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Datasheet for the decision of 7 February 2022

Case Number: T 1310/18 - 3.3.09

Application Number: 12719405.8

Publication Number: 2688427

IPC: A23C11/10, A23L2/52, A61K31/575, A23L33/11

Language of the proceedings: EN

Title of invention:
SERUM CHOLESTEROL LOWERING DRINK

Patent Proprietor:
Raisio Nutrition Ltd

Opponent:
BASF SE

Headword:
Serum cholesterol lowering drink/RAISIO

Relevant legal provisions:
EPC Art. 52, 54, 54(4), 54(5), 56, 83, 84, 123(2), 104(1)
RPBA 2020 Art. 16(1), 16(1)(c)

Keyword:
Main request: Clarity - (yes), added subject-matter - (no), sufficiency of disclosure - (yes), non-patentable subject-matter - (no), novelty - (yes), inventive step - (yes)
Apportionment of costs - (yes)

Decisions cited:
T 0026/86, T 0258/13

Catchword:

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Beschwerdekammern

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Case Number: T 1310/18 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 7 February 2022

Appellant: (Opponent)	BASF SE Carl-Bosch-Str. 38 67056 Ludwigshafen (DE)
Representative:	BASF IP Association BASF SE G-FLP-C006 67056 Ludwigshafen (DE)
Respondent: (Patent Proprietor)	Raisio Nutrition Ltd Raisionkaari 55 21200 Raisio (FI)
Representative:	Carpmaels & Ransford LLP One Southampton Row London WC1B 5HA (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 23 March 2018 concerning maintenance of the European Patent No. 2688427 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	A. Veronese
	D. Rogers

Summary of Facts and Submissions

I. The appeal was filed by the opponent against the decision of the opposition division finding that European patent No. 2 688 427, as amended in accordance with auxiliary request 2 filed during the oral proceedings before the opposition division, meets the requirements of the EPC.

II. With its notice of opposition, the opponent had requested that the patent be revoked in its entirety on the grounds under Article 100(a) (lack of novelty and lack of inventive step) and Article 100(b) and (c) EPC.

III. Claim 1 of auxiliary request 2 found allowable by the opposition division reads:

"*1. A drink portion with serum LDL cholesterol lowering effect, wherein the drink portion comprises 0.8-15 g, preferably 1.0-15 g, more preferably 1.5-12 g, still more preferably 1.8-10 g, and most preferably 2.0-8.0 g total plant sterol and plant stanol equivalents, of which equivalents*

a) 0.10-3.0 g, preferably 0.15-3.0 g, more preferably 0.18-2.5 g, still more preferably 0.20-2.0 g, and most preferably 0.20-1.5 g are in free form, provided that 5.0-25 %, preferably 6.0-23 %, more preferably 7.0-20 %, still more preferably 8.0-18 %, and most preferably 10-15 % by weight are in free form, and

b) the rest of the equivalents are in esterified form,

- *2.5-15 g, preferably 3.0-12 g, more preferably 4.0-12 g, still more preferably 4.5-12 g, even more preferably 5.0-12 g, and most preferably 6.0-12 g triglyceride fat,*
- *at least one additional edible ingredient, and*
- *water.*"

IV. The documents submitted during the opposition proceedings included:

D1 (=D6): WO 2010/084240 A1
D2: WO 2005/013707 A1
D3: WO 2009/068651 A1
D4: WO 2009/013395 A2
D5: US 2008/261927 A1
D9: WO 2007/057511 A1
D10: WO 2009/010641 A2
D16: WO 2009/071737 A1
D22: US 2010/0272858 A1
D27: EP 911385 A1
D35: WO 2004/093571 A1
D36: DE 10063288 A1
D38: WO 2004/014141 A1
D40: N. St. Jean, "Lowering Cholesterol: through the use of Plant Sterols and Stanols", publication from University of Rhode Island, 2008.

