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**Datasheet for the decision
of 22 November 2022**

Case Number: T 0565/21 - 3.3.04

Application Number: 11734694.0

Publication Number: 2526963

IPC: A61K39/00, A61K9/08, A61K9/19,
A61K47/18, A61K47/26

Language of the proceedings: EN

Title of invention:
Stabilized Antibody-Containing Liquid Formulations

Patent Proprietor:
Chugai Seiyaku Kabushiki Kaisha

Opponent:
Hexal AG

Headword:
Antibody formulation/CHUGAI

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Basis of decision - text or agreement to text withdrawn by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, T 0186/84, T 0655/01, T 1526/06, T 2405/12,
T 1389/18



Beschwerdekammern

Boards of Appeal

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Case Number: T 0565/21 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 22 November 2022

Appellant: Chugai Seiyaku Kabushiki Kaisha
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Appellant: Hexal AG
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
12 March 2021 concerning maintenance of the
European Patent No. 2526963 in amended form.**

Composition of the Board:

Chairwoman M. Pregetter
Members: O. Lechner
L. Bühler

Summary of Facts and Submissions

- I. The appeals of the patent proprietor and the opponent lie from the decision of the opposition division that European patent No. 2 526 963 amended in the form of auxiliary request 2, and the invention to which it relates, meets the requirements of the EPC.
- II. The board summoned the parties to oral proceedings as requested and informed them of its preliminary opinion in a communication pursuant to Article 15(1) RPBA.
- III. Oral proceedings before the board took place on 22 November 2022.

During the oral proceedings, the patent proprietor

- withdrew its consent and agreement under Article 113(2) EPC to the text of the patent as granted,
- also withdrew all its pending requests, and
- indicated that it would not be filing a replacement text.

At the end of the oral proceedings, the Chairwoman announced the board's decision.

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 patent proprietor. This principle has to be strictly observed also in opposition appeal proceedings.

2. The patent proprietor no longer approves the text in which the patent was granted or as amended by way of any of the claim requests on file and explicitly states that no new requests will be filed.

By disapproving the text in which the patent was granted or as amended by way of any of the claim requests on file and explicitly stating that no new requests will be filed, the patent proprietor has withdrawn its approval of any text for maintenance of the patent. 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.

There is therefore no text of the patent on the basis of which the board can consider the appeal filed by the opponent.

3. In the case of T 73/84 (see Headnote and Reasons), the board decided that if the proprietor of a European patent stated in opposition or appeal proceedings that it no longer approved the text in which the patent was granted, and did not submit any amended text, the patent was to be revoked. This approach was confirmed *inter alia* by decisions T 186/84, T 655/01, T 1526/06, T 2405/12 and T 1389/18.
4. Furthermore, as clarified in decision T 186/84, the examination as to whether the grounds for opposition laid down in Article 100 EPC prejudice the maintenance of the patent becomes not merely superfluous but impossible since the absence of a valid text of the patent precludes any substantive examination of the alleged impediments to patentability.

5. In the circumstances of the present case, the board sees no reasons for deviating from the principles set out in the above-mentioned decisions. The patent must therefore be revoked, without a substantive examination first being carried out.

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:



I. Aperribay

M. Pregetter

Decision electronically authenticated