

Relevant legal provisions:

EPC Art. 123(2), 56

Keyword:

"Grounds of opposition - board as well as opponent entitled to raise new arguments based on grounds, facts and evidence already present in the proceedings"

"Amendments - added subject-matter (main and first auxiliary requests: yes; second auxiliary request: no)"

"Inventive step - (yes) no incentive to combine unobvious features"

Decisions cited:

G 0007/91, G 0008/91, G 0009/91, G 0010/91, G 0004/92,
G 0006/95

Catchword:

Alerting a party to a possible argument against him and on a

ground on which the burden of proof rests on him, in advance of the oral proceedings, would amount to a clear violation of the principle of impartiality, irrespective of the fact that the communication setting out such an argument would also be sent to the other party.

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Boards of Appeal

Chambres de recours



Case Number: T 0253/95 - 3.3.3

D E C I S I O N
of the Technical Board of Appeal 3.3.3
of 17 December 1997

Appellant: BASF Aktiengesellschaft, Ludwigshafen
(Opponent) -Patentabteilung - C6-
Carl-Bosch-Strasse 38
67056 Ludwigshafen (DE)

Representative: -

Respondent: Montedison S.p.A.
(Proprietor of the patent) 31, Foro Buonaparte
20121 Milan (IT)

Representative: Barz, Peter, Dr.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 24 January 1995
rejecting the opposition filed against European
patent No. 0 160 974 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: C. Gérardin
Members: B. ter Laan
J. Stephens-Ofner

Summary of Facts and Submissions

- I. Mention of the grant of European patent No. 0 160 974 in respect of European patent application No. 85 105 602.8, filed on 7 May 1985, claiming priority from an earlier application in Italy (2084284 of 8 May 1984), was announced on 1 August 1990, on the basis of eight claims, Claim 1 reading:

"Modified impact-resistant vinylaromatic polymers having a gloss of at least 50%, as measured by the gloss-meter, and containing from 2 to 10% by weight of an ethylenically unsaturated nitrile and from 8 to 15% by weight of

- (i) a butadiene-styrene block rubber with different linear or star-shaped configuration and/or
- (ii) a polybutadiene rubber having a Mooney viscosity of 35; the size of the rubber particles being below 1 μm ."

Claims 2 to 4 and 5 to 8 were dependent and referred to preferred embodiments and mixtures, respectively, of the polymers of Claim 1.

- II. On 29 April 1991 a Notice of Opposition was filed and revocation of the granted patent in its entirety was requested under Articles 100(a) and 100(c) EPC. The objections were essentially based upon D1 (EP-A-0 051 336). Four further documents, in particular D5 (EP-A-0 103 657), were relied upon for the substantiation of the opposition.

III. By a decision delivered orally on 14 December 1994 and issued in writing on 24 January 1995, the Opposition Division rejected the opposition.

The Opposition Division held, in essence, that:

- (a) The requirements of Article 123(2) EPC were fulfilled since the Mooney viscosity of the polybutadiene now present in Claim 1 was supported by all examples.
- (b) Four of the five documents mentioned by the Opponent were not admitted into the proceedings for non-compliance with Rule 55(c) EPC as they had not been supported by any facts, evidence or arguments.
- (c) D1 did not damage the novelty of Claim 1 since (i) the amounts of the components concerned the combination of a number of selections out of the ranges disclosed by that document, (ii) the rubbers used in D1 were in the form of a latex and (iii) they had a different structure from those of D1, and (iv) the minimal gloss of 50% was a distinguishing feature.
- (d) Regarding inventive step, the problem to be solved was to provide impact resistant vinylaromatic polymers containing ethylenically unsaturated nitrile which were suited for injection moulding. Neither of D1 and D6 (Leaflet "Firestone Diene 35 A" mentioned by the Proprietor in response to the Notice of Opposition) referred to that problem.

The Opponent had not formulated its objection on a combination of D1 with D6 anyway.

- IV. On 21 March 1995 the Appellant (Opponent) lodged an appeal against the above decision and paid the prescribed fee on the same day. The Statement of Grounds of Appeal was filed on 1 June 1995.
- V. During the oral proceedings held on 17 December 1997, after a discussion of the question whether the claims as granted (main request) met the requirements of Article 123(2) EPC, the Respondent (Proprietor) filed two new sets of claims as first and second auxiliary requests. The Board then gave its intermediate decision to refuse the main and first auxiliary requests for not complying with Article 123(2) EPC, so that the further proceedings only concerned the second auxiliary request.

