

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 10 January 2018**

**Case Number:** T 1091/14 - 3.3.04

**Application Number:** 08153545.2

**Publication Number:** 1974746

**IPC:** A61K39/00

**Language of the proceedings:** EN

**Title of invention:**

Use of an adjuvanted allergy vaccine formulation for  
parenteral administration

**Patent Proprietor:**

Alk-Abelló A/S

**Opponent:**

Merck Patent GmbH

**Headword:**

Allergy vaccine/ALK-ABELLO

**Relevant legal provisions:**

EPC R. 84(1), 100(1)

**Keyword:**

Lapse of patent in all designated states - continuation of  
appeal proceedings (no)

**Decisions cited:**

T 0329/88, T 0165/95, T 0749/01, T 0436/02, T 0289/06,  
T 0432/11, T 0018/13

**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 1091/14 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 10 January 2018**

**Appellant:** Merck Patent GmbH  
(Opponent) Postfach  
Frankfurter Strasse 250  
64293 Darmstadt (DE)

**Respondent:** Alk-Abelló A/S  
(Patent Proprietor) Bøge Allé 6-8  
2970 Hørsholm (DK)

**Representative:** Inspicos P/S  
Kogle Allé 2  
2970 Hørsholm (DK)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted on 10 March 2014  
rejecting the opposition filed against European  
patent No. 1974746 pursuant to Article 101(2)  
EPC.

**Composition of the Board:**

**Chairwoman** G. Alt  
**Members:** B. Claes  
P. de Heij

## **Summary of Facts and Submissions**

- I. The opponent lodged an appeal against the decision of the opposition division to reject the opposition filed against the European patent No. 1 974 746 (the patent in suit).
  
- II. By a communication dated 22 September 2017, the board informed the parties that it was apparent from the entries in the European Patent Register that the patent in suit had been surrendered or has lapsed with effect for all the designated Contracting States in the course of the present appeal proceedings. The appellant/opponent was invited to indicate, within two months from notification of the communication, whether or not it requested continuation of the appeal proceedings. The appeal proceedings would be discontinued if no request for continuation of the proceedings was filed in due time and the state of the file gave no grounds for the proceedings to be continued by the board of its own motion.
  
- III. No reply from the appellant/opponent was received within the set time period.

## **Reasons for the Decision**

1. Rule 84(1) EPC provides that if "the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States, the opposition proceedings may be continued at the request of the opponent filed within two months of a communication from the European Patent Office informing him of the surrender or lapse".

2. Based on Rule 100(1) EPC, Rule 84(1) EPC applies *mutatis mutandis* in opposition appeal proceedings, *i.e.* the appeal proceedings may be continued at the request of the appellant-opponent filed within two months as from notification of the lapse. According to an interpretation *argumentum e contrario*, if no request for continuation of the proceedings is filed within the set time period and the state of the file gives no grounds for the proceedings to be continued by the board of its own motion, the appeal proceedings are terminated (see e.g. decisions T 329/88 of 22 June 1993; T 165/95 of 7 July 1997; T 749/01 of 23 August 2002; T 436/02 of 25 June 2004; T 289/06 of 17 December 2007; T 432/11 of 5 February 2016; T 18/13 of 14 December 2016).
  
3. In the present case, the notification of the lapse within the meaning of Rule 84(1) EPC was sent to the appellant on 22 September 2017. Thus, the period of two months for requesting the continuation of the appeal proceedings ended on Monday, 4 December 2017 (*cf.* Rule 126(2) and Rule 134(1) EPC). No request for continuation of the appeal proceedings has been submitted during that period. Hence, the appeal proceedings have to be terminated (*cf.* point 2 *supra*).

**Order**

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

The appeal proceedings are terminated.

The Registrar:

The Chairwoman:



N. Schneider

G. Alt

Decision electronically authenticated