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**Datasheet for the decision
of 9 November 2016**

Case Number: J 0009/14 - 3.1.01

Application Number: 07733714.5

Publication Number: 2029203

IPC: A61M5/42

Language of the proceedings: EN

Title of invention:

Improvements relating to intravenous needle insertion or cannulation

Patent Proprietor:

Olberon Medical Innovation SAS

Headword:

Correction of withdrawal (no)

Relevant legal provisions:

EPC R. 139

Keyword:

Correction of withdrawal of the designation of a Contracting State (no)

Publication in European Patent Register

Publication in European Patent Bulletin

Decisions cited:

J 0010/87, J 0012/03, J 0019/03, J 0025/03, J 0037/03,
J 0038/03, J 0014/04, J 0007/06, J 0018/10, J 0001/11,
J 0002/15

Catchword:

The withdrawal of the designation of a contracting state cannot be retracted once it has been published in the European Patent Bulletin.



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Case Number: J 0009/14 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 9 November 2016

Appellant: Olberon Medical Innovation SAS
(Applicants) Le Galenis, Bât. A
55 Rue Salvador Allende
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Representative: Adamson Jones
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Decision under appeal: **Decision of the Examining Division of the European Patent Office rejecting the request for correction of the withdrawal of the designation of United Kingdom, posted on 23 January 2014.**

Composition of the Board:

Chairwoman C. Vallet
Members: J. Geschwind
L. Bühler

Summary of Facts and Submissions

- I. On 22 May 2013 the applicant's representative informed the EPO that it withdrew the designation of the United Kingdom for the European patent application EP 07 733 714.5.

The information on the withdrawal was made public in the Register of European Patents on 24 May 2013 by way of EPO form 2056 and a communication confirming the deletion which was sent on the same day to the applicant.

- II. On 28 May 2013 a communication concerning the amendments made to the application was sent to the applicant and the decision to grant was sent to the applicant on 6 June 2013. The United Kingdom was not listed as designated Contracting State in either of these notifications.

- III. On 14 June 2013 the applicant's representative filed a request for correction of the withdrawal of the designation of the United Kingdom. This request was reasoned with regard to the fact that the withdrawal was made under misinterpretation of the instruction given by the applicant to "Keep UK patent", which the representative interpreted as an instruction to maintain a corresponding national UK patent and to withdraw the designation of UK for the pending European patent application.

Furthermore the applicant's representative submitted that the error was only noticed upon receipt of the decision to grant on 11 June 2016.

- IV. With a communication of 3 July 2013 the Office informed the applicant that the request for correction of the withdrawal could not be granted. The applicant responded to this communication with letter dated 13 September 2013.

- V. With a decision of 23 January 2014 the Office rejected the request for correction of the withdrawal of the designation of United Kingdom.

- VI. The applicant filed an appeal against this decision on 2 April 2014, paid the corresponding fee on the same day and submitted the grounds of appeal on 2 June 2014.

The appellant's arguments can be summarized as follows :

The appellant submits that the request for withdrawal of the UK designation of 22 May 2013 was made by error based on an misinterpretation of the applicant's instructions.

According to J 10/87 no formal publication of the withdrawal had been made by the EPO at the date of the request to correct the withdrawal on 14 March 2013 and the interests of any third parties would remain adequately protected even if the requested correction was performed.

The appellant submitted that the conclusion drawn from J 14/04 is at odds with the rights of the applicant and that this decision should not be followed for the present case since it would not adequately preserve the applicant's rights to make a correction in a practical and realistic sense.

VII. The board issued a communication on 9 August 2016 and summoned the appellant to oral proceedings which were held on 9 November 2016.

The appellant did not attend the oral proceedings as announced by letter of 8 November 2016.

The appellant had requested in writing that the decision under appeal be set aside and that the designation of the United Kingdom (GB) be reinstated for European patent application No. 07733714.5 such that European patent No. 2029203 be granted with respect to the United Kingdom (GB).

Reasons for the Decision

1. The appeal fulfils the conditions laid down in Articles 106 to 108 and Rule 99 EPC. It is thus admissible.
2. It is established jurisprudence of the present board that a statement of withdrawal is binding on the applicant and can only be corrected under Rule 139 EPC in very particular circumstances (see J 10/87, J 14/04, J 25/03, J 19/03, J 7/06). It is a precondition for any correction that, at the time the request for retraction of a withdrawal is filed, the public has not yet been officially informed of the withdrawal.

According to the settled case law of the board, the publications in the European Patent Bulletin according to Article 129(a) EPC and the entries in the Register of European Patents under Article 127 EPC constitute both official notifications to the public (see J 25/03, J 12/03, J 37/03, J 38/03, J 14/04, J 7/06, J 18/10, J

1/11, J 2/15) and entries into the Register of European Patents are available to the public from the day they appear therein. Therefore, the publication of the withdrawal in the Bulletin and the mention of the withdrawal in the Register render its later retraction impossible.

3. In the present case it is undisputed that the letter filed on 22 May 2013 contained a clear request to withdraw the United Kingdom designation and that information on the withdrawal was entered into the Register of European Patents on 24 May 2013.

The request for correction was only filed on 14 June 2013, notwithstanding two prior communications from the Office of 24 May 2013 and 28 May 2013 both clearly reflecting the withdrawal.

Thus, the request for correction was obviously made after the public had been officially informed of the withdrawal of the designation of United Kingdom.

The applicant relied on decision J 10/87 that made a distinction between a mention in the European Patent Register and a publication in the European Patent Bulletin and points to a possible conflict with decision J 14/04. This point has been comprehensively addressed in decision J 1/11 (see pt. 6 to 12 of the reasons), which considers that with regard to the progress of technology and the implementation of Internet technology by the EPO a distinction between public file inspection and publication in the European Patent Bulletin is not relevant anymore in particular due to the possibility of an online access to the official information.

4. The argument submitted by the appellant that the interests of third parties would have been protected even in case the requested correction had been done, since in that case "the period in which there was uncertainty over the UK designation is only three weeks" can also not convince the board.
An argumentation based on a possible time of limited uncertainty for the public is not pertinent (see J6/13, pt. 8 of the reasons).
The public has a legitimate interest in relying on the information published by the EPO since the Register of European Patents is subject to public inspection.

The official notification to the public of the withdrawal is a key step and legal certainty would suffer unacceptably if thereafter, even for only a short period a correction of the withdrawal would be allowable (see J 25/03, J 37/03, J 7/06).

The protection of this principle is essential with regard to the evolution of technical means and the ability of third parties to access practically at a glance to official patent information without any risk of error.

There would have been no reason for a third party to suspect at the time of its publication that the withdrawal could be erroneous and later retracted, all the more, in the present case the request for withdrawal was filed after communication by the EPO of the information to grant to the applicant.

As a consequence, the explanation given by the appellant in order to clarify the reasons of the allegedly wrong withdrawal of the United Kingdom from among the designated Contracted States is of no relevance in the present case.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



C. Eickhoff

C. Vallet

Decision electronically authenticated