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Datasheet for the decision of 22 January 2026

Case Number: T 0361/24 - 3.3.02

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Language of the proceedings: EN

Title of invention:
BIOGENIC LOW VISCOSITY INSULATING OIL

Patent Proprietors:
Avantherm AB
Neste Oyj

Opponent:
TotalEnergies One Tech

Headword:

Relevant legal provisions:
EPC Art. 123(2), 84, 56
RPBA 2020 Art. 12(6)

Keyword:

Amendments - allowable (yes) - extension beyond the content of the application as filed (no)
Claims - clarity in opposition appeal proceedings - clarity after amendment (yes)
Inventive step - (yes) - non-obvious alternative
Late-filed evidence - admitted in first-instance proceedings (no) - error in use of discretion at first instance (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
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Office européen des brevets

Beschwerdekammern

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Case Number: T 0361/24 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 22 January 2026

Respondent: (Patent Proprietor 1)	Avantherm AB Götlundagatan 3 124 71 Bandhagen (SE)
Respondent: (Patent Proprietor 2)	Neste Oyj Keilaranta 21 02150 Espoo (FI)
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Appellant: (Opponent)	TotalEnergies One Tech La Défense 6 2 Place Jean Millier 92400 Courbevoie (FR)
Representative:	August Debouzy 7, rue de Téhéran 75008 Paris (FR)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 2 January 2024 concerning maintenance of the European Patent No. 3352177 in amended form.**

Composition of the Board:

Chairman	M. O. Müller
Members:	M. Kollmannsberger
	L. Bühler

Summary of Facts and Submissions

I. Both the patent proprietors and the opponent appealed the opposition division's decision that the amended patent in the form of auxiliary request 14 (AR14) lying before it complied with the requirements of the EPC, Article 101(3)(a) EPC.

II. The patent was granted with one independent claim relating to a process for producing a non-petroleum based electrical insulating oil. It was opposed under the grounds of opposition according to Article 100(a) EPC, namely lack of novelty, Article 54 EPC, and inventive step, Article 56 EPC, and under Article 100(c) EPC for unallowable amendments, Article 123(2) EPC.

III. The opposition division concluded that the patent could be maintained in amended form on the basis of auxiliary request 14.

In particular, the amendments carried out in the claims of this request did not introduce any lack of clarity (Article 84 EPC), did not extend beyond the content of the application as filed, (Article 123(2) EPC), the independent claim was novel over D1 (Article 54(3) EPC) and the claimed process involved an inventive step starting from any of the documents D2-D5, Article 56 EPC.

The claims of the patent as granted and of all of the patent proprietors' higher ranking auxiliary requests were found to contain subject-matter that extended

beyond the content of the application as filed, Article 123(2) EPC.

IV. Claim 1 of the patent as amended in the form of auxiliary request 14, i.e. the form held allowable by the opposition division, reads as follows:

"*A method of producing a non-petroleum based electrical insulating oil having a kinematic viscosity at 40°C in the range of 3.4 to 4.5 mm^2/s, preferably in the range of 3.6 to 3.9 mm^2/s, more preferably of 3.8 mm^2/s, the method comprising:*
- performing distillation/stripping of a primary mixture comprising isomerised straight chain hydrocarbons;
- collecting a paraffinic base oil as an intermediate distilled/stripped product; and
- mixing the base oil with an antioxidant additive,
characterized in that,
the primary mixture comprises isomerised saturated hydrocarbons in the range C10-C20, having a boiling point range within 180 to 310°C, a kinematic viscosity at 40°C of 2.5 to 3.2 mm^2/s, a flash point, as measured by Pensky-Marten closed cup method, in the range of 100 to 120°C and a pour point in the range of -60 to -40°C,
the method further comprises controlling the flash point of different distilled/stripped fractions and collecting the base oil at the desired flash point, including controlling the collection of the paraffinic base oil in such a way that the initial boiling point of the distillation cut is chosen so that the flash point, as measured by Pensky-Marten closed cup method, is above 135°C and the final boiling point of the distillation cut is chosen so

that the viscosity of the paraffinic base oil falls within the range of 3.4 to 4.5 mm^2/s at 40°C."

V. The following documents are referred to in the present decision:

D1: WO 2017/046177 A1

D2: EP 3 095 838 A1

D3: WO 2016/185047 A1

D4: WO 2015/044289 A1

D5: WO 2015/101837 A2

D6: US 2009/0036337 A1

D8: Norm ASTM D3487-16e1, June 2016

D10: EP 3 315 590 A1

D15: Experimental data, filed 25 October 2022

D23: Opticool Brochure, accessible via the link http://dsiventures.com/wpcontent/uploads/2013/09/OptiCool-Brochure.pdf

D23a: Evidence of the public availability of the OptiCool Brochure (D23) prior to the filing date of the patent, with dated screenshots from January 7, 2017 (via Wayback Machine)

D24: Technical data sheet Solvarex 10A; https://specialfluids.totalenergies.com

EXP1: Experimental data, filed 10 August 2023

EXP2: Experimental data, page 18 of the opponent's submission of 2 May 2024

VI. In the written phase of the appeal proceedings, the patent proprietors submitted that the opposition division's decision on Article 123(2) EPC concerning the patent as granted as well as auxiliary requests

1-13 was erroneous, while the finding that the claims of auxiliary request 14 fulfilled the requirements of the EPC was correct. The opponent submitted that the finding of the opposition division on Article 123(2) EPC concerning the patent as granted and auxiliary requests 1-13 was correct, but that the decision to maintain the patent on the basis of auxiliary request 14 was erroneous, since the claims of this request contravened various provisions of the EPC, namely Articles 123(2), 84 and 56.

VII. Oral proceedings took place on 22 January 2026. The board had issued a communication under Article 15(1) RPBA on 10 September 2025, containing the board's preliminary opinion on the disputed points.

VIII. During oral proceedings the patent proprietors withdrew their appeal.

IX. The final requests of the parties were the following:

The opponent (appellant) requested that the decision under appeal be set aside and that the patent be revoked. Furthermore, it requested that documents D23/ D23a, EXP1, EXP2 and D24 be admitted to appeal proceedings.

The patent proprietors (respondents) requested that the opponent's appeal be dismissed.

X. The decision was announced at the end of the oral proceedings.

Reasons for the Decision

1. The patent proprietors withdrew their appeal during oral proceedings before the board and, as respondents to the opponent's appeal, requested the opponent's appeal to be dismissed. Thus, the present decision is about whether the opposition division's decision that the patent in amended form based on auxiliary request 14 (AR14) fulfils the requirement of the EPC was correct.

2. Admittance of documents to appeal proceedings

2.1 The experimental data compiled in EXP1 and EXP2 as well as document D24 were filed by the appellant during opposition or appeal proceedings. As will become apparent below these documents are not relevant for the present decision so the respective requests for admittance need not be decided upon.

2.2 D23/D23a

2.2.1 Documents D23/D23a were filed by the appellant, then opponent, on 10 August 2023, i.e. before the time limit for making final submissions set by the opposition division in its summons for oral proceedings under Rule 116 EPC.

2.2.2 In its decision, the opposition division did not admit D23/D23a into opposition proceedings, see page 13, and reasoned the non-admittance with the fact that it had been filed after the nine months opposition period and that it lacked *prima facie* relevance.

2.2.3 Under Article 12(6) RPBA, first sentence, the board shall not admit evidence that was not admitted in opposition proceedings, unless the decision not to admit it suffered from an error in the use of discretion or unless the circumstances of the appeal case justify its admittance.

2.2.4 D23 is a commercial brochure disclosing a variety of marketed heat transfer fluids (insulating oils), in particular the product "*OptiCool-H*", which has a kinematic viscosity at 40°C of 3.70 cSt and a flashpoint of 135°C. D23a proves that D23a was publicly available before the priority date of the patent.

2.2.5 The appellant submitted that D23/D23a were filed as a reaction to the opposition division's statement in the annex to the summons that none of the documents filed in the opposition period could be taken as closest prior art documents since none of the documents related to an insulating oil (annex to the summons, page 4). Moreover, during oral proceedings before the opposition division, the technical expert of the respondents (then patent proprietors) had stated for the first time in the proceedings that, before the priority date, there was no insulating oil on the market which had the viscosity and the flash point as defined for the product obtained in the independent process claim of the opposed patent. D23 directly countered this statement and should thus have been admitted into opposition proceedings.

2.2.6 The respondents' arguments centred around the question of whether the filing of D23/D23a was a direct reaction to the opposition division's preliminary opinion as set out in the annex to the summons and whether the

document was *prima facie* relevant for the outcome of the proceedings.

2.2.7 In the board's view D23/D23a should have been admitted into the proceedings at least during oral proceedings.

As apparent from the minutes, point 6.3, the technical expert of the patent proprietors stated that the insulating oils of the patent had a lower viscosity "*than the lowest viscosity oil on the market at the time of the patent*", Nytro 10XN. Furthermore, according to the minutes, point 6.1.7(ii), the opponent requested to admit D23/D23a to react to this submission, since it disclosed that at least one marketed product had the viscosity required by the claims, and thus that the statement by the technical expert was erroneous.

In such a situation D23/D23a should have been admitted to opposition proceedings already for reasons of equity. The non-admittance of D23/D23a suffered from an error in discretion.

2.2.8 Thus, the board decided to overturn the opposition division's decision not to admit D23/D23a such that D23/D23a forms part of the appeal proceedings.

3. Amendments (Article 123(2) EPC)

3.1 Claim 1 of AR14 is based on claim 10 as originally filed. The disputed amendment relates to the characterizing part of the claim, in particular the way of controlling the distillation cuts. The disputed amendment is highlighted with respect to original claim 10 (relevant parts only):

"the method further comprises controlling the flash point of different distilled/stripped fractions and collecting the base oil at the desired flash point, including controlling the collection of the paraffinic base oil in such a way that the initial boiling point of the distillation cut is chosen so that the flash point (...) is above 135°C and the final boiling point of the distillation cut is chosen so that the viscosity of the paraffinic base oil falls within the range of 3.4 to 4.5 mm^2/s at 40°C"

3.2 The appellant argued that claim 1 of AR14 contained *two* controlling steps, namely controlling the flash point as well as controlling the collection of the paraffinic base oil. In the original disclosure, however, there was no control of the collection, just the control of the flashpoint in order to know when the collection should start.

3.3 The respondents essentially argued that it was clear from the wording of the claim that "*controlling the collection*" was done by controlling the flashpoint as starting trigger and the viscosity as end trigger of the distillation. This was originally disclosed on page 5, lines 19-25 of the description as originally filed, and thus the collection was controlled also in the original disclosure. The opposition division followed these arguments, see pages 8/9 of the decision.

3.4 The passage of the original description referred to above describes that the initial boiling point of the distillation cut is chosen so that the flash point requirement defined in the claim is fulfilled, and that the final boiling point of the distillation cut is chosen so that the viscosity of the resulting oil has the values defined in the claim. While this passage

does not use the literal wording of the amended claim ("*controlling the collection of the paraffinic base oil*"), it is disclosed that the initial and final distillation cuts are chosen in a specific way, i.e. the collection of the distillation product is controlled in this way. In the board's view there is no difference in technical content between the amended claim and the original disclosure. In particular, the claim does not require two distinct physical controlling steps, as argued by the appellant. The claim does not define any subject-matter which would extend beyond the disclosure of the application as originally filed.

3.5 Thus, the claims of AR14 do not contravene Article 123(2) EPC.

4. Clarity (Article 84 EPC)

4.1 The appellant objected that the order of the two controlling steps was undefined. It was unclear in which order the control of the flashpoint on the one hand, and the control of the collection on the other hand, should be carried out.

4.2 This part of claim 1 of AR14, which corresponds to the amendment discussed above under Article 123(2) EPC is open to objections under Article 84 EPC. More specifically, this amendment was taken from the description, and thus can be objected to under Article 84 EPC, see G 3/14, headnote. This was undisputed.

4.3 The Board does however not consider the appellant's objection convincing. As set out above with respect to Article 123(2) EPC, the control of the collection of

the base oil is implemented by the choice of starting and end points of the distillation cut, rather than being a separate step as such. Thus, there does not arise any lack of clarity in this respect.

4.4 Therefore, the amendments carried out in claim 1 of AR14 do not introduce any lack of clarity, Article 84 EPC.

5. Novelty (Article 54 EPC)

Novelty of the process defined in claim 1 of AR14 was not objected to in appeal proceedings.

6. Inventive step (Article 56 EPC)

6.1 Claim 1 of AR14 is directed to a method of producing a non-petroleum based electrical insulating oil having a certain kinematic viscosity at 40°C. It is known that insulating oils used in transformers need to be of low viscosity, see paragraph [0005] of the patent, and also need to fulfil certain requirements relating to their flash point, see paragraph [0024] of the patent. The claimed method comprises distilling a feedstock of isomerised saturated hydrocarbons fulfilling certain parameters, collecting an intermediate fraction of the distillation product and adding an antioxidant. The method further comprises controlling the flashpoint of different distilled fractions in order to define the initial distillation cut, and choosing the final boiling point of the distillation cut so that the desired viscosity is obtained.

6.2 The opposition division acknowledged inventive step over D2-D5, see pages 10-12 of the decision under appeal. In particular the opposition division stated that starting from any of these documents the problem of providing an insulating oil with improved oxidative stability had been solved in a non-obvious way. Regarding improvements the opposition division relied on the experimental data in D15.

6.3 The appellant objected to inventive step based on each of D2 to D5 as a starting point.

6.4 In its preliminary opinion under Article 15(1) RPBA the board indicated that it had doubts whether D15 could establish an improvement over any of D2-D5. However, since the board's conclusion is that inventive step can be acknowledged without considering the data of D15, see below, this question can be left open. Therefore, also the appellant's requests concerning the admittance of the data compiled in EXP1 and EXP2 or of document D24, filed by the appellant in appeal, need not be decided. All these documents concern the interpretation of the data in D15 and are not relevant for the present decision.

6.5 Inventive step starting from D2

6.5.1 D2 discloses a process for producing hydrocarbon fluids via a hydrogenation process, possibly followed by distillation. In the example of D2 a hydrogenated hydrocarbon fluid is subjected to fractionation; three fractions are obtained. The opponent referred to example 3 in paragraph [0112] as a starting point. Example 3 is the terminal fraction of the distillation carried out in D2. The nature of the feedstock used for the distillation in D2 is undefined, the only

information disclosed is "isoalkane", see paragraph [0109]. It is not disclosed whether the product formed complies with the viscosity and flashpoint requirements of the product obtained using the claimed process. The appellant has inferred this information from D10. Even accepting the appellant's conclusion drawn from D10, namely that the product formed in example 3 of D2 complies with the viscosity and flashpoint requirements of the product obtained using the claimed process, D10 is a document published after the filing date of the patent. It was thus not available to the skilled person at the filing date of the patent, such that a skilled person would have had to first carry out experimental investigations in order to realize that the product characteristics of example 3 are the desired ones according to claim 1 of AR14.

6.5.2 Accepting the appellant's argument that based on D10, the product obtained in example 3 of D2 complies with the viscosity and flashpoint requirements of the product obtained using the claimed process, the differences of claim 1 compared to the disclosure of example 3 of D2 are the following:

- the specification of the feedstock, i. e., the starting material of the distillation
- the collection of an intermediate fraction of the distillation, including the control of the flash point and the viscosity for defining the distillation cuts
- the presence of an antioxidant

This was undisputed.

6.5.3 Starting from example 3 of D2 the least ambitious objective technical problem solved that can be

formulated based on these differences is the provision of an alternative method to produce a non-petroleum based electrical insulating oil having the desired viscosity (see also point 13.4.2 of the board's communication under Article 15(1) RPBA).

6.5.4 With regard to this problem, the appellant submitted that the suitability of the product as an insulating fluid was not a process feature and should be disregarded, as a feature in the claim as well as in the formulation of the objective technical problem to be solved. In any case, also the products described in the cited prior art documents were said to be suitable, among other uses described there, as insulating fluids.

The appellant likewise argued that, since the product in D2 had the desired viscosity, this feature could not be part of the objective technical problem.

The objective technical problem could thus only relate to "*the provision of an alternative preparation of an oil*."

6.5.5 The board disagrees.

The suitability of the product as an insulating oil is certainly not a process feature, but it is a feature of the product obtained by the process. The board sees no reason to disregard this feature in the formulation of the objective technical problem. In the end the very reason for carrying out the process is to obtain a product suitable for the intended purpose. Thus, whether a product is described as being useful as an insulating fluid or not in the cited prior art documents may play a role for the skilled person when looking for a solution to the objective technical

problem, i. e. for a method for preparing such a product.

Likewise, even if accepting that D2 already discloses a product having the desired viscosity the board does not see a reason why this feature could not be part of the objective technical problem. The claim is directed to a method for preparing a product as defined in the preamble of the claim, so the objective technical problem needs to relate to the preparation of such a product as well.

Thus, the objective technical problem is the one defined in point 6.4.3 above.

6.5.6 The appellant submitted that the claimed solution to the problem defined above was obvious for a skilled person.

First of all, the starting point of the problem-solution approach could be freely chosen. Thus, the choice of example 3 as a starting point precluded any considerations about whether a skilled person would have had a reason to start from this example, e.g. based on the information given in D3 on its suitability as an insulating oil.

Since the distinguishing features, in the appellant's view, neither resulted in any particular technical effect nor were interrelated one to another, the objective technical problem could be split into three partial problems, each of which had been solved in an obvious way.

Regarding the specification of the feedstock, this was an arbitrary choice. Any suitable feedstock could be chosen by the skilled person.

Also the distillation characteristics were a mere alternative way of carrying out a distillation. There were only three possibilities to choose from, namely the top fraction, the intermediate/middle fraction or the bottom fraction of a distillation, each of which could be chosen according to the circumstances. Moreover, it was known from D5, paragraph [0070] that flash points and viscosities of the fractions could be adjusted.

Regarding the addition of an antioxidant this was obvious to the skilled person since antioxidants are commonly used in electrical insulating oils. Reference was made to D6, paragraph [0087], and to the ASTM norm for insulating oils, D8.

6.5.7 The board disagrees.

In order to arrive at the claimed process when starting from D2 a skilled person would have to

- realize that the product of example 3 has the desired viscosity, and would be suitable as an insulating oil
- take a feedstock as defined in the claim instead of the undefined feedstock of D2 as a starting material for the distillation process
- control the distillation cuts by measuring flashpoints and viscosities of different fractions obtained

- collect the fractions starting with the one having a flashpoint of >135°C until the viscosity limit is reached, as intermediate fractions, and
- add an antioxidant

The specific feedstock used in the claimed process is nowhere described in the cited documents. The appellant's argument that any feedstock may be used is not convincing since, evidently, the choice of the feedstock has an influence on the product obtained. A distillation can only result in a fraction of something that was already present in the feedstock. The same distillation conditions applied to different feedstocks may lead to different products.

The process features of the claim, i.e the measurement of flashpoints and viscosities of different fractions and the choice of the distillation cuts based on these properties to obtain an intermediate fraction, are nowhere described in the cited documents. In D2 the feedstock is fractioned into three products according to undisclosed criteria, presumably simply their boiling points, and example 3 is the bottom fraction, not an intermediate fraction as required in the present claim. Paragraph [0070] of D5, to which the appellant referred, merely discloses that the flashpoints and viscosities of the fractions obtained in the distillation illustrated in table 12 of this document vary depending on their boiling point. This is a trivial statement and does not teach the skilled person to collect a fraction using a flashpoint and a viscosity to define the distillation cuts. Even less does it teach the skilled person to choose distillation cuts according to the parameters defined in claim 1. The only product of table 12 of D5 that fulfils the flashpoint and viscosity requirements according to

claim 1, "285-FBP", is the heaviest fraction of the distillation, i. e. the one with the highest boiling point, not an intermediate fraction. Furthermore, it is the fraction having the highest electrical conductivity, see table 13, so it is the product least suitable as an insulating fluid. As stressed by the respondents, paragraph [0076] of D5 describes that the impurities leading to high conductivity tend to accumulate in the heaviest fraction. From D5 the skilled person had no reason to choose distillation cuts based on flashpoints and viscosities according to claim 1 that lead to product "285-FBP" in this document.

Thus, even if one accepts the appellant's argument on example 3 of D2 as a starting point as well as the argument that the addition of an antioxidant was an obvious thing to do, neither the process steps nor the feedstock defined in the claim are described in or rendered obvious by the cited prior art. The skilled person would not have had any information about whether these conditions, when applied to the specific feedstock, would lead to products suitable as insulating fluids. Thus, starting from D2 the claimed solution of the objective technical problem defined above was not obvious to the skilled person.

6.6 Inventive step starting from D3 or D5

The distinguishing features of claim 1 of AR14 over D3 and D5 are the same as the ones over D2. Thus, when taking D3 or D5 as a starting document the same arguments apply as when starting from D2. This was stated in the board's communication under Article 15(1) RPBA and the appellant did not make any further submissions during oral proceedings.

6.7 Inventive step starting from D4

6.7.1 D4 deals with the preparation of non-petroleum based functional fluids having low viscosities and high flash points, see page 1 lines 1-21. While the flash points are in the range defined in the claim, the viscosities are higher, see page 3 lines 23-30. These fluids are high boiling, with boiling points of at least 300°C, see page 2 lines 23-31. The appellant has referred to the product described in table 1 of D4. This product is the bottom product of the distillation and has a viscosity of 5.9 mm^2/s, which is higher than defined in the claim, and a flashpoint of 128.5°C, which is lower than defined in the claim. The feedstock in D4 is described as resulting from a Fischer-Tropsch-type synthesis and must contain isoparaffins, since the final product is said to contain isoparaffins (page 4 line 15). The feedstock is not further specified as to its physical parameters.

6.7.2 Thus, the claim differs from the disclosure of D4 at least in:

- the specification of the feedstock, i. e., the starting material of the distillation
- the collection of an intermediate fraction of the distillation, including the control of the flash point and the viscosity for defining the distillation cuts
- the viscosity of the prepared base oil
- the presence of an antioxidant

These are the same differences as those relative to D2, with the additional difference that in D4 the viscosity

of the final product is too high compared to the values defined in the claim.

The objective technical problem solved starting from D4 remains the same as that discussed above when starting from D2, namely the provision of an alternative method to produce a non-petroleum based electrical insulating oil having the desired viscosity (see also point 13.4.5 of the board's communication under Article 15(1) RPBA).

6.7.3 For the viscosity of the base oil product the appellant referred to D5 and to D23 which disclose base oils having the desired viscosity parameters.

However, this does not change the result of the analysis carried out with respect to D2, namely that at least the specification of the feedstock and the process steps, i. e. the collection of an intermediate fraction using the flashpoints and viscosities as distillation cuts, were not rendered obvious by the cited documents. This analysis applies in the same way when starting from D4.

Moreover, starting from D4 the skilled person has a high boiling product in hand which has a too high viscosity, but a too low flashpoint, see table 1. Even if the skilled person took the information from D23 that higher flashpoints and lower viscosities may be desirable, the skilled person could not obtain such a product using the feedstock of D4. Lowering the viscosity would correspond to collecting a fraction with a lower initial boiling point. However, such a fraction will then have an even lower flashpoint. D23 neither discloses a feedstock nor a preparation method, so it does not help the skilled person finding a method for the preparation of a product. D5 does disclose a

feedstock and a preparation method, however, neither of them corresponds to the ones defined in the claim, and the product of D5 which fulfils the viscosity and flashpoint requirements of the claim is, as discussed above, the one with the highest electrical conductivity. When looking at D5 the skilled person had no reason to consider this product as a desirable goal. Thus, the additional distinguishing feature, the lower viscosity, provides a further inventive distinction over D4.

6.8 During oral proceedings before the board the appellant requested certain of the respondents' arguments relating to cooling properties of insulating fluids not to be admitted to the proceedings. Since the above reasoning does not rely on such arguments this request is moot.

6.9 In summary, the method defined in claim 1 of AR14 involves an inventive step over the cited prior art.

7. The amended patent in the form of auxiliary request 14 fulfils the requirements of the EPC. A description adapted to the claims of AR14 was already filed in opposition proceedings and was undisputed. The opposition division's decision that the patent can be maintained in this form under Article 101(3)(a) EPC is confirmed.

Order

For these reasons it is decided that:

The opponent's appeal is dismissed.

The Registrar: The Chairman:

U. Bultmann M. O. Müller

Decision electronically authenticated