V. In its decision, the opposition division found *inter alia* that, as far as auxiliary request 2 was concerned:

- the claimed invention was sufficiently disclosed: the skilled person would have been able to prepare

the composition of claim 1 and the pack of claim 7 and to determine cholesterol levels

- claim 10 met the requirements of Article 52 EPC

- the claimed invention was novel over D16 and D35, and

- the claimed subject-matter involved an inventive step considering either D1 or D27 as the closest prior art and taking into account the teaching of the other cited prior-art documents.

VI. The opponent (appellant) contested the opposition division's decision and requested oral proceedings on an auxiliary basis. The appellant's arguments which were relevant to the present decision were as follows:

- certain expressions, such as "a pack containing a drink" in claim 7, "ensured serum LDL cholesterol lowering effect" in claim 9 and the overlap between certain preferred ranges of claim 1 with the ranges of some dependent claims, were unclear

- claims 10 and 11 contained non-technical subject-matter which was excluded from patentability under Article 52 EPC

- claim 15 mixed the claim formats provided for by Articles 54(4) and 54(5) EPC, and was thus not allowable

- the ranges in claims 2 and the use of claim 15 added originally undisclosed subject-matter

- the claimed invention was not sufficiently disclosed: the claims encompassed compositions which could not be prepared because: - incompatible ranges were claimed; - the size of the drink was not specified and could be insufficient to accommodate the claimed ingredients; - the type of percentage (weight or moles) was not indicated; - it was not possible to determine whether the compositions of the examples corresponded to those claimed; - measuring LDL cholesterol and assessing the claimed effect involved an undue burden; - the claimed snack and the powder were insufficiently described

- the claimed subject-matter was not novel over D2 to D6, D9, D16/D22, D35; although the amount of triglycerides and free and esterified sterols and stanols was not explicitly disclosed in the prior-art documents, it could be calculated making certain assumptions

- the claimed invention did not involve an inventive step over D1 or D27 as closest prior art or, alternatively, over one of D2 to D4, D36, D38 & D40 as closest prior art; in particular, starting from D1 or D27, the choice of the degree of esterification of the sterols and stanols and the use of triglycerides would have been obvious; the only test in the patent was insufficient to substantiate the purported effect in a drink.

VII. The arguments of the proprietor (respondent) which are relevant to the present decision were as follows:

- the ranges in claim 2 were based on a combination of the general and the most preferred ranges of

claim 1 as filed; claim 15 was based on page 3 and 15 as filed

- there was no evidence that the skilled person would not have been capable of preparing compositions of suitable size comprising the claimed ingredients and of measuring their serum LDL cholesterol lowering effect; the skilled person would have avoided illogical construction of the claims; the objections concerned at most clarity, not sufficiency of disclosure

- claim 15 was limited to a medical use of the claimed composition and did not contravene Articles 54(4) and 54(5) EPC

- all novelty attacks were based on a wrong interpretation of the wording "equivalents" used in claim 1 and on unjustified assumptions as to the volume, density and nature of the ingredients of the compositions of the prior art; all the appellant's calculations had to be disregarded; none of the cited documents anticipated the claimed subject-matter

- there was a notable absence of reasoned and structured argumentation in the appellant's inventive-step attacks; D1 was the closest prior art because it related to a single-dose snack drink; the claimed subject-matter differed from the teaching of D1 in the amount of free and esterified sterols and stanols and triglycerides used; as shown in example 3, drink 3, comprising the claimed combination of ingredients, was more effective in lowering LDL cholesterol compared with a drink similar to that of example 6 of D1; the underlying

problem was to provide an in-between meal drink with enhanced cholesterol lowering effect; none of the cited documents taught providing a combination of the claimed ingredients in the claimed ratio: the claimed subject-matter thus involved an inventive step

- by initially announcing that it would be participating in the oral proceedings and then announcing, only late in the afternoon on the eve of the scheduled oral proceedings, that it would not be attending, the appellant had caused the respondent unnecessary costs, which had to be apportioned.

VIII. The appellant had requested oral proceedings to be held, on an auxiliary basis. On 9 February 2021, the board issued a summons to oral proceedings scheduled for 10 December 2021. In an electronic letter received at 16:34 on 9 December 2021, the appellant informed the board that it would not be participating in the oral proceedings, and requested that a decision be taken on the basis of the state of the file. Subsequently, on the same day, the board informed the parties that the oral proceedings had been cancelled. In a letter dated 10 December 2021, the respondent requested costs under Article 104 EPC and Rule 88 EPC. This letter was forwarded to the appellant on 20 December 2021.

Requests

IX. The appellant requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

X. The respondent requested that the appeal be dismissed, that the patent be maintained in accordance with auxiliary request 2 found allowable by the opposition division (main request) or, alternatively, on the basis of one of auxiliary requests 1 to 3 filed with the reply to the appellant's statement of grounds of appeal.

The respondent also requested a different apportionment of costs pursuant to Article 104 and Rule 88 EPC.

Reasons for the Decision

Main request

1. *Clarity*

1.1 The appellant referred to the requirement of clarity in the context of some "preliminary remarks" in item 6.8 of the statement setting out the grounds of appeal. Clarity is not a ground for opposition. All the features considered unclear by the appellant, namely the expressions "a pack containing a drink" in claim 7, "ensured serum LDL cholesterol lowering effect" in claim 9 and the overlap of certain of the preferred ranges of claim 1 with some ranges of dependent claims 2, 4 and 5, were already present in the granted claims. Thus they cannot be examined for compliance with the requirements of clarity (Article 84 EPC and Case Law of the Boards of Appeal of the European Patent Office, 9th edition, 2019 ["Case Law"], section II.A.1.4).

2. *Article 52 EPC*

2.1 Claim 10 defines a drink and a pack containing the drink, wherein the consumer is advised to use the drink as a snack. The board concurs with the appellant that this advice is non-technical information. However, as noted by the respondent, claim 10 relates to a drink portion comprising different ingredients, i.e. to a product defined by technical features. The EPC does not prohibit the patenting of inventions consisting of a mix of technical and non-technical features (see T 26/86, reasons, point 3.4). Thus claim 10 does not contravene Article 52 EPC. The same applies to claim 11 even if it is assumed that, as alleged by the appellant, the feature "snack" does not have a technical character.

3. *Format of claim 15 and Articles 54(4) and 54(5) EPC*

3.1 According to the appellant, claim 15 can neither be seen as a "first" nor as a "further" medical use claim, and for this reason is not allowable under Articles 54(4) and 54(5) EPC. This argument is not persuasive. Reading claim 15, the skilled person will understand that:

- this claim is directed to a product intended for treating subjects in need of their serum LDL cholesterol being lowered, and that

- the treatment is of therapeutic nature.

3.2 This interpretation is in line with the teaching of the description, see e.g. paragraphs [0002], [0013], [0067] and [0071], which refer to LDL as a risk factor for cardiovascular disease and to the treatment of

hypercholesterolaemic subjects. Whether the use of sterols for this purpose was already known, and/or the fact that the drink portion contains fats, which might not have a therapeutic activity, does not change this conclusion. The issue of whether claim 15 relates to a "first" or a "further" medical use is also irrelevant. Indicating the intended use of the claimed composition in any case does not render the claim unallowable as such.

4. *Added subject-matter*

4.1 Objections were raised against claims 2 and 15.

4.2 Claim 2 defines the total amount of sterol and stanol equivalents, the amount of them in free form and the amount of triglyceride fat. As stated by the respondent, the definition in claim 2 is based on claim 1 as originally filed. The claimed subject-matter has been limited, combining the lower value of each of the general ranges of the original claim 1 with the highest value of the most-preferred ranges. Thus, as decided by the opposition division, the amendments do not create originally undisclosed subject-matter.

4.3 Claim 15 indicates that the claimed drink is for use as a medicament for lowering serum LDL cholesterol. The application as filed teaches that the invention relates to a method for lowering LDL cholesterol and preventing cardiovascular diseases in hypercholesterolaemic subjects (page 1, lines 7 to 10; page 3, lines 3 to 5; page 17, line 4, and claim 15 as filed). It is thus clear that it relates to a medicament for lowering serum LDL cholesterol. Thus claim 15 does not create originally undisclosed subject-matter either (Article 123(2) EPC).

