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**Datasheet for the decision  
of 20 March 2025**

**Case Number:** T 0745/23 - 3.3.08

**Application Number:** 11859141.1

**Publication Number:** 2678436

**IPC:** C12P7/06, C12N1/16, A01N37/16

**Language of the proceedings:** EN

**Title of invention:**  
Method for preventing bacterial infection in a fermentation process

**Patent Proprietor:**  
Kemira OYJ

**Opponent:**  
ECOLAB USA INC.

**Headword:**  
preventing bacterial infection in fermentation/KEMIRA

**Relevant legal provisions:**  
EPC Art. 123(2), 112(1)  
RPBA 2020 Art. 13(2), 15a(1), 21

**Keyword:**

Oral proceedings by videoconference

Referral to the Enlarged Board of Appeal - (no)

Amendments - allowable (no)

New request filed at oral proceedings - admitted (no)

**Decisions cited:**

G 0002/10, G 0001/21, T 2303/19, T 2432/19, T 0758/20,  
T 1171/20, T 0618/21

**Catchword:**

Article 15a RPBA provides the board with the discretion to decide to hold oral proceedings pursuant to Article 116 EPC by videoconference if the board considers it appropriate to do so, either upon a party's request or of its own motion. Its scope is general and not limited to a pandemic situation (see point 7 of the Reasons).

The board exercises its discretion in view of the particular circumstances of the case and of the reasons provided by each party in support of their opposing requests as to the format, including the reasons why the party not consenting to a videoconference considers that videoconference, in the case in hand, is not suitable or why the party is otherwise disadvantaged (see points 10-13 of the Reasons).



**Beschwerdekammern**

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**Case Number:** T 0745/23 - 3.3.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.08**  
**of 20 March 2025**

**Respondent:**  
(Patent Proprietor)      Kemira OYJ  
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**Appellant:**  
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**Representative:**  
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**Decision under appeal:**      **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
22 February 2023 concerning maintenance of the  
European Patent No. 2678436 in amended form**

**Composition of the Board:**

**Chair**      T. Sommerfeld  
**Members:**      B. Claes  
                    A. Bacchin

## **Summary of Facts and Submissions**

- I. Both the patent proprietor and the opponent lodged appeals against the interlocutory decision of an opposition division concerning European patent No. 2 678 436, entitled "*Method for preventing bacterial infection in a fermentation process*" and granted on European patent application No. 11 859 141.1, which was filed as an international application under the PCT and published as WO 2012/113042 (application as filed). In the appealed decision, the opposition division decided that at least one ground of opposition prejudiced the maintenance of the European patent as granted, but that the set of claims of auxiliary request 7 and the invention to which it relates met the requirements of the EPC.
- II. Claims 1 and 2 of the patent as granted read as follows:
- "1. A method for preventing bacterial infection in a process for fermenting a sugar-containing material, characterized in that a disinfectant comprising performic acid is used.
2. The method according to claim 1, including using a fermentation system comprising the sugar-containing material and an inoculant such as yeast, wherein the disinfectant is added to the sugar-containing material and/or to the inoculant."
- III. With the grounds of appeal, the appellant/patent proprietor maintained the main request (patent as granted) and re-submitted auxiliary requests 1 to 6.

- IV. The appellant/opponent submitted, with the grounds of appeal, *inter alia*, objections of added subject-matter (Article 123(2) EPC) against the set of claims in auxiliary request 7 dealt with in the decision under appeal.
- V. With the reply to the appellant/opponent's grounds of appeal, the appellant/patent proprietor re-submitted auxiliary request 8 and submitted a new auxiliary request, auxiliary request 9.
- VI. After the parties were summoned to oral proceedings, the appellant/patent proprietor requested that oral proceedings be held by videoconference. The appellant/opponent then requested that oral proceedings be held in person; it moreover requested that questions be referred to the Enlarged Board of Appeal if the board decided to hold oral proceedings by videoconference.
- VII. The board issued a communication pursuant to Article 15(1) RPBA, providing a preliminary opinion on the issues of the case and indicating its intention to change the format of the oral proceedings to videoconference.
- VIII. The parties made no further written submissions as regards the format of the oral proceedings or any other issue. The board then changed the venue of the oral proceedings to videoconference.
- IX. At the oral proceedings the appellant/patent proprietor withdrew its appeal (hereinafter "respondent") as well as the main request and auxiliary requests 1 to 8 and filed a new auxiliary request, auxiliary request 10.

X. The parties' submissions and arguments on appeal, insofar as they are relevant for the decision, are taken into consideration in the reasons for the decision by the board set out below.

XI. The parties' final requests were as follows:

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked. The appellant further requested that auxiliary request 9, filed with the reply to the patent proprietor's grounds of appeal, and auxiliary request 10, filed during the oral proceedings, not be admitted into the appeal proceedings.

The appellant also requested that the oral proceedings be held in person on the premises of the EPO, or, alternatively, that the board refer the following two questions to the Enlarged Board of Appeal:

*"1. Is the conduct of oral proceedings as a videoconference in appeal proceedings outside a general emergency situation without the consent of the parties in accordance with the provisions of the EPC?*

*2. If yes, on which criteria should the discretion be exercised if a Board of Appeal decides on its own motion to hold oral proceedings as a videoconference pursuant to Art 15a (1) RPBA against the request of a party?"*

The respondent (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained with the set of claims of auxiliary request 9, filed with the reply to the grounds of appeal of the opponent or, alternatively, with the set

of claims of auxiliary request 10, filed during the oral proceedings.

## **Reasons for the Decision**

### *Format of the oral proceedings*

1. The board summoned the parties to oral proceedings on the EPO premises (see section VI.).
2. The respondent requested that the oral proceedings be held by videoconference and the appellant requested, in reply, that the oral proceedings be held in person on the EPO premises.
  - 2.1 The respondent submitted that holding oral proceedings by videoconference would facilitate full participation and interaction between the parties' employees and their representatives, reduce travel costs and contribute towards the UN Sustainable Development Goals, particularly the climate action goal.
  - 2.2 The appellant argued that "*the optimum form of the oral proceedings is the proceedings in person on site*" (see letter dated 6 June 2024, section 1). As the pandemic measures had been discontinued, there was no particular reason to hold oral proceedings by videoconference. According to the appellant, the consideration in decision G 1/21 of the Enlarged Board of Appeal (OJ EPO 2022, 49) that, at least at that time, oral proceedings by videoconference could not be equated to oral proceedings in person was still applicable. Therefore, holding oral proceedings by videoconference was a disadvantage for the party which had not consented to

it and had instead requested in-person oral proceedings.

3. In the communication under Article 15(1) RPBA (see section VII.) the board noted that the decision on the format of the oral proceedings is at the board's discretion pursuant to Article 15a RPBA. The board provisionally considered it appropriate to hold the oral proceedings by videoconference and found the case in hand suitable for being heard by videoconference on account of the number of parties involved, the particular requests at stake and the matter under discussion. The appellant had not argued differently, and in particular it had not provided any case-related circumstances as to why oral proceedings in the case in hand could not be conducted by videoconference, but necessarily required the parties to be heard in person on the EPO premises. The board also indicated that it would decide on the format of oral proceedings at a later point in time.
4. The appellant did not respond to the board's communication under Article 15(1) RPBA, and hence did not object to the board indicating its intention to grant the respondent's request for a videoconference. Therefore, the board changed the venue of the oral proceedings to videoconference. In reply, the appellant did not insist on in-person oral proceedings, and provided the contact data for the videoconference and later also informed the board that, in addition to the appointed representative, three employees of Ecolab USA Inc. would be attending the videoconference oral proceedings.
5. At the oral proceedings the appellant did not discuss the issue of the format of the present oral



proceedings, but instead wanted to discuss the request for referral of questions to the Enlarged Board of Appeal (see section XI.).

6. The appellant did not dispute that Article 15a RPBA provides the board with discretionary power to decide on holding oral proceedings by videoconference, but objected that this provision did not define the criteria for exercising this discretion. This gave rise to different practices and legal uncertainty. Since, according to decision G 1/21, oral proceedings in person were the gold standard, there could be doubt as to whether Article 15a RPBA was actually in line with the EPC.
7. The board does not agree. Article 15a RPBA provides the board with the discretion to decide to hold oral proceedings pursuant to Article 116 EPC by videoconference if the board considers it appropriate to do so, either upon a party's request or of its own motion. Its scope is general and is not limited to a pandemic situation. In decision G 1/21, the Enlarged Board expressly acknowledged that oral proceedings in the form of a videoconference are oral proceedings within the meaning of Article 116 EPC (Reasons 30). It also considered that, although the limitations at that time that were inherent in the use of video technology could make it suboptimal as a format for oral proceedings, either objectively or in the participants' perception, this was not normally to such a degree that a party's right to be heard or right to fair proceedings was seriously impaired (see Reasons 43.). In view of these considerations made by the Enlarged Board, this board fails to see how Article 15a RPBA as such violates any EPC provisions governing the fair conduct of proceedings and the right to be heard.

8. The board also fails to identify a possible violation of the EPC in the way the discretion under Article 15a RPBA was exercised in the case in hand. Indeed, this board interprets the discretionary power set out in Article 15a RPBA within the framework of decision G 1/21.
9. The board agrees with decision G 1/21 that oral proceedings in person are the gold standard. For this reason, this board issues summons for oral proceedings in person by default, as was also done in the case in hand.
  - 9.1 However, decision G 1/21 did not exclude videoconference oral proceedings *a priori*, but set certain limitations and restrictions, especially when a party does not give its consent. Some of these limitations were due to the technology available at that time and, in relation to this, the Enlarged Board considered whether a videoconference was not suitable in a particular case (Reasons 48.). In this context, it cannot be denied that since case G 1/21 was decided, some technological improvements have been adopted. While the ZOOM<sup>TM</sup> platform was already in place at the time of the Enlarged Board's decision, the visual and image quality have been enhanced by adoption of e.g. better cameras and the parties and the boards have further expanded their experience and enhanced their familiarity with the systems adopted.
  - 9.2 The Enlarged Board has further referred to the discretionary power of a given board to decide on a deviation from the gold-standard form of oral proceedings (Reasons 50.). This board does not disregard that, at the same time, decision G 1/21

stated that the choice of format of oral proceedings can be made by the party which requested oral proceedings, and not only by the board, as this is more than just an organisational matter (Reasons 46.); however, this latter consideration does not appear helpful in the case in hand, since both parties requested oral proceedings, and therefore both can be said to have an equal interest as regards the format of these proceedings.

10. On account of these considerations, the board exercises its discretion in view of the particular circumstances of the case and of the reasons provided by each party in support of their opposing requests as to the format. Thus also the party not consenting to a videoconference should provide some reasons as to why it considers that videoconference, in the case in hand, is not suitable or why the party is otherwise disadvantaged.
11. The appellant, however, did not submit, either in writing or at the oral proceedings, any objective reason why the case in hand should not be heard by videoconference. It also did not provide any subjective reason, such as it lacking the necessary tools, or experience or familiarity with the videoconference systems, for the board to assume there was any disadvantage to that party. On the other hand, the board had indicated the criteria on which it preliminarily found the case suitable for this format, namely the fact that only two parties were involved, the limited number of auxiliary requests on file and the fact that the issues to be discussed did not appear particularly complex. Moreover, simultaneous interpretation was not necessary, nor was it necessary to take particular means of evidence or to provide and discuss any issue, such as difficult drawings, in

person. The general reference to body language and other non-verbal communication, made by the appellant at the oral proceedings, was not considered a persuasive reason to discard videoconferences, even by the Enlarged Board in decision G 1/21 (Reasons 41.).

12. In support of the request for videoconference, the respondent provided subjective reasons, such as better participation and interaction between the employees and the parties with their representatives, and objective ones, in particular environmental benefits and reduction of costs, which were even acknowledged by the appellant as advantages of videoconferences. On balance, the board also took these circumstances into account in the exercise of its discretion.
13. In the absence of any further submissions by the appellant regarding the format of the oral proceedings, the board had no reason to (again) change the format of the present oral proceedings. Oral proceedings were thus held by videoconference.

*Request to refer questions to the Enlarged Board of Appeal  
(Article 112 EPC)*

14. The appellant requested that the board refer two questions to the Enlarged Board of Appeal (see section XI.).
15. Under Article 112(1)(a) EPC, referral of questions to the Enlarged Board of Appeal is only admissible if a decision is required to ensure uniform application of the law or if an important point of law of fundamental importance arises. The answer to the referred question should not be merely of theoretical or general interest, but has to be essential for reaching a

decision on the appeal in question (see e.g. decision G 3/98, OJ EPO, 2001, 62, Reasons 1.2.3).

16. Pursuant to Article 21 RPBA, a question is to be referred to the Enlarged Board of Appeal if the referring board considers it necessary to deviate from an interpretation or explanation of the Convention contained in an earlier opinion or decision of the Enlarged Board of Appeal.
17. In the communication under Article 15(1) RPBA (see section VII.) the board noted that the appellant had not provided reasons related to the case in hand for the request to refer questions to the Enlarged Board of Appeal, but instead had made reference to a number of decisions of the boards, allegedly diverging from decision G 1/21, which the board should take into account when referring two particular questions to the Enlarged Board of Appeal. Under those general circumstances the board saw no reason to refer questions to the Enlarged Board of Appeal.
18. At the oral proceedings the appellant again referred to diverging jurisprudence and also to different practices amongst the boards with regard to the format in which oral proceedings are conducted. The appellant submitted that the diverging jurisprudence was due to different interpretations of decision G 1/21. In addition, different criteria appeared to be applied by the boards under Article 15a RPBA, particularly with regard to the meaning of the notion "... *if the Board considers it appropriate* ...". Therefore, there appeared to be a need for legal certainty by defining the criteria necessary for deciding on the format of oral proceedings in circumstances outside the pandemic.

19. The first question proposed for referral has already been answered by the Enlarged Board in decision G 1/21. In section C.5 of the decision, after having concluded that oral proceedings by videoconference are oral proceedings within the meaning of Article 116 EPC and, although not fully equivalent to oral proceedings held in person, normally do not infringe a party's right to be heard or the right to fair proceedings (Reasons 44.), the Enlarged Board addressed the question of whether oral proceedings by videoconference could be imposed on a party. Despite the judgement essentially being limited to the pandemic (Reasons 16.), this section undoubtedly has a general character (as also acknowledged in the decision T 2432/19, Reasons 1.5.2, cited by the appellant). Decision G 1/21 also provides observations as to possible reasons that could justify denying a party its right to have the oral proceedings held in person (see points 9. to 9.2 above). These reasons are to be taken into account in the board's exercise of discretion (Reasons 48. to 50.).
20. The board does not agree with the appellant that there is a fundamental difference in interpreting decision G 1/21. Few decisions, such as decision T 618/21, cited by the appellant, take the view that Article 15a RPBA alone allows the board to decide on its own motion to hold videoconferences where appropriate; however, the majority of the jurisprudence, and this board shares this view, does not interpret Article 15a RPBA outside the teaching of decision G 1/21 (see e.g. decisions T 2432/19 and T 2303/19, cited by the appellant). More importantly, even in these cases, the boards nevertheless provide justifications for holding oral proceedings in person, in the same way as is done for holding oral proceedings by videoconference.

21. Accordingly, the complexity of the matter to be discussed, or the high number of auxiliary requests at stake, the required presence of interpreters or any other circumstance which could extend the duration of the oral proceedings and thus render a videoconference more fatiguing are taken into account when deciding in favour of in-person oral proceedings against a request for a videoconference (see e.g. decision T 1171/20, Reasons 1.9). Contrary to the appellant's argument, the suitability and appropriateness of the format, despite being the main objective criterion for discretion (as was also emphasized in decision G 1/21, Reasons 49.), is not the only criterion adopted in the exercise of discretion. Other circumstances, such as those related to the party's perception and subjective reasons why videoconference may be disadvantageous, are taken into account.
22. In the case in hand this board followed the teaching of decision G 1/21: it summoned the parties in person and, following the respondent's reasoned request for oral proceedings by videoconference, it informed the parties that since the circumstances of the case appeared to support the respondent's request and since the appellant had not provided any reason why oral proceedings had to take place in person in this case, the board was inclined to grant the request for videoconference. The appellant did not respond and in fact gave the impression that it accepted the conduct of oral proceedings by videoconference.
23. On account of these events the board fails to identify a departure from the teaching of decision G 1/21, and thus a need to (again) refer the first question in order to decide the present case. The posed question

thus does not warrant a referral, which would otherwise be of theoretical interest only.

24. With regard to the different practices, as mentioned by the appellant, the board is aware that some boards issue the summons to oral proceedings by videoconference by default and others summon in person by default; however, this practice is normally unproblematic since it follows the experience acquired by each board from the pandemic, based on the requests and acceptance of the parties normally acting before the relevant board. Nevertheless, after summons are issued, parties may always request conversion into another format.
25. With regard to the second question for referral (see section XI.), concerning clear criteria for exercising discretion under Article 15a RPBA, this board finds that any answer to it depends on the specific case and providing anything more than general instructions would risk compromising the principle of judicial discretion. For this reason alone, it cannot be regarded as a point of law suitable for being referred to the Enlarged Board of Appeal. Furthermore, the situation in the second question does not reflect the case in hand. Here, the board did not decide of its own motion to hold the oral proceedings via videoconference, but instead, having summoned the parties in person, the board granted one party's request over the other's unsubstantiated request, which was not pursued any further.
26. Finally, the board acknowledges that in exercising discretion, it is imperative to refrain from making arbitrary decisions; however, in its preliminary opinion the board indicated the criteria which would be



taken into account for a decision on the format (see point 11. above). The board finds that these criteria are in line with the limitations indicated by the Enlarged Board in decision G 1/21 to the possibility of holding oral proceedings by videoconference. Moreover, these criteria appear to be amongst those consistently adopted by the boards in the exercise of their discretion when setting oral proceedings by videoconference (see e.g. decisions T 2432/19, point 1.15 of the Reasons; T 1171/20, point 1.9 of the Reasons; and T 758/20, points 1.3.2 (ii), (iii) and (iv) of the Reasons), and therefore there does not appear to be any divergence in the case law as to the criteria adopted.

27. In light of the above reasoning, the board decided to reject the request for referral to the Enlarged Board of Appeal.

*Auxiliary request 9*

*Admittance*

28. This new request was filed for consideration by the board with the respondent's reply to the appellant's grounds of appeal (see section V.) and thus constitutes an amendment to the respondent's case within the meaning of Article 12(4) RPBA, which may be admitted into the proceedings at the board's discretion.
29. At the oral proceedings, the board admitted and considered the request in the appeal proceedings; however, since the request is not allowable in substance (see points 39. to 41.), it is not necessary

to provide reasons for the decision to admit the request.

*Added subject-matter (Article 123(2) EPC) - claim 1*

30. Claim 1 of auxiliary request 9 reads as follows:

"1. A method for preventing bacterial infection in a process for fermenting a sugar-containing material, using a fermentation system comprising the sugar-containing material and an inoculant such as yeast, wherein a disinfectant comprising performic acid is added to the sugar-containing material and the inoculant."

31. The opposition division considered this method claim, in the context of the then-pending main request and auxiliary requests 3 and 7, to comply with the requirements of Article 123(2) EPC in view of claims 1 and 2 as filed, *inter alia*. The appellant contested the decision under appeal in this respect.

32. Independent claims 1 and 2 and dependent claim 6 of the application as filed read as follows:

"1. A process for fermenting a sugar-containing material, characterized in that performic acid is used to prevent bacterial infection in said process.

2. A method for preventing bacterial infection in a fermentation system comprising a sugar-containing material and an inoculant such as yeast, wherein one or more disinfectants are added to the sugar-containing material and/or to the inoculant, characterized in that at least one of the disinfectants comprises performic acid."

"6. Method according to any of claims 2 - 5, characterized in that said fermentation process is for the production of ethanol."

33. The appellant was correct that claims 1 and 2 of the application as filed are both independent claims defining different aspects of the disclosed invention. Indeed, claim 1 as filed concerns the prevention of bacterial infection in a process for fermenting sugar-containing material in general, whereas claim 2 concerns the prevention of bacterial infection in a fermentation system, i.e. in the experimental setup in which the fermentation takes place and in which the sugar-containing material, the inoculant and the disinfectant react. Accordingly, with regard to their features, claim 2 as filed could potentially form a basis for claim 1 of auxiliary request 9.
34. However, contrary to the situation in claim 2 as filed, in claim 1 of auxiliary request 9 the prevention of bacterial infection is claimed in a process for fermenting a sugar-containing material and is not limited to the prevention of bacterial infection in a fermentation system. The claim is thus more generally formulated than claim 2 as filed and, for example, also relates to the prevention of bacterial infection during the preparation of the sugar-containing material and the inoculant as well as every other process step taking place before the components are introduced into the fermentation system.
35. In this context, the respondent submitted that the "fermentation system" referred to in claim 2 of the application as filed was in fact not a limitation on the prevention of bacterial infection because claim 1

of the application as filed (see point 32.) referred more generally to prevention of bacterial infection in a process for fermenting a sugar-containing material without any reference to a fermentation system.

36. This argument is, however, not persuasive since claims 1 and 2 of the application as filed are independent claims. Claim 2 of the application as filed therefore cannot form a basis for claim 1.
37. The respondent further submitted that it was implicit for the skilled person that claim 1 as filed also referred to a fermentation system when read in the context of claims 2 and 6 of the application as filed (see point 32.), the title of the application (see section I.), as well as the disclosures on page 1, lines 4 to 8, and page 6, lines 18 to 21, of the application as filed. Interpreting claim 1 as filed differently made no technical sense.
38. The disclosure on page 1, lines 4 to 8, of the application as filed reads as follows: *"The present invention relates to an improved process for fermenting a sugar-containing material and an improved method for preventing bacterial infection in a fermentation process by using performic acid. The present invention further relates to the manufacture of ethanol and the ethanol so obtained. Moreover, it relates to the use of performic acid for preventing bacterial infection in a process for fermenting a sugar-containing material"*. The disclosure on page 6, lines 18 to 21 of the application as filed reads as follows: *"By the term "fermentation system" is meant the batch or continuous flow liquefaction train and fermentation tanks, vessels, reactors, heat exchangers, pipings (such as a*

*plug flow reactor) or combinations thereof, in which the fermentation of sugar occurs".*

39. The gold standard for assessing compliance with Article 123(2) EPC is that any amendment to the parts of a European patent application as filed or a European patent relating to the disclosure is subject to the mandatory prohibition on extension laid down in Article 123(2) EPC. Therefore, irrespective of the context, an amendment can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed. After the amendment, the skilled person must not be presented with new technical information (see decision G 2/10, OJ EPO 2012, 376 and "Case Law of the Boards of Appeal of the EPO", 10th edition 2022, "CLBA", II.E.1.1).
40. The board considers that the skilled person would not derive directly and unambiguously, using common general knowledge, the method for preventing bacterial infection in a process for fermenting a sugar-containing material, using a fermentation system from claim 1, from any of the disclosures in the application as filed that are referred to. In particular, claim 2 as filed requires the prevention of bacterial infection to take place only in the fermentation system (see points 32. and 34. above). Furthermore, claim 6 as filed (see point 32. above), the title of the application (see section I.) and the disclosures on page 1, lines 4 to 8 of the application as filed in fact do not refer to a fermentation system and the passage on page 6, lines 18 to 21 merely refers to the definition of a "fermentation system" (see point 38. above).

41. By the same token, the skilled person would not derive from these passages that claim 1 as filed can only sensibly be read as implicitly using a fermentation system.
42. For the above reasons, claim 1 contains added subject-matter and therefore contravenes Article 123(2) EPC.

*Auxiliary request 10 - admittance (Article 13(2) RPBA)*

43. The respondent filed auxiliary request 10 at the oral proceedings before the board (see section IX.) after the board announced its opinion that claim 1 of auxiliary request 9 did not comply with the requirements of Article 123(2) EPC.
44. Claim 1 of auxiliary request 10 reads as follows:
- "1. A method for preventing bacterial infection in a process for fermenting a sugar-containing material, ~~using~~ in a fermentation system comprising the sugar-containing material and an inoculant such as yeast, wherein a disinfectant comprising performic acid is added to the sugar-containing material and the inoculant." (indicated amendments as compared with claim 1 of auxiliary request 9; see point 30. above)
45. It is uncontested that auxiliary request 10 constitutes an amendment to the respondent's appeal case, the admittance of which is subject to the provisions of Article 13(2) RPBA, which implements the third level of the convergent approach applicable in appeal proceedings and thus imposes the most stringent limitations on a party wishing to amend its appeal case at an advanced stage of the proceedings. It provides

that any amendment to a party's appeal case made at this stage of the proceedings will, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons.

46. The respondent submitted that the amendment in the new auxiliary request 10 was a response to the board's finding that claim 1 of auxiliary request 9 did not comply with the requirements of Article 123(2) EPC and was consistent with the position that they had always taken in their arguments in the context of claim 1 of auxiliary requests 7 and 9. Furthermore, there were exceptional circumstances because the board's preliminary opinion in the communication pursuant to Article 15(1) RPBA had been inconsistent: on the question of added subject-matter in the context of claim 2 as granted (see section II.) and of claim 1 of auxiliary request 7 (identical to claim 1 of auxiliary request 9; see point 30.), which both referred to the feature "using a fermentation system comprising the sugar-containing material and an inoculant such as yeast", the board's opinion had been different and thus provided guidance to the respondent which led in different directions.
47. The board considers that no exceptional circumstances are apparent in the case in hand.
48. First, the objection of added subject-matter concerning the method in claim 1 of auxiliary request 7 had already been raised and addressed at the start of the appeal proceedings in the appellant's grounds of appeal. The issue was also pointed out in the board's communication under Article 15(1) RPBA (see section VII.) in the context of auxiliary request 7 and

repeated in the context of auxiliary request 9. The fact that the board, merely agreeing to an objection raised by an appellant, came to a different conclusion from the opposition division on this point does not constitute exceptional circumstances as such. Indeed, it is a possible outcome that the respondent could have expected. The respondent also had reason to file the new auxiliary request 10 earlier in the appeal, in response to the appellant's grounds of appeal, or at the latest after the board's communication under Article 15(1) RPBA, without waiting until the last stage of the appeal proceedings and filing it at the oral proceedings.

49. In addition, the fact that the board's preliminary opinion in the communication pursuant to Article 15(1) RPBA on the question of added subject-matter in the context of dependent claim 2 as granted and of independent claim 1 of auxiliary request 7 had been different does not constitute exceptional circumstances warranting admittance and consideration of the new auxiliary request 10. Indeed, in the case in hand, the board's preliminary opinion in the above-mentioned communication on claim 1 of auxiliary requests 7 and 9 was negative with regard to added subject-matter, and this very opinion was not reversed by the board during the oral proceedings. Furthermore, the fact that the board may have expressed a different opinion on added subject-matter in the same communication but in a different context (dependent claim 2 as granted) cannot be accepted as constituting exceptional circumstances as required by Article 13(2) RPBA either.
50. Accordingly, the board did not admit auxiliary request 10 into the proceedings.



## Order

### For these reasons it is decided that:

1. The request for referral of questions to the Enlarged Board of Appeal is rejected.
2. The decision under appeal is set aside.
3. The patent is revoked.

The Registrar:

The Chair:



L. Stridde

T. Sommerfeld

Decision electronically authenticated