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**Datasheet for the decision  
of 11 July 2011**

**Case Number:** T 0397/11 - 3.3.09

**Application Number:** 99957002.1

**Publication Number:** 1106073

**IPC:** A23G 1/00

**Language of the proceedings:** EN

**Title of invention:**

Cocoa powder rich in polyphenols, process for producing the same and modified cocoa containing the same

**Patentee:**

Meiji Seika Kaisha Ltd.

**Opponents:**

Barry Callebaut AG  
NESTEC S.A.  
Mars Incorporated

**Headword:**

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**Relevant legal provisions:**

EPC Art. 104(1), 113(2)  
EPC R. 103(1)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"No text agreed by the patentee - revocation of the patent"  
"Apportionment of costs - no"  
"Reimbursement of appeal fee - no"

**Decisions cited:**

T 0601/98

**Catchword:**

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Case Number: T 0397/11 - 3.3.09

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.09  
of 11 July 2011

**Appellant:**  
(Opponent 01)

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**Representative:**

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**Respondent:**  
(Patent Proprietor)

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**Representative:**

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**Party as of right:**  
(Opponent 02)

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**Representative:**

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**Party as of right:**  
(Opponent 03)

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**Representative:**

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**Decision under appeal:** Interlocutory decision of the Opposition Division of the European Patent Office posted 25 November 2010 concerning maintenance of European patent No. 1106073 in amended form (Article 101(3)(a) EPC).

**Composition of the Board:**

**Chairman:** W. Sieber  
**Members:** J. Jardón Álvarez  
K. Garnett

## Summary of Facts and Submissions

- I. In its interlocutory decision posted 25 November 2010, the opposition division decided that European patent No. 1 106 073 could be maintained in amended form according to Article 101(3)(a) EPC.
- II. Opponent 01, Barry Callebaut AG, (appellant) lodged an appeal against this decision on 4 February 2011 and paid the appeal fee on the same day. In its notice of appeal, the appellant requested that:
- "1. the Interlocutory Decision dated November 25, 2010 be set aside and the patent No. 1 106 073 (99 957 002.1-1221) be revoked in its entirety.
  2. oral proceedings be held in case that there is no Decision according to item 1."
- III. By letter dated 23 March 2011, the patent proprietor (respondent), Meiji Seika Kaisha, Ltd, stated that:
- "Patentee no longer approves the text in which the patent was maintained by the Opposition Division with its decision of November 25, 2010. Accordingly, the revocation of the patent is requested."
- IV. The statement of grounds of appeal of the appellant was filed on 4 April 2011.
- V. By letter dated 12 April 2011, the appellant requested apportionment of costs according to Article 104 EPC, in conjunction with Article 111(1) EPC and Rule 100(1) EPC.
- VI. In a communication dated 23 May 2011 pursuant to Rule 100(2) EPC the board informed the parties that having regard to the request of the patent proprietor

the appeal proceedings were to be terminated by a decision ordering the setting aside of the decision and revocation of the patent, without going into the substantive issues. The board also noted that it did not consider that a different apportionment of costs by reasons of equity as set out in Article 104(1) EPC was justified and asked the appellant whether under these circumstances it wished oral proceedings to be held to discuss the issue of a different apportionment of costs.

VII. By letter dated 30 May 2011, the appellant withdrew its request for oral proceedings but maintained the request for a different apportionment of costs. The appellant further requested that the appeal fee be reimbursed.

VIII. The arguments of the appellant, insofar as they are relevant for the present decision, can be summarized as follows:

- The appellant argued that the costs for the preparation of the statement setting out the grounds of appeal could have been avoided if the respondent had requested the revocation of the patent earlier in the proceedings. In its opinion, it was a party's duty of care to avoid unnecessary costs being incurred by the other party.
- The reimbursement of the appeal fee was equitable because no examination of the substantive issues by the board of appeal was necessary in this case.

## Reasons for the Decision

1. The appeal is admissible.
  
2. *Disapproval of the text (Article 113(2) EPC)*

Article 113(2) EPC requires that the EPO may decide upon the European patent only in the text submitted to it, or agreed by the proprietor of the patent.

Agreement cannot be held to be given if the proprietor, without submitting an amended text, expressly states that he no longer approves the text of the patent as granted or previously amended. In such a situation a substantive requirement for maintaining the patent is lacking and the proceedings are to be terminated by a decision ordering revocation, without going into the substantive issues (see, for instance T 601/98).

3. *Apportionment of costs (Article 104 EPC)*

3.1 The appellant requested an apportionment of the costs incurred by it during the preparation of the statement of grounds of appeal. It argued that these costs could have been avoided if the respondent had filed its request to revoke the patent earlier.

3.2 Under Article 104(1) EPC, each party to the opposition proceedings shall in general bear the costs it has incurred. The board cannot recognise any basis for ordering a different apportionment of costs in the circumstances of the present case. A departure from the principle of each party to proceedings bearing his own costs requires special circumstances, such as improper

behaviour, which makes it equitable to award costs against one of the parties.

3.3 In the present case, such circumstances do not arise from the respondent's conduct in the appeal proceedings. In fact the request for revoking the patent was filed at an early stage of the appeal proceedings and it has saved the appellant possible costs relating to oral proceedings.

3.4 Nothing in the EPC prevents a patentee from requesting a revocation of its own patent at any stage of the procedure. Such request is not a culpable or improper conduct and as such cannot be a factor in assessing whether reasons of equity exist in accordance with Article 104(1) EPC.

4. *Reimbursement of the appeal fee (Rule 103 EPC)*

4.1 According to Rule 103(1) EPC, the appeal fee shall be reimbursed where the board of appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation, or if the appeal is withdrawn before the filing of the statement of grounds of appeal and before the period for filing that statement has expired.

4.2 The appellant did not give any reasons why the reimbursement would be equitable by reasons of a substantial procedural violation, as required by Rule 103(1) EPC. Nor does the board perceive any such reasons.



4.3 Since in the present case Rule 103(1)b EPC is not applicable either, as the appeal has not been withdrawn, there is no legal basis for a reimbursement of the appeal fee.

4.4 The fact that no examination of the substantive issues was necessary is not in itself a reason for the reimbursement of the appeal fee.

### **Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for an apportionment of costs is refused.
4. The request for reimbursement of the appeal fee is refused.

The Registrar

The Chairman

G. Röhn

W. Sieber