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Datasheet for the decision of 20 July 2021

Case Number: T 0510/17 - 3.2.01

Application Number: 10781821.3

Publication Number: 2493341

IPC: A24F47/00

Language of the proceedings: EN

Title of invention:
A SMOKING SYSTEM HAVING A LIQUID STORAGE PORTION AND IMPROVED AIRFLOW CHARACTERISTICS

Patent Proprietor:
Philip Morris Products S.A.

Opponent:
JT International S.A.

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 83
EPC R. 80
RPBA Art. 12
RPBA 2020 Art. 11

Keyword:

Novelty - main request (no) - auxiliary request 2 (no) - auxiliary request 4 (yes)
Inventive step - auxiliary request 4 (yes)
Sufficiency of disclosure - (yes)
Amendment occasioned by ground for opposition - auxiliary requests 1 and 3 (no)
Remittal - special reasons for remittal

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 0510/17 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 20 July 2021

Appellant: (Patent Proprietor)	Philip Morris Products S.A. Quai Jeanrenaud 3 2000 Neuchâtel (CH)
Representative:	Morf, Jan Stefan Abitz & Partner Patentanwälte mbB Postfach 86 01 09 81628 München (DE)
Appellant: (Opponent)	JT International S.A. 1, Rue de la Gabelle 1211 Geneva 26 (CH)
Representative:	Gill Jennings & Every LLP The Broadgate Tower 20 Primrose Street London EC2A 2ES (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 19 December 2016 concerning maintenance of the European Patent No. 2493341 in amended form.**

Composition of the Board:

Chairman	G. Pricolo
Members:	M. Geisenhofer
	A. Jimenez

Summary of Facts and Submissions

I. Appeals were filed by the patent proprietor (appellant-proprietor) and the opponent (appellant-opponent) against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 4A (then on file), the European patent EP 2 493 341 met the requirements of the EPC.

II. The opposition division decided that

(a) the subject-matter of this request was novel and inventive; and

(b) the patent, on the basis of this request, disclosed the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

The opposition division further decided with regard to the higher ranked requests filed in opposition proceedings that

(c) the subject-matter of the main request (patent as granted) and of auxiliary request 1 (then on file) was not novel in the sense of Article 54 EPC;

(d) the amendments made in accordance with auxiliary request 2 did not comply with Rule 80 EPC;

(e) the subject-matter of the auxiliary request 2A was not novel in the sense of Article 54 EPC.

III. The opposition division's decision was based on the following documents filed with the notice of opposition:

E1 EP 2 113 178 A1

E2 EP 0 893 071 A1

E5 WO 2007/131450 A1

Furthermore, the opposition division admitted late filed documents

E14 WO 08/077271 A1 (with translation E14A) and

E15 US 2 057 353,

but did not admit document

E16 EP 0 358 002.

With their statement of grounds of appeal, the appellant-opponent filed the following documents:

E17 EP 2 022 349 A1

E18 CN 101518361 A (with translation E18a)

E19 CN 201085044 Y (with translation E19a)

IV. Oral proceedings were held before the Board.

(a) The appellant-proprietor requested that the decision under appeal be set aside and the patent be maintained as granted or in amended form based on one of the auxiliary requests 1 – 10 filed with the reply to the statement of grounds of appeal.

(b) The appellant-opponent requested that the decision under appeal be set aside and the patent be revoked.

(c) During oral proceedings, the appellant-opponent withdrew their request for admitting documents E16 and E18.

V. Independent claim 1 according to the **main request** (patent as granted) reads as follows:

"*A smoking system (100) comprising:*

a capillary wick (117) having a fibrous or spongy structure for holding liquid;

at least one heater (119) for heating the liquid in at least a portion of the capillary wick to form an

aerosol, the heater comprising a coil of wire at least partially surrounding the capillary wick; at least one air inlet (123), at least one air outlet (125) and a chamber (127) between the air inlet and air outlet, the air inlet, the air outlet and the chamber being arranged so as to define an air flow route from the air inlet to the air outlet via the capillary wick so as to convey the aerosol to the air outlet; and
at least one guide (201) for channeling the air flow in the air flow route and the at least one guide defining a constricted air flow cross section over the wick (117) which will force the air flow to accelerate, so as to control particle size in the aerosol."

