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**Datasheet for the decision  
of the Enlarged Board of Appeal  
of 22 April 2016**

**Case Number:** R 0002/14

**Appeal Number:** T 1627/09 - 3.3.08

**Application Number:** 99965105.2

**Publication Number:** 1147174

**IPC:** C12N1/10, C12N1/12, C12N9/00,  
C12N15/06, C12N15/09, C12N15/12,  
C12N15/30

**Language of the proceedings:** EN

**Title of invention:**  
Desaturases and methods of using them for synthesis of  
polyunsaturated fatty acids

**Patentee:**  
Washington State University

**Opponent:**  
E.I. Du Pont de Nemours and Company

**Headword:**  
Fundamental violation of the right to be heard

**Relevant legal provisions:**  
EPC Art. 24(4), 83, 100(b), 112a(2)(c), 112a(4), 113(1)  
EPC R. 106, 107, 108(3), 109(2)(a), 109(2)(b), 110, 115(2)  
RPEBA Art. 13, 14(2), 14(4)

**Keyword:**

"Petition admissible (yes) - obligation to raise objection (no)"

"Petition allowable (yes) - remaining doubts as to whether the petitioner's right to be heard was observed to be solved to the affected party's benefit"

"Decision under review set aside (yes)"

"Re-opening of proceedings (yes)"

"Replacement of members of the Board of Appeal (no) - not requested and no *ex officio* exception from the general principle"

**Decisions cited:**

J 0007/82, R 0001/08, R 0002/08, R 0003/10, R 0019/10,  
R 0022/10, R 0023/10, R 0008/11, R 0015/11, R 0017/11,  
R 0013/12, R 0015/12, R 0019/12, R 0016/13, T 1557/07

ECHR case of De Cubber v. Belgium, no. 9186/80, case of Suominen v. FINLAND, no. 37801/97, case Vojtěchová v. Slovakia, no. 59102/08



**Case Number:** R 0002/14

**DECISION**  
**of the Enlarged Board of Appeal**  
**of 22 April 2016**

**Petitioner:**

(Patent Proprietor)

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**Representative:**

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**Respondent:**

(Opponent)

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**Representative:**

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**Decision under review:**

**Decision of the Technical Board of Appeal  
3.3.08 of the European Patent Office of  
10 October 2013.**

**Composition of the Board:**

**Chairman:**

W. van der Eijk

**Members:**

I. Beckedorf

W. Sieber

F. Blumer

T. Bokor

## Summary of Facts and Submissions

I. The patent proprietor (hereinafter: the petitioner) filed a petition (hereinafter: the petition) in respect of decision T 1627/09 of Technical Board of Appeal 3.3.08 (hereinafter: the board) dated 10 October 2013 (hereinafter: decision under review) by which the board had dismissed the petitioner's appeal against the decision of the opposition division revoking European patent EP 1 147 174 (hereinafter: the decision under appeal).

II. The petition is concerned only with the decision under review relating to the petitioner's main request and first auxiliary request (hereinafter: the auxiliary request), which the board held not to be allowable for reason of non-compliance with Articles 100(b) and 83 EPC. The petitioner's complaint is directed against the written reasons given by the board for its decision, which are said neither to reflect the petitioner's submissions nor to explain adequately why their arguments were not accepted.

III. Relevant requests before the board:

1. Claim 1 of the main request (claim 1 of the patent as granted) reads:

*"A purified protein having desaturase activity, and comprising an amino acid sequence selected from the group consisting of:*

*(a) an amino acid sequence as shown in SEQ ID NO: 4; and  
(b) an amino acid sequence having at least 60% sequence identity to the sequence specified in (a)."*

2. Claim 1 of the auxiliary request reads:

*"A purified protein having delta 8 desaturase activity, and comprising an amino acid sequence selected from the group consisting of an amino acid sequence having at least 80% sequence identity to the sequence specified in SEQ ID NO: 4."*

IV. Procedural issues I (events preceding the review proceedings)

1. The opposition division revoked the patent essentially for non-compliance with the requirements of Articles 100(b) and 83 EPC. The first point in the decision under appeal was that SEQ ID NO:4 itself did not exhibit any desaturase activity; the sequence contained a mistake. The second issue was then whether the skilled person, confronted with this error, would have been able to make a protein having desaturase activity, given that claim 1 of the main request also covered an amino acid sequence having at least 60% sequence identity to the sequence shown in SEQ ID NO:4. In view of this the skilled person was faced with an undue burden to identify a variant which has desaturase activity. The same argument applied for the first auxiliary request.

2. In their appeal, the petitioner essentially argued that the opponent (hereinafter: the respondent) had not discharged the burden of proof on the Articles 100(b) and 83 EPC objection. Furthermore, it was argued that the person skilled in the art would have realized the possibility of errors in the sequencing of the nucleic/amino acid. Thus, making the necessary modifications to provide the desired activity would not impose an undue burden on the skilled person.

3. The petitioner's submissions were commented on by the opponent in detail, and the board in its communication sent to the parties in preparation of the oral proceedings before the board concluded that the main and auxiliary requests did not satisfy Articles 100(b) and 83 EPC. In their reply, the petitioner submitted that the skilled person could arrive at the claimed subject-matter using the information in the application as originally filed and in the patent specification.

4. The matter was discussed with the parties during the oral proceedings on 10 October 2015, at the end of which the board announced the decision under review.

5. The full reasoning of the board's decision was set out in the written decision under review.

5.1 Point 26 of the reasons is concerned with the respondent's argument that SEQ ID NO:4 does not exhibit any desaturase activity. At point 27 the board concluded that it did not; no complaint is made about this part of the decision.

5.2 The decision then recited that the petitioner had argued that the information contained in the application as filed would nevertheless have been sufficient to allow the skilled person to prepare a protein having the required activity. This is summarized in the facts and submissions, and briefly at point 29 of the reasons. The crucial passage follows in points 30 and 31:

*"30. Since the skilled person relying on the patent application was not informed that the protein defined by SEQ ID NO:4 was inactive, and since the patent*

application neither disclosed any active sequence variants having at least 60% sequence identity nor which positions of SEQ ID NO:4 had to be modified in order to obtain a functional desaturase, it had to go back to *E. gracilis* and reclone the desaturase in order to put the claimed invention into practice. Even though each of the steps necessary for recloning could be performed by a person skilled in the art, it is the combination of all the necessary steps (isolation of total mRNA, PCR amplification and selection of a group of amplification products with homology to known desaturases, completion of the 5' and 3' ends by RACE amplification, cloning and expression of the full length sequence to assess its function) which creates an undue burden on the skilled person trying to perform the invention. The same applies to the two alternative approaches mentioned by the appellant.

31. Thus, contrary to the requirements of Article 83 EPC, the skilled person would not have been in a position to perform the claimed invention readily and without undue burden across essentially the entire scope of claim 1."

While the board thus accepted that the skilled person could have carried out each of the steps in isolation, it held that the necessary combination of the steps created an undue burden.

5.3 As to the auxiliary request the position was much the same (points 33 to 36 of the reasons):

"33. Claim 1 is directed to an active delta 8-desaturase which comprises an amino acid sequence having at least 80% identity to the sequence SEQ ID NO:4.

34. In the patent application, such proteins are referred to once (see bottom of page 13, reading "Proteins of the invention also include proteins showing at least 60%, at least 70%, **at least 80%**, at least 90%, and at least 95% **similarity (to the sequence of FIG. 6A or FIG. 7A)** using blastp with default parameters)" (emphasis by the Board); the sequence represented in FIG. 7A is the sequence SEQ ID NO:4).

35. Thus, the only criterion provided to the skilled person trying to identify proteins according to claim 1 is the self-contained reference to a protein of sequence SEQ ID NO:4. However, as discussed in points 26 and 27 (supra), the protein encoded by SEQ ID NO: 4 has no delta 8-desaturase activity. As for the main request, the

*skilled person trying to perform the invention according to the first auxiliary request was therefore left with the undue burden of embarking on a research program with the aim of first cloning a protein with delta 8-desaturase activity and then locating in its sequence those portions which could be altered to the extent of no more than 20% of the total sequence without prejudicing the enzymatic activity.*

*36. The Board reaches the conclusion that the patent fails to disclose the subject matter of claim 1 of auxiliary request 1 in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. Therefore, this request does not meet the requirements of Article 83 EPC."*

V. The petition

1. The petition is essentially based upon two complaints in respect of both the main request and the auxiliary request:

First, that the board did not sufficiently reason why it did not accept the petitioner's argument that the skilled person would have been able to carry out the invention.

Second, that the board based its decision on facts and arguments in respect of which the parties were not heard and did not reason its conclusions about the objection under Articles 100(b) and 83 EPC.

2. Concerning the first complaint, the petitioner argued that the required cloning was a matter of routine for the skilled person (being a molecular biologist) applying well known techniques. The petitioner relied upon document D6, which is a post-published article by two of the inventors, corresponding to the patent. The petitioner argued that this document repeated almost word for word the content of examples 3 to 5 of the patent, describing two of three cloning routes. This article had



been published in a peer-reviewed publication so that, if the routes as described in D6 were beyond the ordinary capabilities of the skilled person, the reviewer would have demanded a more detailed explanation or would not have accepted it for publication. The board neither adequately dealt with these arguments nor mentioned D6 at all in the decision under review, neither in the summary of facts and submissions nor in the reasons.

3. Concerning the second complaint, the petitioner argued that the board in reaching its conclusion that, although the skilled person could have carried out each of the steps in isolation, the necessary combination of the steps created an undue burden, made up its own undiscussed argument. The distinction made by the board between the individual steps in isolation and their combination had never been brought to the parties' attention. Thus, the decision under review was based upon an aspect in respect of which the parties to the appeal proceedings had not been heard and that appeared for the first time in the written reasons of the decision under review without proper reasoning.

VI. Procedural issues II (*ex parte* part of the review proceedings)

1. The Enlarged Board as composed under Rule 109(2)(a) EPC issued a first communication pursuant to Articles 13 and 14(2) RPEBA informing the petitioner of its preliminary view that the decision under review contained a sufficient indication of why the petitioner's submissions were not considered convincing.

2. The petitioner's objection to all members of the Enlarged Board in its (original) composition pursuant to Rule 109(2)(a) EPC was rejected by the Enlarged Board in its composition pursuant to Article 24(4) EPC by interlocutory decision of 17 February 2015 as partly inadmissible and partly unjustified.

3. Oral proceedings before the Enlarged Board in its composition pursuant to Rule 109(2)(a) EPC with the petitioner as the only party were held on 11 May 2015 at the end of which the Enlarged Board submitted the petition to the Enlarged Board as composed under Rule 109(2)(b) EPC for decision.

4. The new composition of the Enlarged Board under Rule 109(2)(b) RPEBA was determined by order of the Chairman of 12 May 2015.

VII. Procedural issues III (*inter partes* part of the review proceedings)

In the following proceedings both the respondent and the petitioner submitted arguments, and oral proceedings were held on 22 April 2016.

1. The petitioner reiterated their earlier submissions and referred to R 19/10 (decision of 16 March 2011, Reasons, point 6.2), R 23/10 (decision of 15 July 2011, Reasons, point 2) and argued that the right to be heard pursuant to Article 113(1) EPC also extended to the right of a party to have the relevant grounds fully taken into account in the written decision. In this respect the petitioner relied also on the case law of the ECHR (case of *De Cubber v. Belgium*, no. 9186/80, judgment of

26 October 1984, para. 26; case of Suominen v. FINLAND, no. 37801/97, judgment of 1/24 July 2003, para. 36 et seq.; case Vojtěchová v. Slovakia, no. 59102/08, judgment of 25 September 2012, para. 40 et seq.).

2. By communication pursuant to Articles 13 and 14(2) RPEBA of 1 March 2016, the Enlarged Board informed the parties of the preliminary examination and assessment of the petition and of the points for discussion at the oral proceedings.

3. Both parties submitted their comments.

3.1 The petitioner argued in particular in respect of two issues raised by the Enlarged Board, namely the potential extension of the scope of the petition by the petitioner's submission of 23 July 2015 and the comparability of the present case to the case underlying decision R 16/13 of 8 December 2014.

3.2 The respondent defended the decision under review in that the petitioner had been given ample opportunity to present their case concerning the aspect of sufficiency of disclosure and that failing to do so, including the submission of arguments that address the objections, which could have been reasonably anticipated, did not amount to an infringement of the right to be heard. The petition was rather directed at seeking to re-open the debate on sufficiency. In addition the respondent objected to the admissibility of the petition with regard to the petitioner's obligation under Rule 106 EPC to raise an objection during the appeal proceedings.

4. Oral proceedings before the Enlarged Board were held in the absence of the duly summoned respondent in accordance with Rule 115(2) EPC and Article 14(4) RPEBA.

4.1 The petitioner focussed their submissions on the issue of allowability of the petition and two complaints (point V. above).

4.2 At the end of the oral proceedings the decision was announced.

#### VIII. Final requests

1. The petitioner requested

that the decision under review be set aside and that the proceedings before the Board of Appeal be re-opened.

2. The respondent essentially requested in writing

that the petition be rejected as inadmissible or unallowable.

## **Reasons for the Decision**

### *Admissibility*

1. The petitioner is adversely affected by the decision under review.
2. The petition was filed in accordance with the formal requirements pursuant to Article 112a(4) EPC and Rule 107 EPC.
3. As to the respondent's objection to the admissibility of the petition (point VII.3.2 above), it is to be noted that the deficiencies relied upon by the petitioner concern only alleged deficiencies in the written reasons given by the board for its decision under review. Thus, the petitioner could not have raised the required objections under Rule 106 EPC.
4. Consequently, the petition is admissible.

### *Allowability*

5. The petitioner essentially invokes the ground of petition according to Articles 112a(2)(c) and 113(1) EPC.
6. The right to be heard according to Article 113(1) EPC is an important procedural right intended to ensure that no party is caught unaware by grounds and evidence in a decision turning down his request on which that party has not had the opportunity to comment (see R 3/10 of 29 September 2011, Reasons, point 2.10; J 7/82, OJ EPO 1982, 391, Headnote II and Reasons,

point 6). This requirement includes the party's right to have the relevant submissions and arguments considered and fully taken into account in the written decision in a manner that enables it to understand, on an objective basis, the reasons for the decision (see R 19/10, *supra*, Reasons, points 6.2 and 6.3; R 23/10, *supra*, Reasons, point 2; R 8/11 of 29 November 2011, Reasons, point 1.2.9; R 17/11 of 19 March 2012, Reasons, point 4; R 15/12 of 11 March 2013, Reasons, point 5 b); R 13/12 of 14 November 2012, Reasons, point 2.2; R 19/12 of 12 April 2016, Reasons, points 6.1 and 6.2).

7. Before investigating the petitioner's arguments, it is to be noted that the examination whether or not a European patent application or patent meets the requirements of Article 83 EPC is a matter of substantive law. In view of this, it has to be borne in mind that review proceedings based on Article 112a(2)(c) EPC are confined to procedural defects so fundamental as to be intolerable. It follows from the essential interest of legal certainty that appeal proceedings leading to a final decision shall be re-opened only if one of the grounds provided for in Article 112a EPC applies. It is by no means the objective of petition for review proceedings to review the correct application of substantive law (consistent case law since R 1/08 of 15 July 2008, citing the *travaux préparatoires*, and R 2/08 of 11 September 2008).
  
8. The issue of sufficiency of disclosure of the claimed invention was dealt with by the board in the decision under review in the summary of facts and submission in points XI. and XII., and in the reasons for the main request in points 22 to 32 and for the auxiliary

request in points 33 to 35. In particular, point 29 of the reasons explicitly referred to submissions of the petitioner, and points 30 and 31 contained the board's conclusions that it disagreed with the petitioner.

9. The first complaint

9.1 With the first complaint the petitioner in particular referred to document D6, which they had relied upon to prove that the skilled person was capable of applying cloning as a matter of routine and that all steps of each of the cloning formed part of his routine.

9.2 The written decision under review indeed does not mention D6 at all, neither in the summary of facts and submissions nor in the reasons.

9.3 In the light of the particular relevance that the petitioner had attributed to this peer-reviewed document, the mention and discussion of it could well be described as a matter of best practice standards for decisions of the boards of appeal. However, falling short of those standards does not immediately lead to setting aside the decision upon a petition. Rather it is to be examined with regard to the case at hand whether the fact that D6 was not explicitly cited and discussed in the decision under review was to be taken as a proof or indication that the board completely ignored the petitioner's arguments in relation to the objection under Articles 100(b) and 83 EPC.

9.4 In this respect it is noted that the petitioner admitted that the teaching of D6 did not go beyond what assumingly already had been disclosed in the patent

(see: letter of 8 July 2014, page 2). Furthermore, the petitioner in the written submissions during appeal referred merely in very general terms to D6 by mentioning it only in the document list attached to the statement setting out the grounds of appeal and subsequently as a counter-argument to the filing of D20 by the respondent (see: letter of 10 September 2013, page 10). Thus, the petitioner chose to present D6 not in a manner that said document should stand on its own as a submission of facts concerning its technical teaching but rather as a means of accessory support for their actual factual and legal arguments on Articles 100(b) and 83 EPC.

- 9.5 As evidenced by the summary of the parties' submissions in the decision under review, the Enlarged Board is satisfied that the board indeed had understood the essential arguments and counter-arguments on the Articles 100(b) and 83 EPC objection submitted by both parties.

As a consequence, the lack of a separate discussion of that document and of its form of publication in the written decision under review does not necessarily indicate that the board had not taken into account the petitioner's core argument in this respect.

- 9.6 Hence, considering the first complaint by itself, the Enlarged Board cannot conclude that the petitioner's right to be heard under Article 113(1) EPC has been fundamentally violated by the board.



10. The second complaint

10.1 Regarding the second complaint, the petitioner argued

(a) that, insofar comparable to the situation underlying decision R 16/13 (*supra*), the board had based the decision under review on a ground that it introduced into the written reasons *ex officio* and without prior discussion with the parties and

(b) that the reasoning of the board was restricted to a mere statement of legal conclusions rather than a discussion of facts previously discussed by and/or with the parties, i.e. that the board failed to reason its conclusion that the person skilled in the art might have performed each of the steps necessary for recloning but that the combination of all the necessary steps would create an undue burden on the skilled person trying to perform the invention.

10.2 In respect of the first argument (a), the Enlarged Board notes the following:

10.2.1 According to decision R 16/13 (*supra*, headnote and Reasons, point 6), the Enlarged Board held that the right to be heard under Article 113(1) EPC is violated if a board of appeal relies for its decision *ex officio* on grounds that had not been put forward by the parties, without having given the losing party an opportunity to comment on these grounds and, if the patent proprietor is concerned, to submit appropriate new request.

10.2.2 However, the case underlying decision R 16/13 (*supra*) concerned particular circumstances where the board of

appeal chose a different document as closest prior art and developed a reasoning of its own starting from this starting point, *inter alia* stating that the comparative tests which sought to make clear that the claimed invention was inventive over the closest prior art were not relevant. The patent proprietor was not given the opportunity to comment on or to react to it because the problem was not mentioned at all and there was no reason for the patent proprietor to suspect that there was a problem in this respect.

10.2.3 In the present review case the discussion before the board was all the time about sufficiency of disclosure and both parties were given every opportunity to convince the board of their point of view.

The board then came to the conclusion that although the individual steps were sufficiently disclosed, implementing the totality of steps was an undue burden.

10.2.4 Thus, the present case is distinct from the procedural situation in case R 16/13 (*supra*).

However, the Enlarged Board understands aforementioned argument (a) rather to be linked to argument (b) in that the petitioner feels themselves in a situation where they are left alone in assuming what circumstances (whether they were discussed with the parties or whether they were introduced by the board on its own motion) had triggered the board to come to the negative conclusion about the issue of sufficiency of disclosure.

10.3 Concerning the second argument (b) the Enlarged Board, in addition to the standard for observing the right to be heard according to Article 113(1) EPC mentioned above in point 6., wishes to rely upon the following principles of the well-established case law of the Enlarged Board of Appeal in respect of the reasons of a board of appeal decision (see: Case Law of the Boards of Appeal, 7<sup>th</sup> edition 2013, chapter IV.E.9.2.9 (b)(iv)):

(1) The right to be heard pursuant to Article 113(1) EPC does not imply that a board of appeal is obliged to inform the parties of all possible reasons for a decision in advance (see e.g. R 16/13, *supra*, Reasons, point 3).

(2) It is generally sufficient for observing the right to be heard pursuant to Article 113(1) EPC if the grounds given in the written decision correspond to the facts of the case and the arguments put forward by any of the parties to the proceedings, so that the petitioner was aware of it and hence could not be surprised by corresponding grounds (see e.g. R 22/10 of 7 March 2011, Reasons, point 6; R 16/13, *supra*, Reasons, point 3.3). This applies even more if said grounds could be objectively foreseen or if the party concerned could have developed those grounds based on their own expertise (see e.g. R 22/10, *supra*, Reasons, point 6; R 16/13, *supra*, Reasons, point 5.2).

10.3.1 Turning to the board's reasoning in the decision under review to dismiss the petitioner's appeal, the Enlarged Board notes that the decisive argumentation of the board in points 30 and 31 of the reasons concerned the

aspect of modifying the inactive SEQ ID NO: 4 by means of recloning the desaturase starting from *E. gracilis*.

The reasons given by the board are limited insofar as, after the determination of the need for recloning, the board immediately stated its conclusion that the skilled person in fact could perform each of the necessary steps (*"isolation of total mRNA, PCR amplification and selection of a group of amplification products with homology to known desaturases, completion of the 5' and 3' ends by RACE amplification, cloning and expression of the full length sequence to assess its function"*), but that combining those steps created an undue burden on the skilled person.

The other two alternative approaches, as mentioned in point 30 of the reasons of the decision under review and relied upon by the petitioner, were not discussed at all by the board but merely referred to as suffering from the same negative conclusion as the recloning approach.

10.3.2 The case at hand is thus marked by the circumstance that the board in the relevant points 30 and 31 of the reasons of the decision under review mentions neither facts nor a sequence of arguments that led it to arrive at the conclusion that the combination of the required steps imposed an undue burden on the skilled person. The summary of facts and submissions in the decision under review is also silent in this respect.

10.3.3 In the absence of any explicit or implicit reference to facts and to arguments and evidence relied upon by the parties to the appeal proceedings, the conclusion drawn

by the board cannot be understood and reproduced by the affected party. Under these circumstances, the petitioner's argument appears to be compelling that the facts considered but not disclosed by the board might or might not justify the board's conclusion.

10.3.4 As a consequence, for the purpose of establishing whether the petitioner's right to be heard was observed by the board, the Enlarged Board is faced with the following situation:

Either: The Enlarged Board cannot establish that the reasons for the decision under review are based on facts (and on what facts) and considerations (and on what considerations) on which the parties to the appeal proceedings, in particular the petitioner as the party affected by the decision under review, had an opportunity to comment.

Or: In the event that the parties had been given an opportunity to comment, the Enlarged Board cannot establish that the parties' relevant submissions and arguments were considered and fully taken into account when taking the decision.

Any remaining doubts in this respect concerning either situation must be solved to the affected party's benefit.

11. Under these particular circumstances the Enlarged Board has to assume that a violation of the petitioner's rights under Article 113(1) EPC occurred which qualifies as fundamental within the meaning of Article 112a(2) (c) EPC because it concerned the ground

on which the petitioner's appeal was eventually dismissed by the decision under review.

12. Since the petition is allowable with regard to the second complaint, the decision under review is to be set aside and the proceedings before the board are to be re-opened (Rule 108(3), first sentence, EPC).
13. No request for replacement of the members of the board under Rule 108(3), second sentence, EPC has been made by the petitioner, nor does the Enlarged Board see any reason to deviate from the general principle that the proceedings are re-opened before the board of appeal responsible under the business distribution scheme (see: R 15/11 of 13 May 2013, Reasons, point 9), i.e. by the board in its composition that issued the decision under review. However, the need for a change in the composition of the board arises from the fact that one of the members is no longer active. It is for the chair of the board to finally determine the actual composition of the board responsible for hearing and deciding the re-opened appeal case.
14. The order to reimburse the fee for the petition is based on Rule 110 EPC.

**Order**

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

1.       **The decision under review is set aside.**
  
2.       **The proceedings before the Board of Appeal 3.3.08 are reopened.**
  
3.       **Reimbursement of the fee for the petition is ordered.**

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk