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**Datasheet for the decision
of 26 February 2009**

Case Number: T 1098/07 - 3.2.04

Application Number: 02002533.4

Publication Number: 1230874

IPC: A47B 57/26

Language of the proceedings: EN

Title of invention:

Coupling and blocking system for shelf supporting elements in bookcases, shelvings or the like

Patentee:

Mittel Group S.r.l.

Opponent:

ARTINOX S.p.A.

Headword:

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Relevant legal provisions:

EPC Art. 100(a), 54, 56, 100(b), 100(c), 113(1), 114(2)
EPC R. 67

Relevant legal provisions (EPC 1973):

EPC R. 68(2)

Keyword:

"Late filed material (not admitted)"

"Substantial procedural violation - evidence and arguments disregarded - (no)"

"Reimbursement of appeal fee (no)"

"Remittal (no)"

"Added subject-matter (no)"

"Inventive step (yes)"

"Sufficient disclosure (yes)"

"Novelty (yes)"

Decisions cited:

G 0011/91, T 0748/91, T 0135/96, T 1110/03, T 0070/02

Catchword:

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Case Number: T 1098/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 26 February 2009

Appellant: ARTINOX S.p.A.
(Opponent) Via F. Fabbri - Z.I. Campidul
I-31015 Conegliano TV (IT)

Representative: Modiano, Micaela Nadia
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Respondent: Mittel Group S.r.l.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 7 May 2007
rejecting the opposition filed against European
patent No. 1230874 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: A. de Vries
C. Heath

Summary of Facts and Submissions

- I. The Appellant (Opponent) lodged an appeal, received 6 July 2007, against the decision of the Opposition Division posted 7 May 2007 to reject the opposition against European Patent No. 1 230 874, and simultaneously paid the appeal fee. The statement setting out the grounds was received 17 September 2007.
- II. Opposition was filed against the patent as a whole and based mainly on Article 100(a) together with Articles 52(1), 54 and 56 EPC, for lack of novelty and inventive step, Article 100(b) for insufficient disclosure of the invention, and Article 100(c) for added subject-matter.

The Opponent based his case on the following documents:

- D1: EP-A-0 839 476
- D2: US-A-4 750 626
- D3: GB-A- 629 779
- D4: US-A-2 573 304
- D5: GB-A- 130 911
- D6: GB-A- 741 089
- D7: DE-U1-299 19 093

After expiry of the opposition period the Opponent submitted further evidence comprising among others a drawing and photographs labelled E1 to E11.

In its decision the Opposition Division held that the grounds for opposition under Article 100 EPC 1973 did not prejudice the maintenance of the patent as granted having regard to the documents D1 to D7. The filing of E3 to E11 is mentioned but their content not further

discussed. E1 and E2 are not mentioned at all in the decision.

- III. With its appeal the Appellant (Opponent) submits further evidence in the form of a drawing D8 and affidavits and invoices D9 to D11, as well as photographs E12 to E16.
- IV. Oral proceedings were duly held before this Board on 26 February 2009.
- V. The Appellant (Opponent) requests that the decision under appeal be set aside and the case be remitted to the department of first instance, the appeal fee be reimbursed due to a substantial procedural violation and all documents E1 to E16 and D8 to D11 be admitted into the proceedings. Auxiliarily, he requests that, should the case not be remitted, the documents be admitted into the proceedings and the patent revoked.

The Respondent (Proprietor) requests that documents E2 to E16 and D8 to D11 be disregarded as late filed, and that the appeal be dismissed.

- VI. The wording of claim 1 as granted is as follows:

"A coupling and blocking system that is especially to be used to form shelf supporting elements in bookcases, shelvings or the like, comprising a cavity (2) shaped like an arc of circle of about 90 degrees is obtained on each corner of the shelf (1), in which cavity at least a bracket (3) is installed and is provided with a pair of tongues (7) showing a conical shape, which tongues are opposite each other and form conical male

projections, and wherein each corner is connected with a supporting element consisting of an essentially frustum-conical piece (4) and at least a bracket (5) is fixed on a side of the supporting element and consists of a structural shape which shows a plurality of walls with planes showing a conical arrangement and forming tongue and groove sectors to be coupled with the said bracket (3) which are provided at the corners of the shelf (1)."

VII. The Appellant argued as follows:

The decision fails to mention E1 to E2 or address crucial arguments based on E1 to E11. Nor does it mention a sketch made during oral proceedings before the opposition division (and now presented as D8) or a model presented there. Disregarding such evidence without providing any reasoning amounts to a substantial procedural violation. Likewise, failure to address central points of the debate meant the decision failed to give a fair idea of how the division had reached its conclusion and was therefore deficient.

E1 to E11 are cited in response to the proprietor challenging the disclosure of D1 and provide further (photographic) detail of the surfaces of the coupling that are the subject of D1, but not directly derivable from D1 itself. Photographs E12 to E16 add further important detail and are a precautionary reaction to the decision, which appears not to fully appreciate the relationship between the actual objects of D1 and the patent. They had already been presented in national litigation proceedings and are thus well known to the

respondent. D9 to D11 merely prove that they form part of the prior art.

The substantial procedural violation on the one hand and consideration of the new, highly relevant evidence, which requires possible hearing of witnesses, justify a remittal.

Redrafting of the claim in one part form has broadened the claim to embrace couplings where the cavity need no longer be provided on each shelf corner. That possibility is not disclosed in the application as filed.

The wording of the claim moreover raises various questions that cannot be resolved by the information provided in the description and figures. The invention is in fact only fully understood when inspecting the model presented at the oral proceedings.

The novelty and inventive step objections hinge on the evidence E1 to E16. These demonstrate that the coupling of the actual subject of the patent as shown in detail in photographs E3 to E11 is nothing other than a double wedging or taper locking. This is exactly what is practised in D1 as may be derived from the enlargement of its figure 1 (E1) and photographs E2 and E12 to E16 of an actual coupling forming the subject of D1. Without this evidence and assuming that the patent does claim a conical coupling (which is denied), it is acknowledged that neither D1 nor the remaining prior art show such coupling.

VIII. The Respondent argued as follows:

E2 to E11 are all late filed. E2 is indisputably not pre-published and therefore behoved no comment from the opposition division. E3 to E11 on the other hand were submitted ostensibly to better understand the coupling of the patent. As the patent is easily understood in its own right these further documents serve no clear purpose and were and can be rightly disregarded.

D9 to D11 and E112 to E16, are all again late filed. They are submitted as proof of an alleged public prior use. In as far as their content corresponds to D1, they add nothing and should be disregarded. Where they do add information, they could have been filed earlier as they pertain to the Appellant's own activity, and should also be rejected. In any case, they are of limited relevance as they fail to show any conicity of the coupling. They should therefore not be admitted.

On both counts there is no reason to remit.

The claims contain relatively simple features which the skilled person understands, if necessary in combination with the description and figures. For example, the conical shape of the tongues is shown in figures 6 and 7 as the conical contact surface with the walls of the frustum-conical support element 4. Description, figures and claims provide a clear picture of the invention for the skilled person who genuinely attempts to make technical sense of the information. In this regard the figures are not technical drawings but merely schematic representations.

In D1 all coupling and contact surfaces are essentially flat. Herein lies the central distinction of the claimed system, which has an arc shaped cavity to accommodate the surface of the frustum-conical support element, as well as conical tongues and conically arranged walls of support element bracket in the sense of the patent. This makes for a much tighter, multidirectional fixation of support element and shelf.

None of the prior art shows such a conical coupling. D2 is of a completely different design, while the photographs and model, even if they were to be considered, show a much simpler coupling via flat surfaces.

Reasons for the Decision

1. The appeal is admissible.

2. *Non-admissibility of new evidence*
 - 2.1 E3 to E11 were submitted in the opposition proceedings after expiry of the opposition period. They comprise a photocopy of a CD, an internet page, an invoice, and photographs pertaining to objects alleged to be manufactured by the respondent-proprietor within the terms of the granted patent. This material, and a corresponding model also presented at the oral proceedings before the Board, was already submitted during the opposition proceedings though after expiry of the opposition period. However, it is not discussed in the decision under appeal (see below), nor did the

opposition division formally decide its admissibility, and it is thus incumbent on the Board to now do so.

This material was belatedly offered by the Appellant "for a better assessing/understanding of the device as shown in the figures of the opposed patent", in particular to demonstrate that the term "conical" used in the patent meant nothing more than "tapered", see letter of 14 March 2007, page 2/3. However, a link with the patent is not apparent. In any case, regardless of such a link, the claimed invention is defined by the terms of the patent alone and these must normally speak for themselves. As discussed below in section 5, the disclosure is indeed sufficiently clear and complete for it to be understood in its own right by the skilled person. Regardless of whether E3 to E11 and the model show double taper mating as asserted (and thus fall outside the terms of the patent) or conical mating as in the patent (in which case they add nothing), they can have no bearing on how to read the patent and its content. Using its discretion under Article 114(2) EPC the Board accordingly disregards this material.

- 2.2 D8 - a schematic presentation of an explanatory sketch drawn by the Appellant-Opponent on a flipchart at oral proceedings before the opposition division - is first filed with the statement of grounds, see page 2/12. It is mentioned only in relation to an alleged substantial procedural violation (see below), but otherwise plays no role in the Appellant's submissions regarding substantive issues. Without any clear indication of its relevance or meaning, which is not self-evident, the Board sees no reason to consider such material.

2.3 E2 and E12 to E16 are photographs of an object said by the Appellant to fall within the terms of D1, while D9 to D11 are documents provided as evidence of the object's public use before the priority date of the patent. A corresponding model was presented for inspection at the oral proceedings before the Board. This evidence, part of which (E12 to E16, D9 to D12) was first submitted with the statement of the grounds of appeal, is intended to strengthen the case made against novelty on the basis of D1.

2.3.1 Though the Appellant submits this evidence as somehow helping to understand D1, it can in fact be regarded as a separate instance of prior art. Indeed, affidavits and invoices D9 to D11 are intended to prove public availability. The affidavits and invoices show in particular that the system in question was sold by Artinox, and thus concerns the Appellant's own activity. Regardless of whether the relevant evidence was known to the Respondent before the Appeal, it was available to the Appellant at a much earlier stage, and could in fact have been submitted during the statutory opposition period.

That the Appellant might only have realized that this prior use was more pertinent than D1 once he had read the decision is of no import: the object is obviously richer in detail than D1, on which it is said to be based, and this should have been apparent to the owner of D1 and the object when he decided to oppose the patent in suit. The Board therefore concludes that it is late filed.

- 2.3.2 Moreover, this evidence appears of limited relevance. Inspection of the photographs and model reveal a number of striking differences with respect to the claimed invention as understood in the light of description and figures (see below). The support element has a square cross-section, see E16, and tapers from top to bottom, see E15; it is thus shaped as the frustum of a *pyramid* rather than a cone. The corners of the shelf, see E12, are bevelled with a *straight* edge without a recognizable arc shaped cavity. Importantly, the contact surfaces of the mating parts are essentially *flat* and thus not conical. Thus, see also E12, the sides 1'' of the recess in the corner of the shelf present flat surfaces while the tongues 21, see E13, on their rear surface, are essentially *wedge-shaped*, in particular in their lower region. In the area of the groove or guide 22 on the support element, which receives sides 1'', the opposing surfaces, formed by the support wall and the lateral regions 23 of the plate 12, see E15 and E16, are essentially flat though they taper from top to bottom and sideways. In effect these elements form a double wedge or taper mating.
- 2.3.3 For these reasons the Board decides to make use of its power in particular under Article 12(4) of the Rules of Procedure of the Boards of Appeal (RPBA) to hold inadmissible this evidence which could have been presented in the first instance proceedings.
- 2.3.4 As E2 to E16 and D8 to D11 are disregarded the legal and factual framework of the present case remains unchanged. The Board, using its discretion under Article 111(1) EPC, therefore decided at the oral

proceedings not to remit the case to the department of first instance.

3. *Background*

The present invention, see e.g. figure 7, concerns a coupling and blocking system for shelving in which a bracket is provided at each corner of the shelf and mates with a bracket of a frustum-conical support element 4. The latter fits onto a post, where it is clamped in place.

Claim 1 focuses on details of the mating of the brackets. The shelf bracket, provided in an arc-shaped cavity in each shelf corner, has a pair of opposite conical shaped tongues forming "conical male projections", while the element bracket has "a plurality of walls with planes showing a conical arrangement and forming tongue and groove sectors" which couple with the shelf-side bracket.

As a result the coupling between shelf and element is more stable and play-free, see for example paragraph [0016].

4. *Added subject-matter*

Claim 1 as filed reads "A ... system ... *characterized by the fact* that a cavity ... is obtained on each corner...". This claim was redrafted in one part form to produce claim 1 as granted, which now reads "A ... system ... *comprising* a cavity is obtained on each corner..." (italics indicate the relevant changes). In the syntax of the otherwise unchanged wording of

redrafted claim 1 "is obtained in each corner" is now somewhat incongruous as is immediately apparent to the reader, and could now be read as pertaining to the system rather than the cavity. The skilled person will be struck immediately by this syntactical incongruity, but will strive to resolve any ambiguity it may give rise to from the remaining lines of the claim. These indicate that "in [the] cavity at least a bracket is installed" while "the said bracket [is] provided at the corners of the shelf". From this he will reasonably conclude that it is the cavity which "is obtained" in each corner, and not simply the system as a whole. This corresponds to his reading of claim 1 as filed. The Board concludes that this amendment to claim 1 does not add subject-matter.

5. *Sufficiency of disclosure*

This issue hinges on points that lack clarity both in claims and description. The Board agrees that claim 1 is imprecisely formulated in a number of aspects. For example, the definition of the tongue shape and that of the mating bracket on the support element is somewhat opaque. However, where the skilled person does not understand all features of the invention from the claim's wording itself, he will refer to the description and figures.

In as far as there might be any doubts as to what an arc shaped cavity looks like, then this will become entirely clear from figure 4, where reference sign 2 denotes an arc shaped cut-out at the corner of the shelf.

As for the shape of the tongues 7 of the shelf-side bracket the skilled person will have recourse to specification paragraphs [0025] and [0026] and the corresponding figures 5 and 6 in particular. The paragraphs indicate "tongues 7 [of the shelf-side bracket] showing a conical arrangement", that they "are specular and form a conical connection sector in which the bracket 5 is inserted". Figure 6 shows the two tongues spaced from and mirroring each other; the lower portions of the tongues (see also figure 4) are in direct contact with the walls of the support element before turning away to mate with the curved tongues 6 of the support element bracket 5. The central portion of bracket 5 fits exactly in the space between the (shelf-side bracket) tongues 7, in the directions of figures 5 and 6. The lower portions of the tongues 7 consequently conform closely in shape to the walls of the frustum-conical support element they contact so closely: they are perforce also conical, forming the "conical connection sector" of the text.

Here, the frustum conical shape of the support-element leaves no doubt as to how "conical" is to be understood, namely in its proper, usual sense as denoting the surface generated by a straight line passing through a fixed point and moved to follow a fixed curve. The mating structure of the support element bracket - the "walls with planes showing a conical arrangement and forming tongue and groove sectors" in the wording of the claim - is also conical. The tongues 6 of bracket 5 taper in figure 1 (or 5), but have a curved cross-section in the top/bottom view of figures 2 or 3, meaning they must necessarily be "conical" in the above accepted sense.

This is not contradicted by what appear to be similar dimensions of the tongues' curvature in these figures. These are not technical drawings intended to provide exact dimensional information. They are rather diagrammatic representations, the main purpose of which is to illustrate functional and positional relationships. It is established case law of the Boards of Appeal that drawings form part of the disclosure, see for instance G 11/91 (OJ EPO 1993, 125), and can be used to infer certain information such as size ratios, see for instance T 748/91 (not published). In the Board's opinion this information may include also shape and relative arrangement of parts, as is the case here. Thus, figures 5 and 6 clearly and unmistakably show the curved cross-sections of the support element and the lower portions of the (shelf-side bracket) tongues 7 closely conforming to the curvature of the support element. This is moreover fully in line with the written description of these diagrammatic representations as well as with the invention's object to be achieved, namely "to remove the foregoing drawbacks [of the prior art] by utilizing a conical coupling system ...", see paragraph [0009] of the patent specification. The same applies also to the curved cross-section of the tongues of the support element bracket.

In conclusion, where the claim may be vague and imprecise in its definition of the mating of the two brackets or their placement, the necessary detail can be inferred by the skilled person, who is genuinely intent on understanding and carrying out the invention, from the description and drawings and using his common

general knowledge. The invention is thus sufficiently clearly and completely disclosed for it to be successfully carried out.

6. *Novelty and Inventive Step*

6.1 None of the duly cited prior art D1 to D7 shows coupling systems in which a shelf-side bracket has conically shaped tongues mating with a conical arrangement of walls and planes on a bracket of a frustum-conical support element. These are understood as indicated above in section 5, where as noted "conical" is to be understood in its classical sense.

6.1.1 In the coupling system of D1, the Appellant's main starting point, the support element takes the form of a collar 11, see figure 1. In the text it is described somewhat curiously as having a "conic [and] quadrilateral ... shape" (cf. column 6, line 47) or as a "quadrangular conic element" (claim 1); figure 1 in fact shows it having an essentially *frustum-pyramidal* shape. The Board can only assume that "conic" has been confused with "tapering".

Collar 11 bears a guide 12 which fixes within a recess 13 at the bevelled corners 1'' of the shelf 1, column 7, lines 17 to 25. The text provides little detail of the mating interaction, but figure 1 appears to show all contact and mating surfaces as *flat*, conforming to the flat side of the collar, which is to lie against the bevelled flat corner of the shelf. The sentence bridging columns 6 and 7 seems to intimate (though this is not fully clear) some form of wedge coupling, most likely between the flat sides of the recess 13 (see

- figure 1) sliding in a tapering groove formed between collar wall and the guides 12' at the side(s) of slide 12.
- 6.1.2 While D2 and D7 do show support elements of frustum-conical shape, their coupling to shelf-side brackets still differs significantly from that of the invention. These invariably involve double wedge or double taper structures, see figures 4 and 8 of D2 or figures 1 and 2 of D7. Similar double wedge fixings are detailed in D3 to D6, showing metal sheet dovetail fittings with cylindrically rolled edges used to fix parts to one another at conjoining flat surfaces.
- 6.1.3 The claimed conical coupling - interpreted as in section 5 above - is essentially different from these known double wedge or taper type fixings or couplings, as also recognized by the Appellant. Where the latter join and fix flat surfaces, the invention specifically adapts coupling to accommodate the curved, conical surfaces of the support element, providing a complex fixation in multiple (non coplanar) directions which is firm and play-free.
- 6.2 As the Board also does not consider such a coupling obvious in the light of the skilled person's common general knowledge, it concludes that the subject-matter of claim 1 as granted involves an inventive step over the prior art.
7. In conclusion, the Board finds that none of the grounds raised in the appeal prejudice maintenance of the patent as granted.

8. *Reimbursement of appeal fee*

8.1 The Appellant's contentions in this regard concern the decision's failure to mention or discuss in detail material and arguments submitted in the course of the opposition proceedings. Drawing E1 and photograph E2 are undoubtedly absent in the decision, as is any mention of the sketch drawn on a flipchart during the oral proceedings before the Board. E3 to E11 on the other hand, though indicated, are not discussed in any detail.

8.2 Failure to consider evidence will normally constitute a substantial procedural violation in that it deprives a party of basic rights enshrined in Article 117(1) and Article 113(1) EPC. Thus, in T 135/96, see reasons 3, ignoring documents (and arguments) relevant to inventive step was found to violate the party's right to be heard. T 1110/03 (OJ EPO 2005, 302) made a similar finding where *indirect* evidence substantiating an allegation of fact relevant to novelty was disregarded.

8.2.1 In this Board's opinion, certain factors may nevertheless mitigate the severity of the violation. Thus, whether or not a failure of the decision to expressly mention material offered by a party in support of its case constitutes a *substantial* procedural violation, in particular of the rights to present evidence and be heard, will depend on the (prima facie) significance and evidentiary value of such material. Here the questions to be asked are: what facts is it intended to prove, how relevant is it to these facts and how likely is it that it will prove

them? The circumstances under which the material is submitted - e.g. whether its role is made sufficiently clear and whether it is accompanied by arguments - may conceivably also play a role.

8.2.2 Turning first to E1 and the sketch, the Board notes that E1 is merely an enlargement of part of a figure in D1, produced to better view its contents. The sketch is intended to illustrate the play of forces in the claimed coupling as understood by the Appellant. Both serve merely as aids in distilling facts from the patent and the prior art and should rather be considered an integral part of the arguments. In as far as these are addressed in the decision - which it does, see reasons 5, the first three paragraphs - the Board sees no reason why such aids should find an express mention in the decision.

8.2.3 Photograph E2 of a coupling element was presented (together with E1) with the submission of 5 September 2006 "for easy assessment of the disclosures of D1". E3 to E11 were said to pertain to an object sold by the Respondent-Proprietor and were intended for "a better understanding/assessing of the ... patent", see also section 2.1 above. As noted above, such material, which has no apparent link to D1 respectively the patent, can have little bearing on the relationship between D1 and the claimed invention. That is determined solely by the terms of D1 and the patent respectively. The significance and evidentiary value of this material are plainly limited.

What is more, this material was accompanied by little or no written comment. The only relevant passages are

found in the letter of 5 September 2006, see page 4 and 14 March 2007 (see page 2). These state that it serves a better understanding of D1 and the patent, while describing E2 as "upper, front and side real size photographic views of the collar 11 of Figure 1 [of D1]". No detail is given as to the material's origin or how it might improve an understanding of D1 or the patent. Otherwise the submissions refer only to D1 (or D2) and the terms of the patent. Likewise, the minutes of the oral proceedings before the opposition division, which are uncontested by the Appellant, also do not record extensive arguments concerning the above material.

In summary E2 to E11 thus, objectively, have little bearing on the main issues, and the Appellant has made little effort to demonstrate otherwise before the opposition division. It appears unreasonable to the Board to require the opposition division to fully acknowledge, i.e. mention and discuss in detail, such prima facie irrelevant material, especially where the Appellant has himself not made this effort. The Board would agree that the opposition division's failure to do so may not demonstrate the highest level of procedural rectitude. However, given that the underlying issue is addressed (see section 8.3 below), it is a pardonable error that has not deprived the Appellant of any fundamental rights.

- 8.3 As regards the further contention that the decision fails to address crucial arguments and (as a result) does not present a full line of reasoning, the Board firstly notes that according to established jurisprudence, cf. T 70/02, Rule 68(2) EPC 1973 does

not require a decision to deal with all arguments in detail. In addition to the logical chain of facts and reasons, it should include some reasoning regarding the crucial points of dispute.

- 8.3.1 In this regard, the decision does in fact address the central discussion concerning the terms "conical" and "tapering", which E1 to E11 and the sketch were intended to illuminate, see reasons 5, first three paragraphs.

The first paragraph summarizes the Appellant's arguments as "conical ... also encompasses tapered elements" and "a frustum-conical piece ... could also be used to describe a straight-sided one". In the following paragraph the decision then refutes these arguments by stating that "anything that is defined as conical is by definition curved and tapered". These passages are admittedly somewhat succinct. However, it shows that the opposition division identified as a central point of contention differences in interpretation of the term "conical" and that it understood this term in a narrower sense than just "tapered".

In the third paragraph this interpretation then serves to differentiate the invention from D1, which, in the division's view, does not possess conically shaped tongues or a frustum-conical support element.

- 8.3.2 These elements together constitute what the Board recognizes as a line of reasoning, which gives a fair idea of where the division saw differences between the invention and D1, and why. In the Board's view this

information should be sufficient to enable the adversely effected party to identify cardinal points of dispute - namely the differences in interpretation of "conical" - and to draft its appeal accordingly. Here also the Board is unable to detect a substantial procedure violation.

- 8.4 The Board cannot allow the appeal on its merit, see above, nor has it found that a substantial procedural violation occurred. As neither of the conditions for reimbursement of the appeal fee under Rule 67 EPC are met, the request for reimbursement must fail.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is rejected.

The Registrar

The Chairman

G. Magouliotis

M. Ceyte