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**Datasheet for the decision
of 10 February 2017**

Case Number: T 0082/15 - 3.3.06

Application Number: 00929599.9

Publication Number: 1244843

IPC: D21C11/04, G05B17/00

Language of the proceedings: EN

Title of invention:

Method and apparatus for controlling a causticizing process

Patent Proprietor:

Valmet Automation Oy

Opponent:

Andritz Oy

Headword:

Density control / VALMET

Relevant legal provisions:

EPC Art. 84, 111(1), 123(2)

RPBA Art. 12(4), 13(1), 13(3)

Keyword:

Admittance of the main request filed during oral proceedings

(yes)

Clarity (yes)

Added matter (no)

Remittal (yes)

Decisions cited:

T 0848/09

Catchword:



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Case Number: T 0082/15 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 10 February 2017

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted on 17 November
2014 revoking European patent No. 1244843
pursuant to Article 101(3) (b) EPC.

Composition of the Board:

Chairman B. Czech
Members: L. Li Voti
C. Heath

Summary of Facts and Submissions

- I. The appeal is from the decision of the Opposition Division to revoke European patent no. 1 244 843.
- II. The opposition had been filed on the grounds of Article 100(a) EPC (lack of novelty and lack of inventive step) and Article 100(c) EPC (extension beyond the content of the application as filed).
- III. The Opposition Division found in its decision that neither claim 1 as granted (main request) nor claim 1 according to the then pending first and second auxiliary requests complied with the requirements of Article 123(2) EPC.
- IV. The Appellant (Patent Proprietor) defended the patent in its granted version, and in addition filed eight sets of amended claims as auxiliary requests 1 to 8, arguing *inter alia* that the claims of all requests met the requirements of Article 123(2) EPC.
- V. The Respondent (Opponent) maintained in its reply that independent claims 1 and 16 as granted were objectionable under Article 123(2). None of the newly filed auxiliary requests 1 to 8 should be admitted into the proceedings pursuant to Article 12(4) RPBA. Moreover, the independent claims according to auxiliary requests 1 to 8 lacked clarity (Article 84 EPC) and/or did not comply with the requirements of Article 123(2) EPC either.
- VI. In a further letter, the Appellant rebutted all the objections raised by the Respondent.

VII. The parties were summoned to oral proceedings. In a communication dated 22 November 2016 issued in preparation therefor, the Board indicated *inter alia* that, in accordance with the requests presented by both parties, it intended to remit the case to the department of first instance for further prosecution in case one of the Appellant's requests were to be found both admissible and formally allowable.

VIII. Oral proceedings before the Board were held on 10 February 2017.

In the course of the oral proceedings, the Board *inter alia* decided to admit the pending Auxiliary claim Request 6 into the proceedings. Compliance with Articles 84 and 123(2) EPC of independent claims 1 (method) and 16 (apparatus) according to this request was controversially debated as well as further issues raised under Article 84 EPC against claims 11, 12, 21 and 22 thereof. Ultimately, the Appellant withdrew all its pending claim requests and filed a new set of claims 1 to 19 as new Main Request.

IX. Final requests

The **Appellant** requested that the decision under appeal be set aside and that the case be remitted to the Opposition Division for further prosecution based on the Main Request filed during oral proceedings.

The **Respondent** requested that the appeal be dismissed or, in the alternative, that the case be remitted to the Opposition Division for further prosecution.

X. Independent claims 1 and 14 according to the Main Request filed during oral proceedings read as follows:

"1. A method for controlling a causticizing process which comprises slaking (1), causticizing (2) and the preparation (3) of white liquor, the slaking (1) being carried out using a slaker (4) into which green liquor and lime are fed to produce lime milk, characterized in that the causticizing process is controlled by measuring the density of green liquor being fed to the slaker;
measuring the total titratable alkali in the green liquor being fed to the slaker;
providing a model that relates green liquor density to total titratable alkali in the green liquor which model comprises an offset that is calculated using the measured density and total titratable alkali and which model is;

$$D = (TTA + os)/kk,$$

where D is the green liquor density;

TTA is the total titratable alkali of the green liquor;

os is the offset; and

kk is an angular coefficient,

controlling the density of the green liquor using both the measurement results and said model;

determining a set value for the density of the green liquor being feed to the slaker by:

setting a target value for the total titratable alkali;

updating the offset; and

calculating the set value for the density of green liquor on the basis of the target value for the total titratable alkali and the model

and controlling the density of the green liquor towards the set value using a density controller which is used to control the amount of weak white liquor to be fed into the green liquor."

"14. An apparatus for controlling a causticizing process which comprises slaking (1), causticizing (2) and the preparation (3) of white liquor, the slaking (1) taking place in a slaker (4) into which green liquor and lime are arranged to be supplied to produce lime milk, characterized in that the apparatus comprises means for measuring the density of green liquor being supplied to the slaker, means for measuring the total titratable alkali in the green liquor being supplied to the slaker, and a density controller which is used to control the amount of weak white liquor to be fed into the green liquor for controlling the density of green liquor toward a set value on the basis of both measurement results produced by measuring means and a model that relates green liquor density to the total titratable alkali in the green liquor which model comprises an offset that is calculated using the measured density and total titratable alkali and updated, and which model is

$$D = (TTA + os)/kk,$$

where D is the green liquor density;
 TTA is the total titratable alkali of the green liquor;
 os is the offset; and
 kk is an angular coefficient,

whereby the set value for the density of the green liquor is calculated on the basis of a target value for the total titratable alkali and the model."

Dependent claims 2 to 13 and 15 to 19 are directed to more specific embodiments of the method of claim 1 and the apparatus of claim 14, respectively.

XI. The arguments of the parties of relevance here, as presented during oral proceedings with regard to the

Main Request at issue, can be summarized as follows:

Admittance of the new main request into the proceedings

- The **Appellant** submitted that the set of claims at issue differed from the previously pending Auxiliary Request 6, filed with the statement of grounds, only in that claims 11, 12, 21 and 22 of the latter request, the clarity of which had been contested for the first time during oral proceedings, were deleted, and in that the remaining claims were renumbered accordingly.

Therefore, the newly filed Main Request had to be admitted into the proceedings for essentially the same reasons that had led to the admittance of the previously pending Auxiliary Request 6, and because it was filed in reaction to the objections under Article 84 EPC raised for the first time during oral proceedings.

Said Auxiliary Request 6 differed from the Second Auxiliary Request considered in the decision under appeal in that the independent method and apparatus claims were further restricted.

It had to be considered that the Opposition Division, after having indicated in the annex to the summons that it considered the granted claims to comply with the requirements of Articles 123(2) EPC, had modified its opinion during oral proceedings and had extended its negative opinion in this respect to all pending auxiliary requests, including the set dealt with as Second Auxiliary Request in the decision under appeal. However, the exact reasons for the negative decision of the Opposition Division on said Second Auxiliary Request only became apparent from the reasoned written

decision. Therefore, claims amended as according to said Auxiliary Request 6 in order to overcome the objections detailed in the decision under appeal could not have been filed earlier.

The Main Request at issue was based on said Auxiliary Request 6, did not introduce new elements potentially giving rise to further issues, and was at first sight formally allowable.

Therefore, it had to be admitted into the proceedings.

- The **Respondent** submitted that the objections under Article 123(2) EPC against the granted claims had been known to the Patent Proprietor since the outset of the opposition. Therefore, it could not have been surprised by the decision of the Opposition Division that such claims (and those of the auxiliary requests containing the same contested features) contravened the requirements of Article 123(2) EPC. Moreover, the Patent Proprietor had also had ample time at the oral proceedings before the Opposition Division to file, in addition to the requests already pending, further auxiliary requests addressing the objections discussed during these oral proceedings. Therefore, it could and should have filed further amended claim requests already before the Opposition Division. For these reasons Auxiliary Request 6, filed by the Appellant with its statement of grounds should not be admitted into the proceedings under Article 12(4) RPBA. Consequently, the Main Request filed by the Appellant during the oral proceedings before the Board, which was a further modified version of said previously pending Auxiliary Request 6 was, likewise, not to be admitted in view of its belated filing.

Furthermore, the Main Request did not at first sight appear to overcome all the objections identified in the decision under appeal and discussed during oral proceedings before the Board. This was a further reason for not admitting it into the proceedings.

Clarity - Claims 1 and 14

- According to the **Respondent** the wording of method claim 1 at issue was ambiguous since it referred to two different steps for controlling the density of the green liquor and did not specify whether these steps had to be carried out in parallel, in sequence or simultaneously.

Moreover, the function of the "model" referred in method claim 1 was ill defined.

Analogous objections were applicable to the independent apparatus claim 14.

Therefore, claims 1 and 14 lacked clarity (Article 84 EPC).

- The **Appellant** essentially argued that the green liquor density control step as mentioned in the final sentence of claim 1 clarified and specified in more detail the more general first mention of the control step in the middle portion of the claim.

Moreover, the function of the model to be applied according to the claimed method was clear when considering the full wording of the claim.

Similar considerations applied also to the apparatus claim 14.

Therefore, claims 1 and 14 complied with the clarity requirement of Article 84 EPC.

Allowability of the amendments - Article 123(2) EPC - Claims 1 and 14

- The **Respondent** argued that the amended independent claims 1 and 14 resulted from an intermediate generalisation of more specific subject-matter disclosed in the application as filed. In particular, at variance with the description of the application as filed, these claims did not specify precise values for the "*angular coefficient kk* " and did not specify that the "*updating of the offset*" had to occur on the basis of a "*longer period of time*".

Moreover, the features "*controlling the density of the green liquor by using both the measurement results and said model*" in claim 1 implied that the measurements of the density of the green liquor (D) and of the total titratable alkali (TTA) were used, together with the model, for controlling the density of the green liquor. However, the description of the application as filed disclosed only that the density of the green liquor was controlled on the basis of the density measurement results (D) whilst the measurements of TTA were used only for designing the model. In fact, figure 1 disclosed that the density controller (DC) did not receive input from a TTA measurement but only from green liquor density measurements and from the set value for density.

Therefore, the application as filed did not disclose that the TTA measurements or the model were used for controlling the density of the green liquor. The features "*controlling the density of the green liquor*

using both the measurement results and said model" were thus not compatible with the embodiments disclosed in the description and figures of the application as filed.

Claims 1 and 14 thus contravened the requirements of Article 123(2) EPC.

- The **Appellant** submitted that the amended claims at issue contained all the essential features of the invention and did not result from an intermediate generalisation. In particular, the description of the application as filed disclosed that the "*angular coefficient kk* " was not necessarily a fixed value but could change, for example over time. Moreover, the "*updating of the offset*" was also disclosed in the application as filed in a more general way. Basing it on a "*longer period of time*" was, in fact, only an option according to the application as filed.

Furthermore, since the TTA measurements were used in designing the model serving to calculate the set value for the green liquor density, the density and TTA measurements as well as the model were indeed all necessary for the control of the density of the green liquor. It was clear from the wording of claim 1 that neither the TTA measurements nor the model were intended to be used directly for controlling the density of the green liquor, and that such hypothetical embodiments were excluded from claim 1. The claimed method and apparatus were thus correctly represented by figure 1 of the application as filed.

Claims 1 and 14 thus complied with the requirements of Article 123(2) EPC.

Reasons for the Decision

Main Request - Admittance into the proceedings

1. The set of claims according to the Main Request was filed by the Appellant during oral proceedings.

1.1 It is not in dispute (see XI, *supra*) that the set of claims according to the Main Request differs from that according to the Auxiliary Request 6, filed with the Appellant's statement of grounds, only insofar as dependent claims 11, 12, 21 and 22 of the latter request are deleted and the other claims renumbered where necessary.

1.1.1 These amendments were carried out in reaction to clarity (Article 84 EPC) objections against said dependent claims that arose for the first time during the oral proceedings before the Board.

In view of the nature of the amendments made to the claims, no further complex issues arose.

1.1.2 Therefore, the Board sees no reason for not admitting this request pursuant to Articles 13(1), (3) RPBA merely because of the amendments made to the claims of the Auxiliary Request 6 that had been previously pending and admitted into the proceedings before being withdrawn.

1.2 The Appellant essentially argued that since said Auxiliary claim Request 6 should not have been admitted pursuant to Article 12(4) RPBA, the Main claim Request at issue, derived from this Auxiliary Request 6, should not be admitted into the proceedings, either.

1.2.1 In the course of the oral proceedings, the Board, in the exercise of its discretion under Article 12(4) RPBA however, decided to admit said Auxiliary Request 6 (which was later on withdrawn) based on the following considerations.

- The set of claims according to Auxiliary Request 6 is almost identical to the set of claims according to the Second Auxiliary Request considered in the decision under appeal. The former differs from the latter only insofar as the term "*a coefficient*" in claim 1 has been amended into "*an angular coefficient*" and in that claim 1 at issue contains appended features relating to the "*density controller*", namely "*which is used to control the amount of weak white liquor to be fed into the green liquor.*" Corresponding amendments are also contained in the independent apparatus claim.
- As pointed out by the Appellant, the Opposition Division, although having indicated in the annex to the summons that it considered the granted claims to comply with the requirements of Articles 123(2) EPC, changed its opinion during oral proceedings and extended its negative opinion to all pending auxiliary requests.

The exact reasons for which the Opposition Division refused the then pending Second Auxiliary Request were, however, in the Appellant's view, not clear at this stage. Therefore, the Appellant could only file further amended requests after having taken knowledge of the detailed reasons given in the decision under appeal. Auxiliary Request 6 was thus filed at the earliest possible moment, i.e. with the statement of grounds, in an attempt to overcome

the detailed objection under Article 123(2) EPC as set out in the decision under appeal with respect to the previous Second Auxiliary Request.

- It emanates from the minutes of the oral proceedings before the Opposition Division (point 2.1, first, sixth and seventh paragraphs; point 3.3, first paragraph; point 4.3) that the main objection under Article 123(2) EPC raised by the Opponent was directed against the incorporation of the features "*controlling the density of the green liquor using both the measurement results and said model*" into claim 1 of all requests, including claim 1 of said Second Auxiliary Request (minutes, point 4.3), wherein this sentence was still present.

- However, in the decision under appeal (Reasons, point 5.3) claim 1 according to the Second Auxiliary Request was found to contravene the requirements of Article 123(2) EPC not only for the reason mentioned above (point 5.3 of the decision referring back to point 4.3 in this respect), but also because the claim represented an unsupported generalization insofar as claim 1 referred to an **unspecified** "*coefficient kk* ", whereas according to the description of the application as filed "*the model employ[ed] a specific constant angular coefficient kk* ".

- On the one hand, in point 4.3 of the Reasons (referred explicitly in point 5.3) concerning the non-compliance with Article 123(2) EPC of claim 1 according to the then pending First Auxiliary Request the features "*controlling the density of the green liquor using both the measurement results*

and said model" are not addressed. Instead, point 4.3 focuses on some **further issues** under Article 123(2) EPC also valid for claim 1 of the Second Auxiliary Request. On the other hand, it cannot be gathered from the minutes of the oral proceedings before the Opposition Division that the objections concerning *inter alia* the feature "*coefficient kk*" and said further issues addressed as regards the First Auxiliary Request also played a role in the discussion concerning the allowability of the Second Auxiliary Request under Article 123(2) EPC.

- The Board thus accepts that the Proprietor only became fully aware of the details of the Opposition Division's reasons for finding the more limited claim 1 according to said Second Auxiliary Request non-compliant with the Article 123(2) EPC upon receipt of the written reasoned decision.

The present case is thus very similar to that of T 848/09 of 7 December 2011, Reasons, 1, in which the Board entrusted with that case admitted (pursuant to Article 12(4) RPBA) a request filed in the appeal proceedings only, based on the finding that "*the reasons for the revocation of the patent were not so explicitly known ... and plausibly the formulation of a suitable new request overcoming the objection was not immediately evident.*"

- Likewise, the Board accepted that, in the present case, it was only upon receipt of the reasoned written decision that the Patent Proprietor was in a position to file further auxiliary requests potentially able to overcome all outstanding objections under Article 123(2) EPC.

- The Board thus considered the filing of Auxiliary Request 6 with the statement of grounds as a legitimate attempt of the Appellant to overcome all the objections against the previous Second Auxiliary Request, set out in full detail only in the Reasons of the (written) decision under appeal.

1.3 Since the Board had decided to admit Auxiliary Request 6 into the proceedings, it saw no reason for not admitting also the Main Request at issue, despite its late filing at the oral proceedings (Articles 13(1) and (3) RPBA).

Main request - clarity (Article 84 EPC) - claims 1 and 14

2. Claim 1

2.1.1 According to the Respondent claim 1 lacks clarity since its wording refers twice, but in different terms to "*controlling the density of the green liquor*".

Indeed, claim 1 (full wording under X, *supra*) refers in its middle portion to

*"controlling the density of the green liquor **using both the measurement results and said model**",*

whilst its final sentence reads

*"controlling the density of the green liquor **towards the set value using a density controller which is used to control the amount of weak white liquor to be fed into the green liquor**".*

- 2.1.2 Moreover, according to the Respondent, it was also not clear how the model was supposed to interact with the other steps of the method.
- 2.2 The objection regarding the feature relating to "*controlling the density...*" is not convincing for the following reasons.
- 2.2.1 For the Board, the final sentence of the claim quoted above specifies that the means for "*controlling the density of the green liquor*" comprise a "*density controller*", which in operation "*controls the amount of weak white liquor to be fed into the green liquor towards the set value*", i.e. implicitly based on a comparison of a measured value of the green liquor density with said set value of the liquor density.
- 2.2.2 The claim requires in a preceding part that the "*set value for the density of the green liquor*" is determined by "*setting a target value for the total titratable alkali*", "*updating the offset*", and "*calculating the set value for the density of green liquor on the basis of the target value for the total titratable alkali and the model*".
- 2.2.3 As also indicated in claim 1, the model relates green liquor density (D) to total titratable alkali (TTA) in the green liquor and involves said offset which is calculated using measured values of D and TTA. The model is represented by the relationship
- $$"D = (TTA + os)/kk",$$
- which is used in the determination of the set value for density. In this relationship "os" represents the "*offset*" which is updated during the determination of the "*set value for the density of green liquor*".

- 2.2.4 The middle portion of the claim also includes the wording *"controlling the density of the green liquor using both the measurement results and said model"*.

The Board holds that this wording merely refers to the overall method for controlling the green liquor density, wherein measurements of the density of the green liquor and of the TTA, as well as the model used for converting the set target TTA value to set value for the green liquor density, all play a role which is further explained in more detail in the subsequent wording of the claim, as indicated above.

- 2.2.5 The Board also holds that taking into account the entire wording of claim 1, *"controlling the density of the green liquor using both the measurement results and said model"* does not mean that the claim encompasses a method wherein TTA measurements are **directly** used, together with density measurements, to control the density of the green liquor.

- 2.2.6 For the Board, the last features of claim 1, according to which *"the density of the green liquor is controlled towards the set value using a density controller which is used to control the amount of weak white liquor to be fed into the green liquor"*, clearly require that this control implies only a comparison of a **measured** density value with a **set** density value, whereas according to the preceding parts of claim 1 TTA measurements are only used (together with the density measurements), for providing the model/formula for converting a set TTA target value to a set value for green liquor density.

Therefore, claim 1 is restricted to embodiments as represented, for example, in figure 1 of the patent.

2.2.7 Of course, the TTA measurements and the model, which are used to calculate the set value for density of green liquor towards which the density of green liquor is controlled according to the last sentence of claim 1, also contribute, generally speaking, together with the density measurements, to *"controlling the density of the green liquor using both the measurement results and said model"*.

2.2.8 In the Board's judgement, based on the above considerations, claim 1 thus expresses unambiguously the single controlling principle applied, as well as the purpose/function of the *"model"* involved.

3. Claim 14

3.1 Claim 14 (see X, *supra*) specifies

- that the apparatus comprises means for measuring the density of the green liquor, means for measuring TTA, and a density controller *"which is used to control the amount of weak white liquor to be fed into the green liquor"*,

as well as

- how the set value for density of green liquor is calculated on the basis of the set target value for TTA and the model specified in the claim.

3.2 The Board is thus also convinced that for reasons analogous to those given in points 2.2.1 to 2.2.7 above, this claim is also unambiguous and, hence, sufficiently clear.

4. In the Board's judgement, claims 1 and 14 are thus not objectionable for lack of clarity for the reasons invoked by the Respondent (Article 84 EPC).

Main request - compliance with Article 123(2) EPC - claims 1 and 14

5. Claim 1

5.1 Method claim 1 finds sufficient support in the application as filed. Reference is made in particular to the combination of claims 1, 11 and 16, in conjunction with figure 1 and the corresponding parts of the description, in particular page 8, lines 27 to 33; page 9, lines 4 to 5; page 9, line 23, to page 10, line 2, and page 10, lines 12 to 15.

5.2 As set out under points 2.2.1 to 2.2.7, *supra*, the method as claimed does not encompass methods wherein the density of the green liquor is controlled using (directly) TTA measurements and/or the model. Hence, the Respondent's objection that such methods are not disclosed in the application as filed is pointless.

5.3 As pointed out by the Respondent, claim 1 as amended does not include a numerical definition of the "*constant angular coefficient kk* " although a relevant passage on page 10, lines 4 to 5, of the application as filed reads

"The model employs a constant angular coefficient kk , the value of which is between 0.9 and 1.4, provided that the unit used to express the TTA and density is the same..."

- 5.4 For the Board, the omission of a numerical range for the "*angular coefficient kk*" value does not, however, amount to a generalisation not supported by the disclosure in the application as filed for the following reasons:
- 5.4.1 Since the "*angular coefficient kk*" expresses the linear relationship (proportionality) between the green liquor density D and the TTA values, it will implicitly, in a given plant, be confined within a certain numerical range.
- 5.4.2 As expressly stated in the subsequent paragraph of the application as filed (page 10, lines 7 to 9) "*[w]hen different units of measurement are used, the angular coefficient kk naturally changes accordingly...*". i.e. the numerical values of "*kk*" may vary.
- 5.4.3 Moreover, since the "*angular coefficient kk*" derives from the model (formula $D = (TTA + os)/kk$) which expresses the relation between measured values of D and TTA, wherein the offset "*os*" is continuously updated, the value of the "*angular coefficient kk*" may well also change over time, as stated by the Appellant during oral proceedings, in accordance with the more generic indication in the application as filed that the process of the invention is "*self-tuning*" (page 6, line 22).
- 5.5 As regards the further Respondent's objection that the claim does not indicate that "*updating the offset*" occurs on the basis of a "*longer period of time*" the Board holds the following.
- 5.5.1 For the Board, the omission of the indication that "*[t]he offset is calculated on the basis of a longer period of time, such as 1 to 40 hours...*" (application

as filed, page 9, lines 23 to 25) does not amount to a generalisation not supported by the disclosure in the application as filed.

5.5.2 In the preceding paragraph on page 9, lines 18 to 20 of the application as filed, also concerning the calculation of the offset according to Figure 2 (page 9, lines 13 to 14 and page 7, lines 9 to 10)), the following is stated: "*These times serve only as examples, averages of any other time from 1 to 40 hours, for example, **being equally well applicable** in the model*" (emphasis added).

5.5.3 Therefore, the Board accepts that the description of the application as filed refers in very general terms to a suitable time basis for the update/calculation of the offset value "os", which is however not mandatory.

6. Claim 14

6.1 The Board's above considerations under 5.2 to 5.5.3, *supra*, apply analogously to independent apparatus claim 14, which finds basis in the combination of claims 17, 22 and 25 of the application as filed, in conjunction with figure 1 thereof and the corresponding parts of the description (see point 5.1, *supra*).

7. In the Board's judgement, independent claims 1 and 14 are thus not objectionable under Article 123(2) EPC for the reasons invoked by the Respondent.

Remittal

8. In its decision to revoke the patent in suit, the Opposition Division only invoked and addressed non-compliance of independent method claims 1 with Article

123(2) EPC. Since the set of claims according to the Main Request was admitted into the proceedings and since independent claims 1 and 14 thereof are found to be formally allowable under both Article 84 and Article 123(2) EPC, the Board, as foreshadowed in its communication dated 22 November 2016, finds it appropriate to remit the case (pursuant to Article 111(1) EPC) to the Opposition Division for further prosecution, in accordance with the parties' requests to this end.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution on the basis of the set of claims filed as Main Request during oral proceedings.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated