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**Datasheet for the decision  
of 15 February 2017**

**Case Number:** T 0626/13 - 3.3.02

**Application Number:** 06851224.3

**Publication Number:** 1920248

**IPC:** G01N33/50

**Language of the proceedings:** EN

**Title of invention:**  
CLOSTRIDIAL TOXIN ACTIVITY ASSAYS

**Patent Proprietor:**  
ALLERGAN, INC.

**Opponent:**  
Merz Pharma GmbH & Co. KGaA

**Headword:**  
Lapse of the patent/ALLERGAN

**Relevant legal provisions:**  
EPC R. 84(1), 100(1)

**Keyword:**  
Lapse of patent in all designated states - termination of  
appeal proceedings

**Decisions cited:**

T 0329/88, T 0165/95, T 0749/01, T 0043/02, T 0289/06

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 0626/13 - 3.3.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.02**  
**of 15 February 2017**

**Appellant:** Merz Pharma GmbH & Co. KGaA  
(Opponent) Eckenheimer Landstrasse 100  
60318 Frankfurt/Main (DE)

**Representative:** Herzog, Fiesser & Partner Patentanwälte PartG  
mbH  
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80331 München (DE)

**Respondent:** ALLERGAN, INC.  
(Patent Proprietor) 2525 Dupont Drive  
Irvine, CA 92612 (US)

**Representative:** Hoffmann Eitle  
Patent- und Rechtsanwälte PartmbB  
Arabellastraße 30  
81925 München (DE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
15 January 2013 concerning maintenance of the  
European Patent No. 1920248 in amended form.**

**Composition of the Board:**

**Chairman** A. Lindner  
**Members:** T. Sommerfeld  
L. Bühler

## **Summary of Facts and Submissions**

- I. The opponent lodged an appeal against the interlocutory decision of the opposition division posted on 15 January 2013 on the amended form in which European patent No. 1 920 248 can be maintained.
- II. By communication of the Board of 27 September 2016, the parties' attention was drawn to the fact that the patent had lapsed with effect for all designated Contracting States. Pursuant to Rules 84(1) and 100(1) EPC, the appellant was invited to inform the board, within four months from notification of the communication, whether it requested a continuation of the appeal proceedings. The parties were informed that if no request for continuation of proceedings was received in due time, the appeal proceedings would be discontinued.
- III. No reply was received within the set time period.

## **Reasons for the Decision**

1. Rule 84(1) EPC provides that if "*the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States, the opposition proceedings may be continued at the request of the opponent filed within two months of a communication from the European Patent Office informing him of the surrender or lapse*". According to Rule 100(1) EPC, Rule 84(1) EPC also applies in opposition-appeal proceedings.
2. If no request for continuation of the proceedings is filed within the set time period and the state of the file gives no grounds for the proceedings to be

continued by the board on its own motion, the appeal proceedings are terminated (see decisions T 329/88 of 22 June 1993; T 165/95 of 7 July 1997; T 749/01 of 23 August 2002; T 436/02 of 25 June 2004; T 289/06 of 17 December 2007).

3. In the present case, the notification of the lapse within the meaning of Rule 84(1) EPC was sent to the appellant-opponent on 27 September 2016. Thus, the period of four months for requesting continuation of the appeal proceedings ended on 7 February 2017 (Rule 126(2) EPC). No request for continuation of the appeal proceedings was received within the set time period. Hence, the appeal proceedings are to be terminated.

## Order

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

The appeal proceedings are terminated.

The Registrar:

The Chairman:



N. Maslin

A. Lindner

Decision electronically authenticated