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**Datasheet for the decision
of 8 October 2024**

Case Number: T 2027/22 - 3.3.07

Application Number: 17811246.2

Publication Number: 3558224

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A61K8/36, A61K8/37, A61K8/44,
A61K8/67, A61Q17/04, A61Q19/00,
A61K8/06

Language of the proceedings: EN

Title of invention:

USE OF CHELATING AGENTS FOR IMPROVING COLOR STABILITY OF
RESORCINOL

Patent Proprietor:

Unilever IP Holdings B.V.
Unilever Global IP Limited

Opponent:

Henkel AG & Co. KGaA

Headword:

Resorcinol/UNILEVER

Relevant legal provisions:

EPC Art. 54, 56
RPBA 2020 Art. 13(2)

Keyword:

Novelty - main request (no) - auxiliary request (no)
Inventive step - auxiliary request (no)
Amendment after notification of Art. 15(1) RPBA communication

Decisions cited:

T 1459/18, T 0428/15, G 0007/95



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Case Number: T 2027/22 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 8 October 2024

Appellant: Henkel AG & Co. KGaA
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 8 July 2022
rejecting the opposition filed against European
patent No. 3558224 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairwoman	Y. Podbielski
Members:	M. Steendijk
	J. Lécaillon

Summary of Facts and Submissions

I. European patent 3 558 224 ("the patent") was granted on the basis of nine claims.

Claim 1 as granted related to:

"A process for preparing a composition comprising
i. a compound selected from resorcinol, phenylethyl resorcinol, 4-alkyl substituted resorcinol and mixtures thereof,
ii. a chelating agent, and;
iii. a cosmetically acceptable base comprising a water phase and an oil phase,

wherein, the process comprises the steps of
(a) combining a compound selected from resorcinol, phenylethyl resorcinol, 4-alkyl substituted resorcinol and mixtures thereof with a chelating agent in water,
(b) preparing a water phase and an oil phase,
(c) combining the water phase and the oil phase to prepare a cosmetically acceptable base, and;
(d) combining the adduct obtained in step (a) with the cosmetically acceptable base of step (c),

wherein the process does not comprise a combination of 4-hexyl resorcinol with ethylenediamine di-succinic acid."

Dependent claim 5 further defined:

"A process according to any one of claims 1 to 4 wherein, step (d) is carried out when the temperature

of mixture obtained in step (c) is in the range from 40 to 50°C."

II. The patent was opposed on the grounds that its subject-matter lacked novelty and inventive step.

The opponent filed the appeal against the decision of the opposition division to reject the opposition.

In its decision the opposition division cited *inter alia* the following documents:

D1: DE 102004025281 A1

D2: JP H11-199454A

D3: Translation D2

D4: WO 2016/016148 A1

D5: US 3265571 A

D6: EP 2292208 A1

D7: KR 2004-0008313 A

D8 : Translation D7

D13: Comparative tests by the applicant from
13 September 2018

The opposition division arrived at the following conclusions:

(a) Claim 1 was interpreted to relate to a process involving the combination of only the resorcinol type of compound and a chelating agent in a separate step with subsequent combination of the resulting adduct to the cosmetically acceptable base.

(b) Documents D1, D2/D3 and D4 described methods for preparing cosmetic compositions in which a multitude of ingredients was combined in one go. It

could further not be directly and unambiguously concluded that according to documents D1, D2/D3 and D4 an adduct as defined in claim 1 was formed.

The subject-matter of claim 1 as granted was therefore new over the cited prior art.

- (c) The patent was concerned with the stabilisation of the defined resorcinol compounds in cosmetic compositions. Document D6 represented the closest prior art describing a stabilizing effect of the combination of resorcinol and a complexing agent in cosmetic compositions.

The process claimed in the patent differed from the disclosure in document D6 in particular by the defined separate steps of combining the resorcinol type compound with a chelating compound and of subsequently combining the resulting adduct with the cosmetic base. The patent substantiated with experimental results that thereby the claimed process led to particular color stability during storage. The ineffective combination of HR and EDDS had been excluded and the opponent had not provided evidence of further non-working combinations.

The problem underlying the patent concerned the provision of a process for providing compositions with improved color stability during long term temperature stress storage. No prior art suggested the procedure involving the defined separate steps as a solution to this problem.

The process as claimed in the patent as granted was therefore inventive over the available prior art.

III. In the statement setting out the grounds of appeal the opponent maintained *inter alia* that the subject-matter of the patent as granted, including claim 5, lacks novelty in view of document D1 and lacks an inventive step in view of document D7/D8 as a starting point in the prior art.

IV. With the reply to the appeal the patent proprietors maintained that the patent as granted meets the requirements of novelty and inventive step and filed, as a precautionary measure, auxiliary requests 1 and 2.

Claim 1 of auxiliary request 1 specifies with respect to granted claim 1 that the cosmetically acceptable base is an emulsion.

Claim 1 in auxiliary request 2 additionally defines with respect to claim 1 in auxiliary request 1 the feature:

"(and) wherein, step (d) is carried out when the temperature of mixture obtained in step (c) is in the range from 40 to 50°C."

With the reply the patent proprietor also filed the following document:

A15: Declaration by Dr Moaddel of 25 May 2022.

V. In its communication pursuant to Article 15(1) RPBA the Board questioned the restrictive interpretation of claim 1 as granted in the decision under appeal and expressed its doubt whether the subject-matter of claim 1 as granted was new in view of document D1. The Board further indicated that the parties should be prepared to discuss in the context of the requirement of

inventive step of the main request the difference of the claimed subject-matter with the disclosure in document D7/D8, and, if any difference existed, the possible effect thereof. The Board also indicated that the question whether the features introduced in auxiliary requests 1 and 2 define a difference with the methods described in the prior art could be discussed.

VI. Oral proceedings were held on 8 October 2024. During the oral proceedings the opponent argued *inter alia* that the subject-matter of auxiliary request 2 did not include any distinguishing feature with respect to document D7/D8.

VII. The arguments of the opponent relevant to the present decision are summarized as follows:

The wording of claim 1 as granted did not exclude the presence of additional components in step (a). The more restrictive interpretation in the decision under appeal did not follow from the description of the patent, which referred in paragraph [0062] specifically to the possible use of polyols to enhance the dissolution of the resorcinol. Moreover, the reference in step (d) of the process to the "adduct" obtained from step (a) could not be considered to imply any particular limitation of the defined process in which the resorcinol compound and the chelating agent are simply combined. The color stabilisation as demonstrated by the experimental results reported in the patent and in documents D13 and D15 was not indicative of some special interaction of the resorcinol type compound with the chelating agent that would further characterize the adduct.

Document D1 already described a process involving the separate steps of combining resorcinol with a chelating agent in an aqueous phase, providing a slowly stirred fatty phase comprising oily substances, an emulsifying agent and water at a temperature of 80°C and subsequently incorporating the aqueous phase in the fatty phase and homogenizing the resulting composition. Document D1 therefore anticipated the subject-matter of claim 1 of the main request and claim 1 of auxiliary request 1.

The subject-matter of auxiliary request 2 did not include any distinguishing feature with respect to the preparation of an emulsion as already described in document D7/D8.

The statement of grounds of appeal included the argument that document D7/D8 qualified as a suitable starting point in the prior art and that insofar the claimed subject-matter involved any difference with respect to the example described in document D7/D8, no unexpected advantage from such difference had been demonstrated. The argument that the subject-matter of claim 1 of auxiliary request 2 did not involve any differentiating feature with respect to document D7/D8 did therefore not represent an inadmissible amendment to the opponent's appeal case.

VIII. The arguments of the patent proprietors relevant to the present decision are summarized as follows:

Claim 1 as granted required a separate process step in which the defined resorcinol type compound is combined with a chelating agent in water to form an adduct. In line with paragraph [0070] of the description of the patent the resorcinol type compound is thereby combined

with the chelating agent before its combination with the cosmetically acceptable base or its contact with other ingredients of the composition. The formation of the adduct in a separate step as distinct from the mere presence of the resorcinol type compound and a chelating agent in a mixture was demonstrated by the experimental results presented in the patent and in documents D13 and D15. These results revealed a higher color stability of compositions prepared by a process in accordance with the patent involving the separate preparation of the adduct as compared to compositions with the same ingredients but prepared without the separate preparation of the adduct.

Document D1 merely described the preparation of a multicomponent mixture including amongst others a resorcinol type compound and a chelating agent. No evidence indicated that thereby an adduct as defined in the patent is formed. Document D1 did thereby not unambiguously disclose the defined separate preparation of an adduct.

Document D1 did furthermore not unambiguously disclose the separate preparation of a cosmetically acceptable base by preparing a water phase and an oil phase as defined in steps (b) and (c) of claim 1 as granted, let alone such preparation of a cosmetic base in the form of an emulsion as defined in claim 1 of auxiliary request 1.

The opponent's argument that claim 1 of auxiliary request 2 did not define any distinguishing feature with respect to document D7/D8 represented a late amendment to the opponent's appeal case presented for the first time during the oral proceedings and should therefore not be admitted.

The teaching in document D7/D8 concerned a hair dye composition for oxidation dyeing and was not specifically aimed at the stabilisation of a resorcinol type compound, whereas the patent concerned a process for providing color stabilized skin care products comprising a resorcinol type compound. In the context of the assessment of inventive step the skilled person would therefore not have considered document D7/D8 as a suitable starting point in the prior art.

Document D8, which represented an evidently imperfect machine translation into English from the original document D7 in Korean, did anyway not unambiguously disclose the preparation of a cosmetic base in the form of an emulsion, in which a water phase and an oil phase are separately combined to form an emulsion to which only subsequently the adduct from the combination of the resorcinol type compound and a chelating agent is added when the temperature of the emulsion is between 40-50°C.

- IX. The appellant-opponent requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

- X. The respondent-patent proprietors requested that the appeal be dismissed and the patent be maintained as granted.

As an auxiliary measure, the patent proprietors requested that the patent be maintained on the basis of auxiliary request 1 or 2 as filed with the reply to the appeal.

The patent proprietors further requested that the opponent's argument that claim 1 of auxiliary request 2 did not define any distinguishing feature with respect to document D7/D8 not be admitted.

Reasons for the Decision

1. Patent as granted - lack of novelty
 - 1.1 The subject-matter defined in claim 1
 - 1.1.1 Claim 1 as granted relates to a process for preparing a composition comprising one or more defined resorcinol type compounds, a chelating agent and a cosmetically acceptable base which involves the separate steps of combining one or more of a resorcinol type compound with a chelating agent in water (a), preparing a water phase and an oil phase (b) which are combined to prepare a cosmetically acceptable base (c), and combining the adduct from step (a) with the cosmetically acceptable base of step (c). Claim 1 as granted further excludes a process in which 4-hexyl resorcinol is combined with a particular chelating agent.
 - 1.1.2 The open-ended wording of claim 1 as granted does not exclude that in step (a) additional components are included when the resorcinol type compound and the chelating agent are combined in water nor that the process involves additional steps. From the wording of claim 1 as granted it can only be derived that the resorcinol type compound is combined with the chelating agent in water prior to its introduction in the cosmetically acceptable base.

The description of the patent accordingly specifies in paragraph [0060] that the process of the invention requires that the resorcinol type compound is combined with the chelating agent before it is combined with the cosmetically acceptable base and specifically indicates in paragraph [0062] that polyols may be used to enhance the solubility of the resorcinol type compound. The description of the patent does thereby indicate that additional components may be included when the resorcinol type compound and the chelating agent are combined.

In paragraph [0070] the patent indicates that the difference between the process of the invention with known processes for preparing cosmetic compositions is that the resorcinol type compound is combined with the chelating agent before it is added to the cosmetically acceptable base or brought in contact with any other ingredient that may be present in the composition. However, a requirement that the resorcinol type compound is combined with the chelating agent before it is brought in contact with any other ingredient of the composition cannot be derived from the actual definition of subject-matter in claim 1 as granted and is contradicted by the possible use of polyols to enhance the dissolution of the resorcinol type compound described in paragraph [0062] of the patent. As a matter of course, the identification in the description of the patent itself of a purported difference between the invention and the prior art cannot be decisive in the assessment of what subject-matter is claimed and whether this subject-matter is actually new over the prior art.

Accordingly, paragraph [0070] of the patent cited by the patent proprietors provides no compelling reason

for a more restrictive interpretation of claim 1 as granted than would follow from the actual terms of the claim.

- 1.1.3 Claim 1 as granted defines that the adduct obtained from the combination of the resorcinol type compound with the chelating agent in step (a) is combined with the cosmetically acceptable base in step (d).

With this reference to an unqualified "adduct" obtained in step (a) the wording of the claim does not by itself define any characteristic that distinguishes such adduct from a mixture including a resorcinol type compound with a chelating agent in water that is not yet incorporated in a cosmetically acceptable base.

The patent postulates (see paragraph [0072]) that the two ingredients interact in a specific way and that as a result the compositions prepared in accordance with the invention show enhanced color stability compared to conventionally prepared compositions. At the same time the patent acknowledges (see paragraph [0073]) that the exact nature of the interaction is not fully understood and merely suggests that this interaction would not be through the known metal chelating effect of the chelating agent, because the color stabilisation from the chelating agent was still observed in solutions of the resorcinol type compound in water containing less than 2 ppm of metals.

The patent thus provides at best a functional qualification of the obtained adduct, namely that it allows for enhanced color stability when included in a cosmetically acceptable base as compared to conventionally prepared compositions. In this context the patent presents experimental results (see paragraph

[0085], Table 2) which indicate enhanced colour stability (lower ΔE) upon storage at 45-50°C for compositions prepared by combining the resorcinol type compounds with chelating compounds in water containing glycerol with the subsequent introduction thereof in an oil/water base (compositions 1, 3 and 4) as compared to compositions comprising the same components, but prepared by dissolving the resorcinol type compounds in water and adding the solution to an oil/water base comprising the chelating agents (compositions A, C and D). However, the enhanced color stability as reported in the patent and as further reported in documents D13 and D15 only indicates an advantage of the defined process in terms of the quality of the prepared final product, which does not imply any distinguishing characteristic of the intermediately obtained "adduct" as defined in the claim with respect to a mere mixture including a resorcinol type compound with a chelating agent in water that is not yet incorporated in a cosmetically acceptable base.

Accordingly, the Board does not consider that the term "adduct" in claim 1 as granted defines any distinction with respect to a mixture including a resorcinol type compound with a chelating agent in water that is not yet incorporated in a cosmetically acceptable base.

1.2 Document D1 anticipates claim 1 as granted

Document D1 relates to a process for the preparation of a hair dye composition, in which an emulsion is prepared from a cold aqueous phase and a hot fatty phase (see D1, paragraph [0009]). This process for preparing a cosmetic composition is illustrated in example 1 (see D1, paragraphs [0120]-[0125]).

Document D1 describes in example 1 the provision of a fatty phase which contains 75 parts Lanette® O, 25 parts Lorol® C₁₂₋₁₈, 20 parts Eumulgin® B2, 5 parts waterglass and 200 parts water at a temperature of 80°C which is gently stirred (see D1, paragraph [0120]). Lanette® O and Lorol® C₁₂₋₁₈ consist of long chain alcohols (see D1, page 18 and D11) which qualify as fatty/oily components of a cosmetic base (see D1, paragraph [0050]). The provision of this fatty phase also implies the prior preparation of an oily phase and a water phase from which it must be constituted. Accordingly, the preparation of the fatty phase as described in example 1 of document D1 corresponds to steps (b) and (c) as defined in claim 1 as granted.

According to example 1 of document D1 an aqueous phase is prepared separately by mixing ascorbic acid, resorcinol, and Turpinal® SL together with a variety of further ingredients in water at a temperature of 90°C (see D1, paragraph [0121]) and the addition of further aqueous components before this aqueous phase is introduced at a reduced temperature in the hot fatty phase (see D1, paragraph [0123]). Ascorbic acid and Turpinal® SL may be regarded as chelating agents, which has not been contested by the patent proprietors. In view of the explanations in section 1.1 above the preparation of this aqueous phase in example 1 of document D1 involving the combination of a resorcinol type compound and a chelating agent in water corresponds to step (a) as defined in claim 1 as granted.

