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**Datasheet for the decision
of 12 April 2019**

Case Number: T 0105/14 - 3.3.08

Application Number: 06124081.8

Publication Number: 1797894

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C12N15/31, C12N15/67,
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A61K39/104, A61K39/102,
A61K39/295, C07K14/195,
C12N1/21

Language of the proceedings: EN

Title of invention:
Vaccine composition

Patent Proprietor:
GlaxoSmithKline Biologicals S.A.

Opponent:
The Kingdom of the Netherlands, represented by
the Minister of Public Health, Welfare and Sports

Headword:
Neisseria meningitidis bleb antigen/GLAXOSMITHKLEIN

Relevant legal provisions:

EPC Art. 83, 104(1), 113(1), 114(2)

RPBA Art. 12(4), 15(3), 16(1)

Keyword:

Main request, auxiliary requests 1 to 9 and 11 to 15 -
admission (no);

Auxiliary requests 10 and 16 to 19 - sufficiency of disclosure
(no);

Apportionment of costs (no);

Decisions cited:

T 0280/15

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 0105/14 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 12 April 2019

Appellant: GlaxoSmithKline Biologicals S.A.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 8 November 2013
revoking European patent No. 1797894 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman B. Stolz
Members: P. Julià
J. Geschwind

Summary of Facts and Submissions

- I. European patent no. 1 797 894 is based on European patent application no. 06 124 081.8 which is a divisional application of the earlier European patent application no. 00 956 369.3, published under the PCT as International patent application WO 01/09350 (hereinafter "the earlier patent application"). The patent was granted with 16 claims.
- II. An opposition was filed on the grounds set out in Articles 100(a) and 100(b) EPC. At oral proceedings held before the opposition division, the patent proprietor filed a new main request and new auxiliary requests 1 to 6 to replace its previous requests. Whilst the opposition division admitted the new main request into the proceedings, new auxiliary requests 1 to 6 were not admitted. The new main request and previously submitted auxiliary requests 1 to 4 were considered not to fulfil the requirements of Article 56 EPC, and previously submitted auxiliary requests 5 and 6 to contravene Articles 123(2) and 84 EPC, respectively. Accordingly, the opposition division revoked the patent.
- III. The patent proprietor (appellant) lodged an appeal and, with the statement setting out its grounds of appeal, filed a main request and auxiliary requests 1 to 19.
- IV. The opponent (respondent) replied thereto.
- V. As an auxiliary measure, oral proceedings were requested by both parties.

- VI. The board summoned the parties to oral proceedings. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the parties were informed of the board's provisional, non-binding opinion on some of the issues of the case. In particular, the board stated that: i) the main request, auxiliary requests 1 to 9 and auxiliary requests 11 to 15 did not appear to be admissible; ii) auxiliary request 10 and auxiliary requests 16 to 19 (main request and auxiliary requests 1 to 4 underlying the decision under appeal) were already part of the appeal proceedings; iii) auxiliary request 10 appeared not to fulfil the requirements of Articles 83 and 56 EPC; and iv) appellant's submissions on auxiliary requests 16 to 19, in particular on Article 56 EPC, appeared not to be in line with the case law; moreover none of these auxiliary requests appeared to overcome the objections raised against auxiliary request 10. Accordingly, the board was of the provisional, non-binding opinion that the appeal was likely to be dismissed.
- VII. In reply thereto and under cover of a letter dated 3 April 2019, the appellant, without making any substantive submissions, announced its intention not to attend the oral proceedings and requested a decision on the basis of its written submissions.
- VIII. In a communication dated 12 April 2019 faxed to the parties on 9 April 2019, the board informed the parties that the oral proceedings were maintained as scheduled on the 12 April 2019 and that they were going to take place only for procedural reasons so as to allow for a decision to be taken on that date.

IX. Under cover of a letter dated 9 April 2019, the respondent, without making any substantive submissions, requested an apportionment of costs in its favour.

