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Datasheet for the decision of 22 March 2022

Case Number: T 0088/19 - 3.3.09

Application Number: 08712666.0

Publication Number: 2117342

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Language of the proceedings: EN

Title of invention:
FEED COMPOSITION FOR SALMONIDS AND USES THEREOF

Patent Proprietor:
Ewos Innovation AS

Opponent:
Nutreco IP Assets BV

Headword:
Feed composition for salmonids/EWOS

Relevant legal provisions:
EPC Art. 54
RPBA 2020 Art. 13(2)

Keyword:
Feed composition for use in a therapeutic treatment - claim construction
Novelty - main request and auxiliary requests 2 to 12 - (no)
Amendment after summons - exceptional circumstances - auxiliary request 1 (no)

Decisions cited:
T 1527/16

Catchword:

Europäisches Patentamt
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Beschwerdekammern

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Case Number: T 0088/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 22 March 2022

Appellant: (Patent Proprietor)	Ewos Innovation AS 4335 Dirdal (NO)
Representative:	Rupp, Christian Mitscherlich PartmbB Patent- und Rechtsanwälte Sonnenstraße 33 80331 München (DE)
Appellant: (Opponent)	Nutreco IP Assets BV Veerstraat 38 5831 JN Boxmeer (NL)
Representative:	Hoffmann Eitle Patent- und Rechtsanwälte PartmbB Arabellastraße 30 81925 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 14 November 2018 concerning maintenance of the European Patent No. 2117342 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	M. Ansorge
	E. Kossonakou

Summary of Facts and Submissions

I. Appeals were filed by the opponent and the proprietor against the opposition division's interlocutory decision holding auxiliary request 3 allowable.

II. With its notice of opposition, the opponent had requested that the patent be revoked on the ground for opposition under Article 100(a) EPC (lack of novelty), *inter alia*.

III. The opposition division decided that the subject-matter of claim 1 of auxiliary request 3 met the requirements of the EPC, including novelty over D8.

IV. In the present decision, reference is made to the following document:

D8: M.A. McCoy et al., "Pancreas disease in Atlantic salmon (*Salmo salar*) and vitamin E supplementation", Comp. Biochem. Physiol., Vol. 109A, No. 4, pages 905 to 912, 1994

V. Claim 1 of the main request reads as follows:

"Feed composition comprising conventional feed ingredients such as protein, lipid, ash, vitamins, minerals, carbohydrates, pigments, wherein the relation of protein to lipid is more than 1, based on weight, for use in alleviation, faster recovery and/or treatment of salmonids with Pancreas disease, wherein the feed composition is provided from the registration of the first symptoms of the infection in fish or a fish population or from the detection of SAV virus in the population."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the relation of protein to lipid is limited to the range of 1.5 to 2.5.

Claim 1 of auxiliary requests 2 and 8 differs from claim 1 of the main request in that the amount of protein in relation to the total weight of the feed composition is limited to the range of 30% to 70% and in that the amount of lipid in relation to the total weight of the feed is limited to less than 28%.

Claim 1 of auxiliary requests 3 and 9 differs from claim 1 of the main request in that the amount of lipid in relation to the total weight of the feed is limited to less than 26%.

Claim 1 of auxiliary requests 4 and 10 differs from claim 1 of auxiliary request 3 in that the amount of protein in relation to the total weight of the feed composition is limited to the range of 30% to 70%.

Claim 1 of auxiliary requests 5 and 11 differs from claim 1 of auxiliary request 3 in that the amount of protein in relation to the total weight of the feed composition is limited to the range of 40% to 60%.

Claim 1 of auxiliary request 6 differs from claim 1 of auxiliary request 3 in that the amount of protein in relation to the total weight of the feed composition is limited to the range of 45% to 55%.

Claim 1 of auxiliary request 7 differs from claim 1 of the main request in that the amount of lipid in relation to the total weight of the feed is limited to less than 28%.

Claim 1 of auxiliary request 12 differs from claim 1 of auxiliary request 3 in that the amount of protein in relation to the total weight of the feed composition is limited to the range of 44% to 55%.

VI. The board summoned the parties to oral proceedings and issued a communication pursuant to Article 15(1) RPBA.

VII. The parties' relevant arguments, submitted in writing and during the oral proceedings, are reflected in the reasons for the decision below.

VIII. Requests

The proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted (main request). As an auxiliary measure, the proprietor requested that the patent be maintained on the basis of one of auxiliary requests 1 to 12, with auxiliary request 1 having been filed during the oral proceedings before the board, auxiliary requests 2 and 3 having been filed with its grounds of appeal, auxiliary requests 4 to 6 having been filed with the reply to the opponent’s grounds of appeal, and auxiliary requests 7 to 12 having been filed by letter of 26 November 2019.

The opponent requested that the decision be set aside and that the patent be revoked in its entirety.

Reasons for the Decision

MAIN REQUEST

1. Novelty

1.1 The proprietor argued that D8 was not novelty-destroying for the subject-matter of claim 1 of the main request, i.e. the opponent's novelty objection over D8 had to fail. It submitted that D8, while disclosing compositions having a protein to lipid relation of more than 1, did not disclose that this relation was responsible for achieving the claimed effect of alleviation of Pancreas disease (PD), faster recovery from PD and/or treatment of salmonids with PD. In addition, D8 failed to disclose a treatment of salmonids suffering from PD. D8 only related to the prevention of PD in salmon since, in D8, healthy salmon were fed with the feed composition.

1.2 For the following reasons, the board does not agree.

1.2.1 D8 describes a study investigating the effect of different feed compositions on PD in Atlantic salmon (see the abstract and section entitled "Materials and Methods", including Table 1 in D8). In this study, three different feed compositions, Diets A to C, were tested. Each of Diets A to C comprises conventional feed ingredients including protein and lipid (fish oil alone in Diets A and B or fish oil and saturated oil in Diet C), as required in claim 1 of the main request. The relation of protein to lipid in each of these diets is about 2.9:1 (calculated from the protein content of 46% and the lipid content of 16%; see Table 1 in

D8), thus indisputably fulfilling the requirement of claim 1 of the main request as well.

Diets A to C in D8 were provided to salmon from day one post transfer to the sea up to the end of the six-month trial. This marine site had a history of PD the year before the start of the study; as a consequence, PD was diagnosed clinically during week 15 post transfer (see section entitled "Clinical observations" in D8).

1.2.2 It was uncontested that, in D8, PD was diagnosed during week 15 and that a feed composition (Diets A to C) coming under the feed composition required in claim 1 of the main request was fed to salmon over the entire period of the study, i.e. also after the outbreak of PD during week 15.

1.2.3 The proprietor argued that D8 failed to disclose that the relation of protein to lipid of more than 1, as required in claim 1 of the main request, was responsible for achieving the alleviation of PD, faster recovery from PD and/or treatment of salmonids with PD. D8 merely related to attempts to reduce the severity of PD and associated lesions by altering the antioxidative and peroxidative substrates in the diets. There was no link in D8 between the required relation of protein to lipid and the therapeutic effects required in claim 1. At best, D8 taught that higher levels of vitamin E had an impact on the incidence of PD, but it could not be fully prevented (see page 910, left-hand column, lines 19 to 21, of D8).

The board does not agree, since claim 1 of the main request does not require such a link between the relation of protein to lipid and the therapeutic effects mentioned therein. Claim 1 of the main request

is directed to a purpose-limited product claim which requires that the feed composition as defined in claim 1 is used to achieve the claimed therapeutic effect. Therefore, what is important as far as the assessment of novelty over D8 is concerned is whether the feed composition of D8 as such comes under the feed composition defined in claim 1 and whether this feed composition is disclosed as being used to achieve the claimed therapeutic effect (see also T 1527/16, points 1.4 to 1.6 of the Reasons).

First, as outlined under point 1.2.2 above, all of the Diets A to C of D8 come under the feed composition defined in claim 1 of the main request.

Second, although the proprietor is correct that Diets A to C in D8 could not fully prevent PD from causing significant mortalities, at least Diet C achieves a lower mortality rate of fish fed with this diet, thus representing an alleviation of PD or treatment of salmonids with PD as required in claim 1 of the main request. This can be found, for instance, on page 909, right-hand column, lines 18 to 23, and page 911, left-hand column, lines 10 to 41, of D8, in which it is indicated that Diet C results in a lower mortality rate than Diets A and B. The fact that this might be associated, *inter alia*, with a higher vitamin E level is irrelevant, since Diet C in D8 indisputably comes under the feed composition defined in claim 1 of the main request.

1.2.4 The parties disagreed on whether D8 disclosed a treatment of salmonids with PD. In this context, the proprietor submitted that D8 only concerned prevention of PD in salmon, since the diets were provided before the outbreak of PD, whereas in claim 1 of the main

request the alleviation of PD, faster recovery from PD and/or treatment of salmonids suffering from PD was claimed.

1.2.5 The board does not agree.

First, there is no limitation on the feeding regime before registration of the first symptoms of the infection or the detection of SAV virus in claim 1 of the main request. This was not contested by the proprietor. Therefore, claim 1 of the main request does not exclude also providing the required feed composition before the registration of the first symptoms of the infection in fish or a fish population or from the detection of SAV virus in the population.

Second, for the reasons given below, preventive feeding starting a couple of weeks before the outbreak of PD and continued feeding with the feed composition defined in claim 1 of the main request after the outbreak of PD falls within the claimed scope.

According to claim 1 of the main request the feed composition is to be provided from the registration of the first symptoms of the infection in fish or a fish population or from the detection of SAV virus in the population. This does not exclude the case in which feeding with the required feed composition starts before the outbreak of PD and is continued after the outbreak of PD. In the board's view, continuing the preventive feeding in D8 also after the outbreak of PD effectively amounts to the disclosure of treatment of PD. This conclusion is further supported by paragraphs [0026] and [0027] of the patent, which also suggest that the feed composition can be provided before the determination of the disease.

1.2.6 It is also noted that claim 1 of the main request does not require that all fish need to have the first symptoms of PD, but that one fish with the first symptoms within the whole population is sufficient.

For the above reasons, D8 discloses the combination of all the features of claim 1 of the main request. Therefore, the subject-matter of claim 1 of the main request is not novel over D8.

AUXILIARY REQUEST 1

2. Article 13(2) RPBA

2.1 The proprietor filed auxiliary request 1 during the oral proceedings before the board (see point V. above), replacing the previously filed auxiliary request 1.

2.2 The opponent requested that this request not be admitted into the appeal proceedings in view of Article 13(2) RPBA.

2.3 For the following reasons, the board shares the opponent's view.

2.3.1 The proprietor argued that D8 was not mentioned in the board's communication, which mainly dealt with sufficiency and inventive step in view of another prior-art document, so it would be fair to admit auxiliary request 1 into the appeal proceedings.

2.3.2 The board is not convinced, since the opponent's novelty objection over D8 was already submitted in the opponent's grounds of appeal, i.e. from the very beginning of the appeal proceedings. The fact that the

board's communication focused on other objections, namely those which were the crucial issues in the opposition division's decision, does not justify auxiliary request 1 being filed at the oral proceedings. Auxiliary request 1 could and should have been filed as a direct response to the opponent's grounds of appeal, and not only during the oral proceedings before the board.

2.3.3 Even if D8 had been explicitly dealt with in the board's communication and a negative assessment on novelty had been made over D8, a different assessment would not have been reached.

2.3.4 The fact that D8 did not play a major role in the decision under appeal, but that it was merely treated as a side aspect, is not relevant. As outlined above, the opponent contested the opposition division's novelty assessment over D8 from the very beginning of the appeal proceedings and provided reasons why the claimed subject-matter lacked novelty over D8. No auxiliary request was filed as a direct response to the opponent's line of argument in its grounds of appeal. Instead, the proprietor merely relied on counter-arguing against this novelty objection.

2.3.5 Even if claim 1 of auxiliary request 1 were *prima facie* clearly novel over D8 and all the other prior-art documents, i.e. clearly overcoming the novelty objections raised by the opponent, it could and should have been filed as a direct response to the opponent's grounds of appeal and not only during the oral proceedings before the board.

2.3.6 It follows that there are no exceptional circumstances within the meaning of Article 13(2) RPBA, justified

with cogent reasons, which could justify admitting this auxiliary request 1 into the appeal proceedings.

Therefore, auxiliary request 1 is not taken into account (Article 13(2) RPBA).

AUXILIARY REQUESTS 2 TO 12

3. No further differences over D8 were identified by the proprietor as far as claim 1 of auxiliary requests 2 to 12 was concerned. Diet C in D8 has an amount of lipid of 16%, falling within the scope of claim 1 of auxiliary requests 2 to 12, and an amount of protein of 46%, falling within the scope of claim 1 of auxiliary requests 2 to 12.

Therefore, the subject-matter of claim 1 of auxiliary requests 2 to 12 lacks novelty over D8 as well.

4. In view of the above, there is no allowable request on file.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

A. Nielsen-Hannerup A. Haderlein

Decision electronically authenticated