Claim 1 of the first auxiliary request reads as follows:

"Modified impact-resistant vinylaromatic polymers having a gloss of at least 50%, as measured by the gloss-meter, and containing from 2 to 10% by weight of an ethylenically unsaturated nitrile and
(i) a butadiene-styrene block rubber with different linear or star-shaped configuration in an amount of 8 to 15% by weight and/or
(ii) a polybutadiene rubber having a 1,4-cis content of 35% and Mooney viscosity of 35 in an amount of 8% by weight or, if in combination with 10% by weight of rubber (i), in an amount of 5% by weight; the size of

the rubber particles being below 1 μm ."

Claim 1 of the second auxiliary request reads as follows:

"Modified impact-resistant vinylaromatic polymers having a gloss of at least 50%, as measured by the gloss-meter, and containing from 2 to 10% by weight of an ethylenically unsaturated nitrile and
(i) a butadiene-styrene block rubber of the A-B type in an amount of 8 to 15% by weight or
(ii) a polybutadiene rubber having a 1,4-cis content of 35% and Mooney viscosity of 35 in an amount of 8% by weight or, if in combination with 10% by weight of rubber (i), in an amount of 5% by weight; the size of the rubber particles being below 1 μm ."

VI. The Appellant argued essentially as follows:

- (a) Regarding the main and first auxiliary requests, the minimum Mooney viscosity for the polybutadiene rubber went beyond the original disclosure as it was derived from the examples where it had only been described in combination with other specific features. The amounts now present in all Claims 1 were also not properly supported by the disclosure in the examples.
- (b) The novelty objection was not maintained having regard to the second auxiliary request.
- (c) As to inventive step, the problem to be solved was

to provide articles having a good gloss, which was generally known to be brought about by using small particle size rubbers, as demonstrated in D1. That document, which concerned mixtures of graft polymers with polycarbonate, was considered relevant state of the art since the wording of the present claim did not exclude the mixing with polycarbonates. Since D5 described small particle size rubbers, amounts of styrene, acrylonitrile and rubber in impact-resistance polymers and a Mooney viscosity of above e.g. 40 within the terms of the patent in suit and no effect had been shown to be obtained by the selected combination of features as now claimed, that selection was obvious.

VII. In response to the appeal, the Respondent (Proprietor) argued essentially as follows:

- (a) No functional relationship existed between the Mooney viscosity and the configuration of the polymer in respect of the problem and solution with which the claimed subject-matter was concerned. From the patent specification it could be seen that there were no special requirements for the polybutadiene rubber to be used apart from its viscosity. Likewise, from the original description and examples the skilled person could see that the amounts were not restricted to any specific rubber and that the exemplified rubbers were interchangeable, so that values disclosed for one rubber could also be used for other rubbers. The same was valid for the use of a mixture. Therefore, Article 123(2) EPC was complied with.
- (b) Although the Respondent in writing had objected to admitting documents other than D1 into the proceedings, in particular D5 relied upon by the Appellant in the Statement of Grounds of Appeal, that protest was not maintained during oral proceedings.
- (c) Regarding inventive step, the problem to be solved was to provide a polymer suitable for producing by injection moulding articles which were resistant to fluor containing compounds, grease, and the like, and which articles had a good appearance. This included high gloss, but also properties like surface irregularities and the presence of tiny

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cracks. As none of the cited documents referred to that problem, in fact there was no relevant prior art available, so that the claimed subject-matter was inventive.

VIII. The Appellant requested that the decision under appeal be set aside and the patent be revoked.

The Respondent requested that the appeal be dismissed and the patent be maintained on the basis of the claims as granted as the main request, or, alternatively, on the basis of one of the first and second auxiliary requests filed during the oral proceedings on 17 December 1997.

Reasons for the Decision

1. *Admissibility of the appeal*

The appeal is admissible.

2. *Article 123(2)*

During the oral proceedings the Board raised the question of the admissibility under Article 123(2) EPC of the weight range for the rubber component(s) present in Claim 1 as granted. That range had not been present as such in the application as originally filed and the basis thereof was allegedly to be found in the examples. The Appellant had raised an objection under

Article 123(2) both before the first instance as well as in appeal, but only with the argument that the definition of one of the rubber compounds went beyond what was disclosed.

- 2.1 The Respondent protested both against the issue of the weight range for the rubber components being raised as it had not earlier been discussed in the proceedings, as well as against the fact that the Board had not informed the parties of that objection beforehand.
- 2.2 According to standard jurisprudence of the Boards of Appeal of the EPO, when considering the admissibility of late filed matter, one has to distinguish between new grounds, new facts, new evidence and new arguments.
 - 2.2.1 Decisions G 9/91 (OJ EPO 1993, 408) and G 10/91 (OJ EPO 1993, 420) dealt with the power and the limitations to that power of opposition divisions and of the boards of appeal regarding the introduction into the proceedings of new grounds for opposition; the tenor of those decisions was that new grounds of opposition should normally not be allowed into the appeal proceedings, unless the Proprietor agreed to their introduction.
 - 2.2.2 In the opinion G 4/92 (OJ EPO 1994, 149) concerning the basis of decisions, the Enlarged Board considered that in inter partes proceedings, even in the absence of one of the parties, new arguments could be used in the reasons for the decision as long as they did not rely on new facts, since they did not constitute new grounds or evidence and did not distort the factual framework, but were reasons based on facts and evidence already put forward. However, new facts could not be taken into

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account and new evidence only insofar as it was previously notified and served only to support existing assertions of the party that submitted it (Reasons for the Opinion, points 9 and 10). Therefore, if an opponent can raise new arguments based on grounds, facts and evidence already present in the proceedings even in the absence of the other party, that must be all the more possible when the other party is present.

2.3 In view of the above, it should be determined in which of the categories of grounds, facts, evidence and arguments the objection against the introduction of the weight range for the rubber component(s) falls.

2.3.1 As an objection under Article 123(2) had been raised by the Opponent as from the beginning (cf. Notice of Opposition, ground 2), there can be no question of a late ground.

2.3.2 Likewise, the facts of the issue, that is Claim 1 as originally filed, Claim 1 as granted and the disclosure in the original description including the examples, had all been present at the beginning of the opposition proceedings, so that no new fact is introduced by discussing the disclosure of the weight range for the rubber components. For the same reason, the weights in the examples, upon which the new range is based, cannot be regarded as new evidence. Therefore, the objection against the introduction of the weight range can at most constitute a late argument, which according to G 4/92 (supra) can always be raised by an opponent and hence a fortiori by the Board.

2.4 Additionally, during the oral proceedings before the Board the Appellant stated that the issue of the weight range had been discussed during the oral proceedings before the first instance, which was, however, denied by the Respondent. In the light of the minutes, which indicate that the Opponent argued that "The Mooney viscosity was disclosed in the examples for a certain rubber only and in combination with certain amounts of styrene and acrylonitrile...", it is reasonable to assume that the quantitative aspects of the claimed polymers have indeed been discussed during that hearing and, consequently, that the Appellant's statement is the more plausible one. Hence the weight range issue, although not dealt with in the decision of the Opposition Division, is most likely not a new argument either.

2.5 Therefore, the Board concludes that it was justified to raise the issue of the introduction of the weight range for the rubber components into Claim 1 as granted with a view to Article 123(2) EPC.

3. Furthermore new arguments, insofar as they do not rely upon new facts or grounds (in the sense of legal grounds as opposed to reasons) are always open to be submitted by either party and hence by the Board. Whether or not notice of such new arguments should be given under the Rules of Procedure of the Boards of Appeal (not Rule 71(a)(1) EPC as amended - see G 6/95 (OJ EPO 1996, 649)) is always a matter of discretion: hence the term "may" in the Boards' rules. In exercising such discretion, the Board must bear in mind that appeal proceedings under the EPC are **judicial**

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(decisions G 7/91 (OJ EPO 1993, 356), G 8/91 (OJ EPO 1993, 346), G 9/91 (supra) and G 10/91 (supra) as well as the preceding jurisprudence of the Boards there upheld). This being the case, in inter partes proceedings the boards must be strictly impartial. Alerting a party (here the Respondent) to a possible argument against him and on a ground on which the burden of proof rests on him, in advance of the oral proceedings, would amount to a clear violation of the principle of impartiality, irrespective of the fact that the communication setting out such an argument would also be sent to the other party (here the Appellant).

4. Claim 1 as originally filed read as follows: "Modified impact-resistant vinylaromatic polymers containing from 2 to 10% by weight of an ethylenically unsaturated nitrile and having the following characteristics:

- (a) sizes of the rubber particles being below 1 micron;
- (b) a gloss of at least 50%, as measured by the gloss-meter."

As correctly pointed out by the Appellant during oral proceedings before the Board, this original wording was broad in that there was no limitation regarding the definition of the rubber and no limitation regarding the amount thereof.

4.1 In line with the broad wording of the claim the original description indicated that it was possible to employ both natural rubbers and those synthetic rubbers

which were generally utilized to impart impact strength to the vinylaromatic polymers. In substance it was said (page 5, line 24 to page 6, line 8) that "Suitable synthetic rubbers are: polybutadiene, polyisoprene, copolymers of butadiene and/or isoprene with styrene or with other monomers, etc., which possess a glass transition temperature (T_g) lower than -20°C. These butadiene and/or isoprene polymers may contain the monomers in different configurations, for example a different cis-configuration content, trans-configuration content and vinyl content. Particularly suited have proved to be the butadiene-styrene block rubbers with different linear or star-shaped configuration.

Other synthetic rubbers which are useful to prepare the modified impact-resistant vinylaromatic polymers according to the present invention are the saturated rubbers, such as ethylene-propylene or ethylene-propylene-diene terpolymers, silicone rubbers with unsaturated groups, etc."

By contrast, the examples illustrated the use of only two specific kinds of rubber in specific amounts (cf. Table 1 in conjunction with page 7, lines 16 to 18): either 8 weight % based on the total composition of a polybutadiene rubber having a 1-4 cis content of 35% and a Mooney viscosity of 35 (Examples 1 to 4), or a butadiene-styrene block rubber of type A-B in the amounts of 8 (Example 12) and 15 (Examples 5 to 8, 10 and 11) weight % based on the total composition, or a mixture of the two specified rubbers in an amount of 5

weight % of the polybutadiene rubber and 10 weight % of the block rubber (Example 9).

- 4.2 Following an objection of lack of novelty raised by the Examining Division (cf. communication of 20 June 1988, paragraph "Novelty") the Respondent (then Applicant) amended Claim 1 by specifying the amount and the type of rubber contained in the claimed compositions (cf. reply of 29 November 1988, page 1). These features were said to be supported by (i) original Claim 5, (ii) Table 1, and (iii) page 7, lines 13 and 12 from the bottom (e.g. lines 16/17).

Original Claim 5 read: "The modified impact-resistant vinylaromatic polymers according to any of the preceding claims, characterized in that they contain a butadiene-styrene block rubber with different linear or star-shaped configuration."

As mentioned above (cf. point 4.1), the various components of the impact-resistant compositions are identified in Table 1, e.g. essentially the vinylaromatic polymer and the rubber, the latter being a polybutadiene rubber and/or a butadiene-styrene block rubber, type A-B, both in specific amounts.

The polymer components are further specified in the passage on page 7 referred to above as being a polybutadiene rubber having a 1-4 cis content of 35% and a Mooney viscosity of 35 respectively a block rubber of types A-B, both being used in the amounts reported in Table 1.

- 4.3 From the original disclosure it is thus clear that the

two specific rubbers which are the basis for the amendments in Claim 1 of all the requests are both well defined in their composition as well as their structure and that moreover for a given rubber the amount used is not arbitrary. It appears in particular (cf. Table 1 in conjunction with page 7, lines 16 to 18) that the specific polybutadiene rubber is only disclosed in connection with an amount of 8% by weight and that similarly the specific block rubber is only disclosed in connection with an amount of either 15 or 8% by weight. It follows that there is no basis in the application as originally filed for impact resistant compositions containing this specific polybutadiene rubber in amounts other than 8% by weight, nor for compositions containing a polybutadiene rubber with a Mooney viscosity of 35 not being additionally characterized by a 1-4 cis content of 35%, nor for compositions containing a butadiene-styrene block rubber not being additionally characterized by an A-B structure.

- 4.4 The argument presented by the Respondent during oral proceedings that a "butadiene-styrene block rubber with different linear or star-shaped configuration" - thus without the A-B block structure requirement - was described as a suitable rubber in the original application (page 6, lines 1 to 3 and Claim 5) and should thus be regarded as an appropriate limitation in view of the original wording of Claim 1 which only referred to rubber in general, cannot be accepted.

It is not disputed that none of the features, the absence of which was objected to in point 4.3 above,

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was disclosed as essential in the original application and that, from that particular point of view, they may not even be necessary to define the matter for which protection was sought originally. However, those are considerations pertaining to the requirements of Article 84 EPC which have nothing to do with the objection actually raised by the Appellant and by the Board.

That objection is based on the fact that during the examination procedure the Respondent (then Applicant) amended original Claim 1 by (i) introducing quantitative features which have only been disclosed in connection with the specific rubbers used in the examples, and (ii) combining the resulting range with a broader definition of these rubbers taken from the description. In other words, instead of being based on the combination of quantitative, compositional and structural features as it appears from the examples, the limitation considers these features in isolation, e.g. out of their technical context, which cannot be in line with the content of the original application.

4.5 In the light of the above the Board cannot but conclude that the subject-matter of Claim 1 of the main request as well as that of Claim 1 of the first auxiliary request is not derivable directly and unambiguously from the original disclosure and hence extends beyond it. Both requests, therefore, do not satisfy the requirements of Article 123(2) EPC.

4.6 The case is different for the definition of the impact-resistant compositions according to Claim 1 of the

second auxiliary request. Regarding the quantitative, compositional and structural features of the rubber component(s), these are now restricted to the exact disclosure of the examples, so that they are directly and unambiguously derived from the original application. More in particular, as regards the block rubber, the amounts of 8 and 15 weight % are specified in the examples and the skilled person would envisage the possibility of using any amount in between those two figures. Therefore, concerning the second auxiliary request, there can be no question about its direct and unambiguous derivability from the original disclosure, so that Article 123(2) EPC is complied with.

5. *Novelty*

The Parties agreed that the subject-matter of the second auxiliary request was novel and the Board sees no reason to deviate from that opinion.

6. *Inventive step*

The patent in suit concerns modified impact-resistant vinyl-aromatic polymers. Such polymers have been described in D1, which the Appellant and the Opposition Division (D1 being the only document taken into account) considered to be the closest prior art document.

6.1 D1 discloses a process for the preparation of a polymer composition comprising a polycarbonate and a graft copolymer obtained by polymerizing, in a first step, a mixture of 10-30% by weight of acrylonitrile, 10-75% by

weight of styrene and 0-70% by weight of α -methylstyrene in the presence of a rubbery polymer and by polymerizing, in a second step, in the presence of the latex produced in the first step, a mixture of 10-30% by weight of acrylonitrile, 0-50% by weight of styrene and 40-90% by weight of α -methylstyrene (Claim 1). The graft polymer preferably contains 10 to 40% by weight rubber (page 2, lines 10 to 11). According to a typical embodiment (page 7) 30 parts by weight of polybutadiene latex, having a solids content of 50 wt.%, 3.5 parts by weight of styrene, 8.8 parts by weight of acrylonitrile and 22.7 parts by weight of α -methylstyrene were reacted in a first polymerisation step and in a second polymerisation step 12.3 parts by weight of acrylonitrile and 22.7 parts by weight of α -methylstyrene were reacted with the product of the first polymerisation step. Thus, the final graft copolymer contains more than 10 weight percent of acrylonitrile. After polymerisation, the latex of the graft copolymer was coagulated, washed, filtered and dried and, finally, mixed with a polycarbonate.

- 6.2 The object of D1 is to provide a polymer composition based on a polycarbonate and a graft copolymer, which has improved stiffness, notch impact resistance and dimensional stability under heat, for a given flow behaviour (page 1, lines 23 to 28). The teaching of that document therefore only refers to the properties of the combined polymers and no conclusions can be drawn regarding the properties of the individual copolymers. Even though in Table 3, Example 1 to 3, some mechanical properties of the exemplified graft

copolymer as well as other graft copolymers are given, that information is not sufficient to predict the effects of changing its monomer composition on its properties. In particular, no conclusion can be drawn regarding the effect on the gloss of the graft copolymer in combination with its suitability for injection moulding applications.

6.3 D5, the only other document to which the Appellant also referred during the oral proceedings before the Board, discloses a rubber-reinforced copolymer comprising a copolymer matrix derived from one or more monovinylidene aromatic monomers, one or more unsaturated nitrile monomers and, optionally, other comonomers having at least 6 weight percent of a rubber based on the total weight of the rubber and copolymer, which exhibits a viscosity, as a 5 weight percent solution in styrene, of at least 120 centipoise dispersed as discrete particles therethrough, said rubber particles containing occlusions of grafted and/or ungrafted polymer and having a volume average particle size of less than 1.5 micrometer (Claim 1). The rubber particles are preferably smaller than 1.2, more preferably smaller than 1.1 micrometer (page 6, lines 18 to 21). Generally, the copolymer will comprise from 5 to 35, preferably from 15 to 25, weight % of the unsaturated nitrile (page 4, lines 35 to 37).

6.4 The object of D5 is to provide an ABS resin wherein the high molecular weight rubber exhibits a desirably small particle size (less than 1.5 micrometer) at a sufficiently high concentration to impart the desired balance of physical properties to the final product.

This is achieved by using a mass or mass/suspension polymerisation process as opposed to the then usual, more expensive and less economical emulsion polymerisation techniques (page 1, lines 21 to 36 and page 2, lines 14 to 35). Therefore, contrary to D1, D5 does concern not only the graft copolymer itself, but also the process of preparation thereof.

6.5 As the patent in suit sets out to improve specific properties of the graft copolymer by using specific amounts of specific monomers, neither D1 nor D5, in view of their teachings, constitute prior art suitable for the problem-solution approach. Since the other documents mentioned during the proceedings are even less relevant, the Board comes to the conclusion that none of the documents qualifies as representing the closest prior art, so that the presently claimed subject-matter is not prejudiced by any of them.

7. Even if, like the Appellant argued, one of D1 and D5 would be considered to form the closest document, the Board deems D5 to be closer than D1 since the information contained in D5 refers to the graft copolymer as such and not to a mixture with another polymer, like in D1.

7.1 According to the patent specification, the object of the patent in suit is to provide impact resistant copolymers that have at the same time a high gloss, a good resistance to fatty and fluorinated compounds and are suited for injection moulding (page 1, lines 1 to 23). From the examples it appears that the copolymers as defined in Claim 1 do indeed possess the desired properties of good impact resistance, high gloss and

suitability for injection moulding. However, the resistance to fatty and fluorinated compounds is not indicated, so that no conclusion can be drawn regarding those properties of the copolymers.

7.2 From the examples of D5 it can be seen that the copolymers there described also have a good impact resistance as well as a high gloss and are suited for injection moulding (Table 1, footnotes (3) and (6): the samples are prepared by injection moulding).

7.3 In view of the absence in the patent in suit of any experimental evidence regarding the resistance to fatty and fluorinated compounds and of any direct comparison with the level of properties achieved in D5, the technical problem underlying the patent in suit would have to be redefined on a less ambitious basis as to provide an alternative graft copolymer suited for injection moulding and having a high gloss and good mechanical properties, which problem, as demonstrated by the examples, is effectively solved by the graft copolymer as defined in Claim 1 (see point 7.1 above).

7.4 As can be seen from the discussion of D5 (point 6.2 above), it differs from the patent in suit in the specific combination of properties of the rubbers. Although the skilled person might surmise that a particular selection out of the rubbers envisioned in D5 would also give satisfactory results, that document in fact only specifies homopolymers of butadiene having a cis-content of less than 55% and a Mooney viscosity of at least 40 (page 5, lines 25 to 37). Moreover, by preferring a range of 15 to 25 weight % of

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acrylonitrile, D5 teaches away from the use of the low amounts of that compound as now claimed and no hint is given that lower amounts of acrylonitrile would also lead to satisfactory results. Therefore, D5 by itself does not render the subject-matter of the patent in suit obvious.

7.5 D1 is also silent regarding the combination of features of the rubbers. The possibility of using 10% by weight of acrylonitrile is mentioned as the lower limit of a broader range in both of the two steps of the process described in Claim 1 (see point 6.1 above). In the description of D1 there is no suggestion to specifically select that lower limit in both process steps in order to solve the above-identified problem, so that a combination of D5 with D1 would likewise not result in the now claimed subject-matter.

7.6 For the same reasons, starting from D1 would also not render the claimed subject-matter obvious.

8. In view of the above, the Board concludes that the subject-matter of Claim 1 involves an inventive step.

9. As Claim 1 of the second auxiliary request is allowable, the same goes for dependent Claims 2 to 4 and 5 to 8, which are directed to preferred embodiments of the product according to Claim 1 and mixtures containing the product of Claim 1, respectively, and the patentability of which is supported by that of Claim 1.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The main and first auxiliary requests are dismissed.
3. The case is remitted to the Opposition Division with the order to maintain the patent on the basis of the second auxiliary request and after any necessary amendment to the description.

The Registrar: The Chairman:

E. Görgmaier C. Gérardin