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**Datasheet for the decision  
of 17 February 2025**

**Case Number:** T 1633/22 - 3.3.04

**Application Number:** 15778927.2

**Publication Number:** 3206666

**IPC:** A61K31/198, A61K31/519,  
A61P35/00, A61K9/00, A61K47/10,  
A61K47/18

**Language of the proceedings:** EN

**Title of invention:**

LIQUID PHARMACEUTICAL COMPOSITION COMPRISING PEMETREXED

**Patent Proprietor:**

Synthon B.V.

**Opponent:**

Larsen & Birkeholm A/S

**Headword:**

Pemetrexed/Synthon B.V.

**Relevant legal provisions:**

EPC Art. 104(1)  
RPBA 2020 Art. 16(1)

**Keyword:**

Apportionment of costs - (no)

**Decisions cited:**

T 0040/17, T 1310/19, T 1484/19, T 1549/22



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Case Number: T 1633/22 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 17 February 2025**

**Appellant:** Larsen & Birkeholm A/S  
(Opponent) Banegårdspladsen 1  
1570 Copenhagen V (DK)

**Representative:** Larsen & Birkeholm A/S  
Banegårdspladsen 1  
1570 Copenhagen V (DK)

**Respondent:** Synthon B.V.  
(Patent Proprietor) Microweg 22  
6545 CM Nijmegen (NL)

**Representative:** Hamm&Wittkopp Patentanwälte PartmbB  
Jungfernstieg 38  
20354 Hamburg (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 2 May 2022  
rejecting the opposition filed against European  
patent No. 3206666 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairwoman** M. Pregetter  
**Members:** R. Hauss  
L. Bühler

## **Summary of Facts and Submissions**

- I. The opponent appealed the decision of the opposition division rejecting the opposition against European patent No. EP 3 206 666.
- II. The board issued a summons to oral proceedings scheduled for 8 November 2024, followed by a communication pursuant to Article 15(1) RPBA dated 9 October 2024.
- III. By letter dated 1 November 2024, the appellant (opponent) withdrew its appeal.
- IV. The board cancelled the oral proceedings.
- V. With a letter dated 6 November 2024, the respondent (patent proprietor) requested under Article 16(1)(e)RPBA that the opponent be ordered to bear the costs of the patent proprietor and its representative for preparing the oral proceedings scheduled for 8 November 2024.
- VI. On 18 November 2024, the board issued a communication under Article 100(2) EPC giving a negative preliminary opinion on the request for apportionment of costs. It set a time limit of two months for the parties to comment.
- VII. By letter dated 17 January 2025, the appellant agreed with the board's preliminary opinion, provided further arguments and requested that the respondent's request for apportionment of costs be refused.

VIII. No reply was received from the respondent within the time limit set.

### **Reasons for the Decision**

#### *Power of the board to decide on ancillary matters*

1. The withdrawal of an appeal immediately terminates the proceedings on the merits (without a decision as to substance), but the board still has the power (and duty) to decide on the apportionment of costs as an ancillary matter (T 1484/19 of 4 July 2023, point 1.2; T 1549/22, point 5).

#### *Oral proceedings not required*

2. In its communication dated 18 November 2024, the board indicated that it planned to arrange for oral proceedings to hear the parties on any contentious matter regarding the respondent's request for apportionment of costs and to decide on that matter. However, as the respondent did not submit any comments on the board's preliminary opinion and as neither party requested oral proceedings, the conduct of oral proceedings is considered neither necessary nor expedient. The board is therefore in a position to decide in writing (Article 12(8) RPBA).

#### *Request for apportionment of costs*

3. Article 104(1) EPC provides that each party bears its own costs. Departing from this principle requires special circumstances which make it equitable to award costs against one of the parties.

4. The respondent relied on Article 16(1)(e) RPBA, i.e. an abuse of procedure. It argued that the late withdrawal was unjustified since there were no further submissions from the parties after the statement of grounds of appeal and the reply thereto. Despite this "clear and concise situation", the appellant did not withdraw its appeal until seven days before the oral proceedings. Moreover, the appellant did not inform the respondent's representative.
  
5. The board of appeal is unable to see anything that points to improper conduct of proceedings or even abuse of procedure, either in the timing of the withdrawal of the appeal or in the conduct of the appeal proceedings by the appellant, which would justify a different allocation of costs.
  - 5.1 The respondent's reference to a "clear and concise situation" seems to imply that the appeal was hopeless and that the appellant knew this. However, an appeal of limited extent is not necessarily indicative of bad faith. Rather than supporting an allegation of abuse of procedure, the presentation of an appeal case that is - in the words of the respondent - "clear and concise" and remains within the framework of the contested decision is in conformity with Article 12(2) and (3) RPBA.
  
  - 5.2 The respondent also seems to suggest that the appellant had no reasonable expectation of success with its appeal and waited until the very last moment to withdraw it. However, if the respondent had considered the appeal to be frivolous or vexatious, there would have been no need for it to reply in detail to the appeal or to prepare for oral proceedings. Rather, the respondent could have relied on the decision under

appeal and requested that the appeal be dismissed. However, from what is on file, it appears that the respondent took the appeal as a serious threat to its patent and considered its attendance at the oral proceedings to be necessary.

5.3 The respondent seems, moreover, to argue that there was no further development after the filing of the reply to the appeal that could justify a withdrawal of the appeal at that very late stage of the proceedings. The respondent seems to imply that the appellant had deliberately delayed the withdrawal, knowing that the respondent had to prepare for the oral proceedings. While it is true that the board did not give a clearly positive or negative preliminary opinion regarding the possible success of the appeal, the board's communication dated 9 October 2024 nevertheless addressed the contentious issue of the starting point for the assessment of inventive step (point 4.5 *et seq.*), discussed in detail the objective technical problem (point 4.11 *et seq.*) and gave guidance for the discussion at the oral proceedings. The purpose was precisely to allow the parties to reconsider their arguments. It cannot therefore be said that the board's communication gave no reason for a withdrawal. Overall, there is nothing in the way the appellant conducted the appeal to suggest that a futile appeal had been filed with the intention of harming the respondent by delaying a final decision.

5.4 As regards the timing of the withdrawal, the board additionally notes that Rule 103(3)(a) and (4)(a) EPC provides for a partial reimbursement of the appeal fee in the case of a withdrawal of the appeal within one month of notification of a communication under Article 15(1) RPBA or even during oral proceedings.

The legislator has considered that the benefits derived by the board and by respondents to an appeal from the withdrawal of the appeal will offset the costs that they incur and has thus acknowledged the legitimacy of withdrawing an appeal at a very late stage of the appeal proceedings. Indeed, Rule 103(4)(a) EPC would be inoperable in *inter partes* proceedings if the withdrawal of an appeal at the end of oral proceedings automatically made it equitable to award costs against the appellant. Therefore, the withdrawal of an appeal shortly before the oral proceedings or even during such proceedings does not constitute, *per se*, a reason to impose costs on the party withdrawing its appeal in the absence of additional circumstances that amount to procedural misconduct or even an abuse of procedure (see T 40/17, points 3 and 5; T 1484/19 of 4 July 2023, point 1.8; T 1310/19, point 8; T 1549/22, point 8).

- 5.5 In the present case, the appeal was withdrawn within the period referred to in Rule 103(3)(a) EPC.
  
6. While the withdrawal saved time and/or expense not only for the board but also for the respondent, the board understands that the respondent could have avoided further expense if it had known earlier that the appellant had withdrawn its appeal. However, a lack of courtesy towards the adverse party does not amount to an abuse of procedure. In the absence of additional circumstances, it cannot be concluded that the appellant neglected the level of care towards the respondent that can be reasonably expected of it.



7. For the above reasons, the request for apportionment of costs is to be refused.

## Order

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

The request for apportionment of costs is refused.

The Registrar:

The Chairwoman:



I. Aperribay

M. Pregetter

Decision electronically authenticated