Independent claim 1 of the **first auxiliary request** (which is identical to independent claim 1 of **second auxiliary request**) requires in addition to claim 1 of the main request the following features:
"*wherein the guides (803) are configured to channel the air flow around the capillary wick in a spiral or wherein the capillary wick (117) is elongate and wherein the guides (601) are configured to channel the air flow on to the capillary wick in a direction intermediate between the direction of the longitudinal axis of the capillary wick and the direction perpendicular to the longitudinal axis of the capillary wick or substantially perpendicular to the longitudinal axis of the capillary wick.*"

The first auxiliary request further comprises the following additional independent claim 12:
"*Use of a smoking system (100) comprising:*
a capillary wick (117) having a fibrous or spongy structure for holding liquid;
at least one heater (119) for heating the liquid in at least a portion of the capillary wick to form an

aerosol, the heater comprising a coil of wire at least partially surrounding the capillary wick; at least one air inlet (123), at least one air outlet (125) and a chamber (127) between the air inlet and air outlet, the air inlet, the air outlet and the chamber being arranged so as to define an air flow route from the air inlet to the air outlet via the capillary wick so as to convey the aerosol to the air outlet; and
at least one guide (201) for channeling the air flow in the air flow route and the at least one guide defining a constricted air flow cross section over the wick (117) which will force the air flow to accelerate, so as to control particle size in the aerosol."

Independent claim 1 of the **third auxiliary request** (which is identical to claim 1 of the **fourth auxiliary request**) is based on the independent product claim of the first and second auxiliary request but the alternative directed to an air flow channelled in a direction intermediate between the direction of the longitudinal axis of the wick and the direction perpendicular to the wick is omitted.

The third auxiliary request comprises in addition to the device claim 1 the same independent use claim 12 as the first auxiliary request.

VI. The appellant-proprietor's arguments can be summarised as follows:

(a) The subject-matter of claim 1 of the main request is novel and inventive over E1 and E2. The same applies to claim 1 of the first to fourth auxiliary requests.

(b) The amendments to the claims according to the first and third auxiliary requests were intended to render the claimed subject-matter novel and hence comply with Rule 80 EPC.

(c) The invention is disclosed in a manner sufficient clear and complete for it to be carried out by a person skilled in the art.

(d) The novelty attack based on E1 against claim 1 of the fourth auxiliary request is late filed and shall not be admitted under Article 13(1) RPBA 2020.

(e) Document E17 and E19 should have been filed during opposition proceedings and hence shall not be admitted under Article 12(4) RPBA 2007.

(f) If either of documents E17 or E19 is admitted, the case shall be remitted to the opposition division for further prosecution to allow for two independent instances to decide on the case.

VII. The appellant-opponent's arguments can be summarised as follows:

(a) The subject-matter of claim 1 of the main request is not novel over E1 and E2 either. The same applies to claim 1 of the first and second auxiliary requests.

(b) The addition of a claim being directed to the use of the smoking system to the set of claims according to the first and third auxiliary requests contravenes Rule 80 EPC.

(c) The invention according to the fourth auxiliary request cannot be carried out since the patent lacks relevant information on the internal design and geometry of the smoking system, in particular on the design of the at least one guide configured to channel the air flow.

(d) The subject-matter of claim 1 of the fourth auxiliary request is neither novel over E1, nor novel over E2. Albeit the novelty attack based on E1 is filed late, it shall be admitted since it is highly relevant.

(e) Documents E17 and E19 shall be admitted into the procedure since both documents are highly relevant and were submitted as a legitimate reaction to the opposition division's decision at the first possible opportunity.

(f) Furthermore, the subject-matter of claim 1 of the fourth auxiliary request is not inventive over a combination of E2 with the general knowledge or E5.

(g) E17 and E19 anticipate the subject-matter of claim 1 of the main request and of the first to fourth auxiliary requests.

(h) A remittal to the opposition division would unnecessarily lengthen the procedure and therefore the Board shall also decide on novelty and inventive step with regard to E17 and E19.

Reasons for the Decision

Main request

Novelty (Article 54 EPC)

1. The opposition division decided that the subject-matter of claim 1 of the main request (patent as granted) is not novel over E1.

1.1 It is undisputed between the parties that E1 discloses a smoking system with a capillary wick (207), a heater comprising a coil of wire (209) surrounding the wick, an air inlet (115), an air outlet (211) and a chamber (213). Air inlet, air outlet and chamber are arranged such that an air flow route from the inlet to the outlet via the wick is achieved (cf. dashed lines in figure 3). The air flow is directed onto the heater such that aerosol is produced and conveyed to the air outlet (cf. [0040]).

1.2 The appellant-proprietor argued that E1 lacks disclosure of a guide defining a constricted air flow cross section over the wick which will force the air flow to accelerate, so as to control particle size in the aerosol.

1.2.1 In the patent in suit it is explained in paragraph [0099] in conjunction with figure 7a that the insert (601) channels the air flow to travel in an annular space between the housing and the insert and therefore the insert is a guide in the sense of the patent in suit.

E1 discloses a similar design whereby an insert (cartridge 203) is inserted into a shell (101) and

delimits an annular space forming a channel. The insert hence is to be considered as a guide in the sense of the patent in suit.

1.2.2 As set out in paragraph [0043] of E1, air is drawn through a inlet (115) and flows via the annular space between the insert (203) and the shell (101) on its path through the smoking system whereby the annular channel provides – compared to the chamber (213) around the heater – a constricted air flow cross section. This constricted air flow cross section also extends over the wick (between its end 207a and the insulating ring 217).

1.2.3 The constricted air flow cross section will inevitably force the air flow to accelerate as it defines a portion of the air flow path where air flows at a certain velocity, whilst the air surrounding the inlet (115) is at rest.

(a) The appellant-proprietor contested that in E1 the air flow is accelerated on its path through the smoking system shown in figure 3 in dashed lines. If the opening (115) was small enough, it would delimit the air flow over the entire path to a constant velocity without any acceleration over the wick.

(b) However, since the cross-section of the channel in E1 varies, the velocity of the air flow cannot remain constant over the entire path. For instance, when leaving the annular channel around the insert (203) and entering the chamber (213) with the heater, the velocity of the air flow will change.

(c) Most importantly, the claim does not specify where on its path the acceleration of the air flow occurs but only requires that the constricted air flow cross section over the wick forces the air flow to accelerate. Since the air surrounding the openings (115) is at rest and then passes with a certain velocity through the annular space around the insert, it is accelerated at some undefined point along its path due to the fact that the path itself is partly defined by the annular space.

1.2.4 The appellant-proprietor further argued that a control of the particle size by the accelerated air flow is not mentioned in E1.

(a) It is to be noted that claim 1 of the main request does not require a particular control and/or a particular size of the particles to be produced. It only refers to a control of the particle size as a result of an acceleration of the air flow.

(b) Since the patent in suit does not specify a particular relationship between air flow velocity and resulting particle size in the aerosol, it must be assumed that each acceleration of the flow resulting in a certain air velocity will also result in a certain (undefined) control of the particle size in the aerosol, which therefore also implicitly occurs in E1.

1.2.5 The appellant-proprietor finally argued that in E1 the air is not channelled through the smoking system and onto the wick but only travels through it, i. e. the flow of air is not actively controlled but simply unintentionally occurs.

This understanding cannot be shared since the smoking system of E1 is also intended to create an aerosol by channelling the air flow onto the heater surrounding the wick such that the flow of air is not achieved by coincidence. E1 discloses in figure 3 the path of air in dashed lines such that it is clear for a skilled person that the smoking system of D1 is is purposefully designed to produce an air flow following that path.

1.3 E1 thus discloses at least one guide for channelling the air flow in the air flow route, and the at least one guide defines a constricted air flow cross section over the wick which will force the air flow to accelerate, so as to control particle size in the aerosol.

1.4 The main request hence does not comply with Article 54 EPC as decided by the opposition division.

First and third auxiliary requests

Allowability of amendments (Rule 80 EPC)

2. The opposition division held that adding the use claim 12 to the set of claims 1 – 11 (being directed to the smoking system as such) in auxiliary request 2 was not occasioned by a ground of opposition under Article 100 EPC and thus concluded that this amendment did not comply with Rule 80 EPC.

2.1 The appellant-proprietor argued that this amendment is intended to restore novelty over E1 and hence serves to resolve an objection raised by the appellant-opponent based on a ground of opposition.

2.2 Adding an additional claim from a different category, namely a use claim, while retaining the independent product claim unchanged cannot restore novelty thereof. Indeed, the scope of protection attached to the independent product claim is not affected by the addition of the use claim which, therefore, still remains the same.

2.3 The Board is further not aware of any other ground of opposition that would be overcome by introducing the additional independent use claim.

2.4 The Board hence agrees with the opposition division's decision that the introduction of the use claim 12 is not occasioned by a ground of opposition and the amendment therefore does not comply with Rule 80 EPC, whereby the first and third auxiliary request are thus not allowable.

Second auxiliary request

Novelty (Article 54 EPC)

3. The second auxiliary request corresponds to auxiliary request 2A in the opposition proceedings. As compared to claim 1 of the main request, claim 1 of the second auxiliary request further defines three alternatives for the air path:

(a) the air flow is channelled around the capillary wick in a spiral;

(b) the air flow is channelled on to the elongate capillary wick in a direction intermediate between the direction of the longitudinal axis of the elongate capillary wick and the direction

perpendicular to the longitudinal axis of the elongate capillary wick; or

(c) the air flow is channelled on to the elongate capillary wick in a direction perpendicular to the longitudinal axis of the elongate capillary wick.

3.2 The opposition division came to the conclusion that alternative (b) is not novel over E1 since the capillary wick is elongate and the path of air flow represented by the dashed line in figure 3 has a direction intermediate between the direction of the longitudinal axis of the wick and the direction perpendicular to the same axis.

3.2.1 The appellant-proprietor argues again similarly to their arguments with regard to the main request that the path shown in figure 3 is not the result of a choice of a particular design of the guides intended at guiding the air flow in an intermediate direction.

3.2.2 This is however irrelevant for the question of novelty of the claimed product. In E1 the air flow is channelled in an intermediate direction, as shown in Fig. 3 by dashed lines, and therefore the known product presents the structural features allowing this particular air flow path.

3.3 The Board hence agrees with the opposition division's decision that E1 also anticipates the subject-matter of claim 1 of the second auxiliary request, this request thus not fulfilling the requirements of Article 54 EPC.

Fourth auxiliary request

4. The fourth auxiliary request corresponds to auxiliary request 4A in opposition proceedings which was deemed allowable by the opposition division.

Sufficiency of disclosure (Article 83 EPC)

5. The patent discloses the invention according to the fourth auxiliary request in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

5.1 The appellant-opponent argued that the patent does not provide detailed information on the internal geometry of the smoking system which allows to channel the air flow around the capillary wick in a spiral.

5.2 In paragraphs [0105] – [0122] of the granted patent, a plurality of arrangements of inlet, flow paths and outlets are described including their effect on the air flow path. In particular paragraph [0106] describes that the air flow can enter tangentially the housing of the smoking system and thus flows spirally around the wick to the outlet. Figures 8a – c disclose a schematic arrangement of the wick (including the coil wound around the wick) showing the path of air flow.

5.3 The skilled person hence knows how to influence the flow path and therefore is able to reproduce the particular smoking system with spiral air flow around the wick, this essentially simply requiring providing the air flow with a component in a tangential direction in addition to the longitudinal direction.

Novelty (Article 54 EPC) with regard to E1

6. During oral proceedings in appeal proceedings, the appellant-opponent raised for the first time a novelty objection based on E1 against claim 1 of the fourth auxiliary request. The appellant-proprietor requested that this new objection be not admitted into the proceedings.

6.1 Since the fourth auxiliary request in appeal proceedings corresponds to the auxiliary request 4A which was discussed during opposition proceedings, and E1 is a document that was discussed during opposition proceedings in respect of novelty of higher-ranking requests, this objection could have been filed earlier – either already during opposition proceedings or at the latest with the notification of grounds of appeal. Furthermore, the appellant-opponent did not provide any reason why this objection was only raised at that very late stage of the appeal proceedings.

