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**Datasheet for the decision  
of 26 August 2024**

**Case Number:** T 1282/22 - 3.3.04

**Application Number:** 14716752.2

**Publication Number:** 3116535

**IPC:** A61K39/00, A61K39/39,  
A61K39/395, C07K16/28,  
A61P35/00

**Language of the proceedings:** EN

**Title of invention:**

Combination of vaccination and OX40 agonists

**Patent Proprietor:**

CureVac SE

**Opponent:**

BioNTech SE

**Headword:**

Vaccination and OX40 agonists/CUREVAC

**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Basis of decision - text or agreement to text withdrawn by  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 0186/84, T 0646/08, T 2434/18, T 0073/84



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 1282/22 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 26 August 2024**

**Appellant:** BioNTech SE  
(Opponent) An der Goldgrube 12  
55131 Mainz (DE)

**Representative:** Thomann, William John  
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**Respondent:** CureVac SE  
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**Representative:** Graf von Stosch, Andreas  
Graf von Stosch  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
22 March 2022 concerning maintenance of the  
European Patent No. 3 116 535 in amended form**

**Composition of the Board:**

**Chairman** B. Rutz  
**Members:** A. Chakravarty  
R. Romandini

## **Summary of Facts and Submissions**

- I. The opponent (appellant) filed an appeal against the interlocutory decision of the opposition division that European patent No 3 116 535, as amended in the form of the main request, met the requirements of the EPC. The patent proprietor is respondent to this appeal.
- II. The board appointed oral proceedings.
- III. In a letter dated 14 August 2024, the respondent withdrew consent to the text of the patent as granted according to Article 113(2) EPC. Additionally, the respondent declared that it would not file a replacement text and withdrew all pending requests.
- IV. The oral proceedings, appointed for 9 October 2024, were cancelled.

## **Reasons for the Decision**

1. Under 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.
2. It follows that the patent cannot be maintained against the will of the respondent (patent proprietor) as expressed in its statement in the letter dated 14 August 2024 (point III. above).
3. In the case in hand, the patent proprietor withdrew its approval of the text of the patent as granted. By

withdrawing all requests, it also unequivocally withdrew its approval of the text of the patent as amended according to any of the auxiliary requests. There is therefore no longer any text of the patent in the proceedings which the board can consider for compliance with the requirements of the EPC, so that it is no longer possible to take a decision as to substance (see e.g. decisions T 186/84, OJ 1986, 79, Reasons 5; T 646/08, Reasons 4 and T 2434/18, Reasons 4).

4. It is established case law that in the present circumstances the decision under appeal must be set aside and the patent 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, sections III.B.3.3 and IV.D.2).
5. Revocation of the patent complies with the request of the appellant. The present decision can therefore be taken without holding oral proceedings (Article 116(1) EPC and Article 12(8) RPBA 2020).

## **Order**

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

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

The Registrar:

The Chairman:



K. Boelicke

B. Rutz

Decision electronically authenticated