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**Datasheet for the decision
of 15 July 2025**

Case Number: T 1503/23 - 3.3.02

Application Number: 17777593.9

Publication Number: 3525585

IPC: A01N25/00, A01N43/56, A01P3/00

Language of the proceedings: EN

Title of invention:

METHOD TO CONTROL SEPTORIA TRITICI THAT IS RESISTANT TO
SUCCINATE DEHYDROGENASE INHIBITOR FUNGICIDES

Patent Proprietor:

BASF SE

Opponent:

Syngenta Crop Protection AG

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 83, 100(a), 100(b), 100(c), 123(2)
RPBA 2020 Art. 12(2), 12(4), 12(6), 13(2)

Keyword:

Amendment to case

Grounds for opposition - added subject-matter - insufficiency
of disclosure - novelty - inventive step

Allegation of fact

Decisions cited:

G 0002/88, G 0001/24, T 1652/06

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

Case Number: T 1503/23 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 15 July 2025

Appellant: Syngenta Crop Protection AG
(Opponent) Rosentalstrasse 67
4058 Basel (CH)

Representative: Carpmaels & Ransford LLP
One Southampton Row
London WC1B 5HA (GB)

Respondent: BASF SE
(Patent Proprietor) Carl-Bosch-Strasse 38
67056 Ludwigshafen am Rhein (DE)

Representative: Meissner Bolte Partnerschaft mbB
Patentanwälte Rechtsanwälte
Postfach 86 06 24
81633 München (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 27 June 2023
rejecting the opposition filed against European
patent No. 3525585 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. O. Müller
Members: S. Bertrand
B. Burm-Herregodts

Summary of Facts and Submissions

I. The appeal by the opponent ("appellant") is against the opposition division's decision to reject the opposition against European patent No 3 525 585.

II. The patent is directed to a method for controlling *Septoria tritici* resistant to SDHI fungicides on cereals by treating the plants, their seed or the soil with pydiflumetofen.

Septoria tritici is a species of filamentous fungus, an ascomycete in the family *Mycosphaerellaceae*. This is a plant pathogen causing *Septoria* leaf blotch, which is currently the most dominant cereal disease in Western Europe.

III. The following documents are referred to in the present decision:

- | | |
|--------|---|
| D1 | WO 2010/063700 A2 |
| D2 | WO 2015/124543 A1 |
| D3 | WO 2014/016279 A1 |
| D4 | WO 2015/049168 A1 |
| D6/D6a | Program and Abstracts, 18 th International Reinhardtsbrunn Symposium on Modern fungicides and Antifungal Compounds, 24-28 April 2016 |
| D7 | APS Annual Meeting, Tampa, Florida, Abstracts of Oral Presentations, 30 July to 3 August 2016 |
| D12a | Gerd Stammer et al., "Respiration inhibitors: Complex II", 2015, Springer Japan, pages 105 to 117 |

- D16 Hida Dooley *et al.*, Pest. Manag. Sci. 2016,
72, pages 2203 to 2207
- A28 "*ADEPIDYNTM fungicide: Cross resistance
patterns in Alternaria solani*", Presentation
from Syngenta Crop Protection at APS Annual
Meeting, 30 July to 3 August 2016, Tampa,
Florida
- A29 Declaration of Gilberto Olaya
- A30 Program Book from APS Annual Meeting,
30 July to 3 August 2016, Tampa, Florida

IV. In the impugned decision, the opposition division's
conclusions included the following.

- Claim 1 as granted met the requirements of Article
123(2) EPC.
- The invention defined in the claims of the main
request was sufficiently disclosed as required by
Article 83 EPC.
- The subject-matter of the claims of the main
request was novel in view of any of D1 to D4.
- The subject-matter of claim 1 of the main request
involved an inventive step starting from *inter alia*
D16.

V. In its statement of grounds of appeal and a further
letter dated 23 May 2024, the appellant raised
objections of lack of novelty, lack of inventive step,
added subject-matter and lack of sufficiency of
disclosure. It submitted documents A28, A29 and A30.

VI. In the reply to the grounds of appeal, the patent
proprietor ("respondent") contested the submissions
made by the appellant.

- VII. The board summoned the parties to oral proceedings as per their requests and issued a communication under Article 15(1) RPBA.
- VIII. Oral proceedings before the board were held in person on 15 July 2025 in the presence of both parties.
- IX. The parties' requests, where relevant to this decision, were as follows.

The appellant requested that the decision under appeal be set aside and the patent be revoked in its entirety.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

Main request (patent as granted)

1. Added subject-matter - claim 1 - Articles 100(c) and 123(2) EPC

- 1.1 Claim 1 of the main request reads as follows:

*"1. A method for controlling *Septoria tritici* on cereals, comprising treating the plants, their seed or the soil with a fungicidally effective amount of pydiflumetofen, wherein the *Septoria tritici* is resistant to SDHI fungicides **due to a T268I amino acid exchange in SDH subunit B, or a H152R, T79N, N86S, V166M or W80S amino acid exchange in SDH subunit C**"*
(emphasis added by the board; bold text representing addition compared to claim 1 as filed).

Claim 1 of the main request thus differs from claim 1 as filed by the addition of six alternative mutations in *Septoria tritici* ("T268I amino acid exchange in SDH subunit B, or a H152R, T79N, N86S, V166M or W80S amino acid exchange in SDH subunit C").

- 1.2 The appellant objected that the addition of the above six alternative mutations to claim 1 of the main request added subject-matter.

It is common ground between the parties that the six mutations found in claim 1 of the main request ("a *T268I amino acid exchange in SDH subunit B, or a H152R, T79N, N86S, V166M or W80S amino acid exchange in SDH subunit C*") are disclosed in the paragraph bridging pages 1 and 2 of the application as filed.

The point of dispute between the parties is whether the list of mutations disclosed in the paragraph bridging pages 1 and 2 of the application as filed can be combined with the features of claim 1 as filed.

The appellant submitted that the paragraph bridging pages 1 and 2 of the application as filed could not represent any basis for the six mutations added in claim 1 of the application as filed since it belonged to a part of the description discussing the prior art. It relied on T 1652/06 to support its submission.

The board disagrees. The appellant's submission is not convincing since the first sentence after the paragraph bridging pages 1 and 2 of the application as filed, on page 2, lines 10 and 11, defines the invention and refers to resistance against SDHI fungicides. This resistance against SDHI fungicides cannot but be the resistance defined in the preceding paragraph (paragraph bridging pages 1 and 2), something which is not inconsistent with the conclusion drawn in

T 1652/06. This is because the board held in this decision (Reasons, 5.1) that the feature "for treating pre sinusoidal portal hypertension" taken from page 1, line 16 of the application as filed added subject-matter the reasons being that the passage on page 1, line 16 of the application as filed reflected the background art **which was not related to the teaching of the invention**, and there was no specific disclosure in the application as filed that the compounds used in the claims were applicable for the treatment of pre sinusoidal portal vein hypertension.

Contrary to the situation in T 1652/06, in the case at hand there is, as set out above, a specific link in the application as filed between the resistance against SDHI fungicides mentioned in the context of the invention and the six specific mutations mentioned when discussing the prior art.

The appellant further submitted that the paragraph bridging pages 1 and 2 in the prior art section of the application as filed only referred to sensitivity and not resistance as stated in the sentence on page 2, lines 10 and 11 of the application as filed. There was thus no link between the prior art section (paragraph bridging pages 1 and 2) and the invention (subsequent sentence on page 2, lines 10 and 11) in the application as filed.

The board does not agree. The paragraph bridging pages 1 and 2 of the application as filed contains the sentence on page 1, lines 41 to 43 which refers to "*SDHI resistance*". The subsequent sentence on page 2, lines 10 and 11 refers to the term "*resistant against SDHI fungicides*". Therefore, since they both refer to the same term, there is a clear link between them.

The appellant also relied on the disclosure in the paragraph bridging pages 1 and 2 of the application as filed of the country where the mutations were detected. It asserted that the mutations were dependent on the geographic location. The omission of the indication of this location for each of the mutations in claim 1 of the main request added subject-matter.

However, as set out below, the allegation of fact that the mutations depend on the geographic location was not admitted into the proceedings. Hence, the omission of the countries in claim 1 of the main request does not add subject-matter.

The appellant also submitted that the paragraph bridging pages 1 and 2 of the application as filed comprised three different lists of mutations, two of which comprised mutations with a moderate sensitivity loss and one of which comprised mutations with a stronger resistance. Multiple selections from these various lists in the paragraph bridging pages 1 and 2 of the application as filed were needed to arrive at the list of the six mutations of claim 1 of the main request. These multiple selections contravened Article 123(2) EPC.

The board disagrees. The paragraph bridging pages 1 and 2 of the application as filed defines various alternatives for one single feature, namely the mutations causing resistance against SDHI fungicides. The fact that the mutations are grouped according to their impact on resistance (moderate sensitivity loss, page 1, line 44 to page 2, line 3, or strong resistance, page 2, lines 4 to 6) in the application as filed does not mean that there are different lists of different features from which multiple selections are

needed to arrive at the subject-matter of claim 1 of the main request.

The board acknowledges that the paragraph bridging pages 1 and 2 of the application as filed discloses a list of eight mutations in *Septoria tritici* and only six out of these eight mutations have been added to claim 1 as filed.

A single selection of six out of the eight mutations in the paragraph bridging pages 1 and 2 of the application as filed does not, however, add subject-matter.

Consequently, the board arrived at the conclusion that claim 1 of the main request does not contain added subject-matter.

- 1.3 Admittance of the allegation of fact that the mutations depend on the geographic location

During the oral proceedings and in the context of the discussion of added subject-matter in claim 1 of the main request, the appellant submitted for the first time that the mutations disclosed in the paragraph bridging pages 1 and 2 of the application as filed depended on the geographic location. This was due to the fact that the mutations disclosed in this paragraph were also identified by their geographic location.

The respondent requested not to admit this new allegation of fact into the proceedings.

The paragraph bridging pages 1 and 2 of the application as filed discloses a list of eight mutations in *Septoria tritici* as follows:

"[...] first with the mutations C-T79N (France) and C-W80S (UK) in 2012, followed by C-N86S (Germany) in 2013, B-N225T (Ireland) and C-T79N (Germany) in 2014. In 2015 isolates with C-V166M, B-T268I, C-N86S and C-T79N were detected in UK, France and/or Ireland."

The paragraph thus discloses the country(ies) where the six alternative mutations of claim 1 of the main request (T268I, H152R, T79N, N86S, V166M and W80S) were detected.

The first question to be answered in relation to admittance is whether this allegation of fact represents an amendment to the appellant's appeal case.

The appellant did not contest that this new allegation of fact was made for the first time during the oral proceedings before the board. It was, however, of the view that its allegation of fact should be admitted since the wording between the paragraph bridging pages 1 and 2 of the application as filed and claim 1 of the main request was different and any such difference had to be discussed under Article 123(2) EPC at any time during the appeal proceedings. Furthermore the allegation of fact merely supplemented the added-matter objection raised in the statement of grounds of appeal against claim 1 of the main request. The allegation of fact was thus not an amendment to the appellant's appeal case.

The board disagrees. As submitted by the respondent, the objection of added-matter raised against claim 1 of the main request in the statement of grounds of appeal is based on whether the six mutations disclosed in the paragraph bridging pages 1 and 2 of the application as filed can be combined with the features of claim 1 as filed, and not on whether, based on the allegation of

fact that the mutations depend on the geographic location, the omission of this geographic location in claim 1 of the main request adds matter. There is no link between the objection raised in the statement of grounds of appeal on the basis of the combination of features and the objection on the basis of the allegation of fact as regards the omission of the geographic location. The allegation of fact thus does not supplement the objection initially raised by the appellant in the statement of grounds of appeal. It represents a totally new objection of added subject-matter. This new allegation of fact thus represents an amendment to the appellant's appeal case.

According to Article 13(2) RPBA, any amendment to a party's appeal case made after notification of a summons to oral proceedings will, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

The appellant did not provide any reasons justifying the submission of the allegation of fact for the first time during the oral proceedings, and the board sees none either. The fact that the wording between the paragraph bridging pages 1 and 2 of the application as filed and claim 1 of the main request is different and the appellant's belief that any such difference had to be discussed under Article 123(2) EPC at any time during the appeal proceedings is not correct. If it were, any new objection under Article 123(2) EPC could be made for the first time at any time including at oral proceedings before the board. This would deprive Article 13(2) RPBA of any meaning.

Therefore, the board decided not to admit into the proceedings the appellant's allegation that the mutations mentioned in the paragraph bridging pages 1 and 2 of the application as filed and incorporated into claim 1 of the main request depend on the geographic location.

2. Admittance of the objection of added subject-matter against claim 2 of the main request

2.1 Claim 2 of the main request reads as follows:

"2. A method according to claim 1, wherein the cereal is wheat."

2.2 The appellant objected that claim 2 of the main request was not based on the application as filed. The respondent requested that this objection not be admitted into the proceedings.

2.3 In the notice of opposition, the appellant objected only to the amendment made in claim 1 of the main request (point 11 of the notice of opposition). In the same way, the impugned decision (point 4 of the Reasons) only deals with an objection of added subject-matter in claim 1 of the main request. An objection of added subject-matter in claim 2 of the main request was neither raised before the opposition division nor addressed in the decision.

The objection of added subject-matter in claim 2 of the main request was thus raised by the appellant for the first time in the statement of grounds of appeal.

This objection is thus a new objection and does not represent an objection on which the impugned decision was based within the meaning of Article 12(2) RPBA. This objection therefore constitutes an amendment to

the appellant's case within the meaning of Article 12(4) RPBA. Any such amendment can be admitted only at the board's discretion.

The appellant's new objection raises complex new issues which, had the objection been admitted, would have had to be discussed for the first time in the appeal proceedings. In particular, a new discussion of the feature of claim 2 of the main request and whether and, if so, where this feature is disclosed in the application as filed would have had to be considered for the first time. This would have been contrary to the need for procedural economy (Article 12(4) RPBA) and the primary object of the appeal proceedings being to review the appealed decision in a judicial manner (Article 12(2) RPBA).

Furthermore, under Article 12(6) RPBA, the board should not admit *inter alia* objections which should have been submitted before the opposition division.

The appellant did not submit any reason why the objection of added subject-matter in claim 2 of the main request was not raised before the opposition division and the board sees none either.

For these reasons, the board decided not to admit the appellant's objection of added subject-matter in claim 2 of the main request into the proceedings, pursuant to Article 12(4) and (6) RPBA.

3. Hence, the ground for opposition under Article 100(c) EPC does not prejudice maintenance of the patent as granted.

4. Novelty - claim 1 - Articles 100(a) and 54 EPC
- 4.1 The appellant contended that the subject-matter of claim 1 of the main request was not novel in view of the disclosure of each of D1 to D4.
- 4.2 As set out above, claim 1 of the main request refers to a method for controlling the fungus *Septoria tritici* on cereals, comprising treating the plants, their seed or the soil with pydiflumetofen, wherein *Septoria tritici* is resistant to SDHI fungicides due to certain mutations.
- As reasoned in the impugned decision, claim 1 of the main request can be considered to represent a second non-medical use characterised by the use of pydiflumetofen for controlling *Septoria tritici* on cereals where *Septoria tritici* is resistant to SDHI fungicides due to six specific mutations.
- 4.3 It is common ground between the parties that each of D1 to D4 (D1, example B-3, page 68; D2, page 54, example C; D3, page 50, lines 28-33 and D4, page 33, lines 5-10) discloses a method for controlling *Septoria tritici* on cereals, comprising treating the plants, their seed or the soil with a fungicidally effective amount of pydiflumetofen.
- 4.4 It is also common ground that in none of D1 to D4 is there any explicit disclosure that the *Septoria tritici* mentioned therein are resistant to SDHI fungicides as required by claim 1 of the main request.
- 4.5 The point of dispute between the parties was whether the purpose of controlling on cereals *Septoria tritici* resistant to SDHI fungicides due to the six mutations as identified in claim 1 of the main request

could establish novelty over the disclosure of any of D1 to D4.

- 4.6 First, the appellant relied on G 2/88 and submitted that the purpose of controlling on cereals *Septoria tritici* resistant to SDHI fungicides due to the six mutations as defined in claim 1 of the main request had to be disregarded in the assessment of the novelty of the subject-matter of claim 1 of the main request, since this purpose did not represent one of the "physical steps" defining the activity of controlling *Septoria tritici* as defined in claim 1 of the main request. In other words, there was no physical step (or in the language of G 2/88, point 9.1: means of realisation) that distinguished the claimed subject-matter from the disclosures of D1 to D4.

The board disagrees. Contrary to the appellant's submission, the purpose of controlling *Septoria tritici* on cereals where *Septoria tritici* is resistant to SDHI fungicides due to the six specific mutations identified in claim 1 of the main request represents a new purpose based on a new technical effect (G 2/88, Reasons 9.1), the new technical effect being the fungicidal effect of pydiflumetofen against *Septoria tritici* resistant to SDHI fungicides. This new purpose and effect is not disclosed in any of D1 to D4.

The board acknowledges that claim 1 of the main request covers prophylactic treatment, namely treating uninfected plants with a fungicidally effective amount of pydiflumetofen to prevent later infection. Thus, at least for a prophylactic treatment, claim 1 of the main request comprises, within the meaning of G 2/88 (OJ EPO 1990, 93, Reasons 2.5), the same physical step or same means of realisation as in each of D1 to D4, namely treating uninfected plants with a fungicidally

effective amount of pydiflumetofen. It can be deduced from the Enlarged Board's observations in point 9.1 that this, i.e. the fact that a use claim implies the same means of realisation as a prior art disclosure, is in itself not sufficient to deny novelty. More specifically, the Enlarged Board observed that "...*what is required in the context of a claim to the "use of a compound A for purpose B" is that such a claim should not be interpreted literally, as only including by way of technical features "the compound" and "the means of realisation of purpose B"; it should be interpreted (in appropriate cases) as also including as a technical feature the function of achieving purpose B, (because this is the technical result)*". Hence, in the present case, the fact that at least for prophylactic treatments covered by claim 1 of the main request, the means of realisation may be the same as disclosed in D1 to D4 is not a sufficient reason to deny novelty over these documents.

- 4.7 Secondly, the appellant submitted that resistant strains of *Septoria tritici* were publicly known before the priority date of the patent. It argued that, even if D1 to D4 did not explicitly disclose that the *Septoria tritici* treated therein was SDHI-resistant due to the six specific mutations identified in claim 1 of the main request, the use of pydiflumetofen for controlling *Septoria tritici* on cereals where *Septoria tritici* was resistant to SDHI fungicides was inevitable in D1 to D4.

The board disagrees.

Even if resistant strains of *Septoria tritici* having the mutations identified in claim 1 of the main request were publicly known before the priority date of the patent, it cannot be concluded, in the absence of a

direct and unambiguous disclosure in D1 to D4 that the *Septoria tritici* strains disclosed therein have the claimed mutations and thus SDHI resistance.

- 4.8 Finally, the appellant submitted that no new effect in view of any of D1 to D4 was derivable from table 1 of the patent. In the absence of any new effect, novelty could not be acknowledged in view of these documents.

The board does not agree. For the assessment of the novelty of a use claim, what matters is whether the subject-matter of the claim rather than the experimental part of the patent is novel. The board acknowledges that a claim can be interpreted on the basis of the description, as set out in G1/24 (headnotes). However, the appellant did not present any interpretation of claim 1 of the main request based on table 1 of the patent, still less did it submit that, on the basis of such an interpretation, claim 1 would lack novelty over any of D1 to D4.

- 4.9 The board concluded that the subject-matter of claim 1 of the main request is novel in view of each of D1 to D4. The ground for opposition under Article 100(a) EPC - lack of novelty - thus does not prejudice maintenance of the patent as granted.

5. Inventive step - claim 1 - Articles 100(a) and 56 EPC

- 5.1 The appellant objected to the inventive step of the subject-matter of claim 1 of the main request starting from any of D1 to D4 and D16.

The appellant relied on secondary documents D7 and A28 as regards the obviousness of the solution proposed by claim 1 of the main request.

5.2 Admittance of the objections starting from any of D1 to D4

The respondent requested that the inventive step objections starting from any of D1 to D4 not be admitted into the proceedings.

The appellant submitted that these objections were raised in the notice of opposition under points 14.5.1 and 14.6.2. The appellant never withdrew these objections. It was thus clear that the objections starting from any of D1 to D4 were admissibly raised and maintained before the opposition division.

As regards the issue of whether the objections starting from any of D1 to D4 were maintained, the course of events during the opposition proceedings was as follows.

- In the notice of opposition (points 14.5.1 and 14.6.2), the appellant submitted in general terms, without specifying any document, that in addition to the fact that the subject-matter of claim 1 as granted was "fully anticipated by the cited references" (D1 to D5), it also lacked an inventive step. In point 14.9.3, the appellant submitted that any of D10 to D17 could be considered to constitute the closest prior art.
- In the annex to the summons to attend oral proceedings (points 9.1. and 9.2), the opposition division noted that the appellant cited quite a number of documents as closest prior art for the assessment of inventive step. The opposition division noted that the appellant's argumentation remained quite general. The opposition division held that, in the absence of identification of a proper closest prior art and a problem-solution

approach based on such a document, it appeared that in principle an inventive step could be acknowledged.

- In its letter dated 23 January 2023 in reply to the annex to the summons to attend oral proceedings, the appellant stated that each of D10-D17 could be considered to constitute the closest prior art. No reference was made to any of D1 to D4.
- In the impugned decision, only documents D10 to D17 were considered as a starting point for the assessment of inventive step. According to the decision (point 8.1 on page 12), these documents are those cited by the appellant. According to the minutes (points 19 and 20), only D15 as the closest prior art was discussed during the oral proceedings before the opposition division.

In view of the above, and as held by the opposition division, the appellant did not raise any substantiated objection of lack of inventive step starting from any of D1 to D4 in the notice of opposition or later. The appellant's inventive step objections thus have not been admissibly raised within the meaning of Article 12(4) RPBA. More importantly, even if it were to be assumed in the appellant's favour that those objections had been admissibly raised in the notice of opposition, they were not maintained within the meaning of Article 12(4) RPBA. More specifically, as set out above, in reply to the opposition division's preliminary opinion in the annex to the summons to attend oral proceedings requesting clarification as regards what documents the appellant considered the closest prior art, the appellant only relied on D10 to D17 as starting documents for the objections of lack of inventive step. Even assuming it had done so in the notice of

opposition, the appellant no longer relied on documents D1 to D4 as starting documents for the objections of lack of inventive step.

The appellant submitted that, during the oral proceedings before the opposition division, it had to restrict itself to one document representing the closest prior art. It therefore did not have the opportunity to present an objection of lack of inventive step starting from any of D1 to D4 during the oral proceedings.

The board is not convinced. An obligation formulated by the opposition division for the appellant to restrict its submission at oral proceedings to one single closest prior art document can at most mean an obligation to restrict itself to one of those closest prior art documents with regard to which it had admissibly raised and maintained inventive step objections, i.e. to one of D10 to D17. It does not, however, in any way mean that, if this obligation was expressed by the opposition division, the appellant would have been prevented from relying on D1 to D4 as closest prior art during the oral proceedings before the opposition division.

Therefore, the objections of lack of inventive step starting from any of D1 to D4 are new objections and do not represent objections on which the impugned decision was based within the meaning of Article 12(2) RPBA. These objections therefore constitute an amendment to the appellant's case within the meaning of Article 12(4) RPBA. Any such amendment can be admitted only at the board's discretion, exercised in view of the need for procedural economy, *inter alia*.

Had the objections of lack of inventive step starting from any of D1 to D4 been admitted, new issues in respect of the inventive step of the claimed subject-matter would have had to be addressed on appeal for the first time. In particular, a new discussion of the technical effect and entirely new arguments regarding obviousness would have had to be considered for the first time. This would be contrary to the need for procedural economy (Article 12(4) RPBA) and the primary object of the appeal proceedings being to review the appealed decision in a judicial manner (Article 12(2) RPBA).

Moreover, under Article 12(6) RPBA, the board should not admit *inter alia* objections which should have been submitted before the opposition division.

The appellant did not submit any reason as to why the objections of lack of inventive step starting from any of D1 to D4 were not raised before the opposition division and the board sees none either.

For these reasons, the board decided not to admit the appellant's inventive step objections starting from any of D1 to D4 as closest prior art into the proceedings, pursuant to Article 12(4) and (6) RPBA.

5.3 Inventive step starting from D16

- 5.3.1 D16 is an article on the study of the effect of SDHI fungicides on SDHI-resistant *Septoria tritici* strains having the C-H152R mutation (i.e. one of the mutations cited in claim 1 of the main request). D16 discloses that *Septoria tritici* strains carrying the C-H152R mutation are sensitive to fluopyram (page 2205, point 4, third sentence).

It is common ground between the parties that D16 can be considered the starting point for assessing inventive step.

5.3.2 Distinguishing feature

It is also common ground between the parties that claim 1 of the main request differs from D16 in that a different SDHI fungicide is used to control resistant strains of *Septoria tritici* carrying the C-H152R mutation, namely pydiflumetofen rather than fluopyram in D16.

5.3.3 Technical effect and objective technical problem

Table 1 of the patent shows the EC50 values of SDHI fungicides against fungal development of a wild-type strain ("WT") and SDHI-resistant species of *Septoria tritici*. In particular, it compares the EC50 values of pydiflumetofen (according to claim 1 of the main request) and fluopyram (according to D16) for controlling a strain of *Septoria tritici* resistant to SDHI due to the mutation C-H152R. Pydiflumetofen (according to claim 1 of the main request) has an EC50 value of 0.136, while fluopyram (according to D16) has an EC50 value of 4.857. Thus, pydiflumetofen (according to claim 1 of the main request) has a lower EC50 value and thus a higher sensitivity (better performance), compared to fluopyram (according to D16).

Consequently, the objective technical problem is the provision of a fungicide providing improved control of the *Septoria tritici* strain carrying the C-H152R mutation.

This also was common ground between the parties.

5.3.4 Obviousness

The appellant relied on the results of table 1 of the patent, D1 (pages 14 and 15, and example B-3), D2 (page 54) and D7 (page S4.61) and submitted that, based on these results, the skilled person would have known that pydiflumetofen was the best of all SDHI fungicides against the wild type of *Septoria tritici*. It was obvious to the skilled person that the best SDHI fungicide against the wild type of the *Septoria tritici* would also be the best against resistant strains of *Septoria tritici*.

The board disagrees.

Firstly, the skilled person would not have assumed that pydiflumetofen is the best of all SDHI fungicides against the wild type of *Septoria tritici*.

- (a) The results of table 1 of the patent are not prior art and cannot be taken into consideration to support the appellant's submission that the skilled person would have known that pydiflumetofen was the best of all SDHI fungicides against the wild type of *Septoria tritici*. What matters for the assessment of inventive step is what the skilled person would have done before the relevant date of the patent, rather than what was found out only later in terms of experimental results contained in the patent.
- (b) Pages 14 and 15 of D1 disclose that the compounds according to D1, encompassing pydiflumetofen, have a very advantageous spectrum of activities for protecting useful plants against diseases and that they are distinguished by excellent activity at low rates of application, by being well tolerated by plants and by being environmentally safe. Example

B-3 on page 68 of D1 discloses that the compounds of D1 show very good activity against the wild type of *Septoria tritici*. There is however no comparison with other SDHI fungicides covered by the compounds of D1, let alone with compounds different therefrom in these passages of D1. The skilled person would thus not have deduced from D1 that pydiflumetofen is the best of all SDHI fungicides against the wild type of *Septoria tritici*

- (c) The table on page 54 of D2 discloses the activity of pydiflumetofen (compound (I-1)) against the wild type of *Septoria tritici*. Like the passages of D1, the table on page 54 of D2 comprises no comparison with other SDHI fungicides.
- (d) On page S4.61 of D7, penultimate abstract, Adepidyn™, i.e. pydiflumetofen, is reported to be effective against leaf spots (i.e. a disease caused by *Septoria tritici*). This abstract also discloses that pydiflumetofen, "at low rates in comparison to commercial standards, [provides] more than three to four weeks control of *A. solani* on potato, *Cercospora* spp. on peanut, and powdery mildew on cucurbits". This abstract teaches that pydiflumetofen has better activity than "commercial standards", but it does not specify whether these "commercial standards" are SDHI fungicides. Furthermore, the comparison is based on a test on *A. solani* on potato, *Cercospora* spp. on peanut, and powdery mildew on cucurbits, i.e. fungi other than *Septoria tritici*.

Therefore, the patent cannot and D1, D2 and D7 do not support the appellant's submission that the skilled person would have assumed that pydiflumetofen is the

best of all SDHI fungicides against the wild type of *Septoria tritici*.

Secondly, and more importantly, there is no reason to assume that, on the basis of any of D1, D2 and D7, the skilled person would have assumed that pydiflumetofen would be more effective than the specific fungicide fluopyram, i.e. the SDHI fungicide used in D16, for controlling on cereals *Septoria tritici* which is resistant to SDHI fungicides due to specific mutations.

This is emphasised by the third abstract on page S4.12 of D7. This abstract relates to cross resistance patterns in *Alternaria solani* and the activity of pydiflumetofen. According to this abstract, cross resistance patterns across SDHI fungicides are complex due to the fact that some mutations confer high levels of resistance and others do not and mutations could lead to different sensitivity shifts in different SDHIs. Thus, even assuming that pydiflumetofen is the best fungicide against resistant strains as referred to in S4.12 of D7, the skilled person would not have been able to predict whether for the specific mutation of D16, which is different from those disclosed on page S4.12 of D7, pydiflumetofen would still be the best SDHI fungicide and in particular better than fluopyram.

Finally, none of A28 to A30, relied on by the appellant in its written submission, leads to any other conclusion.

A28 is a presentation from Syngenta Crop Protection entitled "*ADEPIDYNTM fungicide: Cross resistance patterns in Alternaria solani*". According to A29 (declaration of one of the presenters of A28), A28 is the presentation corresponding to the abstract on page S4.12 of D7 of the same title by the same presenters

and given during the 2016 APS Annual meeting in Tampa, Florida.

Thus the reasons given in relation to D7 apply in relation to A28.

A30 is the program book from the 2016 APS Annual meeting in Tampa, Florida, supporting where and when the presentation disclosed in A28 was made. A30 is thus not relevant to the assessment of the obviousness of the solution proposed by claim 1 of the main request.

Consequently, contrary to the appellant's submission, the skilled person would not have assumed that pydiflumetofen was the best of all SDHI fungicides against the wild type of *Septoria tritici*. Furthermore, it would not have been obvious to the skilled person that the best SDHI fungicide against the wild type of *Septoria tritici* would also be the best against resistant strains of *Septoria tritici*. The appellant's argument must thus fail.

In fact, as not disputed by the appellant, neither D16 itself nor any of the further cited prior art documents, contains any indication that pydiflumetofen improves the control of SDHI fungicide resistant *Septoria tritici*, relative to fluopyram as disclosed in D16.

5.3.5 Considering the above, the board concluded that the subject-matter of claim 1 of the main request involves an inventive step starting from D16. The ground for opposition under Article 100(a) EPC - lack of inventive step - thus does not prejudice maintenance of the patent as granted.

5.4 In arriving at this conclusion, the board took account of the appellant's submissions based on A28 to A30 and

D16 in conjunction with D1 and D2, the admittance of which was contested by the respondent.

The board did not take into account the respondent's submission that its submissions dated 9 March 2023 on inventive step over D12a in view of D6a and D7, apply *mutatis mutandis* to the appellant's objections raised with regard to D16.

Since the decision is in the respondent's favour, there is no need for the board to set out its reasons for taking the appellant's submissions based on A28 to A30 and D16 in conjunction with D1 and D2 into account and for not taking into account the respondent's submission that its submissions dated 9 March 2023 on inventive step over D12a in view of D6a and D7, apply *mutatis mutandis* to the appellant's objections raised with regard to D16.

6. Sufficiency of disclosure - claim 1 - Articles 100(b) and 83 EPC
- 6.1 The appellant submitted that the skilled person would not be able to carry out the invention across the scope of claim 1 of the main request without undue burden.
- 6.2 Before addressing the appellant's specific objections, it is necessary to recapitulate what, in terms of claim construction, is common ground between the parties. It was common ground between the parties that in claim 1 of the main request, the term "*resistant to SDHI fungicides*" is to be interpreted as resistant against any SDHI fungicide except pydiflumetofen.

The board agrees with this interpretation, since it is the interpretation of the claim which makes technical

sense and takes account of the whole disclosure of the patent.

- 6.3 The appellant relied on document D16 and submitted that, according to D16, fluopyram was effective against resistant *Septoria tritici*. In claim 1 of the main request, the term "*resistant to SDHI fungicides*" thus could not mean resistant against all SDHI fungicides with the only exception of pydiflumetofen because there was no resistance against fluopyram. The feature "*resistant to SDHI fungicides*" was thus not clear. It was therefore an undue burden for the skilled person to determine the resistant strains of *Septoria tritici* which were to be treated by the method of claim 1 of the main request.

The board disagrees.

As set out above, table 1 of the patent discloses EC50 values of SDHI-resistant strains of *Septoria tritici* treated by different SDHI fungicides. In this table, it is shown that, compared to pydiflumetofen, the strains of *Septoria tritici* "C-H152R2", "C-T79N", "C-N86S" and "B-T268I" exhibit resistance to fluopyram.

Thus, the appellant's submission that there could be no resistance to fluopyram and therefore the feature "*resistant to SDHI fungicides*" is unclear is not convincing. There cannot therefore be any lack of sufficiency arising from a lack of clarity. Irrespective of this, no concrete argument, let alone evidence, has been provided by the appellant supporting the alleged undue burden.

- 6.4 The appellant also submitted that, in order to carry out the claimed subject-matter, farmers had first to identify the strain of *Septoria tritici* to be controlled to find out whether it was resistant to SDHI

fungicides before they could perform the method. However, it was not within a farmer's common general knowledge to isolate single strains from cereal plants and to identify genetic mutations in order to tell whether a particular strain exhibited the claimed resistance to SDHI fungicides. For this reason too, the farmer was unable to carry out the invention without undue burden.

The board is not convinced by the appellant's argument. As submitted by the respondent, farmers are assisted and comprehensively advised by plant protection experts. The skilled person would thus not be a farmer but would consist of a team of a farmer assisted by a plant protection expert. The latter provides the farmer with advice for example on the occurrence of any fungicide resistance and the type of resistance, and gives recommendations on which measures to take (resistance risk management). External companies are available which are in a position to analyse and identify the *Septoria tritici* mutants in question and any farmer can send infected material to these companies for analysis. Therefore, farmers know whether they are confronted with a resistance problem and, if so, which one. On this basis, it does not represent an undue burden for the skilled person, i.e. a farmer assisted by an expert, to determine the nature of the resistance and the mutants to which it can be attributed.

- 6.5 Finally, the appellant submitted that prophylactic treatment was covered by claim 1 of the main request, but that it was an undue burden to identify in the case of prophylactic treatment whether any plants might be infected in the future by SDHI fungicide resistant *Septoria tritici*.

The board does not agree.

If the appellant's submission were correct, this would mean that ANY prophylactic treatment would be insufficiently disclosed. It lies in the very nature of a prophylactic treatment that this treatment is carried out in order to prevent later occurrence of the disease against which the treatment is effective. It is self-evident that when the prophylactic treatment is carried out, the disease is not yet present (if it were present, the treatment would be curative rather than prophylactic) and that it cannot be known for certain at that point in time whether it would occur if the prophylactic treatment were not carried out. This uncertainty inherent in any prophylactic treatment is, however, no reason to deny sufficiency of disclosure.

- 6.6 Thus the board concluded that the skilled person is able to carry out the invention across the scope of the claim without undue burden. The ground for opposition under Article 100(b) EPC - lack of sufficiency of disclosure - therefore does not prejudice maintenance of the patent as granted.
7. The board thus concluded that none of the grounds for opposition prejudices maintenance of the European patent.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

The Registrar:

The Chairman:



U. Bultmann

M. O. Müller

Decision electronically authenticated