X. Oral proceedings were held on 12 April 2019 in the presence of the respondent.

XI. Claims 1 and 2 of the main request read as follows:

"1. A *Neisseria meningitidis* vaccine comprising a genetically-engineered bleb antigen preparation made from a modified *Neisseria meningitidis* strain and a pharmaceutically acceptable excipient characterized in that said strain is obtainable by employing the following processes:

d) a process of detoxifying the lipid A portion of LPS within the strain, comprising the steps of identifying an *msbB* gene involved in rendering the lipid A portion of LPS toxic, and engineering the strain so as to reduce or switch off expression of said gene; and

h) a process of engineering the strain such that it is free of capsular polysaccharide.

2. The vaccine of claim 1, wherein the *msbB* gene has a nucleotide sequence of SEQ ID NO: 81."

XII. Claims 1 and 2 of auxiliary request 10 read as claims 1 and 2 of the main request, except for the preamble of claim 1 which reads as follows:

"1. A vaccine comprising a genetically-engineered bleb preparation made from a modified *Neisseria meningitidis* strain and a pharmaceutically acceptable excipient characterized in that said strain is obtainable by

employing the following processes: ... [as in claim 1 of the main request]".

XIII. Claims 1 and 2 of auxiliary requests 16 to 18 read as claims 1 and 2 of auxiliary request 10, except for a sentence added at the end of claim 1:

"1. [as in claim 1 of auxiliary request 10] ... and wherein the vaccine further comprises an adjuvant" (auxiliary request 16);

"1. [as in claim 1 of auxiliary request 10] ... and wherein the vaccine further comprises adjuvant which is an aluminium salt, an aluminium hydroxide gel or aluminium phosphate." (auxiliary request 17);

"1. [as in claim 1 of auxiliary request 10] ... and wherein the vaccine further comprises one or more plain or conjugated meningococcal capsular polysaccharides selected from the serotypes A, C, Y or W." (auxiliary request 18);

XIV. Claims 1 and 2 of auxiliary request 19 read as claims 1 and 2 of auxiliary request 10, except for the fact that the "modified *Neisseria meningitidis* strain" referred to in the preamble of the claim is defined as a "modified *Neisseria meningitidis* Serogroup B strain".

XV. The following documents are cited in this decision:

(1): I. Claassen *et al.*, Vaccine, 1996, Vol. 14, No. 10, 1001 to 1008;

(6): WO-A1-00/26384 (publication date: 11 May 2000);

- (7): Global DNA Alignment Results (reference htrB1 octrooi of document (6), and msbB WO 01/009350, SEQ ID NO: 81);
- (15): Global protein Alignment Results (reference HtrB1 octrooi of document (6), and MsbB WO 01/009350, SEQ ID NO: 81);
- (17): Sequence alignments;
- (18): Affidavit/Declaration of Cindy Castado, signed on 18 June 2008.

XVI. Appellant's submissions, insofar as relevant to this decision, may be summarised as follows:

Main request, auxiliary requests 1 to 9 and auxiliary requests 11 to 15; Admission

The main request and auxiliary requests 1 to 9 were filed in direct response to the statement made by the opposition division in the decision under appeal that "[a]lthough Claim 1 is directed to a vaccine, the claim language encompasses the embodiment that the blebs act as adjuvant in the vaccine rather than as the antigenic component". These requests were filed at the earliest possible stage of the proceedings, after realising that the opposition division did not change its preliminary opinion despite the appellant's *bona fide* attempts to address and overcome this situation by filing previous claim requests.

The filing of amended claim requests before and during oral proceedings at first instance was a *bona fide* attempt to overcome objections arising from the broad interpretation of claim 1 by the opposition division.

The decision of the opposition division not to admit auxiliary requests 1 to 4 and 6 (now auxiliary requests 11 to 15 in appeal) into the opposition proceedings was incorrect. These requests were filed in the interest of procedural efficiency and clarity; procedural efficiency was improved by the prevention of unnecessary discussions on Article 84 EPC arising from typographical/transcription errors.

Auxiliary requests 10 and 16 to 19; Article 83 EPC

No submissions were made under Article 83 EPC in the statement setting out appellant's grounds of appeal. Nor did the appellant comment on the board's provisional, non-binding opinion on the objections concerning insufficiency of disclosure expressed in its communication under Article 15(1) RPBA and which was not in appellant's favour.

Apportionment of costs

No submissions were made in this respect.

- XVII. Respondent's submissions, insofar as relevant to this decision, may be summarised as follows:

Main request, auxiliary requests 1 to 9 and auxiliary requests 11 to 15; Admission

An excessive number of requests was filed and the amendments introduced into these requests had been inconsequently indicated by the appellant. Understanding all these amendments in this excessive number of requests posed an undue burden, was unfair to the other party and not a *bona fide* attempt regarding procedural efficiency. The main request and auxiliary

requests 1 to 9 had not been filed at first instance, although they could and should have been. Moreover, auxiliary requests 11 to 15, which were rightly not admitted into the proceedings by the opposition division, could not be admitted in appeal proceedings. The opposition division took its decision on the basis of the right principles and in a reasonable way. Thus, this exercise of the opposition division's discretion need not be overturned. The less so, since neither the opposition nor the appeal proceedings were meant to tidy up the claims after grant; amendments in opposition proceedings were only allowable if occasioned by a ground of opposition under Article 100 EPC and Article 84 EPC was not a ground of opposition.

Auxiliary requests 10 and 16 to 19; Article 83 EPC

The subject-matter of claim 2 was not sufficiently disclosed because the claim required the existence of a *N. meningitidis* strain with an *msbB/htrB1* having the incorrect sequence of SEQ ID NO: 81. Serious doubts, supported by submitted verifiable facts, were raised whether such a strain could actually be found in nature. Even if accepting that the reduction or knocking out of the expression of the *msbB* gene of *N. meningitidis* could be put into practice by the skilled person using the wrong sequence of SEQ ID NO: 1, the fact remained that a prerequisite for claim 2 was that a skilled person first obtained a strain having this wrong sequence. Only then was it possible to reduce or knock out its expression, if at all still possible, in that strain. The fact remained that there were serious doubts that such a strain could be obtained. Engineering first a *N. meningitidis* strain to have the wrong sequence of SEQ ID NO: 81 and then to

knock it out, was such a pointless waste of effort that it could not be considered industrially applicable (Article 57 EPC).

Apportionment of costs

The appellant's letter announcing its non-attendance at the oral proceedings, scheduled for 12 April 2019, was dated 3 April 2019 but submitted to the European Patent Office no sooner than on 9 April 2019 without any courtesy copy being sent to the respondent. Even though appellant's decision not to attend the oral proceedings had been taken on 3 April, appellant waited another six days, i.e. until three days before the oral proceedings, to inform the board without having the courtesy to also immediately inform the respondent. Appellant's behaviour not only offended against the basic rules of courtesy but also deprived the respondent of any possibility to timely cancel any hotel and flight reservations. According to the case law (cf. "Case Law of the Boards of Appeal of the EPO", 8th edition 2016, IV.C.6.2.2, 990; and in particular the decision T 280/15 of 7 March 2019), there was an equitable obligation on every party summoned to oral proceedings to inform the board as soon as a party knew that it was not attending as summoned; it was highly undesirable for summoned parties to announce too late, unclearly or not at all that they would not be attending. Such a conduct was inconsistent with the responsible exercise of its rights and with the basic rules of courtesy. Thus, in line with this established case law and in view of appellant's behaviour in the present case, respondent's request for an apportionment of the costs for travelling, accommodation and preparation of the respondent's representative was fully justified.

- XVIII. The appellant (patent proprietor) requested in writing to set aside the decision under appeal and to maintain the patent on the basis of the main request or, in the alternative, any one of the auxiliary requests 1 to 19, all filed with the statement of grounds of appeal.
- XIX. The respondent (opponent) requested that the appeal be dismissed and an apportionment of costs in its favour.

Reasons for the Decision

Article 113(1) EPC

1. By its decision not to attend the oral proceedings and not to file substantive arguments in reply to the issues raised in the board's communication pursuant to Article 15(1) RPBA, the appellant has chosen not to make use of the opportunity to comment on the board's provisional opinion, either in writing or at the oral proceedings, although this opinion was to the appellant's disadvantage. According to Article 15(3) RPBA, the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying on its written case.
2. In the light thereof, and since the respondent did also not file substantive arguments in reply to the board's communication, the present decision, except for respondent's request for apportionment of costs which was filed only shortly before the oral proceedings, is based on the same grounds, arguments and evidence on which the provisional opinion of the board was based.

Admission of the main request and auxiliary requests 1 to 9

3. According to the established case law, the function of an appeal is to give a judicial decision upon the correctness of a separate earlier decision taken by an examining or opposition division. Appeal proceedings are not an opportunity to re-run or re-open the proceedings before any of these divisions. The admission of new requests into the appeal proceedings is at the board's discretion (Articles 12(4) and 13(1) RPBA; see "Case Law", *supra*, IV.E.1, 1065 and IV.E.4, 1127).

4. According to the appellant, the filing of the main request and auxiliary requests 1 to 9 was a direct response to the broad interpretation of claim 1 by the opposition division in the decision under appeal, namely that the language of that claim allowed or encompassed embodiments wherein the blebs acted as adjuvant in the vaccine rather than as the antigenic component (cf. point XVI *supra*).

5. However, in the statement of grounds of appeal, the appellant itself acknowledged that the parties had already been informed of this broad interpretation of claim 1 in the communication of the opposition division annexed to the Summons to attend oral proceedings at first instance (cf. page 5, point 3, lines 7 to 14 of the Summons). In reply to the communication of the opposition division, the patent proprietor/appellant filed a new main request and auxiliary requests 1 to 6 that took into account the preliminary opinion of the opposition division, including the broad interpretation of claim 1. Moreover, at the oral proceedings before the opposition division, the patent proprietor/

appellant filed yet another new main request and new auxiliary requests, among them auxiliary requests 11 to 15 in appeal, which are dealt with by the board below.

6. In view of this course of events during the opposition proceedings, the board considers that the main request and auxiliary requests 1 to 9 filed by the appellant with the statement setting out its grounds of appeal and with claims directed to "a *Neisseria meningitidis* vaccine comprising a genetically-engineered bleb antigen preparation ..." (underlined by the board), could and, indeed, should have been filed before the opposition division. The board, as stated in its communication pursuant to Article 15(1) RPBA, cannot recognize any reason that could have prevented the patent proprietor/appellant from filing them at an earlier stage of the proceedings instead of waiting for the opposition division to decide upon the broad interpretation of the claims referred to above.
7. The appellant has not replied to the board's communication and thus, no reason has been given for explaining the filing of these requests at this late stage of the proceedings. In view thereof, the board sees no reason to change its opinion in this respect.
8. Therefore, the board, in the exercise of its discretion, does not admit the main request and auxiliary requests 1 to 9 into the appeal proceedings (Article 12(4) RPBA).

Admission of auxiliary requests 11 to 15

9. Auxiliary requests 11 to 15 are identical to auxiliary requests 1 to 4 and 6, respectively, newly filed at the oral proceedings at first instance but not admitted by

the opposition division (cf. page 12 of the decision under appeal).

10. According to the case law, when the way in which a department of first instance has exercised its discretion is challenged in appeal, it is not the board's function to review all the facts and circumstances of the case as if it were in that department's place and to decide whether or not it would have exercised such discretion in the same way. In such cases, the board can overrule the way in which the department has exercised its discretion if it comes to the conclusion that it has not done so in accordance with the proper principles or has done so in an unreasonable way, exceeding the proper limit of its discretion (cf. "Case Law", *supra*, IV.E.4.3.2.a), 1140; see also III.K.5, 761).
11. In the appellant's statement of grounds of appeal, there is no reference to the opposition division using a wrong principle or exceeding the proper limit of its discretion for not admitting auxiliary requests 1 to 4 and 6 (auxiliary requests 11 to 15 in appeal) into the opposition proceedings. Nor does the board, as stated in its communication pursuant to Article 15(1) RPBA, consider that this was the case. Since the appellant has not replied to the board's communication, the board sees no reason for changing its opinion on this issue.
12. Therefore, auxiliary requests 11 to 15 are not admitted into the appeal proceedings (Article 114(2) EPC).

Auxiliary requests 10 and 16 to 19

13. These auxiliary requests are identical to the main request and auxiliary requests 1 to 4 examined by the opposition division and underlying its decision.

Article 83 EPC

14. Although the appellant made no submissions in respect of Article 83 EPC in appeal proceedings, the board addressed the respondent's disagreement with the decision of the opposition division on Article 83 EPC and the objections raised in reply to the appellant's statement of grounds of appeal in its communication pursuant to Article 15(1) RPBA. To arrive at its provisional, non-binding opinion, the board considered the appellant's arguments put forward at first instance and summarised by the opposition division on page 5, point 2 of the decision under appeal (cf. points 21 to 28 of the board's communication).
15. As stated in the board's communication, it is common ground between the parties that the nucleotide sequence of SEQ ID NO: 81 cited in claim 2 of auxiliary requests 10 and 16 to 19 differs from the nucleotide sequences of the *msbB* gene of *Neisseria meningitidis* strains known in the art by deletion of a nucleotide at position 798 (cf. page 4 of the decision under appeal). As a result thereof (frame-shift), the encoded amino acid sequence of the lipid A acyl-transferase differs from the corresponding amino acid sequences known in the art, in particular, at the C-terminus (see alignments in documents (7) and (15)).
16. With reference to documents (17) and (18), the appellant argued that the sequencing error was

irrelevant for performing the invention, since a particular sequence was not required and the correct sequence could easily be retrieved by a skilled person (documents (1) and (6) were cited in this context). The opposition division shared the appellant's view and, relying on paragraphs [0067] and [0068] of the patent and on the nucleotide sequence of SEQ ID NO: 81, considered the skilled person to be "able to knock out or reducing expression of a *N. meningitidis msbB* gene of SEQ ID NO: 81 or a different sequence" (cf. paragraph bridging pages 5 and 6 of the decision under appeal).

17. In the board's view, paragraphs [0067] and [0068] of the patent refer to "process d)" which is limited to "either the deletion of part (or preferably all) of one or more of the above open reading frames or promoters (*msbB* according to the invention). Alternatively, the promoters could be replaced with weaker promoters". However, claim 1 is not limited thereto but comprises other modifications of the *msbB* gene, such as point mutations (claim 3), for which there is no information/guidance provided in the patent.

18. According to the opposition division, "whether the hypothetical protein sequence encoded by SEQ ID NO: 81 performs the function of the *msbB* protein or exists in nature is not relevant for the repeatability of the claimed subject-matter" (cf. page 6, first paragraph of the decision under appeal). In the board's view, this statement is not correct. Claim 1 of auxiliary requests 10 and 16 to 19 is directed to a vaccine defined, *inter alia*, by features related to a method of production (product-by-process claim), wherein these features are actually defined by the result to be achieved, namely (i) "to reduce or switch off

expression of" the *msbB* gene so as to result in (ii) a detoxification of "the lipid A portion of LPS within the [modified *N. meningitidis*] strain".

19. Whilst "switch off expression of the *msbB* gene" is a requirement defined in absolute terms, this is not the case for "reduce expression of the *msbB* gene" because it necessarily requires a comparison of the expression of the *msbB* gene of a modified/engineered *N. meningitidis* strain with that of the corresponding (non-modified/non-engineered) reference *N. meningitidis* strain. According to the patent, the *msbB* gene of a reference *N. meningitidis* strain has the nucleotide sequence of SEQ ID NO: 81, i.e. the subject-matter of dependent claim 2 of auxiliary requests 10 and 16 to 19. However, there is no information at all on the actual level of expression of such a nucleotide sequence in the patent nor is this information directly derivable from the prior art.

- 19.1 As the board observed in this context in its communication, the deletion of a nucleotide at the 3'-end of a nucleotide sequence may result not only in a different C-terminus of the encoded amino acid sequence (the acyl-transferase may have structural and kinetic properties different from those of the wild-type sequence) but it may have other effects as well. In particular, the deletion of a nucleotide produces a shift in the reading frame so that the codons are different from those of the corresponding non-deleted sequence and (apart from encoding different amino acid residues) the shifted codons may well be not preferred/suitable for a *N. meningitidis* strain (organism codon preference). The presence of non-preferred codons within a nucleotide sequence may result in a reduced transcription of the sequence, shorter half-life of the

transcript, etc. Other effects are not to be disregarded, such as changes in the 3'-end secondary/tertiary structure that may destabilise/stabilise the resulting transcript, create/destroy 3'-binding sites of possible (transcription/expression) enhancers/inhibitors, etc. Any of these effects may result in a *N. meningitidis* strain having properties different from those of a *N. meningitidis* strain without the shifted codons, such as culture growth, etc.

- 19.2 In view thereof, the board considers that any information and guidance found in the art for *N. meningitidis* strains having a *msbB* gene with a nucleotide sequence different from SEQ ID NO: 81 cannot be directly extrapolated to a *N. meningitidis* strain having a *msbB* gene with the sequence of SEQ ID NO: 81. Nor is it possible to carry out such an extrapolation on the basis of the information and teaching derivable from the patent.
20. Moreover, claim 1 of auxiliary requests 10 and 16 to 19 requires that the modification of the expression of the *msbB* gene results in a detoxification of the lipid A portion of LPS. In the board's view, there is no indication in claim 1 of these auxiliary requests as regards the level of said detoxification. However, taking into account the intended purpose indicated in the claim (vaccine), it may well be understood that this detoxification must be complete or, if incomplete, at least sufficient to result in a product suitable/appropriate for this purpose. In any case, it may be necessary to carry out a comparison of the toxicity of the lipid A portion of the modified/engineered *N. meningitidis* strain with that of the reference non-modified/non-engineered *N. meningitidis* strain, which, according to claim 2, is a *N. meningitidis* strain

having a *msbB* gene with the nucleotide sequence of SEQ ID NO: 81.

- 20.1 However, as stated above, the actual level of expression of a *msbB* gene with the nucleotide sequence of SEQ ID NO: 81 is neither directly derivable from the patent nor from the prior art. Nor is it directly derivable therefrom whether the encoded acyl-transferase has the same, higher or lower, enzymatic activity than an acyl-transferase encoded by a nucleotide sequence not having the deletion of the nucleotide at position 798. Thus, the effect of a *msbB* gene with the nucleotide sequence of SEQ ID NO: 81 on the toxicity of the lipid A portion of LPS is not directly derivable from the patent or from the prior art on file and it cannot be directly extrapolated from the effect of a *msbB* gene with a nucleotide sequence without a deletion of the nucleotide at position 798.
21. It follows from all the above considerations that auxiliary requests 10 and 16 to 19 do not fulfil the requirements of Article 83 EPC.

Apportionment of costs

22. The board agrees with the respondent on the relevance of the case law concerning the equitable obligation on every party summoned to oral proceedings to inform the board and, following the basic rules of courtesy, the other parties as soon as that party knows that it will not attend as summoned. It is also established by this case law that, under certain circumstances and in certain cases, if a party fails to attend as summoned, an apportionment of costs in favour of another party, who has attended as summoned, may be justified for reasons of equity in accordance with Article 104(1) EPC

(cf. "Case Law", *supra*, IV.C.6.2.2, 990). In support of its arguments regarding the request for apportionment of costs, the respondent has also mentioned decision T 280/15 of 7 March 2019, wherein the board competent in that case decided an apportionment of costs in favour of the party attending as summoned (cf. point XVII *supra*).

23. In the case underlying decision T 280/15, *supra*, the parties were informed of the board's provisional, non-binding opinion in a communication pursuant to Article 15(1) RPBA. The board competent in that case agreed with the decision of an opposition division to revoke the patent on the grounds of lack of inventive step. Since the appellant (patent proprietor) neither commented on the board's communication nor attended the oral proceedings, the board maintained its provisional, non-binding opinion and, accordingly, dismissed the appeal.
24. As regards the course of events, the board agrees that the general procedural situation underlying decision T 280/15, *supra*, closely resembles the situation of the present appeal proceedings, even though in said case the ground of opposition for revocation of the patent was a lack of inventive step (Article 56 EPC) and not insufficiency of disclosure (Article 83 EPC). However, the board does not consider this procedural similarity to be decisive for attaining a decision on the respondent's request for apportionment of costs. For such a decision, it is necessary for the board to first consider the behaviour of the party not attending as summoned, and then to assess whether, as a consequence of this behaviour, the other party attending as summoned has been put at a disadvantage.

25. According to decision T 280/15, *supra*, the appellant announced its non-attendance only on the eve (18:23 hours) of the oral proceedings scheduled for 7 March 2019. This particular situation cannot be compared with the situation of the present appeal proceedings in which the appellant informed the board of its non-attendance three days in advance of the oral proceedings. Therefore, the reasoning of decision T 280/15, *supra*, does not apply, in a straightforward manner and without further consideration by the board, to the present case.

26. For arriving at a decision, the board considers the following points to be of relevance:
 - 26.1 The respondent referred to the basic rules of courtesy and to the case law referring to those rules for arguing that, in the present case, the appellant had to inform not only the board but also the respondent. The board agrees with the respondent that such basic rules are much desirable and certainly contribute to a fair development of all proceedings, not only of appeal proceedings. Unfortunately, most of these rules are not enshrined or laid down in the Convention, let alone any means and measures to enforce them. In the present case, the information provided to the board concerning the appellant's non-attendance at the oral proceedings was unfortunately not directly transmitted to the respondent. It was however immediately faxed by the board's registrar to the respondent - on the very same day on which this information was filed before the board, i.e. on 9 April 2019. Under cover of a letter dated 9 April 2019, i.e. on the same day the fax was sent by the board's registrar, the respondent filed a request for apportionment of costs in its favour. Thus,

the respondent was made aware of the appellant's non-attendance on the same day as the board.

26.2 As regards the respondent's reference to the date printed on the appellant's letter, 3 April 2019, i.e. six days earlier than the date on which the appellant informed the board, this date is considered not to be relevant for the board to decide on the respondent's request for apportionment of costs. In the board's view, it is not possible to conclude with certainty from the date on the appellant's letter that a decision was already taken on this date. The board cannot be sure of the appellant's decision-taking process. Appellant's letter may have been drafted on 3 April but only approved at a later date. It is not for the board to assess whether or not the letter could have been filed at an earlier date; relevant for the board to attain a decision on the respondent's request is only the date on which the board and the respondent were actually informed of the appellant's decision not to attend as summoned, i.e. three days before the scheduled oral proceedings.

26.3 It is worth noting here that the board's provisional, non-binding opinion was in line with the decision taken by the opposition division at first instance and accordingly the board explicitly stated that "the appeal was likely to be dismissed" (cf. point 42 of the board's communication pursuant to Article 15(1) RPBA). Since the parties did not reply to the board's communication in substance and no further submissions were on file, it was reasonable to expect a decision of the board in line with its provisional, non-binding opinion. All the more so, since the fax sent on 9 April 2019 by the board's registrar to the respondent explicitly stated that the oral proceedings "are

maintained and will take place only for procedural reasons to allow for a decision to be taken on that date" (underlined by the board). Any other decision could not have been expected, would take the parties by surprise and would be hard to reconcile with the requirements of the EPC and the Rules of Procedure of the Boards of Appeal.

26.4 As a matter of principle, each party must meet the costs it has incurred. It is up to a party to decide how and when to prepare its case, whether on the days shortly before the scheduled oral proceedings or at an earlier date so as to decide whether further submissions, the filing of further requests, etc. are necessary. There is always a chance that, as a result of this preparation and the filing of new submissions, requests, etc., the parties may have to react shortly before the oral proceedings. In the board's view, although not desirable and measures are in place to limit such late-filed submissions and requests, this situation is not unusual in both opposition and appeal proceedings before the EPO. Therefore, the decision whether to attend or not oral proceedings as summoned depends always not only on the party itself but on the other parties' actions and behaviour. In the light thereof, it is always up to a party to find and decide on the most appropriate conditions and suitable ways for arranging its travel and accommodation reservations accordingly. In the board's view, the filing of a notice of non-attendance three days in advance of the scheduled oral proceedings and the particular circumstances of the instant case are not comparable to the situation in the case underlying decision T 280/15 (less than one day), *supra*, and cannot justify an apportionment of costs.

27. Therefore, the respondent's request for apportionment of costs is rejected (Article 104(1) EPC, Article 16(1) RPBA).

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The respondent's request for an apportionment of costs is rejected.

The Registrar:

The Chairman:



L. Malécot-Grob

B. Stolz

Decision electronically authenticated