

**Internal distribution code:**

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

**Datasheet for the decision  
of 6 February 2023**

**Case Number:** T 0252/19 - 3.3.08

**Application Number:** 11736497.6

**Publication Number:** 2591114

**IPC:** C12N15/86, A61K39/00

**Language of the proceedings:** EN

**Title of invention:**

Immunisation of large mammals with low doses of RNA

**Patent Proprietor:**

GlaxoSmithKline Biologicals SA

**Opponents:**

Janssen Vaccines & Prevention B.V.  
Bayer Intellectual Property GmbH/Bayer Pharma  
Aktiengesellschaft/Bayer Animal Health GmbH  
Müller, Christian Stefan Gerd

**Headword:**

Immunisation of large mammals/GlaxoSmithKline Biologicals

**Relevant legal provisions:**

EPC Art. 113(2), 116(1)

**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Basis of decision - text or agreement to text withdrawn by  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**

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 0252/19 - 3.3.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.08**  
**of 6 February 2023**

**Appellant I:** GlaxoSmithKline Biologicals SA  
(Patent Proprietor) Rue de l'Institut 89  
1330 Rixensart (BE)

**Representative:** Thornley, Rachel Mary  
GlaxoSmithKline  
Global Patents (CN925.1)  
980 Great West Road  
Brentford, Middlesex TW8 9GS (GB)

**Appellant II:** Janssen Vaccines & Prevention B.V.  
(Opponent 1) Archimedesweg 4  
2333 CN Leiden (NL)

**Representative:** Mewburn Ellis LLP  
Aurora Building  
Counterslip  
Bristol BS1 6BX (GB)

**Appellant III:** Bayer Intellectual Property GmbH/Bayer Pharma  
(Opponent 2) Aktiengesellschaft/Bayer Animal Health GmbH  
Alfred-Nobel-Str. 10/Müllerstr. 178/  
Kaiser-Wilhelm-Allee 10/  
40789 Monheim am Rhein/13353 Berlin/  
51373 Leverkusen/DE (DE)

**Representative:** Cohausz & Florack  
Patent- & Rechtsanwälte  
Partnerschaftsgesellschaft mbB  
Bleichstraße 14  
40211 Düsseldorf (DE)

**Appellant IV:** Müller, Christian Stefan Gerd  
(Opponent 3) ZSP Patentanwälte PartG mbB  
Hansastraße 32  
80686 München (DE)

**Decision under appeal:**        **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
27 November 2018 concerning maintenance of the  
European Patent No. 2591114 in amended form**

**Composition of the Board:**

**Chairman**                    T. Sommerfeld  
**Members:**                  M. Montrone  
                                  D. Rogers

## **Summary of Facts and Submissions**

- I. The patent proprietor (appellant I), and opponents 1 to 3 (appellants II to IV, respectively) lodged an appeal against the interlocutory decision of an opposition division finding that the European patent No. 2 591 114 as amended according to auxiliary request 3 met the requirements of the EPC.
- II. The appellants reciprocally replied to the other appeals.
- III. Appellant I requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or, alternatively, on the basis of one of the filed auxiliary requests.
- IV. Appellants II to IV requested that the decision under appeal be set aside and the patent be revoked.
- V. The board summoned the parties to oral proceedings in accordance with their requests.
- VI. With a letter dated 3 February 2023 appellant I informed the board as follows:

*"We hereby withdraw the appeal. We also withdraw all auxiliary requests, including auxiliary request 3 as upheld by the opposition division. We disapprove all texts of the patent on file".*

## **Reasons for the Decision**

1. The appeals of the parties comply with the requirements of Articles 106 to 108 EPC and the further provisions referred to in Rule 99 EPC and are admissible.
2. Pursuant to Article 113(2) EPC the European Patent Office shall examine, and decide upon the European patent application or the European patent only in the text submitted to it, or agreed, by the applicant or the proprietor of the patent.
3. Since the text of the patent is at the disposition of the patent proprietor (appellant I), their patent cannot be maintained against their will. In the present case the patent proprietor (appellant I) withdrew their approval of the text of the patent as granted. By withdrawing their auxiliary requests, they also unequivocally withdrew their approval of the text of the patent as amended according to any of these requests. Consequently, there is no longer any text of the patent in the proceedings which the board can consider for compliance with the requirements of the EPC.
4. It is established case law that in the present circumstances 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, 10th edition 2022, section IV.D.2). The board has no reason to deviate from this consistent approach of the Boards of Appeal, with the consequence that the patent is to be revoked.

5. Revocation of the patent complies likewise with the requests of the appealing opponents (appellants II to IV). The present decision can therefore be taken without holding oral proceedings (Article 116(1) EPC).

## 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:



L. Malécot-Grob

T. Sommerfeld

Decision electronically authenticated