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**Datasheet for the interlocutory decision
of 14 March 2017**

Case Number: T 1889/13 - 3.3.10

Application Number: 02790278.2

Publication Number: 1458425

IPC: A61L24/10, A61L24/04,
B01F13/00, B01F15/02,
B65D25/08, A61K9/00, B01F3/12,
A61L33/12

Language of the proceedings: EN

Title of invention:

A HEMOSTATIC KIT, A METHOD OF PREPARING A HEMOSTATIC AGENT AND
A METHOD OF PROMOTING HEMOSTASIS

Patent Proprietor:

Ferrosan Medical Devices A/S

Opponent:

Baxter Innovations GmbH

Headword:

Relevant legal provisions:

EPC Art. 24(3), 24(4)

Keyword:

"Partiality of two board members (no)"

Decisions cited:

G 0001/05, G 0002/08, J 0015/04, R 0002/12, T 1028/96,
T 1020/06, T 1676/11

Catchword:

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Case Number: T 1889/13 - 3.3.10

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.3.10
of 14 March 2017

Appellant: Ferrosan Medical Devices A/S
(Patent Proprietor) Sydmarken 5
2860 Søborg (DK)

Representative: Høiberg P/S
Adelgade 12
1304 Copenhagen K (DK)

Respondent: Baxter Innovations GmbH
(Opponent) Industriestrasse 67
1221 Wien (AT)

Representative: Sonn & Partner Patentanwälte
Riemergasse 14
1010 Wien (AT)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 5 July 2013
revoking European patent No. 1458425 pursuant to
Articles 101(2) and 101(3) (b) EPC.**

Composition of the Board:

Chairwoman J. Mercey
Members: J.-C. Schmid
F. Blumer

Summary of Facts and Submissions

- I. The appeal lies from the decision of the opposition division to revoke European patent No. 1 458 425.
- II. In its statement setting out the grounds of appeal, the appellant (patent proprietor) requested that the members of the board who were involved in decision T 1676/11 (not published in OJ EPO) relating to divisional application No. 09159082.8 of the opposed patent be excluded from taking part in the present appeal proceedings for suspected partiality under Article 24(3) EPC.

The members who took part in T 1676/11 and who are affected by the objection are the chairman and the rapporteur of the board in its original composition.

- III. In a communication dated 7 October 2014, the board in its original composition informed the parties that it tended to regard the objection under Article 24(3) EPC as admissible and asked the parties to state whether they were prepared to agree to the board taking a decision on its admissibility without oral proceedings.
- IV. The respondent (opponent), who had not provided any arguments against the admissibility of the appellant's objection, indicated such agreement, by letter dated 14 November 2014.
- V. In accordance with the procedure described in T 1028/96 (interlocutory decision of 15 September 1999, OJ EPO 2000, 475), the board in its original composition decided in the interlocutory decision of 20 May 2015 that the objection of suspected partiality on the part of two members of the original board was admissible.

VI. By order of 1 June 2015, the composition of the original board was changed in view of the decision on the admissibility of the partiality objection (Article 24(4) EPC).

VII. In a communication issued on 23 December 2016 and accompanying the summons for oral proceedings, the board in its altered composition took the preliminary position that the request for exclusion of the two board members should not be allowed.

VIII. The arguments of the appellant can be summarised as follows:

The critical issues of the present appeal were in essence the same as the critical issues in the previous appeal proceedings T 1676/11 concerning the divisional application, namely Article 123(2) EPC in view of the feature "void volume" and Article 56 EPC in view of the same closest prior art document.

The board members having decided the appeal for the divisional application would have difficulty in re-examining and deciding the present case without having a preconceived or anticipatory judgment or without giving rise to suspicion of such preconceived or anticipatory judgment. They would be forced to re-evaluate their own previous decision with respect to Articles 56 and 123(2) EPC.

Decision T 1028/96 established the criteria of "same subject-matter" and "same points of law" for the exclusion of board members. These criteria were met, which was also accepted by the opposition division in the first instance proceedings who repeatedly referred

to T 1676/11 and even rescheduled the planned oral proceedings to wait for the publication of the written decision in T 1676/11. The subject-matter and the points of law were not only similar, as was the case in T 1020/06 (see interlocutory decision of 28 November 2008, not published in OJ EPO), they were in fact identical.

IX. The arguments of the respondent can be summarised as follows:

Even though there were significant parallel technical and legal issues to T 1676/11, there was no *res iudicata* in the present case *vis-à-vis* T 1676/11.

The rejection of the feature "void volume" under Article 123(2) EPC and the identification of a certain document as closest prior art had been decided by the board in T 1676/11, by the examining division in the case underlying T 1676/11 and by the opposition division in the appealed decision in the present case. Any diligently acting board would decide said issues in the same manner.

The guidelines defined in J 15/04 (interlocutory decision of 30 May 2006, not published in OJ EPO) had to be appropriately applied with regard to Article 24(3) EPC.

X. The appellant requested that the members of the board who were involved in decision T 1676/11 relating to the divisional application no. 09159082.8 of the present patent be excluded from taking part in the present appeal proceedings for suspected partiality in accordance with Article 24(3) and 24(4) EPC.

- XI. The respondent stated in writing that the appellant's objection was unfounded. The board understood that the respondent requested that the objection under Article 24(3) and 24(4) be refused.
- XII. Oral proceedings were held on 14 March 2017 in the absence of the parties who had informed the board in their letters of 6 February 2017 and 14 February 2017, respectively, that they would not be represented at the oral proceedings. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

1. Scope of the interlocutory decision

The present decision was taken by the alternate board composition established under Article 24(4) EPC in order to decide on an objection of suspected partiality raised under Article 24(3) EPC (see above points II, VI). In accordance with the procedure described in decision T 1028/96, the board in its original composition decided in its interlocutory decision of 20 May 2015 that the objection was admissible (see above point V). Said interlocutory decision is binding on the present (alternate) board. The scope of the present decision is therefore limited to the allowability of the objection of suspected partiality.

2. Allowability of the objection

2.1 Legal basis of the objection

- 2.1.1 The appellant has not argued that there was any reason for exclusion under Article 24(1) EPC, nor does the present board see any basis for the application of

Article 24(1) EPC either. The appellant raised an objection for suspected partiality under Article 24(3) EPC only. Under Articles 24(3) and 24(4) EPC, the deciding board should apply a twofold test, namely:

- Firstly a "*subjective*" test "*in concreto*" requiring evidence of actual partiality of the member or members concerned;
- Secondly an "*objective*" test "*in abstracto*" to determine if the circumstances of a case would allow a reasonably objective and informed person to conclude that he or she might have good reason to suspect the partiality of the member concerned. (see G 2/08, interlocutory decision of 15 June 2009, not published in OJ EPO, Reasons point 4)

2.1.2 As far as the "subjective" test is concerned, the appellant has not alleged that there was actual partiality and the present board has no doubts about the personal impartiality of all members of the board in its original composition. The appellant's objections concern the "objective" test, namely the possibility that board members could give raise to an objectively justified fear of partiality due to their decision on similar legal and factual matters in an earlier case.

2.1.3 The Rules of Procedure of the Boards of Appeal (RPBA) and the business distribution scheme for the Technical Boards of Appeal do not foresee any obligation to arrange for non-overlapping boards where similar legal and factual issues have to be decided in different cases. To the contrary, Article 7 of the business distribution scheme foresees that where appeals pending before a board are closely linked, in particular by involving similar legal or factual questions, the Chairman may order that the board shall decide in the same composition (Business distribution scheme of the

Technical Boards of Appeal for the year 2013, Supplement to OJ EPO 1/2013, 12).

- 2.2 Possible conflicts between the Business Distribution Scheme and the desideratum of a detached board
 - 2.2.1 Both the composition of the board in T 1676/11 and the original composition in the present case were determined by the chairman of Board 3310 in accordance with Article 1(2) of the Rules of Procedure of the Boards of Appeal and the applicable business distribution scheme. Due to the identical classification of the applications underlying both the present appeal and T 1676/11, Board 3310 is competent for both cases which means that the members of the board in both cases had to be chosen from the members attributed to Board 3310.
 - 2.2.2 The appellant argued that a board should not be put in a position wherein its members are forced to either confirm or not their previous own judgment. However, the right to a lawful judge also includes the right to a judicial body having a foreseeable composition in accordance with a predetermined business distribution scheme. There may be unavoidable conflicts between the wish for a completely detached board and the requirements of the business distribution scheme from which deviations are allowed only in specific circumstances. In cases where three or more proceedings are related to each other (e.g. a parent and two divisional applications), it would normally be impossible to compose three non-overlapping boards within the business distribution scheme.
 - 2.2.3 In view of the potential conflicts with the business distribution scheme, the mere desire for a board which

has not encountered any of the relevant factual and legal issues in a related case cannot justify an obligation to appoint non-overlapping boards in cases concerning divisional and parent applications in the absence of specific facts which are sufficient to raise specific concrete doubts on the ability of the board members to hear the appeal with an objective judicial mind (see J 15/04, Reasons point 8).

2.2.4 It follows that practical considerations and the procedural framework not only gave rise to a provision in the business distribution scheme encouraging identical compositions in closely linked cases (see above point 2.1.3), but may even require that overlapping or identical board compositions are established in cases which may involve closely linked questions.

2.3 Specific circumstances in view of the suspicion of partiality

2.3.1 The right to object against a judge for reasons of suspicion of partiality is meant to prevent a judge being influenced in his or her decision making - be it deliberately or inadvertently - by extraneous considerations, prejudices and predilections, i.e. by considerations other than the arguments he or she considers as being factually and legally relevant for the case under consideration. A suspicion of partiality might arise where there are circumstances possibly justifying a suspicion of a tendency to favour one or more of the parties or to discriminate against one of them. However, any such suspicion must be based on the specific facts of the case. It cannot be justified merely by the submission that a legal question was already decided in a certain way in a prior decision

(see G 1/05, OJ EPO 2007, 362, Reasons point 23 with references to national laws).

2.3.2 There are no indications or evidence on file which may be used to rebut the assumption that all members of the original composition would decide on the merits of the present case in an unbiased manner. The two technically qualified members may have decided in a related case on similar technical and legal issues but they did not do so in such outspoken, extreme or unbalanced terms that it would preclude them from dealing with the present case with an open mind and without preconceived attitudes (see R 2/12, interlocutory decision of 26 September 2012, not published in OJ EPO, Reasons point 2.2; G 1/05, Reasons point 24).

2.4 Case law referred to by the appellant

2.4.1 In support of its argument that members of a board should not be put in a position where they are compelled to confirm or not to confirm their own previous judgment, the appellant relied, in particular, on decision T 1028/96. In this case, the board members who had decided the appeal proceedings leading to the grant of the patent had to be replaced in the opposition appeal proceedings, since the legal issues to be discussed in the opposition appeal proceedings were essentially the same as those relevant in the earlier ex-parte appeal proceedings. The board in T 1028/96 referred to Article 19(2) EPC which sets clear limits to overlaps between examining divisions and opposition divisions in the same file and took the position that such limitations should apply all the more to the second instance (T 1028/96, Reasons point 6.6). For the examining divisions assigned for a divisional and its parent application, no provisions

exist which limit overlaps between the examining divisions. Accordingly, the examining division in the present case consisted of the same examiners as the examining division for the divisional application underlying decision T 1676/11.

2.4.2 In the view of the present board, cases involving grant and opposition appeal proceedings for the same file have to be clearly distinguished from cases involving parent and divisional applications, and not only in view of Article 19(2) EPC. A board which has taken a specific decision in ex-parte appeal proceedings may be compelled to directly interfere with its own earlier decision if the same issues are relevant in opposition appeal proceedings (for example, if the same amendments were allowed under Article 123(2) EPC before grant and were attacked under Article 100(c) EPC in opposition). Certain decisions taken in the ex-parte appeal proceedings may formally restrict (i.e. under Article 123(3) EPC) the possible outcome of opposition appeal proceedings.

2.4.3 Such possible conflicts and limitations do not exist in the present case. The claims presently on file differ from the claims not allowed in T 1676/11, for example, in that the claims refused under T 1676/11 included product claims whereas the requests presently on file contain only process claims, the subject-matter of said process claims differing substantially from the process claims decided upon in T 1676/11. Furthermore, within the generally applicable procedural rules, the appellant may at any time file new requests and rely on new arguments or evidence, which may or may not be related to the issues decided in T 1676/11, but which may lead to issues being decided differently than in T 1676/11.

2.4.4 In view of the differences which already exist and/or may arise in the future proceedings between the facts of T 1676/11 and those of the present proceedings, in contrast to T 1020/06, the appellant's argument that the subject-matter and the points of law to be discussed in the two cases were identical, cannot hold.

2.5 For the above reasons, the board in its present (alternate) composition does not recognise any sufficient basis for a suspicion of partiality under the terms of Article 24(3) EPC. The request to exclude the members of the original composition who had taken part in T 1676/11 is therefore refused and the appeal proceedings will continue with the original composition of the board.

Order

For these reasons it is decided that:

The request to exclude two members of the original board from taking part in the present appeal proceedings is rejected.

The Registrar:

The Chairwoman:



C. Rodríguez Rodríguez

J. Mercey

Decision electronically authenticated