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**Datasheet for the decision  
of 19 May 2021**

**Case Number:** T 2418/16 - 3.2.06

**Application Number:** 02794270.5

**Publication Number:** 1455713

**IPC:** A61F13/15, B32B7/02

**Language of the proceedings:** EN

**Title of invention:**

ABSORBENT ARTICLE

**Patent Proprietor:**

THE PROCTER & GAMBLE COMPANY

**Opponents:**

Johnson & Johnson Consumer Inc.  
Essity Hygiene and Health Aktiebolag

**Headword:**

**Relevant legal provisions:**

EPC Art. 101, 113(2), 105a(2)  
EPC R. 103(4)(c), 125, 126(2)

**Keyword:**

Basis of decision - text or agreement to text withdrawn by  
patent proprietor - patent revoked  
Reimbursement of appeal fee - (no)

**Decisions cited:**

T 0073/84, T 0186/84, T 0459/88, T 0655/01, T 1526/06,  
T 1960/12

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 2418/16 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 19 May 2021**

**Appellant:** THE PROCTER & GAMBLE COMPANY  
(Patent Proprietor) One Procter & Gamble Plaza  
Cincinnati, OH 45202 (US)

**Representative:** Elkington and Fife LLP  
Prospect House  
8 Pembroke Road  
Sevenoaks, Kent TN13 1XR (GB)

**Appellant:** Johnson & Johnson Consumer Inc.  
(Opponent 1) 199 Grandview Road  
Skillman, NJ 08558 (US)

**Representative:** Kirsch, Susan Edith  
Carpmaels & Ransford LLP  
One Southampton Row  
London WC1B 5HA (GB)

**Appellant:** Essity Hygiene and Health Aktiebolag  
(Opponent 2) 405 03 Göteborg (SE)

**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  
21 September 2016 concerning maintenance of the  
European Patent No. 1455713 in amended form.

**Composition of the Board:**

<b>Chairman</b>	M. Harrison
<b>Members:</b>	P. Cipriano
	J. Hoppe

## **Summary of Facts and Submissions**

- I. In its interlocutory decision dated 21 September 2016 the opposition division found that European patent No. 1 455 713 in an amended form met the requirements of the EPC.
- II. This decision was appealed by both opponents and the patent proprietor. In light of this the Board will continue to refer to the parties as opponent 1, opponent 2 and patent proprietor.
- III. The opponents requested with their grounds of appeal that the decision under appeal be set aside and the patent be revoked.
- IV. The patent proprietor requested with its grounds of appeal that the opponents' appeals be dismissed or, as an auxiliary measure, that the patent be maintained on the basis of one of auxiliary requests 1 to 4. With its reply to the opponents' appeals the patent proprietor additionally filed auxiliary requests 5 to 18.
- V. In preparation for oral proceedings, the Board issued a communication under Article 15(1) RPBA 2020 dated 22 March 2021 containing *inter alia* its provisional view on the various requests.
- VI. With letter dated 4 May 2021, the patent proprietor withdrew its approval of the granted text of the patent in any form. The patent proprietor also withdrew its main request and all the auxiliary requests "with the intention that the patent shall be revoked" as well as its request for oral proceedings. It further requested

"a partial refund of the appeal fee pursuant Rule 103 EPC".

VII. The scheduled oral proceedings were subsequently cancelled.

### **Reasons for the Decision**

1. Under Article 113(2) EPC, the European Patent Office shall consider and decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent. This principle has to be strictly observed also in opposition and opposition appeal proceedings.
2. Since the text of the patent is at the disposition of the patent proprietor, a patent cannot be maintained against the patent proprietor's will. With letter of 4 May 2021 the proprietor withdrew its approval of any text for maintenance of the patent. There is therefore no text of the patent on the basis of which the Board can consider the appeal. Moreover the proprietor clarified in its letter that it intended that the patent be revoked.
3. Revocation at the request of the patent proprietor in the framework of opposition or opposition appeal proceedings is not possible, as it is expressly excluded by Article 105a(2) EPC. At the same time, the proceedings ought to be terminated as quickly as possible in the interests of legal certainty. Thus, in view of there being no text of the patent on the basis of which the Board can consider the appeal, the only possibility is for the Board to revoke the patent as

envisaged, albeit for other reasons, in Article 101 EPC.

4. In view of the above, the Board concludes that the patent must be revoked. This conclusion is also in line with case law developed by the Boards of Appeal in *inter alia* decisions T 73/84, T 186/84, T 237/86, T 459/88, T 655/01, T 1526/06 and T 1960/12.

*Request for partial reimbursement of the appeal fee*

5. Since the proprietor did not withdraw its appeal, the only possibility of a partial reimbursement in this case would be under Rule 103(4)(c) EPC. Pursuant to this Rule, the appeal fee is reimbursed if any request for oral proceedings is withdrawn within one month of notification of the communication issued by the Board of Appeal in preparation for the oral proceedings, and no oral proceedings take place. The patent proprietor withdrew its request for oral proceedings on 4 May 2021 and thus one day after the one month period triggered by notification (Rules 125, 126(2) EPC) of the communication dated 22 March 2021 had expired. No basis for refunding the appeal fee therefore exists.
6. The proprietor's request for partial reimbursement of the appeal fee is thus refused.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for partial reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated