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**Datasheet for the decision  
of 17 October 2019**

**Case Number:** T 0182/16 - 3.3.01

**Application Number:** 10193040.2

**Publication Number:** 2338484

**IPC:** A61K31/215, A61K31/22, A61P3/04

**Language of the proceedings:** EN

**Title of invention:**  
Metabolic imprinting effects of structured lipids

**Patent Proprietor:**  
N.V. Nutricia

**Opponent:**  
Fresenius Kabi Deutschland GmbH

**Relevant legal provisions:**  
EPC Art. 54  
RPBA Art. 12, 13

**Keyword:**  
Late-filed requests - justification for late filing (no)  
Novelty - (no)  
Requests filed pursuant to Article 12 RPBA - not held  
inadmissible

**Decisions cited:**

T 1278/12



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Case Number: T 0182/16 - 3.3.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.01**  
**of 17 October 2019**

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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
23 November 2015 concerning the maintenance of  
European patent No. 2338484 in amended form.**

**Composition of the Board:**

**Chairman** A. Lindner  
**Members:** R. Hauss  
L. Bühler

## **Summary of Facts and Submissions**

- I. European patent No. 2 338 484 was granted with a set of twelve claims.
- II. A notice of opposition was filed, objecting to the patent under Article 100(a), (b) and (c) EPC on the grounds that the claimed subject-matter lacked novelty and inventive step, was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art and extended beyond the content of the application as filed.
- III. The patent proprietor's main request during the opposition proceedings was the rejection of the opposition. The patent proprietor also filed amended sets of claims as auxiliary requests.
- IV. The documents cited in the opposition and appeal proceedings included the following:
  - D4: WO 2009/047 754 A2
  - D11: European Journal of Clinical Nutrition 56,  
1242-1254 (2002)
  - D12: WO 2005/036 987 A1
- V. The decision under appeal is the interlocutory decision of the opposition division, announced on 24 September 2015 and posted on 23 November 2015, rejecting the patent proprietor's main request and auxiliary requests 1 and 2 and finding that the patent as amended in the form of auxiliary request 3 filed on 24 September 2015 met the requirements of the EPC.

VI. Claim 1 of auxiliary request 3 deemed allowable by the opposition division reads as follows:

*"1. A composition, said composition not being human milk, and said composition comprising triglycerides comprising at least 10 wt.% of palmitic acid residues based on total fatty acid residues present in the triglycerides, and comprising at least 30 wt.% of the palmitic acid residues in the sn-2 position of the triglycerides based on total palmitic acid residues for use in improving body composition, the improvement of body composition being selected from the group consisting of increased lean body mass and increased muscle mass, and wherein the composition is an infant formula or growing up milk for toddlers."*

VII. According to the decision under appeal:

- (a) The subject-matter of the claims as granted (main request) and the claims of auxiliary requests 1 and 2, insofar as it related to reducing body fat and preventing obesity, was insufficiently disclosed (Article 83 EPC).
- (b) Since the nutrition of a newborn had to be regarded as a therapeutic application, claim 1 of auxiliary request 3 related to a further medical use drafted in the claim format according to Article 54(5) EPC. As a consequence, the alleged technical effect had to be taken into account as a functional technical feature in the assessment of patentability. The claimed infant formula differed from any prior-art infant formula in the specified use of a composition enriched with sn-2 palmitic acid for improving body composition with regard to lean body mass and muscle mass and was therefore novel (Article 54 EPC).
- (c) The subject-matter of auxiliary request 3 also involved an inventive step (Article 56 EPC).

VIII. The opponent and the patent proprietor each filed an appeal against this decision.

IX. In its statement setting out the grounds of appeal dated 16 March 2016, the opponent argued *inter alia*

(a) that infants and toddlers were not a patient group and the mere reference to infants did not imply a medical use (with reference to decision T 1278/12 of 28 April 2015, reasons 3.3.5),

(b) that the specified use "for use in improving body composition, the improvement of body composition being selected from the group consisting of increased lean body mass and increased muscle mass" related to the support of normal growth and was therefore non-therapeutic.

(c) Hence, claim 1 of auxiliary request 3 could not benefit from the legal fiction of Article 54(5) EPC, but simply defined a composition suitable for increasing lean body mass and/or muscle mass.

X. With its statement setting out the grounds of appeal dated 4 April 2016, the patent proprietor submitted three amended sets of claims as its new main request and auxiliary requests 1 and 2.

With its letter of reply (dated 2 August 2016) to the opponent's statement of grounds, the patent proprietor re-submitted the identical main request and auxiliary requests 1 and 2 and also filed two new sets of claims as auxiliary requests 3 and 4.

The wording of claim 1 of auxiliary request 2 was identical to that of claim 1 of former auxiliary request 3 deemed allowable by the opposition division.

XI. The board issued a summons to oral proceedings dated 12 June 2019.

In a communication annexed to the summons advising the parties of its preliminary opinion, the board observed *inter alia* that feeding an infant or toddler was not a therapeutic step and the purpose of "improving body composition" as defined in the claims covered non-therapeutic improvements in body composition. As a consequence, the claims presented by the patent proprietor could not be regarded as purpose-related product claims according to Article 54(5) EPC.

XII. In a letter dated 19 July 2019, the patent proprietor requested that the day for the oral proceedings, scheduled for 17 October 2019, be changed.

XIII. In a letter dated 9 August 2019, the board refused the patent proprietor's request to re-schedule.

XIV. With a letter dated 17 September 2019, the patent proprietor filed five new sets of amended claims as its main request and auxiliary requests 1 to 4. These requests involved a change of claim category as the independent claim of each request was directed to a "non-therapeutic method for improving body composition". On the condition that these requests were admitted into the proceedings, they were to replace the requests previously filed with the letter dated 2 August 2016.

XV. Oral proceedings before the board took place on 17 October 2019. During the oral proceedings the patent proprietor withdrew its requests of 17 September 2019 and filed further amended claim requests.

XVI. The parties' final requests were the following:

(a) The appellant - patent proprietor 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 following sets of claims:

- main request (filed as auxiliary request 2 on 17 October 2019)
- auxiliary request 1 (filed as auxiliary request 3 on 17 October 2019)
- auxiliary request 2 (filed as auxiliary request 4 on 17 October 2019)
- auxiliary request 3 (filed as auxiliary request 2 with the letter of 2 August 2016)
- auxiliary request 4 (filed as auxiliary request 3 with the letter of 2 August 2016)
- auxiliary request 5 (filed as auxiliary request 4 with the letter of 2 August 2016)

(b) The appellant - opponent requested that the decision under appeal be set aside and that the patent be revoked. Within the purview of this request, the opponent also requested that the main request and auxiliary requests 1, 2, 4 and 5 not be admitted into the proceedings.

XVII. Claim 1 of the **main request** reads as follows:

*"1. A non-therapeutic method for improving body composition, the improvement of body composition being selected from the group consisting of increased lean body mass and increased muscle mass, said method comprising administering to a human subject a composition, said composition not being human milk, and said composition comprising triglycerides comprising at least 10 wt.% of palmitic acid residues based*



*on total fatty acid residues present in the triglycerides, and comprising at least 30 wt.% of the palmitic acid residues in the sn-2 position of the triglycerides based on total palmitic acid residues, and wherein the composition is an infant formula or growing up milk for toddlers."*

Claim 1 of **auxiliary request 1** reads as follows:

*"1. A non-therapeutic method for improving body composition of a human subject when said human subject has an age above 5 years, the improvement of body composition being selected from the group consisting of increased lean body mass and increased muscle mass, said method comprising administering to a human subject with an age between 0 and 36 months a composition, said composition not being human milk, and said composition comprising triglycerides comprising at least 10 wt.% of palmitic acid residues based on total fatty acid residues present in the triglycerides, and comprising at least 30 wt.% of the palmitic acid residues in the sn-2 position of the triglycerides based on total palmitic acid residues, and wherein the composition is an infant formula or growing up milk for toddlers."*

Claim 1 of **auxiliary request 2** reads as follows:

*"1. A non-therapeutic method for improving body composition, the improvement of body composition being increased muscle mass, said method comprising administering to a human subject a composition that comprises lipid, said composition not being human milk, and said composition comprising triglycerides comprising at least 10 wt.% of palmitic acid residues based on total fatty acid residues present in the triglycerides, and comprising at least 30 wt.% of the palmitic acid residues in the sn-2 position of the triglycerides based on total palmitic acid residues, and wherein the composition is an infant formula or growing up milk for toddlers."*

Claim 1 of **auxiliary request 3** is identical to claim 1 of former auxiliary request 3 deemed allowable by the opposition division (see point VI above).

Claim 1 of **auxiliary request 4** reads as follows:

*"1. A composition, said composition not being human milk, and said composition comprising triglycerides comprising at least 10 wt.% of palmitic acid residues based on total fatty acid residues present in the triglycerides, and comprising at least 30 wt.% of the palmitic acid residues in the sn-2 position of the triglycerides based on total palmitic acid residues for use in improving body composition of a human subject when said human subject has an age above 5 years, the improvement of body composition being selected from the group consisting of increased lean body mass and increased muscle mass, and wherein the composition is an infant formula or growing up milk for toddlers and is fed to the human subject having an age between 0 and 36 months."*

Claim 1 of **auxiliary request 5** reads as follows:

*"1. A composition, said composition not being human milk, and said composition comprising triglycerides comprising at least 10 wt.% of palmitic acid residues based on total fatty acid residues present in the triglycerides, and comprising at least 30 wt.% of the palmitic acid residues in the sn-2 position of the triglycerides based on total palmitic acid residues for use in improving body composition, the improvement of body composition being increased muscle mass, and wherein the composition is an infant formula or growing up milk for toddlers."*

XVIII. The opponent's arguments may be summarised as follows:

*Admission of the main request and auxiliary requests 1 and 2*

These requests involved a change of claim category in comparison with earlier claim requests, in order to address the argument that the stated use of the claimed compositions did not qualify as therapeutic and could therefore limit the claimed scope only insofar as the claimed composition had to be suitable for said use.

Since this argument had been raised by the opponent as early as in the notice of opposition these requests - directed to a non-therapeutic method (or use) - should already have been filed during the proceedings at first instance, or at the latest, with the reply to the opponent's statement setting out the grounds of appeal.

With decision T 1278/12 of 28 April 2015, it had been established in EPO case law that enteral administration to an infant did not constitute a medical use. Both parties had been aware of that decision before they filed their appeals. The opponent had raised the issue once more in its statement setting out the grounds of appeal. Nevertheless, the patent proprietor had waited more than three years until one month before the oral proceedings to submit, for the first time in the course of the appeal proceedings, claim requests directed to a non-therapeutic method (namely the requests of 17 September 2019).

Since the board, in its written preliminary opinion of 12 June 2019, had simply agreed with the opponent's long-known argument, this could not be regarded as an unforeseeable procedural development justifying such a substantial change of the patent proprietor's case.

Moreover, since oral proceedings had been scheduled to take place four months later, a delay of more than three months for filing new requests was not acceptable in any case. The opponent had only received the amended set of requests on 23 September 2019 and as a consequence had not had sufficient time to prepare its case. New issues were raised, such as whether the claimed method was indeed non-therapeutic, since it might well be argued that it inherently involved a prophylactic treatment against obesity (Article 53(c) EPC).

The pending main request and auxiliary requests 1 and 2 of 17 October 2019, likewise directed to a non-therapeutic method, were modified versions of the corresponding requests of 17 September 2019 and had been filed even later, namely on the day of the oral proceedings before the board, and only after the board had rejected the requests of 17 September 2019.

It was incumbent on the patent proprietor to define its own framework of requests and not just to react little by little, and belatedly, to external pressures.

*Novelty - auxiliary request 3*

Claim 1 of auxiliary request 3 referred to a use of the claimed composition which was non-therapeutic. Hence, the wording in question ("for use in improving body composition, the improvement of body composition being selected from the group consisting of increased lean body mass and increased muscle mass") limited the scope of claim 1 only insofar as the composition had to be suitable for achieving an increase in lean body mass or muscle mass. This criterion was met by any composition supporting normal growth in infants.

The subject-matter of claim 1 of auxiliary request 3 therefore lacked novelty relative to the disclosure of, *inter alia*, each of documents D4, D11 and D12, all of which disclosed infant formula products with triglycerides enriched with sn-2 palmitic acid as defined in claim 1 (D4: example 2 and Table 6; D11: Table 3 and Table 5; D12: example 4).

*Admission of auxiliary requests 4 and 5*

Identical requests had not been put forward during the proceedings before the opposition division. No reason had been given why these requests could not have been filed during the proceedings at first instance. Moreover, the requests were not *prima facie* allowable; in particular, they could not overcome the objections regarding lack of novelty.

*Novelty - auxiliary requests 4 and 5*

The same arguments applied as in the case of auxiliary request 3.

XIX. The patent proprietor's arguments may be summarised as follows:

*Admission of the main request and auxiliary requests 1 and 2*

At the time of the proceedings at first instance, it had been the usual practice of EPO examination and opposition divisions to regard the administration of a composition to infants, who constituted a particularly vulnerable and fragile target group, as a medical use referred to in Article 53(c) EPC. For that reason, the patent proprietor's initial requests had been drafted as claims for a further medical use, in the format according to Article 54(5) EPC ("composition for use").

While the amendments made to the pending main request and auxiliary requests 1 and 2 involved a change of claim category, this could not have come as a surprise to the opponent and to the board in view of the board's provisional opinion. At an early stage of the appeal proceedings, namely in the letter of 2 August 2016, the patent proprietor had moreover indicated its willingness to redraft the "composition for use" claims as claims directed to a method for improving body composition, in line with claim 2 of former auxiliary request 9 on file during the proceedings at first instance, should the board consider that improving body composition as defined in the claims did not constitute therapy.

The patent proprietor had also assumed that the board would grant its request to re-schedule the oral proceedings. When that request had been refused, the patent proprietor had presented its new claim requests of 17 September 2019 directed to a non-therapeutic method.

The technical features to be considered in the amended requests of 17 October 2019 were exactly the same as in the corresponding requests of 2 August 2016 previously produced in accordance with Article 12(1) and (2) RPBA. Additional features taken from the description - which were included in the previous set of requests of 17 September 2019 - had been removed. Thus the new requests were straightforward in that there was no change in substance regarding the technical features and issues to be discussed, in comparison with the initially filed requests of 2 August 2016.

*Novelty - auxiliary request 3*

It was conceded that the combination of technical features defining the claimed composition was indeed

disclosed in the cited passages of documents D4, D11 and D12.

However, the subject-matter of claim 1 differed from the prior-art disclosures in the feature "for use in improving body composition", in terms of lean body mass and muscle mass.

The definition of claim 1 did not cover the normal growth of an infant or toddler. Since the claim was drafted in the format according to Article 54(5) EPC, it was intrinsically restricted to therapeutic improvements, including those of a prophylactic nature, e.g. reducing the chance of developing obesity and associated secondary disorders. Also, the term "increased lean body mass" would be understood by a person skilled in the art to refer not to an absolute increase, but to a relative increase based on total body mass.

Thus, the use stated in claim 1 had to be taken into account in the assessment of novelty as a functional technical feature, and not only to the extent that the claimed composition was suitable for such a use.

*Admission of auxiliary requests 4 and 5*

Auxiliary request 4 was in line with former auxiliary request 6 presented before the opposition division. Claim 1 of auxiliary request 5 corresponded largely to claim 1 of auxiliary request 3, as only the effect of "increased lean body mass" had been deleted.

*Novelty - auxiliary requests 4 and 5*

In support of the novelty of the subject-matter of auxiliary requests 4 and 5, the same arguments applied as in the case of auxiliary request 3.

## **Reasons for the Decision**

1. Admission of the main request, auxiliary request 1 and auxiliary request 2
  - 1.1 Pursuant to Article 13(1) RPBA, any amendment to a party's submissions once it has filed its statement of grounds of appeal or reply may be admitted and considered at the Board's discretion.
  - 1.2 The claim requests presented by the patent proprietor at the outset of the appeal proceedings with the submissions of 4 April 2016 and 2 August 2016 were all directed to a composition for use in improving body composition. These requests included the still pending auxiliary requests 3, 4 and 5 (see points XVI and XVII above).
  - 1.3 The claims of the pending main request and of auxiliary requests 1 and 2, on the other hand, were presented for the first time during oral proceedings before the board of appeal (see points XVI and XVII above).
    - 1.3.1 The definition of claim 1 of the main request is identical to the definition of claim 1 of auxiliary request 3, except for a change of claim category in that the claim is directed to a "non-therapeutic method for improving body composition comprising administering to a human subject a composition", instead of to a "composition for use in improving body composition".
    - 1.3.2 The relationship between auxiliary requests 1 and 2 and auxiliary requests 4 and 5 is the same as between the main request and auxiliary request 3: only the claim category was changed.



- 1.4 The issue of whether the intended use of the composition was therapeutic or non-therapeutic and how the claims should accordingly be drafted was addressed in the proceedings before the opposition division and also in the opponent's statement setting out the grounds for appeal. Furthermore, in decision T 1278/12, issued in 2015, a technical board of appeal of the EPO considered that enteral administration to an infant was not therapeutic *per se*. This decision was known to the patent proprietor who was party to the appeal case decided in T 1278/12.
- 1.5 Instead of filing, at an early stage of the appeal proceedings, further auxiliary requests that simply changed the claim category of the existing requests as a fallback position, the patent proprietor merely announced that it might consider filing such requests at a later stage (see the letter of 2 August 2016, last paragraph).
- 1.6 Three years later, three months after the board communicated its preliminary opinion and only four weeks before the day scheduled for oral proceedings, the patent proprietor finally presented a set of claim requests directed to a non-therapeutic method (namely the requests of 17 September 2019). However, the claims of these requests also contained added technical features taken from the description. No substantiation regarding the requirements of Article 123(2) EPC was given in the accompanying letter.
- 1.7 The pending main request, auxiliary request 1 and auxiliary request 2 were filed at an even later stage, namely on the very day of the oral proceedings before the board, after several hours of discussion.

1.8 Since it was apparent at an early stage of the appeal proceedings that requests directed to a non-therapeutic method or use, mirroring the patent proprietor's initial "composition for use" claims, might be required, the procedural behaviour of the patent proprietor of filing these requests only at the very last minute contravenes its duty to conduct the proceedings with due care, namely to complete its relevant submissions at the earliest possible stage of the proceedings.

1.9 For these reasons, the board found it appropriate to exercise its discretion under Article 114(2) EPC and Article 13(1) RPBA by not admitting these requests into the proceedings.

2. Novelty - auxiliary request 3

2.1 Claim 1 of auxiliary request 3 relates to a composition which comprises triglycerides. The triglycerides comprise at least 10% by weight of palmitic acid residues, based on total fatty acid residues present in the triglycerides. Furthermore, at least 30% by weight of the palmitic acid residues (based on total palmitic acid residues) are located in the sn-2 position of the triglycerides.

2.2 It is further specified that the composition is an "infant formula or growing up milk for toddlers", but that it is not human milk.

These terms imply that the claimed composition is suitable as food for infants ("infant formula") or is a milk-type composition suitable as food for toddlers ("growing up milk for toddlers").

2.3 The intended use of the composition is indicated as "improving body composition", the improvement being

selected from increased lean body mass and increased muscle mass.

- 2.3.1 Irrespective of the fact that the wording of claim 1 does not actually restrict the group of subjects to whom the composition is to be administered to infants and toddlers, and in line with decision T 1278/12 of 28 April 2015 (reasons 3.3), the board takes the view that simply referring to infants (see point 2.2 above) does not imply a therapeutic use, since feeding an infant is not a therapeutic step within the meaning of Article 53(c) EPC.
- 2.3.2 Also, the stated purpose of improving body composition with regard to increasing lean body mass or muscle mass is typically not therapeutic, and in any case covers non-therapeutic improvements or increases.
- 2.3.3 Contrary to the patent proprietor's view, the mere choice of the wording "composition for use" does not imply that the claim must relate to a use in a method referred to in Article 53(c) EPC. There is nothing in the claim to indicate that its scope is intended to be restricted to uses which are prophylactic against medical conditions or therapeutic in other ways.
- 2.3.4 Since the definition of the use in claim 1 is not recognisably restricted to a medical indication, the claim cannot be regarded as a purpose-related product claim drafted in the format according to Article 54(5) EPC. Rather, the wording chosen by the patent proprietor merely requires that the claimed composition must be suitable for the purpose of attaining an increase in muscle mass or lean body mass when administered to a subject.

- 2.4 Each of documents D4, D11 and D12 discloses infant formulas containing triglycerides enriched with sn-2 palmitic acid.
  - 2.4.1 Document D4 discloses (see example 2, pages 22 to 24), an infant formula with a fat source having 23.5 wt% palmitic acid (C16), 43% of which is located in the sn-2 position. As far as the ratio of sn-2 palmitic acid is concerned, the percentage of 43% is the same whether referring to molar amounts or weights.
  - 2.4.2 Document D11 discloses the fatty acid composition of different infant formulas. According to D11, all formulas contained palmitic acid at well above 10 wt% based on total fatty acids (see page 1246, Table 3, line 9). In formulas IF1, IF5, IF9 and IF11, more than 30 wt% of the palmitic acid residues are present in the sn-2 position (see page 1248, Table 5, line 7).
  - 2.4.3 Document D12 relates to a human breast milk lipid mimetic designed for use in the field of infant nutritional foods. Example 4 describes an infant formula comprising a fat blend containing structured triglycerides, the blend containing 23.5 wt% palmitic acid, 43 wt% of which are in the sn-2 position (see D12: Table 1 on page 20 and pages 23 to 24).
- 2.5 Thus, the cited prior-art disclosures D4, D11 and D12 all relate to infant formulas that meet the mandatory qualitative and quantitative criteria defined in claim 1 (see points 2.1 and 2.2 above).
- 2.6 These infant formulas are also suitable for improving body composition within the meaning of claim 1, for the following reasons:
  - 2.6.1 According to the patent in suit, administering to an infant a composition having the mandatory features

mentioned in points 2.1 and 2.2 above will result in the desired improvement of body composition, due to its similarity to human milk.

2.6.2 Furthermore, infant formulas are nutritional products intended to nourish infants and thereby support their growth. It is common general knowledge that the growth of an infant involves an increase in muscle mass.

2.7 As a consequence, the subject-matter of claim 1 of auxiliary request 3 lacks novelty since it is anticipated by the disclosure of documents D4, D11 and D12 (Articles 52(1), 54(1) and (2) EPC).

3. Admission of auxiliary requests 4 and 5

3.1 These requests were presented with the patent proprietor's reply to the opponent's statement setting out the grounds of appeal. Pursuant to Article 12(1), 12(2) and 12(4), second half-sentence, RPBA, they are thus, in principle, to be taken into account in the proceedings.

3.2 Article 12(4), first half-sentence, RPBA, confers to the board the discretionary power to hold inadmissible requests which could have been presented or were not admitted in the first-instance proceedings.

3.3 While identical requests were not in fact presented during the proceedings before the opposition division, the subject-matter of present auxiliary requests 4 and 5 was nevertheless covered by former auxiliary requests 6 (see claim 2) and 3 as presented on 24 September 2015 (each listing additional alternatives for the improvement of body composition which are deleted in the corresponding current auxiliary requests 4 and 5).

- 3.4 The board therefore saw no compelling reason to hold auxiliary requests 4 and 5 inadmissible.
4. Novelty - auxiliary requests 4 and 5
- 4.1 The definition of the composition in claim 1 of each of auxiliary requests 4 and 5 is the same as in claim 1 of auxiliary request 3: it comprises triglycerides enriched with sn-2 palmitic acid residues and is an infant formula or growing up milk for toddlers different from human milk.
- 4.2 According to the patent in suit, the administration of a composition having these mandatory features to a human subject will result in the desired improvement of body composition, due to its similarity to human milk.
- 4.3 The patent also teaches that this applies in particular to an improvement in a human subject above the age of five years, when the composition was fed to said subject at an age between 0 and 36 months, as specified in claim 1 of auxiliary request 4. Since the properties and the resulting suitability of the composition are presumably based on its mandatory components (see points 4.1 and 4.2 above), the board's conclusions regarding the novelty of the claimed subject-matter remain the same with regard to auxiliary request 4 as set out in section 3 above for auxiliary request 3.
- 4.4 Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary request 3 solely in that the option "increased lean body mass" was deleted. This amendment does not in any way affect the assessment of novelty as set out in section 3 above.
- 4.5 For these reasons, the subject-matter of claim 1 of each of auxiliary requests 4 and 5 lacks novelty (Articles 52(1) and 54(1) and (2) EPC).

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated