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**Datasheet for the decision
of 1 April 2014**

Case Number: T 0287/11 - 3.3.10

Application Number: 00910197.3

Publication Number: 1173140

IPC: A61K8/34, A61K8/89, A61Q5/06

Language of the proceedings: EN

Title of invention:
HAIR STYLING COMPOSITIONS CONTAINING SELECTED POLYALKYLENE
GLYCOL STYLING AGENTS

Patent Proprietor:
THE PROCTER & GAMBLE COMPANY

Opponent:
Henkel AG & Co. KGaA

Headword:

Relevant legal provisions:
EPC Art. 84, 111(1), 112(1)(a), 123(2), 123(3)

Keyword:

Main request: amendments -

extension of protection conferred (yes)

Referral to the Enlarged Board of Appeal - (no)
not a question of law

Auxiliary request 1: extension of protection conferred (no);
clarity (yes); added subject-matter (no)

Appeal decision - remittal to the department of first instance
(yes)

Decisions cited:

T 0181/82, T 0172/07, T 2017/07, T 0009/10, T 0999/10

Catchword:



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Case Number: T 0287/11 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 1 April 2014

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 15 December
2010 revoking European patent No. 1173140
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman: P. Gryczka
Members: J. Mercey
C. Schmidt

Summary of Facts and Submissions

I. The Appellant (Proprietor of the patent) lodged an appeal against the decision of the Opposition Division revoking European patent No. 1 173 140. Said patent comprises seven independent claims, claim 1 reading as follows:

"An aerosol hair styling composition comprising:
(a) from 5% to 90% by weight of a water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers, except if the composition comprises a silicone or silicone derivative, and that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4;
(b) from 1% to 90% by weight of a liquid carrier; and
(c) from 5% to 40% by weight of a propellant."

Claim 4 relates to a method of making a hair mousse composition from *inter alia* 5% to 25% by weight of a water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers, having a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4.

Claim 5 relates to a hair styling composition comprising *inter alia* from 65% to 99% by weight of a water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers, except if the composition comprises a silicone or silicone derivative, and that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating

alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4.

Claim 6 relates to a hair styling composition comprising *inter alia* from 5% to 80% by weight of a water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers, except if the composition comprises a silicone or silicone derivative, and that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4.

Claim 7 relates to a hair styling composition comprising *inter alia* from 5% to 80% by weight of a water-soluble polyalkylene glycol that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4.

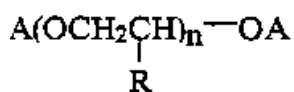
Claim 16 relates to a method of making a hair mousse composition from *inter alia* 9% to 25% by weight of a water-soluble polyalkylene glycol having a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4.

Claim 17 relates to a method for styling dry hair comprising applying compositions of preceding claims to the hair.

II. Notice of Opposition had been filed by the Respondent (Opponent) requesting revocation of the patent in its entirety on the grounds of Article 100(a) EPC.

III. The decision under appeal was based on a main request and three auxiliary requests, independent claim 1 of auxiliary request 1 reading as follows:

"An aerosol hair styling composition comprising:
(a) from 5% to 90% by weight of a water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers, except if the composition comprises a silicone or silicone derivative, and that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4;
(b) from 1% to 90% by weight of a liquid carrier; and
(c) from 5% to 40% by weight of a propellant; and wherein the water-soluble polyalkylene glycol conforms to the formula:



wherein A is selected from the group consisting of methyl or hydrogen or mixture thereof and wherein R is selected from the group consisting of H, methyl, and mixtures thereof, and wherein n has an average value of from 5 to 35."

Independent claims 4 to 6 and 15 of auxiliary request 1 had each been amended *vis-à-vis* the respective claims 4, 6, 7 and 16 of the granted patent in a similar manner to claim 1, namely by further defining a formula for the water-soluble polyalkylene glycol. Granted claim 5 was deleted.

IV. The Opposition Division found that the subject-matter of all the then pending requests contravened the requirements of Article 123(3) EPC, since in contrast to claim 1 as granted, claim 1 of each of these requests was no longer restricted to a composition comprising a water-soluble polyalkylene glycol as defined in granted claim 1 in an amount of 5% to 90% by weight.

V. With letter dated 23 December 2011, the Appellant (Patent proprietor) submitted a main request and auxiliary requests 1 to 19, the main request being identical to auxiliary request 1 on which the decision under appeal was based. During oral proceedings before the Board, held on 1 April 2014, the Appellant submitted a fresh auxiliary request 1, which replaced auxiliary request 1 filed with letter dated 23 December 2011. Claim 1 of this request differs essentially from claim 1 of the main request in that the following feature is present at the end of the claim:

"wherein the total amount of water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers, except if the composition comprises a silicone or silicone derivative, and that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4 is in the range of 5% to 90% by weight."

Claims 4 to 6 and 15 of auxiliary request 1 were amended *vis-à-vis* the corresponding claims of the main request in a similar manner to claim 1, namely by

further defining the total amount of water-soluble polyalkylene glycol.

VI. The Appellant argued that the amendments made to the independent claims of all requests did not lead to an extension of the protection conferred by the patent as granted. Taking claim 1 as being exemplary for all the independent claims of each of these requests, claim 1 always specified *inter alia* that the composition comprised from 5% to 90% by weight of a water-soluble polyalkylene glycol of the same definition as that given in granted claim 1, such that it did not encompass compositions having a content of more than 90% by weight of such water-soluble polyalkylene glycols. The Appellant cited decisions T 999/10 and T 009/10 in support of its arguments for the main request, and T 172/07 (none of these decisions being published in OJ EPO) in support of its arguments for auxiliary request 1, in this respect. During the oral proceedings before the Board, it also requested that should the main request be considered not allowable, the following question be referred to the Enlarged Board of Appeal in order to ensure uniform application of the law, since such a decision would be in contradiction to those of decisions T 999/10 and T 009/10:

"Where a granted claim relating to a composition comprising certain components specifies an amount range for a class of specific components and that claim is later amended in opposition such that the composition is limited with an additional feature versus granted claim stating that the composition must comprise specific species from that class, does that result in a contravention of A.123(3) EPC in view of the amount range for the component class automatically applying to

only those specific species now listed and not applying to those specific species now listed AND the component class?"

The Appellant argued that the subject-matter of the main request and auxiliary request 1 was clear, the skilled person understanding the definitions of R and A as mixtures of methyl and hydrogen in the context of polymer chemistry to mean that these two variables were merely independent of one another. It argued that document (6) (see point VII below) was late-filed and that in any case, the wording requiring that the polyalkylene glycol was water-soluble had been in the claims as granted. As such, any alleged lack of clarity did not arise out of the amendments made, with the consequence that the Board had no power to examine lack of clarity at this stage of the proceedings.

- VII. The Respondent (Opponent) argued that the main request led to an extension of the protection conferred by the granted patent, since claim 1 thereof embraced compositions containing amounts of water-soluble polyalkylene glycol greater than 90% by weight, since the weight amount of 5% to 90% specified in claim 1 of this request applied only to the more limited definition of the water-soluble polyalkylene glycol specified therein, citing decision T 2017/07 (not published in OJ EPO) in this respect. The Respondent had no objections under Article 123(2) or (3) EPC to the claims of auxiliary request 1.

The Respondent submitted that all independent claims of the main request and auxiliary request 1 were unclear, since in the formula for the water-soluble polyalkylene glycol, R and A were each defined as *inter alia* mixtures of hydrogen and methyl, whereas a substituent

could not simultaneously be hydrogen and methyl. With letter dated 28 March 2014, it submitted document (6):

(6) Handbook of Toxic Properties of Monomers and Additives, V. O. Scheffel, 1995, Lewis Publishers, pages 120 and 121

which taught that certain polyalkylene glycols specified by the formula for the water-soluble polyalkylene glycol in the independent claims of the main request and auxiliary request 1 were in fact water-insoluble, this internal contradiction within the claims leading to a further lack of clarity.

VIII. The Appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request, filed with letter dated 23 December 2011, auxiliarily that the question filed at the oral proceedings (see point VI above) be referred to the Enlarged Board of Appeal, auxiliarily that the patent be maintained on the basis of auxiliary request 1 filed during oral proceedings before the Board, or on the basis of any of auxiliary requests 2 to 19, all filed with letter dated 23 December 2011.

The Respondent requested that the appeal be dismissed.

IX. At the end of the oral proceedings, the decision of the Board was announced.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. *Amendments (Article 123(3) EPC)*

- 2.1 Article 123(3) EPC requires that the claims of a patent as granted may not be amended during opposition/appeal proceedings in such a way as to extend the protection conferred by the patent as a whole. In order to decide whether or not an amendment satisfies this requirement, it is necessary to compare the protection conferred by the claims as granted, with that of the claims after amendment.

- 2.2 Thus the question to be answered is whether the claims of the main request cover any compositions or methods which were not covered by the claims as granted. The following analysis is for claim 1 of the main request compared to claim 1 as granted, similar considerations applying to independent claims 4 to 6, 15 and 16 of the main request *vis-à-vis* the respective claims 4, 6, 7, 16 and 17 as granted.

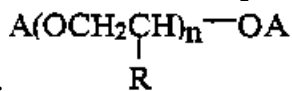
- 2.3 Claim 1 of the patent as granted is directed to an aerosol hair styling composition comprising *inter alia* (a) from 5% to 90% by weight of a water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers, except if the composition comprises a silicone or silicone derivative, and that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4.

2.3.1 The use of the term "comprising" in connection with a numerical range defining the amount of a component implicitly means that the protection conferred by the claim does not extend to compositions containing that component in amounts outside the defined range (see T 2017/07, Headnote, *ibid.*).

2.3.2 In the present case, this means that the protection conferred by claim 1 as granted, as far as component (a) is concerned, is restricted to aerosol hair styling compositions containing not less than 5% and not more than 90% by weight of any water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers, except if the composition comprises a silicone or silicone derivative, and that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4, which finding has not been contested by the Appellant.

2.4 Claim 1 of the main request differs from claim 1 as granted by virtue of the insertion after the definition of the component (c) of the feature:

"wherein the water-soluble polyalkylene glycol conforms



to the formula:

wherein A is selected from the group consisting of methyl or hydrogen or mixture thereof and wherein R is selected from the group consisting of H, methyl, and mixtures thereof, and wherein n has an average value of from 5 to 35".

2.4.1 In view of the wording "wherein **the** water-soluble polyalkylene glycol **conforms to the formula**" (emphasis

added), the component (a) is to be regarded as restricted to those specific water-soluble polyalkylene glycols of the formula recited, such that the amount of 5% to 90% by weight of water-soluble polyalkylene glycol applies to this more restricted definition only, and no longer to the broader definition.

2.5 Thus, claim 1 of the main request no longer requires, as does claim 1 as granted, that the composition contains at most 90% by weight of polyalkylene glycols of the broader definition given in granted claim 1, since the definition of the composition in claim 1 is "open" due to the characterization by the term "comprising", i.e. the composition can contain in addition to the compounds specified in the claim any other compounds. Therefore, the composition of claim 1 of the main request may comprise in addition to water-soluble polyalkylene glycols of the specific formula now defined, any other water-soluble polyalkylene glycol as defined in granted claim 1 **in an undefined amount**, whereas claim 1 as granted restricted the amount of these compounds to no more than 90% by weight.

2.6 The protection conferred by claim 1 according to the main request is thus extended in comparison with the protection conferred by claim 1 as granted. The Appellant did not argue that the protection conferred by claim 1 of the main request was covered by any of the other independent claims as granted, nor does the Board hold that this is the case.

2.7 For similar reasons, independent claims 4 to 6, 15 and 16 of the main request extend the protection conferred by the respective claims 4, 6, 7, 16 and 17 as granted.

2.8 The Appellant argued on the basis of the conclusions reached in decision T 999/10 that since claim 1 of the main request was drafted in "cascade form", i.e. the claim contained both a broader and a narrower definition of a particular group of compounds (see T 999/10, points 3.4 and 3.5 of the Reasons), the weight limitation of 5% to 90% applied to both definitions of the component (a) given therein, with the consequence that the total amount of water-soluble polyalkylene glycol could not fall outside the amount of 5% to 90% by weight. The Appellant also submitted that in the case underlying decision T 009/10 (see point 2.1 of the Reasons), a claim which had been amended similarly *vis-à-vis* the granted version was considered not to contravene Article 123(3) EPC.

2.8.1 However, in view of the wording "wherein **the** water-soluble polyalkylene glycol **conforms to the formula**", the Board considers that the water-soluble polyalkylene glycol of component (a) is defined as **being** of that specific formula, and not, as suggested by the Appellant as **comprising** a water-soluble polyalkylene glycol of this formula. Thus, the Board holds that the first, broader definition of component (a) in claim 1 is restricted by the second narrower definition of the specific formula, such that the amount of 5% to 90% weight applies to the narrower definition only. In view of this interpretation of the claim, the Board sees no need to turn to the description in order to interpret the claim, as was the case in decision T 009/10.

2.8.2 Concerning decision T 999/10 cited by the Appellant, claim 1 of the main request thereof relates to an adhesive comprising *inter alia* 45 to 85% by weight of one or more styrene block copolymers, wherein the styrene block copolymer is a copolymer of the type

styrene/isoprene/styrene (SIS), claim 1 as granted relating to an adhesive comprising *inter alia* 45 to 85% by weight of one or more styrene block copolymers, said copolymer not being further defined (see T 999/10, points I and IX of the Facts and Submissions). Said decision states (see point 3.4 of the Reasons) that in view of the sequential ("cascade") formulation of the claim, there was no doubt as to the "intention" of the patent proprietor that no other block copolymers other than the specific SIS-type may be present in the adhesive. The decision goes on to state (see point 3.5 of the Reasons) that even if the claim were to be interpreted as not excluding the presence of other block copolymers, the sequential formulation chosen by the patent proprietor meant that the condition limiting the amount of block copolymer defined in the broader manner as in granted claim 1, should also be fulfilled in the amended claim.

However, the scope of protection should not be interpreted in the light of the intention of the drafter of a claim, since this is a subjective criterion, but rather on the basis of the meaning generally accepted by the person skilled in the art to the technical features defined in said claim, such that this Board is not convinced by argumentation based on any alleged intention of a drafter of a claim.

2.9 Thus, the Board concludes that the scope of protection conferred by claim 1, and by the same token that of independent claims 4 to 6, 15 and 16, has been broadened *vis-à-vis* that of the claims as granted, such that the main request does not satisfy the requirements of Article 123(3) EPC.

3. *Request for referral of a question to the Enlarged Board of Appeal*
- 3.1 Under Article 112(1)(a) EPC, a board of appeal may, during proceedings on a case and either of its own motion or following a request from a party to the appeal, refer a question to the Enlarged Board of Appeal if it considers that a decision is required in order to ensure uniform application of the law, or if an important point of law arises.
- 3.2 In the present case, the Appellant requested that if the Board did not allow its main request for reasons of contravening Article 123(3) EPC, such a decision would be contradictory to decisions T 999/10 and T 009/10, such that a question (see point VI above for exact formulation) regarding whether particular amendments to granted claims relating to compositions comprising a class of components and specifying an amount range thereof contravened Article 123(3) EPC should be referred to the Enlarged Board of Appeal in order to ensure uniform application of the law.
- 3.3 The Board holds, however, that the question formulated by the Appellant concerns the interpretation of technical features of a claim of the specific patent in suit, this not being a question of law but primarily a technical issue (cf. T 181/82, point 14 of the Reasons, OJ EPO 1984, 401), because it requires the skilled person to interpret technical information, namely whether amendments to a chemical definition have an impact on the broadness of the claim.
- 3.4 Hence, the Appellant's request to refer a question to the Enlarged Board of Appeal is rejected.

Auxiliary request 1

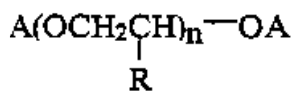
4. *Amendments (Article 123(2) EPC)*

Claim 1 is based on granted claim 1 (Article 100(c) EPC not being a ground for opposition), the water-soluble polyalkylene glycols of the specific formula finding a basis at page 6, lines 15 to 19 of the application as filed. Independent claims 3 to 6, 15 and 16 are similarly based on granted claims 3, 4, 6, 7, 16 and 17, respectively, together with page 6, lines 15 to 19 of the application as filed. Claims 2 and 7 to 14 are based on granted claims 2 and 8 to 15, respectively. The claims thus comply with the requirements of Article 123(2) EPC, the Respondent having no objections under this Article to the amended claims.

5. *Amendments (Article 123(3) EPC)*

5.1 Compared with claim 1 as granted, the definition of component (a) in claim 1 according to auxiliary request 1 is supplemented by the following feature:

"wherein the water-soluble polyalkylene glycol conforms to the formula



wherein A is selected from the group consisting of methyl or hydrogen or mixture thereof and wherein R is selected from the group consisting of H, methyl, and mixtures thereof, and wherein n has an average value of from 5 to 35",

and after the definition of component (c), the following feature has been added:

"wherein the total amount of water-soluble polyalkylene glycol that is substantially free of polyalkylene glyceryl ethers and that has a number average molecular weight of from 190 to 1500 and from 5 to 35 repeating alkylene oxide radicals wherein each of the repeating alkylene oxide radicals has from 2 to 6 carbon atoms, or triglycerin or PPG-4 is in the range of 5% to 90% by weight".

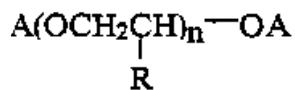
5.2 The amended claim thus requires that a water-soluble polyalkylene glycol of the specific formula is present within the amounts given, but **also** that **the total amount** of water-soluble polyalkylene glycols of the broader definition indicated in the claim is in the range of 5% to 90% by weight. Said wording renders it unambiguous that no more and no less than the amount of a water-soluble polyalkylene glycol as defined in granted claim 1 may be present in the aerosol hair styling composition, and thus overcomes the problem of extension of protection inherent in the main request.

5.3 Thus, the Board concludes that the scope of protection conferred by claim 1, and by the same token that of independent claims 4 to 6, 15 and 16, has not been broadened *vis-à-vis* that of the claims as granted.

5.4 Thus, the requirement of Article 123(3) EPC is satisfied, the Respondent also having no objections under Article 123(3) EPC to the claims of this request

6. *Article 84 EPC*

6.1 Granted claim 1 was amended during opposition-appeal proceedings *inter alia* by specifying that the water-soluble polyalkylene glycol conforms to the formula:



wherein A is selected from the group consisting of methyl or hydrogen or mixture thereof and wherein R is selected from the group consisting of H, methyl, and mixtures thereof, and wherein n has an average value of from 5 to 35.

6.2 The Respondent submitted that as a result thereof the subject-matter of all independent claims did not fulfil the requirements of Article 84 EPC, for two different reasons:

6.2.1 Firstly, in the formula for the water-soluble polyalkylene glycol, R and A were each defined *inter alia* as mixtures of hydrogen and methyl, whereas a substituent could not simultaneously be both hydrogen and methyl.

6.2.2 Secondly, document (6) taught that certain polyalkylene glycols specified by the formula for the water-soluble polyalkylene glycol in the independent claims were in fact water-**insoluble**, resulting in an internal contradiction within the claims.

6.3 The Appellant argued *inter alia* that the Board had no power to examine the second objection under Article 84 EPC, since the alleged lack of clarity had already been present in the granted claims, and in any case, the document (6) on which the objection was based, had been filed merely three days before the oral proceedings before the Board and should thus not be admitted into the proceedings.

6.4 With regard to the first objection, the Board holds that the skilled person would clearly understand the

definition of R and A in the formula for the water-soluble polyalkylene glycol as being mixtures of hydrogen and methyl to mean that the definitions of R and A in the glycol are merely independent of each other. Thus, in a polyalkylene glycol of the formula given in any of the independent claims, depending on the value of n, R can occur 5 to 35 times, and depending on the nature of the monomers used to make the polyalkylene glycol, i.e. of the ethylene- and/or the propylene-type, each occurrence of R in a single polyalkylene glycol molecule may not necessarily be the same, but may be hydrogen or methyl. Similarly, in the polyalkylene glycol, A represents the two end groups, such that when A is defined as a mixture of hydrogen and methyl, then it is clear that one end group is hydrogen and the other is methyl.

6.5 With regard to the second objection, the Board holds that regardless of whether or not the Board has the power to examine this objection, and regardless of whether or not the late-filed document (6) were to be admitted into the proceedings, the polyalkylene glycols of component (a) of the compositions of the independent claims are defined by both a structural definition, namely by a specific formula, and by a functional definition, namely that they are water-soluble. Thus, even if some of the polyalkylene glycols falling under the structural definition given would be water-insoluble, then they would not fulfil both requirements of the claim and as a consequence, would not fall within the scope of the claim.

6.6 Thus, all independent claims fulfil the requirements of Article 84 EPC.

7. *Remittal*

Having so decided, the Board has not taken a decision on the whole matter, since the decision under appeal dealt exclusively with amendments which contravened the provisions of Article 123(3) EPC, which objections are no longer pertinent due to the amendments made. As the Opposition Division has not yet ruled on the other grounds for opposition, namely novelty and inventive step, the Board considers it appropriate to exercise its power conferred on it by Article 111(1) EPC to remit the case to the Opposition Division for further prosecution on the basis of the claims according to auxiliary request 1 in order to enable the first instance to decide on the outstanding issues.

Auxiliary requests 2 to 19

8. Since the auxiliary request 1 is remitted to the first instance for the reasons set out above, there is no need for the Board to decide on the lower ranking auxiliary requests.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The request for referral of a question to the Enlarged Board of Appeal is refused.
3. The case is remitted to the department of first instance for further prosecution on the basis of auxiliary request 1 filed during the oral proceedings before the Board.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated