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**Datasheet for the decision  
of 8 September 2021**

**Case Number:** T 2216/17 - 3.3.04

**Application Number:** 12712662.1

**Publication Number:** 2834361

**IPC:** C12N15/82, C12N15/52, C12N9/88,  
A01H5/00, A01H5/10, C12Q1/68

**Language of the proceedings:** EN

**Title of invention:**

Sorghum plants having a mutant polynucleotide encoding the large subunit of mutated acetohydroxyacid synthase protein and increased resistance to herbicides

**Applicant:**

Advanta Holdings BV

**Headword:**

Sorghum herbicide-resistant AHAS/ADVANTA

**Relevant legal provisions:**

RPBA 2020 Art. 13(2)

**Keyword:**

Late-filed request - justification for late filing (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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

Case Number: T 2216/17 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 8 September 2021**

**Appellant:** Advanta Holdings BV  
(Applicant) Claudius Prinsenlaan 144 A, Blok A  
4818 CP Breda (NL)

**Representative:** van Someren, Petronella F. H. M.  
Arnold & Siedsma  
Bezuidenhoutseweg 57  
2594 AC The Hague (NL)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 6 April 2017  
refusing European patent application No.  
12712662.1 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** B. Claes  
**Members:** D. Luis Alves  
L. Bühler

## **Summary of Facts and Submissions**

- I. The applicant ("appellant") filed an appeal against the examining division's decision to refuse European patent application No. 12 712 662.1 entitled "*Sorghum plants having a mutant polynucleotide encoding the large subunit of mutated acetohydroxyacid synthase protein and increased resistance to herbicides*".
- II. The decision under appeal dealt with a main request and an auxiliary request. The examining division held that the subject-matter of the claims of each request did not involve an inventive step (Article 56 EPC).
- III. With the statement setting out the grounds of appeal, the appellant filed sets of claims as auxiliary requests I to III, IVa and IVb, and also filed one document. They requested that the decision under appeal be set aside and that a patent be granted on the basis of the set of claims of the main request considered by the examining division, or alternatively on the basis of one of the auxiliary requests filed with the statement setting out the grounds of appeal. Oral proceedings were requested as an auxiliary measure.
- IV. The board appointed oral proceedings and, in a communication pursuant to Article 15(1) RPBA 2020, informed the appellant of its preliminary opinion on some of the issues in the appeal.
- V. In reply to the board's communication the appellant filed a set of claims as auxiliary request V. With a subsequent letter the appellant filed five documents.

VI. At the oral proceedings the appellant submitted, for the first time, a line of argument in the context of inventive step of the subject-matter of claim 1 of the main request based on a technical effect relating to plant growth, expressed as a percentage of dry matter, at higher versus lower application rates of herbicide.

At a later stage the appellant withdrew the sets of claims of this main request and the auxiliary requests (see sections III and V) and filed a set of claims as a new main request. Subsequently, the appellant withdrew this request and filed two claims as yet another new main request. These claims read as follows:

"1. A sorghum plant comprising in its genome at least one polynucleotide, wherein said polynucleotide encodes a polypeptide having an alanine to threonine substitution at position 93 of the large subunit of sorghum AHAS protein, said plant having increased resistance to one or more herbicides as compared to wild-type sorghum plants, in particular to a herbicide selected from the group consisting of imazethapyr, imazapir, and imazapic, wherein the at least one polynucleotide comprises SEQ ID No. 1 encoding the polypeptide comprising SEQ ID No. 2, and wherein the sorghum plant is selected from the group consisting of a progeny of an NCIMB 41870 plant, an NCIMB 41870 mutant plant and a progeny of the NCIMB 41870 mutant, and wherein the plant has a percentage of more than 100% of dry matter in aerial tissues ten days after spraying the herbicide as compared to an untreated control.

2. A sorghum seed of the plant of claim 1, comprising in its genome at least one polynucleotide, wherein said polynucleotide encodes a polypeptide having an alanine

to threonine substitution at position 93 of the large subunit of sorghum AHAS protein, wherein said seed generates a plant having increased resistance to one or more herbicides from the group of imidazolinones as compared to wild-type sorghum plants, and wherein said seed comprises in particular a mutation in the AHAS gene as shown in the deposited seed NCIMB 41870."

- VII. At the end of the oral proceedings the chair announced the board's decision.
- VIII. The appellant's arguments, insofar as they are relevant to this decision, may be summarised as follows:

*Admittance of the (sole) main request into the appeal proceedings*

The main request filed at the oral proceedings should be admitted into the appeal proceedings. It constituted an attempt to address the board's concerns on the issue of inventive step, in particular those relating to the appellant's line of argument presented for the first time at the oral proceedings.

- IX. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the set of claims of the main request filed at the oral proceedings.

### **Reasons for the Decision**

1. The appeal complies with the requirements of Articles 106 to 108 EPC and the further provisions referred to in Rule 101(1) EPC and is admissible.

*Main request*

*Admittance into the appeal proceedings*

2. This request was the second request filed at the oral proceedings before the board that was meant to address the board's concerns on the issue of inventive step of the subject-matter of the main request considered in the decision under appeal by the examining division, in particular those concerns relating to the appellant's line of argument presented for the first time at the oral proceedings.
3. According to Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings is, in principle, not taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
4. The appellant did not argue that exceptional circumstances were applicable in the present case, although this requirement as set out in Article 13(2) RPBA 2020 was discussed at the oral proceedings.
5. Instead the appellant argued that the request was filed to address the board's concerns expressed at the oral proceedings on the issue of inventive step, specifically in the context of claim 1 of the main request considered in the decision under appeal and the appellant's new line of argument, which relied on a technical effect mentioned for the first time at the oral proceedings.

6. The board considers that, in the present case, the appellant's decision to present a new line of argument at the oral proceedings cannot *per se* justify the filing of new requests to address any concerns on the part of the board in response, and in particular cannot justify the subsequent filing of two attempts.
7. For the reasons set out above, and in accordance with Article 13(2) RPBA, the board did not admit the amended main request filed during the oral proceedings.
8. As a result, there were no requests on file which could form the basis for the appellant's request for a patent to be granted.

## Order

### **For these reasons it is decided that:**

1. The appeal is dismissed.

The Registrar:

The Chair:



I. Aperribay

B. Claes

Decision electronically authenticated