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**Datasheet for the decision  
of 18 June 2019**

**Case Number:** T 0337/17 - 3.3.05

**Application Number:** 05732741.3

**Publication Number:** 1829140

**IPC:** H01M2/02, H01M2/16, H01M2/18,  
H01M4/04, H01M4/12, H01M4/36,  
H01M4/38, H01M4/58, H01M4/62,  
H01M6/16, H01M6/10, H01M6/50

**Language of the proceedings:** EN

**Title of invention:**  
HIGH DISCHARGE CAPACITY LITHIUM BATTERY

**Patent Proprietor:**  
Energizer Brands, LLC

**Opponent:**  
The Gillette Company

**Headword:**  
High discharge capacity lithium battery/ENERGIZER

**Relevant legal provisions:**  
EPC Art. 113(1)  
EPC R. 111(2), 103(1)(a)

**Keyword:**

Right to be heard - substantial procedural violation (yes)  
Reimbursement of appeal fee - appealed decision sufficiently  
reasoned (no)

**Decisions cited:**

T 0246/08, T 0763/04, T 0168/11

**Catchword:**



**Beschwerdekammern**

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Case Number: T 0337/17 - 3.3.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.05**  
**of 18 June 2019**

**Appellant:**

(Opponent)

The Gillette Company  
One Gillette Park - 3E  
Boston, MA 02127 (US)

**Representative:**

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**Respondent:**

(Patent Proprietor)

Energizer Brands, LLC  
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St. Louis, Missouri 63141 (US)

**Representative:**

dompatent von Kreisler Selting Werner -  
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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
2 December 2016 concerning maintenance of the  
European Patent No. 1829140 in amended form.**

**Composition of the Board:**

**Chairman**

E. Bendl

**Members:**

T. Burkhardt

P. Guntz

## **Summary of Facts and Submissions**

- I. The appeal lies from the interlocutory decision of the opposition division that the European patent EP 1 829 140 B1 as amended fulfilled the requirements of the EPC.
- II. In a first appeal in the present case, T 168/11, the same board in a different composition remitted the case to the department of first instance with the order to maintain the patent in amended form on the basis of the auxiliary request as filed during oral proceedings on 12 May 2015 with a description and drawings to be adapted.
- III. Following an invitation by the opposition division of 25 February 2016, the proprietor submitted adapted description pages 4 and 9 via a submission of 12 April 2016.
- IV. In a submission made on 6 May 2016, the opponent commented on this adapted description and requested that the patent not be maintained in this form.
- V. On 2 December 2016, the opposition division issued an interlocutory decision that the patent in the form of the auxiliary request as submitted on 12 May 2015 and the adapted description as submitted by the proprietor with the letter of 12 April 2016 fulfilled the requirements of the EPC, however, without mentioning the opponent's requests.
- VI. The opponent (appellant) appealed this decision, argued that no reasons were provided as to why these requests were rejected and asked for reimbursement of the appeal fee.

- VII. The respondent (proprietor) does not believe that there was a severe procedural violation justifying the refund of the appeal fee and consequently asked for the dismissal of the appeal but also submitted, as an auxiliary measure, amended pages 3, 4, 9 and 12.
- VIII. In reply to the board's preliminary opinion, the appellant declared its agreement to the maintenance of the patent on the basis of this amended description.
- IX. The appellant's request for oral proceedings was conditionally withdrawn via a submission dated 17 June 2019.
- X. The respondent requests that the appeal be dismissed (main request) or, alternatively, that the decision be set aside and that the case be remitted to the department of first instance with the order to maintain the patent based on the adapted description pages as submitted with the submission of 22 May 2017 (auxiliary request).

The appellant agrees that the decision should be set aside and that the patent be maintained in amended form as per auxiliary request with the amended description pages submitted with the letter of 22 May 2017. It moreover requests that the appeal fee be refunded.

## **Reasons for the Decision**

### Respondent's main request

1. According to established case law, a decision of the European Patent Office must show that all potentially

refutative arguments adduced by a party are actually refutable (T 246/08, catchword) and that comments were demonstrably heard and considered (T 763/04, reasons 4.4).

2. However, the impugned decision does not give reasons as to why the appellant's comments in its letter dated 6 May 2016 with regard to the adapted description as submitted by the respondent with the letter of 12 April 2016 were not acceptable.

In its letter dated 6 May 2016, the appellant indicated that paragraphs [16,17,18 and 19] of the adapted description were not in agreement with the claims as amended per the auxiliary request dated 12 May 2015. This was supported by arguments. Furthermore, it was indicated that the examples did not fall within the scope of the amended claims, again supported by arguments. The appellant requested that the patent not be maintained in this form.

The opposition division reacted by stating in the contested decision that "[t]he description has been amended; the Parties have been given opportunity to comment thereto". However, this does not prove that the appellant's comments were demonstrably heard and considered.

3. For these reasons, the contested decision is not sufficiently reasoned within the meaning of Rule 111(2) EPC.
4. As a consequence, the appellant's right to be heard within the meaning of Article 113(1) EPC has not been respected, which amounts to a substantial procedural violation.

5. Therefore, the respondent's main request to dismiss the appeal must fail.

Refund of the appeal fee

6. The substantial procedural violation also justifies the refund of the appeal fee according to Rule 103(1)(a) EPC.

Respondent's auxiliary request

7. In its submission of 1 February 2019, the appellant declared its agreement with the maintenance of the patent on the basis of the respondent's auxiliary request. The board too agrees that the proposed amendments meet the requirements of the EPC.
8. Since the appellant's other requests are granted, the board exercises its discretion under Article 111(1) EPC not to remit the case to the department of first instance.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain a patent in amended form on the basis of:
  - claims 1-27 of the auxiliary request as submitted during the oral proceedings on 12 May 2015
  - pages 3, 4, 9 and 12 of the description as submitted by the respondent with the letter dated 22 May 2017
  - pages 2, 5-8, 10, 11, 13-19 of the description of the patent specification
  - drawings 1/6-6/6 of the patent specification
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



K. Götz-Wein

E. Bendl

Decision electronically authenticated