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Datasheet for the decision of 11 November 2021

Case Number: T 3228/19 - 3.3.10

Application Number: 14709839.6

Publication Number: 2970752

IPC: C09K8/584, C07C41/03, C07C29/34, C07C31/125

Language of the proceedings: EN

Title of invention:
MIXED CARBON LENGTH SYNTHESIS OF PRIMARY GUERBET ALCOHOLS

Patent Proprietor:
Chevron U.S.A. Inc.

Opponent:
Sasol Germany GmbH

Headword:

Relevant legal provisions:
EPC Art. 100(a), 56, 111(1)
RPBA 2020 Art. 13(2)
EPC R. 103(1)(a)

Keyword:
Substantial procedural violation - reimbursement of appeal fee (no) - remittal (no)
Inventive step - (no)
Amendment after summons - cogent reasons (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

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

Case Number: T 3228/19 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 11 November 2021

Appellant: (Patent Proprietor)	Chevron U.S.A. Inc. 6001 Bollinger Canyon Road San Ramon, CA 94583 (US)
Representative:	Haseltine Lake Kempner LLP Redcliff Quay 120 Redcliff Street Bristol BS1 6HU (GB)
Respondent: (Opponent)	Sasol Germany GmbH Anckelmannsplatz 1 20537 Hamburg (DE)
Representative:	Müller Schupfner & Partner Patent- und Rechtsanwaltspartnerschaft mbB Schellerdamm 19 21079 Hamburg (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 8 October 2019 revoking European patent No. 2970752 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	P. Gryczka
Members:	R. Pérez Carlón
	T. Bokor

Summary of Facts and Submissions

I. The appellant (patent proprietor) lodged an appeal against the decision of the opposition division revoking European patent No. 2 970 752.

II. Notice of opposition had been filed on the grounds of added subject-matter (Article 100(c) EPC), insufficiency of disclosure (Article 100(b) EPC), and lack of novelty and inventive step (Article 100(a) EPC).

III. The documents filed during the proceedings include the following:

D1 WO 2011/131549, filed as S1
D1a US 2011/0263467, filed as S1a
D13 Fettalkohole. Rohstoffe Verfahren Verwendung. Henkel KGaA, Ed. Düsseldorf, 2nd Ed. 1982, pages 168 and 169, filed as S13.

IV. Claim 1 of the patent as granted, which is the appellant's main request, reads as follows:

"A method of synthesizing mixed chain length surfactants from a mixture of primary alcohols comprising, determining a molecular weight distribution of surfactants for use in a specific reservoir; determining the ratios of primary alcohols needed to produce Guerbet alcohols with the molecular weight distribution;
receiving a mixture of primary alcohols comprising at least two different chain length primary alcohols, wherein the received mixture of primary alcohols is of the determined primary alcohol ratio;

reacting the mixture of primary alcohols to produce a mixture of Guerbet alcohols; and producing a surfactant composition from the mixture of Guerbet alcohols."

V. The opposition division concluded that document D1, or its equivalent D1a in the language of the proceedings, was the closest prior art. The problem underlying the claimed invention was to provide a process which allowed the preparation of tailor-made mixtures of Guerbet alcohols and mixed chain length surfactants derived therefrom. The claimed solution was characterised by: determining a molecular weight distribution of surfactants for use in a specific reservoir, determining the ratios of primary alcohols needed to produce Guerbet alcohols with the molecular weight distribution, and receiving a mixture of primary alcohols comprising at least two different chain length primary alcohols, wherein the received mixture of primary alcohols is of the determined primary alcohol ratio, reacting the mixture to produce Guerbet alcohols and producing a surfactant composition from that mixture. This claimed solution would have been obvious for a person skilled in the art and was thus not inventive. The division concluded that the composition of a Guerbet product obtained from a known mixture of alcohols was common general knowledge so "notorious" that documentary support was not needed. The objection applied analogously to claim 1 of those auxiliary requests before the opposition division that correspond to auxiliary requests in these appeal proceedings (auxiliary requests 7 to 10 and 13 to 15).

VI. With the statement setting out the grounds of appeal, the appellant filed auxiliary requests 1 to 15, corresponding to the auxiliary requests pending before the opposition division. Auxiliary requests 1 to 6, 11

and 12 were subsequently withdrawn with a letter dated 28 May 2021. The auxiliary requests remaining (7 to 10 and 13 to 15) were not renumbered.

Claim 1 of auxiliary request 7 contains, in addition to the features of claim 1 of the main request, the following:

"wherein the ratios of the primary alcohols are back calculated to produce the specific ratios of surfactant lengths needed; and
wherein the mixture of primary alcohols consists of three different length primary alcohols, four different length primary alcohols, five different length primary alcohols, six different length primary alcohols, or seven or more different length primary alcohols."

Claim 1 of auxiliary request 9 has the features of claim 1 of auxiliary request 7 and further requires the mixture of primary alcohols to comprise three to five primary alcohols.

Claim 1 of auxiliary requests 8 and 10 contains all the features of claim 1 of auxiliary requests 7 and 9, adding:

"wherein the mixture of primary alcohols comprises different primary alcohols in different ratios".

Claim 1 of auxiliary request 13 has all the features of claim 1 of the patent as granted, adding:

"wherein the mixture of primary alcohols comprises three primary alcohols, four primary alcohols or five primary alcohols".

Claim 1 of auxiliary request 14 further restricts the method of claim 1 of auxiliary request 13 by the feature:

"wherein the mixture of primary alcohols comprises different primary alcohols in different ratios".

Lastly, claim 1 of auxiliary request 15 has all the features of claim 1 of auxiliary request 14 and further adds:

"wherein reacting the mixture of primary alcohols to produce a mixture of Guerbet alcohols is stopped when a Guerbet alcohol conversion of at least 80% is obtained."

VII. During the oral proceedings before the board on 11 November 2021, the appellant filed auxiliary requests A and B, to follow auxiliary requests 14. Claim 1 of auxiliary request A has the features of claim 1 of auxiliary request 14 but requires the mixture of primary alcohols to comprise five primary alcohols. In addition to that feature, claim 1 of auxiliary request B requires the surfactants to be "*optimized for use in a specific reservoir formation*".

VIII. The arguments of the appellant relevant to the present decision were as follows:

The opposition division committed a fundamental procedural violation by not informing the appellant, either with the annex to the summons or during the oral proceedings, that it intended to consider the alleged common general knowledge as "notorious" knowledge for which no written evidence was required. The violation occurred even if the finding of the opposition division

on the common general knowledge was in itself correct.

Document D1a was the closest prior art. It disclosed a method of synthesising surfactants which did not include the steps of determining a molecular weight distribution of surfactants for use in a specific reservoir and determining the ratios of primary alcohols needed to produce Guerbet alcohols with the molecular weight distribution. D1a did not disclose either that the mixture of primary alcohols received was according to the predetermined primary alcohol ratio. The problem underlying the claimed invention was to provide an improved method of synthesising surfactants. The solution would not have been obvious for a person skilled in the art and was thus inventive.

Claim 1 of auxiliary requests 7 to 10 and 13 to 15 added further distinguishing features with respect to D1a. The claimed method was inventive at least for the same reasons as for method claim 1 of the main request.

The filing of auxiliary requests A and B was a reaction to the issue raised during the oral proceedings before the board that the feature "for use" did not necessarily restrict the surfactants obtained by the process of claim 1 to optimised surfactants. The amendments further distinguished the subject-matter claimed from that of D1a and did not necessitate extensive re-discussion of the issues on file. Auxiliary requests A and B had thus to be admitted into the proceedings.

IX. The arguments of the respondent (opponent) relevant to the present decision were as follows:

If the claimed subject-matter were to be considered

novel, D1a would be the closest prior art. Even if the problem of providing an improved method for synthesising surfactants were credibly solved, the claimed solution would have been obvious over D1a for a person skilled in the art and as such not inventive.

No exceptional circumstances could justify the admission of auxiliary requests A and B into the proceedings. The outstanding objections were known to the appellant from the opposition proceedings. Any reaction to those objections should have been filed at an earlier point in time.

X. The final requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and

- that the case be remitted to the opposition division for examination of inventive step following a substantial procedural violation and the appeal fee reimbursed, or
- if not remitted, that the patent be maintained by the board as granted (main request), or
- that the patent be maintained with the claims of auxiliary requests 7, 8, 9, 10, 13, 14, A, B or 15, all as filed with the statement of grounds of appeal, except auxiliary requests A and B filed at the oral proceedings before the board of appeal.

The respondent requested that the appeal be dismissed. It also requested that neither auxiliary request A nor auxiliary request B nor the evidence filed by the appellant by letter dated 28 May 2021 be admitted into the proceedings.

XI. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

1. The appeal is admissible.

2. Alleged procedural violation

2.1 In the appealed decision the opposition division had relied on the general knowledge of the person skilled in the art. It did not cite documentary evidence in support of that knowledge. This is not disputed.

2.2 Document D13, filed as S13 by the respondent in these appeal proceedings, is a textbook from 1982, which provides written evidence of what the opposition division considered "notorious".

In view of D13, the appellant did not challenge the opposition division's conclusion concerning the substance of the common general knowledge at the oral proceedings before the board.

2.3 The appellant argued that it had not been heard on the issue that the common general knowledge was so "notorious" that it did not require written evidence. This issue only became apparent to the appellant from the decision under appeal. It requested for this reason that the file be remitted to the opposition division "to rehear the issue of inventive step".

2.4 The board disagrees. The opposition division raised the issue of the common general knowledge in its communication in preparation for the oral proceedings.

According to the minutes of the oral proceedings (page 6, third full paragraph), this issue was discussed during the oral proceedings. The minutes show that the appellant understood the objection and argued that the common general knowledge was not properly substantiated in the absence of written evidence.

The appellant thus was aware of which objections stood against its case. It also knew that the opposition division considered the alleged common general knowledge to be so trivial that no written evidence needed to be provided, even if the word "notorious" may not have been used by the division in the course of the oral proceedings.

Thus, the board cannot accept the appellant's argument that it was unaware of this objection prior to receiving the opposition division's decision.

2.5 If the skilled person's knowledge is in dispute, evidence, for example in the form of textbooks, might be required. However, concepts which constitute basic knowledge do not necessarily need to be proven. The members of opposition divisions have an appropriate technical qualification and are thus able to assess the technical information in the file and draw the correct conclusions therefrom.

2.6 The opposition division relied on the known Guerbet process, disclosed for example in paragraphs [0074]-[0081] of D1a. It derived the stoichiometry of the product's mixture therefrom. A skilled person can arrive at that conclusion without further support.

2.7 The board thus holds that relying on the common general knowledge without written evidence to prove it does not

amount to a procedural violation in the present case.

3. Inventive step

3.1 Claim 1 of the patent as granted relates to a method of synthesising Guerbet alcohols. The method requires determining the molecular weight distribution of surfactants for use in a specific reservoir, determining the ratio of primary alcohols required to produce Guerbet alcohols with that distribution, receiving a mixture of alcohols with that distribution, reacting them to produce a mixture of Guerbet alcohols, and producing a surfactant composition.

3.2 Closest prior art

During these appeal proceedings, the parties relied interchangeably on D1 and D1a. This decision refers to D1a, which is in the language of the proceedings.

The opposition division and the parties treated D1a as the closest prior art, and the board accepts it.

Document D1a relates to a process for mineral oil extraction by means of flooding with surfactant mixtures containing at least three components of the general formula (1) [0001]. D1a also discloses the preparation of those mixtures by dimerisation of alcohols, preferably having 16 or 18 carbon atoms, leading to Guerbet alcohols having 32, 34 and 36 carbon atoms [0083]. A mixture containing 30% of C16 and 70% of C18 linear alcohols is a particularly preferred starting material [0084], [0085]. Paragraph [0082] discloses a ternary mixture of primary alcohols, containing C16C18 and iC17 alcohol, as a suitable starting material. Paragraph [0104] discloses that the

skilled person made a suitable selection of surfactants according to the conditions in the mineral oil formation. Examples 5, 6 and 9 (Table 1) disclose mixtures of surfactants having a C32C34C36-Guerbet alcohol unit. These surfactants are tested using decane as a model oil [0119] and found suitable for tertiary mineral oil production [0128], [0113].

The parties disagreed on the distinguishing features of the claimed invention with respect to document D1a.

The appellant argued that D1a did not disclose

- determining a molecular weight distribution of surfactants for use in a specific reservoir,
- determining the ratios of primary alcohols needed to produce Guerbet alcohols with the molecular weight distribution, and
- that the received mixture of primary alcohols is of the determined primary alcohol ratio.

The question of whether these features could be disclosed in D1a can remain undecided. The board holds that even if they had not been disclosed, the proposed solution would have been obvious for the reasons below.

3.3 Technical problem underlying the invention

The parties had different views on the problem underlying the claimed invention.

In the oral proceedings before the board, the appellant defined the problem as the provision of an improved method for synthesising surfactants. The board accepts it as the starting point for examining inventive step.

3.4 Solution

The claimed solution to this technical problem is the method of claim 1, characterised by

- determining a molecular weight distribution of surfactants for use in a specific reservoir,
- determining the ratios of primary alcohols needed to produce Guerbet alcohols with the molecular weight distribution, and
- requiring the mixture of primary alcohols received to be in the determined primary alcohol ratio.

3.5 Success

The respondent argued that the problem of providing an improved method had not been solved in all aspects.

The board considers, however, that synthesising the surfactants suitable for a specific reservoir is inevitably an improvement over the method of D1a, as the latter leads to the preparation of surfactants suitable for tertiary oil recovery in general.

The board's conclusion concerning inventive step is negative, even considering that the problem formulated by the appellant is solved. Therefore, it is not necessary to further elaborate on this point.

3.6 It remains to be decided whether the proposed solution to the objective problem defined above would have been obvious for the skilled person over the prior art.

Following the appellant's argument, in the context of the claimed invention the skilled person is considered to be an oil engineer.

The appellant did not dispute that it was state of the art that surfactants made from Guerbet alcohols could be used for enhanced oil recovery (point 20 of its letter dated 20 May 2021).

Document D1a discloses surfactant mixtures for tertiary oil recovery [0001], which are obtained by Guerbet condensation of linear alcohols including mixtures of C16C18 fatty alcohols (Table 1).

It was not disputed that the optimum surfactant composition varies from reservoir to reservoir, and that surfactant optimisation is at the core of an oil engineer's skills. Optimisation is also disclosed in D1a [0027] and, according to the appellant's arguments, testing merely requires routine iterative testing.

The skilled person needs to identify the optimum mixture in order to ensure that it can be reproduced. The molecular weight distribution is one suitable parameter allowing that identification, known from D1a. According to D1a the Guerbet alcohol-based surfactants are defined by the number of carbon atoms and the relative amounts of components [0049]. This is equivalent to a molecular weight distribution and the parties, and has been used as such by the parties throughout the proceedings.

Once the most suitable surfactants had been determined, the oil engineer would have attempted to synthesise them following the method disclosed in D1a.

It would thus have been obvious for the skilled person seeking to improve the method of synthesising Guerbet alcohol-based surfactants of D1a to: determine those optimised for a specific reservoir; determine the

molecular weight distribution of that composition; and synthesise it, following the process disclosed in D1a.

The appellant did not dispute at the oral proceedings that a determination of the ratios of primary alcohols needed for a specific distribution is directly obtainable from the knowledge of the product to be synthesised (D13). This feature is thus a direct consequence of the optimisation of the surfactants and determination of their molecular weight distributions.

Lastly, receiving a mixture of the exact starting materials for obtaining the desired final products would have been the sensible, easiest way for the skilled person to proceed. Receiving a different mixture would inevitably have increased the complexity of the process, as additional separation or mixing steps would have been required.

Seeking to improve the method of D1a, the skilled person would thus have arrived at the claimed method without requiring inventive skills. The claimed method is thus not inventive (Article 56 EPC) and the ground of opposition set out in Article 100(a) EPC precludes the maintenance of the patent as granted.

3.7 The appellant argued that the claimed method avoided the disadvantages of the standard method, the mixing of surfactants in an oil extraction field. Being tied to a specific mixture from a supplier and the chance of error by staff on site were among such disadvantages.

However, D1a discloses the synthesis of a mixture of surfactants in the context of tertiary oil recovery. Thus, any advantage linked to the direct synthesis of surfactant mixtures is already achieved by the method

of D1a. It does not result from the distinguishing features of the claimed method.

3.8 The appellant criticised the results of D1a. Decane was not a suitable model for oil in a specific reservoir. The alkoxy chain of the surfactants did not correspond to that of the comparative examples, and butoxy chains were too hydrophobic for the surfactant to be soluble. In addition, testing conditions such as the amount of surfactants, salt content and temperature varied between tests. For these reasons, the conclusion of paragraph [0128] of D1a that the mixtures of Guerbet alcohols obtained from C16C18 fatty alcohol led to better high-performance surfactants was not a sound conclusion upon closer scrutiny.

Even if the board were to accept the appellant's argument that the mixtures of surfactants of examples 5, 6 and 9 were not superior to those of the comparative examples, D1a discloses their suitability for tertiary oil recovery. The board sees no reason why the mixtures of surfactants of examples 5, 6 and 9 of D1a could not be used in the field of tertiary oil recovery. No evidence on their unsuitability has been submitted. The problem-solution approach analysis does not necessarily have to take as the starting point the best solution to a specific problem. In principle, any known solution to the problem underlying the claimed invention represents a suitable starting point.

In addition, the board can accept the argument that decane is only a surrogate of oil in a specific reservoir. It is, however, a model oil [0119] which provides an initial result that the skilled person would further develop, so that they would not dismiss the results obtained from decane as irrelevant.

Lastly, butylene oxide repeating units are disclosed as suitable building blocks of the products of the method of claim 1 in the patent [0027]. The skilled person would therefore not dismiss detergents containing this unit as unsuitable for tertiary oil recovery.

This argument is thus not convincing either.

3.9 The appellant also argued that the skilled person would not have necessarily determined the molecular weight distribution of a suitable mixture. They could have done it, but there was no reason why they would.

Surfactants in the field of tertiary oil recovery are used in very large amounts. In order to reproduce a method for synthesising them, a reliable identification method is needed. The skilled person would not seek to synthesise "just a mixture" but "the" mixture optimised for a specific reservoir. Characterisation of the product is crucial for this reason.

D1a only provides one means for identifying surfactants, namely the number of carbon atoms and their relative amount. Including a step of determining these parameters would thus have been obvious for the person skilled in the art.

This argument of the appellant is thus not convincing.

3.10 The appellant argued that the skilled person had no reason to determine the molecular weight distribution of the Guerbet alcohols. In the context of reproducibility, all the skilled person had to do was to use the same starting materials for preparing them. However, the appellant also argued at the oral

proceedings before the board that alcohol mixtures such as C16C18 alcohol obtainable from natural sources can vary greatly, even for the same natural source, due to factors such as the time of harvesting. For this reason alone, using "the same starting material" does not necessarily guarantee the reproducibility of the product obtained. This argument is thus not convincing.

3.11 The appellant argued that D1a placed no importance on the synthesis method. A perfectly suitable solution was available to the skilled person, namely the blending of different surfactants. The skilled person would not have abandoned a solution that worked.

The disclosure of D1a does not require blending. For this reason alone, this argument cannot be accepted.

In addition, the appellant defined the problem underlying the claimed invention as the provision of an improved method for synthesising surfactants. It is contradictory to formulate the problem in this manner and to argue at the same time that the skilled person would not try to solve it.

4. Auxiliary requests 7 to 10 and 13 to 15

4.1 The board issued a communication conveying its preliminary view that the subject-matter of these auxiliary requests was not inventive.

At the oral proceedings before the board, the appellant did not wish to add anything on the issue of inventive step with respect to these requests, and relied on its written arguments.

4.2 Claim 1 of auxiliary request 7 includes the step of back-calculating the ratios of primary alcohols required to produce the specific ratios of surfactants needed. It also requires the primary alcohols to consist of three or more alcohols.

Back-calculating the ratios of primary alcohols is obvious once the structure of the final product is selected (D13). This was not disputed by the appellant at the oral proceedings (see 2.2 above).

No advantage linked to the use of three or more alcohols is either disclosed or immediately apparent. This feature thus does not contribute to the problem of providing an improvement. D1a hints at the use of mixtures of three different alcohols as starting materials (last embodiment in paragraph [0082]). This would thus have been an obvious alternative for the skilled person.

4.3 Claim 1 of auxiliary request 8 requires, in addition to the features of claim 1 of auxiliary request 7, that the mixture of primary alcohols should comprise different primary alcohols in different ratios.

Document D1a discloses a C16C18 alcohol as the starting material. These alcohols are usually obtained from natural sources and comprise C16 and C18 components in different relative proportions. A mixture of 30% C16 and 70% C18 is particularly preferred [0085]. Such a starting material would thus have been obvious for a person skilled in the art.

4.4 Claim 1 of auxiliary requests 9 and 10 only differs from claim 1 of auxiliary requests 7 and 8 by requiring the mixture of primary alcohols to comprise three, four

or five primary alcohols. The arguments in the two preceding points thus apply analogously.

4.5 Claim 1 of auxiliary request 13 differs from claim 1 of the patent as granted by requiring the mixture of primary alcohols to comprise three, four or five primary alcohols. The skilled person would, however, have been prompted to use this embodiment in view of paragraph [0082] of D1a.

4.6 Claim 1 of auxiliary request 14 requires, in addition, that the mixture of primary alcohols should comprise different primary alcohols in different ratios. This is usually the case if alcohols are obtained from natural sources and is particularly preferred in the method of D1a [0085]. Thus, this embodiment would also have been obvious for a person skilled in the art.

4.7 Lastly, claim 1 of auxiliary request 15 requires, in addition to the features of claim 1 of auxiliary request 14, that the reaction should be stopped when a Guerbet alcohol conversion of at least 80% is achieved. The appellant argued that this feature introduced a further element of control. However, it would have been an obvious option for a person skilled in the art that was not linked to any advantage over and above efficiently using most of the starting material.

4.8 The board is thus of the view that claim 1 of these auxiliary requests is not inventive and, therefore, that none of these requests is allowable.

5. Auxiliary requests A and B

5.1 The grounds of appeal were filed on 18 February 2020. It was not disputed that RPBA 2020 was applicable in

these appeal proceedings.

5.2 Auxiliary requests A and B were filed at the oral proceedings before the board after the board stated its conclusion on the issue of inventive step of the method of claim 1 of the main request.

5.3 The discretion of the board in respect of admittance is set out in Article 13(2) RPBA 2020. This stipulates that any amendment to a party's case is not to be taken into account unless there are exceptional circumstances, justified by cogent reasons.

5.4 The appellant argued that auxiliary requests A and B were a reaction to the board's comment during the oral proceedings that the surfactants defined by claim 1 only needed to be suitable for use in a reservoir, but otherwise did not have to be optimised.

5.5 The board further fails to see how the amendment in auxiliary request A requiring a mixture of five primary alcohols could address that comment.

The board fails to see how, by reading word by word a feature of claim 1, it could have triggered the filing of auxiliary request B. The board has nevertheless examined inventive step of the method of claim 1 of the main request based on the assumption that it required the surfactants obtained to be optimised for a specific reservoir. Auxiliary request B could thus not solve any outstanding issue in that respect.

Auxiliary requests A and B were the appellant's reaction to the negative conclusion of the board on the issue of inventive step. This had been the main argument in the decision of the opposition division. It

was maintained by the respondent in its reply and discussed by the board in its communication in preparation for the oral proceedings. Any reaction to this issue should have been filed earlier in the proceedings. A negative conclusion of the board on this contentious point is by no means an exceptional circumstance required by Article 13(2) RPBA 2020.

For these reasons, the board decided not to admit auxiliary requests A and B into the proceedings.

6. The admission of the late filed documents (see point above) submitted by the appellant was not decisive for the board's decision, and did not have to be decided.

7. Conclusion

The ground of opposition in Article 100(a) EPC precludes the maintenance of the patent as granted. Auxiliary requests 7 to 10 and 13 to 15 are not allowable. Auxiliary requests A and B are not admitted into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.
The request for reimbursement of the appeal fee is refused.

The Registrar: The Chair:

C. Rodríguez Rodríguez P. Gryczka

Decision electronically authenticated