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Datasheet for the decision of 23 May 2024

Case Number: T 1870/21 - 3.3.07

Application Number: 13869984.8

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Language of the proceedings: EN

Title of invention:
CRENOLANIB FOR TREATING FLT3 MUTATED PROLIFERATIVE DISORDERS

Patent Proprietor:
Arog Pharmaceuticals, Inc.

Opponent:
HEXAL PHARMA AG

Headword:
Crenolanib for treating flt3 mutated proliferative disorders / AROG

Relevant legal provisions:
EPC Art. 113(1)
EPC R. 103(1)(a)
RPBA 2020 Art. 11

Keyword:
Substantial procedural violation - (yes) - reimbursement of appeal fee (yes)
Remittal to the department of first instance - fundamental deficiency in first instance proceedings (yes)

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Case Number: T 1870/21 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 23 May 2024

Appellant: (Opponent)	HEXAL PHARMA AG Industriestrasse 25 83607 Holzkirchen (DE)
Representative:	Kraus & Lederer PartGmbB Thomas-Wimmer-Ring 15 80539 München (DE)
Respondent: (Patent Proprietor)	Arog Pharmaceuticals, Inc. 5420 LBJ Freeway Suite 410 Dallas, TX 75240 (US)
Representative:	Barker Brettell LLP 100 Hagley Road Edgbaston Birmingham B16 8QQ (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 30 August 2021 rejecting the opposition filed against European patent No. 2941251 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	A. Usuelli
Members:	E. Duval
	L. Basterreix

Summary of Facts and Submissions

I. The appeal was filed by the opponent (appellant) against the decision of the opposition division to reject the opposition filed against the patent in suit.

II. Claim 1 of the patent as granted read as follows:

"A composition comprising a therapeutically effective amount of crenolanib or a pharmaceutically acceptable salt thereof for use in the treatment of a FLT3 mutated acute myeloid leukemia (AML) in a subject, wherein the subject is a human subject."

III. The following documents are relevant for the present decision:

D1: Allison Galanis et al., Blood 2012, 120:1341
D2: Catherine C Smith et al., Blood 2012, 120:141
D3: Slides from an oral presentation at the American Society of Hematology (ASH) meeting on December 9, 2012
D50: Meads et al., Clin. Cancer Res. 2008, 14(9), 2519-2526.

IV. The opposition had been filed solely on the ground of lack of inventive step. The opposition division decided that D1, D2 and D3 were equally promising starting points for the assessment of inventive step. None of these documents disclosed the treatment of human patients *in vivo* and thus the successful treatment of FTL3 mutated AML human patients. The problem to be solved was to find an efficacious treatment of FLT3/D835 mutated AML *in vivo* for human patients using crenolanib. The claimed solution involved an inventive step.

V. The appellant (opponent) requests that the decision under appeal be set aside and that the patent be revoked in its entirety. The appellant further requests that:
- documents D46-D56 and Annex 3 be not admitted into the proceedings,
- the appeal fee be reimbursed for reason of a substantial procedural violation.

VI. The respondent (patent proprietor) requests that the appeal be dismissed and the patent be maintained as granted, or, alternatively, that the patent be maintained on the basis of one of auxiliary request 1 or 2, both filed with the reply to the appeal.

VII. In the course of the appeal proceedings, the Board summoned the parties to oral proceedings, and issued a communication under Article 15(1) RPBA expressing the preliminary view that a substantial procedural violation was apparent in the first-instance proceedings.

By letter dated 29 April 2024, the respondent indicated that they did not require oral proceedings before the Board on the point of possible remittal, and agreed that a decision may be made, based on the written arguments, solely on the issue of remittal to the opposition division and reimbursement of the appeal fee.

By letters dated 25 April 2024 and 15 May 2024, the appellant expressed their agreement with a remittal to the department of first instance.

The Board cancelled the oral proceedings.

VIII. Regarding the alleged substantial procedural violation, the appellant's arguments may be summarised as follows:

Documents D46-D56 and Annex 3 had been filed late by the respondent in the first instance proceedings. Neither the admittance of these documents, nor their content, were discussed at the oral proceedings before the opposition division. The appealed decision stated in this respect that these documents were not relevant for the decision, and that the appellant's request not to admit them was therefore not discussed.

Yet, the contested decision relied on D50 in the inventive step reasoning, referring to this document as E40, the original designation used by the respondent. The appealed decision was thus based on a document, whose admittance into the proceedings was never discussed among the parties. Furthermore, the appellant was not heard at the oral proceedings on the respondent's argument based on D50 and regarding an alleged lack of robustness of the mouse model of D3.

Consequently, the appellant's right to be heard under Article 113(1) EPC had been violated. This was to be considered a substantial procedural violation justifying the reimbursement of the appeal fee under Rule 103(1)(a) EPC.

IX. The respondent's arguments on the above topic may be summarised as follows:

It was agreed that, during the oral proceedings before the opposition division, no formal decision had been taken regarding the admissibility of D50, and that the content of D50 had not been discussed.

However, D50 did not appear to be the underlying reason for the opposition division's finding of non-obviousness. A key reason for finding the invention non-obvious was based on the case law of the Boards of Appeal acknowledging inventive step over prior art referencing ongoing phase I or II clinical trials. The question whether there was a reasonable expectation of success in view of the "promising" *in vitro* and *in vivo* results, was already addressed at the end of section 8.4.2 of the appealed decision, such that the same conclusion on inventive step would have be reached even without the section 8.4.3.1 referring to D50.

Reasons for the Decision

1. Procedural violation

1.1 During the first instance proceedings, the respondent filed annex 3 and D46-D56 (i.e. E36-E46 in the respondent's original numbering) on 13 March 2020, i.e. on the last date for making submissions set by the opposition division under Rule 116 EPC in the summons dated 10 September 2019.

Following a postponement, the oral proceedings before the opposition division eventually took place on 29 March 2021. The appellant raised an objection against the admittance of annex 3 and documents D46-D56 (see the minutes, page 1, 4th paragraph). It is established that, during the oral proceedings, neither the admittance of these documents, including D50, nor their contents, were discussed.

1.2 According to the appealed decision (see §6.2), annex 3 and D46-D56 were not relevant for the reasons of the decision, so that the appellant's request not to admit them was not discussed. This is however contradicted by the fact that the inventive step reasoning set out later in the decision relies on "E40", which corresponds in fact to D50 in the respondent's original numbering (see §8.4.3.1).

1.3 The relevant question is thus whether the opposition division committed a substantial procedural violation justifying a reimbursement of the appeal fee under Rule 103(1)(a) EPC.

1.3.1 The sole fact that, at the oral proceedings, the parties did not refer to D50 does not as such mean that the opposition division's reliance on this document in the decision infringes the appellant's right to be heard under Article 113(1) EPC. This is because D50 and the line of argumentation based thereon had been submitted in writing by the respondent in their letter dated 13 March 2020 (see page 4) and had been notified to the appellant. Accordingly, the appellant had an opportunity to present their comments on D50.

1.3.2 However, it remains that the opposition division took D50 into account in the appealed decision without first hearing the parties on the appellant's request not to admit D50. By deciding to reject the opposition without hearing the appellant on a request relevant to that decision, the opposition division infringed Article 113(1) EPC and committed a procedural violation. Considering that, during the oral proceedings before the opposition division, neither the admittance nor the content of D50 were discussed, and no decision as to its admittance was announced, it could not be expected

from the appellant that they would present their arguments at the oral proceedings with regard to D50.

1.4 Under Rule 103(1)(a) EPC, for the appeal fee to be reimbursed, the procedural violation must be substantial (see the Case Law of the Boards of Appeal, 10th edition, 2022, II.B.2.2.2).

1.4.1 According to the respondent, D50 is not the underlying reason for the opposition division's finding of non-obviousness, which was rather motivated by the case law (T385/07 and T715/03) acknowledging inventive step over prior art referencing ongoing clinical phase I and II trials. The opposition division's conclusion at the end of section 8.4.2 would already address the question of 8.4.3 regarding whether there was a reasonable expectation of success in view of the promising results, such that the same conclusion would have been reached even without section 8.4.3.1.

1.4.2 The Board is not convinced that, considering the reasoning set out in the appealed decision, the same outcome would have been reached if D50 had not been admitted, for the following reasons.

In the contested decision, the opposition division examines first the disclosure in the prior art starting points. According to §8.1, document D3, and the corresponding abstract D2 (considered together by the opposition division), teach in particular that crenolanib was assessed for its suitability in the treatment of FLT3 mutant AML and has shown very promising results in *in vitro* experiments on human cell lines and in an animal *in vivo* model (mouse). D2/D3 would further refer to ongoing clinical trials.

The section relying on D50 (i.e. §8.4.3.1) is the only passage of the decision explaining why, in the opposition division's view, and contrary to the appellant's position, there was no reasonable expectation of success despite these promising results disclosed in the prior art D2/D3.

In sections §8.4.1 and 8.4.2, the opposition division explains that phase II clinical trials were known (from D4) to be ongoing, but that this neither meant that phase I trials of crenolanib in AML had been performed, nor did it allow the skilled person to expect crenolanib to be active on AML patients, because clinical trials are known to regularly fail. These passages address the question of reasonable expectations in view of the known ongoing clinical trials, but not in view of the promising results reported in D2/D3. Despite the broader wording of the last paragraph of section §8.4.2 ("the OD has come to the conclusion that the mere fact that phase II clinical trials are ongoing *and that in vitro and in vivo experiments were considered promising* is not enough to render it obvious to administer crenolanib to human patients with FTL3 mutated AML and expect it to work", emphasis added by the Board), there is in fact up until this point of the decision no explanation why the promising results do not as such provide this expectation.

In section §8.4.4, the opposition division differentiates the case at hand from decisions T 2506/12, T 725/11 and T 239/16, and concludes that the knowledge that clinical trials were ongoing would not have given the skilled person a reasonable expectation of success. This passage does not address either the issue of expectations in view of the

promising experimental *in vitro* and *in vivo* results reported in D2/D3, which the appellant had raised in the first instance proceedings (see the third paragraph on page 4 of the minutes).

Accordingly, it cannot be concluded that the argumentation based on D50 is to be seen as a merely supererogatory and incidental argument in the appeal decision.

1.5 The Board therefore concludes that the appealed decision is tainted by a substantial procedural violation.

2. Remittal and reimbursement of the appeal fee

Under Article 11 RPBA, the Board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so. As a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.

In the case at hand, the above substantial procedural violation is a fundamental deficiency in the sense of Article 11 RPBA justifying that the case be remitted to the opposition division for further prosecution. In addition, as a result of this substantial procedural violation, the appeal decision must be set aside and a reimbursement of the appeal fee is equitable under Rule 103(1)(a) EPC.

Considering that the parties' agreement that the issues of remittal and reimbursement of the appeal fee be addressed without oral proceedings, the present

decision can be issued in writing without holding oral proceedings.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the opposition division for further prosecution.

The appeal fee is reimbursed.

The Registrar: The Chairman:

B. Atienza Vivancos A. Usuelli

Decision electronically authenticated