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Datasheet for the decision of 29 October 2021

Case Number: T 1764/16 - 3.3.04

Application Number: 05762925.5

Publication Number: 1771191

IPC: A61K38/02, A61K38/16, A61K31/4188, A61K31/714, A61P3/00

Language of the proceedings: EN

Title of invention:
Preparation for use of aspartate and vitamin B12 or biotin for regulating ketone bodies

Patent Proprietor:
N.V. Nutricia

Opponents:
Fresenius Kabi Deutschland GmbH
Abbott Laboratories

Headword:
Aspartate for treating metabolic disorders/NUTRICIA

Relevant legal provisions:
EPC Art. 56
RPBA Art. 13(1), 13(3)

Keyword:
Main request - inventive step (no)
Auxiliary request - admitted (no)

Decisions cited:
T 0939/92, T 0950/16

Catchword:
-

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Case Number: T 1764/16 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 29 October 2021

Appellant: (Patent Proprietor)	N.V. Nutricia Eerste Stationsstraat 186 2712 HM Zoetermeer (NL)
Representative:	Nederlandsch Octrooibureau P.O. Box 29720 2502 LS The Hague (NL)
Respondent I: (Opponent 1)	Fresenius Kabi Deutschland GmbH Else-Krömer-Strasse 1 61352 Bad Homburg (DE)
Representative:	Fresenius Kabi Deutschland GmbH Patent Department Borkenberg 14 61440 Oberursel (DE)
Respondent II: (Opponent 2)	Abbott Laboratories 100 Abbott Park Rd. Abbott Park, IL 60064-6004 (US)
Representative:	Boult Wade Tennant LLP Salisbury Square House 8 Salisbury Square London EC4Y 8AP (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 9 June 2016 revoking European patent No. 1771191 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	B. Claes
Members:	D. Luis Alves
	R. Romandini

Summary of Facts and Submissions

I. The patent proprietor (appellant) filed an appeal against the decision of the opposition division to revoke European patent No. 1 771 191, entitled "*Preparation for use of aspartate and vitamin B12 or biotin for regulating ketone bodies*".

II. The opposition proceedings were based on the grounds for opposition set out in Article 100(a) EPC, in this case lack of novelty (Article 54 EPC) and lack of inventive step (Article 56 EPC), as well as the grounds for opposition set out in Article 100(b) and (c) EPC. The decision under appeal dealt with sets of claims of a main request and auxiliary requests 1 and 2. The opposition division decided, *inter alia*, that the subject-matter of claim 1 of auxiliary request 1 did not involve an inventive step (Article 56 EPC).

Claim 1 of **auxiliary request 1** read:

"1. An enteral nutritional composition containing a protein fraction and a carbohydrate fraction providing 15-22 en% and 25-50 en%, respectively, wherein said protein fraction comprises at least two proteins comprising a combination of a protein from plant origin and one of animal origin, and wherein said protein fraction comprises 12.0-70 wt% of aspartate equivalents, based on the total weight of the protein fraction, and wherein the composition further contains vitamin B 12 and optionally biotin."

III. With the statement setting out the grounds of appeal, the appellant re-submitted the claims of the main

request and auxiliary request 1. With further submissions, the appellant filed, *inter alia*, document D31.

IV. Opponent 1 and opponent 2 (respondent I and respondent II, respectively) replied to the appeal and filed further submissions and documents. Respondent I filed, *inter alia*, document D35 and arguments based on it relating to novelty.

V. The board summoned the parties to oral proceedings in line with the parties' requests.

VI. With a letter dated 7 November 2019, the appellant filed auxiliary claim requests 2 to 4, conditional on the board admitting into the appeal proceedings document D35 and the related arguments submitted by respondent I on novelty.

Claim 1 of **auxiliary request 4** read as claim 1 of auxiliary request 1 (see section II.) apart from the lower limit of the range of aspartate equivalents in wt%, which read 12.5 instead of 12.0.

VII. In a communication pursuant to Article 15(1) RPBA, the board informed the parties of its preliminary opinion on various matters concerning the appeal.

VIII. In reply, further submissions were filed by the appellant and the respondents.

IX. At the oral proceedings, the appellant withdrew the main request and auxiliary requests 2 and 3. Auxiliary requests 1 and 4 became the main request and auxiliary request 1, respectively. Respondent I withdrew the request to admit, *inter alia*, document D35 and the

submissions based on it on novelty. At the end of the oral proceedings, the Chair announced the board's decision.

X. The following documents are referred to in this decision:

D4: Experimental report filed by the patent proprietor, pp. 3/7-7/7
D5: Hageman *et al.*, The Journal of Nutrition 138, 2008, pp. 1634-1640
D9: Souci *et al.*, "Food composition and nutrition tables 1989/90", ed. Scherz and Senser, Wissenschaftliche Verlagsgesellschaft mbH Stuttgart, 1989, pp. 50-51
D12: Crespillo *et al.*, Clinical Nutrition 22(5), 2003, pp. 483-487
D21: US 6,743,770 B2
D31: Salway, "Metabolism at a glance", 3rd edn., 2004, pp. 17 and 111

XI. The appellant's arguments relevant to this decision may be summarised as follows.

Main request - claim 1
Inventive step (Article 56 EPC)

The closest prior art was represented by the disclosure in document D12 of composition DD comprising soy protein. This protein source comprised 11.8 wt% aspartate equivalents (see Table 2).

The claimed composition differed by the percentage of aspartate in the protein fraction and the presence of protein of animal origin in addition to protein of plant origin.

The technical effect related to 12.0 wt% or more aspartate in the protein fraction was a decrease in postprandial blood glucose (PPG) levels and an increase in postprandial blood insulin (PPI) levels as was shown in documents D4 and D5.

Document D4 showed a clear trend of improved PPG levels with increasing aspartate levels in the protein fraction which could already be observed at 12.5 wt% aspartate equivalents, in particular in terms of the time for return to baseline levels (composition DSB). The effect on PPG levels was greatest with composition CAS+, i.e. the composition with the highest percentage of aspartate equivalents tested. Thus, the technical effect was correlated to the aspartate equivalents.

Also document D5 showed that improved PPG levels correlated with aspartate (see Figure 2 and Table 1). Although the difference in plasma glucose measured for the composition comprising soy alone (MaltoSI) compared to that comprising a mixture of soy with α-lactalbumin (MaltoSIα) was statistically significant (see Table 2), a technical effect did not need to be shown with statistical significance.

As regards the absolute amount of the aspartate equivalents in the composition as a whole, no evidence had been put forward that the technical effect was not present with a lower amount of protein. The experimental results showed an effect related to aspartate levels. Accordingly, the technical effect applied to the whole range claimed.

The objective technical problem was the provision of an improved composition for reducing PPG levels and increasing PPI levels.

Even if the problem was formulated as the provision of an alternative composition for reducing/lowering PPG levels, the claimed solution was not obvious because the state of the art did not provide a pointer to solving this problem by increasing aspartate levels.

Moreover, an alternative composition that resulted in increased aspartate levels was not available to the skilled person. Indeed, the claimed invention and document D21 belonged to unrelated technical fields: the technical field of the claimed invention was the reduction of PPG levels, whereas document D21 dealt with different diseases. Although it disclosed an effect of the nutritional compositions on glucose levels, the document was purely concerned with the carbohydrate source and the aim of increasing serotonin (see column 2, line 18 and following, column 3, line 41 and column 5, lines 48 to 52). The claimed solution was thus not obvious.

The technical effect related to the presence of a protein of animal origin was improved taste and the rapid availability of the aspartate equivalents (see paragraph [0061] of the patent).

The skilled person addressing the problem of providing an improved composition had no motivation to provide a composition with increased aspartate levels. Therefore, the claimed composition was not obvious.

Auxiliary request 1 - Admittance

This request was filed as a direct response to respondent I's submissions on novelty based on, *inter alia,* document D35 filed for the first time in appeal proceedings.

XII. The respondents' arguments relevant to this decision may be summarised as follows.

Main request - claim 1
Inventive step (Article 56 EPC)

The disclosure in document D12 of composition DD comprising soy protein, having 11.8 wt% aspartate equivalents in the protein fraction, could be considered to represent the closest prior art. The claimed composition differed by (i) the percentage of aspartate in the protein fraction and (ii) the presence of protein of animal origin in addition to protein of plant origin.

Two partial objective technical problems should be formulated because there was no synergy between the two distinguishing features.

With regard to difference (i), the claimed composition comprised at least 12.0 wt% aspartate equivalents instead of 11.8 wt% in composition DD. When assessing the technical effect associated with this difference, a distinction should be made between the percentage of aspartate equivalents relative to the total composition and the percentage in relation to the protein fraction only. Claim 1 encompassed embodiments with lower aspartate content than composition DD. Indeed, claim 1 encompassed compositions having 15% energy provided by

the protein fraction having 12.0 wt% aspartate equivalents. This corresponded to 450 mg aspartate equivalents per 100 kcal in the composition. For composition DD, this value was 507 mg aspartate per 100 kcal when the same calculation was carried out. However, for embodiments having a lower content of aspartate equivalents than DD, no improvement in PPG levels occurred. Thus, claim 1 encompassed embodiments that did not result in the technical effect relied on by the appellant for difference (i) (i.e. a decrease in postprandial blood glucose (PPG) levels and an increase in postprandial blood insulin (PPI) levels).

Because the compositions tested in documents D4 and D5 differed in several respects from those defined in the claims, including the percentage of energy supplied by the protein and carbohydrate fractions, they could not establish any technical effect of the aspartate levels alone. Furthermore, these documents did not show an improvement in PPG levels for 12.0 wt%, neither for the value of 12.5 wt% in composition DSB in document D4. As regards the results in Table 2 and Figure 2 of document D5, the difference between the compositions comprising 11.8 and 13.6 wt% aspartate was not statistically significant.

Since the alleged technical effect was not present over the whole range claimed, the partial objective technical problem should be formulated as the provision of an alternative composition.

There was no need for a pointer in the art to a claimed solution. The claimed solution was an arbitrary choice from a host of possible solutions. Alternative protein sources that automatically supplied more aspartate included potato (see paragraph [0062] of the patent).

Document D21 disclosed nutritional compositions beneficial in terms of their glycaemic index (see columns 3 and 4 concerning the choice of carbohydrate) and disclosed the use of α-lactalbumin-enriched whey protein (see claim 1) which had increased aspartate levels (see Table 2 of patent). The aspartate content of whey was 12.4 wt% aspartate equivalents (calculated from document D9, pages 50 to 51). Thus, using common ingredients to solve the objective technical problem, the skilled person would have arrived at aspartate levels above 12.0 wt%, as defined in the claim. Document D21 furthermore disclosed the use of mixtures of soy and α-lactalbumin-enriched whey (see column 5, lines 55 to 65).

Document D21 concerned compositions with a low glycaemic index (see columns 3 and 4) and thus belonged to the technical field of the claimed invention and document D12. Indeed, both document D12 (see page 483, right-hand column) and the patent suggested the importance of a low glycaemic index.

With regard to difference (ii), the claim defined no limits for the nature and percentage of protein of animal origin. However, there was no evidence available that the presence of any protein of animal origin would result in an improvement in taste or aspartate availability for all the embodiments claimed, which included compositions with minor amounts of animal protein. Thus, the partial objective technical problem was the provision of an alternative composition. The claimed solution was arbitrary and therefore did not involve an inventive step. Each of documents D18, D21 and D30 disclosed mixtures of animal and plant proteins (see document D18, example 3; document D21, column 3,

lines 55 to 65 and document D30, page 90, lines 1 and 2).

Auxiliary request 1 - Admittance

This claim request was filed with the letter dated 7 November 2019. The request to admit it was formulated as a request conditional on the board admitting documents D35 to D37 into the appeal proceedings. Since the filing of these documents and related submissions had in the meantime been withdrawn, until the oral proceedings there had effectively been no request to admit the set of claims of auxiliary request 1.

XIII. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the set of claims of the main request, filed as auxiliary request 1 with the statement of grounds of appeal or, alternatively, on the basis of the set of claims of auxiliary request 1, filed as auxiliary request 4 with the letter dated 7 November 2019.

Both respondents requested that the appeal be dismissed.

Reasons for the Decision

Admittance of document D31

1. The appellant requested that document D31, filed in the context of sufficiency of disclosure, be admitted into the appeal proceedings. Since the decision is not based on sufficiency of disclosure, it was not necessary for the board to decide on this request.

Main request - claim 1
Inventive step (Article 56 EPC)

Closest prior art

2. Claim 1 of the main request is directed to an enteral nutritional composition having at least 12.0 wt% aspartate equivalents in the protein fraction (see section II.). As such, the composition is defined by a percentage of aspartate equivalents relative to the protein fraction and not relative to the composition as a whole. The protein fraction is further required to represent from 15 to 22% of the total composition, in terms of the energetic content, and to comprise at least two proteins, one being of animal origin and one of plant origin.

3. The board agrees with the opposition division and the parties that nutritional composition DD disclosed in document D12 may be taken to represent the closest prior art. This document concerns the metabolic effects of enteral nutritional compositions in patients with diabetes and in particular the aim of achieving an *"acceptable glycaemic and lipid metabolic control*" (see page 483, right-hand column, first paragraph, last sentence). It discloses a study comparing three compositions differing in the type and content of dietary fibre, carbohydrate, fat and protein (see title, abstract and page 486, left-hand column, first to third paragraphs). Composition DD was designed for diabetes patients and contained 45% carbohydrates, 38% lipids and 16% soy protein. This corresponded to 11.8 wt% aspartic acid in the protein fraction (according to Table 2). Composition DD achieved the lowest postprandial glycaemic levels (see "Results" and

"Conclusions" on page 483). The authors suggest a number of factors which could be responsible for this result, including the type of carbohydrate, type of fat, content and type of dietary fibre, and type of protein.

4. The parties agreed that the claimed composition differed from the DD composition disclosed in document D12 on two accounts: (i) the percentage of aspartate in the protein fraction and (ii) the presence of a protein of animal origin in addition to a protein of plant origin. The effect of these differences was, however, disputed.

5. When determining the technical effect that may be attributed to these two distinguishing features, the board will consider each separately. Indeed, neither has it been argued that these features are functionally interdependent, nor does the board have any reason to consider this to be the case.

First difference: the percentage of aspartate in the protein fraction

Technical effect and objective technical problem

6. Under the established case law of the boards, a technical effect should be achieved by substantially all embodiments claimed for it to be taken into account when formulating the objective technical problem (see decision T 939/92 (OJ EPO 1996, 309), Reasons 2.5.4 and 2.6 and the further decisions cited in Case Law of the Boards of Appeal of the European Patent Office, 9th edn. 2019, I.D.4.3.).

7. The patent, in paragraph [0137], asserts that a technical effect that may be attributed to "*the relatively high amount of rapidly available aspartate*" in the protein fraction is a decrease in postprandial glucose levels. However, the patent does not provide any evidence for this technical effect. This is in particular so for a technical effect linked to 12.0 wt% aspartate equivalents relative to the protein fraction, irrespective of the percentage relative to the composition as a whole.

8. The appellant referred to the disclosure in documents D4 and D5 to argue there was a link between an improvement of postprandial blood glucose (PPG) and postprandial blood insulin (PPI) levels and the percentage of aspartate equivalents in the protein fraction.

9. Document D4 is an experimental report providing results obtained from a diabetic rat model (see page 3/7). It compares three types of compositions differing in the protein fraction. The compositions are designated CAS, DSB and CAS+ and comprise 6.6 wt% (CAS), 12.5 wt% (DSB) and 18.9 wt% (CAS) aspartate equivalents in the protein fraction, respectively (see page 3/7). The proportion of aspartate equivalents to the composition as a whole is not reported. PPG levels, fasting glucose levels and fasting insulin levels observed for the three compositions are reported.

10. Document D5 reports the PPG levels observed in healthy rats fed compositions differing in the protein and carbohydrate sources. It compares the effect of soy as the sole protein source (composition MaltoSI) with that of a mixture of 50% soy and 50% α-lactalbumin (composition MaltoSIα), corresponding to 11.6 and

13.6 wt% aspartate equivalents in the protein fraction, respectively (see abstract, in relation to experiment 2, and the aspartate content in Table 1). The content of aspartate relative to the whole composition is also not reported. An improvement in PPG levels observed for the composition comprising the mixture of soy and α-lactalbumin is attributed to the aspartate content in the protein (see abstract in relation to experiment 2). Nevertheless, the document also reports that the improved PPG response was observed for both compositions including a protein source (MaltoSI and MaltoSIα) versus the composition comprising only carbohydrates. Furthermore, the results did not differ when the two protein sources were compared (see page 636, left-hand column, last paragraph and right-hand column, last paragraph and Figure 2A).

11. Accordingly, documents D4 and D5 do not disclose experimental results for claimed compositions in which the protein fraction comprises 12.0 wt% of aspartate equivalents. From the disclosure in document D4, a comparison can only be made between 12.5 and 6.6 wt%; from document D5, only a comparison between 13.6 and 11.8 wt% can be made.

12. In addition, the appellant has not pointed to experimental results obtained with compositions having an overall lower aspartate content despite a 12 wt% or higher aspartate content relative to the protein fraction. Nevertheless, it is not disputed by the appellant that claim 1 encompasses compositions having less aspartate equivalents, relative to the composition as a whole, than composition DD.

13. Hence, the board concludes that an improvement in postprandial blood glucose (PPG) and postprandial blood insulin (PPI) levels cannot be considered achieved for all the percentages of aspartate equivalents in the protein fraction of the compositions indicated in the claim.

14. In accordance with the case law of the boards, alleged advantages or improvements over the state of the art which are merely referred to without evidence to support a comparison with the closest prior art cannot be considered in determining the objective technical problem underlying the invention (see also the decisions cited in Case Law of the Boards of Appeal of the European Patent Office, 9th edn. 2019, I.D.4.2.).

15. As discussed above, from the disclosure in documents D4 and D5, it cannot be ascertained that an effect is present over composition DD disclosed in document D12. It cannot be inferred either that a trend of lower PPG levels is attributable to the percentage of aspartate in the protein fraction rather than the percentage of the meal as a whole.

16. The appellant has also argued that document D4 disclosed a trend of improved PPG levels from 12.5 to 18.9 wt% aspartate and that this allowed inferring that an improvement also occurred at 12 wt%. However, the decisive question in the current case is whether a technical effect has been demonstrated which can be attributed to the percentage of aspartate in the protein fraction as opposed to in the composition as a whole. In this regard, the board concurs with the respondents that such an effect has not been demonstrated (see points 12. to 15.).

17. Consequently, the board considers that no technical effect beyond the effects known for the composition disclosed in document D12 can be attributed to all the claimed compositions. Hence, the objective technical problem solved by all claimed compositions is formulated as the provision of an alternative enteral nutritional composition for glycaemic control.

Obviousness

18. Document D21 concerns nutritional compositions for managing stress symptoms and preventing related secondary effects such as the development of diabetes and discloses protein sources commonly used in nutritional compositions: "*Sources of protein can be any suitable protein utilized in nutritional formulations and can include whey protein, whey protein concentrate, whey powder, egg, soy protein, soy protein isolate, caseinate (e.g., sodium caseinate, sodium calcium caseinate, calcium caseinate, potassium caseinate), animal and vegetable protein and mixtures thereof.*
The preferred protein is alpha lactalbumin-enriched whey protein used alone or in combination with other protein (e.g., whey, casein, soy, milk, egg) [...]" (column 5, lines 55 to 63; emphasis added by the board).

The document thus classifies whey protein enriched in α-lactalbumin, as well as its mixtures with other proteins of animal or plant origin, as protein sources commonly used in nutritional compositions.

19. In the board's view, it would have been obvious for the skilled person, faced with the above formulated objective technical problem (see point 17.), to use any

of the protein sources available for nutritional compositions, including α-lactalbumin-enriched whey. By using α-lactalbumin-enriched whey as the protein source, the skilled person would obtain compositions comprising at least 12.0 wt% aspartate equivalents, as encompassed by the claim. Indeed, α-lactalbumin-enriched whey contains 12.4 wt% or 13 wt% aspartate (see document D9, pages 50 to 51 and the patent, Table 2), a fact which was not disputed by the appellant.

20. According to the appellant, the claimed alternative was not obvious because an alternative with a higher percentage of aspartate in the protein fraction was not available to the skilled person. Indeed, document D21 belonged to a different technical field than the claimed invention because it was concerned with different diseases, namely managing stress symptoms. The α-lactalbumin-enriched whey disclosed in this document was thus not available as an alternative to the skilled person in the case in hand.

21. The board disagrees and considers that the objective technical problem as formulated above is addressed by a person skilled in nutritional compositions in general and that technical fields are not restricted to nutritional compositions for a given disease. Firstly, the board observes that the appellant's point of view seems inconsistent with the patent, which is not directed solely at nutritional compositions aimed at reducing PPG levels. The patent relates to a broader technical field, namely to nutritional compositions for the treatment of metabolic disorders associated with elevated concentrations of ketone bodies, lactate and/or other organic acids and/or insufficient pH homeostasis, in particular in diseased, traumatised or

metabolically stressed states of the individual to be t reated, as well as nutritional compositions for the prevention or treatment of secondary disorders associated with those metabolic disorders (see paragraphs [0001] and [0019] of the patent). Secondly, the board observes that, despite being directed to compositions for the management of stress symptoms, in the case of document D21, and glycemic control in diabetes patients, in the case of document D12, many considerations of the skilled person in the development of these nutritional compositions are common. Indeed, issues considered in both documents include the sources of protein, carbohydrate and lipids and their relative proportions in the composition (see document D21, table in column 3 and columns 3 to 4; as regards document D12, see point 3. above). The focus may change from the components of the carbohydrate or lipid fractions to the components of the protein fraction, or to the presence of vitamins or further components, depending on the therapeutic application. This, however, does not imply that the skilled person would not be aware of documents concerning nutritional compositions for a different disease.

22. The appellant has also submitted that only documents relating to nutritional compositions for reducing PPG levels should be taken into account when assessing inventive step.

23. The board can agree that, under certain circumstances, the question might arise why the skilled person in a technical field would have envisaged adapting a disclosure in their technical field to implement it in a remote technical field. However, such a question does not arise in this case. The appellant has not argued that document D21 belongs to a remote technical field,

neither is the board convinced of that being the case, as explained above.

Second difference: the presence of a protein of animal origin in addition to a protein of plant origin

Technical effect and objective technical problem

24. The appellant relied on statements in paragraph [0061] of the patent that the presence of a mixture of proteins of animal and plant origin in the composition correlated with aspartate bioavailability and the taste of the composition.

25. However, the claim does not restrict the proportion of protein of animal origin to be included in the composition mixture. Thus, the claim encompasses compositions provided they include some animal protein. However, no indication is available to the board that allows concluding that better organoleptic properties or bioavailability are achieved, irrespective of the amount of animal protein present in the composition. In the absence of any indication going beyond the assertions in the patent, the board concurs with the respondents that the alleged technical effect cannot be considered for all the claimed embodiments.

26. In the absence of any technical effect going beyond the technical effects known for the composition disclosed in document D12, the objective technical problem solved by the claimed composition is identical to the technical problem formulated for the other distinguishing feature, i.e. the provision of an alternative enteral nutritional composition for glycaemic control (see point 17.).

Obviousness

27. The board considers the claimed solution to be obvious in view of the disclosure of α-lactalbumin as a preferred source of protein, for example in document D21, as well as the disclosure of the use of mixed proteins sources for nutritional compositions (see also document D21, column 5, lines 55 to 65).

Conclusion

28. In view of the above considerations on both distinguishing features, the claimed subject-matter does not involve an inventive step.

Auxiliary request 1 - Admittance

29. The set of claims of auxiliary request 1 is identical to that of auxiliary request 4 filed with the letter dated 7 November 2019. Auxiliary request 4 had been filed "*in case the Board is minded to allow O1's submissions and D35 - D37 into the proceedings*" (see also page 3 of the mentioned letter dated 7 November 2019 stating: "*if the Board decides to admit O1's submissions into the proceedings, it is respectfully requested to admit AR2, AR3 and AR4*"; see also section VI. of the present decision).

30. This means, in the board's understanding, that the filing of the auxiliary request 4 had been made under the condition that the board admitted the new documents filed by the respondent and the related submissions on novelty. However, these documents and submissions were withdrawn at the oral proceedings, and they did not play any role in the final decision of the board on the main request. Consequently, the condition on which the

request had been made was not fulfilled in the proceedings. For this reason, the request could be considered *tamquam not essent*, namely, that it was never filed. However, at the oral proceedings, the appellant did not withdraw the set of claims present before the board as auxiliary request 1 after respondent I withdrew the arguments on novelty and document D35. Accordingly, it was necessary for the board to decide on admittance.

31. The admittance of the request concerned is subject to Article 13 RPBA 2007 since the first summons pursuant to Rule 115(1) EPC was sent on 7 October 2019 (see Article 25(3) RPBA 2020, under which Article 13 RPBA 2007 applies instead of Article 13(2) RPBA 2020 "where the summons to oral proceedings [...] has been notified before the date of the entry into force" of RPBA 2020). The circumstance that, due to the COVID-19 pandemic, the oral proceedings originally scheduled for 25 May 2020 was postponed and later cancelled and a new summons was issued is not relevant for determining the applicable provisions of the RPBA (see for the same conclusion and a convincing reasoning decision T 950/16, point 3.2).

32. As the set of claims in hand was originally a reaction to novelty objections and the board had not been presented with reasons why it would overcome the inventive-step objections, the board decided to not admit the request (Article 13(1) and (3) RPBA 2007).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

A. Chavinier Tomsic B. Claes

Decision electronically authenticated