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Datasheet for the decision of 7 April 2022

Case Number: T 2261/15 - 3.3.08

Application Number: 05016726.1

Publication Number: 1650306

IPC: C12N15/63, C12N15/82

Language of the proceedings: EN

Title of invention:
Means and methods for modifying gene expression using unpolyadenylated RNA

Patent Proprietor:
Commonwealth Scientific and Industrial Research Organisation

Opponents:
BASF SE (opposition and appeal withdrawn)
STRAWMAN LIMITED

Headword:
Modifying gene expression unpolyadenylated RNA/COMMONWEALTH SCIENTIFIC INDUSTRIAL RESEARCH ORGANISATION

Relevant legal provisions:
EPC Art. 76(1), 123(2)
RPBA 2020 Art. 13(1), 15(3)
RPBA Art. 12(4)

Keyword:
Main request - admission (no);
Auxiliary request - admission (yes);
Auxiliary request - added subject-matter (yes);

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 2261/15 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 7 April 2022

Not a party to these proceedings : (Opponent 1), opposition and appeal withdrawn	BASF SE 67058 Ludwigshafen (DE)
Representative:	Altmann Stößel Dick Patentanwälte PartG mbB Theodor-Heuss-Anlage 2 68165 Mannheim (DE)
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Representative:	Wainwright, J.H. and Harding, T.D. Potter Clarkson The Belgrave Centre Talbot Street Nottingham NG1 5GG (GB)
Respondent: (Patent Proprietor)	Commonwealth Scientific and Industrial Research Organisation Black Mountain Science and Innovation Park Clunies Ross Street Acton ACT 2601 (AU)
Representative:	Ernest Gutmann - Yves Plasseraud S.A.S. c/o Plasseraud IP 66, rue de la Chaussée d'Antin 75440 Paris Cedex 09 (FR)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on**

30 October 2015 concerning maintenance of the European Patent No. 1650306 in amended form.

Composition of the Board:

Chair	M. Montrone
Members:	P. Julià
	R. Winkelhofer

Summary of Facts and Submissions

I. European patent no. 1 650 306 is based on the European patent application no. 05 016 726.1 (hereinafter "the patent application"), a divisional application of the earlier European patent application no. 00 953 352.2 (EP 1 208 211), published under the PCT as International patent application WO 01/12824 (hereinafter "the earlier patent application"; for passages common to both, the patent application and the earlier patent application, reference will be made hereinafter to "the (earlier) patent application"). The patent was granted with 52 claims.

II. Two oppositions were filed on the grounds as set forth in Articles 100(a), 100(b) and 100(c) EPC. The opposition division considered the main request to contravene Articles 76(1) and 123(2) EPC and auxiliary request I to fulfil the requirements of the EPC. The patent was thus maintained in amended form on the basis of auxiliary request I.

III. Appeals were lodged by both opponents and, in the statements setting out their grounds of appeal, they maintained the objections raised under Articles 76(1), 123(2), 84, 83, 54 and 56 EPC against auxiliary request I upheld by the opposition. In reply thereto, the patent proprietor ("respondent") filed new documentary evidence, auxiliary requests II and III, and, as a main request, maintained auxiliary request I upheld by the opposition division (i.e. to dismiss the appeals). As an auxiliary measure, oral proceedings were requested by all parties.

IV. Opponent 01 withdrew their opposition and appeal and is thus no longer a party to these proceedings. Opponent 02 is the sole remaining appellant.

V. The parties were summoned to oral proceedings. In a communication issued in preparation of these oral proceedings, the parties were informed of the board's provisional opinion on the issues of the case.

VI. Both parties replied in substance to the board's communication. With submissions dated 2 March 2020, the respondent withdrew the former main request, filed a new auxiliary request II to replace former auxiliary request II, and made this new auxiliary request II their main request; auxiliary request III being thus the respondent's sole auxiliary request.

VII. After several postponements due to, *inter alia*, the COVID-19 pandemic, oral proceedings were rescheduled for 7 April 2022. With submissions dated 22 March 2022, the respondent withdrew their request for oral proceedings.

VIII. In a communication issued on 28 March 2022, the parties were informed that the oral proceedings were to take place as scheduled on 7 April 2022.

IX. Oral proceedings were held on 7 April 2022 in the absence of the respondent.

X. Claims 1 and 16 of the main request ("new auxiliary request II") read as follows:

"1. A method for reducing the phenotypic expression of a nucleic acid of interest, which is normally capable of being expressed in a eukaryotic cell, said method

comprising the step of providing to the nucleus of said eukaryotic cell an unpolyadenylated RNA molecule comprising

- one target-specific sense nucleotide sequence essentially similar to part of an RNA molecule transcribed or produced from the nucleic acid of interest, wherein said target-specific sense nucleotide sequence includes a sequence of about 20 consecutive nucleotides with 100% sequence identity to the corresponding part of the target nucleic acid, and

- one target-specific antisense nucleotide sequence essentially similar to the complement of part of an RNA molecule transcribed or produced from said nucleic acid of interest,

wherein said target-specific sense and antisense nucleotide sequences are essentially complementary to each other and are capable of forming a hairpin structure with each other,

wherein said unpolyadenylated RNA is produced by transcription of a chimeric gene comprised within said eukaryotic cell, said chimeric gene comprising a promoter functional in said eukaryotic cell operably linked to a target specific DNA region encoding said RNA, and

wherein said method is not a method of treatment of the human or animal body by surgery or therapy, or a diagnostic method practised on the human or animal body."

"16. A chimeric gene encoding an unpolyadenylated RNA molecule, said unpolyadenylated RNA molecule comprising

one target specific sense nucleotide sequence essentially similar to part of an RNA molecule produced from a nucleic acid of interest, said target specific sense nucleotide sequence being essentially similar to part of an RNA molecule produced from a nucleic acid of interest and including a sequence of about 20 consecutive nucleotides with 100% sequence identity to the sequence of a corresponding part of said nucleic acid of interest,

and one target-specific antisense nucleotide sequence essentially similar to the complement of part of an RNA molecule transcribed or produced from said nucleic acid of interest,

wherein said target-specific sense and antisense nucleotide sequences are essentially complementary to each other and are capable of forming a hairpin structure with each other,

wherein said nucleic acid of interest is normally present in a eukaryotic cell and wherein said unpolyadenylated RNA produced by transcription of the chimeric gene reduces expression of said nucleic acid of interest when provided to the nucleus of said cell,

said chimeric gene comprising a promoter functional in said eukaryotic cell operably linked to a target specific DNA region encoding said RNA."

Claims 2 to 15 are directed to particular embodiments of claim 1; claims 2 to 7 and claims 10 to 15 read as granted claims 8 to 13 and granted claims 20 to 25, respectively; claims 8 and 9 read as granted claims 17 and 18, respectively, the latter with the additional feature "provided said eukaryotic cell comprises the

corresponding RNA polymerase in active form". The dependencies of these dependent claims being correctly adapted.

Claims 17 to 24 are directed to particular embodiments of claim 16 and read as granted claims 33 to 40. Claims 25 to 31 and claim 32 read as granted claims 42 to 48 and granted claim 52, respectively. The dependencies of these claims being also correctly adapted.

XI. Claims 1 and 16 of the auxiliary request ("auxiliary request III") read as follows:

"1. A method for reducing the phenotypic expression of a nucleic acid of interest, which is normally capable of being expressed in a eukaryotic cell, said method comprising the step of providing to the nucleus of said eukaryotic cell an unpolyadenylated RNA molecule comprising

- one target-specific sense nucleotide sequence of 20 consecutive nucleotides with 100% sequence identity to part of an RNA molecule transcribed or produced from the nucleic acid of interest, and

- one target-specific antisense nucleotide sequence,

wherein said target-specific sense and antisense nucleotide sequences are complementary to each other and are capable of forming a hairpin structure with each other,

wherein said unpolyadenylated RNA is provided to the nucleus by transcription of a chimeric gene comprised within said eukaryotic cell, said chimeric gene

comprising a promoter functional in said eukaryotic cell operably linked to a target specific DNA region encoding said RNA, and

wherein said method is not a method of treatment of the human or animal body by surgery or therapy, or a diagnostic method practised on the human or animal body."

"16. A chimeric gene encoding an unpolyadenylated RNA molecule, said unpolyadenylated RNA molecule comprising one target specific sense nucleotide sequence of 20 consecutive nucleotides with 100% sequence identity to part of an RNA molecule produced from a nucleic acid of interest,

and one target-specific antisense nucleotide sequence

wherein said target-specific sense and antisense nucleotide sequences are complementary to each other and are capable of forming a hairpin structure with each other,

wherein said nucleic acid of interest is normally present in a eukaryotic cell and wherein said unpolyadenylated RNA produced by transcription of the chimeric gene reduces expression of said nucleic acid of interest when provided to the nucleus of said cell,

said chimeric gene comprising a promoter functional in said eukaryotic cell operably linked to a target specific DNA region encoding said RNA."

Claims 2 to 15 and claims 17 to 32 read as the corresponding claims 2 to 15 and claims 17 to 32 of the main request.

XII. The arguments of the appellant, insofar as relevant to the present decision, may be summarised as follows:

Consideration/admission of the main request and of the auxiliary request into the appeal proceedings

The main request was filed three months after the issuance of the board's communication and one month before the originally scheduled date of the oral proceedings. It was thus a late-filed request which did not even address, let alone overcome, all the objections raised against the former main request; the late-filed main request addressed only one of the objections raised under Articles 76(1) and 123(2) EPC but none of the others raised under these articles. No exceptional circumstances had been put forward, and none was present, to justify the filing of this claim request at this late stage of the proceedings.

Although the auxiliary request was filed in reply to the appeal, the respondent failed to indicate in this reply a basis for this auxiliary request in the (earlier) patent application. Thus, as regards this auxiliary request, the respondent failed to provide a complete case as required by Article 12 RPBA. Moreover, this auxiliary request neither addressed nor overcame, *prima facie*, all the objections raised against the former main request. The amendments introduced into independent claims 1 and 16 were the same as those introduced into the corresponding claims of an auxiliary request II filed shortly before the oral proceedings at first instance and renumbered auxiliary request III during these oral proceedings. Neither the admission of this auxiliary request into the proceedings at first instance nor any of these

amendments were considered by the department of first instance and there was thus neither a reference thereto in the decision under appeal nor a decision was taken thereupon at first instance.

Auxiliary request ("auxiliary request III")
Articles 76(1) and 123(2) EPC

The sole disclosure of a sequence of 20 consecutive nucleotides was at page 17, line 21 of the (earlier) patent application. However, this disclosure related to a fragment or a subsequence of the total target-specific sense nucleotide sequence which was itself defined at page 17, lines 14 to 19 by a specific length and percentage of sequence identity to the corresponding part of the target nucleic acid. The disclosures on pages 16 and 18 of the (earlier) patent application related to the total target-specific sense nucleotide sequence and required this sequence to be "essentially similar" to the target nucleic acid (page 16) and further defined the meaning of the term "essentially similar" (page 18). However, these requirements relating to the total target-specific sense nucleotide sequence were omitted from claim 1 of the auxiliary request and thus, the scope of the claim was broader than the disclosure of the (earlier) patent application and comprised embodiments that were not envisaged in the (earlier) patent application.

Moreover, the disclosure in the paragraph bridging pages 18 and 19 of the (earlier) patent application defined the target-specific sense and antisense nucleotide sequences to be essentially complementary to each other and capable of forming an artificial hairpin structure. The omission of the terms "essentially" and "artificial" in claim 1 of the auxiliary request

contravened Articles 76(1) and 123(2) EPC. The latter term imposed an intended limitation on the hairpin that was no more present in claim 1.

XIII. The arguments of the respondent in writing, insofar as relevant to the present decision, may be summarised as follows:

Consideration/admission of the main request and of the auxiliary request into the appeal proceedings

The main request was derived from the auxiliary request upheld by the opposition division and from the former auxiliary request II by cancellation of several dependent claims that had been objected under Articles 76(1) and 123(2) EPC in the board's communication. The main request was thus a direct response to these objections; it neither changed the respondent's case nor diverged from the subject-matter of the former requests on file, in particular of auxiliary request I upheld by the opposition division. The main request simplified the subject-matter and the number of objections at issue, reducing solely the number of claims.

The auxiliary request was derived from auxiliary request I upheld by the opposition division by cancellation of several dependent claims and by amendment of features in the independent claims to address, *inter alia*, the objections raised by the appellant in their statement setting out the grounds of appeal. The auxiliary request did not change the respondent's case and was convergent with the subject-matter of the former requests on file; it simplified the subject-matter and reduced the number of claims.

In total, only a small number of claim sets had been filed in these proceedings and their order had never been changed. This approach respected the principle of convergence and contributed to procedural efficiency.

Auxiliary request ("auxiliary request III")
Articles 76(1) and 123(2) EPC

The disclosure of the paragraph bridging pages 18 and 19 of the (earlier) patent application provided a basis for the unpolyadenylated RNA comprising target-specific sense and antisense nucleotide sequences capable of forming a hairpin structure. The disclosure at page 17, lines 19 to 21 of the (earlier) patent application provided the basis for the length of the target-specific sense nucleotide sequence (20 consecutive nucleotides) and its degree of identity (100%) with the target nucleic acid of interest. Page 16, lines 10 to 12 of the (earlier) patent application disclosed that the target nucleic acid of interest, to which the target-specific sense nucleotide sequence was "essentially similar", was part of an RNA molecule transcribed or produced from the nucleic acid of interest. In addition, page 18, lines 6 to 10 disclosed that "essentially similar" meant a sequence identity between two sequences of at least about 75% to 100%. Since this part of the teaching explicitly mentioned 100% identity, it was clearly intended to be combined with the disclosure of the target-specific sense nucleotide sequence having 100% identity to the target nucleic acid of interest as present at page 17, lines 19 to 21 of the (earlier) patent application. These combined passages provided the basis for the target-specific sense nucleotide sequence of 20 consecutive nucleotides with 100% sequence identity to part of an RNA molecule transcribed or produced from

the nucleic acid of interest. Claims 33 to 35 of the earlier patent application and page 9, lines 18 to 19 and 22 of the (earlier) patent application provided a basis for the provision of the unpolyadenylated RNA molecule to the nucleus by transcription of the chimeric gene.

XIV. The appellant requests that the decision under appeal be set aside and the patent be revoked.

XV. The respondent requests that the decision under appeal be set aside and the patent be maintained on the basis of the main request (new auxiliary request II filed with submission dated 2 March 2020) or, in the alternative, on the basis of the auxiliary request (auxiliary request III filed with submission dated 25 July 2016).

Reasons for the Decision

Consideration/admission of the respondent's claim requests into the appeal proceedings

Main request ("new auxiliary request II")

1. With submissions dated 25 July 2016 and in reply to the appeal, the respondent maintained, as a main request, auxiliary request I upheld by the opposition division, and filed auxiliary requests II and III.

1.1 Claim 1 of auxiliary request I upheld by the opposition division was directed to a method for reducing phenotypic expression of a nucleic acid of interest comprising the step of providing to the nucleus of an eukaryotic cell an unpolyadenylated RNA molecule comprising one target-specific sense nucleotide

sequence and one target-specific antisense nucleic acid sequence. Claim 21 of auxiliary request I upheld by the opposition division was directed to a chimeric gene encoding an unpolyadenylated RNA molecule as defined in claim 1.

1.2 Claims 1 and 17 of auxiliary request II were identical to claims 1 and 21 of auxiliary request I upheld by the opposition division. Auxiliary request II differed from auxiliary request I by, *inter alia*, the deletion of several dependent claims that defined the degree of sequence identity of the total target-specific sense and antisense nucleotide sequences to the target nucleic acid and to the complement of said target nucleic acid, respectively.

2. With submission dated 2 March 2020 and in response to the board's communication, the respondent withdrew the main request, replaced auxiliary request II by a new auxiliary request II which was the respondent's main request. The filing of this main request represents an amendment of the respondent's appeal case and thus, according to Article 13(1) RPBA 2020, it may be admitted only at the discretion of the board.

2.1 This main request differs from the former auxiliary request II by the deletion of dependent claims 2 and 18. These dependent claims defined the target-specific antisense nucleotide sequence as including a sequence of about 20 consecutive nucleotides with 100% sequence identity to the corresponding part of the target nucleic acid. This subject-matter was identical to that of granted claims 3 and 28, respectively.

2.2 This subject-matter as well as that of the other granted dependent claims defining the properties of

both, the target-specific sense and the target-specific antisense nucleotide sequences, were already objected under Articles 76(1) and 123(2) EPC at the outset of the opposition proceedings (see, *inter alia*, paragraph bridging pages 12 and 13 of the notice of opposition of opponent 01). These objections were addressed by the opposition division in the summons to oral proceedings (see page 3, point 6.3 of the summons to the oral 23 October 2014). In response thereto and in preparation of the oral proceedings at first instance, the patent proprietor/respondent filed auxiliary requests I and II which, at the oral proceedings, were renumbered as auxiliary requests II and III, respectively. The new auxiliary auxiliary I on which the patent was upheld, was filed at these oral proceedings.

2.3 All auxiliary requests filed at first instance addressed, *inter alia*, the objections raised against the dependent claims defining the properties of the target-specific sense and target-specific antisense nucleotide sequences by deleting some or all of these dependent claims. Auxiliary request II filed before the oral proceedings at first instance and renumbered as auxiliary request III at these proceedings, did not comprise any dependent claim defining the target-specific antisense nucleotide sequence, in particular, there was no claim defining said antisense nucleotide sequence as including a sequence of about 20 consecutive nucleotides with 100% sequence identity to the corresponding part of the target nucleic acid. This auxiliary request III with deletions of further dependent claims, was auxiliary request III filed by the respondent in reply to the appeal.

3. In light of this course of events in these proceedings, the respondent had an opportunity to file a claim request with the amendments introduced into the main request at an earlier stage of the proceedings. The admission of the main request at this stage of the appeal proceedings would give the respondent yet another opportunity to re-open the proceedings which is not in line with the purpose of an appeal proceedings (cf. "Case Law of the Boards of Appeal of the EPO", 9th edition 2019, V.A.1, 1133).

4. Thus, the main request ("new auxiliary request II") could not be admitted into the appeal proceedings.

Auxiliary request ("auxiliary request III")

5. The auxiliary request was filed by the respondent as auxiliary request III with submission dated 25 July 2016 and in reply to the appeal. Article 25(2) RPBA 2020, in conjunction with Article 12(4) RPBA 2007, states that it is within the board's discretion to hold inadmissible, *inter alia*, requests which could have been presented in the first instance proceedings.

6. The auxiliary request was filed at the earliest stage of the appeal proceedings and already forms part of the appeal proceedings. The auxiliary request is based on auxiliary request II filed before the oral proceedings at first instance and renumbered as auxiliary request III during the oral proceedings at first instance. It differs from auxiliary request III and auxiliary request I as upheld by the opposition division by, *inter alia*, the deletion of several dependent claims. Since the opposition division considered that auxiliary request I fulfilled the requirements of the EPC, there was no need to consider

the admission of auxiliary request III into the proceedings, and there is thus no reference thereto in the decision under appeal.

7. Thus, the auxiliary request ("auxiliary request III") was to be admitted into these proceedings.

Auxiliary request ("auxiliary request III")

8. In the communication issued on 11 December 2019, the board drew the parties' attention to the fact that no basis had been given in the (earlier) patent application for the subject-matter of any of the auxiliary requests filed in the appeal proceedings (cf. point 23 of the board's communication). With submissions dated 2 March 2020 and in response thereto, the respondent provided such a basis.

Articles 76(1) and 123(2) EPC

9. Except for the disclosure from page 38, line 21 to page 44, line 29 of the patent application - which is not present in the earlier patent application, the descriptions of both, the patent application and the earlier patent application, are identical. The parties' references to the patent application and to the earlier patent application cited under Articles 76(1) and 123(2) EPC are identical for both patent applications and thus, reference is made hereinafter to both the patent application and the earlier patent application as "the (earlier) patent application".

10. Claim 1 of the auxiliary request defines the "target-specific sense nucleotide sequence" as being "of 20 consecutive nucleotides with 100% sequence identity to part of an RNA molecule transcribed or produced from

the nucleic acid of interest". Although there is no definition of the "target-specific antisense nucleotide sequence" in claim 1, the target-specific sense and antisense nucleotide sequences are required to be complementary to each other, and capable of forming a hairpin structure with each other.

11. The sole disclosure of a nucleotide sequence of "20 consecutive nucleotides with 100% sequence identity to the corresponding part of the target nucleic acid" is found in the second paragraph of page 17, lines 19 to 23 of the (earlier) patent application. This paragraph is concerned with the preferred percentage of sequence identity of the total length of the target-specific sense nucleotide sequence, wherein the sentence disclosing the feature "20 consecutive nucleotides" reads: "however, it is preferred that the sense nucleotide sequence always **includes** a sequence of about 10 consecutive nucleotides, particularly about 20 nt, more particularly about 50 nt, especially ... with 100% sequence identity to the corresponding part of the target nucleic acid" (emphasis added by the board). Indeed, the preferred total length of the target-specific sense nucleotide sequence is disclosed in the first paragraph of page 17 which reads: "preferably the **total length** of the sense nucleotide sequence is at least 10 nt, preferably 15 nt, particularly at least about 50 nt, more particularly at least about 100 nt, especially ..." (cf. page 17, lines 1 to 4) (emphasis added by the board).

12. There is thus no reference in the first paragraph of page 17 to a target-specific sense nucleotide sequence with a total length of 20 nucleotides. The sole reference to (about) "20 consecutive nucleotides" is found in the second paragraph of page 17, but this

reference - by using the term "includes" - relates to a fragment of, or a subsequence of, a larger (total length) target-specific sense nucleotide sequence, not to the total length of the target-specific sense nucleotide sequence. Therefore, the disclosure at page 17 of the (earlier) patent application does not provide a clear and unambiguous basis for a target-specific sense nucleotide sequence as defined in claim 1 of the auxiliary request.

13. As regards the disclosures at pages 16 and 18 of the (earlier) patent application, they relate to a generic disclosure of the target-specific sense nucleotide sequence ("a target-specific sense nucleotide sequence may be essentially similar to part of an RNA molecule transcribed or produced from the nucleic acid or gene of interest"; cf. page 16, lines 10 to 12) and to the interpretation of this generic disclosure ("sequences are indicated as "essentially similar" when such sequence have a sequence identity of at least about 75%, particularly at least about 80%, more particularly at least about ... quite especially are identical"; cf. page 18, lines 6 to 10). This interpretation equates the broad term "essentially similar" to the specific (preferred) degrees of sequence identity of the total length of the target-specific sense nucleotide sequence as defined on page 17, lines 14 to 19. However, whilst the definition at page 18 informs a skilled person how to read the generic disclosure of page 16, it neither adds anything to the specific disclosure of page 17 nor informs the skilled person how to read said specific disclosure.

14. The disclosure at page 17 relates to the degree of sequence identity of the total length of the target-specific sense nucleotide sequence, wherein this total

sense nucleotide sequence **includes** a sequence of about 20 consecutive nucleotides with 100% sequence identity. As stated above, the target-specific sense nucleotide sequence of claim 1 of the auxiliary request is defined as a "sequence of 20 consecutive nucleotides with 100% sequence identity", i.e. as the total (length of the) target-specific sense nucleotide sequence and not as a fragment or a subsequence thereof. There is neither a reference in claim 1 of the auxiliary request to a target-specific sense nucleotide sequence other than the defined "sequence of 20 consecutive nucleotides" nor a reference to a degree of sequence identity other than the "100% sequence identity". The broad term "essentially similar" is not present in claim 1 of the auxiliary request. Therefore, the disclosures at pages 16 and 18 of the (earlier) patent application are not anymore relevant and cannot provide a basis for the claimed subject-matter.

15. The paragraph bridging pages 18 and 19 of the (earlier) patent application has been given as a basis for the feature in claim 1 of the auxiliary request that requires the target-specific sense and antisense nucleotides sequences to be complementary to each other and to be capable of forming a hairpin structure with each other. The disclosure in this paragraph reads: "the unpolyadenylated RNA molecule may comprise sense and antisense target-specific nucleotide sequences wherein the sense and antisense nucleotide sequences are **essentially** complementary to each other and capable of forming an artificial hairpin structure" (emphasis added by the board).

16. There is no basis in the (earlier) patent application for the deletion of the term "essentially" when defining the complementarity of the target-specific

sense and antisense nucleotide sequences to each other. The term "essentially" is not technically meaningless and, hence, not superfluous. On the contrary, this term is technically meaningful and defines relevant structural properties of the target-specific sense and antisense nucleotide sequences. Indeed, the question arises as to whether fully complementary sense and antisense nucleotide sequences may indeed be capable of forming a hairpin structure as required by claim 1 of the auxiliary request.

17. In view of the fact that there is no basis in the (earlier) patent application for the deletion of the term "essentially" in claim 1 of the auxiliary request, it can be left open whether the reference in claim 1 of the auxiliary request to a hairpin structure in general, without being limited to an "artificial" hairpin structure as in the disclosure of the paragraph bridging pages 18 and 19 of the (earlier) patent application, may also contravene Articles 76(1) and 123(2) EPC.

18. Thus, it follows from all these considerations above that the auxiliary request contravenes Articles 76(1) and 123(2) EPC.

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:

L. Malécot-Grob M. Montrone

Decision electronically authenticated