Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 31 May 2016

Case Number: T 2255/12 - 3.3.07

Application Number: 06778240.9

Publication Number: 1931316

IPC: A61K9/36, A61K38/46

Language of the proceedings: EN

Title of invention:
Controlled release pharmaceutical compositions for acid labile drugs

Patent Proprietor:
Abbott Laboratories GmbH

Opponent:
Aptalis Pharma S.r.l.

Relevant legal provisions:
EPC Art. 123(2), 56

Keyword:
Amendments - allowable (yes)
Inventive step - (yes)

Decisions cited:
T 0099/13, T 0667/08

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 2255/12 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 31 May 2016

Appellant: (Patent Proprietor)	Abbott Laboratories GmbH Freundallee 9A 30173 Hannover (DE)
Representative:	Hart-Davis, Jason Cabinet Beau de Loménie 158, rue de l'Université 75340 Paris Cedex 07 (FR)
Respondent: (Opponent)	Aptalis Pharma S.r.l. Via Martin Luther King 13 20060 Pessano Con Bornago (IT)
Representative:	Gerli, Paolo Botti & Ferrari S.r.l. Via Cappellini, 11 20124 Milano (IT)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 5 September 2012 revoking European patent No. 1931316 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	J. Riolo
Members:	A. Usuelli
	I. Beckedorf

Summary of Facts and Submissions

I. European patent 1 931 316, based on European application 06778240.9, was granted on the basis of 23 claims.

II. Notice of opposition was filed against this patent on the grounds that its subject-matter lacked novelty and inventive step, that it was not sufficiently disclosed and that it extended beyond the content of the application as filed (Article 100(a), (b) and (c) EPC). The following documents were among those cited during the first-instance proceedings:

D1: US 6,426,091
D3: CA 2263703
D4: EP 8 780

III. By decision posted on 5 September 2012 the patent was revoked. The decision was based on a single request submitted on 23 February 2012.

The independent claims of that request read as follows:

Claim 1:
"1. A controlled release pharmaceutical composition comprising an oral dosage form of pancreatin and an enteric coating, the enteric coating comprising:
a) at least one film-forming agent selected from the group consisting of cellulose acetate phthalate, hydroxypropyl methylcellulose acetate succinate, hydroxypropyl methylcellulose phthalate, methacrylic acid-ethyl methacrylate-copolymer, and mixtures of said film-forming agents;
b) a plasticizer which is a mixture of cetyl alcohol and triethyl citrate, which are collectively present in

an amount of greater than 3% by weight relative to the film forming agent and wherein the weight to weight ratio of cetyl alcohol to triethyl citrate is from 0.05:1 to 1:1 ; and
c) optionally at least one anti-sticking agent".

Claim 9:
"9. A process for producing a controlled release pharmaceutical composition, the process comprising the steps of
a. providing an oral dosage form of pancreatin;
b. providing an enteric-coating solution comprising
i. at least one film-forming agent selected from the group consisting of cellulose acetate phthalate, hydroxypropyl methylcellulose acetate succinate, hydroxypropyl methylcellulose phthalate, methacrylic acid-ethyl methacrylate copolymer, and mixtures of said film-forming agents;
ii. a plasticizer which is a mixture of cetyl alcohol and triethyl citrate which are collectively present in an amount of greater than 3% by weight relative to the film forming agent and wherein the weight to weight ratio of cetyl alcohol to triethyl citrate is from 0.05:1 to 1:1;
iii. optionally, at least one anti-sticking agent: and
iv. one or more enzyme-friendly organic solvent(s) selected from the group consisting of acetone, 2-butanol, tert-butanol, chloroform, dichloromethane, ethanol, methanol, 1-propanol, 2-propanol and mixtures of said solvents;
c. coating the oral dosage form with the enteric-coating solution wherein the product temperature of the oral dosage form during coating is kept at a temperature between 32°C and 55°C; and
d. drying the coated oral dosage form".

Claim 13:
"13. An enteric coated oral dosage form of pancreatin, obtainable by a process according to claim 9".

Claim 14:
"14. A use of an enteric coated oral dosage form of pancreatin as defined in claim 13 for the manufacture of a medicament for the treatment of digestive disorders, pancreatic exocrine insufficiency, pancreatitis, cystic fibrosis, diabetes type I and/or diabetes type II".

IV. In its decision the opposition division came to the conclusion that the application as filed provided a basis for the amendments introduced in independent claims 1 and 9. Therefore the requirements of Article 123(2) EPC were met.

The subject-matter of the claims was considered novel since none of the cited documents disclosed a sustained release composition comprising pancreatin, cetyl alcohol (CA) and triethyl citrate (TEC).

As to the requirement of inventive step, document D3 was regarded as the closest prior art. The composition defined in claim 1 differed from the formulation disclosed in example 6 of D3 in the use of a mixture of CA and TEC in a ratio from 0.05:1 to 1:11 as plasticizer. In the opinion of the opposition division, the experimental data disclosed in the patent were not consistent and did not show an effect over the whole range claimed. The technical problem was formulated as the provision of an alternative enteric coated composition comprising pancreatin. Document D1 suggested the use of combinations of CA and TEC in the

preparation of enteric coatings. Hence, the claimed subject-matter was obvious in view of the combined teachings of D3 and D1.

Sufficiency of disclosure was not dealt with in the decision. In the communication annexed to the summons issued on 22 December 2011, the opposition division had expressed the view that the requirement of sufficiency of disclosure was met.

V. The patent proprietor (appellant) filed an appeal against that decision. With the statement setting out the grounds of appeal filed on 2 January 2013 it submitted seven sets of claims consisting of a main request and six auxiliary requests.

The subject-matter of the main request was identical to the subject-matter of the request forming the basis of the decision under appeal (see point III above).

With the statement setting out the grounds of appeal the appellant furthermore submitted the following piece of evidence:

D16: Further experimental data #1

VI. The opponent (respondent) replied to the proprietor's appeal with letter of 13 May 2013.

VII. With letter of 4 April 2016, the appellant submitted amended pages 2-4, 6-8 and 11 of the description for each set of claims filed on 2 January 2013.

VIII. Oral proceedings were held on 31 May 2016.

IX. As far as relevant for the present decision, the appellant's arguments in relation to the subject-matter of the main request may be summarised as follows:

(a) Claim 1 was based on the combination of original claims 1 and 9. Feature b) of the claim found support in original claims 5 and 7. The deletion of some substances from the original list of feature a) reflected the indications of page 3 of the description as to the preferred film-forming agents. Claim 9 corresponded to original claim 16 and contained the same limitations introduced in claim 1. The list of suitable solvents and the coating temperature were disclosed respectively on original page 9 and in claim 24.

(b) Example 6 of document D3 represented the closest prior art for the assessment of inventive step. The composition of claim 1 differed from the composition of this example in that a mixture of TEC and CA was used as plasticizer instead of TEC alone. The experimental data disclosed in Table 2 of the patent demonstrated the presence of a technical effect deriving from the distinguishing feature, namely better resistance to the gastric acids. It was credible that this effect was present across the scope of claim 1, and there was no need to provide data for compositions having different film-forming agents since those listed in claim 1 were well-known in the art. Some differences of stability between the compositions of the invention were inevitable in view of the fact that the experiments were carried out with enzymes whose activity could vary from batch to batch. In any case, the increase of stability over the compositions representing the teaching of D3 was

much more evident than the deviations within the data concerning the compositions of claim 1. The technical problem was to be seen in the provision of pancreatin compositions with improved gastric acid resistance. Neither D3 nor the other documents considered by the respondent taught to use as plasticizer a combination of TEC and CA as defined in claim 1 in order to solve this problem. Therefore the requirements of inventive step were met.

X. As far as relevant for the present decision, the respondent's arguments in relation to the subject-matter of the main request may be summarised as follows:

(a) Claim 1 was based on a combination of original claims 1 and 9 with the additional introduction of features taken from original claims 5 and 7. Original claim 9 referred back to claim 1. However, it did not contain any reference to claims 5 and 7. Thus the original application did not provide a disclosure of the combination of original claims 1, 5, 7 and 9. Also, the list of film-forming agents did not have a clear basis in the original application. Indeed, some of them were mentioned on page 3 as preferred agents, others as most preferred agents. Claim 9 was derived from original claim 16. However, the film-forming agent was arbitrarily limited to 4 agents which were not individualised in the original application as preferred agents in relation to a process. Other limitations included in original claim 16 had a basis in original claims 17, 19 and 24. Each of these claims referred back to claim 16 alone. Hence claims 17, 19 and 24 were not linked with each

other in the original application. There was also no support for combining the features of these claims with the list of preferred solvents disclosed on page 9. Hence claims 1 and 9 did not comply with Article 123(2) EPC. The same conclusion applied to claims 13 and 14, which referred back to claim 9.

(b) The composition disclosed in example 6 of document D3 contained only TEC as plasticizer. However, this document disclosed on page 3 a short list of suitable plasticizers which included both CA and TEC. Moreover, it was indicated in this passage of page 3 that the plasticizers could be combined as mixtures of two or more. Mixtures of TEC and CA were also disclosed in examples 1 and 8 of D1. As explained on page 6 of D4, it was very common to combine different plasticizers in the preparation of an enteric coating. The data disclosed in the patent and in D16 concerning the gastric acid resistance of the compositions of claim 1 were highly variable. This made the comparisons proposed in the patent statistically insignificant. Moreover, the data indicated that the coating temperature had a strong impact on the stability of the composition, while they did not show how the stability could be affected by changing the film-forming agent. Hence no conclusion could be drawn as to the presence of any improvement for the compositions of claim 1. It was also not appropriate to compare the stability of the compositions of claim 1 with the stability of composition D, since the latter was the worst-performing composition among the comparative compositions. Thus, the experimental data described

in the patent were not suitable to support the presence of an inventive step.

XI. The appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of one of the sets of claims filed as main request and as auxiliary requests 1 to 6 with letter of 2 January 2013, together with amended replacement pages of the description filed for each of the aforementioned requests with letter of 4 April 2016.

XII. The respondent requested that the appeal be dismissed.

Reasons for the Decision

Main request

1. Article 123(2) EPC

The respondents raised objections under Article 123(2) EPC against all the independent claims of the main request, namely claims 1, 9, 13 and 14.

1.1 Claim 1

1.1.1 The preamble of claim 1 indicates that this claim relates to a controlled release pharmaceutical composition comprising an oral dosage form of pancreatin and an enteric coating. The second part of the claim, after the word "comprising", describes the features of the enteric coating (see point III above).

Original claim 9 relates to a controlled release pharmaceutical composition comprising an oral dosage

form of a acid-labile drug and an enteric coating according to claim 1.

Claim 1 of the main request derives from the introduction in original claim 9 of some limiting features concerning the definition of the active ingredient and of the enteric coating.

1.1.2 The indication that the active ingredient is pancreatin is supported, for instance, by original claim 9 or by page 5, line 32, of the description, where it is stated that pancreatin is the preferred acid-labile drug.

The definition of the enteric coating in claim 1 of the main request is more restricted in comparison to the definition included in original claim 1, to which original claim 9 refers. The restrictions concern components a) and b) of the enteric coating. As to component a) (film-forming agent), claim 1 has been limited to four out of the original twenty-five agents. This limitation reflects the indications of page 3 of the original application (line 20 to 23) as to the preferred film-forming agents. As to component b) (plasticizer), this is defined in claim 1 of the main request as a mixture of CA and TEC in a given amount and specific weight ratio. This definition of the plasticizer is based on the preferred embodiment defined by the combination of claims 7 and 5, which refer back to claim 1, and on the first entire paragraph of page 4 of the description.

In the Board's view, the limitations introduced in original claim 9 illustrated above reflect the teaching of the whole disclosure of the original application as to the preferred embodiments of the invention. Therefore the skilled person is not presented with new

technical information as a result of the amendments resulting in claim 1.

