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Datasheet for the decision of 27 January 2026

Case Number:	T 0098/24 - 3.3.07
Application Number:	17169098.5
Publication Number:	3266456
IPC:	A61K31/4745, A61K31/513, A61K31/519, A61K45/06, A61P35/00, A61K9/00, A61K9/127, A61P1/18, A61P9/00, A61P43/00
Language of the proceedings:	EN

Title of invention:

COMBINATIONS OF LIPOSOMAL IRINOTECAN, 5-FU AND LEUCOVORIN FOR THE TREATMENT OF PANCREATIC CANCER

Patent Proprietor:

Ipsen Biopharm Ltd.

Opponents:

Sandoz AG
Teva Pharmaceutical Industries Ltd.
Generics [UK] Limited

Headword:

Liposomal irinotecan II/IPSEN

Relevant legal provisions:
EPC Art. 76(1)
RPBA 2020 Art. 12(6)

Keyword:
Divisional application - added subject-matter (yes)
Late-filed evidence - should have been submitted in first-instance proceedings (yes)

Decisions cited:
T 0740/91, T 1227/10, T 0586/23, T 1946/16

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Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: T 0098/24 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 27 January 2026

Appellant: (Patent Proprietor)	Ipsen Biopharm Ltd. Ash Road Wrexham Industrial Estate Wrexham LL13 9UF (GB)
Representative:	Carpmaels & Ransford LLP One Southampton Row London WC1B 5HA (GB)
Respondent: (Opponent 1)	Sandoz AG Centralbahnstrasse 4 4051 Basel (CH)
Representative:	Kraus & Lederer PartGmbB Thomas-Wimmer-Ring 15 80539 München (DE)
Respondent: (Opponent 2)	Teva Pharmaceutical Industries Ltd. 124 Dvora HaNevi'a St. 6944020 Tel Aviv (IL)
Representative:	D Young & Co LLP 3 Noble Street London EC2V 7BQ (GB)
Respondent: (Opponent 3)	Generics [UK] Limited Building 4, Trident Place Mosquito Way Hatfield Hertfordshire AL10 9UL (GB)
Representative:	Elkington and Fife LLP Prospect House 8 Pembroke Road Sevenoaks, Kent TN13 1XR (GB)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 16 November 2023 revoking European patent No. 3266456 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman A. Usuelli
Members: M. Steendijk
A. Jimenez

Summary of Facts and Submissions

I. European patent 3 266 456 ("the patent") was granted with six claims.

Claim 1 as granted defined:

"Irinotecan sucrose octasulfate salt liposome injection for use in a method of treating pancreatic cancer in a human patient who has failed prior treatment with gemcitabine or become resistant to gemcitabine, the method comprising co-administration of an effective amount each of irinotecan sucrose octasulfate salt liposome injection, 5-fluorouracil (5-FU) and leucovorin to the patient,

wherein, in each cycle, the irinotecan sucrose octasulfate salt liposome injection is administered prior to the leucovorin, and the leucovorin is administered prior to the 5-FU and, in the method:

(a) the 5-FU is administered intravenously over 46 hours;
(b) the leucovorin is administered intravenously over 30 minutes, and
(c) the irinotecan sucrose octasulfate salt liposome injection is administered intravenously over 90 minutes."

Dependent claim 6 as granted defined:

"The irinotecan sucrose octasulfate salt liposome injection for use according to any of the preceding claims, wherein

(a) the irinotecan sucrose octasulfate salt liposome injection is administered intravenously at a dose of:

80 mg/m^2 every 2 weeks to patients who are not homozygous for the UGTA1*28 allele or; 60 mg/m^2 every 2 weeks to patients who are homozygous for the UGTA1*28 allele, and wherein the dose is increased to 80 mg/m^2 if the patient does not experience any drug related toxicity;

(b) the 5-FU is administered intravenously at a dose of 2400 mg/m^2 over 46 hours, and the leucovorin is administered intravenously at a dose of 200 mg/m^2 over 30 minutes, every 2 weeks;

wherein irinotecan sucrose octasulfate salt liposome injection is administered prior to 5-FU and leucovorin, and wherein leucovorin is administered prior to 5-FU;

wherein the patient has been premedicated with dexamethasone and a 5-HT3 antagonist; and wherein the patient has metastatic pancreatic cancer that has progressed on gemcitabine based therapy."

The patent was granted on a divisional application. The earlier ("parent") application was the European patent application 13731230.2, originally published as international application WO 2013/188586 A1.

II. Three oppositions were filed against the grant of the patent on the grounds that its subject-matter lacked novelty and inventive step, that the claimed invention

was not sufficiently disclosed and that the patent comprised subject-matter extending beyond the content of the application or the parent application as filed.

The opposition division decided to revoke the patent. The decision was based on the patent as granted (main request), auxiliary requests 1-3 filed on 5 September 2022 and auxiliary requests 4-7 filed on 19 September 2023.

The following documents were *inter alia* cited during the opposition proceedings:

D1: Journal of Clinical Oncology (2010), 28(12S), Abstract e13024
D19: Digestive and Liver Disease, (2011), 43, 912-916
D29: Summary of product characteristics for calcium folinate 15mg Tablets (29 March 2022).

The opposition division arrived at the following conclusions:

(a) The parent application as filed disclosed the individual features of claim 1 as granted but failed to disclose the specific combination of these features as defined in claim 1 as granted. The claimed combination of features could not be based on Example 7 of the parent application, which disclosed under Arm C a combination treatment involving specific doses of the agents to be administered as well as a specific frequency for their administration, which were not defined in claim 1 as granted.

Claim 1 of the patent as granted therefore comprised subject-matter extending beyond the

content of the parent application as originally filed.

(b) Claim 1 of auxiliary request 1 resulted from the combination of claims 1 and 6 as granted.

The treatment defined in claim 1 of auxiliary request 1 corresponded to the combination treatment as disclosed in Example 7 (Arm C) of the parent application, except for the definition of the dose of leucovorin. Claim 1 of auxiliary request 1 defined a dose of 200 mg/m^2 leucovorin which, absent further specification, would be understood as referring to the racemic mixture. By contrast, Example 7 described a dose of 400 mg/m^2 racemic leucovorin or 200 mg/m^2 levo-leucovorin. The only mention of 200 mg/m^2 leucovorin in the parent application occurred in Figure 7, which represented an illustration of Example 7 but did not cite the combination of all features of claim 1 of auxiliary request 1. The skilled person would therefore regard the disclosure of 200 mg/m^2 leucovorin in Figure 7 as an error when read in conjunction with Example 7. Moreover, when considered in isolation, Figure 7 did not disclose a 200 mg/m^2 leucovorin dose in combination with all the features of claim 1 of auxiliary request 1.

Claim 1 of auxiliary request 1 therefore comprised subject-matter extending beyond the content of the parent application as originally filed.

(c) Claim 1 in auxiliary requests 2, 4 and 6 included the same features as claim 1 of the main request.

Claim 1 in auxiliary requests 3, 5 and 7 included the same features as claim 1 of auxiliary request 1.

These auxiliary requests therefore comprised subject-matter extending beyond the content of the parent application as originally filed for the same reasons as set out for the main request and auxiliary request 1.

III. The patent proprietor appealed the decision of the opposition division.

With the statement of grounds of appeal, the patent proprietor filed a new main request and auxiliary request 1-3, which correspond to auxiliary requests 1, 3, 5 and 7 on which the decision under appeal is based.

Claim 1 of the new main request defines:

"Irinotecan sucrose octasulfate salt liposome injection for use in a method of treating pancreatic cancer in a human patient who has failed prior treatment with gemcitabine or become resistant to gemcitabine, the method comprising co-administration of an effective amount each of irinotecan sucrose octasulfate salt liposome injection, 5-fluorouracil (5-FU) and leucovorin to the patient,

wherein, in each cycle, the irinotecan sucrose octasulfate salt liposome injection is administered prior to the leucovorin, and the leucovorin is administered prior to the 5-FU and, in the method:

(a) the 5-FU is administered intravenously over 46 hours;

(b) the leucovorin is administered intravenously over 30 minutes, and
(c) the irinotecan sucrose octasulfate salt liposome injection is administered intravenously over 90 minutes

wherein

(a) the irinotecan sucrose octasulfate salt liposome injection is administered intravenously at a dose of:

80 mg/m^2 every 2 weeks to patients who are not homozygous for the UGTA1*28 allele or; 60 mg/m^2 every 2 weeks to patients who are homozygous for the UGTA1*28 allele, and wherein the dose is increased to 80 mg/m^2 if the patient does not experience any drug related toxicity;

(b) the 5-FU is administered intravenously at a dose of 2400 mg/m^2 over 46 hours, and the leucovorin is administered intravenously at a dose of 200 mg/m^2 over 30 minutes, every 2 weeks;

wherein irinotecan sucrose octasulfate salt liposome injection is administered prior to 5-FU and leucovorin, and wherein leucovorin is administered prior to 5-FU;

wherein the patient has been premedicated with dexamethasone and a 5-HT3 antagonist; and
wherein the patient has metastatic pancreatic cancer that has progressed on gemcitabine based therapy."

Auxiliary request 1 differs from the main request by the additional feature in claim 1 that the patient achieves a response which is at least stable disease.

Auxiliary request 2 differs from the main request in the deletion of dependent claims 2-3.

Auxiliary request 3 combines the amendments of auxiliary requests 1 and 2.

IV. With the statement of grounds of appeal, the patent proprietor filed the following additional document:

A36: NCCN Clinical Practice Guidelines in Oncology (NCCN Guidelines), Pancreatic Adenocarcinoma, Version I, 2013

V. In its communication pursuant to Article 15(1) RPBA, the Board indicated its preliminary view that document A36 was not to be admitted and that the appeal should be dismissed.

VI. Oral proceedings were held on 27 January 2026.

VII. The arguments of the appellant-patent proprietor relevant to the present decision are summarized as follows:

(a) Admittance document A36

Document A36 was an extract from the NCCN guidelines published in April 2013 and represented evidence of the relevant common general knowledge that lower doses of leucovorin are likely to be as efficacious as higher doses. The filing of document A36 was a justified response to the

finding in the decision under appeal regarding the disclosure of the dose of 200 mg/m^2 leucovorin in Figure 7 of the parent application, in which the opposition division deviated from its preliminary opinion.

(b) Article 76(1) EPC

The subject-matter of claim 1 of the main request could be directly and unambiguously derived from the parent application as filed as demonstrated by two lines of argument.

According to one line of argument, "derivation #1", the features of the first part of claim 1 of the main request ("Irinotecan sucrose octasulfate salt liposome injection for use (...) over 90 minutes") were individually disclosed in the application as originally filed on page 3 under "Summary", page 12 under "Administration" and "Patient Populations", and page 4, lines 2-9. The parent application expressed preferences for the treatment of pancreatic cancers resistant to current treatment modalities, the combination treatment with irinotecan sucrose octasulfate salt liposome injection as well as the defined duration and order of administration of the active agents. It further provided a pointer to the combination of these features in Arm C of Example 7. The additional features of claim 1 of the main request ("wherein (...) gemcitabine based therapy") were disclosed in Figure 7 of the application as filed, which described under Arm C all remaining features of the claimed dosage regimen and which in line with Example 7 related to the investigation of the treatment of patients with metastatic pancreatic

cancer that have progressed on gemcitabine based therapy, including the triple therapy defined in the first part of the claim.

According to an alternative line of argument,"derivation #2", the utility of the combination as defined in claim 1 of the main request essentially reproduces the dosage regimen of Arm C of Figure 7 of the original disclosure. The "MM-398" corresponded to irinotecan sucrose octasulfate salt liposome injection, which was according to the parent application as filed suitably administered intravenously over 90 minutes. Moreover, according to Example 7, the study of Figure 7 specifically related to the treatment of patients with metastatic pancreatic cancer that have progressed on gemcitabine based therapy.

The parent application as filed explained that leucovorin acts by potentiating the cytotoxic effects of fluorinated pyrimidines, such as 5-fluorouracil. The skilled person would therefore understand that the defined dose of the leucovorin was not particularly critical. Documents D1, D19 and D29 confirmed that the skilled person would consider the leucovorin dose of 200 mg/m^2 as a suitable dose in the context of Figure 7. The explicit, direct and unambiguous disclosure of the leucovorin dose of 200 mg/m^2 in Figure 7 should therefore not be disregarded as an error. In line with the considerations in T 740/91, T 1227/10, T 586/23 and T 1946/16, the finding that a disclosure is possibly wrong or inconsistent with other parts of the disclosure was irrelevant for the purpose of Articles 76(1) and 123(2) EPC.

VIII. The arguments of the respondents-opponents relevant to the present decision are summarized as follows:

(a) Admittance document A36

The objection that the dose of 200 mg/m^2 leucovorin shown in Figure 7 of the parent application was erroneous, and that the wrong dose of 200 mg/m^2 leucovorin of Figure 7 was not disclosed in combination with all other features of claim 6 as granted, had already been raised and maintained by the opponents during the proceedings. Document A36 should therefore have been filed during the proceedings before the opposition division.

(b) Article 76(1) EPC

Claim 1 of the main request defined the utility of irinotecan sucrose octasulfate salt liposome injection in a specific combination treatment with leucovorin and 5-fluorouracil involving the administration of a dose of 200 mg/m^2 leucovorin. In the absence of a further specification of the leucovorin in the claim, the skilled person would understand the defined dose to relate to 200 mg/m^2 racemic leucovorin. The parent application as filed consistently described the dose of leucovorin to be administered as part of the described combination treatment to be 400 mg/m^2 of racemic leucovorin or 200 mg/m^2 of levo-leucovorin. The parent application as filed mentioned a dose of 200 mg/m^2 leucovorin as part of combination treatment only in Figure 7. However, Figure 7 was presented as illustrating the study design of the trial described in Example 7. Consistent with the

description of the parent application as a whole, this trial involved according to Example 7 the administration of 400 mg/m^2 racemic leucovorin or 200 mg/m^2 levo-leucovorin. It was therefore evident that the mention of a dose of 200 mg/m^2 leucovorin in Figure 7 was erroneous and that the correct dose was the leucovorin dose described in Example 7. The dose of 200 mg/m^2 leucovorin as part of the specific combination treatment defined in claim 1 of the main request could not be based on Figure 7 when considered separately from Example 7, because Figure 7 did not specifically describe the dose of 200 mg/m^2 leucovorin in combination with feature of treatment of patients with metastatic pancreatic cancer who have progressed on gemcitabine based therapy nor the feature of the administration of the irinotecan sucrose sulfate liposome injection over 90 minutes.

IX. The appellant-patent proprietor requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or else on the auxiliary requests 1-3 as filed with the statement of grounds of appeal. Insofar as relevant to the decision, the patent proprietor further requested that document A36 be admitted into the appeal proceedings.

X. The respondents-opponents requested that the appeal be dismissed. Insofar as relevant to the decision, the opponents further requested that document A36 not be admitted into the appeal proceedings.

Reasons for the Decision

1. Admittance document A36

The patent proprietor justified the filing of document A36 with the statement of grounds of appeal as a legitimate reaction to the finding in the decision under appeal that the skilled person would regard the disclosure of 200 mg/m^2 leucovorin in Figure 7 as an error when read in conjunction with Example 7 and that Figure 7 did not disclose a 200 mg/m^2 leucovorin dose in combination with all the features of the claim, which deviated from the opposition division's preliminary opinion.

However, the objection that the dose of 200 mg/m^2 leucovorin shown in Figure 7 of the parent application was erroneous, and that the wrong dose of 200 mg/m^2 leucovorin of Figure 7 was not disclosed in combination with all the other defined features, had been raised at an early stage during the proceedings before the opposition division (see submission by opponent 1 of 14 October 2022, pages 3-5, section 2.2) and maintained following the opposition division's preliminary opinion (see submission by opponent 1 of 17 August 2023, page 3, section 2.8). Document A36 should therefore have been filed during the proceedings before the opposition division.

The Board therefore did not admit document A36 into the appeal proceedings under Article 12(6) RPBA.

2. Main request - Article 76(1) EPC

2.1 Claim 1 of the main request defines the utility of irinotecan sucrose octasulfate salt liposome injection in a specific combination therapy also involving the administration of leucovorin and 5-fluorouracil. The features of the defined therapy include *inter alia* the purpose of the treatment of a patient with metastatic pancreatic cancer that has progressed on gemcitabine based therapy, the intravenous administration of the irinotecan sucrose octasulfate salt liposome injection over 90 minutes and the administration of a dose of 200 mg/m^2 leucovorin.

2.2 The parent application as originally filed states under the heading "Summary" (see page 3, lines 5-10 and page 4, lines 5-9):

> "Provided are methods for treating pancreatic cancer in a patient (i.e., a human patient) comprising administering to the patient liposomal irinotecan (e.g., irinotecan sucrose octasulfate salt liposome injection, also referred to as MM-398) alone or in combination with 5-fluorouracil (5-FU) and leucovorin (together, 5-FU/LV), according to a particular clinical dosage regimen."

and

> "In another embodiment, the liposomal irinotecan is administered intravenously over 90 minutes. In another embodiment, the 5-FU is administered intravenously over 46 hours. In another embodiment, leucovorin is administered intravenously over 30 minutes."

The parent application further states under the heading "Administration" (see page 12, lines 7-14):

> "Liposomal irinotecan is administered intravenously, either alone or in combination with 5-fluorouracil (5-FU) and/or leucovorin. In one embodiment,
> liposomal irinotecan is administered prior to 5-FU and leucovorin. In another embodiment, leucovorin is administered prior to 5-FU. In another embodiment, liposomal irinotecan is administered intravenously over 90 minutes. In another embodiment, 5-FU is administered intravenously over 46 hours. In another embodiment, leucovorin is administered intravenously over 30 minutes. In various embodiments the liposomal irinotecan is MM-398."

and under the heading "Patient Populations" (see page 12, lines 23-31):

> "In an additional embodiment, the patient has failed prior treatment with gemcitabine or become resistant to gemcitabine (...) In another embodiment, the pancreatic cancer of the patient undergoing treatment is advanced pancreatic cancer, which is a pancreatic tumor that exhibits either or both of distant metastasis or peripancreatic extension of the tumor."

The parent application consistently refers to the administration of leucovorin at a dose of 200 mg/m^2 in the form of levo-leucovorin or 400 mg/m^2 of the racemic form (see page 3, lines 31-32, page 5, lines 21-23, page 13, lines 27-28, page 14, lines 28-29).

In Example 7 (see pages 24-52), the parent application describes the outline of a Phase 3 Trial for exploring the "MM-398 and 5-FU plus leucovorin combination". The described primary objective of the Phase 3 trial is to compare overall survival following treatment with MM-398, with or without 5-fluorouracil plus leucovorin, versus 5-fluorouracil and leucovorin in patients with metastatic pancreatic cancer that have progressed on gemcitabine based therapy (see page 24, under "Objectives"). The disclosed study design of the trial includes a treatment Arm C (see pages 25-26, bridging part of the Table under "Study Design") involving the administration of the combination of liposomal irinotecan (MM-398), 5-FU and leucovorin in the order, at the doses, over the duration and at the frequency as defined in claim 1 of the main request, except for the dose of leucovorin. Consistent with the preceding passages in the description, Arm C of the disclosed study design involves the administration of leucovorin at a dose of 200 mg/m^2 in the form of levo-leucovorin or 400 mg/m^2 of the racemic form. According to the parent application as filed (see page 27, line 17), Figure 7 illustrates the study design of Example 7.

This Figure 7 is reproduced as follows (with highlighting by the Board):

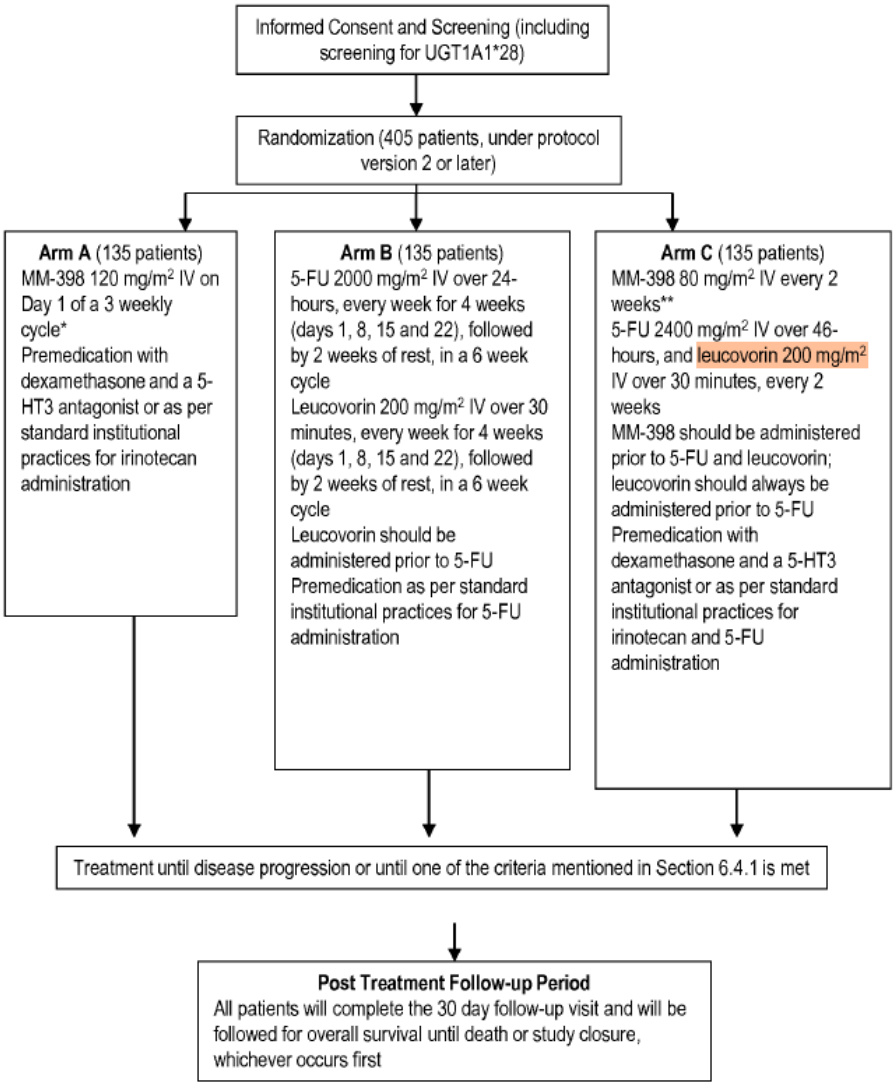

Fig. 7

Figure 7 refers to the administration of a dose of 200 mg/m^2 leucovorin in the triple combination treatment of Arm C of the study design. Figure 7 does not recite in its description of the triple combination treatment of Arm C the duration of the administration

of the liposomal irinotecan (MM-398) nor the patients to be treated as having metastatic pancreatic cancer that has progressed on gemcitabine based therapy.

2.3 In the decision under appeal (see page 10, section 5.2), the opposition division concluded:

> "(...), arm C of the experiment refers to leucovorin dosed at 400 mg/m^2 (when the l+d racemic mixture is used) and to levo-leucovorin dosed at 200 mg/m^2 when the enantiomer is used. This is explained repeatedly through the whole description. The present claim 1 refers to 200 mg/m^2 of leucovorin.
>
> It is understood that leucovorin, when this is not further specified, is the racemic mixture. This was not contested by the parties.
>
> As a consequence, the dosage claimed for leucovorin (which is the racemic mixture) of 200 mg/m^2 is half of the dosage foreseen for the racemic mixture according to the teaching of example 7 of the description. This was not contested by the parties, who agreed that the dosage originally disclosed was either 200 or 400 mg/m^2 while presently it is 200 mg/m^2 of the racemic mixture."

During the oral proceedings before the Board the patent proprietor submitted that it was not conceded that the leucovorin dose as defined in claim 1 of the main request related to 200 mg/m^2 of the racemic mixture. However, the patent proprietor did not substantiate in its submissions during the appeal proceedings, why the assessment in the decision under appeal regarding the understanding of the dose of leucovorin defined in the

claim as relating to racemic leucovorin was wrong. The Board therefore concludes that claim 1 of the main request may be interpreted as defining the feature of the administration of 200 mg/m^2 of racemic leucovorin.

Accordingly, the main request may not be considered to comply with Article 76(1) EPC, if the feature of the administration of a dose of 200 mg/m^2 of racemic leucovorin, as part of the specific combination therapy as defined in claim 1 of the main request, is not directly and unambiguously derivable from the parent application as filed.

2.4 It was undisputed that the only reference in the parent application as filed to a dose of 200 mg/m^2 leucovorin appears in Figure 7.

As explained in section 2.3 above, Figure 7 is presented in the parent application as illustrating the study design of the trial described in Example 7. Example 7 describes this study design as involving in Arm C the administration of 400 mg/m^2 racemic leucovorin or 200 mg/m^2 levo-leucovorin. This description of the leucovorin dose in Arm C of the study design in Example 7 is consistent with the general references to the leucovorin dose in the parent application, which likewise differentiate between doses of 400 mg/m^2 and 200 mg/m^2, depending on whether leucovorin is administered as racemic mixture or as levo-leucovorin. By contrast, Figure 7 refers simply to a dose of 200 mg/m^2 leucovorin in Arm C of the study design without further qualification of the administered form of leucovorin.

The leucovorin dose indicated in Figure 7 is therefore inconsistent with the leucovorin dose described in Example 7.

Notably, the inconsistency between the leucovorin dose of 200 mg/m^2 indicated in the study design of Figure 7 as opposed to 400 mg/m^2 or 200 mg/m^2, depending on whether leucovorin is administered as racemic mixture or as levo-leucovorin, described in Example 7 and the general references to the leucovorin dose does not merely concern a semantic incongruity in the disclosure of an otherwise realistic embodiment. It directly affects the statement in the parent application as filed that Figure 7 illustrates the study design of Example 7 (see page 27, line 17), which is rendered ambiguous by the discrepancy.

2.5 In view of this ambiguity, the Board concludes that, contrary to "derivation #1" and "derivation #2" proposed by the patent proprietor, it cannot be directly and unambiguously derived from the application as originally filed that

(a) in the specific treatment by triple therapy of patients with metastatic pancreatic cancer who have progressed on gemcitabine based therapy involving the administration of the irinotecan sucrose sulfate liposome injection or MM-398 over 90 minutes, as described in the study design in Example 7 and as arguably otherwise derivable from the original disclosure, the dose of 200 mg/m^2 leucovorin as described in Figure 7 is alternatively applicable,

and

(b) the treatment involving a dose of 200 mg/m^2 leucovorin as described in Figure 7 is specifically intended to be applied in the treatment of patients with metastatic pancreatic cancer who have progressed on gemcitabine based therapy involving the administration of the irinotecan sucrose sulfate liposome injection or MM-398 over 90 minutes as described in Example 7 and as arguably otherwise derivable from the original disclosure.

Moreover, in view of the disclosure in the parent application as filed that Figure 7 and Example 7 relate to one and the same study design and taking account of the ambiguity resulting from the discrepancy between the leucovorin dose indicated in Figure 7 and Example 7, the Board considers that it cannot be directly and unambiguously derived from the parent application as filed that the dose of 200 mg/m^2 leucovorin mentioned in the context of Arm C in Figure 7 concerns a dose of 200 mg/m^2 of racemic leucovorin.

2.6 The patent proprietor argued that the skilled person would nevertheless have considered the dose of 200 mg/m^2 leucovorin indicated in Figure 7 as suitable for the triple combination therapy described in the parent application. This followed from the references to such a dose in documents D1 and D19 as well as from the explanation in the parent application that leucovorin potentiates the cytotoxicity of 5-fluorouracil. The suitability of the low dose of 200 mg/m^2 was in its view also apparent from document D29. Referring to the reasoning in T 740/91, T1227/10, T 586/23 and T 1946/16 the patent proprietor contended that, given the credible, direct and unambiguous, explicit disclosure of the claimed subject-matter of the relevant leucovorin dose in Figure 7, any

inconsistencies in the description were irrelevant for the purpose of Articles 76(1) and 123(2) EPC.

The Board observes, however, that this line of argument does not resolve the identified inconsistency in the disclosure of the parent application, nor the resulting ambiguity, because this inconsistency arises from the fact that Example 7 and Figure 7 report different doses of leucovorin for one and the same study design.

In T 740/91 it was held that the level of 0.6% for an epoxy compound, although later found to be inaccurate, could nevertheless serve as a valid basis for amendment because it had been credibly disclosed in the application as filed (see T 740/91, reasons 2.4–2.6). In T 1227/10 (reasons 1.1.2, 1.1.4 and 1.1.6), the Board referred to T 740/91 but nonetheless concluded that the amendment at issue contravened Article 123(2) EPC. The cases T 586/23 (reasons 3.5.1) and T 1946/16 (reasons 1.1) concerned whether amendments in question amounted to the correction of an obvious error, which had to be denied where the skilled person would not have considered the original disclosure manifestly incorrect. By contrast, in the present case, the problem lies in the ambiguity created by the inconsistent leucovorin doses. As a result, the dose used in the triple combination therapy defined in claim 1 of the main request cannot be directly and unambiguously derived from the 200 mg/m^2 dose mentioned in Figure 7.

The Board therefore does not find the patent proprietor’s argument convincing.

2.7 Accordingly, the Board concludes that the main request does not comply with Article 76(1) EPC.

3. Auxiliary requests - Article 76(1) EPC

Auxiliary request 1 differs from the main request by the additional feature in claim 1 that the patient achieves a response which is at least stable disease.

Auxiliary request 2 differs from the main request in the deletion of dependent claims 2-3.

Auxiliary request 3 combines the amendments of auxiliary requests 1 and 2.

The claims of auxiliary requests 1-3 thus include the same feature of the administration of a dose of 200 mg/m^2 of leucovorin as part of the specific combination therapy as defined claim 1 of the main request. Auxiliary requests 1-3 therefore do not comply with Article 76(1) EPC for the same reasons as set out above in section 2 for the main request.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

B. Atienza Vivancos A. Usuelli

Decision electronically authenticated