

**Internal distribution code:**

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

**Datasheet for the decision  
of 2 September 2021**

**Case Number:** T 0728/18 - 3.3.01

**Application Number:** 10722215.0

**Publication Number:** 2416774

**IPC:** A61K31/4709, A61P35/00

**Language of the proceedings:** EN

**Title of invention:**

TREATMENT REGIMEN UTILIZING NERATINIB FOR BREAST CANCER

**Patent Proprietor:**

Wyeth LLC

**Opponent:**

Hexal AG

**Headword:**

Neratinib/WYETH

**Relevant legal provisions:**

EPC Art. 113(2)

**Keyword:**

Agreement to text withdrawn by patent proprietor - patent revoked

**Decisions cited:**

T 0073/84



**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 0728/18 - 3.3.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.01**  
**of 2 September 2021**

**Appellant:** Hexal AG  
(Opponent) Industriestrasse 25  
83607 Holzkirchen (DE)

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

**Respondent:** Wyeth LLC  
(Patent Proprietor) 235 East 42nd Street  
New York, NY 10017 (US)

**Representative:** Jones Day  
Rechtsanwälte, Attorneys-at-Law, Patentanwälte  
Prinzregentenstrasse 11  
80538 München (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 8 January 2018  
rejecting the opposition filed against European  
patent No. 2416774 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairwoman** T. Sommerfeld  
**Members:** J. Molina de Alba  
R. Romandini

## **Summary of Facts and Submissions**

- I. The decision under appeal is the opposition division's decision rejecting the opposition filed against European patent No. 2 416 774.
- II. The opponent (appellant) filed an appeal requesting that the decision be set aside and the patent be revoked.
- III. In its reply to the statement of grounds of appeal, the patent proprietor (respondent) requested that the appeal be dismissed, implying that the patent be maintained as granted (main request).  
  
In subsequent letters, the respondent filed claim sets as auxiliary requests.
- IV. The board summoned the parties to oral proceedings and gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA 2020.
- V. With the parties' agreement, oral proceedings were held as a videoconference on 2 September 2021. During the oral proceedings, the respondent withdrew all its auxiliary requests and its consent to the text in which the patent had been granted.
- VI. At the end of the oral proceedings the board's decision was announced.

## **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 respondent 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, it is established case law that 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

T. Sommerfeld

Decision electronically authenticated