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**Datasheet for the decision
of 22 January 2019**

Case Number: T 2278/14 - 3.3.04

Application Number: 07873953.9

Publication Number: 2064231

IPC: C07K14/29, A61K39/02,
C07K16/12, A61K39/00

Language of the proceedings: EN

Title of invention:

Immunoreactive Glycoprotein gp19 of Ehrlichia Canis

Patent Proprietor:

Research Development Foundation

Opponent:

Macquet, Christophe

Headword:

Immunoreactive gp19/RESEARCH DEVELOPMENT FOUNDATION

Relevant legal provisions:

EPC R. 76(2) (c)

Keyword:

Decisions cited:

G 0009/91

Catchword:



Beschwerdekammern

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Case Number: T 2278/14 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 22 January 2019

Appellant: Macquet, Christophe
(Opponent) MACQUET & ASSOCIES
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Respondent: Research Development Foundation
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 13 October 2014 rejecting the opposition filed against European patent No. 2064231 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chair G. Alt
Members: A. Chakravarty
P. de Heij

Summary of Facts and Submissions

- I. European patent EP 2 064 231, entitled "*Immunoreactive Glycoprotein gp19 of Ehrlichia Canis*" was opposed. The extent of opposition was limited to claim 13 as granted. The opposition division rejected the opposition.
- II. The opponent (appellant) filed an appeal against this decision. The patent proprietor is the respondent to this appeal.
- III. In the statement of grounds of appeal, the appellant requested *inter alia* that claims 13 and 14 of the patent be cancelled due to a of lack of patentability of their subject-matter. This was understood by the board to mean that it was requested that the decision under appeal be set aside and that the patent be revoked due to lack of compliance of the subject-matter of claims 13 and 14 with the requirements of Articles 54 and 56 EPC .
- IV. In their reply to the appellant's statement of grounds of appeal, the respondent requested that the appeal be dismissed and stated that the appeal proceedings should be limited to examination of the subject-matter of claim 13 only.
- V. The respondent made two further submissions containing observations regarding the appeal. Document D5 was submitted together with one of them (the letter dated 19 November 2015) and an experimental report was submitted together with the other (the letter dated 22 November 2018).

- VI. Together with a summons to oral proceedings, the board issued a communication pursuant to Article 15(1) RPBA informing the parties of its preliminary and non-binding opinion concerning the appeal.
- VII. Oral proceedings before the board took place on 22 January 2019. Both parties were represented. During these oral proceedings, the respondent filed a new main request. All remaining claim requests were withdrawn. This new claim request was identical to the claims as granted except that claims 13 and 14 were deleted and the subsequent claims renumbered accordingly.
- At the end of the oral proceedings, the Chair announced the decision of the board.
- VIII. The appellant's requests were: 1) that the decision under appeal be set aside and that the patent be revoked; 2) that the proceedings be extended to examination of patentability of the subject-matter of claim 14.
- IX. The respondent's requests were 1) that the decision under appeal be set aside and that the patent be maintained on the basis of the main request; 2) that the report of experiments referred to in the appellant's letter dated 22 November 2018 not be admitted into the appeal proceedings; 3) that document D5, submitted with the appellant's letter dated 19 November 2015, not be admitted into the appeal proceedings.

Reasons for the Decision

1. The appeal is admissible.

Admissibility of the main request - Article 13(1) RPBA

2. The request, filed after the statement of grounds of appeal, represents an amendment to the appellant's case. Hence, pursuant to Article 13(1) RPBA, it may be admitted and considered at the board's discretion. Article 13(1) RPBA states that "*[t]he discretion shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy*".
3. The claim request was filed during the oral proceedings before the board, i.e. at a very late stage of the appeal proceedings in response to the opinion of the board on the novelty given at the oral proceedings which was contrary to the preliminary view set out in the board's communication pursuant to Article 15(1) RPBA. It can therefore be argued that the case developed in a manner unforeseeable or at least unexpected by the respondent, sufficiently to justify the late filing of this request. Furthermore, the amendments made are straightforward, since the deletion of former claims 13 and 14 removes all opposed subject-matter from the claims. Therefore the board, taking into account the factors mentioned in Article 13(1) RPBA, decided to admit the claim request into the proceedings.

Allowability of the claim request

4. The opposition was directed only against claim 13 of the patent (see notice of opposition, section V) and

the grounds for opposition were also limited to claim 13 and its subject-matter (Rule 76(2)(c) EPC; see page 1 of these grounds). The Enlarged Board of Appeal in its decision G 9/91 (OJ EPO 1993, 408) remarked that *"by limiting the extent to which the patent is opposed to only certain subject-matters, the opponent deliberately refrains from making use of his right under the EPC to oppose remaining subject-matters covered by the patent. Such subject-matters are therefore, strictly speaking, not subject to any "opposition" in the sense of Articles 101 and 102 EPC, nor are there any "proceedings" in the sense of Articles 114 and 115 EPC in existence concerning such non-opposed subject-matters. Consequently, the EPO has no competence to deal with them at all (see reasons, point 10). It is furthermore noted that, where an opposition is explicitly directed only to the subject-matter of an independent claim, subject-matter covered by claims dependent on that claim may also be examined as to patentability, in the case the independent claim falls in opposition or appeal proceedings, provided their validity is prima facie in doubt on the basis of already available information (see reasons, points 10 and 11).*

5. Now that independent claim 13 and dependent claim 14 of the former main request, have been deleted, it follows that the main request and its subject-matter are allowable because they are not subject of the opposition proceedings.
6. The appellant's request 2) and the respondent's requests 2) and 3) (see sections VIII and IX above) need not to be considered as they are not relevant for the decision.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent with the following claims and a description to be adapted thereto:

Claims: 1-13 of the main request, received during oral proceedings of 22 January 2019.

The Registrar:

The Chair:



S. Lichtenvort

G. Alt

Decision electronically authenticated