1.1.3 The respondent objected to the amendments under Article 123(2) EPC, arguing that original claim 9 referred back to claim 1 but not to claims 5 and 7. Hence, in the respondent's opinion, the combination of the features of original claims 1, 5, 7 and 9 was not disclosed in the original application. It furthermore observed that the list of film-forming agents was arbitrarily restricted to substances disclosed as preferred or most preferred agents.

In this context, the Board observes that, according to the established jurisprudence of the Boards of Appeal, the assessment of the requirements of Article 123(2) EPC should be done from the standpoint of the skilled person (see e.g. T 99/13 of 14 January 2016, point 2.3, and T 667/08 of 20 April 2014, point 4.1.4). This helps to avoid an overly formalistic approach to the assessment of this requirement in which more emphasis is given to the literal content of the original application rather than the technical information that it conveys.

As discussed above, original claim 9 relates to controlled release pharmaceutical compositions comprising the enteric coating of claim 1. Original claims 2 to 8 depend on claim 1 and specify some features of the enteric coating of claim 1. Thus the enteric coating of original claim 1 is more narrowly defined in dependent claims 2 to 8. The respondent's remark that claim 9 refers back to claim 1, but not to claims 5 and 7, is correct. However, in the Board's view the relevant technical information that the skilled person would derive from the original

application is that the enteric coatings disclosed in the application can be used to prepare the controlled release pharmaceutical compositions. This would equally apply to the broadly defined enteric coating of original claim 1 as well as to the more specific coatings defined in the dependent claims. In this respect the Board observes that the subject-matter of original claims 5 and 7 defines an enteric coating in which the plasticizer is a mixture of CA and TEC. This specific plasticizer is also disclosed on page 4 as a preferred plasticizer for the preparation of the enteric-coatings. In the Board's opinion, it would be against any reasonable technical reading of the original application to consider that pharmaceutical compositions comprising an enteric coating containing the preferred plasticizer are not part of the original disclosure.

Concerning the film-forming agents, as discussed above, the original application on page 3 discloses a list comprising more than twenty suitable substances. In the sentence starting from line 20, it is indicated that cellulose acetate phthalate, hydroxypropyl methylcellulose acetate succinate and methacrylic acid-ethyl methacrylate copolymer are the preferred agents while hydroxypropyl methylcellulose phthalate is the most preferred one. In claim 1 of the main request the film-forming agent has been limited to these four substances. The relevant technical information that the skilled person would gather from the passage on page 3 is that the four substances mentioned above are favourite over the others as film-forming agents. Thus the skilled person is not presented with new technical information as a result of limiting the list of film-forming agents to these substances.

Having regard to the comments above, the Board considers that the amendments leading to claim 1 do not contravene Article 123(2) EPC.

1.2 Claim 9

1.2.1 This claim is derived from claim 16 of the originally filed application. The limitations concerning the definition of components a) and b) of the enteric coating are the same as those discussed above in respect of claim 1 and have the same basis in the original application (see point 1.1.1 above). The use of a mixture of CA and TEC as plasticizer is also supported by claim 19.

The restriction of the acid-labile drug to pancreatin has a basis in original claim 17 and in page 5, line 32, of the description

The solvent of the enteric-coating solution was defined in original claim 16 as "one or more enzyme-friendly organic solvent(s)". Present claim 9 specifies that this solvent is selected from a group of nine different substances. This amendment has a basis in page 9 of the original description, lines 3 to 6.

The coating temperature in original claim 16 was defined as "suitable to apply the enteric-coating solution". Claim 9 now defines a specific temperature range, namely from 32°C to 55°C, which was disclosed in original claim 24 and on page 11, line 24.

As for claim 1, the Board considers that the amendments resulting in claim 9 are based on preferred embodiments of the original application and do not introduce any additional subject-matter.

1.2.2 The respondent's argument that the film-forming agents listed in claim 9 were not individualised in the original application in the context of a process is not persuasive. The process of claim 9 relates to the preparation of the controlled release pharmaceutical compositions of claim 1. Thus the active ingredient and the components of the enteric coating, such as the film-forming agents, are the same as in claim 1. As discussed above, page 3, lines 20 to 23, provides a basis for the selection of the four specific film-forming agents recited in claim 1. It is correct that this passage does not explicitly refer to the process for preparing the controlled release pharmaceutical compositions. However, reading this passage as relating exclusively to the pharmaceutical compositions as such, and not also to the process for their preparation, would be very reductive and not based on a technical reading of the original disclosure. In the absence of any indication to the contrary, the skilled person would consider that the agents disclosed on page 3 as preferred film-forming agents of the pharmaceutical compositions of the invention are preferred agents also when these compositions are to be prepared, i.e. in the context of a process.

As to the respondent's observation that the original application did not disclose a combination of the subject-matter of original claims 16, 17, 19 and 24, which are combined in claim 9 of the main request, the following is observed. Original claim 24 depends on original claim 16 and specifies that in process step c) the temperature is maintained between 32°C and 55°C. As mentioned in point 1.2.1 above, this information is also disclosed on page 11, line 24, of the original

application. Claim 24 does not refer to claims 17 and 19 which depend on claim 16 and specify respectively the active ingredient and the composition of the plasticizer of the controlled release formulation. However, the skilled person would derive from original claim 24 as well as from page 11 of the description the information that the coating step is preferably carried out at a temperature between 32°C and 55°C. This technical information applies in the context of the broadest process defined in original claim 16 as well as in the context of the processes more narrowly defined in the dependent claims.

It follows from the above that claim 9 complies with the requirements of Article 123(2)

1.3 Claims 13 and 14

These claims correspond to original claims 25 and 27 respectively. The respondent's objections against the amendments introduced in claims 13 and 14 are based on the argument that these claims refer directly (claim 13) or indirectly (claim 14) to claim 9.

However, since claim 9 is considered to comply with the requirements of Article 123(2) EPC, the objections against claims 13 and 14 must also fail.

1.4 The Board is satisfied that the subject-matter of the dependent claims also complies with the requirements of Article 123(2) EPC. In particular the subject-matter of product claims 2 to 8 is based on the disclosure of original claims 3, 4, 6, 8, 12, 13 and 15 respectively. Process claims 10 to 12 are based upon original claims 18, 21 and 22 respectively.

It follows from the above that the main request fulfils the requirements of Article 123(2) EPC.

2. Novelty and sufficiency of disclosure

During the appeal proceedings the respondent did not pursue the objections based on Article 100(a) EPC in combination with Article 54 EPC and Article 100(b) EPC.

Under these circumstances, the Board has no reason to depart from the positions expressed by the opposition division on these matters (see point IV above). Hence, the main request meets the requirements of novelty and sufficiency of disclosure.

3. Inventive step

3.1 The invention underlying the patent in suit relates to pharmaceutical compositions comprising pancreatin as active ingredient. As explained in paragraphs [0002] and [0003] of the description, pancreatin is an acid-labile active ingredient which is incompatible with the acidic environment of the stomach and needs to be protected until such time as it reaches a point of lower acidity in the gastro-intestinal tract.

3.2 Closest prior art

In agreement with the parties and with the decision of the opposition division the Board considers document D3 to be the closest prior art.

Document D3 relates to a process for preparing enteric coated pancreatin granules. Particularly relevant is example 6, which discloses the preparation of pancreatin granules coated by a coating solution

comprising TEC and Eudragit® L30D. The parties did not dispute the finding of the opposition division that the composition of claim 1 of the main request differs from the composition of example 6 of D3 in that a mixture of TEC and CA is used as plasticizer instead of TEC alone.

The Board sees no reason to depart from the analysis of the opposition division.

3.3 Technical problem

3.3.1 The main problem addressed by the patent is the provision of a pancreatin formulation which resists gastric acidity (see point 3.1 above).

Paragraphs [0071] to [0075] of the description disclose an experiment in which the gastric acid resistance of enteric coated pancreatin micropellets is determined at pH 1 and pH 5. Table 2 provides the results obtained for 21 different formulations which include compositions according to claim 1, i.e. compositions having an enteric coating containing both TEC and CA (examples 4 to 14) and compositions representing the disclosure of D3, i.e. compositions in which the enteric coating contains only TEC (examples C, D, 1, E and F).

3.3.2 In order to assess the effects originating from the distinguishing feature (i.e. combination of TEC/CA vs TEC alone), the analysis of the data of Table 2 needs to be focused on the results relating to compositions which have been prepared at the same temperature. Indeed in paragraph [0047] of the patent it is stated that the coating is preferably carried out at a temperature between 37°C and 49°C and that maintaining the temperature within the preferred range during

coating results in improved gastric-acid resistant properties. Furthermore, the compared compositions should preferably also contain the same (or a very similar) total amount of plasticizers. Comparing compositions prepared under different conditions of temperature or containing major differences in the amount of plasticizer would make it impossible to establish whether any possible effect on gastric acid resistance is due to the distinguishing feature over D3 or to other factors.

3.3.3 All the compositions representing the teaching of D3 (i.e. containing only TEC as plasticizer) were prepared at a temperature of 40°C. The compositions according to claim 1 in suit prepared at the same temperature are those numbered 4-6, 10 and 13. The data concerning the stability at pH 5 restricted to these compositions show that four formulations according to claim 1 in suit (numbered 13, 10, 6 and 5) appear to provide better results than the most stable composition within the group of compositions containing only TEC (i.e composition 1). The three compositions showing the weakest acid resistance are compositions D, E and F, i.e. compositions containing only TEC. The results concerning the stability at pH 1 (limited to the compositions prepared at 40°C) are substantially similar. The most acid-stable compositions are those according to claim 1 in suit. As for stability at pH 5, the best results are provided by compositions 13, 10 and 6, while the three compositions showing the weakest acid resistance appear to be compositions D, E and F.

Among the compositions prepared at 40°C those having an identical or very similar total amount of plasticizer are the compositions according to claim 1 of examples 4-6 and 13 (with 4 mg of plasticizer) and the

comparative composition D (with 4.1 mg of plasticizer). Composition D, containing only TEC as plasticizer, appears the less stable at pH 5. At pH 1 only one composition (composition 5) is less stable than composition D.

3.3.4 The above analysis indicates that compositions containing a mixture of TEC and CA are generally more stable than compositions containing only TEC.

This conclusion is not invalidated by the observation that the experimental data concerning the stability of the compositions of claim 1 reveals some inter-batch deviations. For instance, as noted by the respondent, the relative gastric acid resistance at pH 5 of composition 8 according to the data disclosed in the patent is 80.5%. The same composition tested three times in document D16 provides results which vary from 75.3% to 85.3%. The Board agrees in this respect with the appellant's remark that some variations are inevitable in view of the fact that the experiments are carried out with enzymes whose activity may vary from batch to batch. In any case composition D, which is the most similar to composition 8 among the compositions representing the teaching of D3, has a relative gastric acid resistance at pH 5 of only 52%. Thus the inter-batch deviations within the data relating to the compositions of claim 1 are much smaller than the gap between the stability of the compositions of the patent and the stability of the compositions representing the teaching of D3.

Also, the argument that the gastric-acid resistance of the compositions is strongly influenced by the coating temperature does not weaken the relevance of the experimental data disclosed in the patent. These data

are analysed in the context of defining the objective technical problem over the closest prior art. What matters in this exercise is to assess the effects arising from the distinguishing feature of the composition of claim 1 over the composition of example 6 of D3, namely the effects deriving from the use of a mixture of TEC and CA as plasticizer instead of TEC alone. As shown above, this comparison indicates that pancreatin compositions with an enteric coating based on a mixture of TEC and CA have better gastric-acid resistance. The effects of the coating temperature on the gastric acid resistance is acknowledged in paragraph [0047] of the patent, where it is recommended that coating should be performed at a temperature between 37°C and 49°C (see also point 3.3.2 above). The fact that composition 7 which falls within the scope of claim 1 and is prepared at a coating temperature of 30°C has relatively poor gastric-acid resistance at pH 5 (67.4%) is of no relevance as far as there are no data concerning compositions according to D3 prepared at the same temperature. Thus the results relating to composition 7 cannot be used for a proper comparison with the closest prior art.

In the Board's view there is also no reason to doubt that the improved effect of the composition of the patent is present across the scope of claim 1. In this respect the respondent argued that all the compositions tested in the patent contained the same film-forming agent, namely hydroxypropyl methylcellulose phthalate, while there were no data for compositions containing the three other film-forming agents mentioned in claim 1. However, as observed by the appellant, the film-forming agents recited in claim 1 are substances commonly used in the preparation of enteric coatings. The same substances are used, for instance, for the

coatings of the compositions disclosed in D3 (page 3, lines 11 to 21). Thus, in the Board's view, it can fairly be assumed that the gastric-acid resistance of the compositions of claim 1 will not be substantially affected by the type of film-forming agent used. In this respect it is also stressed that the experimental data of the patent should be assessed with a view to determining the effects deriving from the distinguishing feature rather than testing the properties of known materials.

The respondent also argued that composition D should not be considered for a comparison with the compositions of claim 1 in that it is much less stable than the other compositions representing the teaching of D3.

As explained in 3.3.3 above, composition D is the only comparative composition having a total amount of plasticizer very close to the compositions of the invention (4.1 mg vs. 4 mg). Hence composition D appears the most suitable composition for a comparison with the formulation of claim 1. In any case, the analysis made in the first paragraph of point 3.3.3 above indicates that a general trend toward improved stability for the compositions of claim 1 also emerges when these compositions are compared with the other comparative compositions.

3.3.5 Therefore the technical problem underlying the patent in suit in the light of document D3 can be seen in the provision of an enteric coated pancreatin composition having improved gastric-acid resistance.

3.4 Obviousness

3.4.1 D3 on page 3, lines 23 to 28, discloses a list of plasticizers suitable for the preparation of the coatings of the compositions disclosed therein. The list comprises *inter alia* TEC and CA. This passage furthermore indicates that the plasticizers can be used singly or as a mixture of two or more.

Although the disclosure of D3 generically encompasses the possibility of using mixtures of TEC and CA as plasticizers, this document does not give any hint towards the use of such a mixture in order to improve the gastric-acid resistance of the pancreatin compositions, not to mention the use of a mixture in which TEC and CA are present in the total amount and weight ratio defined in claim 1 of the main request. In more general terms, D3 does not provide any teaching as to the effects of the plasticizers on the gastric-acid resistance of the compositions.

3.4.2 Pharmaceutical compositions having a coating layer comprising TEC and CA are disclosed in examples 1 and 8 of D1. However, these compositions do not contain pancreatin as active ingredient. In any case there is no indication in D1 that the use of a mixture of TEC and CA in the coating layer may improve the gastric-acid resistance of the compositions.

The respondent also referred to the first paragraph of page 6 of D4 to argue that using a mixture of plasticizers in the preparation of enteric coating films is common practice in the pharmaceutical field. In the Board's view this argument is of no merit since D4 does not provide any teaching as to the beneficial

effects of mixtures of TEC and CA on the gastric-acid resistance of the formulations.

3.5 For these reasons it is concluded that claim 1 meets the requirements of Article 56 EPC.

3.6 No arguments were submitted by the parties in relation to the inventive step of the other independent claims of the main request, namely claims 9, 13 and 14.

The Board notes that claim 9 relates to a process for preparing a controlled release pharmaceutical composition having the same features as the composition defined in claim 1. Since this composition is non-obvious, claim 9 likewise meets the requirements of Article 56 EPC.

Claims 13 and 14 concern oral dosage forms obtainable by the process defined in claim 9. Since these forms correspond to the compositions of claim 1, claims 13 and 14 likewise meet the requirements of Article 56 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division with the order to maintain the patent in amended form on the basis of the following documents:

   claims: 1 to 14 filed as main request with letter of 2 January 2013

   description of the patent specification with replacement pages 2, 3, 4, 6, 7, 8 and 11 filed for the main request with letter of 4 April 2016.

The Registrar: The Chairman:

S. Fabiani J. Riolo

Decision electronically authenticated