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**Datasheet for the decision
of 11 October 2013**

Case Number: T 1405/11 - 3.3.06

Application Number: 00928165.0

Publication Number: 1175481

IPC: C11D3/12, C11D17/00

Language of the proceedings: EN

Title of invention:
Detergent compositions

Patent Proprietor:
THE PROCTER & GAMBLE COMPANY

Opponents:
Unilever N.V.
Henkel AG & Co. KGaA

Headword:
Softening laundry detergent tablet / PROCTER & GAMBLE

Relevant legal provisions:
EPC Art. 52(1), 54(3), 56, 108, 114(2), 123(2)
EPC R. 99(2)
RPBA Art. 12(4)

Keyword:
Admissibility of appeal - (yes)
Added subject-matter - (no)
Novelty - (yes)
Inventive step - (yes)

Decisions cited:

T 0382/96, T 0774/97

Catchword:



**Beschwerdekammern
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Chambres de recours**

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Case Number: T 1405/11 - 3.3.06

**D E C I S I O N
of Technical Board of Appeal 3.3.06
of 11 October 2013**

Appellant: Unilever N.V.
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Respondent: THE PROCTER & GAMBLE COMPANY
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 April 2011 concerning maintenance of the
European Patent No. 1175481 in amended form.**

Composition of the Board:

Chairman: B. Czech
Members: L. Li Voti
U. Lokys

Summary of Facts and Submissions

- I. The present appeal by Opponent 01 is from the interlocutory decision of the Opposition Division posted on 7 April 2011 concerning maintenance of the European patent no. 1 175 481 in amended form.
- II. In their notices of opposition the Opponents 01 and 02 had sought revocation of the patent on the grounds of Articles 100(a) EPC 1973, alleging lack of novelty and inventive step of the claimed subject-matter. Opponent 01 sought also revocation of the patent on the grounds of Article 100(b) EPC 1973.

The following documents were cited inter alia in support of the oppositions:

E3: EP 0 466 484 A2; and
E8: US 4 746 445 A.

The Opposition Division decided at the oral proceedings of 27 May 2008 that the patent as amended met the requirements of the EPC.

- III. In its decision T 1579/08 of 23 July 2010 the Board in charge of the case admitted into the proceedings document E19: WO 00/66688 A1 and remitted the case to the department of first instance for further prosecution.
- IV. The Opposition Division decided at the oral proceedings of 23 March 2011 that the patent with claims 1 to 9 according to the then pending first auxiliary request, submitted with letter of 17 November 2010, complied with all requirements of the EPC. This is the decision under appeal.

In particular, the Opposition Division found in its decision that the amended claims complied with the requirements of Articles 123(2) and (3) EPC and that the claimed subject-matter was novel and involved an inventive step over the cited prior art.

- V. Independent claims 1 and 9 according to said first auxiliary request submitted with letter of 17 November 2010 read as follows:

"1. A softening laundry detergent tablet comprising clay and laundry surfactant, wherein the clay consists of smectite clay, and wherein the tablet is a compressed mass of particles, and at least 70% by weight of the clay is present as granules which have a size of between 150µm and 850µm, the clay granules containing at least 50% by weight of the clay."

"9. A process of making softening laundry detergent tablets comprising clay and laundry surfactant, wherein the clay consists of smectite clay, comprising providing at least 70% by weight of the clay as granules which have a size of between 150µm and 850µm, mixing the clay granules with other components of the tablet in particulate forms, and compressing the mix into tablets, the clay granules containing at least 50% by weight of the clay."

The dependent claims 2 to 8 of this request relate to particular embodiments of the softening laundry detergent tablet according to claim 1.

- VI. In his statement setting out the grounds of appeal, the sole Appellant (Opponent 01) submitted that the amendments in claims 1 and 9 contravened the requirements of Articles 123(2) EPC and that the

claimed subject-matter was not novel or not inventive over the cited prior art.

VII. In his reply of 22 December 2011, the Respondent (Patent Proprietor) rebutted the objections raised, defended the patent in the version held allowable by the Opposition Division but also submitted six sets of amended claims as auxiliary requests.

VIII. Both the Appellant and Opponent 02 (party as of right to the proceedings) announced by letters of 6 August 2013 and 13 June 2013, respectively, that they would not attend the oral proceedings to which the parties had been summoned.

The Respondent withdrew his request for oral proceedings with letter of 3 July 2013.

Accordingly, the oral proceedings were held on 11 October 2013 in the (previously announced) absence of the parties.

IX. The Appellant requested (in writing) that the decision under appeal be set aside and that the patent be revoked.

The Respondent requested (in writing) that the appeal be dismissed (main request) or, in the alternative, that the patent be maintained on the basis of the claims according to any of the auxiliary requests 1 to 6 submitted with letter of 22 December 2011.

Opponent 02 did not submit any request.

X. As relevant here, the arguments of the parties can be summarised as follows:

The Appellant held that

- at least claims 1 and 9 according to the Respondent's main request did not comply with the requirements of Article 123(2) EPC; in fact, even though all individual features of the softening laundry detergent tablet according to claim 1 were mentioned in the application as originally filed, their combination was not disclosed;

- document E19 disclosed in example 2 six softening laundry detergent tablets containing clay granules not having exactly the particle size distribution required by the wording of claim 1 according to the main request; however, at least 70% by weight of the clay granules of these tablets will be comprised between a value "X" which can be reasonably assumed to be comprised between 500 and 750 μm , and the specifically disclosed upper value of 1000 μm ; hence, the particle size distribution of 70% by weight of the clay granules in these six tablets overlapped necessarily with that of the tablets according to the claims at issue and the prior art value "X" would fall within the claimed range of 150 to 850 μm and would take away the novelty of the claimed range of clay particles; therefore, the known tablets of document E19 took away the novelty of the claimed subject-matter.

As regards inventive step the Appellant argued that

- the technical problem underlying the invention with regard to the closest prior art, represented by document E3, consisted in the provision of an

alternative laundry detergent softening tablet with good disintegration properties;

- it was obvious for the skilled person, faced with this technical problem, to try the incorporation, into the tablets according to document E3, of the bentonite clay agglomerates known from document E8, which had a particle size distribution as required by claim 1 of the main request, were suitable for use as softener in detergent compositions and dispersed readily in a laundry liquor;

- therefore, the claimed subject-matter did not involve an inventive step.

The Respondent submitted in essence that

- the Appellant had not raised any objection under Article 123(2) EPC during the proceedings before the opposition division; therefore, the Opponent's appeal was inadmissible insofar as it related to the objection raised under Article 123(2) EPC;

- moreover, the combination of features of claim 1 according to the main request found support in the application as filed; therefore, the claims complied with the requirements of Article 123(2) EPC;

- document E19 did not disclose tablets containing clay granules having a particle size distribution as required by claim 1 of the main request; moreover, claim 1 concerned a specific particle size distribution and not simply a range of possible particle sizes; the case law relating to the novelty of overlapping ranges concerned in this respect only overlapping ranges of one-dimensional entities, such it could be, for

example, the particle size, but it did not concern two-dimensional entities such as the particle size distribution, which includes not only a range of possible particle sizes but also the number of each of those particles; therefore, the claimed subject-matter was novel over document E19.

As regards inventive step, the Respondent submitted that

- the objective technical problem to be solved concerned the improvement of the disintegration and softening characteristics of a tablet as disclosed in document E3;
- the tests filed with letter of 17 February 2005 and the comparative examples contained in the patent in suit supported the statement contained in paragraph [0128] of the patent that the chosen particle size distribution of claim 1 led to reduced % residues, i.e. to a better disintegration, of the tablets used;
- document E8 did not contain any suggestion that clay granules having the particle size distribution of claim 1 could be useful for solving the technical problem of the invention;
- moreover, the skilled person would not have combined the teaching of document E3 with that of document E8; in fact, in order to apply the teaching of document E8 to the tablets of E3, he would have to modify the method of preparation of the tablets of document E3, which required the step of coating detergent granules with clay and not a simple mixing of both detergent and clay granules as taught in document E8; therefore, the

skilled person could have combined the teachings of documents E3 and E8 only with the benefit of hindsight;

- the claimed subject-matter thus involved an inventive step.

Reasons for the Decision

1. Admissibility of the appeal
 - 1.1 The Respondent submitted that the Opponent's appeal was inadmissible insofar as it related to objections under Article 123(2) EPC, since said objections against the amended claims had not been raised previously, although this would have been possible.
 - 1.2 However, according to the jurisprudence of the Boards of Appeal of the EPO, the admissibility of an appeal can only be assessed as a whole and there is no support in the EPC for a notion of "partial inadmissibility" of an appeal (see T 382/96, point 1 of the reasons, *in fine*; T 774/97, point 1.1 of the reasons, *in fine*).
 - 1.3 It is undisputed that the statement setting out the grounds of appeal contains substantiated objections based on other grounds for opposition, i.e. the alleged lack of novelty and inventive step, in support of the Appellant's request for revocation of the patent in suit in its entirety.
 - 1.4 Since the appeal meets the requirements of Article 108 and Rule 99(2) EPC, the Board concludes that the appeal is admissible.

Respondent's main request

2. Admissibility of the objection under Article 123(2) EPC

2.1 The Respondent considered that the objection under Article 123(2) EPC, raised for the first time in the statement of the grounds of appeal, was inadmissible since the Appellant (Opponent 1) had already had the opportunity to raise this objection against the amended claims during the opposition proceedings.

2.2 The Board observes in this respect that the Opposition Division considered extensively the issue of allowability of the amendments under Article 123(2) EPC in point 2.1.1 of the reasons of the decision under appeal, although it is apparent from both the contested decision (point 2.1.1., last sentence) and the minutes of oral proceedings (point II.2) that Opponent 1 had not raised a corresponding objection.

2.3 The Board thus considers the arguments provided by the Appellant in support of its objection under Article 123(2) EPC as an attempt to deal with and rebut the specific reasons given in the attacked decision as regards the allowability of the amendments.

2.4 The Board, in the exercise of its discretionary power under Article 114(2) EPC and Rule 12(4) RPBA, thus decided to admit and consider the objection raised by the Appellant under Article 123(2) EPC, although it could possibly have been raised earlier in the course of the opposition proceedings.

3. Allowability of the amendments (Article 123(2) EPC)

3.1 In the Appellant's view, the documents of the application as originally filed do not disclose the combination of all features of claims 1 and 9, respectively.

3.2 Claim 1

3.2.1 The Board remarks that the description of the application as originally filed (in this respect, reference is made hereinafter to passages of the published application WO 00/66693 A1) discloses in the "Summary of the Invention" (pages 2 and 3) "*a softening laundry detergent tablet comprising clay and laundry surfactant, wherein the tablet is a compressed mass of particles*" (page 2, second and third lines below the header "Summary of the Invention"). Moreover, it is specified that "*the clay is usually the major component in the granules and is usually present in an amount of at least 30%, and normally at least 50%...by weight of the granules*" (page 2, fifth to seventh lines below the header "Summary of the Invention"). At page 3 it is specified that "*Preferably at least 70%...by weight of the clay is present as granules having a size of between 150 μ m and 850 μ m*" (page 3, lines 5 and 6).

The description (page 12, first, second, sixth and seventh lines below "Clays") explains also that "*The clay minerals used to provide the softening properties of the instant compositions can be described as expandable, three-layer clays*" and that "*The three-layer expandable clays used herein are those materials classified geologically as smectites.*".

Hence, the Board finds that the wording of claim 1 consists of a combination of the generic disclosure of the invention contained in the above mentioned passages of the summary of the invention with one preferred embodiment relating to the particle size distribution of the clay granules, also mentioned in said "Summary of the Invention".

3.2.2 Therefore, in the Board's judgement, the combination of features of claim 1 is directly and unambiguously derivable from one and the same section of the description.

3.3 Claim 9

3.3.1 As regards process claim 9, which concerns the preparation of a tablet of claim 1, the only process step actually specified, i.e. the step of *"mixing the clay granules with other components of the tablet in particulate form and compressing the mix into tablets"* is also disclosed in said "Summary of the Invention" (page 3, lines 12 to 14).

Therefore, also the combination of features of the process claim is in the Board's judgement directly and unambiguously derivable from one and the same section of the description.

3.4 Dependent claims 2 to 8 and adapted description

3.4.1 The Board is also not aware of reasons that could justify objections under Article 123(2) EPC with regard to any of the dependent claims or the amendments made to the description before the Opposition Division to adapt it to the claims at issue. No specific objections were raised in this respect by the Appellant.

3.5 In the Board's judgement, the amended patent in the version held allowable by the Opposition Division, i.e. according to the Respondent's main request, thus complies with the requirements of Article 123(2) EPC.

4. Novelty

4.1 Document E19 (prior art pursuant to Article 54(3) EPC) discloses in examples 2 and 7 softening laundry detergent tablets ExA, ExB; ExC; ExD, ExE, ExF, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK and LL comprising "Clay 3", which is "Any clay according to example 1" (see page 56, line 7 of E19). Said example 1 describes processes for the preparation of bentonite or montmorillonite, i.e. smectite, clay granule fractions. The granules prepared consist essentially of compressed smectite clay or include 10% by weight of wax and 5% by weight of a humectant. The granules were "sieved to obtain the fraction whereof 95% by weight had a particle size from 500 microns to 1000 microns".

4.2 As acknowledged by the Appellant, "the exact particle size distribution is not given in E19". However, it held that the particle size distribution of these clays derivable from the disclosure of document E19 on the basis of certain assumptions could be compared to the particle size distribution feature of claim 1 according to which "*at least 70% by weight of the clay is present as granules which have a size of between 150 μ m and 850 μ m*".

4.3 The issue to be decided in the present case is whether E19 describes a tablet comprising a particle size distribution of clay granules falling under the definition given in claim 1 at issue.

4.3.1 In this respect, the Board accepts the Respondent's view that claim 1, by relating to a particle size distribution, does not merely concern a range of one-dimensional values defining the clay particles but is characterised by the two-dimensional combination of a specific range of particle sizes ("*of between 150µm and 850µm*") with a range of values ("*at least 70% by weight*") defining the relative amount of granules containing at least 50% by weight of clay comprised in the tablet and having a size within said range of from 150 to 850 µm.

Therefore, the Board considers that the principles developed in the Case Law with respect to the novelty of overlapping ranges are indeed not applicable to the present case as argued by the Respondent.

4.3.2 Even though the ranges of particle sizes specified, respectively, in claim 1 at issue (150 to 850 µm) and in example 1 of document E19 (500 to 1000 µm) overlap, the relative amount (in % by weight) of particles having a size within the range defined in claim 1 at issue is not necessarily identical. In fact, document E19 does not contain the express or implicit information that at least 70% by weight of the clay particles of the tablets disclosed in the cited examples have a particle size within the range of particle size of claim 1 or, in other words, that the amount of particles having a size in the range of from 850 to 1000 µm, if any are present, is smaller than 30 % by weight. Moreover, all the hypotheses and conclusions submitted in this respect by the Appellant are based on the assumption of the value of a particular particle size "X" which is nowhere disclosed in document E19.

Therefore, document E19 does not, in the Board's judgement, disclose directly and unambiguously tablets containing clay granules having the particle size distribution required by claim 1 at issue, i.e. the feature "*at least 70% by weight of the clay is present as granules which have a size of between 150µm and 850µm*".

4.4 The subject-matters of claim 1 and, consequently, of claims 2 to 8 dependent thereon, and of claim 9 referring to the preparation of tablets made from inter alia a clay component as defined in claim 1, thus are novel (Articles 52(1) and 54(1) and (3) EPC).

5. Inventive step

5.1 The present invention relates to softening laundry detergent tablets containing smectite clay and laundry surfactant, wherein the tablet is a compressed mass of particles (see claim 1).

5.1.1 As explained in the description of the patent in suit (paragraph [0007]), it was known that clay present in low amounts in a tablet gives a disintegration effect. However, higher amounts of clay, suitable for providing a useful softening effect, can tend to impede disintegration and inhibit tablet dispersion rather than promote it. This is because of the tendency of high amounts of clay to gel upon contact with water so as to form a gel layer around the tablet, which layer hinders the penetration of water into the tablet.

5.1.2 According to the description of the patent in suit (paragraph [0008]) it would, therefore, be desirable to provide a tablet wherein "*the tendency for gelling at high clay concentrations is minimised and the*

disintegration effect on the tablet of the clay is maximised".

5.2 For the Board, document E3, and in particular each of examples 4 and 5 thereof, constitutes the closest prior art for the evaluation of inventive step. This was also common ground between the parties.

5.2.1 More particularly, document E3 also concerns the provision of a laundry detergent tablet (page 6, lines 3 and 4) having improved disintegration and dispersion properties (see page 2, lines 34 to 35), which tablet may also contain fabric softening agents (page 8, line 20).

5.2.2 According to the teaching of document E3, the tablet comprises matrix detergent particles which are coated before compaction with a binder which is capable of acting as a disintegrant of the tablet when it is immersed in water (page 5, lines 13 to 15), and which may additionally act as softening agent (page 5, lines 33 to 34). An example of an inorganic swelling disintegrant that may be used according to the teaching of E3 is a bentonite clay (page 5, lines 31 to 32).

5.2.3 More particularly, examples 4 and 5 of document E3 disclose tablets prepared by compressing granules of a detergent composition (sieve fraction) having particle sizes in the range of from 500 to 710 μm , which granules are coated with 3% by weight of sodium montmorillonite or bentonite clay, both of them being smectite clays (see page 8, line 40 to page 9, line 54 and page 10, lines 1 to 2 and 10 to 11).

5.3 The technical problem underlying the invention in the light of document E3 was formulated by the Respondent

as consisting in the provision of an alternative softening detergent tablet with improved disintegration and softening characteristics.

5.4 As a solution to this technical problem, the patent in suit proposes a softening laundry detergent tablet according to claim 1 at issue, which is characterised in particular in that *"at least 70% by weight of the clay is present as granules which have a size of between 150 μm and 850 μm , the clay granules containing at least 50% by weight of the clay"*.

5.5 Concerning the alleged success of the solution, the Board observes the following:

5.5.1 Neither the patent in suit nor the experimental data filed with letter of 17 February 2005 contain a comparison with a tablet according to one of examples 4 or 5 of document E3.

5.5.2 Moreover, the experimental data filed with letter of 17 February 2005 concern tablets containing clay material which is merely characterised by the respective proportions (weight percent) of the particles larger than 100 μm and of the particles smaller than 100 μm . These indications do not necessarily correspond to a particle size distribution as prescribed by claim 1 at issue.

5.5.3 Claim 1 does not prescribe a clay content of the tablet of more than 5% by weight, which is however a preferred feature (see claim 2 at issue). In this respect the Board observes that the experimental data presented in the patent in suit do not concern tablets containing more than 5% by weight of clay and thus are not able to show that the alleged goal of providing tablets wherein

"the tendency for gelling at high clay concentrations is minimised and the disintegration effect on the tablet of the clay is maximised" is effectively achieved at high clay contents above 5% by weight, as preferred according to the patent in suit (see paragraph [0011]).

5.5.4 The Board thus concludes that an improvement in terms of disintegration and/or softening effect over the tablets of examples 4 and 5 of document E3 has not been convincingly shown to be achieved across the full breadth of claim 1.

5.6 Therefore, the technical problem has to be reformulated in a less ambitious way. For the Board, it can be seen in the provision of further softening laundry detergent tablets containing clay and having good disintegration properties, as was also suggested by the Appellant.

5.6.1 In view of the information comprised in the patent in suit, the Board is satisfied that the claimed subject-matter effectively solves this technical problem across the full breadth of claim 1.

5.6.2 More particularly, tablets made in accordance with examples 5, 8 and 9 of the patent in suit (see Table 2) using clay granules having a particle size distribution as prescribed by claim 1 at issue were found to give the "*lowest residues (and therefore the best dispersion)*" (see paragraph [0128]), when tested according to the method indicated in paragraph [0119], compared to similar tablets containing a similar amount (5%) of clay powder or clay granules having, however, a different particle size distribution.

Therefore, the Board accepts that these results show convincingly that the softening laundry detergent tablets according to claim 1 have good disintegration properties. This was not disputed.

5.7 Hence, it remains to be assessed whether the claimed solution was obvious in the light of the prior art relied upon by the Appellant.

5.7.1 Document E3 taken alone

Document E3 teaches the addition of a binder/disintegrant component, which may be an inorganic swelling disintegrant like bentonite clay, preferably in amounts of from 0.1 to 10% by weight (page 5, lines 31, 32 and 38 to 39). Moreover, examples 4 and 5 of E3 describe detergent granules in the size range of from 500 to 710 μm which are, however, coated with only 3 % by weight of sodium montmorillonite or bentonite clay (E3: page 10, lines 1, 2, 10 and 11; table on page 11).

Hence, E3 taken alone does not suggest incorporating the clay component into the tablets in the form of granules containing at least 50% by weight of the clay whilst also having a particle size distribution as required by claim 1 at issue. This was not in dispute.

5.7.2 Combination of documents E3 and E8

Document E8 (see claim 1 and column 2, lines 4 to 15) discloses the manufacturing of bentonite clay agglomerates having a defined particle size range. Said agglomerates are used as a fabric softening component in admixture with granular laundry detergent compositions. In particular, it discloses bentonite agglomerates having particle sizes comprised

essentially within the numbers 10 to 100 of the U.S. sieve series, corresponding to a particle size of from 2000 to 149 μm , although occasionally greater particles as large as numbers 6 and 8 (3360 and 2380 μm) may be present. Preferred size ranges for these agglomerates are (E8: column 4, lines 29 to 33), for example, the range between U.S. sieve sizes Nos. 30 and 100 (i.e. 595 to 149 μm) or between Nos. 40 and 100 (i.e. 420 to 149 μm), i.e. particle size ranges in accordance with claim 1 at issue.

Document E8 (see column 1, lines 58 to 61; column 2, lines 4 to 15; column 12, lines 16 to 37) concerns, however, the provision of clay agglomerates for use in a non-segregating admixture with detergent powder particles. The particles constituting said mix product are structurally stable but disintegrate and disperse readily in water. Accordingly, document E8 does not mention detergent tablets and does not address any issue associated with the fabrication or use of such tablets. Therefore, document E8 does not contain any suggestion to use the described bentonite agglomerates in a compacted detergent tablet or for coating detergent granules contained in a tablet.

Moreover, as this document E8 relates only to the dissolution and dispersion of a powdery mixture in a laundry liquor, it is completely silent about the possible dissolution and disintegration properties of a compressed tablet containing similar ingredients. In this respect the Board remarks that detergent tablets as described in document E3 have to meet different criteria than powdery detergent mixtures described in document E8; E3 and E8 belong in fact to different technical fields of application.

Furthermore, the Board remarks that the teaching of E8 is incompatible with the teaching of the closest prior art: Whereas according to E8 the bentonite particles are provided as a component distinct from the detergent granules, examples 4 and 5 of E3 concern detergent particles coated with a relatively small amount of clay.

Therefore, the Board finds that the skilled person, facing the technical problem posed, would not have combined the teachings of documents E3 and E8 in an obvious way leading to tablets falling within the terms of claim 1 at issue.

The Board remarks also that according to document E8 (column 1, lines 30 to 38) bentonite powder in very finely divided form had previously been considered to be useful for achieving maximum softening effectiveness and to be suitable for being agglomerated on the surface of spray-dried detergent particles. Therefore, the skilled person, in order to increase the softening effectiveness of the compositions of examples 4 and 5 of document E3, would have rather considered coating very finely divided bentonite powder onto the matrix detergent particles and would have had no incentive to incorporate the clay in form of the much coarser agglomerates also disclosed in E8, but for a different purpose (not for incorporation into tablets).

Therefore, increasing the clay content of the coated detergent granules according to one of examples 4 or 5 of E3 to a value more than 50% by weight or admixing thereto additional clay granules having a particle size distribution as required by claim 1 at issue are measures that the skilled person, unaware of the

present invention, would not have considered without the benefit of hindsight.

5.8 Therefore, the Board concludes that the subject-matter of claim 1 involves an inventive step (Articles 52(1) and 56 EPC).

Consequently, the subject-matters of dependent claims 2 to 8, relating to specific embodiments of the tablets according to claim 1 at issue, and the subject-matter of claim 9, concerning a process for making tablets with all the features of the tablets according to claim 1 at issue, also involve an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated