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DECISION of 14 October 2002

T 1137/97 - 3.3.4 Case Number:

Application Number: 91203365.1

Publication Number: 0496135

IPC: A61K 39/255

Language of the proceedings: EN

Title of invention:

Cell free marek's disease virus vaccine

Patentee:

Akzo Nobel N.V.

Opponent:

American Home Products Corporation

Headword:

Marek's Disease Virus Vaccine/AMERICAN HOME PRODUCTS CORPORATION

Relevant legal provisions:

EPC Art. 106, 107, 108, 111(1), 54 EPC R. 64

Keyword:

- "Transfer of opponent status allowable (yes)"
- "Appeal by original opponent filed before entry at EPO of transfer of opposition - admissible (yes)"
- "Appeal by transferee of opposition filed before entry at EPO of transfer of opposition - admissible (no)"
- "Prior publication date of receipt of journal in library strength of presumptions based on circumstantial evidence" "Apportionment of costs (yes) - fixed amount awarded by board"

Decisions cited:

G 0004/88, T 0326/87, J 0026/95

Catchword:

- 1. A transfer of an opposition together with the relevant business assets in whose interests the opposition has been filed is allowable (following G 4/88). Where both the original opponent and the transferee each file an appeal before the transfer of the opposition has been notified to the EPO with supporting evidence of the transfer, the appeal of the original opponent is admissible, but the appeal of the transferee is inadmissible. The transferee however acquires the status of opponent and appellant as of the date when the EPO has been requested to make the transfer and has been supplied with adequate documentation evidencing the transfer. (Points 1 to 7).
- 2. The strength of the presumption in favour of the accuracy of a Received date marking appearing on the copy of a journal in a library as evidence of the actual date when the journal was made available to the public will depend on the library routine used. A handwritten date on the cover of a journal not accepted as correct in view of other evidence. (Points 8 to 14).
- 3. Relevant document belatedly introduced was allowed into the procedure. The belated submission was, however, considered to have caused unnecessary costs to be incurred, and so to make equitable an apportionment of costs in favour of respondent patentee. A fixed sum of Euro 2,500 was awarded by board of appeal itself, in the exercise of its discretion under Article 111(1) EPC to avoid the need for an investigation of an exact amount which would be more burdensome for the parties. (Points 18 to 20).



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Boards of Appeal

Chambres de recours

Case Number: T 1137/97 - 3.3.4

DECISION

of the Technical Board of Appeal 3.3.4 of 14 October 2002

Appellant: American Home Products Corporation

(Opponent) Five Giralda Farms

Madison, New Jersey 07940 0874 (US)

Representative: Walters, Philip Bernard William

Wyeth Laboratories

Patents & Trade Marks Department

Huntercombe Lane South

Taplow Maidenhead

Berkshire SL6 OPH (GB)

Respondent: Akzo Nobel N.V. (Proprietor of the patent) Velperweg 76

NL-6824 BM Arnhem (NL)

Representative: Mestrom, Joannes Jozef Louis

INTERVET INTERNATIONAL B.V.

P.O. Box 31

NL-5830 AA Boxmeer (NL)

Decision under appeal: Decision of the Opposition Division of the

European Patent Office posted 4 September 1997 rejecting the opposition filed against European patent No. 0496135 pursuant to Article 102(2)

EPC.

Composition of the Board:

Chairman: U. M. Kinkeldey Members: R. E. Gramaglia

S. C. Perryman

- 1 - T 1137/97

Summary of Facts and Submissions

- I. European patent No. 0 496 135 (application No. 91203365.1), claiming priority from EP 90314297 filed on 24 December 1990, was granted on the basis of 10 claims for all designated Contracting States, except ES and GR (hereafter: non-ES/GR Contracting States) and 9 claims for the Contracting States ES and GR. Claims 1 and 9 for the non-ES/GR Contracting States read as follows:
 - "1. A vaccine for the protection of poultry against Marek's Disease, characterized in that it comprises cell-free Marek's Disease serotype 2 viruses, and a pharmaceutically acceptable carrier.
 - 9. A method for the preparation of a vaccine that protects poultry against Marek's Disease which comprises:
 - a) growing a serotype 2 Marek's Disease virus in a cell culture from which sufficient quantities cell-free virus necessary to prepare an effective immunizing dosage can be obtained,
 - b) disrupting the cells,
 - c) subsequently collecting the cell-free viruses, and
 - d) subjecting the material obtained from step c) to at least one of the following treatments:
 - i clarifying by centrifugation and/or
 filtration;
 - ii adding buffer;
 - iii adding a stabilizing agent;
 - iv putting the material in a vial;
 - v freeze-drying."

- 2 - T 1137/97

Claims 2 to 8 were addressed to specific embodiments of the vaccine of claim 1, whereas claim 10 was directed to the use of Marek's Disease serotype 2 viruses for preparing a vaccine.

- II. An opposition was filed against the European patent by Duphar International Research B.V. requesting it be revoked on the grounds of Article 100(a) EPC, because of lack of novelty and inventive step in view of:
 - (D1) Witter R.L. et al., Avian Diseases, Vol. 34, pages 944-957 (1990)
 - (D2) Kirisawa R. et al., Archives of Virology, Vol. 89, pages 24-43 (1986);
 - (D3) Calnek B.W. et al., Applied Microbiology, Vol. 20, No. 5, pages 723-726 (1970); and
 - (D4) Calnek B.W. et al., Avian Diseases, Vol. 16, pages 954-957 (1972).
- III. Central to the opponent's line of argument for questioning both the novelty and the inventive step of the claims was document (D1), which, in the opponent's view, disclosed the serial passage of Marek's Disease viruses (MDV) serotype 2 leading to the production of sufficient cell-free virus to prepare a vaccine.
- IV. The opposition division issued a preliminary opinion indicating that it considered the patent novel and inventive and asking the parties whether they maintained their requests for oral proceedings. The opponent indicated that it maintained its request for

oral proceedings. The patentee indicated that it withdrew its request for oral proceedings provided it remained the Opposition Division's opinion to reject the opposition. The parties were duly summoned to oral proceedings.

- V. Oral proceedings took place on 18 July 1997 at which no-one appeared on behalf of the opponent. At the beginning of the proceedings, the chairman of the opposition division established that it was the intention that the opponent not be represented, by contacting the representative's office.
- VI. By a decision posted on 4 September 1997 the opposition division rejected the opposition under Article 102(2) EPC and made an award of costs under Article 104(1) and (2) EPC against the opponent of the extra costs involved to the proprietor in attending the oral proceedings.
- VII. The opposition division considered that the evidence before it established that document (D1) had not been made available to the public until after the priority date of the patent in suit. Therefore, the subject-matter of the granted claims was held to meet the requirements of both Articles 54 and 56 EPC since document (D1) had been the only basis for an attack of lack of novelty, and the central plank in the attack of lack of inventive step. The invention was considered to lie in the use of serotype 2 viruses which at the time of the priority date were considered in the art to be unsuitable as sources of cell-free virus capable of acting as vaccine, and since documents (D2), (D3) and (D4) were not directed to Marek's Disease and were only

- 4 - T 1137/97

of a general nature, there was no case for lack of inventive step.

- VIII. On 4 November 1997 a Notice of Appeal was filed in the name of American Home Products Corporation (AHPC) with an explanatory note informing the EPO that AHPC had acquired the relevant business of the original opponent Duphar International Research B.V. and thus fulfilled the requirements for a transfer of an opposition as stated decision G 4/88. The appeal fee was also paid at the same time.
- IX. On 13 November 1997, a Notice of Appeal was filed in the name of Duphar International Research B.V., and an appeal fee was paid on behalf of this appellant.
- X. On 14 January 1998 two identical Statements of Grounds of Appeal were filed in the name of American Home Products Corporation (AHPC) and Duphar International Research B.V., respectively.
- XI. On 19 March 1998 the EPO issued a notification pursuant Rule 20 EPC inviting the opponent to provide evidence of the change in identity from Duphar International Research B.V. to AHPC.
- XII. On 26 May 1998 a "Statement of Transfer of Interest in the Opposition" from Duphar International Research B.V. to AHPC was filed at the EPO.
- XIII. On 22 June 1998 the EPO issued a communication according to which AHPC had been entered as opponent with effect as from 27 May 1998.

- 5 - T 1137/97

- XIV. With a communication dated 25 May 1999 the board informed the parties that the issue of admissibility of the present appeal, together with the remaining issues, would have to be resolved during oral proceedings.
- XV. With the submission dated 13 September 2002, the appellant filed the following new documents:
 - (D10) US-A-4,895,718;
 - (D11) Witter R.L. et al., Avian Pathology, Vol. 13, pages 75-92 (1984);
 - (D12) Witter R.L., Avian Pathology, Vol. 11, pages 49-62 (1982);
 - (D13) Witter R.L., Avian Diseases, Vol. 31, pages 752-765 (1987); and
 - (D14) Cho B.R., Avian Diseases, Vol. 22, No. 1, pages 170-176 (1978).

Further documents referred to in the present decision are:

- (D7) Extract from the trade register of the Chamber of Commerce and Industries of Hilversum;
- (D8) Data relating to Fort Dodge Animal Health Benelux BV.;
- (D9) Extract from the trade register of the Chamber of Commerce and Industries of Gooi- en Eemland;

- 6 - T 1137/97

- (D20) Declaration of Prof. R.L. Witter dated 12 January 1998;
- (A1) Letter from Allen Press Inc. dated 15 February 1991;
- (A2) Letter from Allen Press Inc. dated 12 November 1991;
- (B) Copy of cover page of document (D1) with stamp "Received DEC 27 1990 Farrell Library Kansas State University";
- (C) Copy of cover page of document (D1) with stamp
 "Library University of Delaware Jan 03 1991";
- (D) Facsimile from the library of the Michigan State University, East Lansing, MI.
- (E) Facsimile from librarian of Avian Diseases and Oncology Laboratory, East Lansing of August 29, 2002.
- (F) Copy of letter of December 20, 1990 from publishers of AVIAN DISEASES, giving a tabulation of mailing of October-December 1990 mailing.
- XVI. Oral proceedings were held on 14 October 2002.

- 7 - T 1137/97

XVII. The arguments by the appellant can be summarised as follows:

Admissibility of the appeal(s)

- The admissibility of the appeals followed automatically from the sequence of events referred to in paragraphs II and VIII to XIII supra.
- Duphar International Research B.V. filed a Notice of Appeal and a Statement of Grounds according to Article 108 EPC. Therefore, it remained opponent/appellant until 27 May 1998, when AHPC was entered as opponent (see paragraph XIII supra).
- It was true that public records (D7) to (D9) showed that Duphar International Research B.V., as a corporation/legal person was still owned by Solvay S.A., however, no conclusion could be drawn therefrom that no transfer of assets from Duphar International Research B.V. to AHPC had occurred, as public records merely related to the transfer of ownership, without providing details as to the transfer of all the types of assets.
- Even if the board considered that no transfer of assets had taken place, the appeal had to be prosecuted in the name of Duphar International Research B.V., for which the representative was also authorized.

- 8 - T 1137/97

Availability to the public of document (D1)

- According to declaration (D20), document (D1) was received by the Regional Poultry Research Laboratory, East Lansing, Michigan, USA on 20 December 1990, ie before the priority date of the patent in suit (24 December 1990). This could be deduced from the handwritten notation "Recvd 20 DEC 90" in the lower left hand corner of the cover page of this document. That the date was correct was confirmed by document (E).
- Further document (F) showed that the issues of the journal had been sent out not only by 2nd class mail, but also by first class mail.

Novelty and inventive step

- Document (D1) was relevant to the novelty and/or inventive step since it disclosed the serial passage of Marek's Disease serotype 2 viruses (MDV) leading to the production of sufficient cell-free virus to prepare a vaccine (see Table 2, wherein up to 26,000 PFU of cell-free serotype 2 MDV/10⁶ cell-associated PFU were obtained).
- Document (D14) disclosed growing serotype 2 MDV (HN and GM-1) in a cell culture from which sufficient cell-free virus to prepare a vaccine could be obtained (see Table 1, wherein up to 41,600 PFU of cell-free MDV serotype-2/ml were obtained).

- 9 - T 1137/97

 Document (D10) also taught how to obtain cell-free serotype 2 MDV from cell cultures to be used as vaccine.

XVIII. The arguments by the respondent can be summarised as follows:

Admissibility of the appeal(s)

- The appeal by AHPC was not admissible because:
 - No transfer of the opposition from Duphar International Research B.V. to AHPC has been entered into the Register before the end of the appeal period. A request for such transfer has been filed only on 26 June 1998.
 - AHPC failed to produce before the end of the appeal period any document showing that the transfer of assets from Duphar International Research B.V. to AHPC had actually taken place (see decision J 26/95). Rather, documents (D7) to (D9) showed that none of the assets of Duphar International Research B.V. were transferred to AHPC, since the former was still owned by Solvay S.A.
- The appeal by Duphar International Research B.V. was also not admissible because the original opponent did not file a written statement setting out the Grounds of Appeal.

- 10 - T 1137/97

Availability to the public of document (D1)

- Poultry Research Laboratory, East Lansing,
 Michigan, USA could receive document (D1) on 20
 December 1990, having regard to the facts that the same was mailed via 2nd class mail by the printer
 Allen Press from Lawrence, Kansas on 19 December
 1990 (see documents (A1) and (A2)) and received by the library of the Michigan State University, East Lansing, MI, on 4 January 1990 (see document (D)).
- Document (B) showed that document (D1) was received by the library of the Kansas State University in Manhattan, Kansas (distant 60-70 miles from the printer's location) on 27 December 1990.
- Document (C) showed that document (D1) was received by the library of the University of Delaware on 3 January 1991.
- The signer of declaration (D20), Prof. R.L. Witter, was both a co-author of document (D1) and a member of the editorial board of this journal (Avian Diseases).

Novelty and inventive step

Even if document (D1) were prior art, neither document (D1) nor any other cited document, alone or in combination, would take away the novelty of, or would render obvious the claimed subject-matter. - 11 - T 1137/97

- Documents (D10) to (D14) should not be admitted into the proceedings because of their late submission and lack of relevance.
- XIX. The appellant (successor to opponent) requested that the decision under appeal be set aside and that the European patent No. 0 496 135 be revoked.

The respondent (patentee) requested as main request that both appeals be declared inadmissible and that the transfer of the opposition and appeal not be recognized, as first auxiliary request that documents (D10) to (D14) not be allowed into the proceedings and that the appeal(s) be dismissed and as second auxiliary request that if documents (D10) to (D14) are admitted into the proceedings that the matter be remitted to the first instance for further prosecution and that there be an apportionment of costs in his favour.

Reasons for the decision

Admissibility of the appeal by Duphar International Research B.V.

1. The original opponent Duphar International Research B.V. filed a Notice of Appeal on 13 November 1997, duly paid the appeal fee at the same time, and filed a Statement of Grounds of Appeal on 14 January 1998. At the time of taking these actions no change of opponent had been requested or entered at the EPO, so as opponent of record at the EPO, Duphar International Research B.V. was and remained at these times a party to the opposition proceedings. This appeal is in accordance

- 12 - T 1137/97

with Articles 106, 107 and 108 as well as Rule 64 EPC, and is thus admissible.

Admissibility of the appeal by AHPC

- 2. . During the pendency of the present appeal case following a request to enter American Home Products Corporation (AHPC) as successor to the original opponent, and a request by the EPO for evidence supporting such a transfer, a statement dated 18 May, 1998 signed by the managing director of Duphar Research International B.V. was filed on 27 May, 1998, indicating that the entire health business assets of this company had been transferred to AHPC under a purchase agreement with the transaction being closed on 28 February 1997, and confirming that the relevant business assets of Duphar International Research BV in the interests of which the opposition was filed had been transferred to AHPC. This statement was accepted by the formalities officer then charged with recording transfers of oppositions in EPO Directorate General 2, as sufficient evidence of the transfer and AHPC entered as successor to the original opponent with effect as from 27 May 1998.
- 3. The factual situation referred to in the statement is in accordance with the factual situation regarded as making transfer of an opposition permissible, even though the transferor still continued in existence, in Enlarged Board of Appeal decision G 4/88 (OJ EPO 1989, 480). The respondent has provided no evidence that the factual situation is not as given in the statement. That Duphar Research International B.V. still continues in existence is irrelevant.

- 13 - T 1137/97

- 4. For the purpose of EPO proceedings, the effective date of the transfer of an opposition must be taken as the date when the transfer has been requested at the EPO and adequate evidence provided. Here this is 27 May 1998. As an opponent is not required to have any interest to file an opposition, a transfer of an opposition is something that has to be requested at the EPO together with supporting evidence before it can take effect. This is also conducive to procedural certainty as to who are the appropriate parties.
- 5. AHPC is thus to be treated as the legal successor of the original opponent Duphar International Research B.V. only as from 27 May 1998.
- 6. As AHPC did not become the legal successor to the original opponent until 27 May 1998, it cannot at the time of filing its own Notice of Appeal in November 1997 be regarded as a party to the opposition proceedings (whether as original opponent or as successor to an original opponent), and accordingly it was not a person entitled to appeal, pursuant to Article 107 EPC, the decision of the opposition division. The appeal of AHPC in its own name is thus inadmissible.
- 7. However as from 27 May 1998 AHPC is to be treated as the successor to the original opponent and appellant Duphar International Research B.V., and as such is entitled to partake in the appeal proceedings.

- 14 - T 1137/97

Availability to the public of document (D1)

- 8. Though document (D1) had already been cited in the search report from the EPO, it was argued in the opposition that it had been inadequately considered during examination. In response the patentee challenged it being prior art at all, and submitted evidence from three different libraries in the Netherlands, including the opponent's, that the copy of document (D1) present in those libraries, reached those libraries only after the priority date of the patent in suit (see point 3 of the decision under appeal).
- 9. At the appeal stage there was much more extensive evidence available from both parties. The appellant relies in particular on document (D20), a letter from the Research Leader of the Avian Disease and Oncology Laboratory, East Lansing, Michigan, of January 12, 1998 addressed to AHPC reading:

"To Whom It May Concern:

Our facility is and has been a recipient of the journal "Avian Disease", a publication of The American Association of Avian Pathologists.

The handwritten notation of "Recvd 20 DEC 90" in the lower left hand corner of the front issue identified as Avian Diseases, vol. 34, no. 4, October-December 1990, per the attached, indicates that this issue of that journal was received and handled in our facility on that date, and ordinarily, it would have been available at our facility to anyone who requested to see it from

- 15 - T 1137/97

that date forward. At the time in question this dating was done by hand.

Sincerely, "

10. The evidence given in this letter is not direct evidence of the date of receipt: such direct evidence could only be given by the person who made the handwritten date marking, assuming that he or she could remember the occasion. The page submitted also bears near top centre a rubber stamp

"LIBRARY COPY

REGIONAL POULTRY RESEARCH LABORATORY
3906 EAST MT. HOPE ROAD
EAST LANSING, MICHIGAN 48823"

but, as commented on by the respondent, there is no connection between this and the handwritten date of receipt. The evidence here for receipt on 20 December 1990 is certainly not as extensive as in a typical case of proof by circumstantial evidence. In such a case there is normally evidence of a date stamped on the journal together with confirmation by a librarian that the date stamp is adjusted each working day to the appropriate date, and the journal after such stamping is laid open for public inspection. Where the date is critically close to the priority date, there is ideally also evidence that the date of receipt stamped in the journal is the same as the date of receipt for that journal entered in a separate record kept of journals received. Such evidence allows the accuracy of the date to be inferred from the presumption that this accurate

- 16 - T 1137/97

dating routine was followed also in the particular case.

- If, as here, there is only a single handwritten entry 11. on the journal itself, any presumption in favour of its accuracy is much weaker, because the dating does not depend on a mechanical routine. The case here is further unusual in that the statement as to routine dating, is not from a librarian but from a Research Leader who, co-incidentally, is a co-author of the article in this issue relied on, and a member of the editorial board of the journal. The librarian of the (by then) MidWest Area Avian Disease and Oncology Laboratory, East Lansing who confirmed in a fax dated August 28, 2002 (document (E)) that there is a handwritten received date of December 20, 1990 on the cover of the issue of Avian Diseases in question in that library, says nothing about what, if anything, the practice was relating to making such entries.
- 12. The respondent has submitted evidence (document F) showing that the publishers of "Avian Diseases" mailed a total of 1841 copies of the issues in question on December 19, 1990, a Thursday. The priority date here is Monday December 24, 1990. Apart from four copies, mailed first class mail, US domestic copies were mailed via 2nd class and copies for foreign countries at surface rate. For a recipient, Farrell Library, Kansas State University, located in the same state, Kansas as the publishers, the date stamp of receipt is Dec 27, 1990 (Document B). For a recipient in the same location as the Regional Poultry Research Laboratory, namely Michigan State University Libraries, East Lansing, the receipt date is given as January 4, 1991 (Document D).

- 17 - T 1137/97

There is no evidence that anybody received a copy of this issue before 24 December 1990, the priority date in question, other than the handwritten date on the cover of the copy in the Library of the Regional Poultry Research Laboratory, East Lansing.

- 13. While four issues were sent by first class mail, there is no evidence as to when these where received, or even that any was sent to someone who can be regarded as a member of the public. Of the four recipients of first class mail, one is described as Postmaster, another as business manager, and a third has a name identical to the editor of the journal.
- 14. Given the choice between assuming that the handwritten date correctly entered, or assuming that one out of a thousand US 2nd class postal deliveries at Christmas time of a journal was miraculously much faster than all other such deliveries, the board has no hesitation in considering that on all the evidence there is no case made out that an issue of this journal was received on 20 December 1990 or any other date before the priority date of 24 December 1990. Thus document (D1) does not form prior art pursuant to Article 54(2) EPC.

Admissibility of documents (D10) to (D14) into the proceedings

15. The next matter to be considered is whether, notwithstanding such lateness, documents (D10) to (D14) (see paragraph XV supra) should be admitted on the grounds of relevance. Without entering into details, the board considers that the contents of at least document (D14) appear prima facie as relevant as the contents of the document (D1), and there is no dispute

- 18 - T 1137/97

that document (D14) was made available to the public before the priority date. The contents of document (D1) were considered by the opposition division as potentially the most relevant state of the art, but could not be relied on as document (D1) was not shown to be a prior publication. Like document (D1), the newly-filed document (D14) discloses growing serotype 2 MDV (HN and GM-1) in a cell culture, from which sufficient cell-free virus to prepare a vaccine can be obtained (see Table 1, wherein up to 76,100 PFU of cell-free serotype 2 MDV/ml are obtained). Therefore, if the contents of (D1) were "central" to the novelty and/or inventive step of the subject-matter of the claims at issue, in the board's view, document (D14) must potentially be considered as highly relevant.

16. The respondent, while quite properly objecting to the admissibility of the new evidence on procedural grounds, could not satisfy the board during the oral proceedings that the new documents were not more relevant than the earlier documents. Accordingly, on the criterion of relevance, which has been the prime criterion hitherto used by the boards of appeal for admitting new documents into the proceedings, these new documents should be considered. The board would comment that under the new Rules of Procedure of the Boards of Appeal applicable to appeals filed after 1st January 2003 the criteria for admitting new documents are stricter, and if these rules had already been applicable in this case the result might have been different.

- 19 - T 1137/97

17. The new evidence is of such weight that the case should be remitted to the first instance so that it is open to consideration at two levels of jurisdiction.

Request for apportionment of costs

- 18. In a number of appeal board decisions it has been decided that the late filing of a relevant document by one party, without giving any convincing explanation for the late introduction of the document, normally calls for an apportionment of costs (Article 104(1) EPC) in the other party's favour (see for example T 326/87, OJ EPO, 1992, 522, reasons point 2.3).
- 19. The Board notes that the notice of opposition by the appellant was received on 2 May 1995 and that documents (D10) to (D14) were introduced into the proceedings with a letter dated 13 September 2002, one month before oral proceedings took place.
- 20. An earlier introduction of document (D14), which unlike document (D1), undoubtedly belongs to the prior art, would likely have avoided many of the arguments that have arisen, and would have made preparation for the oral proceedings before the board less complicated or even avoided the need for such oral proceedings. In these circumstances the board considers it equitable to make an apportionment of costs in favour of the respondent of Euro 2,500 (two thousand five hundred). While some extra costs will have been incurred, an exact investigation of the amount is a matter of near impossibility and would be far more burdensome to all parties than the board fixing an amount. Thus the board

- 20 - T 1137/97

has exercised its discretion under Article 111(1) EPC to itself set the amount.

21. The decision under appeal is set aside only insofar as it rejected the opposition under Article 102(2) EPC.

The decision on costs in the decision under appeal, was not challenged on appeal, and remains in effect.

Order

For these reasons it is decided that:

- 1. The decision under appeal insofar as it rejected the opposition under Article 102(2) EPC is set aside.
- 2. The appeal filed by the present appellant's predecessor in title Duphar International Research B.V. is admissible and the transfer to the present appellant of the status of appellant and opponent is recognized.
- 3. The separate appeal filed by the present appellant in its own name is inadmissible.
- 4. The matter is remitted to the first instance for further prosecution.
- 5. An apportionment of costs of Euro 2,500 (two thousand five hundred) is made in favour of the respondent.

The Registrar:

The Chairwoman:

P. Cremona

U. M. Kinkeldey