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Datasheet for the decision of 21 November 2019

Case Number: T 0005/16 - 3.3.04

Application Number: 08005013.1

Publication Number: 1941904

IPC: A61K39/395, A61K31/505, A61P19/02, A61P37/06, A61K38/17, C07K14/705

Language of the proceedings: EN

Title of invention:

TNF antagonists for use in adjunctive therapy to methotrexate in the treatment of autoimmune diseases

Patent Proprietor:

The Kennedy Trust for Rheumatology Research

Opponents:

Celltrion, Inc. (opposition withdrawn)
Pfizer Inc. (opposition withdrawn)
AbbVie Inc. (opposition withdrawn)
Hospira UK Limited (opposition withdrawn)
Hexal AG
Storz, Dr. Ulrich
Amgen Inc.
Appelt, Christian W.

Headword:
Anti TNF antibody for use in adjunctive therapy to methotrexate in the treatment of rheumatoid arthritis/THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH

Relevant legal provisions:
EPC Art. 123(2)
EPC R. 115(2)
RPBA Art. 13(1), 15(3)

Keyword:
Main request, auxiliary request I: amendments - allowable (no) auxiliary request II - admitted (no)

Decisions cited:
G 0002/10

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 0005/16 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 21 November 2019

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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted on 21 October 2015 revoking European patent No. 1941904 pursuant to Article 101(3)(b) EPC.

Composition of the Board:

Chair G. Alt
Members: R. Morawetz
M. Blasi

Summary of Facts and Submissions

I. The appeal by the patent proprietor (appellant) lies from the opposition division's decision revoking European patent No. 1 941 904. The patent derives from European patent application No. 08 005 013.1 (document D72 in these proceedings, "application as filed" or "application"), which was filed as a divisional application of European patent application No. 05 076 131.1, which is itself a divisional application of European patent application No. 97 933 799.5.

II. Eight oppositions were filed against the patent. The patent was opposed on the grounds in Article 100(a) EPC, namely in relation to exclusion from patentability (Article 53(c) EPC), novelty (Article 54 EPC) and inventive step (Article 56 EPC), and in Article 100(b) and 100(c) EPC.

With respect to the set of claims of the main request filed during the oral proceedings on 23 September 2015, the opposition division decided that the subject-matter of the claims met the requirements of Articles 76(1) and 123(2) EPC, was novel (Article 54 EPC), but lacked an inventive step (Article 56 EPC). With respect to the set of claims of auxiliary request I filed during the oral proceedings on 24 September 2015, the opposition division decided that, while the subject-matter of the claims met the requirements of Articles 76(1) and 123(2) EPC, claims 1 and 6 lacked clarity (Article 84 EPC).

III. In the statement of grounds of appeal, the appellant maintained the sets of claims of the main request and of auxiliary request I considered by the opposition division and provided arguments as regards inventive step (Article 56 EPC).

Claim 1 of the main request reads as follows:

"1. Use of a tumour necrosis factor antagonist for the preparation of a medicament for treatment of rheumatoid arthritis, wherein the tumour necrosis factor antagonist is to be administered as adjunctive therapy to methotrexate therapy to an individual suffering from rheumatoid arthritis and
wherein the tumour necrosis factor antagonist is an anti-tumour necrosis factor antibody, or a fragment thereof, which binds specifically to tumour necrosis factor,
and wherein the TNF antagonist is to be administered in multiple doses and the methotrexate is to be administered in multiple doses."

Claim 1 of auxiliary request I differs from claim 1 of the main request in that a feature worded "*producing a clinical response for a longer duration compared to that obtained with a multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*" has been added at the end.

IV. Opponents 1, 2 and 4 withdrew their oppositions during the proceedings before the opposition division. The remaining opponents 3, 5, 6, 7 and 8 are respondents in these appeal proceedings.

V. Opponent 3 (respondent III) and opponent 8 (respondent VIII) filed replies to the statement of grounds of appeal. In his reply, respondent VIII provided arguments as to why, *inter alia*, claim 1 of the main request and of auxiliary request I did not meet the requirements of Article 123(2) EPC.

VI. By letter dated 14 September 2016, respondent III withdrew its opposition.

VII. The appellant filed observations on respondent VIII's reply to the statement of grounds of appeal.

VIII. Having noted that the patent's term of 20 years from the date of filing (Article 63(1) EPC) had expired, the board invited the appellant to indicate whether or not continuation of the appeal proceedings was requested.

IX. In response, the appellant requested continuation of the appeal proceedings.

X. The board scheduled oral proceedings and issued a communication pursuant to Article 15(1) RPBA setting out its preliminary opinion on various matters concerning the appeal. The parties were informed, *inter alia*, that, with respect to independent claim 1 of the main request and of auxiliary request I, the board was inclined to agree with respondent VIII that the subject-matter extended beyond the content of the application as filed (see points 11 to 13 and 19 of the board's communication).

XI. In response to the board's communication:

The appellant filed a further written submission indicating where support could be found in the application as filed for the subject-matter of claim 1 of the main request and of auxiliary request I.

Respondent VIII re-filed respondent III's reply to the appeal, i.e. the submissions dated 14 July 2016, and indicated that he intended to rely on these submissions.

Respondents V, VI and VII informed the board that they would not attend the oral proceedings.

XII. Oral proceedings before the board were held on 21 November 2019. During the course of the proceedings, the appellant submitted a set of claims as auxiliary request II.

Claim 1 of auxiliary request II differs from claim 1 of auxiliary request I in that the feature at the end of the claim has been amended (as indicated by underlining) to read "*producing a highly beneficial clinical response for a significantly longer duration compared to that obtained with a multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone.*"

XIII. At the end of the oral proceedings the chair announced the board's decision.

XIV. The appellant's arguments, submitted in writing and during the oral proceedings, are summarised as follows:

Main request

Amendments (Article 123(2) EPC) - claim 1

A) Page 7, line 29, to page 8, line 30, of the application, the examples providing an additional pointer

"[T]*he OD correctly decided that support for the independent claims can be found inter alia at page 7, line 29 to page 8, line 30 of the application, the Examples providing an additional pointer to the claimed rheumatoid arthritis adjunctive therapy*" (see appellant's response to respondent VIII's reply to the statement of grounds of appeal, page 2, second paragraph).

B) Page 4, lines 2 to 18, and the headings of Examples 1 and 3

Claim 1 comprised five features, designated (a) to (e). The passage on page 4, lines 2 to 18, explicitly disclosed, in the context of treatment of patients suffering from a tumour necrosis factor (TNF) mediated disease, three of the five features of the claimed invention in combination: (c) the TNF antagonist was an anti-TNF antibody; (b) the anti-TNF antibody was used in adjunctive therapy with methotrexate (MTX); (d) the regimen was a multiple dose regimen of an anti-TNF antibody.

The only features missing from the disclosure on page 4 which were needed to arrive at the subject-

matter of claim 1 were feature (a), i.e. the selection of rheumatoid arthritis (RA) as the TNF-mediated disease from a list of diseases, and feature (e), i.e. the selection of the administration of MTX in multiple doses.

However, not only were these missing features explicitly disclosed in the application but there were also clear pointers to their selection and to their combination with features (b), (c) and (d). For instance, the headings of Examples 1 and 3 explicitly disclosed the use of anti-TNF antibodies in repeated doses in the treatment of RA.

Moreover, RA was the only pathology referred to in an example anywhere in the application and thus constituted a most preferred embodiment. The skilled person would therefore clearly contemplate the selection of RA as the disease of choice.

With respect to the selection of feature (e), i.e. the administration of multiple doses of MTX, the preference for multiple doses of MTX in the treatment of RA was clearly discernible from the examples and the skilled person would unambiguously select the "*multiple*" alternative from the only two options presented on page 8, lines 12 to 14, and on page 38, lines 28 to 30, of the application.

Finally, the fact that the claimed treatment produced a "*highly beneficial or synergistic clinical response for a significantly longer duration compared to that obtained with a single or multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*" as indicated on page 4, lines 15 to 18, was inherent in the claimed

adjunctive therapy and necessarily achieved when the claimed regime was implemented, and therefore did not need to be recited in the claim.

Auxiliary request I

Amendments (Article 123(2) EPC) - claim 1

In the context of a treatment for RA a clinical response was inherently beneficial. In the application as filed the term "clinical response" was used in multiple passages without the qualifier "*beneficial*", for example on: page 8, line 5; page 46, line 2; page 54, line 1; page 62, line 26; page 64, line 24; page 66, lines 3, 4, 6 and 26; page 69, line 8. These passages also did not use the word "*synergistic*" to describe the clinical response.

With regard to the feature "*longer duration*", the improved duration in clinical response compared with that obtained with a multiple dose regimen of the antibody alone, or with MTX alone, was disclosed throughout the application, not only on page 4, lines 15 to 18, by the use of the word "*longer*", but also in multiple passages of the description and the examples, by the use of the words "*sustained*" or "*better sustained*", for example: page 4, line 7; page 48, line 6; page 62, line 26; page 63, line 1; page 66, lines 5, 17 and 27; page 68, line 14; page 69, line 9. None of these passages used the term "*significant*".

On page 4, line 14, "*highly beneficial*" or "*synergistic*" were disclosed as alternatives; one of these could be omitted.

In the claim the clinical response was qualified by comparison with administration of MTX or the antibody alone; the claim thus contained a reference for comparison and therefore "*highly*" and "*significantly*" could be omitted.

Auxiliary request II

Admission into the appeal proceedings (Article 13(1) RPBA)

This request had not been filed before because the appellant was of the opinion that the claims of the main request and of auxiliary request I were compliant with the provisions of the EPC and because they had not wanted to file an undue number of claim requests.

The amendments made were straightforward and were aimed at addressing the problem identified by the board with respect to the higher-ranking requests.

It was accepted that the issues addressed had been raised in respondent VIII's reply to the statement of grounds of appeal.

The amendments were clear, and the features "*highly beneficial*" and "*significantly longer*" had a reference for comparison in the claim.

XV. Respondent VIII's arguments, submitted in writing and during the oral proceedings, are summarised as follows:

Main request

Amendments (Article 123(2) EPC) - claim 1

A) Page 7, line 29, to page 8, line 30, of the application, the examples providing an additional pointer

A selection from various lists and various possibilities disclosed in the passage on page 7, line 29, to page 8, line 30, had to be made in order to arrive at the combination of features in claim 1. Moreover, in order to arrive at the subject-matter of claim 1 the skilled person had to choose "*an anti-tumour necrosis factor antibody*" or a "*fragment thereof*", neither of which was disclosed in that passage at all.

The examples were more limited than claim 1 in that they referred to specific dosages, and treatment regimes, none of which were recited in the claim. Moreover, the examples were all about the specific antibody cA2 and did not distinguish between adjunctive and concomitant therapy; see e.g. page 57, line 24; page 60, line 1; page 62, lines 21 and 22, and 32 and 33; page 63, lines 6 to 10; page 66, lines 21 to 23, and 29 and 30; page 69, lines 3 to 5 and 10 to 14. Claim 1 related to an unallowable intermediate generalisation of the examples.

The claimed combination of features had been picked from various parts of the application without there being any pointer to that combination.

B) Page 4, lines 2 to 18, of the application and the headings of examples 1 and 3

On page 4, lines 14 to 18, the application put the treatment in a particular context, i.e. it was supposed to produce a particular clinical response which was "*highly beneficial or synergistic* (...) *for a significantly longer duration compared to that obtained with a single or multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*". This was missing from claim 1.