6.2 The novelty attack based on E1 is therefore not admitted into the appeal proceedings according to Rule 13(1) RPBA 2020.

Novelty (Article 54 EPC) with regard to E2

7. The subject-matter of claim 1 of the fourth auxiliary request is novel over E2.

7.1 It is undisputed between the parties that E2 discloses a smoking system comprising
- a capillary tube (36) for transporting liquid to a heater (42) for heating the liquid to form an aerosol
- an air inlet (18),
- an air outlet (22) and

- a chamber (21) between the air inlet and air outlet.

The air inlet, the air outlet and the chamber are arranged so as to define an air flow route from the air inlet to the air outlet such that the aerosol is conveyed to the air outlet.

The smoking system further comprises a guide ("squeeze plate" 24) for channelling the air flow in a direction substantially perpendicular to the longitudinal axis of the capillary tube. The guide defines a constricted air flow cross section that forces the air flow to accelerate.

7.2 The appellant-opponent alleged that the guide would form an air flow cross section over the wick. He further alleged that the heater of E2 is a resistive heater and therefore at least implicitly comprises a coil of wire.

7.2.1 The squeeze plate (24) of E2 is located offset from the capillary tube and is formed by a plate comprising a central opening (24a). Due to the wall thickness of this plate, the passage through the opening can be considered as a constricted air flow cross section, which however does not extend over the end (36b) of the capillary tube (36) but ends with the downstream facing surface of the plate. E2 is silent with respect to details of the flow of air produced by the squeeze plate downstream of it such that E2 neither explicitly discloses that the restricted air flow cross section extends over the wick nor that this can be implicitly deduced up to the required standard ("directly and unambiguously").

7.2.2 The kind of heater (42) is not detailed in E2 either. E2 only describes (cf. column 7, line 9 or column 9, lines 8 - 10) that the heater uses electricity to evaporate the liquid to form an aerosol. Since the skilled person is aware of resistance heaters without coils, it cannot be assumed that the heater of E2 implicitly comprises a coil of wire.

7.3 The appellant-proprietor in turn contested that the capillary tube of E2 would be a wick. They further alleged that the heater would not surround the tube but would be an extension thereof sitting on the upper end of the tube such that the air flow is not directed onto the wick but only onto the heater. Furthermore, the guide allegedly would not be intentionally shaped for accelerating the flow of air to direct it onto the wick and to control the particle size of the aerosol.

7.3.1 E2 discloses in column 3, starting in line 49 that the liquid passageway through which the liquid is transported by capillary force can be either a capillary tube or as an alternative a pore structure arranged in an enclosure, the pore structure being an open-cell foamed structure or bundled fibres. An open-cell foamed structure or a bundle of fibres transporting the liquid are embodiments of a capillary wick such that it is – contrary to the opposition division's decision – disclosed in E2 to use a capillary wick within the tube to transport liquid to the heater.

(a) The appellant-proprietor argued that the open-cell foamed structure or these fibres would however not extend into the heater since the fibres' enclosure (tube 36) would end below the heater as can be seen in figures 2A – 2C.

(b) E2 however discloses in column 7, lines 5 – 7 that the liquid passageway extends up to the outlet port formed by the upper end of the heater (42) itself such that the fibres will not end below the outlet port but extend up to the end of that passageway, i. e. also into the heater, such that the air flow is not only directed onto the heater but also onto the wick.

7.3.2 As already set out with regard to the main request, any acceleration of the flow of air will inevitably result in a control of the particle size of the aerosol. The squeeze plate of E2 forming a guide that accelerates the flow of air will hence also automatically control the size of the particles.

7.4 The subject-matter of claim 1 of the fourth auxiliary request therefore differs from the smoking system of E2 in that:

(a) the constricted air flow cross section extends over the wick; and

(b) the heater comprises a coil of wire.

Claim 1 thus complies with Article 54 EPC.

Inventive step (Article 56 EPC) with regard to a combination of E2 with E5/general knowledge

8. The subject-matter of claim 1 of the fourth auxiliary request is not rendered obvious by a combination of E2 with E5 or E2 with the general knowledge of the skilled person.

8.1 The appellant-opponent argued that E5 would render it obvious to use a heater comprising a coil of wire

surrounding the wick. In this context, E5 would be representative of the common general knowledge of the skilled person.

8.2 Document E5 indeed discloses several embodiments of a smoking system (cf. in particular figures 8 – 11) comprising a wick surrounded by a coil of wire. These wicks however have a different set-up as compared to the wick of E2: The wicks shown in figures 8 – 11 of E5 are cylindrical inserts arranged within a tubular body of the smoking system whereby the wick fills the entire cross section of the housing, whereas the wick of E2 extends only a short distance into the gas passageway 20 from a side wall thereof. The wicks of E5 hence cannot be used in E2 without further adapting them.

8.3 The same applies to a coil of wire which is indeed matter of common general knowledge. However, the provision of a coil would need adaptation to the particular design of the wick, the liquid to be evaporated and the geometry of the chamber of the smoking system.

8.4 But even if the skilled person would consider using a coil of wire as a heater in E2, the constricted air flow cross section of E2 would still not extend over the wick.

The appellant-opponent failed to point to any document cited in the proceedings that would provide an indication to the skilled person that a constricted air flow cross section extending over the wick would provide a particular advantage. In absence of such an indication the skilled person would not consider modifying the design of the squeeze plate known from E2.

8.5 Accordingly, the opposition division's conclusion on inventive step based on the documents available in the opposition procedure is therefore correct.

Admission of documents E17 and E19 (Article 12 RPBA 2007)

9. The appellant-opponent filed the documents E17 and E19 with the statement of grounds of appeal and requested to admit these documents into the procedure since they were highly relevant. Furthermore, they argued that the filing of these documents would be a legitimate reaction to the opposition division's decision and could not have been done earlier than on appeal.

9.1 As regards the proceedings before the opposition division, the following is noted.

9.1.1 With the notice of opposition the appellant-opponent raised objections of lack of novelty based on E1 and E2.

With the reply to the notice of opposition (reference is made to the respective paragraphs thereof) the appellant-proprietor replied that

- E1 does not disclose a guide for channelling the air flow (point III.1.1); and
- E1 does not disclose acceleration of the air flow (point III.1.2).
- E2 does not disclose a heater comprising a coil or wire (point III.2.1);
- E2 does not disclose acceleration of the air flow (point III.2.2); and
- E2 does not disclose the creation of an aerosol from a fibrous or spongy wick (point III.2.3).

The opposition division did not provide the parties with a preliminary opinion on the case prior to the oral proceedings. In the communication issued with the summons for oral proceedings, the opposition division only summarized the parties' positions.

9.1.2 During oral proceedings, the opposition division came to the conclusion that the prior art documents E2 did not disclose the further feature that the restricted air flow cross section extends "over the wick" (cf. minutes point 10; grounds for the decision, page 6, last paragraph). The question whether the prior art discloses or at least renders obvious a restricted air flow cross section over the wick was hence raised for the first time during oral proceedings in opposition.

9.2 Considering that in the statement of grounds of appeal the appellant-opponent specifically deals with this feature when discussing E17 and E19 (and submits that it is disclosed therein), the Board takes the view that the filing of this documents is a legitimate and timely reaction to the above-mentioned finding of the opposition division. The Board therefore does not make use of its power according to Article 12(4) RPBA 2007 to hold documents E17 and E19 inadmissible. Both documents are thus to be taken into account (Article 12(4) and (1) and (2) RPBA 2007).

Remittal to the opposition division

10. Documents E17 and documents E19 appear to be highly relevant for the question of novelty of the fourth auxiliary request, in particular in view of the fact that they appear to disclose a restricted air flow cross section extending over the wick. However, considering that these documents were not part of the

first-instance proceedings, that the appellant-proprietor insisted on having the opportunity to discuss them before the opposition division first, and that the discussion on novelty/inventive step on the basis of these documents is not devoid of complexity, the Board acknowledges special reasons in the sense of Article 11 RPBA 2020 that justify remittal of the case to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution.

The Registrar: The Chairman:

A. Vottner G. Pricolo

Decision electronically authenticated