

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 17 November 2020**

**Case Number:** T 0777/15 - 3.3.01

**Application Number:** 02782507.4

**Publication Number:** 1330249

**IPC:** A61K31/496, C07D215/22,  
A61P25/18

**Language of the proceedings:** EN

**Title of invention:**

LOW HYGROSCOPIC ARIPIPRAZOLE DRUG SUBSTANCE AND PROCESSES FOR  
THE PREPARATION THEREOF

**Patent Proprietor:**

OTSUKA PHARMACEUTICAL CO., LTD.

**Opponents:**

Teva Pharmaceutical Industries Ltd.  
Fermion Oy  
Pharmaceutical Works POLPHARMA  
EGIS Gyógyszergyár Nyrt  
Ratiopharm GmbH

**Headword:**

Crystalline form of aripiprazole/OTSUKA

**Relevant legal provisions:**

EPC Art. 108, 113(2)

EPC R. 99(2), 101(1), 103(4)(c), 134(2), 134(4)

**Keyword:**

Basis of decision - text or agreement to text withdrawn by  
patent proprietor - patent revoked

Appellant-opponent 5: Admissibility of appeal - statement of  
grounds (not filed)

Appellant-opponent 5: partial reimbursement (no)

Appellant-opponent 2: partial reimbursement of appeal fee  
(yes) - 25%

**Decisions cited:**

T 0073/84, T 0186/84, T 0507/00, T 0545/10, T 1258/16

**Catchword:**



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

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 0777/15 - 3.3.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.01**  
**of 17 November 2020**

**Appellant:** Fermion Oy  
(Opponent 2) P.O. Box 28  
FIN-02101 Espoo (FI)

**Representative:** Uexküll & Stolberg  
Partnerschaft von  
Patent- und Rechtsanwälten mbB  
Beselerstraße 4  
22607 Hamburg (DE)

**Appellant:** Pharmaceutical Works POLPHARMA  
(Opponent 3) Pelplinska Str. 19  
83-200 Starogard Gdanski (PL)

**Representative:** Elkington and Fife LLP  
Prospect House  
8 Pembroke Road  
Sevenoaks, Kent TN13 1XR (GB)

**Appellant:** Ratiopharm GmbH  
(Opponent 5) Graf-Arco-Strasse 3  
89079 Ulm (DE)

**Representative:** D Young & Co LLP  
120 Holborn  
London EC1N 2DY (GB)

**Respondent:** OTSUKA PHARMACEUTICAL CO., LTD.  
(Patent Proprietor) 9, Kandatsukasa-cho 2-chome  
Chiyoda-ku  
Tokyo 101-8535 (JP)

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

**Party as of right:** Teva Pharmaceutical Industries Ltd.  
(Opponent 1) 5 Basel Street  
49131 Petah Tiqva (IL)

**Representative:** D Young & Co LLP  
120 Holborn  
London EC1N 2DY (GB)

**Party as of right:** EGIS Gyógyszergyár Nyrt  
(Opponent 4) 1106 Budapest  
Keresztúri út 30-38 (HU)

**Representative:** Stelmár & Partner  
Patentanwälte PartG mbB  
Blumenstraße 17  
80331 München (DE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
20 February 2015 concerning maintenance of the  
European Patent No. 1330249 in amended form**

**Composition of the Board:**

**Chairman** A. Lindner  
**Members:** G. Seufert  
M. Blasi

## **Summary of Facts and Submissions**

- I. In its interlocutory decision posted on 20 February 2015, the opposition division decided that European patent No. 1 330 249 in its amended form complied with the requirements of the EPC.
  
- II. Opponents 2, 3 and 5 (appellant-opponents 2, 3 and 5) duly filed notices of appeal against the decision of the opposition division, requesting revocation of the patent in suit in its entirety. Appellant-opponent 2 additionally requested oral proceedings. The appeal fees were duly paid. Appellant-opponents 2 and 3 filed their statements setting out the grounds of appeal by letters dated 17 June 2015 and 2 July 2015, respectively. In its letter, appellant-opponent 3 requested oral proceedings if the board intended to reach a decision other than setting aside the decision under appeal and revoking the patent in its entirety. No statement setting out the grounds of appeal was filed by appellant-opponent 5.
  
- III. With a communication dated 22 July 2015, receipt of which was acknowledged on 3 August 2015, the board notified appellant-opponent 5 that it was to be expected that its appeal would be rejected as inadmissible. No reply was received.
  
- IV. In its reply to the statement of grounds of appeal, the respondent-patent proprietor requested that the appeals be dismissed or, alternatively, that the patent be maintained on the basis of the claims of an auxiliary request filed by letter dated 24 October 2014.

- V. On 20 March 2020, the board issued a communication pursuant to Article 15(1) RPBA informing the parties of its preliminary opinion on relevant aspects of the appeal case.
- VI. Appellant-opponent 2 withdrew its request for oral proceedings by letter dated 8 May 2020, received by the EPO on 11 May 2020.
- VII. Because of the COVID-19 pandemic, the oral proceedings, initially scheduled for 17 June 2020, were cancelled. Subsequently, new summons to oral proceedings scheduled for 7 October 2020 were issued.
- VIII. By letter dated 30 July 2020, opponent 1 and appellant-opponent 5 stated that they would not be represented at the oral proceedings.
- IX. By letter of 17 August 2020, the respondent-patent proprietor withdrew all pending requests and stated that it no longer approved the text in which the patent was granted or the text in amended form, based on which, according to the opposition division, the patent in suit could be maintained; that no replacement text would be filed; and that the revocation of the patent in suit was requested and expected.
- X. Oral proceedings scheduled for 7 October 2020 were cancelled.

## **Reasons for the Decision**

1. The appeals of appellant-opponents 2 and 3 are admissible. The appeal of appellant-opponent 5 has to be rejected as inadmissible pursuant to Rule 101(1) EPC as no statement of grounds of appeal was filed within the time limit provided by Article 108, third sentence, EPC, and neither the notice of appeal nor any other document filed on behalf of appellant-opponent 5 contains anything that could be regarded as a statement of grounds of appeal pursuant to Article 108 EPC and Rule 99(2) EPC.
  
2. 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.

In the present case, the respondent-patent proprietor expressly stated that it no longer approved the text of the patent as granted or the amended text considered allowable by the opposition division and withdrew all pending requests, indicating that no amended text would be submitted (see point IX above).

Therefore, there is no longer any text of the patent in the proceedings which the board can consider for compliance with the requirements of the EPC. It is established case law of the boards of appeal that, under these circumstances, the patent is to be revoked without further substantive examination as to patentability (see also T 73/84, OJ EPO 1985, 241).

Revocation of the patent complies with the requests of the respondent-patent proprietor and appellant-opponents 2, 3 and 5.

In the absence of any request for oral proceedings on the part of appellant-opponent 5, the decision concerning the inadmissibility of appellant-opponent 5's appeal can also be taken in written proceedings.

Opponents 1 and 4, parties as of right, did not make any requests or submissions as to the merits of the case.

Accordingly, and as there are no remaining issues that have to be dealt with, the decision can be taken without oral proceedings.

3. Partial reimbursement of appeal fees

3.1 Pursuant to Rule 103(4)(c) EPC, as in force since 1 April 2020, the appeal fee shall be reimbursed at 25% if any request for oral proceedings is withdrawn within one month of notification of the communication issued by the board of appeal in preparation for the oral proceedings, and no oral proceedings take place. The amended provision applies to any pending appeal pursuant to Article 2(2) of the Decision of the Administrative Council of 12 December 2019 amending Rule 103 EPC (CA/D 14/19, see OJ EPO 2020, A5), thus also to the present appeal case.

3.2 Appellant-opponent 2 withdrew the request for oral proceedings on 11 May 2020 whereas the board's communication was issued on 20 March 2020. However, in view of the Notice from the EPO dated 1 May 2020



concerning the disruption due to the COVID-19 outbreak (OJ EPO 2020, A60, updating the earlier Notices dated 15 March 2020 and 30 March 2020), and Rule 134(2) and (4) EPC, the board concludes that the withdrawal occurred in due time. The requirements for reimbursement of 25% of appellant-opponent 2's appeal fee pursuant to Rule 103(4)(c) EPC are therefore met.

4. No reimbursement of the appeal fees of appellant-opponent 3 and 5 is to be ordered.
  - 4.1 The board construes Rule 103(4)(c) EPC to provide an incentive to a party that had initially requested oral proceedings before the board to reconsider any such request at a later stage of the appeal proceedings and, in case that the party abandons this request, to provide a reward by way of a partial reimbursement of this party's appeal fee. Accordingly, appellant-opponent 5, an appealing party not having requested oral proceedings in the proceedings before the board, does not benefit from another party's withdrawal of the request for oral proceedings. Rule 103(4)(c) EPC does thus not apply in relation to appellant-opponent 5.
  - 4.2 Appellant-opponent 3 requested oral proceedings on the condition that the board intends to reach a decision other than setting aside the decision under appeal and revoking the patent in its entirety. This condition is not fulfilled since the outcome of the present case is as requested by the appellant-opponent 3 and, hence, appellant-opponent 3's request for oral proceedings has not become procedurally relevant. Moreover, appellant-opponent 3 has neither withdrawn its request for oral proceedings nor filed any statement which could be interpreted as a withdrawal of its request for oral

proceedings.

## Order

### For these reasons it is decided that:

1. The appeal of appellant-opponent 5 is rejected as inadmissible.
2. The decision under appeal is set aside.
3. The patent is revoked.
4. The appeal fee of appellant-opponent 2 is reimbursed at 25% pursuant to Rule 103(4) (c) EPC.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated