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**Datasheet for the decision
of 14 March 2023**

Case Number: T 0967/18 - 3.3.04

Application Number: 09007539.1

Publication Number: 2100615

IPC: A61K39/00, A61P35/00,
G01N33/68, G01N33/574

Language of the proceedings: EN

Title of invention:

Cancer therapy

Patent Proprietor:

Biotempus Pty Ltd

Opponent:

Bristol-Myers Squibb Company

Headword:

Cancer therapy/BIOTEMPUS

Relevant legal provisions:

EPC Art. 104(1), 106(1)
RPBA 2020 Art. 13(2), 16, 15(3), 13(1), 12
EPC R. 142(1)(b), 115(2)

Keyword:

Admissibility of appeal - (no)

Apportionment of costs - severe negligence (no)

Amendment after summons - exceptional circumstances (yes)

Decisions cited:

J 0009/21, T 1045/19, J 0014/19, J 0015/01

Catchword:

Where opposition proceedings have been interrupted under Rule 142(1)(b) EPC, acts done by the parties or the competent body of the EPO during the period of interruption are considered invalid.

An appeal against a decision taken during the interruption is inadmissible, because it has no valid subject eligible for a judicial review.

The RPBA also apply to requests for apportionment of costs under Article 104(1) EPC.

A negligent behaviour may also justify apportionment of costs. However, the negligence must be serious enough to be considered equivalent to wilful misconduct.



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Case Number: T 0967/18 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 14 March 2023

Appellant: Biotempus Pty Ltd
(Patent Proprietor) Suite 01 Level 2
517 Flinders Lane
Melbourne VIC 3000 (AU)

Representative: Script IP Limited
Suite J, Anchor House
School Close
Chandlers Ford
Eastleigh, Hampshire SO53 4DY (GB)

Respondent: Bristol-Myers Squibb Company
(Opponent) Route 206 and Province Line Road
Princeton, NJ 08543-4000 (US)

Representative: Mewburn Ellis LLP
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 5 February 2018
revoking European patent No. 2100615 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairwoman M. Pregetter
Members: O. Lechner
R. Romandini

Summary of Facts and Submissions

- I. The appeal of the patent proprietor lies from the decision of the opposition division issued on 5 February 2018 that European patent No. 2 100 615 did not meet the requirements of the EPC, thus revoking the patent.
- II. The opponent (respondent to the patent proprietor's appeal) submitted a reasoned reply to the statement setting out the grounds of appeal and requested that the appeal be dismissed.
- III. Following the above-mentioned decision of the opposition division and the filing of the appeal, the patent proprietor informed the EPO's Legal Division by submission dated 19 July 2019 that Biotempus Ltd had, on 21 February 2017, assigned the patent to HHKM KH Pty Ltd, which had, on 14 March 2017, changed its name to Biotempus Pty Ltd. The patent proprietor further stated that an external administrator for Biotempus Ltd had been appointed on 26 September 2016 as part of the company entering voluntary administration.

The EPO's Legal Division informed the patent proprietor - with the communication dated 26 July 2019 - that the opposition proceedings had been interrupted in accordance with Rule 142(1)(b) EPC with effect from 11 November 2016 and that the proceedings would be resumed on 4 November 2019.

The opponent responded to the Legal Division's findings and requested an appealable decision should the Legal Division not set aside or amend its findings.

In its decision of 9 July 2021, the Legal Division rejected the opponent's requests:

- (a) to set aside the interruption of the proceedings ordered in the communication of the Legal Division dated 26 July 2019 (erroneously indicated as being 26 July 2021) (main request)
- (b) alternatively, to set 21 February 2017 as the date of resumption of the opposition proceedings (auxiliary request)

IV. The opponent filed an appeal against this decision which was dismissed by the Legal Board of Appeal in a decision dated 23 November 2022 (see J 9/21). In that decision, the Legal Board of Appeal concluded that:

- (a) the Legal Division had "*the power to determine an interruption of the proceedings*"
- (b) the conditions for an interruption under Rule 142(1)(b) EPC were fulfilled
- (c) as a consequence, the interruption provided for under Rule 142(1)(b) EPC occurred directly by operation of law, so that the communication of the Legal Division had only declaratory effect
- (d) setting a declaration of interruption aside, declaring that the proceedings were interrupted from 11 November 2016 to 4 November 2019 or setting a different date as the new date of resumption was not possible because an interruption could be set aside only with *ex-nunc* effect and not retroactive effect

V. The current board issued a communication pursuant to Article 15(1) RPBA providing its preliminary appreciation of the appeal, stating that:

- the board agreed with the Legal Board of Appeal's decision that it was not possible to set aside with *ex-nunc* effect a decision on interruption or to

replace the date of interruption or resumption with a different date

- acts of the parties or the competent body of the EPO during the time of the interruption were to be considered "invalid"
- the appeal was deemed to be inadmissible, and the case had to be remitted to the department of first instance for further prosecution

VI. By letter of 27 February 2023, the appellant (patent proprietor) withdrew its request for oral proceedings.

VII. By letter of 28 February 2023, the opponent maintained the request for oral proceedings and requested an apportionment of cost under Article 104(1) EPC to the extent that the cost incurred by the opponent in preparing and filing the reply to appeal be borne in full by the patent proprietor.

VIII. The board issued a further communication informing the parties that:

- the board understood from the written submissions of the parties that the admissibility and allowability of the opponent's request for apportionment of costs under Article 104(1) EPC was the only issue to be discussed at the oral proceedings
- the opponent had not filed any breakdown/evidence for the claimed amount incurred in the preparation and submission of the response to the appeal

IX. The opponent replied providing a breakdown of the costs incurred.

The patent proprietor replied and requested, for its part, apportionment of costs under Article 104(1) EPC.

X. The oral proceedings before the board took place as scheduled on 14 March 2023 in the absence of the patent proprietor.

At the end of the oral proceedings, the Chairwoman announced the board's decision.

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

(a) Apportionment of the opponent's costs

The opponent's new request was filed only two weeks before the oral proceedings before the technical board. The new request therefore represented an amendment to the opponent's case, and Article 13(2) RPBA applied.

The opponent's allegation that patent proprietor acted negligently before the EPO since it had to have known that it was prevented by legal reasons from continuing the proceedings was not based on any fact.

There was no reason to believe that the voluntary administration and subsequent change in shareholders in any way prevented the representative by legal reasons from continuing the proceedings before the EPO. Neither the patent proprietor, nor its Australian counsel, nor its European representative, nor anyone else acting on behalf of the patent proprietor knew at the time of filing the appeal that the EPO would later decide that it was prevented by legal reasons from continuing the proceedings.

Even the opponent held in its statement of grounds of appeal before the Legal Board of Appeal that the interruption and resumption of proceedings as ordered

by the Legal Division was not lawful (see statement of grounds of appeal in J 9/21 filed on 16 November 2021, section 2.2 on pages 5 and 6). There had been no bankruptcy judgment and no evidence that the action of voluntary administration and the appointment of an administrator had prevented the patent proprietor from continuing in the proceedings by legal reasons (see pages 6 to 7).

The patent proprietor had never requested an interruption of proceedings before the EPO, let alone one with retrospective effect. The patent proprietor had merely requested the recording of a transfer of rights. The interruption of proceedings had been instituted by the Legal Division of its own motion. It was also true that the patent proprietor had never submitted that it had been prevented from continuing in the proceedings since there had been no bankruptcy judgment.

The actual date of filing of a request for recording a transfer by the patent proprietor in the current case compared to entirely separate national proceedings was irrelevant to the issue at hand. The national recordings in Germany and the UK had not been performed by the current European representative but by different national agents in those states, and these recordings had not resulted in any interruption of proceedings in those states.

The complexity of the appeal proceedings in J 9/21 showed that the determination of when and for what duration an interruption of proceedings must be declared was not a straightforward matter, even with the benefit of hindsight.

It therefore had been reasonable for the patent proprietor to believe at the time that it was entitled to continue to act and indeed was required to act (by filing an appeal) if it wished to preserve its rights. The fact that an appeal had proved to be inadmissible did not justify an award of costs if the patent proprietor believed that it had been adversely affected.

If the opponent had succeeded in its appeal to the Legal Board, the current appeal would have been considered admissible. Therefore, there was clearly no abuse of procedure by the patent proprietor in filing this appeal.

Moreover, an apportionment of costs could only be rooted in a party's conduct during the respective proceedings. The patent proprietor's conduct in these proceedings had been entirely proper in merely seeking to defend its legitimate interest in the patent.

(b) Apportionment of the patent proprietor's costs

The opponent's new request for apportionment of costs completely changed the issue to be discussed at the oral proceedings at the last moment and forced the patent proprietor to provide a detailed response to that new issue at extremely short notice. The patent proprietor had the right to assume that the matters to be discussed at the oral proceedings were as set out in the board's communication of 20 January 2023 and that it did not, therefore, need to plan to attend the oral proceedings. It was unfair on the patent proprietor to have to respond at such short notice. It would also be inequitable on the patent proprietor to have to attend oral proceedings and consequently incur additional

costs purely to discuss a request for an award of costs that could have been filed earlier.

The opponent's new request did not address an issue raised by another party, it had been filed extremely late and could clearly have been filed much earlier in these proceedings. The request for apportionment of costs for acts performed several years ago, and filed only two weeks before the date of oral proceedings, represented an amendment to the appeal case pursuant to Article 13(2) RPBA. This late-filed amendment prejudiced the efficient conduct of oral proceedings since the issues to be discussed at the oral proceedings had completely changed at very short notice. The effect of the opponent's request, whether intentional or not, was also to pressure a party with vastly inferior financial resources to the opponent and a known record of financial difficulties, to fail to properly defend its legitimate interests, this being an abuse of procedure.

The filing of this request at such a late stage in the proceedings, without any justifiable reason, therefore made it equitable to order apportionment of costs to the patent proprietor for the costs incurred in filing the reply to the opponent's request.

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

(a) Apportionment of the opponent's costs

The request concerned the costs of preparing the reply to the statement of grounds of appeal only. This request could have been made only in these appeal

proceedings and was filed without delay. The decision of the Legal Board of Appeal J 9/21 had been notified on 16 January 2023; the preliminary opinion of the current technical board issued on 20 January 2023 had triggered the opponent's request for apportionment of costs, which was filed promptly after this opinion had been issued.

Two issues were relevant.

- a) Did the patent proprietor and its representative know that Biotempus Ltd had entered voluntary administration?
- b) Did the patent proprietor's representative know that voluntary administration was a reason preventing the conduct of proceedings in Europe?

The negligent behaviour for which the patent proprietor was liable was also shown by the sequence of events.

When filing the statement of grounds of appeal on 15 June 2018, the patent proprietor was aware that it had entered into voluntary administration and that the authorisation of its representative was legally affected after appointment of the external administrator.

The patent proprietor had kept silent during the entire interruption and resumption of proceedings where these facts were discussed.

The transfer of ownership of EP 2 100 615 from Biotempus Ltd to HHKM KH Pty Ltd and the name change from HHKM KH Pty Ltd to Biotempus Pty Ltd had been recorded at the UK Intellectual Property Office and the German Patent and Trademark Office on 4 May and 20 February 2018, respectively. This was prior to the

patent proprietor filing the appeal against the revocation of the patent and more than one year before Biotempus Pty Ltd requested that Biotempus Pty Ltd be recorded as the proprietor of EP 2 100 615 in the EPO register. The European representatives must have been aware of this before the first-instance decision of the opposition division had been appealed. It was entirely within the sphere of a patent proprietor to inform the EPO of any change in the ownership of the patent. The responsibility for delays in doing so and the consequences lay with the patent proprietor.

Thus, the patent proprietor acted in the proceedings before the EPO despite the fact that it knew or must have known that it was prevented by legal reasons from continuing in the proceedings. This negligence had caused the opponent to incur substantial cost.

Under Article 104(1) EPC, each party to opposition proceedings should, as a rule, bear the costs it has incurred. However, the board might, when a party's costs arise from culpable or negligent actions of another party, order a different apportionment of the costs incurred.

The costs incurred in preparing and filing the reply to the statement of grounds of appeal had arisen from the patent proprietor's failure to act with the care required in proceedings before the EPO. When it requested the change of ownership before the national patent authorities, it had failed to do the same before the EPO. Instead, it filed the notice of appeal and the statement of grounds with the EPO. In doing so, the patent proprietor acted negligently and exacerbated the detrimental consequences of the ensuing interruption.

The patent proprietor's negligent conduct was also reflected in point 5.2 of the decision from the Legal Board of Appeal, J 9/21: "*[...] it was nevertheless unfortunate that the respondent only informed the EPO by letter of 19 July 2019 about having entered into voluntary administration almost three years before. Had the respondent informed the EPO in a more timely manner, the impact of the interruption could have been less severe.*"

Apportionment of costs was justified not only owing to abusive behaviour with awareness but also negligence. The opponent had no proof that the patent proprietor had known that a ground for interruption existed, but the patent proprietor must have known this and negligently ignored it.

(b) Apportionment of the patent proprietor's costs

The patent proprietor's request for apportionment of costs was to be refused. It was filed only on Friday afternoon, meaning that it appeared in the European Patent Register only on the following Monday, i.e. one day before the oral proceedings.

It was late filed and was a further aspect to be considered in the overall behaviour of the patent proprietor.

XIII. The parties' requests relevant to the decision were as follows.

The patent proprietor (appellant) requested:

- that the opponent (respondent)'s request for apportionment of costs be held inadmissible under Article 13(2) RPBA

- if the request was held admissible, that it should not be allowed
- apportionment of the patent proprietor's costs in filing the reply to the respondent's last request for apportionment of costs

The opponent (respondent) requested that:

- the appeal be dismissed
- the costs incurred by the opponent in replying to the statement of grounds of appeal be borne in full by the patent proprietor
- the board reject the patent proprietor's request for apportionment of costs as put forward in its letter dated 10 March 2023

Reasons for the Decision

1. Parties not represented at oral proceedings

The patent proprietor had withdrawn its request for oral proceedings in writing and was not represented at the oral proceedings. The proceedings were continued in its absence, and the patent proprietor was treated as relying on its written case in accordance with Rule 115(2) EPC and Article 15(3) RPBA.

2. Admissibility of the appeal

2.1 According to the Legal Board of Appeal's decision J 9/21 (see in particular Reasons 7 and 8), it is not possible to set aside with *ex-nunc* effect a decision on interruption or to replace the date of interruption or resumption with a different date. The Legal Board of Appeal therefore considered, for this reason alone, not allowable both the main request, i.e. that the decision

of the Legal Division and the interruption of the proceedings be set aside and that the case be remitted to the Legal Division, and the auxiliary request, i.e. that the decision of the Legal Division be set aside and that 21 February 2017 be set as the date of resumption of the proceedings.

The current board agrees with the conclusion of the Legal Board of Appeal that it is not possible to set aside with *ex-nunc* effect a decision on interruption. It also agrees with the Legal Board's reasoning. In the current proceedings, it is only necessary to decide on the effects that the interruption has on the appeal.

- 2.2 As correctly explained by the Legal Board of Appeal (J 9/21, Reason 3.3), in accordance with previous decisions of the boards, where the proceedings have been interrupted under Rule 142(1)(b) EPC, acts done by the parties or the competent body of the EPO during the period of interruption are considered "invalid".

Categories may be borrowed from legal national traditions to argue whether they are invalid, devoid of effect or even non-existent. But irrespective of this qualification issue, the result and impact on appeals lodged against decisions taken during an interruption remain the same: the appeal and the appeal proceedings have no valid subject eligible for judicial review.

In line with established case law, an admissible appeal requires the existence of an appealable decision. Thus, the appeal in question must be regarded as not satisfying the requirements set out in Article 106(1) EPC.

Hence, the board considers the appeal to be inadmissible.

3. *Reimbursement of the appeal fee*

Under established case law (see, for instance, J 15/01, Reason 3), where an appeal has been duly filed, as in these proceedings, but is deemed to be inadmissible, it is not possible to reimburse the appeal fees.

4. *Apportionment of costs - Article 104(1) EPC*

Both parties have filed a request for apportionment. Each request - to the board's understanding - had been considered late filed and not allowable by the opposing party. These two issues are discussed separately below.

4.1 *Admittance*

4.1.1 *Request of the opponent*

The opponent has argued that the rules of procedure do not apply to requests for apportionment. Hence, these requests may be filed at any time. Even if the rules applied, according to the opponent, its request did not constitute an amendment of its case, so it was not subject to Article 13(2) RPBA.

The board disagrees. There is no textual reason why the request for apportionment filed under Article 16(1) RPBA must not be considered part of an appeal case, which is implicitly defined in the rules of procedure and includes all "*requests, facts, objections, arguments and evidence*" presented by a party in the appeal proceedings (see Article 12(3) RPBA). The generic term "requests" covers requests on the costs of

the proceedings. Therefore, adding such a request changes the appeal case.

Even if the opponent's view was correct and requests for apportionment were not subject to the RPBA, this would result in a lacuna in the procedural framework which the board should fill. This board sees no reason why it should not apply Articles 12 and 13 RPBA by analogy to the request at hand. The application of the RPBA to this request would not lead to any practical or dogmatic difficulties or unfair results. If the event or conduct which triggers the request took place after the statement of grounds and the reply, the board has the discretion to admit such a request under Article 13(1) RPBA. If the event or conduct which triggers the applicant's request takes place after the time limit referred to in Article 13(2) RPBA, this could constitute an exceptional circumstance within the meaning of that provision.

In the current case, the board had serious doubts as to whether the request could be admitted under Article 13(2) RPBA.

The respondent did not give any reason when making the request, left alone a cogent one, why this request was filed only two weeks before the oral proceedings. These reasons were only explained for the first time at the oral proceedings and were not convincing. The request could have been made earlier, for instance, when the Legal Division decided to suspend the proceedings. The effect of this decision on the proceedings was obvious from the outset and was also the reason for appealing against it.

However, in view of the lack of case law on the applicability of the RPBA to a request for apportionment indicated by the opponent, and as the request in question was not allowable, the board preferred to decide on the merits. Therefore, the request was admitted into the proceedings.

4.1.2 *Request of the patent proprietor*

The patent proprietor's request was filed in due time. The first procedural opportunity to file it (as well as to object to the opponent's request) was the oral proceedings. The patent proprietor anticipated this reaction by filing a written statement before the oral proceedings. The reason for this was admittedly that the patent proprietor did not intend to participate in the oral proceedings. Nevertheless, anticipating new requests or submissions in writing makes the preparation of the oral proceedings for both the board and the other party easier. Therefore, the arguments put forward by the opponent at the oral proceedings that the request and reply were filed late or that the conduct of the patent proprietor was problematic also in that regard are not convincing.

4.2 *On the merits*

4.2.1 Under Article 104(1) EPC, "*[e]ach party to the opposition proceedings shall bear the costs it has incurred, unless the Opposition Division, for reasons of equity, orders, in accordance with the Implementing Regulations, a different apportionment of costs*". Under Article 16 RPBA subject to Article 104(1) EPC, the board may on request order a party to pay some or all of another party's costs. In accordance with the second sentence of Article 16(1) RPBA, such costs may include

those incurred by amendment to a party's appeal case, extension of a period, acts or omission prejudicing the timely and efficient conduct of the oral proceedings, failure to comply with a direction of the board, and abuse of procedure. The list is not exhaustive.

- 4.2.2 From the wording of Article 104(1) EPC, the general rule governing proceedings before the EPO is that each party must bear the costs it has incurred. As an exception to this principle, a party may be ordered to pay part of the costs of another party on grounds of equity. Since this is understood as an exception of a more general principle, it applies only in exceptional cases (see also T 1045/19, Reason 8).

As the case law correctly states, "*Article 16(1) RPBA 2020 does not regulate in which cases a different apportionment of costs is justified*" (T 1045/19, Reason 7). The provision has a different function: it lists "*situations for which specific costs may be included in the apportionment*". Indeed, the question "*whether a different apportionment of costs is warranted is governed by Article 104(1) EPC which requires that, in order to find an exception to the rule that each party bears the costs it has incurred, "reasons of equity" must exist*" (T 1045/19, *ibidem*). However, it is clear that at least the mention of "abuse of procedure" in Article 16(1)(e) RPBA does more than specify which costs may be taken into account. It provides a case where the apportionment would be justified on the merits under Article 104(1) EPC.

- 4.2.3 From the exceptional nature of the cost apportionment provided under Article 104(1) EPC and the reference to the abuse of procedure contained in Article 16(1)(e) RPBA, the board draws the following inference. More

than just a mistake made by a party or a negligent delay in a procedural act which may occur in a proceedings and which may lead to additional activities and costs is required for the order of a different apportionment. The abuse of procedure refers to such extreme situations where "*the exercise of rights is predominantly intended to cause damage and other legitimate purposes take a back seat*" (J 14/19, Reason 13.1). Therefore, while the board considers that negligent behaviour may also justify apportionment, the negligence must be serious enough to be considered equivalent to wilful misconduct.

4.3 *Apportionment of the opponent's costs*

The opponent's request is not allowable for two reasons:

- 4.3.1 First, there is no evidence of an abusive behaviour of the patent proprietor. The patent proprietor did not request an interruption. The latter was ordered *ex officio* by the Legal Division under Rule 142(1)(b) EPC, after the patent proprietor had requested the registering of a change of ownership.

It is not apparent that the patent proprietor was aware that the request for the change of ownership with the relevant information concerning the voluntary administration would have triggered an interruption of the proceedings. There is no evidence that the patent proprietor was aware that the legal situation created under Australian law required an interruption in the EPO proceedings. There is also no evidence that it deliberately waited for the outcome of the opposition proceedings to provide information which would have led to an interruption.

Finally, there is no evidence on file that (i) the patent proprietor's representative before the EPO knew that the patent proprietor had entered voluntary administration and (ii) the national records of a transfer in Germany and the UK were performed by the European representative before the EPO. According to the patent proprietor, these national changes of ownership records had not resulted in any interruption of proceedings in those states. The board has no evidence to the contrary.

- 4.3.2 Second, the board is not convinced that the failure to recognise the implications of the entry into voluntary administration for the EPO proceedings constitutes a serious and gross lack of diligence on the part of the patent proprietor.

As the proceedings before the Legal Division and the Legal Board of Appeal confirmed, a complex analysis was required to properly assess the legal consequences. It was necessary to examine the interaction between Australian domestic rules and EPC provisions and to assess whether voluntary administration (without a bankruptcy judgment) under Australian law could be considered equivalent to an action taken against the patent proprietor's property which prevented it by legal reasons from continuing in the proceedings (Rule 142(1)(b) EPC). This assessment was not straightforward. The external administrator's appointment was voluntary. And there was no bankruptcy judgment.

As argued by the patent proprietor and also reflected in decision J 9/21 (see Reason 2.2), even the opponent was of the opinion that (i) the appointment of an

external administrator did not result in the patent proprietor being prevented by legal reasons from continuing in the proceedings, (ii) an interruption was not justified and (iii) Rule 142 EPC was not applicable to that scenario.

In the current proceedings, the opponent argues the opposite. The European representative should have known that it was prevented from continuing because Rule 142 EPC is clear in this respect. At the oral proceedings, when asked to explain these contradictions, the opponent stated that the main reason for the appeal against the decision of the Legal Division was to make clear that the Legal Division should not have ordered an interruption without hearing the parties affected by that decision. However, the case made in the two proceedings remains contradictory.

- 4.3.3 The board concludes that the patent proprietor's conduct in failing to notify the EPO of its entry into voluntary administration in the circumstances described above was the result of an error of assessment. This error was not due to such a gross lack of care that could be considered equivalent to wilful misconduct.
- 4.3.4 The conclusion drawn by this board is in line with the assessment of the Legal Board of Appeal. The Legal Board of Appeal did not consider the patent proprietor's conduct to be abusive. It merely stated that *"it was nevertheless unfortunate that the respondent only informed the EPO by letter of 19 July 2019 about having entered into voluntary administration almost three years before. Had the respondent informed the EPO in a more timely manner, the impact of the interruption could have been less severe"* (see J 9/21, Reason 5.2).

4.3.5 In view of the above considerations, the opponent's request for apportionment of costs under Article 104(1) EPC is refused.

4.4 *Apportionment of the patent proprietor's costs*

The patent proprietor's request for an apportionment of costs is not allowable for the following reasons. The request is based on the late filing of the opponent's request.

More specifically, the patent proprietor considers that it was an abuse of procedure to file a request only two weeks before the oral proceedings which could have been filed earlier in the proceedings. The board agrees that the request could and should have been filed earlier. However, in cases where there is an unjustified delay in filing a request, the question is whether this conduct results in additional costs that would not have been incurred if there had been no delay. In the current case, there is no evidence that this occurred. Indeed, the patent proprietor would have had to prepare the submissions filed on 10 March 2023 in any event. The board has no evidence that higher costs were incurred due to time pressure in the current case. Consequently, the patent proprietor's request for apportionment of costs is also rejected.

Order

For these reasons it is decided that:

- The appeal is inadmissible.
- The requests of the respondent (opponent) and the appellant (patent proprietor) for a different apportionment of costs under Article 104 EPC are refused.

The Registrar:

The Chairwoman:



I. Aperribay

M. Pregetter

Decision electronically authenticated