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

**Case Number:** T 2908/19 - 3.3.10

**Application Number:** 11799644.7

**Publication Number:** 2637710

**IPC:** A61L27/26, A61L27/50, A61L27/52

**Language of the proceedings:** EN

**Title of invention:**  
HYALURONIC ACID BASED FORMULATIONS

**Patent Proprietor:**  
Allergan Industrie, SAS

**Opponents:**  
Farco-Pharma GmbH  
Merz Pharma GmbH & Co. KGaA  
Laboratoires Vivacy

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100 (c), 123 (2)

**Keyword:**

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

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Case Number: T 2908/19 - 3.3.10

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.10**  
**of 14 November 2023**

**Appellant:** Allergan Industrie, SAS  
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**Decision under appeal:**      **Decision of the Opposition Division of the  
European Patent Office posted on 23 August 2019  
revoking European patent No. 2637710 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chair**                      P. Gryczka  
**Members:**                R. Pérez Carlón  
                                  F. Blumer

## Summary of Facts and Submissions

- I. The appellant-patent proprietor lodged an appeal against the opposition division's decision revoking European patent No. 2 637 710.
- II. Three notices of opposition were filed on grounds including added subject-matter (Article 100(c) EPC). Respondent-opponent 1 took no active part in the appeal proceedings.
- III. The opposition division concluded that claim 1 of the patent as granted requiring the average molecular weight to be calculated using a specific equation lacked a basis in the application as originally filed. The objection also applied to claim 1 of auxiliary requests 1 to 3 which were thus not allowable. Claim 1 of auxiliary requests 4 to 7 was not clear and thus these requests were not allowable either.
- IV. Claim 1 of the patent as granted relates to a soft tissue filler having components (1) and (2). Component (2) is defined as  
  
*"an uncrosslinked HA solution [...] which is present in the composition in an amount of at least 0.5% w/w and less than 5.0% w/w [...]"*.  
  
This is a feature of claim 1 of all the appellant-patent proprietor's auxiliary requests too.
- V. The appellant did not dispute that there was no word-for-word basis in the application as originally filed for the feature of claim 1 requiring component (2) to be a solution and to be present in the composition in

the set amount. It would nevertheless have been immediately apparent to a skilled reader that claim 1 as originally filed required component (2) to be a solution in view of dependent claim 13 and of independent claims 15 and 18. In view of claim 13, a skilled reader would have understood that the definition in claim 1 should not be taken literally; claim 1 thus related to a composition comprising uncrosslinked HA. The lower limit required by claim 1 was disclosed in the passage bridging pages 18 and 19. This interpretation of claim 1 was furthermore in line with the first full paragraph on page 19 and the disclosure of the examples of the patent. Therefore, the amendment to claim 1 of all request was allowable (Article 123(2) EPC).

VI. The respondents-opponents 2 and 3 argued that a skilled reader had no reason to conclude that claim 1 as originally filed contained an error. Even if they did, the application as originally filed did not disclose the upper limit of uncrosslinked HA component in combination with requiring said component to be a solution. The passage on page 19 was ambiguous and could be read as referring to the proportion of uncrosslinked HA relative to the total HA amount. Claim 1 thus did not have a clear and unambiguous basis in the application as originally filed and the ground in Article 100(c) EPC precluded the maintenance of the patent as granted. The issue was not solved by any of the requests on file.

VII. In a communication, the board informed the parties of its preliminary opinion that claim 1 of all the requests on file included added subject-matter.

VIII. The parties' final requests were as follows:

The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or on the basis of the claims of any one of auxiliary requests 1 to 8, auxiliary requests 1 to 7 as filed with the statement setting out the grounds of appeal and corresponding to the requests which formed the basis of the appealed decision, auxiliary request 8 as filed with a letter dated 5 October 2021.

The respondents II and III (opponents 2 and 3) requested that the appeal be dismissed.

IX. At the end of the oral proceedings held on 14 November 2023, the decision of the board was announced.

### **Reasons for the Decision**

1. The appeal is admissible.
2. Amendments. Feature "an uncrosslinked HA solution [...] which is present in the composition in an amount of at least 0.5% w/w and less than 5.0% w/w".
  - 2.1 It was undisputed that the application as originally filed had no word-for-word basis for this feature.

Claim 1 as originally filed relates to a soft tissue filler composition and requires an uncrosslinked HA component (2) which is HA or its salt. Component (2) is to be less than 5.0% by weight of the claimed soft tissue filler composition.

Claim 1 as originally filed neither discloses component (2) to be a solution, nor the lower limit of component (2) in the soft tissue filler composition.

The upper value of the proportion of (2) in the soft tissue filler composition of 5% by weight is only disclosed in claim 1 of the application and on the last paragraph of page 5. Both disclosures are equivalent. This was undisputed.

2.2 The appellant-patent proprietor saw a basis for the feature in point 2. for the reasons that follow:

In view of dependent claim 13, it was apparent that claim 1 of the application as originally filed, which defined the HA concentration as being of 10.0 mg/g to 50.0 mg/g, could not intend to refer to a component (2) which was hyaluronic acid or its salt, but to a component (2) which comprised HA.

Claim 13 and the passage bridging pages 18 and 19 of the description disclosed component (2) to have a proportion of 1% to 5% HA: the proportion of uncrosslinked HA in the filler must be much lower than required by claim 1. This was confirmed by the first full paragraph on page 19 and by the examples of the application. Independent claim 15 disclosed an uncrosslinked HA component and process claim 18 explicitly mentioned the use of a solution in the preparation of the claimed compositions. Claim 1 thus could not require that component (2) was HA itself but a solution which comprised HA.

It was thus clear that claim 1 as originally filed was faulty and that the proportion required by claim 1 was to be read as the proportion of diluted HA, i.e. of HA

solution, as disclosed in the passage bridging pages 18 and 19 of the application a originally filed. Since claim 1 as originally filed had to be correctly interpreted, the amendment of claim 1 as granted was allowable.

2.3 The appellant-patent proprietor's arguments were not convincing for the reasons that follow.

2.3.1 Would a skilled person have read claim 1 differently?

There is no apparent reason why a skilled person would have considered claim 1 to be faulty. There is indeed an inconsistency between claims 1 and 13 as originally filed, but either claim could be at the bottom of the discrepancy. A skilled reader could have considered that claim 1 needed to be read differently, but they must not necessarily have done so.

For this reason alone, claim 1 as originally filed does not provide a basis for the upper limit of 5.0% by weight for HA being in solution.

The appellant-patent proprietor argued that the paragraph bridging pages 18 and 19 would have taught a skilled reader that claim 1 should have been read differently too. This passage discloses the use of a solution of uncrosslinked HA in the preparation of a dermal filler composition. The solution contains at the most 50 mg/g of HA (5% by weight). Such dilute component (2) solution could not provide 5% by weight of uncrosslinked HA in the final dermal filler composition.

However, claim 1 defines an upper limit of 5% which does not necessarily have to be close to the

embodiments exemplified and, remarkably, sets no lower limit. Claim 1 as originally filed thus envisages compositions having very few uncrosslinked HA including 0.02% by weight as in the first full paragraph of page 19. A skilled person would thus not inevitably have concluded that claim 1 was not accurate.

For this reason too, the appellant's argument is not convincing.

2.3.2 Were claim 1 as originally filed not accurate, how should it have been read?

Even if, in the appellant's favour, it were concluded that a skilled reader would have considered claim 1 of the application as originally filed to contain an error or incoherence, they would not inevitably have concluded that crosslinked HA should have been in the form of a solution. At the most, they would have envisaged a composition, in general, but not necessarily a solution.

Page 18, last full paragraph of the description discloses an uncrosslinked HA in the form of either a solution or of a gel. Thus, the application discloses not only solutions but also other forms of uncrosslinked HA component.

Thus, even if a skilled reader would have sought to interpret claim 1 in view of the application as originally filed, they would not inevitably have considered that component (2) needed to be in the form of a solution.

As the application as originally filed only discloses the upper proportion of component (2) in the context of

an uncrosslinked HA component and the skilled person would not have concluded that a solution was the sole possible form of said component, the features requiring component (2) to be a HA solution and to be present in the soft tissue filler composition in an amount of less than about 5.0% w/w are not disclosed in combination in the application as originally filed.

The disclosure in the last paragraph of page 5 does not differ from than in claim 1.

The appellant-patent proprietor referred to the paragraph bridging pages 18 and 19 of the application in support of its interpretation of claim 1. However, whilst disclosing a lower limit of 0.5% by weight, the passage fails to disclose the upper limit of 5.0% required by claim 1.

- 2.3.3 Thus, the application as originally filed does not disclose the upper limit of less than 5.0% by weight in the context of an uncrosslinked HA solution. A skilled person would not have inevitably recognised the need for interpretation of claim 1 as originally filed, and even if they did they would not have unambiguously arrived at the wording of claim 1.
- 2.4 Therefore, claim 1 of the patent as granted contains added subject-matter and the ground in Article 100(c) EPC precludes the maintenance of the patent as granted.
- 2.5 The feature mentioned above is present in claim 1 of all the appellant-patent proprietor's auxiliary requests in the same context as in the patent as granted. It was undisputed that the negative conclusion on added subject-matter applied analogously to all the

requests on file. None of the auxiliary requests is thus allowable (Article 123(2) EPC).

## Order

### For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated