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**Datasheet for the decision
of 10 December 2014**

Case Number: T 0516/12 - 3.2.07

Application Number: 02425226.4

Publication Number: 1352840

IPC: B65D5/74

Language of the proceedings: EN

Title of invention:

Sealed package for pourable food products

Patent Proprietor:

Tetra Laval Holdings & Finance S.A.

Opponent:

SIG Technology AG

Headword:

Relevant legal provisions:

EPC Art. 14(2), 56

RPBA Art. 12(4)

Keyword:

Bringing into conformity the translation with the application
as filed

D2 admitted into the appeal proceedings

Inventive step - main and auxiliary requests (no)

Decisions cited:

Catchword:



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Chambres de recours**

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Case Number: T 0516/12 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 10 December 2014

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
2 February 2012 concerning maintenance of the
European Patent No. 1352840 in amended form.**

Composition of the Board:

Chairman H. Meinders
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. Appellant (opponent) lodged an appeal against the interlocutory decision of the opposition division maintaining European patent No. 1 352 840 in amended form.
- II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step).
- III. The opposition division found that the subject-matter of claim 1 according to the then main request meets the requirements of the EPC.
- IV. Oral proceedings took place before the Board on 10 December 2014.
 - a) The appellant requested that the decision under appeal be set aside and that the European patent No. 1 352 840 be revoked.
 - b) The respondent requested that in setting aside the decision under appeal the patent be maintained in amended form on the basis of one of the sets of claims filed during the oral proceedings as main request and as first auxiliary request.
- V. The following documents are referred to in the present decision:

D1: DE 297 16 230 U,
D2: EP 0 755 862 A,
D4: EP 1 081 054 A,
Annex A of the minutes of the oral proceedings before the Board: New Marolli, The Complete Technical

Dictionary, 14th edition, pages 1862 and 1863.

VI. Claim 1 according to the main read as follows:

"A sealed package (1) for pourable food products, made of a packaging material (1a) having a multilayer structure and comprising a fibrous base layer (5) laminated with layers of thermoplastic material (6, 8, 10); said package (1) having a hole (12) formed through said fibrous base layer (5), at least one removable portion (11) covering said hole (12), and a closable opening device (2) in turn comprising a frame (15) defining a pour opening (16) and having a first connecting portion (20) fixed to the package (1) about said removable portion (11) and said hole (12), and a removable cap (17) fitted to said frame (15) to close said pour opening (16) and having an anchoring portion (25) extending through said pour opening (16) and said hole (12) and fixed directly to said removable portion (11);

said frame (15) comprising a threaded, cylindrical annular portion (21) projecting perpendicularly from said first connecting portion (20) and coaxially with said pour opening (16);

said cap (17) having an annular portion (23) projecting from a circular outer peripheral edge (24) of a closing portion (22) screwed onto said threaded annular portion (21) of said frame (15);

wherein said removable portion (11) comprises laminated thermoplastic and barrier layers (6, 8, 10, 7) covering said hole (12) in said fibrous base layer (5);

said removable portion (11) being obtained by forming said hole (12) through said base layer (5), and by laminating both sides of said base layer (5) with said thermoplastic material layers (6, 8, 10) to cover said hole (12);

said base layer (5) being covered, on the side defining the outer face of said package (1), with a first said thermoplastic layer (6); a second said thermoplastic layer (8, 10) covering said base layer (5), on the opposite side of said first thermoplastic layer (6); characterized in that said frame (15) comprises a second connecting portion (28) extending about said anchoring portion (25) of said cap (17) and perpendicularly fixed to a peripheral area (11a) of said removable portion (11); said threaded, cylindrical portion (21) projecting coaxially with said second connecting portion (28)".

Dependent claim 2 of the main request reads as follows (amendments over claim 2 of the patent as granted are in bold):

"A package as claimed in claim 1, characterised in that said second connecting portion (28) of said frame (15) covers **in contact** the edge of said hole (12) in said base layer (5)".

Claim 1 of the first auxiliary request has, with respect to claim 1 of the main request, the additional features that "said second connecting portion (28) of said frame (15) **covering in contact** the edge of said hole (12) in said base layer (5) and adhering at its free end to said removable portion (11)" (amendments over claim 2 of the patent as granted are in bold).

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

Admissibility of the respondent's requests filed during the oral proceedings

The proposed amendments in claim 2 of the main and claim 1 of the first auxiliary request violate the requirements of Articles 123(2) and (3) EPC and they have not been occasioned by a ground for opposition under Article 100 EPC as required by Rule 80 EPC. Said requests filed for the first time during the oral proceedings before the Board and being thus late filed should not be admitted into the proceedings in accordance with Article 13(3) RPBA. The amended claims of said requests in combination with the unamended description are not clear, contrary to the requirements of Article 84 EPC.

Furthermore, for an allowable correction of a part of a European patent, said part has to contain such an obvious error that the skilled person was in no doubt that the feature concerned could not be meant to read as such. This is not here the case concerning the term "covers" in claim 2 of the patent as granted. i.e. in claim 4 of the translation into English of the application as originally filed in Italian.

Finally, there was no description adapted to take account of this amendment.

Claim 1 according to the main request - inventive step, Article 56 EPC

The sealed package according to claim 1 differs from the one known from D4 by the feature that the frame

comprises a second connecting portion extending about the anchoring portion of the cap and perpendicularly fixed to a peripheral portion of the removable portion.

The problem to be solved is the provision of means for accomplishing a neat shearing of the removable portion when said last is removed.

The skilled person seeking to solve the above-mentioned problem would take into consideration the disclosure of D1, since D1 is not only directed to a sealed package having several structural features in common with the sealed package according to claim 1, but it also aims at providing a controlled opening and removing of the removal portion of said sealed package.

The combination of the teachings of D4 and D1 renders the subject-matter of claim 1 obvious.

Consideration of document D2 in the appeal proceedings

In the statement setting out the grounds of appeal *inter alia* an objection based on lack of inventive step of the subject-matter of the then valid claim 2 was raised based on the combination of the teachings of documents D1 and D2, see page 9, first paragraph. Accordingly, D2 being filed at the earlier possible stage of the appeal proceedings, namely together with the statement setting out the grounds of appeal, should be taken into consideration in the appeal proceedings in accordance with Article 12(4) RPBA.

Claim 1 according to the first auxiliary request - inventive step, Article 56 EPC

The feature of claim 1 of the first auxiliary request

which is additional over claim 1 of the main request, namely that the second connecting portion of the frame covers in contact the edge of the hole in the base layer, does not involve an inventive step, since centering the closable opening device by using a downwardly extending tubular projection which enters the pre-cut opening in the laminated base layer belongs to the normal technical knowledge of the person skilled in the art, see for example also figures 3 and 4 of D2.

Furthermore, a two-fold barrier against soaking of the fibrous base layer is also present in the sealed package according to claim 1 of the main request. The above-mentioned additional feature of claim 1 of the first auxiliary request does not provide any additional protection against an accidental impingement of the thermoplastic layer(s) of the removable portion.

VIII. The respondent argued essentially as follows:

Admissibility of the respondent's requests filed during the oral proceedings

The correct translation into English of the expression "riveste" present in claim 4 of the application as originally filed in Italian is the expression "covers in contact". Support for this is to be found in the originally filed figure 3 in connection with the corresponding translation of the expression "rivestimento" in annex A. An accordingly adapted English translation of said claim would have the expression "covers" replaced by the expression "covers in contact" which then would be the basis for the amendments in claim 2 of the main request and in claim 1 of the first auxiliary request. Since such amendments are in compliance with Article 14(2), second sentence,

EPC said article allowing the adaptation of the translation to the original application, **throughout** the proceedings before the European Patent Office, the main and first auxiliary requests should be admitted into the proceedings.

The requirements of Articles 123(2) and (3) EPC and also those of Rule 80 EPC are met.

Furthermore, said amended requests can be dealt with without adjournment of the oral proceedings.

In case the Board finds the claims of one of said requests allowable an adapted description would be filed.

Claim 1 according to the main request - inventive step, Article 56 EPC

The differentiating features of claim 1 over the sealed package known from D4, namely that the frame comprises a second connecting portion extending about the anchoring portion of the cap and perpendicularly fixed to a peripheral portion of the removable portion,

solve two different technical problems:

- a) avoiding delamination between the thermoplastic layers at the edge of the removable portion and
- b) the provision of a neat separation of the removable portion when it is removed.

The skilled person seeking to solve the above-mentioned problems would disregard D1 for the following reasons.

Firstly, there exists no delamination problem in the layers of the removable portion as depicted in figure 5

of D1, since there is no superposition of the upper layer 7 and lower layer 9 in the removable portion 11 and there is also no information in D1 that said layers 7 and 9 are thermoplastic layers.

Secondly, D1 does not teach how to achieve a neat separation of the removable portion but only how to safely and completely remove the removable portion, see page 2, third paragraph and page 4, fifth paragraph of D1.

Even if the skilled person would have taken into consideration the teaching of D1 the result would not have been the subject-matter of claim 1 since in D1 no direct link exists between the presence of the tubular projection 17 and a clear and safe separation of the removable portion.

Consideration of document D2 in the appeal proceedings

D2 being late filed should not be taken into consideration in the appeal proceedings.

Claim 1 according to the first auxiliary request - inventive step, Article 56 EPC

The feature of claim 1 of the first auxiliary request, additional over claim 1 of the main request, namely that the second connecting portion of the frame covers in contact the edge of the hole in the base layer, is a feature not derivable from D4, nor from D1.

Said feature develops the following technical effects:

a) preventing the pourable food product from soaking the fibrous base layer by the provision of a two-fold

barrier in the event that the package is laid horizontally for a relatively long period of time with the removable portion detached and the cap put back on,

b) providing, by contacting the thermoplastic layer(s) in the area close to the fibrous base layer, an additional protection against an accidental impingement of said layer(s),

c) centring of the closable opening device when attached to the packaging material,

and involves thus an inventive step.

The teaching of D2 is not applicable to the sealed packages known from D1 or D4, since said last packages have a screw cap where D2's package has a hinged cap.

Reasons for the Decision

1. *Admissibility of the respondent's requests filed during the oral proceedings*
 - 1.1 The present application was originally filed in Italian, i.e. in a language other than one of the official languages of the EPO, and consequently its translation into English, i.e. into one of the official languages of the EPO, was filed in accordance with Article 14(1), first sentence, EPC.
 - 1.2 According to Article 14(2), second sentence, EPC such translation may be brought in conformity with the originally filed application throughout the proceedings

before the EPO.

1.3 During the oral proceedings the respondent filed a main request having in claim 2 the term "covers" of claim 2 of the patent as granted, replaced by the expression "covers in contact". It filed further a first auxiliary request having its claim 1 based *inter alia* on the combination of claims 1 and 2 of the above-mentioned main request, with the corresponding expression "covering in contact".

1.4 The respondent argued in this respect that the correct translation into English of the expression "riveste" as present in claim 4 of the application as originally filed in Italian is the expression "covers in contact" and that the basis for this fact is to be found in the originally filed figure 3 in connection with the corresponding translation of the expression "rivestimento" in annex A. An accordingly adapted English translation of said claim should have the expression "covers" replaced by the expression "covers in contact" which then would be the basis for the amendments in claim 2 of the main request and in claim 1 of the first auxiliary request. Since such amendments are in compliance with Article 14(2), second sentence, EPC, said article allowing the adaptation of the translation "throughout the proceedings before the European Patent Office", which included the appeal proceedings, the main and the first auxiliary requests should be admitted into the proceedings.

1.5 Since the appellant did not object to the respondent's statement that the correct translation into English of the expression "riveste" present in originally filed claim 4 in Italian is the expression "covers in contact" the Board sees no reason not to admit a

corresponding amendment of the English translation of said claim in accordance with Article 14(2), second sentence, EPC. It is then obvious that the claims of the respondent's main and first auxiliary request, which are based on said claim 4, i.e. claim 2 of the main request and claim 1 of the first auxiliary request, would have to be correspondingly adapted.

1.6 Given the fact that the expression "covers in contact" defines a feature more limited than the expression "covers" present in claim 2 of the patent as granted, amended claim 2 of the main request and amended claim 1 of the first auxiliary request do not violate the requirements of Articles 123(2) and (3) EPC.

1.7 The Board follows further the respondent's argument that this adaptation of the claims of its main and first auxiliary request was a proper reaction to the appellant's lack of inventive step objections based on Article 100(a) EPC in an attempt to correctly delimit the invention over the prior art documents present in the file. The conditions of Rule 80 EPC for amending a European patent are thus met.

1.8 The present case is not one of a correction of an obvious error (Rule 139, second sentence, EPC), but falls under the application of Article 14(2) EPC. Fulfilling the requirements of said Rule and its relevant jurisprudence is therefore not a prerequisite for the admissibility of the present amendments.

1.9 According to Article 13(3) RPBA amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings.

Since the Board finds that the amendments made to claim 2 of the main and claim 1 of the first auxiliary request are easily understood, are covered by the documents in the file and so would not require adjournment of the oral proceedings, the Board saw no reason for not admitting said requests.

- 1.10 The Board notes further that the respondent offered to adapt the description in case the Board would find the claims of one of its requests allowable. The objection concerning the non-conformity of the description with the amended claims generating a problem with Article 84 EPC would not hold in such a case.
- 1.11 For the above-mentioned reasons, the Board admits the respondent's main and first auxiliary requests into the proceedings.
2. *Claim 1 according to the main request - inventive step, Article 56 EPC*
 - 2.1 It is undisputed that the sealed package according to claim 1 differs from the one known from D4, said document being considered as presenting the closest prior art, by the feature that the frame comprises a second connecting portion extending about the anchoring portion of the cap and perpendicularly fixed to a peripheral portion of the removable portion.
 - 2.2 The Board follows both parties arguing that the technical effect of said differentiating features is to be seen in the provision of a neat shearing of the removable portion when said last is removed.

- 2.3 Accordingly, the problem to be solved can be seen in improving the shearing of the removable portion.
- 2.4 It has first to be established whether the skilled person seeking to solve the above-mentioned problem would take into consideration the disclosure of D1.
- 2.5 The Board follows in this respect the appellant arguing that D1 is directed to a sealed package for pourable food products, made of a packaging material having a multilayer structure and comprising a fibrous base layer 8 laminated with inner and outer layers 7, 9 and 10, said package having a hole formed through said fibrous base layer, at least one removable portion 11 covering said hole, and a closable opening device in turn comprising a frame 5 defining a pour opening and having a first connecting portion 16 fixed to the package about said removable portion and said hole, and a removable cap 4 fitted to said frame to close said pour opening and having an anchoring portion 14 extending through said pour opening and said hole and fixed directly to said removable portion.

This means that the sealed package known from D1 has most of the structural features in common with the sealed package according to claim 1.

Furthermore, D1 aims at providing a controlled opening and removing of the removal portion, see page 2, third paragraph, and a safe separation of the removable part, see page 4, fifth paragraph, i.e. D1 focuses also on the functionality of the package, when removing the removable portion, in particular the part between the portion fixed to the cap and the portion fixed to the fibrous base layer.

- 2.6 For the above-mentioned reasons the Board considers that the person skilled in the art seeking to solve the problem mentioned under point 2.3 above would take into consideration the teaching of D1. In that respect it is not necessary that D1 mentions "neat shearing" as such.
- 2.7 According to paragraph [0011] of the patent in suit, the package of D4 has the drawback that the thermoplastic material at the edge area of the opening tends to fray when removing the cap with the removable portion from the package, thus preventing the food product from flowing smoothly out of the package.
- 2.8 It is obvious to the person skilled in the art, that the separation of the removable portion in the sealed package known from D4 takes place within the free area extending between the cap's lower circumferential edge 41 being fixed to said removable portion and the lower inner edge of the opening 7, said removable member being attached to said lower inner edge. Given the fact that the heat-sealed layers 9, 11 and 14 in D4 are polyethylene layers, see paragraphs [0021] and [0023] of D4, and that it is well known to the person skilled in the art that a polyethylene layer, when pulled apart, first elongates and then tears leading thereby precisely to fraying of said layer, the skilled person would realise that this phenomenon would be countered by reducing that free area of the polyethylene layer(s) to be pulled apart. This would provide a more defined separation edge achieving a cleaner edge of the opening.
- 2.9 As stated above, D1 ensures a controlled opening and removal of the sealing element. For this purpose the closure element is connected with the sealing element

such that by a first opening of the package the sealing element is separated in the region of the opening from the surrounding material and it remains adhered to the closure element at least up to a first lifting of the latter, see the characterizing part of claim 1 of D1.

- 2.10 The Board notes in this respect that there is clear structural similarity between the peripheral horizontal flange 16 of the frame 5 depicted in figure 5 of D1, said flange being fixed to the outer layer 7, with the peripheral horizontal flange 20 of the frame 15 depicted in figure 4 of D4, said latter flange being fixed to the outer layer 6.

Furthermore, the skilled person immediately recognizes that the circumferential flange 16 of frame 5 comprises an annular extension extending downwardly from this horizontal flange, said extension being fixed with its lower edge 17 to the inner layers 9 and 10 of the sealing element, i.e. the latter being identical with removable portion 11 of the invention at issue.

- 2.11 Moreover, since according to claim 7 and page 4, second complete paragraph of D1 the area of the connecting region between the cap's flat bottom 14 and the sealing element substantially matches the extent of the opening, it is obvious that the distance between the outer peripheral edge of the cap's flat bottom 4 and the inner peripheral edge of the annular extension of the frame 5 extending downwardly is reduced to a minimum and that the separation of the sealing element from its surrounding material takes place within this distance. Thus, the inner peripheral edge of the downward extension defines thereby a more defined tearing edge.

- 2.12 The structural and functional constellation in figure 5 of D1 as discussed above is a clear teaching for the skilled person that starting from the sealed package known from D4 and wishing to solve the problem of a frayed tearing edge in the opening, the frame 15 needs to be provided with an annular extension of the horizontal flange 20, extending downwardly into the hole 7, to be connected to the sealed area 10a of the removable portion. The presence of such an annular extension within the coated hole 7 reduces the distance between the outer peripheral edge 41 of the cap and the periphery at which the laminated sheets 9, 11, 12, 13 and 14 are held fixed together, thus providing in that limited annular space a better obtainable tearing edge for the removable portion. In this respect, D1 does not need to refer to a "neat edge" or a "clear edge" being obtained. In view of the teaching of D1 and the arrangement of D4, there is sufficient space for such an annular extension and thus no technical obstacle exists.
- 2.13 By performing the above-mentioned straightforward modification of the frame known from D4, said modification not requiring any inventive skills, the skilled person would indeed solve the problem mentioned under point 2.3 above and would arrive at a sealed package according to claim 1 without the exercise of an inventive activity.
- 2.14 The respondent further argued, at the oral proceedings, that the differentiating feature mentioned under point 2.1 above solves an additional problem, namely that the delamination (or the not complete lamination) in the bottom corner of the hole 7, between the thermoplastic layers 9 and 11 covering the top, respectively the bottom of the fibrous base layer 8, has no effect on

the tearing of the removable portion. Since D1 is not directed to thermoplastic layers and it is also not referred to any delamination problem the person skilled in the art seeking to solve such a problem would not take it into consideration.

2.15 The Board considers that the phrase in paragraph [0011] of the patent in suit mentioning that "the packaging material is laminated better inwards of than about the edge of the removable portion" cannot be considered sufficient support for this argument, especially in light of claim 1 not claiming, i.e. not requiring that the thermoplastic layer on top of the fibrous base layer is laminated to the layer on the bottom of the fibrous base layer. Thus, the fact that D1 does not deal with delamination (or bad lamination) between the two thermoplastic layers covering both sides of the fibrous base layer cannot play a role.

2.16 Accordingly, the subject-matter of claim 1 of the main request does not involve an inventive step (Articles 52(1) and 56 EPC).

3. *Consideration of document D2 in the appeal proceedings*

3.1 D2 has been filed together with the notice of opposition and has been also mentioned in the impugned decision, see page 4, first paragraph. In the statement setting out the grounds of appeal *inter alia* an objection based on lack of inventive step of the subject-matter of the then valid claim 2 had been raised based on the combination of the teachings of documents D1 and D2, see page 9, first paragraph of said statement.

3.2 Since according to Article 12(4) RPBA everything presented by a party with its statement of grounds of appeal shall be taken into consideration by the Board and as stated above a lack of inventive step objection based *inter alia* on D2 was presented with said statement, there is no reason for excluding D2 from consideration in the appeal proceedings.

4. *Claim 1 according to the first auxiliary request - inventive step, Article 56 EPC*

4.1 The respondent argued that the feature of claim 1 of the first auxiliary request, additional over claim 1 of the main request, namely that the second connecting portion of the frame **covers in contact** the edge of the hole in the base layer, said feature being derivable neither from D4 nor D1, has the following technical effects:

a) preventing the pourable food product from soaking the fibrous base layer by the provision of a two-fold barrier in combination with the polyethylene layers of the removable portion, in the event that the package is laid horizontally for a relatively long period of time with the removable portion detached and the cap put back on,

b) providing, by having said second connecting portion contacting the thermoplastic layer(s) in the area close to the fibrous base layer, an additional protection against an accidental impingement of said layer(s),

c) centering the closable opening device when attaching it to the packaging material.

Said additional feature thus involves an inventive

step.

4.2 The Board cannot follow the respondent's arguments for the following reasons.

4.2.1 As argued under point 2 above the provision of a second, annular, connecting portion extending about the anchoring portion of the cap and perpendicularly fixed to a peripheral portion of the removable portion of the sealed package known from D4 is obvious to the skilled person.

In such a case said second, annular, connecting portion forms in combination with the layer 9 being laminated to layer 11 according to D4, also a two-fold barrier against a possible ingress of the pourable food product.

This two-fold barrier is present independently of whether said second connecting portion is **in contact** or not with the fibrous base layer of the sealed package.

Accordingly, the above-mentioned technical effect a) is already obtained when applying the teaching of D1 in the sealed package of D4, as discussed in point 2 above. This effect cannot therefore provide support for the presence of an inventive step.

4.2.2 The Board can follow the respondent's argument, that the additional feature of claim 1 mentioned under point 4.1 above provides the possibility of centering the closable opening device on the package, by using the edge of the hole in the fibrous base layer as a guide.

The technical problem to be solved can then be seen in the provision of means for correctly positioning the

- closable opening device of the package.
- 4.2.3 In point 2 above the Board found that the skilled person would arrive, in an obvious manner, at a sealed package according to claim 1 of the main request. In doing so the frame of the closable opening device would be fixed to the fibrous base layer, and an annular second connecting portion would be inserted into the hole in said base layer and perpendicularly fixed to a peripheral area of said removable portion. This requires a precise, correct positioning of the closable opening device with respect to the hole.
- 4.2.4 The person skilled in the art seeking to achieve that would regard it an obvious measure to adapt the outer diameter of said annular projection to the inner diameter of said hole so that the hole has a centering function. The result is that the annular second connecting portion is in contact with the edge of said hole in the base layer. Such a measure is part of the general technical knowledge of the person skilled in the art, as exemplified by D2, column 4, lines 43 to 46, figures 3 and 4.
- 4.2.5 In doing so, any risk of accidental impingement of the thermoplastic layers in that area is avoided as a bonus effect.
- 4.3 The respondent argued that the skilled person seeking to center a closable opening device having a screw cap as it is the case for the packages known from D4 and D1 would not take into consideration the teaching of D2, said last having a closable opening device with a hinged cap.

4.4 The Board cannot follow this argument, since the type of connection between the cap and the frame of the closable opening device, i.e. whether the cap is hingedly connected or screwed onto the upper part of the frame, said connection being positioned outside the hole of the fibrous base wall, has no influence on the centering of the closable opening device with respect to said hole as discussed above.

4.5 For the above-mentioned reasons, the subject-matter of claim 1 of the first auxiliary request does not involve an inventive step (Articles 52(1) and 56 EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated