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**Datasheet for the decision
of 7 November 2022**

Case Number: T 1127/20 - 3.3.04

Application Number: 15808674.4

Publication Number: 3233914

IPC: C07K16/24

Language of the proceedings: EN

Title of invention:

Composition, kit and method for inhibition of il-21 mediated activation of human cells

Applicant:

MABTECH AB

Headword:

Inhibitory anti-IL-21 antibody/MABTECH

Relevant legal provisions:

RPBA 2020 Art. 12(2), 12(4), 12(6)

Keyword:

primary object of appeal proceedings to review decision -
appeal case directed to requests on which decision was based
(no)



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Case Number: T 1127/20 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 7 November 2022

Appellant: MABTECH AB
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Representative: Theander, Anna Katarina Henrietta
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 28 November
2019 refusing European patent application No.
15808674.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairwoman M. Pregetter
Members: O. Lechner
R. Romandini

Summary of Facts and Submissions

- I. The appeal of the applicant ("appellant") lies from the decision of the examining division to refuse European patent application No. 15 808 674.4 ("application"). The application and the invention to which it relates were found not to meet the requirements of the EPC (Article 97(2) EPC).
- II. The examining division refused the application on the grounds that the invention was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 83 EPC) and that the claims were not clear (Article 84 EPC).
- III. With its statement of grounds of appeal, the appellant filed as its sole claim request a new main request and provided arguments why the new claim request complied with the requirements of the EPC.
- IV. The board summoned the appellant to oral proceedings as requested and informed it of its preliminary opinion in a communication pursuant to Article 15(1) RPBA 2020.

In this communication, the board indicated that:

- the set of claims filed with the statement of grounds of appeal could and should have been filed during the first-instance proceedings
- documents D8 and D9, as filed with the appellant's statement of grounds of appeal, were inadmissible
- the subject-matter of claim 1 as well as claims 11 and 12 lacked clarity within the meaning of Article 84 EPC

- the subject-matter of claim 5 was not clear (Article 84 EPC) or sufficiently disclosed within the meaning of Article 83 EPC
- claims 6 and 7 were unclear (Article 84 EPC) and/or insufficiently disclosed (Article 83 EPC)
- designations "MT6" and "MT3" in claims 2, 6 and 7 were unclear (Article 84 EPC) and insufficiently disclosed (Article 83 EPC)
- the amendment in claim 8 found no basis in the application as filed within the meaning of Article 123(2) EPC
- the board agreed with the examining division that the term "immune-related condition" as used in claim 8 was not a clear therapeutic goal and had no generally accepted meaning leaving the reader in doubt as to the scope of protection conferred

V. By letter of 24 October 2022, the appellant informed the board that it would not attend the oral proceedings.

VI. The appellant's arguments relevant to the decision are summarised as follows.

The new set of claims 1 to 12 was filed to overcome the examining division's decision to refuse the application on the basis of the set of claims filed on 5 November 2018 for not complying with Articles 84 EPC and 83 EPC.

VII. The appellant requested in writing that the decision under appeal be set aside and that the patent be granted on the basis of the set of claims as filed with the statement of grounds of appeal.

Reasons for the Decision

Admittance of the set of claims as filed with the statement of grounds of appeal

1. Article 12(2) RPBA sets out that in view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner, a party's appeal case shall be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based.

In the case at hand, the appellant did not maintain the set of claims underlying the decision under appeal. Instead, it submitted a new set of claims with its statement of grounds of appeal.

Article 12(4) RPBA sets out that any part of a party's appeal case which does not meet the requirements in paragraph 2 is to be regarded as an amendment, unless the party demonstrates that this part was admissibly raised and maintained in the proceedings leading to the decision under appeal. Any such amendment may be admitted only at the discretion of the board. Under Article 12(4), third sentence, the party shall clearly identify each amendment and provide reasons for submitting it in the appeal proceedings. Furthermore, in the case of an amendment to a patent application or patent, the party shall also indicate the basis for the amendment in the application as filed and provide reasons why the amendment overcomes the objections raised.

The appellant did not demonstrate that the set of claims of the main request, the only set of claims on file, had been admissibly raised and maintained before

the examining division. Nor have any reasons for submitting this set of claims only in appeal proceedings been given.

2. Finally, in accordance with Article 12(6) RPBA, second sentence, the board shall not admit requests, facts, objections or evidence which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.

In applying these provisions to the question of admittance of the sole claim request filed in this appeal proceedings, in the board's view, two aspects are relevant.

Firstly, the appellant was not represented at the oral proceedings before the examining division, as announced in the letter dated 7 November 2019.

Secondly, all issues leading to the examining division's finding that claims 1, 12, 13, 14 and 16 were not clear within the meaning of Article 84 EPC and/or insufficiently disclosed within the meaning of Article 83 EPC had already been reasoned by the examining division at the latest in the summons to oral proceedings.

Thus, the applicant was fully aware of the objections of the examining division. Consequently, the applicant could and should have reacted earlier, more precisely, in the proceedings leading to the decision under appeal, for instance, by attending the oral proceedings and/or filing, before or during them, e.g. a further set of claims as an auxiliary request, without

disagreeing with the text of auxiliary request 2 considered allowable by the examining division.

Given this background, the board decided to not admit the sole claim request pending into the appeal proceedings in accordance with Article 12(4) and (6) RPBA.

Order

For these reasons it is decided that:

- The appeal is dismissed.

The Registrar:

The Chairwoman:



I. Aperribay

M. Pregetter

Decision electronically authenticated