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Datasheet for the decision of 26 November 2025

Case Number: T 1462/24 - 3.3.04

Application Number: 13169139.6

Publication Number: 2653873

IPC: G01N33/68, G01N33/50

Language of the proceedings: EN

Title of invention:
Compositions and uses for treating Multiple Sclerosis

Patent Proprietor:
Biogen MA Inc.

Opponents:
neuraxpharm Arzneimittel GmbH
Generics [UK] Limited (trading as Mylan)
Polpharma S.A.
Hexal AG
Zentiva k.s.
G. L. Pharma GmbH
Stada-Arzneimittel Aktiengesellschaft
TEVA PHARMACEUTICAL INDUSTRIES, LTD.
Adalvo Ltd.
Accord Healthcare Ltd
Glenmark Pharmaceuticals Europe Ltd
Kraus & Lederer PartGmbB
BIOGARAN
Dr. Schön, Neymeyr & Partner Patentanwälte mbB
betapharm Arzneimittel GmbH

Headword:
Dimethyl fumarate or Monomethyl fumarate for treatment of multiple sclerosis/ BIOGEN

Relevant legal provisions:
EPC Art. 100(c), 76(1), 112(1)(a)
EPC R. 106
RPBA 2020 Art. 16(1)

Keyword:
Amendments - allowable (no)
Referral to the Enlarged Board of Appeal - (no)
Objections under Rule 106 EPC - rejected
Apportionment of costs - (yes)

Decisions cited:
G 0002/10, R 0021/22, R 0006/22, R 0014/11, R 0004/08, T 1441/21, T 1261/21, T 0783/09, T 0615/95, T 0401/94, T 0012/81

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Case Number: T 1462/24 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 26 November 2025

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Party as of right: (Opponent 15)	betapharm Arzneimittel GmbH Kobelweg 95 86156 Augsburg (DE)
Representative:	Maiwald GmbH Elisenhof Elisenstraße 3 80335 München (DE)

Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted on 11 December 2024 concerning maintenance of the European Patent No. 2653873 in amended form**

Composition of the Board:

Chair M. Pregetter
Members: S. Albrecht
L. Bühler

Summary of Facts and Submissions

I. European patent No. 2 653 873 ("patent") was granted on European patent application No. 13 169 139.6 ("current application"). This application is a divisional application of the earlier European patent application No. 08 725 256.5 ("earlier application"). The earlier application had been filed as an international application under the PCT published as WO 2008/097596.

The patent as granted comprises two independent claims, one of which is claim 5. This claim reads:

"*5. Dimethyl fumarate or monomethyl fumarate for use in treating multiple sclerosis, wherein the dimethyl fumarate or monomethyl fumarate is to be orally administered to a subject in need of treatment for multiple sclerosis at a dose of 480 mg per day.*"

II. The patent was opposed by 14 opponents. The grounds for opposition were Article 100(a) EPC for lack of novelty and lack of inventive step, and Article 100(b) and (c) EPC.

III. In the course of the opposition proceedings, the patent proprietor submitted 29 sets of claims filed as auxiliary requests 1 to 29. The sets of claims of auxiliary requests 1 to 19 were filed on 23 May 2023. The sets of claims of auxiliary requests 20 to 29 were filed on 21 March 2024.

IV. The opposition division decided that the patent, as amended in the form of auxiliary request 12, and the invention to which it related met the requirements of the EPC. The decision was based on the patent as

granted as the main request and on the sets of claims of auxiliary requests 1 to 15 and 18.

The opposition division concluded, *inter alia*, that:

- claim 5 of the main request fulfilled the requirements of Article 76(1) EPC but claims 6 to 9 of this request did not

- auxiliary requests 1, 3 to 5, 8, 10, 11, 13 to 15 and 18 did not meet the requirements of Article 76(1) EPC for the same reasons as claims 6 to 9 of the main request

- auxiliary requests 2, 6, 7 and 9 complied with the requirements of Article 76(1) EPC but lacked sufficiency of disclosure

- auxiliary request 12 fulfilled the requirements of Articles 76 (1), 123 (2), 83, 54 and 56 and Rule 80 EPC

V. The patent proprietor and all 14 opponents filed an appeal against the opposition division's decision. As a consequence, they are referred to in this decision by their status in the opposition proceedings.

VI. The Board summoned the parties to oral proceedings in view of their requests to that effect.

VII. In a letter dated 6 February 2025, the patent proprietor objected, *inter alia,* to the transfer of the appeal case from Board 3.3.08 to Board 3.3.04 for not being in line with the applicable business distribution scheme of the Boards of Appeal, and requested that the case be transferred back to Board 3.3.08 or, failing

that, that the case be reallocated to another Board, such as Board 3.3.07 ("case transfer request").

VIII. In a communication dated 21 February 2025, the Board indicated, *inter alia*, that Board 3.3.04 was competent for dealing with this appeal case (Article 1(2)(a) of the Business distribution scheme of the Technical Boards of Appeal for the year 2024 ("BDS")). The Board further explained that the right to present oral arguments in proceedings concerning the merits of a patent or patent application as stipulated in Article 116 EPC did not apply to matters which were not at the parties' disposal, such as the reallocation of an appeal within the meaning of Article 1(2) of the BDS. The Chair of the Board had therefore decided that no separate oral proceedings on the issue of reallocation of the current appeal to Board 3.3.04 would be arranged.

IX. By letters dated 14 March 2025 and 12 May 2025, the patent proprietor maintained its objection to the transfer of the appeal case from Board 3.3.08 to Board 3.3.04 and reiterated its requests that the appeal T 1462/24 be transferred back to Board 3.3.08 or another competent Board.

X. With its statement of grounds of appeal, the patent proprietor resubmitted the sets of claims of auxiliary requests 1 to 29 filed before the opposition division (see point III. above) and filed ten further sets of claims as auxiliary requests 30 to 39, respectively. In addition, the patent proprietor filed corrected versions of each of auxiliary requests 4, 6, 14, 16, 24 and 26.

The set of claims of auxiliary request 1 differs from that of the main request in that claims 1 to 4 have been deleted and the remaining claims renumbered. For the other auxiliary requests, reference is made to the electronic file.

XI. In a communication dated 19 May 2025, the Registrar stated on behalf of the Board, *inter alia*, that the patent proprietor's case transfer request was impermissible.

XII. On 21 May 2025, betapharm Arzneimittel GmbH filed a notice of intervention under Article 105(1)(a) EPC. The intervention was based on the grounds for opposition pursuant to Article l00(a) in conjunction with Article 56 EPC and Article l00(b) and (c) EPC. In accordance with decision G 2/24 of 25 September 2025, point 52, the intervener is to be treated as an opponent with full rights and is referred to as opponent 15 in this decision.

XIII. In a communication under Article 15(1) RPBA ("Board's communication"), the Board expressed the preliminary view that the earlier application as filed did not disclose the subject-matter of claim 5 of the main request in a direct and unambiguous manner. In the Board's preliminary view, the same considerations applied to the claimed subject-matter of all auxiliary requests on file. The Board further noted, *inter alia*, that the parties' proposals concerning the composition of the Board were inadmissible as this matter did not fall within the competence of the parties.

XIV. Subsequently, opponent 10 informed the Board that it would not be attending the oral proceedings.

XV. In a letter dated 20 November 2025 (see section II), the patent proprietor indicated under the title "Possible referral in relation to added matter" that it "may find it appropriate" to request the referral of the following questions to the Enlarged Board of Appeal, if, during oral proceedings, the Board were to conclude that the main request adds matter on the basis of the reasoning set out in the Board's preliminary opinion in items 6 to 10:

"**Question 1**: *For the assessment of compliance with Article 123(2) EPC, do selections of features from two lists 'of some length' necessarily lead to added subject matter?*
Question 2: *If the answer to 1 is yes, can such a list 'of some length' be composed of only two members?*
Question 3: *If the answer to 2 is no, how long should such a list 'of some length' be?*" (Underlining in the original.)

XVI. Oral proceedings took place before the Board on 25 and 26 November 2025 in the presence of all parties save for opponent 10. In the course of these proceedings, the patent proprietor confirmed that its request for referral of questions to the Enlarged Board of Appeal was no longer conditional and requested that three questions be put to the Enlarged Board of Appeal under Article 112(1)(a) EPC. The Board rejected this request. Subsequently, the patent proprietor submitted two written statements of objections under Rule 106 EPC, one on 25 November 2025 and one on 26 November 2025 (see Annexes of the minutes of the oral proceedings before the Board). The Board rejected these objections. At the request of all opponents present at the oral proceedings, the Board ordered a different apportionment of costs. For further details, reference

is made to the minutes of the oral proceedings before the Board. At the end of the oral proceedings, the Chair announced the Board's decision.

XVII. The following documents are referred to in this decision.

D6b: L. Kappos *et al.*, "Efficacy of a novel oral single-agent Fumarate, BG00012, in patients with relapsing-remitting multiple sclerosis: results of a phase II study", 16th Meeting of the European Neurological Society, 2006, Slide Presentation

D9: S. Schimrigk *et al.*, "Oral fumaric acid esters for the treatment of active multiple sclerosis: an open-label, baseline-controlled pilot study", European Journal of Neurology 13(6), 2006, 604-10

XVIII. The patent proprietor's submissions relevant to this decision can be summarised as follows.

Extension of subject-matter
Main request - claim 5 (Article 100(c) EPC)
Auxiliary requests 1 to 9 and corrected versions of auxiliary requests 4 and 6 (Article 76(1) EPC)

The combination of the claimed dimethyl fumarate dosage and the claimed medical application (treatment of multiple sclerosis ("MS")) was directly and unambiguously derivable from the earlier application as filed.

Paragraph [0116] of this application disclosed the oral dimethyl fumarate dosage range of 480 to 720 mg per day, and thus the claimed value of 480 mg per day, as the most preferred of the dosage options recited in

this paragraph. When reading the disclosure of this paragraph in the context of the earlier application as filed, the skilled person would immediately recognise multiple explicit and implicit pointers to MS, and to MS only, as the neurological disease to be treated with the oral dimethyl fumarate dosages disclosed in paragraph [0116].

Extension of subject-matter
Auxiliary requests 10 to 19 and corrected versions of auxiliary requests 14 and 16 (Article 76(1) EPC)

The limitation of the claimed medical indication to relapsing-remitting MS ("RRMS") found a basis in paragraph [0003], taken alone or in combination with paragraph [0104], of the earlier application as filed.

Extension of subject-matter
Auxiliary requests 20 to 39 and corrected versions of auxiliary requests 24 and 26 (Article 76(1) EPC)

The limitation of the claimed medical indication to a subgroup of certain forms of MS, including RRMS, found a basis in paragraph [0104] of the earlier application as filed.

Request for referral to the Enlarged Board of Appeal

The patent proprietor argued that the gold standard for the assessment of the allowability of amendments under Article 76(1) EPC did not require the combination of features to be disclosed in a single passage. The Board appeared to have accepted the opponents' arguments that the combination of the specific disease claimed together with the dose of 480 mg per day was not disclosed, this implying that the Board considered

these features to be selections from lists of equal alternatives. However, the dose of 480 mg per day was not part of a list. In the patent proprietor's view, the gold standard for assessing the allowability of amendments under Article 76(1) EPC was "overshadowed" by case law dealing with combinations of features based on whether the combination required selections from more than one list of alternatives ("selections from lists" approach). As was held e.g. in decision T 992/22, point 2.4.3, the EPC did not prohibit selecting a part of the originally disclosed subject-matter and claiming it. The decisive question was not whether selections had been made, and if yes, how many. The decisive question was whether the amendments result in subject-matter extending beyond the original disclosure, i.e. whether they added information that was not directly and unambiguously derivable from the original application documents. Further decisions had held that the sole standard to be applied for the allowability of amendments was the gold standard, i.e. what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing. The patent proprietor referred to decision T 983/24, point 1.2. A formalistic approach should be avoided, as stated in decisions T 1261/21, point 4.2.13, and T 1210/20, point 3.11.2. The opposite approach had been taken in decisions T 727/00 and T 1773/16.

Furthermore, there were diverging decisions on the number and length of lists required for the combination of individual elements of these lists to result in the creation of an undisclosed subject-matter. The patent proprietor pointed to, *inter alia*, decisions T 783/09 and T 1621/16, which it had relied on in its reply for being favourable to its case. According to the patent

proprietor, this divergence created legal uncertainty which warranted a referral. Therefore, questions 2 and 3 as proposed by the patent proprietor in its letter dated 20 November 2025 should be referred to the Enlarged Board of Appeal as questions which are independent of the answer to the first question.

Objections under Rule 106 EPC

The patent proprietor alleged in its objections pursuant to Rule 106 EPC dated 26 November 2025, which replaced its objections dated 25 November 2025, that:

(a) a fundamental violation of Article 113 EPC had occurred (Article 112a(2)(c) EPC)
(b) the Board had failed to arrange for the holding of oral proceedings as requested (Article 112a(2)(d) EPC in conjunction with Rule 104(a) EPC)

As to the substance of its objections, the patent proprietor argued that, by letters dated 6 February 2025 and 14 March 2025 (sections III. and II., respectively), it had objected to the reallocation of the appeal T 1462/24 from Board 3.3.08 to Board 3.3.04, which had been ordered on 19 December 2024, for not being in accordance with the BDS. It also complained that it had not been consulted on this transfer while the order appeared to accede to opponent 2's request for reallocation filed in its notice of appeal of 28 October 2024. Furthermore, the patent proprietor had requested oral proceedings on this matter. However, in a communication from the Board of 21 February 2025, the Board declined the request for reallocation and the request for oral proceedings. By communication of 19 May 2025 from the Registry on behalf of the Board, the patent proprietor was

instructed to not further comment on this matter. This instruction was repeated in the Board's communication pursuant to Article 15(1) RPBA.

As to the timing of the objections under Rule 106 EPC, the patent proprietor argued that it had raised the above concerns on several occasions. However, the Board had instructed the patent proprietor to refrain from further correspondence on this matter by the communication of 19 May 2025 from the Registry on behalf of the Board. It was furthermore clear from point IX of the Board's preliminary opinion in its communication pursuant to Article 15(1) RPBA that this issue would not be discussed further during the oral proceedings. It was the patent proprietor's last opportunity to raise the issue after the substantive discussion. It had the right and obligation to raise such objections to be able to file a petition for review. The patent proprietor had even given the Board advance notice in its letter dated 20 November 2025 (section III., point 11), where it stated that it had "noted the Board's statement under item IX, third paragraph of the [preliminary opinion] and reserves the right to make an objection". The end of the substantive discussion at the oral proceedings was the only occasion to raise the objections.

On the questions raised by the Board with reference to the reasoning in decision R 21/22 concerning the legal basis for its possible competence to deal with the objection to the reallocation of the appeal T 1462/24 from Board 3.3.08 to Board 3.3.04, which was based on an agreement between the respective Chairs, and in particular on whether the patent proprietor actually assumed that the current Board would set aside the agreement reached between those Chairs, the patent

proprietor considered that decision R 21/22 was not applicable since it did not concern a reallocation of an appeal case. Moreover, it should be able to bring this matter before the Enlarged Board of Appeal since the right to a judge appointed by law was a recognised constitutional right of the EPC contracting states and thus enshrined in the EPC pursuant to Article 125 EPC and the European Convention on Human Rights ("ECHR"). Article 6(1) of the ECHR enshrines the parties' right to an impartial tribunal established by law.

Apportionment of costs

The right to be heard by a judge appointed by law was a recognised constitutional right of the EPC contracting states and thus enshrined in the EPC pursuant to Article 125 EPC and the ECHR, which underlies the interpretation of the EPC. Article 6(1) of the ECHR enshrined the parties' right to an impartial tribunal established by law. The patent proprietor had a right to object to a violation of its right to a judge appointed by law and to bring the matter before the Enlarged Board of Appeal. It had acted in good faith and had followed the Board's instructions. The filing of objections at the end of the oral proceedings was the last opportunity to keep open the possibility of filing a petition for review.

XIX. The opponents' submissions relevant to this decision can be summarised as follows.

Extension of subject-matter
Main request - claim 5 (Article 100(c) EPC)
Auxiliary requests 1 to 9 and corrected versions of auxiliary requests 4 and 6 (Article 76(1) EPC)

The earlier application as filed did not directly and unambiguously disclose the claimed dimethyl fumarate dosage and the treatment of MS in combination.

Contrary to the patent proprietor's view, paragraph [0116] of the earlier application as filed disclosed the dosage of 720 mg per day rather than the dosage range of 480 to 720 mg per day as the most preferred. The technical context of this paragraph was given by paragraphs [0112] to [0155] and [0117] of the earlier application as filed. Paragraphs [0104] to [0115] kept the medical indications broad. As a consequence, the skilled person reading paragraph [0116] in its technical context would not understand the dosages disclosed in paragraph [0116] to be related to the specific medical indication of MS.

Extension of subject-matter
Auxiliary requests 10 to 39 and corrected versions of auxiliary requests 14, 16, 24 and 26 (Article 76(1) EPC)

The limitation of the claimed medical indication to, for example, RRMS was not directly and unambiguously derivable from paragraphs [0003] and [0104] of the earlier application as filed, taken alone or in combination. Neither paragraph [0003] nor paragraph [0104] disclosed RRMS as the preferred form of MS to be

treated in the context of the invention described in the earlier application as filed. As a consequence, the skilled person reading paragraph [0116] in the context of the preceding paragraphs [0104] to [0115] would not understand the dosages disclosed in paragraph [0116] to be related to the specific medical indication of RRMS.

Request for referral to the Enlarged Board of Appeal (opponents 1 to 9, 11 to 15)

According to the opponents, the issue was not whether the combination of features claimed was disclosed in a single passage of the earlier application as filed. The applicable gold standard as stated in point 4.5.2 of decision G 2/10 of the Enlarged Board of Appeal required the direct and unambiguous disclosure of the combination of features as claimed in the earlier application as filed.

The "selection from lists" approach was not the main basis of the opponents' objection of added matter. Rather, they had argued that there was a lack of disclosure in the earlier application as filed of any link between the disease (MS) and the dose (480 mg per day) as claimed.

The "selection from lists" approach was nevertheless not in contradiction with the gold standard. It provided a tool for assessment on a case-by-case basis of whether a combination of features was directly and unambiguously disclosed. The assessment depended on the substance of the individual case and not on formalism. As exemplified by decision T 1020/21, this approach included the assessment of pointers towards the combination.

The divergent statements in decisions on the number and length of lists did not imply a divergence as to substance. The nature and relevance of a list and the question of whether or not combinations of features from lists resulted in an extension of subject-matter had to be decided on the substance of the case. Since the Enlarged Board of Appeal could not be requested to answer case-specific questions, the questions proposed for referral were not suitable to be answered by the Enlarged Board of Appeal.

Apportionment of costs

Opponents 1 to 9 and 11 to 15 based their request for apportionment of costs mainly on Article 16(1)(c) RPBA but also on the ground in accordance with Article 16(1)(e) RPBA. They argued that the patent proprietor had deliberately withheld its objections under Rule 106 EPC and had presented them in an unclear manner. There had been no good reasons to withhold these objections until the end of oral proceedings since all the acts objected to had occurred during written proceedings well before the oral proceedings.

The opponents noted that the letter dated 25 November 2025 setting out the objections had been prepared in advance of the oral proceedings since the patent proprietor had no access to printer facilities. Moreover, the wording of the letter itself, referring to a potential adverse finding, made it clear that the patent proprietor had prepared its objections before the oral proceedings. It was also clear from its repeated references to section III of its letter filed on 20 November 2025 to be given the opportunity to file further requests that the patent proprietor intentionally filed the objections under Rule 106 EPC

at the end of the oral proceedings. But even when filed, its objections were unclear. There was no substantiation, and even on the 26 November 2025, after repeated questions by the Board, it remained unclear what was objected to, why and on what basis. The patent proprietor even failed to give reasons why it was unable to file the objections earlier.

Rule 106 EPC was misconstrued by the patent proprietor since the issue at stake should not be to make use of the last possibility to pursue a petition. As set out in Case Law of the Boards of Appeal of the EPO, 11th edn. 2025 ("Case Law of the Boards"), V.B.3.7.1, the purpose of Rule 106 EPC was to give the Board a chance to react immediately and appropriately by either removing the cause of the objection or dismissing it. There had been no need to wait for a decision on the merits. The patent proprietor was under the obligation to raise the objections immediately and not withhold them.

Opponents 1 to 9 and 11 to 15 argued that the allocation of an appeal case to a Board of Appeal was an organisational matter internal to the Boards of Appeal. The Board, having explained that the parties had no say on that matter, had therefore been right to decline further correspondence on the reallocation of the appeal T 1462/24 from Board 3.3.08 to Board 3.3.04. This was not contradicted by the suggestion of opponent 2. While parties may wish to make suggestions on the proper allocation, they must expect that this will not be taken into account, and there is no need to hear parties on their suggestions and to hold oral proceedings.

The patent proprietor could and should have filed its objections earlier. If it had felt prevented from doing so on the basis of the Board's instruction not to engage in further correspondence on this matter, this should also have been the case for the oral proceedings since the situation remained unchanged.

The oral proceedings were prolonged without good reason, and the patent proprietor failed to state a legitimate purpose when pursuing the objections under Rule 106 EPC, despite several opportunities to do so.

Rule 106 EPC was used in an inappropriate manner as the filing of a request requires a proper objection to procedural defects. In this regard, Article 16(1)(e) RPBA could also be invoked.

XX. The patent proprietor's final requests relevant to this decision were as follows.

The patent proprietor requested that the decision under appeal be set aside, the oppositions be rejected and the patent be maintained as granted (main request).

Alternatively, the patent proprietor requested that the patent be maintained in amended form on the basis of one of the sets of claims of auxiliary requests 1 to 19 filed during opposition proceedings on 23 May 2023 and re-filed with its statement of grounds of appeal or one of the sets of claims of auxiliary requests 20 to 29 filed during opposition proceedings on 21 March 2024 and re-filed with its statement of grounds of appeal or one of the sets of claims of auxiliary requests 30 to 39 filed with its statement of grounds of appeal.

The patent proprietor further requested that corrected versions of auxiliary requests 4, 6, 14, 16, 24 and 26, filed with its statement of grounds of appeal, be admitted into the proceedings.

The patent proprietor further requested that questions be put to the Enlarged Board of Appeal under Article 112(1)(a) EPC (see point XVI. above).

The patent proprietor further requested that the opponents' request for apportionment of costs be dismissed.

XXI. The opponents' final requests relevant to this decision were as follows.

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

Opponents 1, 3, 7, 9 and 14 further requested that auxiliary requests 20 to 29 not be admitted into the proceedings.

Opponents 1, 3 to 9, 11, 13 and 14 further requested that auxiliary requests 30 to 39 not be admitted into the proceedings.

Opponents 4 and 5 requested that the corrected versions of auxiliary requests 4, 6, 14, 16, 24 and 26 not be admitted into the proceedings.

Opponents 1 to 9 and 11 to 15 further requested that the patent proprietor's conditional request in section II of its letter dated 20 November 2025 for questions to be referred to the Enlarged Board of Appeal not be

admitted into the appeal proceedings.

Opponents 1 to 9 and 11 to 15 further requested that the patent proprietor be ordered to bear their costs for preparing for and attending the additional day necessitated by the patent proprietor's filing of unsubstantiated requests.

Reasons for the Decision

1. The appeals and the intervention are admissible.

Main request (patent as granted) - claim 5
Extension of subject-matter (Article 100(c) EPC)

2. Independent claim 5 of the main request (see point I. above) is a purpose-limited product claim under Article 54(5) EPC. It defines two alternative subject-matters:

- dimethyl fumarate for use in the treatment of multiple sclerosis ("MS") by orally administering dimethyl fumarate at a dose of 480 mg per day to a subject in need of treatment for MS ("alternative (A)")

- monomethyl fumarate for use in the treatment of MS by orally administering monomethyl fumarate at a dose of 480 mg per day to a subject in need of treatment for MS ("alternative (B)")

3. Since a significant number of claim requests on file comprise subject-matter directed to alternative (A) of claim 5 of the main request, the reasoning provided in points 4. to 12. below will focus on this alternative for the sake of simplicity.

4. The parties were in dispute as to whether the combination of the following technical features of alternative (A) of claim 5 of the main request extended beyond the content of the earlier application as filed within the meaning of Article 100(c) EPC:

- the claimed dimethyl fumarate dosage, i.e. oral administration of dimethyl fumarate at a dose of 480 mg per day to a subject in need of treatment for MS ("feature (i)")

- the claimed medical application, i.e. the treatment of MS ("feature (ii)")

5. It is established case law of the Boards that the generally accepted gold standard for assessing any amendment for its compliance with the prohibition on extension laid down in Article 123(2) EPC is the disclosure test. Accordingly, any amendment to the parts of a European patent relating to the disclosure (the description, claims and drawings) can only be made within the limits of what is disclosed - either explicitly or implicitly - directly and unambiguously in the application as filed as a whole, when read objectively and relative to the date of filing by the skilled person in light of common general knowledge (see Case Law of the Boards of Appeal, II.E.1.1 and II.E.1.3.1).

6. The disclosure test thus requires an objective reading of the application relative to the date of filing. The common general knowledge cannot be used to supplement the disclosure as filed. It may only be used for the purpose of understanding and interpreting the disclosure by a person skilled in the art (see Case Law of the Boards of Appeal, II.E.1.3.4a) with reference to

T 598/12 and T 1441/21, point 2.10 of the Reasons). However, the information in the application as filed should be taken at face value, leaving aside any subjective interpretation which may vary with time and any further element based on later findings. In this assessment, it is also irrelevant whether a particular embodiment can be derived in an obvious manner from the general teaching.

7. The content of the application as filed is not limited to explicitly disclosed subject-matter but also includes subject-matter implicitly disclosed to the skilled person using common general knowledge. Implicitly disclosed subject-matter must be a clear and unambiguous consequence of what is explicitly mentioned (see Case Law of the Boards of Appeal, II.E.1.3.3).

8. The gold standard is equally to be applied for determining whether subject-matter of a European patent granted on a divisional application extends beyond the content of the earlier application as filed within the meaning of Article 100(c), second alternative, EPC (see Case Law of the Boards of Appeal, II.E.1.1).

9. In the case at issue, the Board finds that the earlier application as filed does not directly and unambiguously disclose the claimed combination of features (i) and (ii) (see point 4. above) for the reasons set out in points 9.1 to 9.43 below. In these sections, unless otherwise stated, the referenced passages are to the earlier application as filed, and features (i) and (ii) are referred to as "claimed dimethyl fumarate dosage" and "treatment of MS", respectively.

9.1 It was common ground that:

- the sole passage of the earlier application as filed disclosing the claimed dimethyl fumarate dosage is paragraph [0116]

- this paragraph discloses further dimethyl fumarate dosage options

- this paragraph does not mention any disease, let alone MS

- MS is disclosed in other parts of the earlier application as filed

9.2 As correctly observed by the patent proprietor, a combination of features originally disclosed separately may still be directly and unambiguously derivable from the (earlier) application as filed if the latter comprises explicit or implicit pointers to the combination. For instance, the fact that the features in question are mentioned in the (earlier) application as filed as "preferred" may act as a pointer (see Case Law of the Boards of Appeal, E.1.6.2.c)(i) with reference to T 407/10).

9.3 In the case at issue, it was uncontested that the earlier application as filed does not explicitly state the claimed dimethyl fumarate dosage or the treatment of MS as preferred. There was, however, disagreement between the parties as to whether:

(a) paragraph [0116] implicitly discloses the claimed dimethyl fumarate dosage as the most preferred of the dosage options recited in this paragraph ("point (a)")

(b) the skilled person reading paragraph [0116] in the context of the earlier application as a whole would directly and unambiguously derive therefrom that the dimethyl fumarate dosages disclosed in this paragraph are related to the specific medical application of treatment of MS ("point (b)")

Point (a) - paragraph [0116] does not implicitly disclose the claimed dimethyl fumarate dosage as the most preferred dosage option

9.4 Paragraph [0116] pertains to dosages of DMF and MMF. The patent proprietor interpreted these abbreviations as referring to dimethyl fumarate and monomethyl fumarate, respectively. In the following, the Board assumes that this interpretation is correct. Whether this is indeed so is not decisive for the Board's conclusion on the main request set out below. As a consequence, the Board did not need to decide on this point.

9.5 Paragraph [0116] reads:

"For DMF or MMF, an effective amount can range from 1 mg/kg to 50 mg/kg (e.g., from 2.5 mg/kg to 20 mg/kg or from 2.5 mg/kg to 15 mg/kg). Effective doses will also vary, as recognized by those skilled in the art, dependent on route of administration, excipient usage, and the possibility of co-usage with other therapeutic treatments including use of other therapeutic agents. For example, an effective dose of DMF or MMR [sic] to be administered to a subject orally can be from about 0.1 g to 1 g per pay [sic], 200 mg to about 800 mg per day (e.g., from about 240 mg to about 720 mg per day; or from about 480 mg to about 720 mg per day; or about

720 mg per day). For example, the 720 mg per day may be administered in separate administrations of 2, 3, 4, or 6 equal doses."

9.6 To the patent proprietor's benefit, the Board will assume that the skilled person reading paragraph [0116] would focus on the disclosure in parenthesis (see third sentence of this paragraph, in the following, "disclosure in parenthesis"), i.e.:

"(e.g., from about 240 mg to about 720 mg per day; or from about 480 mg to about 720 mg per day; or about 720 mg per day)"

9.7 The disclosure in parenthesis gives three dosage options for dimethyl fumarate and monomethyl fumarate. The first two dosage options are dosages defined by numerical ranges, i.e.:

(i) from about 240 to about 720 mg per day

(ii) from about 480 to about 720 mg per day ("480 to 720 mg dosage range")

The third dosage option is "about 720 mg per day" ("720 mg dosage").

9.8 Evidently, the third dosage option is fully encompassed by the second dosage option, and the latter is again fully encompassed by the first dosage option. Therefore, there is no doubt that the disclosure in parenthesis represents a list of converging embodiments.

9.9 As correctly observed by the patent proprietor at the oral proceedings, a preference for an embodiment can be

implied from how a patent application is drafted, e.g. convergence. However, contrary to the patent proprietor's view, the disclosure in parenthesis does not converge to the 480 to 720 mg dosage range but to the 720 mg dosage, as submitted by several opponents in writing. Furthermore, the 720 mg dosage is the sole dosage option discussed in the fourth and final sentence of paragraph [0116] (see point 9.5 above).

9.10 In light of these facts, the Board concludes that paragraph [0116] implicitly discloses the 720 mg dosage as the most preferred of the three dosage options referred to in point 9.7 above. Conversely, this means that the 480 to 720 mg dosage range and, by the same token, its lower endpoint of 480 mg/day constitute less preferred dimethyl fumarate dosage options.

9.11 The patent proprietor contended that the term "(or) about 720 mg per day" ("term in dispute") disclosed in parenthesis in paragraph [0116] (see point 9.6 above) did not constitute a third, separate dosage option but a mere repetition of the upper endpoint of the second dosage option, i.e. the 480 to 720 mg dosage range. This same upper endpoint was again referred to in the fourth sentence of paragraph [0116]. As a consequence, the 480 to 720 mg dosage range constituted the narrowest and hence the most preferred dosage range of the two dosage ranges mentioned in parenthesis.

9.12 However, the patent proprietor did not point to any disclosure, explicit or implicit, in the earlier application as filed in support of its interpretation of the term in dispute. The fact that the dosage options mentioned in parenthesis in the third sentence of paragraph [0116] are separated by the term "or"

instead confirms the opponents' reading of the term in dispute as a third, separate dosage option.

9.13 In a further argument, the patent proprietor submitted that the skilled person reading paragraph [0116] would focus on the 480 to 720 mg dosage range in light of the disclosure of document D6b.

9.14 This argument is not found persuasive either.

9.14.1 Document D6b (see slide 1) is a slide presentation reporting the results of a phase II study with oral BG00012 in patients with relapsing-remitting MS ("RRMS"). BG00012 is a microtablet comprising dimethyl fumarate as the sole active ingredient (see slide 5). The study identified the highest of the three doses tested (i.e. 720 mg of BG00012 per day) as having statistically significant efficacy on the primary and all secondary endpoints. By contrast, the two lower doses tested (i.e. 120 mg of BG00012 per day and 360 mg of BG00012 per day) did not have statistically significant efficacy on any of these endpoints (see slides 12 to 15).

9.14.2 To the patent proprietor's benefit, the Board will assume that document D6b reflects common general knowledge. However, the patent proprietor's argument amounts to inferring from common general knowledge a pointer to the 480 to 720 mg dosage range in the absence of any justification for this pointer in the content of the earlier application as filed.

9.14.3 As explained in T 598/12 (see Case Law of the Boards of Appeal, II.E.1.3.4a)) and T 1441/21 (see point 2.10 of the Reasons), what has to be assessed is whether the notional skilled person working in the field would

consider something as directly and unambiguously implicitly disclosed in light of their common general knowledge. The assessment of what information is implicitly disclosed in an (earlier) application cannot go beyond the limits of what the skilled person would objectively understand to be a direct and unambiguous consequence of the explicit disclosure. Moreover, when performing this assessment, the common general knowledge cannot serve to enlarge or replace, in a subjective or *ex post facto* manner, the actual content of the (earlier) application as filed.

9.14.4 Even if, to the patent proprietor's benefit, it were assumed that the skilled person would read paragraph [0116] with the disclosure of document D6b in mind, they would focus on the dose which has been shown to have statistically significant efficacy in patients with MS, i.e. the 720 mg dose disclosed in the third and fourth sentences of paragraph [0116] rather than the 480 to 720 mg dosage range or its lower endpoint of 480 mg/day.

9.15 In view of the preceding considerations, the Board concludes that paragraph [0116] does not implicitly disclose the claimed dimethyl fumarate dosage as the most preferred dosage option.

9.16 For the sake of completeness, the Board notes that in reaching this view, it did not consider itself bound by decision T 1773/16 regarding the patent granted on the earlier application as filed.

Point (b) - the skilled person reading paragraph [0116] in the context of the earlier application as a whole would not directly and unambiguously derive that the dimethyl fumarate dosages disclosed in this paragraph are related to the specific medical application of treatment of MS

9.17 The Board, in agreement with the opponents, finds that the skilled person reading paragraph [0116] in its technical context would understand the oral dimethyl fumarate dosages disclosed in paragraph [0116] to be of a general nature rather than being related to the specific medical application of treatment of MS.

9.18 The patent proprietor took a different view and presented two main arguments.

(b)(i) - The patent proprietor's first argument

9.19 In its first argument, the patent proprietor submitted that the earlier application as filed contained multiple explicit pointers to MS as the neurological disease to be treated with the dimethyl fumarate dosages disclosed in paragraph [0116]. In support of its case, the patent proprietor relied on the following disclosure:

- paragraphs [0001] to [0004], [0010], [0019], [0030], [0032], [0063], [0104], [0108] and [0109]
- examples 1 to 3
- the claims as filed, in particular claim 3 and claim 17 as a dependent claim of claim 16, itself being dependent on claim 14 ("claim 17")
- document D6b

9.20 Paragraph [0001] is an introductory paragraph setting out the objective and purpose of the invention as disclosed upon filing ("original invention"). It reads:

"*Provided are certain compounds for treating neurological diseases, including demyelinating neurological diseases, such as, e.g., multiple sclerosis.*"

9.21 As submitted by opponent 5 in writing (see section 2.1.1. of its submission dated 21 March 2024 filed as an annex to its reply to the patent proprietor's statement of grounds of appeal), MS is cited as an exemplary demyelinating neurological disease in this paragraph. In light of this exemplary character of MS, paragraph [0001] does not explicitly disclose MS as the preferred neurological disease to be treated in the context of the original invention.

9.22 At the same time, the patent proprietor is correct that MS is the only disease specifically mentioned in paragraph [0001]. Moreover, MS is fully encompassed by the term "demyelinating neurological diseases", the latter itself being fully encompassed by the general term "neurological diseases" in this paragraph. This focus on MS is retained in paragraphs [0002] to [0004], which are all exclusively dedicated to RRMS. Although these paragraphs describe background art only, they nonetheless form part of the content of the earlier application as filed and can therefore not be ignored in the context of Article 100(c) EPC.

9.23 However, the disclosure of the earlier application as filed does not end with paragraph [0004] but continues by discussing further background art in paragraphs [0005] to [0008]. Unlike paragraphs [0002] to [0004],

paragraphs [0005] to [0008] do not exclusively focus on MS but address neurodegeneration and neuroinflammation in more general terms. Specifically, paragraph [0006] refers to MS only as one among several neurodegenerative diseases (i.e. ALS, Alzheimer's disease and Parkinson's disease) in which the Nrf2 pathway is activated as an endogenous protective mechanism. This shift in focus from MS to neurodegenerative diseases with this Nrf2 pathway activating mechanism leaves the skilled person in doubt whether MS is the predominant target of the original invention, as initially suggested in paragraphs [0001] to [0004].

9.24 To seek clarification on this point, the skilled person would turn to the next paragraph, i.e. paragraph [0009]. This paragraph defines the original invention as comprising at least one of the following five methods:

1) methods of screening for at least one new candidate compound for treating a neurological disease ("Method 1")
2) methods of evaluating neuroprotective properties of at least one drug candidate for treating a neurological disease ("Method 2")
3) methods of comparing (e.g. for bioequivalence) at least two pharmaceutical compositions which comprise fumaric acid derivatives ("Method 3")
4) methods of treating a neurological disease by administering to the subject in need thereof at least one compound that is partially structurally similar to DMF or MMF ("Method 4")
5) methods of treating a neurological disease by a combination therapy that comprises administration of at

least one first compound that upregulates the Nrf2 pathway and at least one second compound that does not upregulate the Nrf2 pathway ("Method 5")

9.25 As submitted by the patent proprietor, Methods 4 and 5 concern aspects of the original invention relating to methods of treatment (treatment of a neurological disease). In the following, these aspects are referred to as "method of treatment aspects of the original invention".

9.26 Following paragraph [0009], paragraph [0010] reads:

"*In some embodiments, the neurological disease is a neurodegenerative disease such as, for example, ALS, Parkinson's disease, Alzheimer's disease, and Huntington's disease. In some embodiments the neurological disease is MS or another demyelinating neurological disease.*"

9.27 Both sentences of paragraph [0010] begin with the statement "In some embodiments, the neurological disease is". From this wording, the skilled person would derive that the neurological diseases referred to in paragraph [0009] belong to two different categories, i.e.:

(i) neurodegenerative diseases other than those of the second category, i.e. neurodegenerative diseases which are not demyelinating neurological diseases

(ii) MS or another demyelinating neurological disease

For this reason, MS is not listed together with the other exemplary diseases of the first category but is referred to independently in paragraph [0010].

9.28 The Board is unable to identify any disclosure in paragraph [0010] which implies that there is a preference for one or the other of these two categories. The wording "In some embodiments" in this paragraph instead suggests that the two categories of neurological diseases are on an equal footing. Even if, as argued by the patent proprietor, MS is the sole demyelinating neurological disease explicitly mentioned in paragraph [0010], it remains that this paragraph does not indicate any preference for the second category of neurological diseases to which MS belongs.

9.29 The skilled person reading paragraph [0010] would immediately recognise that this paragraph cites all the neurodegenerative diseases referred to in paragraph [0006] as having Nrf2 pathway activation as an endogenous protective mechanism. From this, the skilled person would infer that the purpose of the method of treatment aspects of the original invention (see point 9.25 above) is to treat neurodegenerative diseases with this endogenous protective mechanism, including but not limited to MS.

9.30 Paragraphs [0019], [0030], [0032] and [0063] do not contain any disclosure which would put the skilled person's understanding of the method of treatment aspects of the original invention set out in point 9.29 above in question.

9.30.1 Paragraph [0019] explains that in some embodiments, Method 4 comprises administering to the subject (a mammal) a therapeutically effective amount of at least

one neuroprotective compound. Undisputedly, the only neuroprotective compounds mentioned in this paragraph are dimethyl fumarate and monomethyl fumarate. However, this paragraph does not specify any neurological disease, let alone MS.

9.30.2 Paragraph [0030] consists of one sentence citing the prior-art document D9 as indicating that fumaric esters, such as dimethyl fumarate, can be used in the treatment of MS. The skilled person having the disclosure of paragraphs [0009] and [0010] in mind would note that in contrast to these two paragraphs, paragraph [0030] does not refer to the original invention or any of its five methods (see point 9.24 above). Consequently, as argued by opponent 14 in writing (see statement of grounds of appeal, page 11, second paragraph), the skilled person would understand the reference to document D9 in paragraph [0030] as providing general information only and would not derive from this disclosure that MS, or RRMS, is the predominant target of the method of treatment aspects of the original invention.

9.30.3 As regards paragraph [0032], the patent proprietor submitted itself (see reply to the opponents' statements of grounds of appeal, paragraph 82) that this paragraph does not pertain to the method of treatment aspects of the original invention but instead discloses the treatment of MS in the context of screening methods forming part of the disclosure relating to Methods 1 and 2 of the original invention (see point 9.24 above). Therefore, like paragraph [0030], paragraph [0032] does not contain any pointer to MS as the preferred disease to be treated in the context of the method of treatment aspects of the original invention.

9.30.4 Paragraph [0063] mirrors the teaching of paragraph [0019] (see point 9.30.1 above). As pointed out by opponent 2 at the oral proceedings, paragraph [0063] keeps the medical indication broad.

9.31 Turning to paragraphs [0104] to [0115], as convincingly argued by opponent 2 at the oral proceedings, these paragraphs (together with paragraph [0117]) provide the technical context for paragraph [0116]. Paragraphs [0104] to [0107] set out in detail the neurological diseases and the subject to be treated. Paragraphs [0108] to [0111] are dedicated to animal models for determining the ability of a compound to slow or prevent neurodegeneration. Paragraphs [0112] to [0117] discuss therapeutically effective dosages.

9.31.1 Paragraph [0104] reads:

"*A neurological disease in methods 1-5 above can be a neurodegenerative disease such as, for example, ALS, Parkinson's disease, Alzheimer's disease, and Huntington's disease. The neurological disease can also be multiple sclerosis (MS), or other demyelinating diseases of the central or peripheral nervous system. In some embodiments the form of MS in methods 1-5 is selected from: relapsing remitting MS (RRMS), secondary progressive MS (SPMS), primary progressive MS (PPMS), and malignant MS (Marburg Variant).*"

9.31.2 As can be seen from points 9.26 and 9.31.1 above, the disclosure of paragraph [0104] mirrors the technical teaching of paragraph [0010] in that it refers to the same two categories of neurological diseases. Furthermore, like paragraph [0010], paragraph [0104] does not contain any disclosure which implied that

there is a preference for one or the other of these two categories. The wording "The neurological disease can also be" in paragraph [0104] instead suggests that the two categories of neurological diseases are on an equal footing. The same holds true for the four forms of MS listed in the third sentence of this paragraph ("In some embodiments the form of MS in methods 1-5").

9.31.3 Paragraphs [0106] and [0107] disclose examples of neurological diseases. The second and third sentences of paragraph [0106] read:

"*Examples of neurological diseases suitable for the methods described herein include neurodegenerative diseases such as amyotrophic lateral sclerosis (ALS), Parkinson's disease, Alzheimer's disease, and Huntington's disease. Other examples include demyelinating neurological disease including, in addition to MS, the following diseases: acute haemorrhagic leucoencephalomyelitis, Hurst's disease, acute disseminated encephalomyelitis, optic neuritis, Devic's disease, spinal cord lesions, acute necrotizing myelitis, transverse myelitis, chronic progressive myelopathy, progressive multifocal leukoencephalopathy (PML), radiation myelopathy, HTLV-1 associated myelopathy, monophasic isolated demyelination, central pontine myelinolysis, and leucodystrophy (e.g., adrenoleucodystrophy, metachromatic leucodystrophy, Krabbe's disease, Canavan's disease, Alexander's disease, Pelizaeus-Merbacher disease, vanishing white matter disease, oculodentodigital syndrome, Zellweger's syndrome), chronic inflammatory demyelinating polyneuropathy (CIDP), acute inflammatory demyelinating polyneuropathy (AIDP), Leber's optic atrophy, and Charcot-Marie-Tooth disease.*"

9.31.4 As submitted by opponent 3 orally, the second and third sentences of paragraph [0106] refer to the same two categories of neurological diseases as paragraphs [0010] and [0104], respectively. Like these two paragraphs, the second and third sentences of paragraph [0106] do not contain any disclosure which implied that there is a preference for one or the other of these two categories. Moreover, contrary to the patent proprietor's view, the wording "in addition to MS," in the third sentence of paragraph [0106] does not point to MS as the preferred neurological disease to be treated in the context of the original invention. Rather, the skilled person, having the understanding of the method of treatment aspects of the original invention as set out in point 9.29 above, would derive from this wording that MS is only one among a multitude of neurodegenerative diseases with Nrf2 pathway activation as an endogenous protective mechanism that the original invention aims to treat. Moreover, the demyelinating diseases disclosed in paragraph [0107] are distinct from MS.

9.31.5 Paragraphs [0108] to [0111] describe animal models suitable for determining the ability of a compound to slow or prevent neurodegeneration, including but not limited to animal models of MS.

9.31.6 Paragraphs [0112] to [0115] form part of the section on therapeutically effective dosages spanning from paragraphs [0112] to [0117]. Like paragraphs [0116] and [0117], these paragraphs do not mention any medical indications, let alone MS.

9.31.7 Hence, as submitted by opponent 2 at the oral proceedings, the disclosure in paragraphs [0104] to [0115] and [0117], which provide the technical context

for paragraph [0116], either do not disclose MS or present it (or animal models of it) on an equal footing with other neurodegenerative diseases (or animal models of them).

9.31.8 Furthermore, as submitted by several opponents in writing, paragraph [0115] explicitly states that a therapeutically effective amount may vary with the condition being treated. This paragraph is directly followed by paragraph [0116], which gives examples of therapeutically effective dosages of dimethyl fumarate and monomethyl fumarate without reference to a specific medical indication (see points 9.1 and 9.5 above).

9.31.9 Hence, when reading paragraph [0116] in context, the skilled person would immediately understand that the dimethyl fumarate dosages disclosed in paragraph [0116] are presented in general terms for a range of medical conditions (i.e. neurodegenerative diseases with Nrf2 pathway activation as an endogenous protective mechanism). As a consequence, the skilled person would not link these dosages to a specific medical indication, let alone MS.

9.32 Contrary to the patent proprietor's view, Examples 1 to 3 do not contain any disclosure on the basis of which the skilled person would revise their understanding of paragraph [0116] set out in point 9.31.9 above.

9.32.1 Examples 1 and 2 show experimentally that dimethyl fumarate and monomethyl fumarate exert Nrf2 activation *in vitro*. Example 1 concludes by stating that dimethyl fumarate and monomethyl fumarate are potent activators of Nrf2 at concentrations within clinical exposure range.

9.32.2 Hence, Examples 1 and 2 serve to show a proof of concept relating to the Nrf2 activation background discussed in paragraphs [0005] to [0008] of the earlier application as filed. As explained in point 9.23 above, this background concerns neurodegenerative diseases in which Nrf2 activation is an endogenous protective mechanism, including but not limited to MS.
As a consequence, Examples 1 and 2 do not contain any disclosure on the basis of which the skilled person would understand the dimethyl fumarate dosages disclosed in paragraph [0116] to be linked to the treatment of MS.

9.32.3 The same holds true for Example 3. This example determines Nrf2 activation of dimethyl fumarate and monomethyl fumarate *in vivo* in an animal model of MS. As submitted by opponent 14 in writing (see reply to patent proprietor's statement of grounds of appeal, page 8), this example does not serve to investigate whether dimethyl fumarate, or monomethyl fumarate, is effective in the treatment of MS. Instead, its purpose is the same as that of Examples 1 and 2, i.e. to show a proof of concept relating to the background discussed in paragraphs [0002] to [0008] of the earlier application as filed.

9.33 As regards the claims as filed, the patent proprietor is correct that MS is the sole neurological disease specifically mentioned in these claims (see claims 3 and 17). However, like Examples 1 to 3, these claims do not contain any disclosure which would make the skilled person revise their understanding of paragraph [0116].

9.33.1 Claim 3 is directed to a method of evaluating neuroprotective properties of at least one test

compound. As correctly observed by several opponents in writing and orally, a "test compound" in the sense of claim 3 is a compound other than dimethyl fumarate and monomethyl fumarate (see claim 9 as filed reciting dimethyl fumarate as a comparator compound). As a consequence, the skilled person would understand claim 3 to be directed to subject-matter distinct and thus unrelated to that covered by paragraph [0116].

9.33.2 Claim 17 is directed to a method of treatment of a neurological disease by combination therapy according to Method 5 (see point 9.24 above). As observed by several opponents in writing (e.g. statement of grounds of appeal of opponent 12, section 22), Methods 4 and 5 are set out as two different methods of medical treatment in the earlier application as filed (see paragraph [0009]). Moreover, none of the claims as filed are directed to Method 4 with dimethyl fumarate or monomethyl fumarate as the therapeutically active agent (see statement of grounds of appeal of opponent 3, sections 10 to 12). In view of the foregoing, the skilled person would understand the focus on MS in claim 17 to be confined to Method 5 and thus retain the understanding that the dosages disclosed in paragraph [0116] are general in nature (see point 9.31.9 above).

9.34 Concerning the patent proprietor's argument that the skilled person reading paragraph [0116] with the common general knowledge reflected in document D6b in mind would understand the dosages disclosed in this paragraph to be primarily directed to MS, reference is made to the reasoning in points 9.14.2 and 9.14.3 above. The patent proprietor's argument amounts to inferring from the alleged common general knowledge illustrated by document D6b a pointer to MS in the

absence of any justification for this pointer in the content of the earlier application as filed.

9.35 Moreover, even if it were assumed to the patent proprietor's benefit that the skilled person would read paragraph [0116] with the disclosure of document D6b in mind, they would be aware from this disclosure that oral dosages of 120 and 360 mg of BG00012 per day did not show statistically significant efficacy in the RRMS study patients (see point 9.14.1 above). As a consequence, they would understand the "effective" dimethyl fumarate dosage ranges reported in paragraph [0116] (which include the aforementioned oral dosages of 120 and 360 mg per day) as not being linked to the treatment of one specific disease (MS) but rather as varying with the condition being treated, as explicitly stated in paragraph [0115] of the earlier application as filed (see point 9.31.8 above).

9.36 In view of the preceding considerations set out in points 9.20 to 9.35 above, the Board concludes that none of the passages relied on by the patent proprietor in support of its first argument contain a pointer to MS as the neurological disease to be treated with the dimethyl fumarate dosages disclosed in paragraph [0116]. Rather, the skilled person reading this paragraph in its technical context would not understand the dimethyl fumarate dosages disclosed there to be linked to a specific medical indication, let alone to the treatment of MS.

9.37 In coming to this conclusion, the Board did not overlook the following points raised by the patent proprietor.

- MS is the sole neurodegenerative disease mentioned throughout the earlier application as filed.

- The earlier application as filed does not contain any disclosure like that in paragraph [0030] for any neurological disease other than MS.

9.38 However, it remains that the technical context of paragraph [0116] is provided by paragraphs [0104] to [0115] and [0117]. As explained under point 9.31 above, these paragraphs do not contain any pointer to MS as the neurological disease to be treated with the dimethyl fumarate dosages disclosed in paragraph [0116].

(b)(ii) - The patent proprietor's second argument

9.39 In its second argument, the patent proprietor submitted that the earlier application as filed contained multiple implicit pointers to MS as the preferred neurological disease to be treated in the context of paragraph [0116] by explicit reference to the hallmarks of MS, i.e. (i) demyelination, axonal loss and neuronal death resulting from this demyelination, and (ii) inflammation of the cells of the central nervous system. The need to reduce these hallmarks ran like a thread through the earlier application as filed, as evidenced by paragraphs [0037], [0039] and [0064], all of which singled out these hallmarks. Moreover, the definition of the term "therapeutically effective dose" in paragraph [0039] made explicit reference to these hallmarks. Paragraph [0116] being equally directed to therapeutically effective doses, the skilled person would immediately make the connection between these two paragraphs and conclude that the dimethyl fumarate

dosages disclosed in paragraph [0116] were linked to MS treatment.

9.40 Without doubt, the skilled person would be aware from their common general knowledge that demyelination, axonal loss and neuronal death resulting from this demyelination, and inflammation of the cells of the central nervous system (in the following "characteristics of neurodegeneration") are hallmarks of MS (see paragraph [0002] of the earlier application as filed).

9.41 However, to qualify as an implicit pointer to MS as the neurological disease to be treated in the context of paragraph [0116], the explicit disclosure of the aforementioned characteristics of neurodegeneration in the earlier application as filed (e.g. paragraphs [0037], [0039] and [0064]) must have as a clear and unambiguous consequence the disclosure of MS (see point 7. above). In other words, it must be clear and unambiguous from the earlier application as filed that the disclosure of the characteristics of neurodegeneration in this application is exclusive to MS.

9.42 In the Board's judgement, this is not so. Paragraph [0106] lists a multitude of exemplary demyelinating neurological diseases (see point 9.31.4 above). As noted by opponent 3 at the oral proceedings, this list includes demyelinating diseases with an inflammatory component, e.g. chronic inflammatory demyelinating polyneuropathy. The patent proprietor did not make the Board aware of any disclosure in the earlier application as filed from which the skilled person would directly and unambiguously derive that the characteristics of neurodegeneration reported (e.g. in

paragraphs [0037], [0039] and [0064]) are indicative of MS only.

9.43 As a consequence, the patent proprietor's second argument cannot succeed either.

Overall conclusion on claim 5 of the main request

10. The earlier application as filed does not explicitly or implicitly disclose the claimed dimethyl fumarate dosage as the most preferred of the dosage options recited in paragraph [0116]. Moreover, the skilled person reading this paragraph in its technical context would understand the dimethyl fumarate dosages disclosed in paragraph [0116] to be of a general nature rather than being related to the specific medical application of treatment of MS.

11. In view of the foregoing, the Board concludes that the earlier application as filed does not directly and unambiguously disclose the combination of the claimed dimethyl fumarate dosage and the treatment of MS, i.e. features (i) and (ii) of alternative A of claim 5 of the main request (see point 4. above). As a consequence, the subject-matter of this claim extends beyond the earlier application as filed within the meaning of Article 100(c) EPC.

12. For the sake of completeness, the Board notes that in reaching this conclusion, it did not overlook the patent proprietor's submissions on the two-list principle (see Case Law of the Boards of Appeal, II.E. 1.6.2). However, as submitted by the patent proprietor in writing and orally, this principle may assist in determining whether there is extension of subject-matter within the meaning of Article 100(c)

EPC, but it does not take the place of the gold standard. In the current case, the Board exclusively applied the gold standard in its assessment of extension of subject-matter within the meaning of Article 100(c) EPC. As a consequence, the patent proprietor's submissions on the two-list principle did not require further consideration by the Board.

Auxiliary requests 1 to 9 and corrected versions of auxiliary requests 4 and 6
Article 76(1) EPC

13. The set of claims of each of these auxiliary requests includes subject-matter comprising the combination of features (i) and (ii) of alternative A of claim 5 of the main request (see point 4. above).

14. In writing and orally, the patent proprietor did not present any arguments beyond those already submitted with respect to alternative (A) of claim 5 of the main request.

15. Consequently, for the same reasons as those outlined above for claim 5 of the main request, the subject-matter of each of auxiliary requests 1 to 9 and that of each of the corrected versions of auxiliary requests 4 and 6 extends beyond the content of the earlier application as filed, contrary to the requirements of Article 76(1) EPC.

16. In view of the foregoing, there is no need to consider the requests of opponents 4 and 5 that the corrected versions of auxiliary requests 4 and 6 not be admitted into the proceedings.

Auxiliary requests 10 to 39 and corrected versions of auxiliary requests 14, 16, 24 and 26
Article 76(1) EPC

17. The set of claims of each of these auxiliary requests includes subject-matter comprising the combination of features (i) and (ii) of alternative A of claim 5 of the main request, with the exception that MS in feature (ii) has been restricted to RRMS (see auxiliary requests 10 to 19 and corrected versions of auxiliary requests 14 and 16) or to a subgroup of certain forms of MS, including RRMS (see auxiliary requests 20 to 39 and corrected versions of auxiliary requests 24 and 26).

18. At the oral proceedings, the patent proprietor did not present any arguments beyond those already submitted with respect to the subject-matter of alternative (A) of claim 5 of the main request. In writing, the patent proprietor relied on paragraph [0003], alone or in combination with paragraph [0104], as support for the restriction of the subject-matter of alternative (A) of claim 5 of the main request to the treatment of RRMS. As a basis for the restriction of the subject-matter of alternative (A) of claim 5 of the main request to the treatment of a subgroup of certain forms of MS including RRMS, the patent proprietor cited paragraph [0104].

19. The Board does not concur with the patent proprietor.

19.1 Paragraph [0003] describes background art on MS and RRMS. Paragraph [0104] cites RRMS as one member of a subgroup of four forms of MS without indicating any preference for any of these four forms, let alone RRMS (see point 9.31.1 above).

19.2 Even if it were assumed to the patent proprietor's benefit that the earlier application implicitly disclosed RRMS or a subgroup of the forms of MS listed in paragraph [0104] with RRMS as a member as preferred, it remains that the skilled person reading the disclosure of paragraph [0116] in its technical context would not understand the therapeutically effective doses of dimethyl fumarate disclosed in this paragraph to be linked to one or more specific medical indications, let alone to RRMS or to a subgroup of the forms of MS listed in paragraph [0104], with RRMS as a member (see the reasoning in points 9.20 to 9.43 above on MS, which applies analogously here).

20. Consequently, the subject-matter of each of auxiliary requests 10 to 39 and that of the corrected versions of auxiliary requests 14, 16, 24 and 26 extends beyond the content of the earlier application as filed, contrary to the requirements of Article 76(1) EPC.

21. In view of the foregoing, there is no need to consider the opponents' requests that auxiliary requests 20 to 39 and the corrected versions of auxiliary requests 14, 16, 24 and 26 not be admitted into the proceedings.

Overall conclusion

22. Since none of the claim requests is allowable, the patent has to be revoked.

Referral to the Enlarged Board of Appeal

23. In the current case, the Board applied the generally accepted standard for assessing any amendment for its compliance with the EPC (Articles 76(1), 100(c) and

123(2) EPC), which is the disclosure test. Accordingly, the Board assessed whether the subject-matter claimed is disclosed - either explicitly or implicitly - directly and unambiguously in the parent application as filed as a whole, when read objectively and relative to the date of filing by the skilled person in light of common general knowledge.

23.1 There is no disagreement that the disclosure test is the proper legal test and, in accordance with decision G 2/10 (OJ EPO 2012, 376), even the gold standard to be applied (see the patent proprietor's reply of 18 August 2025, item 76). However, the patent proprietor's request to refer questions to the Enlarged Board of Appeal implies the patent proprietor's view that the Board's assessment under Articles 100(c) and 76(1) EPC is nonetheless in conflict with the disclosure test, at least to the extent that the Board may have relied on the case law on selections from lists as a methodological approach to conclude that the claimed subject-matter extends beyond the earlier application as filed. Indeed, the first question proposed by the patent proprietor implies that it considers this case law itself to be in conflict with the disclosure test. Otherwise, the answer to this first question would be a straightforward "no" since the methodology developed in the case law regarding selections from lists does not constitute a purely formalistic approach, as explained below.

23.2 As a secondary consideration, the patent proprietor argued that there were diverging decisions on the number and length of lists required for the combination of individual elements of these lists to result in the creation of undisclosed subject-matter. The patent proprietor pointed to, *inter alia*, decisions T 783/09

and T 1621/16, which it had relied on in its reply for being favourable to its case. According to the patent proprietor, this divergence created legal uncertainty which warranted a referral.

23.3 The Board rejected the patent proprietor's request for a referral under Article 112(2) EPC as no point of law of fundamental importance had arisen that required a decision by the Enlarged Board of Appeal, nor was a referral deemed necessary to ensure the uniform application of the law. Furthermore, the Board did not consider it necessary to deviate from an interpretation or explanation of the Convention contained in an earlier decision or opinion of the Enlarged Board of Appeal in accordance with Article 112(1) EPC, which would have required a referral (Article 21 RPBA). Rather, the decision of the Board is in line with previous decisions by the Enlarged Board of Appeal relevant to the assessment of the allowability of amendments to an application or patent. Moreover, the case law on selections from lists is not in contradiction with the established disclosure test. Finally, the divergent statements in the case law on the number or length of lists do not as such establish a divergence in substance. In fact, determining whether the "selections from lists" approach is being applied in an inconsistent or even contradictory way requires a detailed analysis of the specific circumstances of each case. No such analysis had been presented to the Board. Irrespective of that, such divergence, if any, has no bearing on the outcome in the current case. This is because the divergence of opinion in the present case relates to what the skilled person can directly and unambiguously derive from the parent application as filed by reading it in light of common general

knowledge, not on the legal standard and methodology. This is reasoned in detail below.

24. In the Board's judgement, the case law using the "selections from lists" approach as a methodology for determining whether or not subject-matter claimed was originally disclosed does not conflict with the disclosure test. Importantly, this methodology does not fall under the "rules of logic" which the Enlarged Board of Appeal considered incompatible with the disclosure test. The Enlarged Board of Appeal clearly set out that it used the term "rules of logic" only in respect of the proposition that where an application discloses a general teaching and specific embodiments, groups thereof or areas, all other potential embodiments or intermediate generalisations falling within the ambit of the general teaching (but not as such disclosed in the application as filed) would thereby, by implication, inevitably also be disclosed (see G 2/10, OJ EPO 2012, 376, point 4.5.3). The Enlarged Board of Appeal thus expressly ruled out the "logical complement" approach of decision T 1107/06. The "selections from lists" approach avoids the fallacy according to which the subject-matter claimed is considered disclosed only because it is conceptually comprised by the general teaching in the application as filed. Indeed, direct and unambiguous disclosure cannot be equated to subject-matter resulting merely from a combination of possibilities selected from a reservoir of equally applicable options or alternatives that define a broad technical field.

24.1 On the other hand, the "selections from lists" approach does not imply a schematic reasoning as suggested by the patent proprietor's first question. A finding on added matter following the methodology developed in the

case law regarding selections from lists depends on the specific circumstances of the case, not on mechanistic logic, and includes, e.g. considerations of whether the combined features are disclosed as part of groups of equally applicable alternatives or options and whether there are pointers, e.g. in terms of preference, to the claimed combination of features or another way in which it is singled out. The examination of whether the application discloses groups or subgroups of equivalent alternatives or options for individual features of a combination, and whether and to what extent technical links between the elements of these groups or other indications for their combination are disclosed, leads to a structured assessment of the technical circumstances of the case in question as required by G 2/10 (OJ EPO 2012, 376, point 4.5.4).

24.2 The Enlarged Board of Appeal expressly approved the principles developed by the Boards of Appeal regarding "*the singling out of compounds or sub-classes of compounds or other so-called intermediate generalisations not specifically mentioned nor implicitly disclosed in the application as filed*" (see G 2/10, OJ EPO 2012, 376, point 4.5.4). The Enlarged Board of Appeal referred to the Case Law of the Boards of Appeal of the European Patent Office, sixth edn., July 2010, III.A.1 and 2. The latter section deals with intermediate generalisations and non-disclosed combinations specifically, while the former section discusses, *inter alia*, a number of decisions such as T 727/00, T 1511/07, T 1374/07, T 615/95, T 859/94, T 942/98 and T 948/02, which are referenced in the 11th edition of the Case Law of the Boards of Appeal of the European Patent Office in II.E.1.6.2 (selections from two lists – singling out a combination of features) and II.E.6.3 (deletion of elements from lists – shrinking

the lists without singling out a combination of features). Had the Enlarged Board of Appeal thought the "selections from lists" approach to be in contradiction to the disclosure test, decision G 2/10 would have overturned the respective decisions (as was the case with the approach taken in decision T 1107/06) and not referred to them approvingly. Indeed, regarding the singling out of subject-matter which was not originally disclosed, the Enlarged Board pointed to decision T 615/95 and thereby highlighted the importance of decisions making use of this approach.

24.3 The Board also fails to see any reason why the "selections from lists" approach would be contrary to the disclosure test. This methodological approach deals with a combination of features in an amended claim which creates subject-matter that is conceptually comprised by the application as filed but not disclosed in that particular individual combined form. This approach correlates with the novelty test when assessing whether subject-matter is merely conceptually or individually disclosed in a document in the prior art. This, in turn, forms the basis for selection inventions (see e.g. T 12/81, OJ EPO 1982 296; T 401/94).

25. The second and third question proposed by the patent proprietor, whether formulated as dependent on the answer of the first question or not, are not suitable for referral.

25.1 It is true that Case Law of the Boards of Appeal of the European Patent Office, 11th edition, deals with a number of decisions that discuss formal aspects such as the number and length of the lists. However, this should not be misunderstood to mean that the

"selections from lists" approach amounts to a schematic argument detached from the specific circumstances of each individual case. As set out above, this approach is a structured methodology that seeks to help in the technical assessment in an individual case of whether an amendment by a combination of features limits the claim to subject-matter that is disclosed in the application as filed or singles out subject-matter, such as a subgroup, which is not disclosed as such. Therefore, a finding of added matter when following the "selections from lists" approach is the result of an assessment of the original disclosure in each case. Consequently, a divergence between decisions as to the number and length of lists does not allow the conclusion to be drawn that the disclosure to be assessed in each case was evaluated differently for formal reasons.

25.2 But even assuming that the "selections from lists" approach is applied differently and leads to a different outcome, the second and third question proposed by the patent proprietor are not suitable for referral. The number of lists and their lengths are not generalisable criteria that the Enlarged Board of Appeal could use to further refine the assessment under Article 100(c) EPC beyond the gold standard. However, this is a prerequisite for referring questions to the Enlarged Board of Appeal on the basis of Article 112(1) EPC to ensure the uniform application of the law. A referral to the Enlarged Board of Appeal that merely seeks to have it examine whether individual decisions have applied Article 100(c) EPC correctly is not admissible.

26. For the above reasons, the patent proprietor's request to refer questions to the Enlarged Board of Appeal was rejected.

Objections under Rule 106 EPC

27. The patent proprietor alleged in its objections under Rule 106 EPC dated 26 November 2025, which replaced its objections dated 25 November 2025, that:
(a) a fundamental violation of Article 113 EPC had occurred (Article 112a(2)(c) EPC)
(b) the Board had failed to arrange for the holding of oral proceedings as requested (Article 112a(2)(d) EPC in conjunction with Rule 104(a) EPC)

28. The Board rejected the objections under Rule 106 EPC for the following reasons.

Allocation of appeal files: parties' rights and power of the Board

29. The Board considers it helpful to recall the legal framework and procedures for the allocation of appeal cases and the determination of the composition of a Board to decide on an appeal.

29.1 Before the beginning of each working year, a business distribution scheme is drawn up by the Presidium of the Boards of Appeal in the composition referred to in Rule 12b(4) EPC. This scheme, which can be amended during the year, distributes among the Boards of Appeal all appeals that may be filed during the year and designates the members who may serve on each Board and their respective alternates (Article 1(1) RPBA and Rule 12b(4) EPC). In case of conflicts regarding the allocation of duties between two or more Boards of

Appeal, the Presidium in the composition referred to in Rule 12b(4) EPC is competent to decide the matter.

29.2 Appeals are allocated to the Technical Board of Appeals on the basis of the main classification of the International Patent Classification assigned to the application or patent at the time of filing as set out in Article 1(1) of the business distribution scheme of the Technical Boards of Appeal for the respective working year. In the current appeal, the business distribution scheme of the Technical Boards of Appeal for 2024 as amended with effect from 1 October 2024 ("BDS") was applicable.

29.3 Under Article 1(2) BDS, the Boards may depart from the allocation on the basis of the main classification of the International Patent Classification set out in Article 1(1) BDS on two grounds: either because of the technical content of an appeal or to balance the workload of the Boards. If a deviation from the allocation in accordance with Article 1(1) BDS is considered appropriate in an appeal, the Chairs of the Boards concerned must endeavour to reach an agreement on the allocation, failing which the Presidium as referred to in Rule 12b(4) EPC must decide.

29.4 Following the allocation of an appeal to a Board of Appeal, the Chair of this Board determines the composition of the Board for each case in accordance with the business distribution scheme (Article 1(3) RPBA; Article 3(1) BDS). This results in the composition of the Board for a particular case. This composition may change in case of prevention or exclusion of one or more of the members (Article 24 EPC; Article 2 and 3 RPBA; Articles 4 to 6 BDS).

30. It is clear from the above that the allocation of appeals from decisions of an examining or opposition division to the competent Technical Boards of Appeal is an organisational matter entirely internal to the Boards of Appeal, on which the parties concerned have no say. The allocation of the appeal files is determined in advance by legal provisions and objective criteria which are established by the Presidium referred to in Rule 12b(4) EPC. The reallocation of appeals based on Article 1(2) BDS solely involves the Chairs of the Technical Boards of Appeal concerned and exceptionally the Presidium if no agreement on the allocation is reached by the Chairs concerned.

30.1 The allocation of an appeal to a Technical Board of Appeal is a procedural step that precedes the decision on the composition of the Board responsible for deciding the appeal and, in the case of reallocation in accordance with Article 1(2) BDS, is concluded by agreement between the Chairs involved. The determination of the composition of a Board in an appeal is a strictly internal matter of case management, on which the parties concerned have no say. It is based on decisions by the Chairs of the competent Technical Boards of Appeal and possibly on agreements between Chairs of other Boards of Appeal in accordance with the Article 3(3) and (4) BDS.

30.2 Neither Rule 12b(4) EPC nor Articles 1, 3, 4 and 6 BDS nor Articles 1 and 2 RPBA provide for a right of a party to be heard on the allocation of an appeal to a particular Technical Board of Appeal or on the composition of this Board. Parties may only object under Article 24 EPC to one or more members designated in accordance with the above provisions (see Article 112a(2)(a) EPC). It follows furthermore from Article

112a(2)(b) EPC that parties to an appeal case can also object to the inclusion of a person not appointed as a member of the Boards of Appeal in the composition of a Board of Appeal.

31. In view of the legal framework outlined above, the Board can only reiterate in relation to the current appeal what it stated in point 7 of its communication dated 21 February 2025: "*the RPBA and the BDS do not provide for parties to appeal proceedings to participate in the procedure set out in Article 1(2) of the BDS and thus do not provide for a right to be heard on the proper allocation of a case file. The latter is an internal case management process involving solely the Chairs of the Boards and, in case no agreement is reached on the allocation, the Presidium. Since the allocation of an appeal case to a Board of Appeal is not a subject for disposition by the parties, any submission by a party to appeal proceedings regarding the reallocation of an appeal pursuant to Article 1(2) of the BDS, including any wish of a party that an appeal be heard by a specific Board (e.g. opponent 02's request submitted in its notice of appeal for the appeal to be allocated to Board 3.3.04 or 3.3.07) is irrelevant and must therefore be disregarded.*"

31.1 From its letter of 14 March 2025, the patent proprietor seemed to have misunderstood or been unwilling to consider the Board's explanations regarding the law and the facts underlying the transfer. The patent proprietor chose to ignore that the reallocation of an appeal under Article 1(2) BDS falls within the exclusive competence of the Chairs involved, possibly the Presidium, but not the Board in the composition ordered on 17 January 2025, and that the parties had no say (and consequently also no right to be heard). The

patent proprietor referred to a "Board's discretion under Article 1(2) BDS" (letter of 14 March 2025, item 11 and 12), disregarding that only Chairs, and exceptionally the Presidium, are involved in the reallocation pursuant to Article 1(2) BDS. Furthermore, a right of the parties to be heard in the process of reallocation under Article 1(2) BDS and even a duty to consult the patent proprietor was asserted (item 13 to 15 and 19), without providing a legal basis and merely alluding to the importance of adherence to the BDS in view of the standards set by Article 6 of the European Convention on Human Rights. The patent proprietor furthermore appeared to adhere to a certain interpretation of the events and repeatedly insinuated that the request of opponent 2 for reassignment of the file had been granted (see item 21 i) and items 11, 13 to 15 and 18 to 20), even though the agreement between the Chairs of 19 December 2024 on the transfer did not refer to any request, and the Board had explained in its communication that such requests by the parties, including those of the patent proprietor, are completely ineffective and are therefore disregarded. In fact, attempts by parties to influence the allocation of an appeal or the composition of a Board of Appeal constitute a serious threat to the right to a judge appointed by law and should be rejected as inadmissible on that ground alone.

The patent proprietor also made untenable assertions as to why the technical content of the appeal could not be a valid reason for the transfer (see letter of 14 March 2025, item 21 ii) and item 13), which ultimately amounted to an accusation of unprofessionalism or arbitrariness by the Chairs involved.

The patent proprietor's unfounded accusations, which cannot be excused by a representative's lack of legal knowledge, culminated in an accusation of bias, the addressee of which was left open (item 22):

"*The Proprietor's concern that O2 got its requested Board before any submissions of the parties were made, coupled with the fact that additional procedural irregularities are present, have created an appearance of bias in these proceedings. The only way to remedy the situation, and ensure a fair hearing, is for the appeal to adhere to the BDS. Therefore, the case should be transferred back to Board 3.3.08, which is the Proprietor's Main Request. As acknowledged by O2 in its letter of October 28, 2024 and the Chairs in their order of December 19, 2024, Board 3.3.08 is the competent Board according to the applicable BDS. Failing that, the Proprietor requests that the appeal be re-allocated to another competent Board, since this would be a means to neutralize the appearance of bias (Auxiliary Request).*" (Underlining in the original.)

31.2 This section demonstrates the patent proprietor's intention to construct a case for review through an unreasonable interpretation of the facts and the law, in particular by accusing the Board of procedural violations in relation to acts that are clearly not within its authority, requesting procedural steps that the Board is clearly not empowered to take, and suspecting the Board of bias without good reason. It should be noted at this point that the patent proprietor essentially only objected to the transfer of the appeal from Board 3.3.08 to Board 3.3.04. In the course of the proceedings, it neither contested the correctness of the composition of the Board ordered on 17 January 2025 pursuant to Article 1(3) RPBA and

Article 3(1) BDS, nor did it raise a substantiated allegation of bias against individual or all of the members of the Board as constituted on 17 January 2025.

31.3 In a further submission of 12 May 2025, the patent proprietor reiterated its requests that "the case should be transferred back to Board 3.3.08 according to the applicable Business Distribution Scheme (Main Request)" and, failing that, that the "appeal be re-allocated to another competent Board, since this would be a means to neutralize the appearance of bias (Auxiliary Request)".

31.4 In view of the patent proprietor's failure to adequately respond to the Board's communication of 21 February 2025 and its continued insistence on its unfounded legal and factual constructs, the Board reiterated via its Registry that neither the Chair nor the Board were under a legal obligation to deal with the requests put forward by the patent proprietor since they concerned organisational matters falling within the sole competence of the Chairs of the involved Boards of Appeal (with the exception of the duration of the oral proceedings, which was, however, not objected to under Rule 106 EPC). Furthermore, the patent proprietor's organisational requests fell outside the scope of its rights as a party and were impermissible. Indeed, as had been set out in the communication dated 21 February 2025, the Board had no power to review and overrule the agreement reached under Article 1(2) BDS between the Chair of Board 3.3.08 and the Chair of Board 3.3.04 on 19 December 2024, as communicated to the parties on 2 January 2025.

31.5 Even when asked several times during the oral proceedings and referred to decision R 21/22, the

patent proprietor did not explain which legal provision, in deviation from Rule 12b(4) EPC, conferred on the Board, in the composition ordered on 17 January 2025, the power and duty to review and overrule the agreement reached under Article 1(2) BDS on 19 December 2024 between the competent Chairs. Consequently, no intelligible explanation was given on how the Board should have dealt with the patent proprietor's objection against "act 1)" (see letter dated 26 November 2025 setting out objections under Rule 106 EPC), i.e. the "transfer of the appeal from Board 3.3.08 to Board 3.3.04 by the Chairs on December 19, 2024 after an opponent requested a deviation from the Business Distribution Scheme (BDS) in a Notice of Appeal filed October 28, 2024", other than by explaining the legal framework and the Board's lack of power and duty to deal with this transfer as part of the appeal proceedings T 1462/24. The patent proprietor's objections and requests filed on 6 February 2025 and reiterated on 14 March 2025 and 12 May 2025 were without any legal basis, despite being aware that they lacked any legal basis. Also, its objections under Rule 106 EPC were filed in bad faith since the patent proprietor's representatives were aware of decision R 21/22, which had held in an comparable situation that decisions within the meaning of Article 112a(1) EPC which are open to review are decisions of the Board of Appeal, not the Chair. The patent proprietor sought to distinguish the current case from that underlying decision R 21/22 in that the latter concerned the decision of the Chair to appoint a Rapporteur. This argument misses the point of law of decision R 21/22, namely that case management decisions by Chairs are not open to review under Article 112a(1) EPC, not even as part of the decision on the appeal by a Board. The patent proprietor's view cannot be

regarded as a *bona fide* assessment of the legal consequences arising from this decision.

31.6 For the above reasons alone, the objections under Rule 106 EPC set out in the patent proprietor's letter dated 26 November 2025 were to be dismissed.

Allocation of appeal files: holding of oral proceedings

32. In view of the Board's lack of power and duty to deal with the reallocation of the appeal T 1462/24 as agreed under Article 1(2) BDS between the Chair of Board 3.3.08 and the Chair of Board 3.3.04 on 19 December 2024, and the parties' lack of right to be heard on that matter, the Board was also not under any legal obligation to hold oral proceedings on this matter.

32.1 Nevertheless, during the oral proceedings, the patent proprietor forced a discussion by filing unfounded objections under Rule 106 EPC, the sole purpose of which could only have been to persuade the Board of Appeal to reconsider and abandon its previous position. Consequently, despite the absence of a legal obligation, oral proceedings in accordance with Article 116 EPC were held during which the patent proprietor had the opportunity to present its view on the reallocation of the appeal T 1462/24 from Board 3.3.08 to Board 3.3.04.

32.2 Thus, the second objection under Rule 106 EPC, that the Board had failed to arrange for the holding of oral proceedings requested by the patent proprietor, was manifestly unfounded in both fact and law. Consequently, this objection was to be dismissed by the Board.

Obligation to file the objections in good time

33. While this is not essential to the Board's dismissal of the patent proprietor's objections pursuant to Rule 106 EPC, the Board notes that these objections were raised at the end of oral proceedings after the Board had informed the parties of its negative opinion regarding added matter and had rejected the request for a referral to the Enlarged Board of Appeal, thus at the very last moment before the proceedings were concluded by the announcement of a decision. The objections, however, pertained to alleged procedural defects that had arisen long before.

33.1 The Board is aware that Rule 106 EPC lays down an admissibility requirement for a petition of review, the examination of which is within the jurisdiction of the Enlarged Board of Appeal. Nevertheless, the point in time at which an objection is raised affects the options available to the Board concerned. As the Enlarged Board of Appeal has repeatedly held, the requirement pursuant to Rule 106 EPC to raise an objection should enable the Board confronted with the objection to react immediately and appropriately by either removing the cause of the objection or, as provided in Rule 106 EPC, by dismissing it (R 4/08, point 2.1 of the Reasons; R 14/11, points 2.5 and 2.6 with further references; R 6/22, point 4).

33.2 With respect to the reallocation of the appeal T 1462/24 from Board 3.3.08 to Board 3.3.04, the Board had no other option than to dismiss the objection. Indeed, the Board was put in an impossible position by the objections at this stage. How could the Board have remedied the alleged procedural defects, assuming that

it had the power to do so, when the discussion of the merits - with the full participation by the patent proprietor - had already taken place? The Board could not undo the oral proceedings nor the procedural acts by the parties during the oral proceedings. Should the Board have declared the oral proceedings and the agreement between the Chairs on the reallocation of the appeal T 1462/24 null and void, declared itself not competent, and declined to take a decision on the matter?

33.3 The patent proprietor did not provide any valid reason why it was consistent with the purpose of Rule 106 EPC to spend a whole day discussing the substance of the case and to wait until the end of the debate on the merits of the appeal in case T 1462/24 to raise objections to procedural acts that had taken place long before the oral proceedings. As the opponents argued, the Board's instruction during the written proceedings not to engage in further correspondence on this matter did not prevent the patent proprietor from raising its objections. However, the patent proprietor did so at an improper time.

33.4 Thus, the objection pursuant to Rule 106 EPC came far too late to comply with the spirit and purpose of this provision, which is that a party should draw the Board's attention expressly, and separately from its other submissions, to any fundamental procedural defect to enable it to investigate and, if necessary, rectify the alleged defect while the proceedings are still pending. The Board therefore had no option but to dismiss the objections pursuant to Rule 106 EPC raised in the patent proprietor's letter dated 26 November 2025 also on formal grounds.

Apportionment of costs

34. The opponents all requested that the patent proprietor be ordered to bear their costs for preparing for and participating in the additional day, which had become necessary because the patent holder had raised unfounded allegations of procedural violations in the late afternoon of 25 November 2025, requiring a lengthy discussion to understand these objections.

34.1 In accordance with Article 16(1)(c) RPBA, and essentially for the reasons given by the opponents (see point XIX. above), the Board ordered the patent proprietor to bear the costs for remuneration of one day for at most two professional representatives present at the oral proceedings of 26 November 2025 for each opponent.

34.2 The Board considers that, despite repeated requests, the patent proprietor has not provided any legitimate reason for its objections under Rule 106 EPC and their filing after completion of the debate on the merits of the appeal T 1462/24. The Board has explained above why it considers both the content and timing of the objections to be unjustified.

34.3 The patent proprietor also failed to provide any good reason that could convince the Board of the good faith of its conduct of the proceedings. The circumstances do not support a finding of good faith. In fact, the patent proprietor used the objections under Rule 106 EPC to pursue objectives for which it had no legal basis. Although it was aware of the lack of legal entitlement because it had been instructed by the Board with regard to the law (see the Board's communication dated 21 February 2025) and was aware of decision

R 21/22. In any case, the patent proprietor's representatives could be expected to recognise the lack of legitimate interest themselves, even without such instructions, by duly analysing the legal basis for their objection to the reallocation of the appeal. The Board notes that the patent proprietor withdrew its third objection of 25 November 2025, namely that if the Board had decided without rectifying the alleged fundamental procedural defects, the patent proprietor's appeal would have been decided without taking a decision on a request relevant to that decision. Contrary to the patent proprietor's view, this did not mean that it no longer requested a rectification because it maintained its other objections pursuant to Rule 106 EPC. The withdrawal of this objection just meant that the patent proprietor had understood that its legal stance was untenable.

34.4 The Board understands that the patent proprietor's irritation is due to the fact that the reallocation of the appeal happened after such a reallocation had been suggested in opponent 2's notice of appeal. However, the patent proprietor's representatives should have appreciated that opponent 2's notice was filed on the day of notification by the opposition division of its written decision and that the Boards of Appeal became responsible only with the filing of this first appeal. Therefore, the agreement on the reallocation of the appeal case could only be reached after the suggestion had been made. The order of events does therefore not imply that the Chair acceded to opponent 2's request for a reallocation of the appeal case. Moreover, an unbiased comparison of the subject-matter claimed in the parent application, which essentially determined the classification of that application, with the subject-matter claimed in the current proceedings

should have prompted the patent proprietor's representatives to acknowledge that the original classification no longer matched the subject-matter under examination in the appeal T 1462/24. However, the patent proprietor remained convinced of its own biased view of events and accused the Chair involved in the reallocation and the Board subsequently constituted of having acted unlawfully. This was unprofessional and even disrespectful. While the patent proprietor's conduct can hardly be seen as compliant with its duty to act in good faith, it does not matter whether this conduct is also to be qualified as an abuse of proceedings since the request for reapportionment of costs could be allowed on the basis of Article 16(1)(c) RPBA.

34.5 Since a whole day of discussions had been necessitated by the filing of the patent proprietor's unsubstantiated and even unwarranted objections set out in its letter dated 25 November 2025, which were specified and amended by its letter dated 26 November 2025, the Board considered it equitable to order the patent proprietor to bear the costs for remuneration of one day for at most two professional representatives present at the oral proceedings of 26 November 2025 for each opponent.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The objections under Rule 106 EPC are rejected.

3. The patent is revoked.

4. The patent proprietor shall bear the costs for remuneration of one day for at most two professional representatives present at the oral proceedings of 26 November 2025 for each opponent.

The Registrar: The Chair:

I. Aperribay M. Pregetter

Decision electronically authenticated