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**Datasheet for the decision  
of 27 January 2022**

**Case Number:** T 0174/18 - 3.3.01

**Application Number:** 02772957.3

**Publication Number:** 1431758

**IPC:** G01N33/487, C12Q1/00,  
G01N27/30, G01N27/416

**Language of the proceedings:** EN

**Title of invention:**

MEASUREMENT INSTRUMENT AND CONCENTRATION MEASUREMENT APPARATUS

**Patent Proprietor:**

ARKRAY, Inc.

**Opponent:**

Roche Diagnostics GmbH

**Headword:**

Measurement apparatus/ARKRAY

**Relevant legal provisions:**

EPC Art. 113(2)

**Keyword:**

Basis of decision - text or agreement to text withdrawn by  
patent proprietor - patent revoked

**Decisions cited:**

T 0073/84

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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European Patent Office  
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Case Number: T 0174/18 - 3.3.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.01**  
**of 27 January 2022**

**Appellant:** ARKRAY, Inc.  
(Patent Proprietor) 57, Nishiaketa-cho  
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Minami-ku  
Kyoto-shi  
Kyoto 601-8045 (JP)

**Representative:** Dehns  
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**Appellant:** Roche Diagnostics GmbH  
(Opponent) Sandhoferstr. 116  
68305 Mannheim (DE)

**Representative:** Altmann Stöbel Dick Patentanwälte PartG mbB  
Isartorplatz 1  
80331 München (DE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
3 November 2017 concerning maintenance of the  
European Patent No. 1431758 in amended form**

**Composition of the Board:**

**Chairwoman** M. Pregetter  
**Members:** T. Sommerfeld  
R. Romandini

## **Summary of Facts and Submissions**

- I. European patent 1 431 758 is based on application 02772957.3, which was filed as international application published as WO 2003/029804. The patent is entitled "Measurement instrument and concentration measurement apparatus" and was granted with 8 claims.
- II. Opposition was filed against the granted patent, the opponent requesting revocation of the patent in its entirety on the grounds of lack of novelty and inventive step (Articles 54(2) and 56 EPC and Article 100(a) EPC), insufficiency of disclosure (Article 100(b) EPC) and added subject-matter (Article 100(c) EPC).
- III. By an interlocutory decision, the opposition division decided that the patent could be maintained in amended form on the basis of the claims of auxiliary request 6 filed 31 March 2017 (Articles 101(3)(a) and 106(2) EPC).
- IV. Both the patent proprietor and the opponent lodged an appeal against that decision.

With the statement of the grounds of appeal, the appellant-patent proprietor requested that the decision be set aside and that the patent be maintained on the basis of the main request or, alternatively according to the first to fourth auxiliary requests, all filed with the grounds of appeal.

With the statement of the grounds of appeal, the appellant-opponent requested that the decision be set aside and the patent revoked in its entirety.

- V. Summons for oral proceedings before the board were issued, followed by a communication pursuant to Article 15(1) RPBA, providing the board's preliminary opinion on some issues.
- VI. By letter dated 14 September 2021, the appellant-patent proprietor stated that they withdrew all requests in connection with the patent and withdrew approval of the granted text in any form, and requested revocation of the patent.

### **Reasons for the Decision**

1. Under Article 113(2) EPC, the European Patent Office shall decide upon the European patent only in the text submitted to it, or agreed, by its proprietor.
2. By disapproving the granted text of the patent and withdrawing all pending requests, the appellant-patent proprietor has withdrawn its approval of any text for maintenance of the patent. Hence, there is no approved text of the patent on the basis of which the board can decide on the appeal.
3. In these circumstances according to established case law the patent must be revoked without further substantive examination as to patentability (see decision T 73/84, OJ EPO 1985, 241 and Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019, section IV.D.2). The board has no reason to deviate from this case law.

**Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairwoman:



M. Schalow

M. Pregetter

Decision electronically authenticated