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**Datasheet for the decision  
of 17 January 2017**

**Case Number:** T 2117/12 - 3.3.04

**Application Number:** 06754596.2

**Publication Number:** 1896062

**IPC:** A61K39/095, A61K39/102,  
A61K39/116

**Language of the proceedings:** EN

**Title of invention:**  
Immunogenic composition

**Patent Proprietor:**  
GlaxoSmithKline Biologicals S.A.

**Opponents:**  
Sanofi Pasteur, Inc.  
Novartis Vaccines and Diagnostics, Inc. (opposition withdrawn)

**Headword:**  
Immunogenic composition/GLAXOSMITHKLINE

**Relevant legal provisions:**  
EPC Art. 113(2)

**Keyword:**  
Basis of decision - agreement to text withdrawn by patent proprietor

**Decisions cited:**

T 0073/84

**Catchword:**



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

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Case Number: T 2117/12 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 17 January 2017**

**Appellant I:** GlaxoSmithKline Biologicals S.A.  
(Patent Proprietor) rue de l'Institut 89  
1330 Rixensart Brussels (BE)

**Representative:** Johnston, Caroline Louise  
GlaxoSmithKline  
Global Patents (CN925.1)  
980 Great West Road  
Brentford, Middlesex TW8 9GS (GB)

**Appellant II:** Sanofi Pasteur, Inc.  
(Opponent 01 ) 1 Discovery Drive  
Knerr Building 1  
Swiftwater PA 18370 (US)

**Representative:** Bösl, Raphael Konrad  
Isenbruck Bösl Hörschler LLP  
Patentanwälte  
Prinzregentenstraße 68  
81675 München (DE)

**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
17 July 2012 concerning maintenance of the  
European Patent No. 1896062 in amended form.

**Composition of the Board:**

**Chairman**            B. Claes  
**Members:**            R. Morawetz  
                             M. Blasi

## **Summary of Facts and Submissions**

- I. Appeals were lodged by the proprietor (hereinafter appellant I), opponent 01 (hereinafter appellant II) and opponent 02 (hereinafter appellant III) against the interlocutory decision of the opposition division concerning maintenance of European patent No. 1896062 in amended form.
- II. The opposition division decided that the subject-matter of the claims of the patent as granted (main request) and of auxiliary requests 1 and 2 lacked an inventive step. The claims of auxiliary request 3 were found to comply with the EPC.
- III. With its statement of grounds of appeal appellant I maintained the main request and auxiliary requests 1 to 3 as filed before the opposition division.
- IV. With its response to the statements of grounds of appeal of appellants II and III, appellant I submitted further auxiliary requests 4 to 8.
- V. Appellant III withdrew, with a letter dated 9 March 2015, its opposition against the patent in suit and its appeal against the opposition division's decision.
- VI. The board summoned the parties to oral proceedings and informed them of its preliminary opinion in a communication pursuant to Article 15(1) Rules of Procedure of the Boards of Appeal (RPBA). Appellant II informed the board with letter dated 24 October 2016 that it would not attend the oral proceedings.

- VII. With a letter dated 9 January 2017 appellant I filed further auxiliary requests 9 to 19.
- VIII. Oral proceedings were held on 17 January 2017 in the absence of appellant II. After the board had given its opinion on the requests, appellant I declared that it withdrew its approval to the text of the patent as granted and as amended according to any auxiliary request. Appellant II had requested in writing that the decision under appeal be set aside and that the patent be revoked. At the end of the oral proceedings the chairman announced the decision of the board.

## **Reasons for the Decision**

### *Procedural issues*

1. The board decided to continue the appeal proceedings in the absence of the duly summoned appellant II in accordance with Rule 115(2) EPC and Article 15(3) RPBA.
2. In view of its withdrawal of the opposition and appeal, appellant III ceased to be a party to the appeal proceedings as regards substantive issues. Other issues for which appellant III would have remained a party did not arise in the present case.

### *Disapproval of the text of the patent by the patent proprietor*

3. Pursuant to Article 113(2) EPC the EPO shall examine, and decide upon, the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.

4. Such an agreement does not exist if the proprietor - as in the present case - expressly states that it no longer approves the text as granted and as amended according to any auxiliary request.
  
5. There is therefore no text of the patent on the basis of which the board can consider the appeal. It is established case law that in these circumstances the patent must be revoked without further substantive examination (see decision T 73/84, OJ EPO 1985, 241 and Case Law of the Boards of Appeal of the EPO, 8th edition 2016, section IV.C.5.2).

**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:



N. Schneider

B. Claes

Decision electronically authenticated