

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 27 October 2020**

Case Number: T 1854/19 - 3.3.04

Application Number: 12827559.1

Publication Number: 2751289

IPC: C12Q1/68, C12N15/82

Language of the proceedings: EN

Title of invention:

Methods and compositions for producing Capsicum plants with powdery mildew resistance

Applicant:

Seminis Vegetable Seeds, Inc.

Headword:

Capsicum plants with powdery mildew resistance/SEMINIS

Relevant legal provisions:

EPC Art. 53(b), 111(1)
EPC R. 28(2)

Keyword:

Exceptions to patentability - (no)
Remittal to the department of first instance - (yes)

Decisions cited:

G 0003/19, G 0002/12, G 0002/13

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1854/19 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 27 October 2020

Appellant: Seminis Vegetable Seeds, Inc.
(Applicant) 800 North Lindbergh Boulevard
St. Louis, MO 63167 (US)

Representative: dompatent von Kreisler Selting Werner -
Partnerschaft von Patent- und Rechtsanwälten mbB
Deichmannhaus am Dom
Bahnhofsvorplatz 1
50667 Köln (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 17 October 2018
refusing European patent application No.
12827559.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair G. Alt
Members: B. Rutz
P. de Heij

Summary of Facts and Submissions

- I. The appeal of the applicant ("appellant") lies from the decision of the examining division refusing European patent application No. 12 827 559.1, entitled "*Methods and compositions for producing Capsicum plants with powdery mildew resistance*".
- II. The decision under appeal dealt with a set of 14 claims filed with a letter dated 3 September 2018. It was held that the subject-matter of claims 1 to 3 and 8 to 14 was excepted from patentability by virtue of Article 53(b) EPC and Rule 28(2) EPC.
- III. With their statement setting out the grounds of appeal the appellant requested, as far as relevant to the present decision, that the decision under appeal be set aside and a patent be granted based on the set of claims dealt with in the decision under appeal and further, oral proceedings as an auxiliary measure.

Claim 1 of the sole (main) request reads:

"1. An agronomically elite pepper plant comprising at least a first introgressed chromosomal interval conferring resistance to Powdery Mildew, wherein the interval is a Powdery Mildew resistance contributing QTL on pepper chromosome 4 between markers NE0235653 and NE0240958."

- IV. The board issued a communication pursuant to Rule 100(2) EPC and informed the appellant of its intention to remit the case to the examining division for further prosecution.

- V. In reply, the appellant withdrew their request for oral proceedings.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is therefore admissible.

Main request - claims 1 to 14

Exceptions to patentability (Article 53(b) EPC)

2. In view of the provisions set out by the Enlarged Board of Appeal for European patent applications pending before 1 July 2017, the new interpretation of Article 53(b) EPC - announced in opinion G 3/19 of 14 May 2020 and being consequential to the introduction of Rule 28(2) EPC on 1 July 2017 - has no retroactive negative effect on the subject-matter of the main request (see opinion G 3/19, points XXVIII and XXIX). This implies that the opinion does not acknowledge the retroactive effect, as provided for in Article 3 of the Decision of the Administrative Council of 29 June 2017 that introduced Rule 28(2) EPC.
3. Thus, Article 53(b) EPC, as interpreted by decisions G 2/12 and G 2/13 (OJ EPO, 2016, A27 and A28) is applicable to the present application and the subject-matter of the set of claims of the main request is not excluded from patentability.
4. The board thus considers the appeal allowable.

Remittal (Article 111(1) EPC)

5. Pursuant to Article 111(1) EPC the board may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.
6. It is the primary function of appeal proceedings to give a judicial decision upon the correctness of the decision under appeal (see Case Law of the Boards of Appeal, 9th edition 2019, section V.A.1.1, second paragraph and decisions referred to there).
7. As explained in section II above, the sole reason for refusing the application was that the subject-matter of claims 1 to 3 and 8 to 14 of the main request was excepted from patentability by virtue of Article 53(b) EPC and Rule 28(2) EPC. The board reviews this decision (see points 2. to 4. above).
8. The board decides to remit the case to the examining division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division for further prosecution.

The Registrar:

The Chair:



I. Aperribay

G. Alt

Decision electronically authenticated