The headings of the examples had to be read in the context of the entire example concerned and provided no general disclosure of the use of an anti-TNF antibody.

Auxiliary request I

Amendments (Article 123(2) EPC) - claim 1

Claim 1 of auxiliary request I had the same deficiencies as the main request. Moreover, in auxiliary request I, an additional feature relating to the clinical response had been introduced. This feature was taken from a passage in the application, namely on page 4, lines 13 to 18; however, certain terms which were present in that passage, such as "*beneficial*" or "*synergistic*", had been omitted, thus no longer limiting the "*clinical response*" in this respect.

Likewise, with respect to the duration of the clinical response, in the application as filed this was a "*significantly longer duration*", whereas according to the amended claim of auxiliary request I, the response was only "*longer*".

The omitted terms had a meaning in the context in which they were used and their omission led to a different and broader meaning than what was disclosed in the application as filed.

"*Highly beneficial or synergistic*" was a single term which could not be picked apart.

The further passages relied on by the appellant put the clinical response in a certain context and/or qualified it more specifically than it was defined in the claim.

Auxiliary request II

Admission into the appeal proceedings
(Article 13(1) RPBA)

Respondent VIII contended that this request should not be admitted into the appeal proceedings. It had been filed very late and the issue addressed, that of added subject-matter, had already been part of the proceedings from the beginning; see respondent VIII's reply to the statement of grounds of appeal on page 6.

Furthermore, the request was not clearly allowable, because the amendments introduced a lack of clarity. The presence of a reference for comparison in the claim did not render the claim clear.

XVI. Respondents V, VI, and VII did not submit any arguments as regards the substance of the case or any requests during the appeal proceedings.

XVII. The appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the set of claims of the main request filed during the oral proceedings before the opposition division on 23 September 2015 or, alternatively, on the basis of the set of claims of auxiliary request I filed during the oral proceedings before the opposition division on 24 September 2015, or further alternatively, on the basis of the set of claims of auxiliary request II filed during the oral proceedings before the board. Furthermore, the board should refuse respondent VIII's request to rely on respondent III's submissions made during the appeal proceedings.

XVIII. Respondent VIII requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is therefore admissible.

2. Respondent III withdrew its opposition during the appeal proceedings and ceased to be a party to these proceedings as no issues other than compliance of the patent or amendments thereto with the EPC had to be decided upon by the board.

Main request

Amendments (Article 123(2) EPC) - claim 1

3. The subject-matter of the claim relates to the second medical use of an antibody and is characterised by the following combination of five features:

Use of a tumour necrosis factor (TNF) antagonist for the preparation of a medicament

(a) for treatment of rheumatoid arthritis (RA),
(b) wherein the TNF antagonist is to be administered as adjunctive therapy to methotrexate (MTX) therapy and
(c) wherein the TNF antagonist is an anti-TNF antibody, or a fragment thereof, which binds specifically to TNF,
(d) and wherein the TNF antagonist is to be administered in multiple doses
(e) and the MTX is to be administered in multiple doses.

A) Page 7, line 29, to page 8, line 30, of the application, the examples providing an additional pointer

4. In the decision under appeal, the opposition division held that:

"*1.1 The features of amended independent claims 1 and 6 have a basis in the application as originally filed from page 7, line 29 to page 8, line 30 and the examples.*

1.2 The OD accepts the intermediate generalisation of the MR as satisfying the criteria of Article 76(1) and 123(2) EPC" (see points III.1.1 and III.1.2 of the Reasons).

5. On appeal, respondent VIII contested the opposition division's decision on this point and maintained that the subject-matter of claim 1 extended beyond the content of the application as filed (hereinafter

"application") because the claimed combination of features was not disclosed in the application (see section XV).

6. The appellant submitted that the opposition division had correctly decided that support for the claim could be found on page 7, line 29, to page 8, line 30, of the application, with "*the Examples providing an additional pointer to the claimed rheumatoid arthritis adjunctive therapy*" (see section XIV).

7. It is established case law of the boards of appeal that the standard for assessing compliance with the requirements of Article 123(2) EPC is the standard set out in decision G 2/10 (OJ EPO 2012, 376, point 4.3 of the Reasons), also known as the "gold standard", i.e. that any 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 the application as filed (see also Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019, section II.E.1.1).

8. Furthermore, it is also established case law that the content of an application must not be considered to be a reservoir from which features pertaining to separate embodiments of the application can be combined in order to artificially create a particular embodiment. In the absence of any pointer to that particular combination, this combined selection of features does not, for the person skilled in the art, emerge directly and

unambiguously from the content of the application as filed. The fact that the features in question have been mentioned in the description as "preferred" may act as a pointer (*ibid.*, section II.E.1.6.1).

9. With respect to the passage on page 7, line 29, to page 8, line 30, relied on in the decision under appeal and by the appellant, the board notes that page 7, lines 30 to 33, discloses that "*tumor necrosis factor antagonists can be administered to patients suffering from a TNF-mediated disease as adjunctive and/or concomitant therapy to methotrexate therapy*". According to page 8, lines 12 to 14, "[t]*he TNF antagonist and methotrexate can each be administered in single or multiple doses*" while page 8, line 25, to page 10, line 35, provides a list of TNF-mediated diseases including RA (see page 8, lines 29 and 30).

10. It is evident from the preceding paragraph that the passage discloses administration of a "*TNF-antagonist*" to patients suffering from a TNF-mediated disease, but not feature (c) of claim 1, i.e. administration of an "*anti-TNF antibody*". Indeed, administration of such an antibody is not disclosed in that passage at all.

In addition, the passage relates to TNF-mediated diseases generally, not to RA specifically, which is mentioned as one alternative in an extensive list of diseases.

Moreover, additional selections as regards the therapy, i.e. "*adjunctive*" versus "*concomitant*", and the dose, i.e. "*single*" versus "*multiple*", are necessary to arrive at the claimed combination of features (a), (b), (d) and (e).

Since the various alternatives are all presented as equally suitable and none is specified as preferred, or most preferred, the selection of features (a), (b), (d) and (e) cannot be derived by the skilled person directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from page 7, line 29, to page 8, line 30.

11. With respect to the alleged pointer provided by the examples, the board notes that the application provides the following three examples:

12. Example 1, entitled "*Clinical Treatment of Rheumatoid Arthritis By Multiple Infusions of an Anti-TNF Antibody With and Without Methotrexate*", discloses that a chimeric anti-TNF monoclonal antibody (mAb), cA2, was administered in multiple infusions of 1, 3 or 10 mg/kg alone or in combination with MTX for the treatment of RA (see application, page 40, lines 1 to 11). Evaluation of the results led to the following conclusion:

"*Thus, the results of this study indicate that treatment with a multiple dose regimen of cA2 as adjunctive and/or concomitant therapy to methotrexate therapy, in RA patients whose disease is incompletely controlled by methotrexate, produces a highly beneficial or synergistic clinical response that can be sustained through 26 weeks*" (*ibid.*, page 62, line 31, to page 63, line 1).

13. Example 2 reports on a clinical treatment of RA by single infusion of cA2 in combination with MTX (*ibid.*, page 63, lines 11 to 16) and thus relates to an embodiment that falls outside the ambit of the claim.

14. Example 3, entitled "*Clinical Treatment of Rheumatoid Arthritis By Repeated Dose Administration of an Anti-TNF Antibody In Patients Following A Single Dose, Double-Blind, Placebo-Controlled Trial*", discloses repeated infusions of 10 mg/kg cA2 in combination with MTX, administered at a dose of 10 mg/week (see page 67, lines 1 to 9) and concludes that:

"A*ccordingly, the results of this study indicate that repeated treatment with cA2 as adjunctive and/or concomitant therapy to methotrexate therapy is an important and efficacious therapeutic approach for treating RA in patients.*" (*ibid.*, page 69, line 10 to line 14).

