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Datasheet for the decision of 11 July 2017

Case Number: T 2331/14 - 3.3.09

Application Number: 08714498.6

Publication Number: 2124616

IPC: A23K1/17, A23K1/18, A61K31/7036

Language of the proceedings: EN

Title of invention:
PAROMOMYCIN SUPPLEMENTED FEEDINGSTUFFS FOR POULTRY SPECIES AND USE THEREOF FOR PROPHYLAXIS OF HISTOMONIASIS, REDUCTION OF THE HORIZONTAL SPREADING OF HISTOMONIASIS, AND FOR IMPROVED WEIGHT GAIN AND FEED CONVERSION

Applicant:
Huvepharma EOOD

Headword:

Relevant legal provisions:
EPC Art. 108, 122
EPC R. 126(2), 136

Keyword:
Re-establishment of rights - (no)

Decisions cited:
T 0854/12, T 1962/08, T 0111/92, T 0413/91, J 0014/16, J 0003/13, J 0002/02, R 0018/13

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

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Case Number: T 2331/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 11 July 2017

Appellant: (Applicant)	Huvepharma EOOD 5th Floor 3ª Nikolay Haytov Street 1113 Sofia (BG)
Representative:	Radkov, Stoyan Atanassov 6 Laurel Rd Chalfont St Peter Gerrards Cross SL9 9SJ (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 2 June 2014 refusing European patent application No. 08714498.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	W. Sieber
Members:	M. O. Müller
	F. Blumer

Summary of Facts and Submissions

I. European patent application No. 08 714 498.6 was filed on 22 February 2008 as international application PCT/BG2008/000003 in the name of Huvepharma AD.

II. With EPO form 1200 dated 5 October 2009, the representative Mr Leifert filed a request for entry into the European phase.

III. The decision of the examining division to refuse the application was sent to "Leifert & Steffan Patentanwälte" on 2 June 2014.

IV. Receipt of the decision was acknowledged by Mr Leifert on 3 June 2014.

V. On 10 December 2014, Mr Radkov, a professional representative then at Urquhart-Dykes & Lord LLP, filed a notice of appeal against that decision. On the same day, the following further documents were filed:

- statement setting out the grounds of appeal including a main and an auxiliary request;

- request for re-establishment of rights and statement of grounds for the request;

- an authorisation for Mr Radkov from the applicant Huvepharma AD;

D5: Declaration of Mr Koen de Gussem signed on 25 November 1014 (the board assumes it should read 2014) including his CV;

D6: Statement signed on 7 December 2014;

D7: US 8,293,266 B2;

D8: Letter of Mr Elmar Leifert dated 21 October 2013;

D9: L. R. Mc Dougald, Avian Diseases, volume 49, 2005, pages 462 to 476;

D10: Article of W. D. Lindquist; and

D11: Email of Mr Brian Deehan dated 2 October 2014.

Also on the same day, Mr Radkov paid the appeal fee and the prescribed fee for re-establishment of rights.

VI. By letter dated 12 January 2015, Mr Radkov informed the Office that the name of the appellant had changed from Huvepharma AD to Huvepharma EAD. The name change was entered in the European Patent Register with effect from 12 January 2015 (communication of the Receiving Section dated 12 March 2015).

VII. By letter dated 13 May 2016, Mr Green from Urquhart-Dykes & Lord LLP informed the Office that he had been appointed as the new representative.

VIII. On 17 October 2016, Mr Green informed the Office that he was withdrawing his representation and that the new representative would be Ms Nikolova from Huvepharma EOOD.

IX. In a communication dated 11 January 2017, the board gave its preliminary opinion that the appellant's

request for re-establishment of rights appeared not to be allowable.

X. With letter dated 22 March 2017, Mr Radkov, then at HGF Limited, stated that he had been appointed as the new representative. An authorisation was annexed. This authorisation was from Huvepharma EOOD for HGF Limited, Association No. 145.

XI. With letter dated 24 April 2017, Ms Taylor from HGF Limited stated that her company had withdrawn its representation and that the new representative was Mr Radkov, 6 Laurel Rd, Chalfont St Peter, Gerrards Cross, SL9 9SJ, England.

XII. On 11 July 2017, oral proceedings took place before the board, during which Mr Radkov and Mr Petkov, Global Business Development Director of Huvepharma EOOD, were present and the following documents were filed:

D12: Certificate of the Registry Agency, Registry Office Sofia, concerning the conversion of Huvepharma EAD into Huvepharma EOOD (in Bulgarian);

D12': English translation of D12;

D13: Declaration of Ms Kumanova (in Bulgarian);

D13': English translation of D13;

D14: Authorisation dated 20 April 2017, signed on behalf of Huvepharma EOOD;

D15: Declaration of Mr Petkov, signed on 10 July 2017; and

D16: Declaration of Ms Vulcheva, signed on 10 June 2017, with annex A (email of 24 July 2014).

XIII. The appellant's position in the written and oral proceedings, in as far as relevant to the present decision, was as follows:

The request for re-establishment of rights was allowable. On 22 July 2014, Ms Vulcheva had phoned Mr Petkov, the appellant's global business development director, informing him that an appeal had to be filed if the patent application was to be pursued. At that time Mr Petkov had unfortunately had a heavy workload and therefore, by mistake, not instructed Ms Vulcheva to file an appeal within the relevant time limits. When the relevant time limits had expired, the appellant had not had a computer-based monitoring system, but such a system was now in the process of being installed.

The request for re-establishment of rights should be granted for the further reason that the appellant had not had the opportunity to comment on new objections the examining division had raised in its decision, such that the right to be heard under Article 113(1) EPC had been violated. More specifically, the statement in the examining division's decision that its objections equally applied to the auxiliary request had not been communicated to the appellant beforehand.

XIV. The appellant requested re-establishment of rights as regards the missed time limits for filing the notice and statement of grounds of appeal and for paying the appeal fee.

Provided that that request was allowed, the appellant asked that the appealed decision be set aside and the case remitted to the examining division for further prosecution on the basis of the main or the auxiliary request filed with the statement of grounds of appeal (letter dated 10 December 2014).

The appellant also requested reimbursement of the appeal fee.

The appellant lastly requested that the inventor Mr Koen de Gussem be allowed to speak in potential future oral proceedings if the request for re-establishment of rights was allowed.

Reasons for the Decision

1. Identity of the appellant/representation

1.1 At the date of the oral proceedings before the board, the appellant entered in the European Patent Register was still Huvepharma EAD although in the meantime Huvepharma EOOD had been mentioned in various letters (see points VIII and X above). The appellant's professional representative during those oral proceedings was Mr Radkov. The authorisation D14 that he filed during the oral proceedings was, however, signed on behalf of Huvepharma EOOD. Thus Mr Radkov was duly authorised only if the appellant was not the one entered in the European Patent Register, but Huvepharma EOOD.

1.2 Responsibility for making entries in the European Patent Register lies with the EPO's Legal Division (OJ EPO 2013, 600). As set out in T 854/12 (point 1.2.4), this responsibility does not, however,

take away the boards' competence to decide who is the party to appeal proceedings. It was thus up to the board to decide whether the appellant in the present proceedings was Huvepharma EOOD or Huvepharma EAD.

1.3 Mr Radkov explained that the difference between the name in the register (Huvepharma EAD) and that in the authorisation (Huvepharma EOOD) was due to the fact that the joint stock company Huvepharma EAD no longer existed, since it had been converted into Huvepharma EOOD, a limited liability company.

In view of D12' and D13', this was credible to the board. More specifically, according to the certificate D12', Huvepharma, UIC 130128520, which according to declaration D13' stands for Huvepharma EAD, had been converted into Huvepharma, UIC 203631745, which according to declaration D13' stands for Huvepharma EOOD.

The board therefore decided that the appellant in the present proceedings was Huvepharma EOOD and that Mr Radkov was duly authorised to represent the appellant during the oral proceedings.

2. Request for re-establishment of rights (Article 122 EPC)

2.1 Admissibility

2.1.1 The appellant requested re-establishment of rights as regards the missed time limits for filing the notice and statement of grounds of appeal and for paying the appeal fee.

2.1.2 The decision of the examining division was issued in writing on 2 June 2014.

Thus the time limit for filing the notice of appeal and paying the appeal fee expired on Tuesday, 12 August 2014 and that for filing the statement of grounds of appeal expired on Monday, 13 October 2014 (Article 108 in conjunction with Rule 126(2) EPC).

Since the notice of appeal and the statement of grounds of appeal were filed and the appeal fee was paid only on 10 December 2014, the appellant missed the relevant time limits.

2.1.3 In D6, Mr Radkov declared that it had only been realised during his visit to the appellant's headquarters in Sofia on 27 October 2014 that these time limits had been missed.

The request for re-establishment was filed and the corresponding fee paid within two months of that date and within one year of expiry of the unobserved time limits. The time limits referred to in Rule 136 EPC have thus been met.

2.1.4 The request for re-establishment of rights was signed by Mr Radkov. When it was filed, Mr Radkov was duly authorised by the authorisation of the then applicant Huvepharma AD dated 10 November 2014 (see point V above).

2.1.5 The request for re-establishment of rights is thus admissible.

2.2 Allowability

2.2.1 During the oral proceedings, the appellant presented the following line of reasoning for why the relevant time limits for filing the appeal and paying the appeal fee had been missed:

Before the expiry of the time limits for filing an appeal, the appellant had been advised on patent matters by its external counsel Ms Vulcheva who had been in contact with the professional representative at the time, Mr Leifert. On 22 July 2014, Ms Vulcheva had phoned Mr Petkov, the appellant's global business development director, informing him that an appeal had to be filed if the refused patent application was to be pursued.

When the relevant time limits had expired, Mr Petkov had had the intention of filing an appeal. However, by mistake, namely due to his heavy workload, he had not instructed Ms Vulcheva to file an appeal, e.g. via the then representative Mr Leifert.

2.2.2 The board acknowledges that, if a time limit is not met due to a single mistake in an otherwise well-functioning system of monitoring due dates, a request for re-establishment of rights may be allowable (T 1962/08, point 5.2.1; R 18/13, point 11; see also point 2 of T 111/92 cited by the appellant).

The board also notes that, during the oral proceedings and in the written declaration D15 (point 8), Mr Petkov stated that he had had the intention of pursuing the patent application, and thus of filing an appeal, when the relevant time limits had expired.

2.2.3 However, this line of argument is not convincing. When Ms Vulcheva informed Mr Petkov on the phone of the need to file an appeal, he did not instruct her to proceed such that an appeal would be filed, not even after a reminder from her two days later (first bullet point on the second page of Ms Vulcheva's declaration D16). On the contrary, he left Ms Vulcheva with the impression that "further internal considerations were necessary and additional experimental support was considered" (quotation from the bullet point bridging the first and second pages of Ms Vulcheva's declaration D16). This was confirmed by Mr Petkov during the oral proceedings, when he stated that, before taking a decision on whether to file an appeal, he had had to first contact his boss and that it had had to be discussed whether experimental evidence was needed to show what the invention really was. That the need for experimental evidence played a role in the decision on whether to file an appeal is plausible, since the examining division had refused the main request before it on the ground that no unexpected or surprising effect had been associated with the claimed subject-matter, such that it lacked inventive step (point 2.6 of the decision). Such an objection is typically countered by filing experimental evidence proving an unexpected effect.

So, if anything, it can be concluded that, when Mr Petkov was contacted by Ms Vulcheva, no decision had been taken yet on whether to file an appeal; rather a decision-making process was still ongoing. How the decision-making process then progressed remains completely unknown. Since Ms Vulcheva did not receive any instructions to file an appeal before expiry of the relevant time limits, it can only be speculated what

the outcome of the decision-making process at that time was.

Under these circumstances, the burden would be on the appellant to prove that, when the relevant time limits expired, it had had the intention of filing an appeal (J 14/16, point 10 and J 3/13, point 3). Since the appellant has not provided any such proof, the board has to assume that there was no such intention. Not filing an appeal within the relevant time limits is thus to be considered to have been a deliberate choice rather than a mistake on the part of the appellant. However, an intentional action cannot be cancelled by means of Article 122 EPC (T 413/91, point 4, and J 2/02, point 7). More specifically, a party that has deliberately chosen not to file an appeal cannot achieve an appellate review through the back door of a request for re-establishment of rights (T 413/91, catchword).

The appellant's request for re-establishment of rights is thus not allowable.

2.3 During the written proceedings, the appellant stated that, when the relevant time limits had expired, it had not been using a computer-based due date reminder system and that, since then, it had taken concerted measures to try to prevent deadlines from ever being missed again. This argument has no relevance to the above question of whether the appellant had had the intention of filing an appeal or not. In fact, the appellant no longer relied on this argument during the oral proceedings.

2.4 During the written proceedings, the appellant furthermore argued that its request for re-

establishment of rights should be granted since it had not had the opportunity to comment on new objections the examining division had raised in its decision, such that the right to be heard under Article 113(1) EPC had been violated. The appellant in particular argued that the reasoning in the examining division's decision that "these objections equally apply to the auxiliary request" had been communicated to it for the first time in the decision itself. In the appellant's view, it should have had the opportunity to comment on the examining division's new objections without the wholly unnecessary expense of having to file an appeal against the decision.

The appellant did not explain that, and the board is unable to see any reasons why, the alleged violation of the right to be heard had the consequence that it was unable to observe the time limits for filing the notice and statement of grounds of appeal and for paying the appeal fee. In any case, the only legal means the EPC provides to redress a substantial procedural violation is to file an appeal. The appellant's argument must thus fail.

2.5 The board's conclusion that the request for re-establishment of rights is not allowable therefore remains valid.

2.6 In view of this, the appeal is deemed not to have been filed. Accordingly, the appeal fee must be reimbursed.

Order

For these reasons it is decided that:

The request for re-establishment of rights is refused.

The appeal is deemed not to have been filed.

The appeal fee is to be reimbursed.

The Registrar: The Chairman:

M. Cañueto Carbajo W. Sieber

Decision electronically authenticated