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**Datasheet for the decision
of 20 December 2021**

Case Number: T 0110/19 - 3.3.04

Application Number: 14178729.1

Publication Number: 2808340

IPC: C07K14/59, A61K38/24, A61K38/00

Language of the proceedings: EN

Title of invention:
Recombinant FSH including alpha 2,3- and alpha 2,6-sialylation

Patent Proprietor:
Ferring B.V.

Opponent:
Merck Serono S.A.

Headword:
FSH/FERRING

Relevant legal provisions:
EPC Art. 113(2)

Keyword:
Basis of decision - agreement to text of the patent withdrawn
by patent proprietor - patent revoked

Decisions cited:

T 0073/84

Catchword:



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Case Number: T 0110/19 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 20 December 2021

Appellant: Merck Serono S.A.
(Opponent) Centre Industriel
1267 Coinsins (CH)

Representative: Weickmann & Weickmann PartmbB
Postfach 860 820
81635 München (DE)

Respondent: Ferring B.V.
(Patent Proprietor) Polaris Avenue 144
2132 JX Hoofddorp (NL)

Representative: Hoffmann Eitle
Patent- und Rechtsanwälte PartmbB
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 14 November
2018 rejecting the opposition filed against
European patent No. 2808340 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chair G. Alt
Members: D. Luis Alves
R. Romandini

Summary of Facts and Submissions

- I. The opponent (in the following "appellant") filed an appeal against the decision of the opposition division to reject the opposition filed against the European patent No. 2 808 340, entitled "*Recombinant FSH including alpha 2,3- and alpha 2,6-sialylation*".
- II. With the statement of grounds of appeal the appellant requested, *inter alia*, that the decision under appeal be set aside and the patent be revoked.
- III. With the reply to the statement of grounds of appeal the patent proprietor (in the following "respondent") requested, *inter alia*, that the appeal be dismissed and the patent be maintained as granted or, alternatively, that the patent be maintained on the basis of the auxiliary request filed in opposition proceedings.
- IV. Both the appellant and the respondent made further submissions.
- V. The board issued a summons to oral proceedings to be held on 10 December 2021 and a communication pursuant to Article 15(1) RPBA.
- VI. Both parties replied, the respondent *inter alia* by filing claim sets of auxiliary requests 2 and 3.
- VII. By letter dated 1 December 2021 the respondent informed the board as follows: "*The Patent Proprietor no longer approves of the text in which the above-mentioned patent was granted and will not submit an amended text.*"

- VIII. The parties were informed by a communication dated 3 December 2021 that the oral proceedings were cancelled.
- IX. In a further communication of the same date, the board referred to the respondent's statement in their letter dated 1 December 2021 (see point VII. above) and informed the parties of the board's understanding of their statement.
- X. By letter dated 17 December 2021 the respondent informed the board as follows: "*The Patent Proprietor herewith confirms the Board's understanding that he no longer approves of the text in which the above-mentioned patent was granted, nor of any of the auxiliary requests, and will not submit an amended text.*" (highlighting in the original).

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is admissible.
2. According to Article 113(2) EPC, the European Patent Office shall decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.
3. The patent proprietor-respondent stated that they no longer approve of the text in which the patent was granted, nor of any of the auxiliary requests, and will not submit an amended text (see section X. above).

4. There is therefore no text on the basis of which the board can decide.
5. According to the established case law of the boards of appeal under these circumstances the patent is to be revoked without further examination of the case as to patentability (see decision T 73/84, OJ EPO 1985, 241, followed by numerous decisions, see Case Law of the Boards of Appeal of the European Patent Office, 9th Edition 2019, IV.D.2). The present board has no reason to deviate from this approach.
6. There are also no ancillary issues that would have to be dealt with by the board in the present appeal case.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chair:



A. Chavinier Tomsic

G. Alt

Decision electronically authenticated