The process of example 1 of document D1 further involves the introduction of the prepared aqueous phase in the prepared fatty phase having a temperature of 80°C (see D1, paragraph [0123]) followed by

homogenization, which corresponds to step (d) as defined in claim 1 as granted.

Accordingly, claim 1 as granted lacks novelty in view of document D1 (Article 54 EPC).

2. Auxiliary request 1 - lack of novelty

Auxiliary request 1 introduces in claim 1 the feature that the cosmetically acceptable base prepared in step (c) is an emulsion.

Example 1 of document D1 specifically describes the provision of single fatty phase comprising the oily components Lanette® O and Lorol® C₁₂₋₁₈, the emulsifier Eumulgin® B2, and water at a temperature of 80°C which is gently stirred (see D1, paragraph [0120]).

The provision of a single phase comprising these oily components together with water and an emulsifier can only mean that the described composition is provided in the form of an emulsion. The skilled person would indeed not expect anything else than that by stirring a mixture of the described components at the elevated temperature of 80°C an emulsion is formed.

The feature introduced in claim 1 of auxiliary request 1 does therefore not distinguish the defined subject-matter from the process described in example 1 of document D1.

Accordingly, claim 1 of auxiliary request 1 lacks novelty in view of document D1 (Article 54 EPC).

3. Auxiliary request 2 - lack of inventive step

3.1 Admittance of an amendment of the opponent's appeal case

Document D8 is an English translation of document D7 in Korean language. The statement setting out the grounds of appeal of the opponent included the objection that the subject-matter of the patent as granted lacks an inventive step in view of document D7/D8 as a starting point in the prior art. According to this objection document D7/D8 represented a relevant starting point in the prior art, because it addressed the stability of compositions comprising resorcinol and disclosed in paragraph [20] a process including steps (a) and (b) of the process of the patent which further involved the preparation of an emulsion. It was argued that insofar any difference with the subject-matter of the patent existed, no unexpected advantage associated therewith had been demonstrated.

Auxiliary request 2 was filed by the patent proprietors with the reply to the appeal to address the opponent's novelty objections in case these would be followed by the Board.

In the communication pursuant to Article 15(1) RPBA the Board indicated that the parties should be prepared to discuss the difference of the claimed subject-matter with the teaching in document D7/D8 and the possible effect thereof insofar any difference existed. The Board also indicated that the question whether the features introduced in auxiliary requests 1 and 2 define a difference with the methods described in the prior art could be discussed during the oral proceedings.

During the oral proceedings the opponent argued for the first time during the appeal proceedings that claim 1 of auxiliary request 2 did not define any distinguishing feature with respect to the teaching in document D7/D8 and thus actually lacked novelty in view of paragraph [20] of the English translation in document D8.

The Board observes that this objection may formally be regarded as an amendment to the opponent's appeal case within the meaning of Article 13(2) EPC. However, this amendment involves the adaptation of the objection against the subject-matter of the patent as granted based on document D7/D8 as presented in the statement setting out the grounds of appeal following the Board's conclusion with respect to the main request and auxiliary request 1. Moreover, the amendment is responsive to the Board's communication pursuant to Article 15(1) RPBA.

Accordingly, the Board recognizes exceptional circumstances within the meaning of Article 13(2) RPBA and has therefore allowed the amendment to the opponent's appeal case into the appeal proceedings.

- 3.2 No distinguishing features over document D7/D8
 - 3.2.1 Compared to auxiliary request 1, auxiliary request 2 introduces in claim 1 the feature that step (d) is carried out when the temperature of the mixture obtained in step (c) is in the range from 40 to 50°C.
 - 3.2.2 The teaching in document D7/D8 is aimed at providing a hair dye composition comprising a two-component kit of a first agent containing an oxidizing dye precursor and

a second agent containing an oxidizing agent which has excellent storage stability (see D8, paragraphs [1] and [4]). The first agent comprising the oxidizing dye precursor may according to document D7/D8 include a coupler such as resorcinol (see D8, paragraph [12], line 134).

Document D7/D8 describes according to the English translation under the heading "Examples 1 to 2 and Comparative Example 1" the preparation of such a first agent in the form of an emulsion comprising in addition to oxidizing dye precursors the chelating agent EDTA and resorcinol (see D8, paragraphs [19]-[20]) as follows:

"According to the composition ratio shown in Table 1 below, propylene glycol, sodium sulfite, EDTA.4Na, dimethicone copolyol, isopropyl alcohol, and sodium lauryl sulfate were added to purified water and heated to 80° C, followed by p-phenylenediamine, and Sorcinol, p-aminophenol, 4- amino-2-hydroxytoluene, and 2-methyl-5-hydroxyethylaminophenol were added and dissolved. Put oleic acid and oleyl alcohol in a separate container, heat and dissolve to 80° C, mix and emulsify, cool to 40° C, add monoethanolamine, strong ammonia water (28%), and fragrance, and mix uniformly with the above solution. The first agent was prepared."

The composition ratio of the agents mentioned in paragraph [20] of document D8 is presented in the subsequent paragraph [22] which refers to Resorcinol instead of Sorcinol.

Taking account of the reference to resorcinol in paragraph [22], the first sentence of the cited paragraph [20] of document D8 thus discloses the

separate step of combining resorcinol and a chelating agent together with a variety of other ingredients in water to form a solution. In view of the explanations in section 1.1 above this separate step corresponds to step (a) as defined in claim 1 of auxiliary request 2.

Oleic acid and oleyl alcohol form an oil phase and their emulsification requires a water phase. The instruction in the second sentence of the cited paragraph [20] of document D8 to prepare oleic acid and oleyl alcohol in a separate container and to emulsify at an elevated temperature of 80°C therefore corresponds to steps (b) and (c) as defined in claim 1 of auxiliary request 2.

The further instruction in the cited paragraph [20] of document D8 to cool after emulsifying oleic acid and oleyl alcohol in a separate container and to mix uniformly with the above solution corresponds to step (d) as defined in claim 1 of auxiliary request 2.

Accordingly, on the basis of the English translation in document D8 claim 1 of auxiliary request 2 does not include any distinguishing feature with respect to the process described in document D7/D8.

- 3.2.3 The patent proprietors contested that document D8 represented a deficient machine translation of document D7 and that due to the deficiencies in this translation it could not be unambiguously derived from paragraph [20] of document D8 how the mentioned emulsification was to be carried out. From the translation it was in particular not evident whether the oleic acid and oleyl alcohol were emulsified and cooled to 40°C before the mixing with the resorcinol comprising solution or whether the oleic acid and oleyl alcohol where

emulsified with the resorcinol comprising solution and only subsequently cooled to 40°C.

However, the Board considers that in line with the considerations in T 1459/18 (see reasons 2.1.2) the machine translation in document D8 of document D7, in particular the above cited paragraph [20], is of sufficient quality to allow the conclusion that according to this passage in document D7/D8 the oleic acid and oleyl were to be included in a mixture and emulsified followed by cooling to 40°C before the described step of uniformly mixing with the separately prepared solution comprising resorcinol. The Board thus distinguishes the circumstances of the present case from the situation in T 428/15, in which the Board considered that the quality of a computer-generated translation of a document in Japanese language did not allow to understand with a sufficient degree of certainty what was in fact disclosed in the original document (see T 428/15, reasons 2.1).

The Board therefore considers that the patent proprietors have not convincingly contested the translation in document D8 regarding the content of paragraph [20] in the original document D7.

- 3.2.4 The patent proprietors further argued that the skilled person would not have considered document D7/D8 as starting point in the prior art with regard the claimed invention, because document D7/D8 related to hair dye compositions which did not necessarily comprise a resorcinol type compound, whereas the patent was concerned with a process providing compositions for skin care with enhanced color stability which specifically comprise a resorcinol type compound.

However, as explained in G 7/95 in the context of the question whether an objection of lack of novelty and an objection of lack of inventive step concern the same ground of opposition, a finding of lack of novelty of the claimed subject-matter over the closest prior art inevitably results in such subject-matter being not allowable on the ground of lack of inventive step (see G 7/95, reasons 7.2).

Document D7/D8 may therefore not be disregarded as a starting point in the prior art.

- 3.3 Accordingly, the Board concludes that auxiliary request 2 does not meet the requirement of inventive step (Article 56 EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairwoman:



S. Sánchez Chiquero

Y. Podbielski

Decision electronically authenticated