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**Datasheet for the decision
of the Enlarged Board of Appeal
of 20 December 2010**

Case Number: R 0016/10
Appeal Number: T 0699/07 - 3.3.01
Application Number: 98965689.7
Publication Number: 1032267
IPC: A01N 57/20
Language of the proceedings: EN

Title of invention:
Method of controlling weeds in transgenic crops

Patentee:
Bayer CropScience S.A.

Opponent:
BASF SE

Headword:
-

Relevant legal provisions:
EPC Art. 112, 113, 24(1)
RPBA Art. 106

Keyword:
"Petition not clearly inadmissible - clearly unallowable"

Decisions cited:
R 0001/08, R 0003/09, R 0008/09, R 0013/09, R 0018/09

Catchword:
-



Case Number: R 0016/10

D E C I S I O N
of the Enlarged Board of Appeal
of 20 December 2010

Petitioner:
(Patent Proprietor)

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Decision under review:

Decision of the Technical Board of Appeal
3.3.01 of the European Patent Office of
25 February 2010.

Composition of the Board:

Chairman: C. Rennie-Smith
Members: M-B. Tardo-Dino
S. Wibergh

Summary of Facts and Submissions

- I. The petition for review concerns the decision T 699/07 of the Board of Appeal 3301 announced on 25 February 2010 and posted on 19 July 2010. The Board of Appeal dismissed the petitioner's appeal against the decision of the opposition division revoking the patent No.1032 267 entitled "Method of controlling weeds in transgenic crops".
- II. The petitioner and patent proprietor Bayer CropScience SA filed the petition by fax on 29 September 2010 and paid the corresponding fee on the same date.
- III. The facts and procedural steps necessary for an understanding of the petition proceedings can be summarised as follows.
- (a) Two oppositions were filed against the patent by Syngenta Limited (Opponent 1) and BASF SE (Opponent 2) on the grounds of lack of novelty and inventive step (Article 100(a) EPC) and insufficiency of disclosure (Article 100(b) EPC). Opponent 1 withdrew its opposition by a letter of 5 April 2006.
- (b) The opposition division found that the subject-matter of the main request and that of auxiliary request I filed during the oral proceedings before it were, respectively, not novel over D2 and not inventive over D13 in combination with D15 or D14. D13, which describes weed control of glyphosate resistant plants with glyphosate alone or in combination with additional herbicides, was

considered to be the closest prior art. The other two documents D15 or D14 disclose the suitability of HPPD-inhibiting herbicide in the post-emergence application.

- (c) In the course of the appeal proceedings the petitioner filed a new main request, maintained as a new first auxiliary request the request submitted before the opposition division as main request, and filed auxiliary requests II and III during the oral proceedings before the Board of Appeal.
- (d) The petitioner also requested that its technical expert Dr Pallett be heard by the Board in order to supply it with technical information, especially about the experimental evidence provided in tables 1-4 of the patent in suit. The Board, after listening to the parties' submissions, decided that it did not need further clarification.
- (e) The Board decided to admit all late-filed documents submitted by both parties and the petitioner's auxiliary requests II and III.

IV. In its petition the petitioner alleges two fundamental procedural violations pursuant to Article 112a EPC:

- An alleged violation of the right to be heard (Article 113 EPC; Article 112a(2)(c) EPC). The Board, according to the petitioner, misconstrued its submissions and did not make clear to the petitioner how it had interpreted these, which was the key point for the decision. Consequently the Board based its

decision on reasoning related to grounds on which the petitioner had not had the opportunity to comment.

- An alleged breach of Article 24(1) EPC (Article 112a(2)(a) EPC). The chairman of the Board should not have taken part in the case, in view of the second ground of exclusion and objection provided by this article: "Members of the Boards of Appeal... may not take part in a case..., if they have previously been involved as representatives of one of the parties..."

V. The petitioner's arguments in the petition were:

(a) As to the alleged violation of the right to be heard, it appeared from the debate during the oral proceedings that two interpretations of the critical data of tables 1-4 of the patent in suit were possible.

The first interpretation relied on the phytotoxicity values of the mixture versus the phytotoxicity value of glyphosate alone. This interpretation was argued by the petitioner in defence of inventive step as presented during the oral proceedings before the Board.

The second interpretation took into consideration the antagonism or synergism as defined by the Colby method.

Under no circumstances should the Board have considered that the invention relied on a synergistic or antagonistic effect as defined by the Colby method. However, during the oral

proceedings, the Board focused on the "Colby Method" which was irrelevant for assessing the synergism or antagonism of herbicide mixtures. According to this method a herbicide combination is considered to be synergistic if the observed response is greater than expected and antagonistic if it is less.

The Board in its written decision surprisingly introduced a third interpretation which considered the relative contribution of each herbicide to the overall activity of the mixture. It understood the petitioner's argument (to wit: the higher value of the mixture shows that the glyphosate activity is not impaired) to mean that the phytotoxic effect attributable to the glyphosate in the mixture was not less than the phytotoxic activity of glyphosate alone (see page 6, last paragraph of the petition).

As the Board did not hear its technical expert the petitioner believed that the Board had rightly understood its submissions.

A further argument was that the Board had overlooked the issue of the phytotoxic value across the spectrum of the weed species, which was an integral part of the petitioner's argument. The petitioner did not expand on this issue nor take it up during the oral proceedings.

As to auxiliary requests II and III filed during the oral proceedings after the Board had refused the main request and the first auxiliary request,

the petitioner argued that it had to defend them on the assumption that the Board would reject any argument based on interpretation 1, although this interpretation was valid for these requests.

(b) As to the alleged breach of Article 24(1) EPC, this Article prohibits a member of a Board of Appeal from taking part in a case if he has been involved as representative of one of the parties in general and not in the specific case before the Board. The chairman of Board 3301 was employed from January 1986 to January 1991 as a patent specialist by Rhone Poulenc Agrochimie, which is the legal predecessor of Bayer CropSciences SA. Exhibits 1-4 filed with the petition provide evidence of his qualification as a European representative, and of his European patent filing activities as representative of Rhone Poulenc Agrochimie.

(c) The petitioner could not raise either of these objections during the appeal proceedings. It first became aware of the reasoning on which the Board based its decision on receipt of the written decision, and it discovered only after the decision was issued that the chairman had previously represented Rhone Poulenc Agrochimie.

VI. With the summons to oral proceedings the Enlarged Board sent a communication dated 25 October 2010 setting out its provisional views including, as regards the alleged denial of the right to be heard, that this would require consideration of the substantive merits of the

decision under review. The petitioner responded, in a faxed letter dated 2 December 2010, that it disagreed.

VII. Oral proceedings took place on 20 December 2010.

The petitioner's additional arguments in its letter of 2 December 2010 and during the oral proceedings, can be summarised as follows:

- (a) The petitioner insisted that the Board's third interpretation of the technical evidence - which the petitioner called "the contribution approach or argument" - was an argument raised by neither the patent proprietor nor the opponent but created by the Board of Appeal and only discovered by the petitioner when reading the written decision. The notion of "contribution" or "attribution" of an effect to the glyphosate was completely outside the petitioner's submissions and intentions. The petitioner agreed with the decision that it is impossible to measure the contribution of the glyphosate but this was not at all the issue at stake. Its only contention was the higher level of phytotoxicity of the mixture compared to the use of glyphosate alone. This effect was indeed acknowledged by the Board, which then took a second step in deciding that the contribution of glyphosate could not be established, without any mention of this new consideration and, moreover, without even addressing the petitioner's own argument.

The petitioner also explained that it was not contesting the Board's refusal to hear its expert but only using this as evidence that the Board

gave the impression that it had understood its argument.

In answer to the Enlarged Board's question whether its arguments were consistent with the case law regarding advance notice of reasons for a decision, the petitioner submitted that they were; in particular, a Board was required to give a party notice of decisive reasons.

- (b) The petitioner maintained its submission that Article 24(1) EPC was applicable to a former employee of a party in general and did not necessarily require that the member had acted in the present case. At least the discrepancy between the English wording of Article 24(1) EPC and the German and French versions called for a decision from the Enlarged Board.

VIII. The petitioner requested that:

- the decision T 699/07 be set aside and the proceedings be reopened before the Board of Appeal (112a(5) EPC);
- the member of the Board to whom objection under Article 24(1) EPC was made be replaced (Rule 108(3) EPC).

Reasons for the Decision

1. Admissibility of the petition
 - 1.1 The requirements under Article 112a(4) EPC (time limit; payment of fee) and the other formal requirements under Rule 107 EPC are met.
 - 1.2 It is indisputable that the first alleged deficiency, namely the misinterpretation of the appellant's submissions, could be discovered only when reading the written decision, and accordingly could not have been objected to during the appeal proceedings. As to the second deficiency, it must on the petitioner's own case be a moot point whether it knew, either directly or as a result of knowledge imputable to it as legal successor to Rhone Poulenc Agrochimie, that the chairman of the Board had been its or its predecessor's representative many years ago. However given the conclusion about allowability below, further investigation of this issue is not justified.
2. Allowability of the petition
 - 2.1 The petitioner submits that the Board based its decision on a misconstruction of the experimental data and relied on an interpretation of which the petitioner was not aware; consequently it could not clarify the misunderstanding and the decision was made on an analysis on which it had no opportunity to comment.

According to the petitioner it is not a matter of assessment of the merits but a question of whether the patentee had been heard on the grounds on which the

decision was based, and more precisely, on the argument made out of the "contribution" of glyphosate to the phytotoxicity of the herbicide mixture and how this contribution could be measured. This question, namely whether the phytotoxicity value could be used as an indication of the contribution of glyphosate to phytotoxicity of the herbicide mixture, had never been raised by the parties nor did the Board ask the parties to comment on it. By comparison, the petitioner's own argument was simpler, namely that the mixture of the glyphosate and the HPPD inhibitor provides an overall level of phytotoxicity which is greater than that of glyphosate alone. This argument relies on the fact that the comparison of the overall phytotoxicity value of the mixture with the value of the glyphosate alone shows that the phytotoxicity obtained when the glyphosate is used alone is not impaired when the HPPD inhibitor is added to the glyphosate.

2.2 However it is immediately apparent to the Enlarged Board when reading the decision under review that it was not a matter of misunderstanding, let alone of the right to be heard, but rather of a divergence of view between the Board of Appeal and the petitioner: the Board of Appeal did not agree with the petitioner's analysis.

2.2.1 In the "Summary of Facts and Submissions", it is specified on page 5 that the discussion focused on the issue whether or not unexpected effects were present as alleged by the petitioner. Then the Board stated, on page 7 in the summary of the petitioner's arguments, that the appellant had submitted that the absence of

impairment should not be confused with the antagonism established according to the Colby method.

2.2.2 In the "Reasons for the decision" (points 5.4 and 5.5), regarding the "antagonism" or "impairment", the Board set out the interpretation or the scope given to this notion by the petitioner but then departed from this view and explained why: after considering tables 1 and 3 of the patent in suit, the Board concluded that the fact that the values of the mixture "glyphosate + isoxazole" were always higher, with the exception of a single example, than the values of the glyphosate used alone was not evidence that the glyphosate was not impaired. The Enlarged Board considers this was an answer to the petitioner's argument: in the Board of Appeal's view this comparison, which corresponds to the first interpretation defined by the petitioner, is not *per se* relevant because the second herbicide has its own herbicidal activity and the antagonism/impairment in a mixture cannot be established on the basis of only one component. What, according to the Board of Appeal, is relevant is the comparison of these values with the ones a skilled person would have expected.

2.2.3 During the oral proceedings before the Enlarged Board the petitioner repeated that this was a breach of its right to be heard. However it appears from the grounds of the decision that the petitioner's arguments were actually discussed and then the Board in its own words explained why these arguments were not sufficiently convincing to establish inventiveness. The decision (points 5.4 and 5.5) acknowledges explicitly the higher phytotoxicity values of the mixture compared to those of glyphosate alone (the petitioner's argument) and

states clearly (point 5.5) that it cannot draw the same conclusion as the petitioner. In other words, the higher value in itself was not evidence of inventiveness, and further reasoning was needed to conclude whether or not there was an inventive step.

2.2.4 What the petitioner in fact criticizes in the decision are the steps of reasoning used by the Board to conclude that no inventive step can be derived from the mere fact that there were higher values. According to the Enlarged Board's established case law, a Board of Appeal is not required by the EPC to provide a party in advance with all foreseeable arguments in favour of or against it (see for example R 1/08 of 15 July 2008, Reasons point 3.1 and R 13/09 of 22 October 2009, Reasons, point 2.6.3). And this principle also applies, contrary to the petitioner's contention at the oral proceedings before the Enlarged Board, to the decisive reasons (see R 18/09 of 27 September 2010, Reasons, point 15).

2.2.5 *In fine*, it appears that the petition amounts to a request to the Enlarged Board to declare the Board of Appeal's reasoning insufficient or wrong. This is not possible because again, as the Enlarged Board's case law shows, (see for example R 1/08 *op.cit.*, Reasons point 2.1; R 3/09 of 3 April 2009, Reasons point 9; and R 8/09 of 23 September 2009, Reasons, point 2.7) petitions for review are not a means of reviewing the correct application of the substantive law. Accordingly the petition based on the alleged violation of the right to be heard is clearly unallowable.

2.3 As to the second ground of the petition, according to Article 112a(2)(c) EPC, the partiality of a member of a Board of Appeal may be a ground for a petition for review insofar as a member took part in the decision in breach of Article 24(1) EPC, or despite being excluded pursuant to a decision under Article 24(4) EPC.

2.3.1 The petitioner submits that the wording of Article 24(1) EPC:

"Members of the Boards of Appeal or the Enlarged Board may not take part in a case in which they have any personal interest, or if they have previously been involved as representatives of one of the parties, or if they participated in the decision under appeal."

includes not only the specific situation where one of the members has represented a party in the case in question but also the general situation where a member has previously acted as representative of that party in any matter.

2.3.2 However the petitioner's interpretation of this article does not match that of a normal reader reading it in its proper context. There was only a slight amendment of the English text in EPC 2000 by which the words "may not take part in any appeal if they have any personal interest therein" were replaced by "may not take part in a case in which they have any personal interest". This amendment shows that the previous English wording was not completely satisfactory compared to that of the other two languages, which were not amended. While the amended English text remains less clear than that of the other two versions, when paragraph 1 is read as a

whole, it becomes unambiguously clear that it deals with three separate cases each governed by the words "in a case in which". Moreover the reference to "previously been involved" is such that the "involvement" is immediately understood by the reader as referring to the "case in which" and no other case.

- 2.3.3 Further, this paragraph cannot be given a different meaning in English to that in the two other languages. It is clearly stated in the German and French versions ("**in der** sie vorher als Vertreter eines Beteiligten tätig gewesen sind"; "s'ils **y** sont personnellement intervenus en qualité de représentant de l'une des parties"- [emphasis added by the Enlarged Board]) that the cause of exclusion relates to the involvement in the particular case in question and not to any past representation.
- 2.3.4 Accordingly, the meaning of the English text of Article 24(1) EPC taken as a whole, in its proper context and with respect to the text of the other two languages, is clear. No further investigation as to the intention of the legislators is necessary. However, the Enlarged Board notes that Article 24(1) EPC quickly met with the approbation of all the contracting states in the wording of EPC 1973, the *travaux préparatoires* showing that the authors were concerned with a similar rule as the then existing Article 16 (now Article 18) of the protocol of the statutes of the Community Court of Justice (document IV/8221/61-F).
- 2.3.5 As the petitioner made clear during the oral proceedings that it did not intend to base its petition on the second ground provided by Article 24(1) EPC, it

results from the above paragraphs that the composition of the Board complied with Article 24(1) EPC.

3. The upshot is that the petition based on the alleged breach of Article 24(1) EPC is also clearly unallowable.

Order

For these reasons the Enlarged Board in its composition according to Rule 109(2)(a) EPC unanimously decides that:

The petition for review is rejected as clearly unallowable.

The Registrar:

The Chairman:

P. Martorana

C. Rennie-Smith