5. *Sufficiency of disclosure*

5.1 The appellant argued that claim 1 encompassed drink portions which could not be prepared by a skilled person. In its opinion, the claim defined incompatible ranges of ingredients and did not indicate the size of the drink and how the percentages of the ingredients had to be calculated, e.g. by weight or in moles. Furthermore, it encompassed drink portions having a size which was insufficient to accommodate the largest claimed amounts of ingredients.

5.2 The board does not agree with these conclusions. As noted by the respondent, claim 1 requires, first of all, the drink portion to comprise from 0.8 to 15 g of total plant sterol and plant stanol equivalents. The two additional conditions a) and b) go on to define the amount of total plant sterol and plant stanol equivalents that must be in free form. These are expressed in terms of absolute weight, with the proviso that a certain percentage by weight be present in the composition.

5.3 The skilled person would rule out illogical interpretations of the claims. For example, one where the composition comprises 0.8 g of total sterol equivalents, wherein 3 g are in free form, or where the 5% to 25% fraction of free sterol is a sub-fraction of a previously-defined fraction of free sterol. The skilled person would also understand that, as far as the amounts of free sterol/stanol defined in points a) and b) are concerned, claim 1 requires condition a) to be met and, if this does not already result in condition b) being met, requires proviso b) also to be applied. The fact that the ranges calculated in

accordance with the two definitions a) and b) do not completely overlap may, at most, be considered an issue of lack of clarity of the granted claims, but not of lack of disclosure.

5.4 Claim 1 does not define the size of the claimed drink portion, but suitable sizes, of e.g. 50 to 500 ml, are mentioned in paragraphs [0021] to [0023]. The appellant argued that the claims encompass compositions having a small volume, which cannot accommodate the maximum claimed amounts of relevant ingredients, and/or cannot be liquid or drinkable. However, the skilled person would not consider preparing these compositions either.

5.5 The appellant's objections appear to be mere attempts to tear down the invention by deliberately focusing on embodiments devoid of technical sense. As such, these objections are unconvincing.

5.6 As decided by the opposition division, it is possible to prepare compositions meeting the technical requirements of claim 1, see e.g. the composition providing the results shown in table 6 mentioned by the respondent. Similar considerations apply to the dependent claims. Even if some claims, e.g. claim 4, do not specify what percent, in terms of weight or moles, is intended, it is evident from claim 1 and paragraph [0032] that the percentage must be calculated relative to weight.

5.7 The appellant has argued that measuring serum LDL cholesterol levels and assessing whether these levels are reduced would involve an undue burden. The board does not find this argument persuasive either. As observed by the respondent, it is routine practice in the medical field to measure the levels of LDL

cholesterol. The skilled person would therefore know how to carry out this measurement, to assess the significance of the results and to determine whether the claimed drink effectively decreases LDL cholesterol.

5.8 The appellant's additional arguments that:

- it was impossible to distinguish the "inventive effect" according to the invention from that of the prior art and to determine whether example 1 and the comparative compositions fell within the claimed scope

- the comparative drink Doornboos® was insufficiently described

- the ranges defined in some dependent claims could not be combined with some of those which are said to be preferred in the independent claim

- the powder of claim 14 did not meet the requirements of previous claims (e.g. contain water)

- the expressions "snack", "pack", "ensured" were unclear

relate at most to clarity issues already present in the granted claims and not to sufficiency. For these reasons, it is concluded that the claimed invention is sufficiently disclosed (Article 83 EPC).

6. *Priority right*

6.1 The appellant considered that the claimed matter did not validly claim the priority right. Nonetheless, it conceded that there is no intervening prior art. Thus there is no need to discuss this issue.

7. *Novelty*

The appellant stated that it was relying in particular on D16 (D22), D1, D5 and D35 for its novelty attacks. However, it then also referred to D2, D3, D4, D6 and D9.

7.1 Documents D16/D22: D16 and D22 belong to the same patent family and disclose the same subject-matter. Thus the attacks based on these documents are dealt with together.

7.2 Claim 1 of the opposed patent requires a combination of 3 components to be present in specific amounts:

- a certain amount of total plant sterol and stanol equivalents, of which a specified part is in free form

- the remainder being in esterified form, and

- triglycerides, in a certain amount.

7.3 D16 and D22 disclose a drink comprising berry juice, water and oat-based material. In order to provide the sterol/stanol component according to the patent, the appellant relies on a combination of claim 1 of D16 and D22 with:

- claim 13, disclosing sterols and stanols

- claim 14, disclosing the additional presence of their esters in an amount of 0.1% to 10% by weight of the drink

- page 9 of D16 (paras. [0052] to [0054] of D22), which states that at least 60%, 85% or 95% of the sterols/stanols are in esterified form and that esters of omega-3 fatty acids are preferred.

7.4 To arrive at the claimed sterol/stanol component, the skilled person therefore has to:

- select plant sterols/stanols in free form, in the required amounts, from among the ingredients listed as optional components in claim 13

- include a sterol/stanol ester mentioned as a further optional component in claim 14, and select a relevant amount of this ester from the list of ranges mentioned in that claim.

7.5 The appellant has presented many calculations based on the combined disclosures of the aforementioned parts of D16 and D22 in order to show that the disclosed amounts of the sterols/stanols fall within the claimed scope. However, as noted by the respondent, these calculations contain numerous unjustified assumptions: the drink size, the identity of the sterol and stanol and/or of the fatty acid, the density of the composition, and the notion that any non-esterified sterol/stanol is necessarily in "free" form. In particular, the assumption that the drink has a specific size, which is inferred from sizes mentioned in the opposed patent,

appears to be totally arbitrary and not based on a direct and unambiguous disclosure in D16 and D22. The calculations shown in annex 1, filed by the respondent, confirm that, applying similar assumptions, the drinks of the examples of D16/D22 would fall outside the claimed scope. It also appears from the appellant's own calculations that a drink having an ordinary size does not necessarily contain the required amounts of sterols: compare e.g. the calculated total amount of sterol (15.8 g-18.29 g) of the drink having a size of 212 ml shown on page 53 of the grounds of appeal with the claimed range of 0.8 g to 15 g.

7.6 The appellant's argument that, since the drink size is not specified in claim 1, novelty should be assessed taking into account any possible foreseeable size of a drink portion is not convincing: the underlying reasoning is tainted by hindsight and disregards the requirement that the prior art must provide a direct and unambiguous disclosure of the claimed subject-matter. Thus, as decided by the opposition division, D16 and D22 do not disclose the subject-matter of claim 1 and of the following claims, which are more limited in scope.

7.7 Document D35: The appellant considered that claims 1 and 7 were not novel over example 7 of D35, although the amount of triglyceride and the degree of esterification of the sterol are not disclosed in this example.
The appellant assumed that the disclosure of "milk" in Example 7 meant "normal milk" and that a milk having a "full fat" content of from 3.5 to 3.9% was used. These assumptions are not substantiated by a direct and unambiguous teaching. To the contrary, as noted by the respondent, the use of a high-fat milk goes against the

teaching of D35, which focuses on the provision of low-fat products having acceptable taste, see passage bridging pages 4 and 5.

7.8 The appellant referred to the degree of esterification of at least 60% mentioned on page 6, last paragraph to calculate the amount of free sterol in example 7. However, this open range does not necessarily imply the disclosure of the claimed amount of free sterol. Furthermore, as noted by the respondent, the stanol esters produced according to the method mentioned on page 7, lines 21-22, by cross-reference to US 6,174,560 have a degree of esterification of 98%. For these reasons it cannot be assumed that the drink of example 7 contains the claimed amount of free sterol.

7.9 Document D1 (identical to D6): claim 1 of D1 discloses beverages comprising sterol/stanol esters, but does not specify the amount of triglycerides. Page 8, last paragraph mentions dairy milk, rice milk and soy milk. However, these milks can contain various amounts of triglycerides and, as noted by the respondent, all the milks described in the examples are fat-free. Furthermore, D1 mentions open ranges when defining the amount and the degree of esterification of the sterol and stanol esters, see pages 5 and 7. The appellant considered that the claimed amounts of free and esterified sterols could be calculated from these ranges, referring to the calculations provided when dealing with D16. However, since, as concluded above, the calculations rely on wrong assumptions, the claimed amounts are not disclosed.

7.10 Document D5: example 5 of D5 discloses a composition comprising "Selin®". However, the appellant conceded that the degree of esterification of this product was

not available at the date of filing of D5. The appellant also argued that D5 cites D13 and D27 as examples for the preparation of suitable sterol esters. However, these documents mention a degree of esterification of 98%, which is incompatible with the claimed amount of free sterol.

7.11 Document D2: D2 describes compositions comprising sitosterols, which can possibly be in ester form. The appellant drew attention to documents cited in D2, describing methods for achieving a degree of esterification of at least 98% or 99%. However, these references could at most imply that the amount of free sterol is 2% of the total sterol, i.e. outside the claimed range. Furthermore, the appellant's objections are based on the same calculations presented when dealing with D16 which, as explained above, are based on wrong assumptions. The compositions of D2 are also not necessarily drinks.

7.12 Document D3: D3 does not specify the amounts of free and esterified sterols. The appellant referred to sterols described in the examples, which it assumed to have the average degree of esterification of commercial products, namely 97% or 98%, and again to the calculation presented when dealing with D16. Thus the same considerations as for D2 apply.

7.13 Document D4: example 1 of D4 describes a composition comprising 3.4% of stanol ester. The appellant calculated the amounts of triglycerides contained in the composition, assuming *inter alia* that the water content in the concentrates is 50% and that the fat content of the purées is those of the raw ingredients, despite the method of manufacture of the purées not being disclosed. Thus the calculations are not

reliable. The amount of free sterols cannot be determined either.

7.14 Document D9: example 1 of D9 discloses a soy drink comprising sterol esters. However, the size of the drink portion and the amount of free sterols are not mentioned. As with the previous documents, the appellant refers to the degree of esterification mentioned in documents cross-referenced in D9 and makes assumptions which are not substantiated to infer the amount of free sterols. Thus, again, the attack fails.

7.15 On page 67 of the grounds of appeal, the appellant considered that D11 "could" also anticipate the claimed invention, but no feature analysis is carried out, so the objection is unsubstantiated and is disregarded.

7.16 For these reasons, it is concluded that the subject-matter of claim 1 is novel over the cited prior-art documents. The same applies to the remaining claims, which are more limited in scope (Article 54 EPC).

8. *Inventive step*

Claimed invention and closest prior art

8.1 The claimed invention relates to the provision of a drink that lowers serum LDL cholesterol. The patent states that earlier studies show that the cholesterol lowering efficacy of sterols is not optimal if these compounds are not taken with a meal. Consumers were thus advised to consume cholesterol lowering drinks containing sterols with a meal, although many would have preferred to consume them between meals, as snacks. The drink according to the invention is said to lower LDL cholesterol when consumed between meals as a

snack (see paragraphs [0003], [0004], [0007], [0013], [0019] and [0077] of the patent and the references to the prior art).

8.2 In the decision under appeal, the opposition division decided that either D1 or D27 was the closest prior art, see page 9, second paragraph.

8.3 The board agrees with the respondent that D1 rather than D27 is the closest prior art because, as with the claimed invention, it relates to the provision of a cholesterol lowering single-dose drink to be used preferably as an "in-between meal beverage", i.e. as a snack, see D1, page 3, lines 26-28.

8.4 D27 relates to a method for making a mixture of stanol and stanol esters which can be used in foods to reduce cholesterol. However, D27 is not concerned with the provision of drinks, nor with enhancing the cholesterol lowering effect of in-between meal snacks. The foods, which are said to be "fat-based", are mentioned in paragraph [0020]. No mention whatsoever is made of drinks or beverages, let alone drinks for use as a snack between meals. All exemplified compositions are in the form of spreads and dressings, i.e. foods to be consumed as part of a meal. Therefore D27 is not the closest prior art.

8.5 In its statement setting out the grounds of appeal, the appellant referred to other documents which in its opinion could also be considered as "the closest prior art", in particular D2, D3, D4, D36, D38 and D40. However, no reasoning was provided as to why any of these documents should represent a better starting point than those considered as the closest prior art by the opposition division in the decision under appeal.

Furthermore, as noted by the respondent, in the statement of grounds of appeal there is a notable absence of any reasoned/structured argumentation as to why any of these documents represents the closest prior art, what the underlying problem is and why, when confronted with that problem, the skilled person would combine the teaching of one document with another to arrive at the claimed subject-matter. For these reasons, none of these documents can be considered the closest prior art for an inventive-step attack.

Distinguishing features

8.6 D1 discloses a beverage for lowering serum total and LDL cholesterol levels comprising sterol esters. However, D1 does not disclose:

- the claimed amount of triglycerides

- the claimed amount of total plant sterol/stanol equivalents, of which the specified amount is in free form and the rest in esterified form; free stanols or sterols are not mentioned either.

Technical effect

8.7 As submitted by the respondent, the drink C700 disclosed in example 1 of the patent is close to the formulations of D1, and in particular to example 6 of D1. This drink is thus suitable for representing the teaching of the closest prior art. Drink C700 contains triglycerides, in an amount lower than that claimed, stanol esters, and does not comprise free stanols, see tables 1 and 2 on page 9.

8.8 As shown in tables 3 and 6 of the patent, drink 3, which has both a triglyceride level falling within the scope of the claims and the required amounts of free stanols and stanol esters, is significantly more effective than drink C700 in reducing cholesterol levels. Drink 3 is also more effective than drink 1 (comprising free stanols, but a lower amount of triglycerides), and drink 2, comprising a large amount of triglycerides, but no stanols. All the drink portions were administered to subjects in fasted state, i.e. without a meal. These results make it credible that the claimed compositions, comprising stanols and their structurally and functionally related sterols, are more effective than the compositions of the closest prior art, and furthermore that the selection of the claimed ingredients, in the claimed amounts, is associated with this improvement.

Problem to be solved

8.9 Taking into account the results, the objective technical problem, as argued by the respondent, is the provision of an in-between meal drink having an enhanced cholesterol lowering effect.

8.10 The appellant argued that the results observed after administering drink 3 were not sufficient to demonstrate that the purported technical effect could be achieved over the claimed scope. However, no evidence or convincing arguments have been provided to support this allegation. The argument that no effect was achieved with a reproducible drink is not convincing either. Drink 3 is reproducible and what counts for inducing the effect is the amount of administered ingredients, rather than the size of the drink in which they are dispersed.

Non-obviousness of the claimed solution

8.11 The board agrees with the respondent and the opposition division that the cited prior art does not provide the necessary guidance to modify the drinks described in D1 so as to obtain a drink portion as defined in claim 1.

8.12 The appellant mentioned D36, which describes compositions comprising phytosterols and oils, as a document pointing to the claimed solution. However, D36 does not disclose the level of triglyceride present in the drinks, and only free sterols are present, in small amounts. Thus D36 does not provide the skilled person with the necessary information to prepare the claimed drink. The appellant has also argued that it was common general knowledge that the bioavailability and the LDL lowering effect of free sterols was augmented by lipids. However, no evidence of such common general knowledge was provided, in particular in relation to a composition in the form of a drink for lowering LDL cholesterol. Finally, the appellant alleged that it would have been trivial to replace a fat-free milk with a fat-containing milk. However, it has not explained why the skilled person would have done this when addressing the underlying problem. The appellant's arguments are tainted with hindsight, and not convincing.

8.13 Thus the drink portion of claim 1 involves an inventive step. The same reasons apply to the pack comprising the drink portion defined in claim 7, to the powder for making the drink portion defined in claim 14, and to claim 15, which further defines the use of the drink portion (Article 56 EPC).

9. *Apportionment of costs*

9.1 The appellant had requested that oral proceedings be held before the board, on an auxiliary basis. A summons to oral proceedings scheduled to take place on 10 December 2021 was issued. In a communication dated 12 February 2021, the board informed the parties of its preliminary opinion on the case, i.e. that the appeal appeared likely to be dismissed.

9.2 By letters dated 11 November 2021 and 16 November 2021, respectively, the parties informed the board that they would participate in the oral proceedings via videoconference. Interpretation was requested by both parties and the board arranged for it.

9.3 On 9 December 2021, the day before the scheduled date, in an electronic letter that was received at 16:34, the appellant informed the board that it would not be participating in the oral proceedings and requested that a decision be taken on the basis of the state of the file. No reason was given for this change of mind. On the same date and following receipt of the above electronic letter, the board informed the parties that the oral proceedings were cancelled.

9.4 On 10 December 2021 the respondent requested apportionment of the costs incurred for the preparation for the oral proceedings which had not taken place.

9.5 According to Article 104(1) EPC and Article 16(1) RPBA 2020, each party to the opposition proceedings shall bear the costs it has incurred, unless the opposition division or the board, for reasons of equity, orders a different apportionment of costs.

9.6 A party which has been summoned to oral proceedings and does not wish to attend them has a duty to notify the board and any other party to the proceedings of this fact, as soon as possible: see Case Law, section III.C. 5.3.

9.7 In the present case, the appellant informed the board that it did not intend to attend the oral proceedings, and that it expected a decision to be issued in writing, only in the late afternoon of the eve of the oral proceedings. Furthermore, the appellant did not inform the respondent.

9.8 As noted by the respondent, the board's preliminary opinion on the case was wholly positive in favour of the respondent. None of the appellant's objections was considered convincing, and the opinion was expressed that the appeal would be dismissed. In fact, as soon as it became clear that the appellant was not attending the oral proceedings, the board cancelled them, deeming them not necessary.

9.9 The preliminary opinion of the board was issued well in advance of the oral proceedings (10 months prior to the scheduled date), giving the appellant ample time to review the case and to consider how it wished to proceed.

9.10 The appellant's request that oral proceedings be held by videoconference and the request for interpretation, dated 11 November 2021, gave the impression that it was intending to attend the oral proceedings and defend its case. Although the board's preliminary opinion was favorable to the respondent, in the absence of any indication from the appellant that it was not continuing to argue the case, it was necessary for the

proprietor's representative, as well as for the board, to spend time properly preparing for the oral proceedings immediately before they took place. It is noted that the respondent had raised numerous lines of attack in its grounds of appeal, referring to multiple documents. Therefore a considerable effort was required to prepare for the case properly.

9.11 It is therefore clear that the appellant's conduct resulted in an inefficient use of the time of both the respondent and the board. The appellant's request for interpretation, which was arranged by the board but turned out to be unnecessary, resulted in a further waste of office resources.

9.12 In these circumstances an apportionment of costs in favour of the respondent is appropriate under Article 104(1) EPC and Article 16(1)(c) RPBA. See also decision T 258/13, reasons, points 2.1 to 2.7.

9.13 The respondent declared that two full days of preparation, namely 14 hours, were necessary for the respondent's representative to properly prepare for the oral proceedings. The respondent requested that the costs incurred for this preparation be apportioned. The board considers that, in view of, *inter alia*, the number of objections raised and the number of pieces of evidence referred to by the appellant, the respondent's request is reasonable and therefore is to be granted.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

2. The appellant shall bear the costs incurred by the respondent for the preparation of the oral proceedings, namely fourteen hours' preparation time for the authorised representative.

The Registrar: The Chairman:

A. Nielsen-Hannerup A. Haderlein

Decision electronically authenticated