15. It is evident from the above (see points 12 and 14) that Examples 1 and 3 disclose specific multiple dose regimens which are based on a specific chimeric anti-TNF mAb, cA2, which is used in combination with MTX for the treatment of RA. Moreover, in the case of both these examples, evaluation of the results led to the conclusion that a multiple dose regimen of "*cA2 as adjunctive and/or concomitant therapy to methotrexate therapy*" (emphasis added, see points 12 and 14 above) is a therapeutic approach for treating RA in patients. However, the examples do not disclose that the results indicate that any anti-TNF mAb would equally be suitable for the treatment of RA or that adjunctive therapy is preferred over concomitant therapy.

16. In the board's view, the examples therefore provide no pointer to the combination of features (b) and (c) and the appellant's argument that they provided "*an additional pointer to the claimed rheumatoid arthritis adjunctive therapy*" thus fails. Whether they provide a pointer to the combination of features (a), (d) and (e) therefore need not be considered.

17. The respondent maintained that the claimed combination of features represented an unallowable intermediate generalisation of the examples. The board notes that no argument has been advanced, either in the decision under appeal or by the appellant, as to why the skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, that there is no functional or structural relationship among the chimeric anti-TNF mAb cA2, the multiple dose regimen and the technical effect achieved in Examples 1 and 3 and so would recognise that the use of the chimeric anti-TNF mAb cA2 in the specific context of the examples can be generalised to the use of just any anti-TNF antibody in a multiple dose regimen for the treatment of RA which is characterised by the combination of the features recited in claim 1.

18. The board concludes from the above that the subject-matter of claim 1 extends beyond the content of the application as filed on page 7, line 29, to page 8, line 30, and the examples. Thus, the opposition division's decision was incorrect on this point.

B) Page 4, lines 2 to 18, of the application and the headings of Examples 1 and 3

19. In a second line of argument, the appellant submitted that the subject-matter of claim 1 resulted from the explicit teaching on page 4, lines 8 to 18, of the application, supplemented by the teaching of the headings of the examples, relating to the most preferred disease, RA, together with the MTX multiple dosage regimen (see section XIV).

20. The relevant passage on page 4, lines 8 to 18, reads, in full, as follows:

"*The present invention is also based on the unexpected and dramatic discovery that a multiple dose regimen of a tumor necrosis factor antagonist, such as an anti-tumor necrosis factor antibody, when administered adjunctively with methotrexate to an individual suffering from a TNF-mediated disease produces a highly beneficial or synergistic clinical response for a significantly longer duration compared to that obtained with a single or multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone.*" (emphasis added)

21. With respect to the clinical response, the board notes that this is characterised (see preceding point) as being "*highly beneficial or synergistic*" and of "*a significantly longer duration compared to that obtained with a single or multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*". These features are not explicitly recited in claim 1.

22. The appellant's entire line of argument hinges on the proposition that the feature "*a highly beneficial or synergistic clinical response for a significantly longer duration*" is inherent in the claimed adjunctive therapy characterised by features (a) to (e) and is thus necessarily achieved when the claimed regime is implemented (see section XIV).

23. According to established case law, an implicit disclosure relates solely to matter which, although not explicitly mentioned, is a clear and unambiguous consequence of what is explicitly mentioned (see Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019, section II.E.1.3.3).

24. The board notes that the claimed regime covers the use of a (any) multiple dose regimen of an (any) anti-TNF antibody administered adjunctively with MTX (see point 2). However, the application provides no teaching that such a use would necessarily result in "*a highly beneficial or synergistic clinical response for a significantly longer duration*" compared with that obtained with a single or multiple dose regimen of the antagonist or MTX alone. On the contrary, the board notes that it is apparent from the examples that "*a highly beneficial or synergistic clinical response for a significantly longer duration*" is obtained in the context of the use of the specific chimeric mAb cA2, in a defined multiple dose regimen (see points 12, 14 and 15 above). Furthermore, as set out in point 17 above, no argument was provided that there is no functional or structural relationship among the chimeric anti-TNF mAb cA2, the multiple dose regimen and the technical effect achieved in Examples 1 and 3. Since the claimed regime is generalised over the teaching of the examples, at least with respect to the anti-TNF antibody and the

dosage regimen, the skilled person does not know whether the effect achieved under the conditions used in the examples is also necessarily achieved by the claimed regime.

25. Therefore, in the board's view, the skilled person would not recognise that "*a highly beneficial or synergistic clinical response for a significantly longer duration*" relates to subject-matter that is the inevitable consequence of implementing the claimed regimen, which is characterised by features (a) to (e), and the appellant's entire line of argument thus fails for this reason alone.

26. The omission of the feature "*a highly beneficial or synergistic clinical response for a significantly longer duration*" extends the claimed subject-matter to the use of any anti-TNF antibody in any multiple dose regime achieving any - including even a minimal - level of clinical response and thus to treatments of RA that are not covered by the disclosure on page 4, lines 8 to 18, of the application. Whether the combination of features (a) to (e) is supported by page 4, lines 8 to 18, and the headings of Examples 1 and 3 therefore need not be considered any further.

27. For the reasons set out above, the board concludes that the subject-matter of claim 1 extends beyond the content of the application as filed. Therefore, the main request does not comply with the requirements of Article 123(2) EPC.

Auxiliary request I

Amendments (Article 123(2) EPC) - claim 1

28. The claim differs from claim 1 of the main request in that an additional feature reading as follows "*producing a clinical response for a longer duration compared to that obtained with a multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*" has been added to it (see section III).

29. The opposition division decided that the additional feature had a basis on page 4, lines 12 to 18, of the application as filed (see decision under appeal, point 5.1 of the Reasons). Respondent VIII contested the opposition division's decision on this point (see section XV).

30. The board notes that, contrary to the definition given on page 4, lines 12 to 18 (see point 19 above), the clinical response according to the additional feature is not qualified as being "*highly beneficial or synergistic*" and of a "*significantly*" longer duration.

31. The appellant submitted that the expression "*highly beneficial or synergistic*" related to two alternatives, that, in the context of a treatment for RA, the clinical response was inherently beneficial and that several passages of the application used the term "*clinical response*" without the qualifier "*beneficial*" or disclosed an improved duration without using the

term "*significantly*". Finally, the terms "*highly beneficial*" and "*significantly*" could in any case be omitted because a reference for comparison was in the claim (see section XIV).

32. In the board's judgement, even if it were accepted that "*or synergistic*" can be omitted from the expression "*highly beneficial or synergistic*", the appellant's line of argument fails for the following reasons.

33. The board notes that, while the further passages relied on by the appellant might not use the terms "*highly beneficial*" or "*significantly*", they nevertheless do qualify the clinical response. Thus, on page 8, line 5, of the application the clinical response is qualified as having a "*significant improvement in duration*" while page 4, line 7, discloses that the therapy produces a "*rapid and sustained reduction in the clinical signs*". In the remaining passages the clinical response is further qualified either in terms of its duration in weeks (see page 46, lines 2 and 3; page 48, lines 6 and 7; page 62, lines 20 to 27; page 63, line 1; page 66, lines 2 to 6 and 15 to 19; page 68, lines 12 to 15; page 69, lines 8 and 9) or in terms of clinical response rates achieved (see page 54, lines 1 and 2; page 64, lines 24 and 25; page 66, lines 6 to 14).

34. The appellant has not advanced any argument as to why, when reading the further passages (see preceding point) in their context in the application, the skilled person would understand directly and unambiguously that the various definitions of the clinical response provided

applied to the RA treatment as disclosed on page 4 (see point 20 above) such that the qualifications "*highly beneficial*" and "*significantly*" could in effect be omitted altogether.

35. Finally, that the claim recited "*compared to that obtained with a multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*" as a basis for comparison does not affect the board's assessment since the treatment disclosed on page 4 of the application already defines the clinical response by reference to the very same comparator. It is self-evident that a clinical response that is "*highly beneficial or synergistic*" and of a "*significantly*" longer duration "*compared to that obtained with a multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*" is different from a clinical response which merely has a longer duration "*compared to that obtained with a multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*".

36. The board concludes that the claim covers treatments of RA that result in a clinical response which is not "*highly beneficial*" or "*significantly*" longer and which are thus not covered by the treatment disclosed on page 4, lines 8 to 18, of the application. Accordingly, the opposition division's decision was incorrect on this point too.

37. For the reasons set out above, the board concludes that the subject-matter of claim 1 extends beyond the content of the application as filed. Therefore, auxiliary request I does not comply with the requirements of Article 123(2) EPC.

Auxiliary request II

Admission into the appeal proceedings (Article 13(1) RPBA)

38. The set of claims of this request was filed during the oral proceedings before the board, after the board had expressed its view that claim 1 of the main request and of auxiliary request I comprised subject-matter which extended beyond the content of the application as filed.

39. In claim 1 of auxiliary request II the additional feature added to claim 1 of auxiliary request I has been further amended, on the basis of the passage on page 4, lines 12 to 18, to read "*producing a highly beneficial clinical response for a significantly longer duration compared to that obtained with a multiple dose regimen of the antagonist administered alone or that obtained with methotrexate administered alone*" (emphasis added; see section XII).

40. Respondent VIII objected to the admission of this request into the appeal proceedings, because it had been filed late in the proceedings without justification and was not clearly allowable.

41. Pursuant to Article 13(1) RPBA, an amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the board's discretion. That discretion is to be exercised in view

of, *inter alia*, the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

42. Auxiliary request II was filed in response to the board's finding that claim 1 of the main request and auxiliary request I did not meet the requirements of Article 123(2) EPC. The board's finding could not be considered unforeseeable or unexpected, given that it was in line with the board's preliminary opinion set out in its communication issued pursuant to Article 15(1) RPBA (see section VIII). Furthermore, the objection which the amendments made to claim 1 of auxiliary request II aimed to address was not a new objection, but had been raised by respondent VIII in his reply to the statement of grounds of appeal (see sections V and XV). The appellant was thus aware of this objection upon receipt of respondent VIII's reply to the statement of grounds of appeal.

43. In the board's judgement, the fact that the amendments were presented as being straightforward could not justify addressing an objection raised at the very beginning of the appeal proceedings at such a late stage, namely during the oral proceedings before the board.

44. Moreover, while the amendments made might be straightforward, there would have needed to be further discussion as to whether or not the claimed combination of features related to subject-matter which extended beyond the content of the application as filed (see points 15 and 24 above). It was thus not immediately

apparent that the suggested amendments resulted in a claim request which was clearly allowable under Article 123(2) EPC.

45. Finally, the amendments would have rendered the discussion of the clarity requirement of Article 84 EPC more complex because "*highly beneficial*" and "*significantly*" seemed to be relative terms without a defined meaning.

46. Therefore, admitting the request at this stage of the proceedings would not have been in keeping with the principle of procedural economy.

47. Accordingly, exercising its discretion pursuant to Article 13(1) RPBA, the board decided not to admit this request into the appeal proceedings.

Conclusion

48. None of the claim requests forming part of the appeal proceedings meets the requirements of Article 123(2) EPC. Accordingly, the patent cannot be maintained in amended form on the basis of any of these requests and, in the absence of another, allowable claim request, the appeal has to be dismissed.

49. As the decision is based on respondent VIII's own submissions, it was not necessary for the board to decide on the appellant's request that it refuse respondent VIII's request to rely on (former) respondent III's submissions.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

I. Aperribay G. Alt

Decision electronically authenticated