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**Datasheet for the decision
of 29 May 2018**

Case Number: T 2032/16 - 3.2.07

Application Number: 10166559.4

Publication Number: 2228320

IPC: B65D85/804, A47J31/06,
A47J31/36

Language of the proceedings: EN

Title of invention:

System and method for preparing a beverage

Patent Proprietor:

Koninklijke Douwe Egberts B.V.

Opponent:

Alice Allison SA

Headword:

Relevant legal provisions:

EPC Art. 123(2), 76(1), 113(1)
RPBA Art. 13(1), 13(3)

Keyword:

Right to be heard - violation (no)

Divisional application - added subject-matter (no) - after amendment

Late-filed request - adjournment of oral proceedings would have been required (no)

Decisions cited:

T 1704/06

Catchword:



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Case Number: T 2032/16 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 29 May 2018

Appellant: Koninklijke Douwe Egberts B.V.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 8 July 2016
revoking European patent No. 2228320 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: K. Poalas
G. Patton

Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal in the prescribed form and time limit against the decision of the opposition division revoking European patent No. 2 228 320.
- II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and inventive step), on Article 100(b) EPC (insufficient disclosure) and on Article 100(c) EPC (unallowable amendments).
- III. The opposition division found that the ground for opposition according to Article 100(c) EPC held against the patent as granted and that the then auxiliary requests 1 to 13 did not meet the requirements of Article 123(2) EPC.
- IV. Oral proceedings took place before the Board on 29 May 2018 in the absence of the duly summoned respondent (opponent) in accordance with Article 15(3) RPBA and Rule 115(2) EPC. For the course of the oral proceedings, in particular for the requests and the matters discussed, reference is made to the minutes.

The appellant requested
that the decision under appeal be set aside and
that the case be remitted to the opposition
division for further prosecution on the basis of
the set of claims filed as auxiliary request 0 with
letter of 15 May 2018.

The respondent requested during the written proceedings
that the appeal be dismissed.

The respondent further requested that, should the decision be set aside and the patent be not revoked, the case be remitted to the opposition division for further prosecution in view of the other grounds for opposition raised during the opposition proceedings.

V. The independent claims according to auxiliary request 0 read as follows:

"1. System (1) for preparing a predetermined quantity of beverage suitable for consumption using an extractable product, comprising:
an exchangeable capsule (2), an alternative capsule (102) also belonging to the system and
an apparatus (104) comprising a receptacle (106) for holding either the exchangeable capsule or the alternative capsule, and a fluid dispensing device (108) for supplying an amount of a fluid, such as water, under pressure to the exchangeable capsule (2);
wherein the exchangeable capsule comprises a substantially rigid circumferential wall (10); a bottom (12) integral with and closing the circumferential wall at a first end (14); and a lid (16) closing the circumferential wall at a second end (18) opposite the bottom, wherein the wall, bottom and lid enclose an inner space (20) comprising the extractable product, wherein the bottom (12) comprises an entrance area and the system is arranged for bringing the fluid dispensing device in fluid connection with the entrance area when the receptacle holds the exchangeable capsule for supplying the fluid to the extractable product for preparing the beverage,
wherein the lid (16) comprises an exit area and the system comprises an outlet which, when in use the receptacle holds the exchangeable capsule, is in fluid

communication with the exit area for draining the prepared beverage from the capsule and supplying the beverage to a container such as a cup, and wherein the receptacle comprises bottom piercing means (122) intended for piercing, when the receptacle holds the alternative capsule (102), the entrance area of the alternative capsule for creating at least one entrance opening (124) for supplying the fluid to the extractable product through said at least one entrance opening (124), characterised in that the entrance area of the exchangeable capsule (2) of the system (1) comprises an entrance filter (34) for supplying the fluid to the extractable product there through which entrance filter (34), when in use the receptacle holds the exchangeable capsule, is positioned at a distance from the bottom piercing means (122), such that the exchangeable capsule of the system is not pierced by the bottom piercing means and the bottom stays intact, wherein the entrance filter is formed by a plurality of entrance openings provided in the bottom of the capsule of the system."

"20. System (1) for preparing a predetermined quantity of beverage suitable for consumption using an extractable product, comprising:
an exchangeable capsule (2), an alternative capsule (102) also belonging to the system and
an apparatus (104) comprising a receptacle (106) for holding either the exchangeable capsule or the alternative capsule, and a fluid dispensing device (108) for supplying an amount of a fluid, such as water, under pressure to the exchangeable capsule (2), wherein the exchangeable capsule comprises a circumferential wall (10); a bottom (12) closing the circumferential wall at a first end (14); and a lid

(16) closing the circumferential wall at a second end (18) opposite the bottom, wherein the wall, bottom and lid enclose an inner space (20) comprising the extractable product, wherein the bottom (12) comprises an entrance area and the system is arranged for bringing the fluid dispensing device in fluid connection with the entrance area when the receptacle holds the exchangeable capsule for supplying the fluid to the extractable product for preparing the beverage, wherein the lid (16) comprises an exit area and the system comprises an outlet which, when in use the receptacle holds the exchangeable capsule, is in fluid communication with the exit area for draining the prepared beverage from the capsule and supplying the beverage to a container such as a cup, and wherein the receptacle comprises lid piercing means (128) intended for piercing, when the receptacle holds the alternative capsule (102), the exit area of the alternative capsule when the exit area sufficiently presses against the lid piercing means (128) under the influence of the pressure of the fluid and/or beverage in the capsule for creating at least one exit opening (130) through which the beverage can drain from the alternative capsule, characterised in that the exit area of the exchangeable capsule (2) of the system (1) comprises an exit filter (36), through which the beverage can drain from the exchangeable capsule of the system, wherein the lid piercing means (128) and the exit filter (36) are adapted to each other such that the exchangeable capsule of the system, when in use the receptacle holds the exchangeable capsule, is not pierced by the lid piercing means and the lid stays intact, and wherein the lid piercing means (128) comprises at least one ridge against which the lid (16), in use, abuts."

"60. Method for preparing a predetermined quantity of beverage suitable for consumption using an extractable product, comprising:

providing an exchangeable capsule (2); comprising a substantially rigid circumferential wall (10); a bottom (12) integral with and closing the circumferential wall at a first end (14), and a lid (16) closing the circumferential wall at a second end (18) opposite the bottom (12), wherein the wall, bottom and lid enclose an inner space (20) comprising the extractable product, providing an alternative capsule (102),

providing an apparatus (104) comprising a receptacle (106) for holding either the exchangeable capsule (2) or the alternative capsule (102); a fluid dispensing device (108) for supplying an amount of a fluid, such as water, under pressure to the exchangeable capsule (2), and an outlet which, in use, is in fluid communication with the capsule for draining the prepared beverage from the capsule and supplying the beverage to a container such as a cup,

wherein the receptacle (106) comprises bottom piercing means (122) intended for piercing the bottom (112) of the alternative capsule (102) when the receptacle holds the alternative capsule for creating at least one entrance opening (124) for supplying the fluid to the extractable product through said at least one entrance opening, and

supplying the fluid to the extractable product for preparing the beverage,

characterised in that the bottom (12) of the exchangeable capsule (2) of the system comprises an entrance filter (34), for supplying the fluid to the extractable product there through, which entrance filter (34), when in use the receptacle holds the exchangeable capsule, is positioned at a distance from

the bottom piercing means (122), such that the exchangeable capsule of the system is not pierced by the bottom piercing means and the bottom stays intact, wherein the entrance filter is formed by a plurality of entrance openings provided in the bottom of the capsule of the system."

"61. Method for preparing a predetermined quantity of beverage suitable for consumption using an extractable product, comprising:

providing an exchangeable capsule (2), comprising a circumferential wall (10), a bottom (12) closing the circumferential wall (10) at a first end (14), and a lid (16) closing the circumferential wall at a second end (18) opposite the bottom (12); wherein the wall (10), bottom (12) and lid (16) enclose an inner space (20) comprising the extractable product, providing an alternative capsule (102), providing an apparatus (104) comprising a receptacle (106) for holding either the exchangeable capsule (2) or the alternative capsule (102), a fluid dispensing device (108) for supplying an amount of a fluid, such as water, under pressure to the exchangeable capsule (2), and an outlet which, in use, is in fluid communication with the capsule (2) for draining the prepared beverage from the capsule and supplying the beverage to a container such as a cup, wherein the receptacle comprises lid piercing means (128) intended for piercing the lid (116) of the alternative capsule (102) when the receptacle holds the alternative capsule when the lid (116) sufficiently presses against the lid piercing means (128) under the influence of the pressure of the fluid and/or beverage in the alternative capsule for creating at least one exit opening through which the beverage can drain from the alternative capsule, and

supplying the fluid to the extractable product for preparing the beverage, characterised in that the lid (16) of the exchangeable capsule (2) comprises an exit filter (36), through which the beverage can drain from the capsule (2) wherein the lid piercing means (128) and the exit filter (36) are adapted to each other such that the exchangeable capsule of the system, when in use the receptacle holds the exchangeable capsule of the system, is not pierced by the lid piercing means and the lid stays intact and wherein the lid piercing means (128) comprises at least one ridge against which the lid (16), in use, abuts."

VI. The patent was granted on the divisional patent application EP 2 228 320 A1. In the present case the parent application as filed is WO 2009/110783 (hereinafter: WO). The content of said parent application is identical with the content of the divisional application, said last being referred to by the opposition division and both parties. Both have the same paragraphs in the same order and an identical paragraph numbering.

VII. The appellant essentially argues as follows:

Admissibility of auxiliary request 0

The new request was to be admitted into the proceedings for having been filed in reaction to the Board's communication.

Auxiliary request 0 - Amendments

As reflected in item II.2.1.1.c, first sentence, of the impugned decision the apparatus 104 shown in

combination with the alternative capsule 102 in figures 1a to 1c of WO was the same apparatus shown in combination with the exchangeable capsule 2 in figure 2 of WO. Because WO objectively disclosed the technical information that the apparatus 104 worked in combination with both the alternative capsule 102 and the exchangeable capsule 2, the collection of the apparatus 104 (together with the receptacle 106), the alternative capsule 102 and the exchangeable capsule 2 constituted a system. The fact that, given the nature of the invention, only one of the capsules 102, 2 would be in use with the apparatus 104 at one time, did not undermine the conclusion that the collection of parts 104, 102, 2 constitutes a system, because there was nothing intrinsic to the term "system" which required all the parts of the system being in use at the same time. Furthermore, claim 1 of auxiliary request 0 now clearly defines that the alternative capsule 102 is an alternative to the exchangeable capsule 2, whereby the use of the capsules is non-synchronous. The same reasoning applies also mutatis mutandis to claims 20, 60 and 61 of auxiliary request 0.

VIII. The respondent essentially argued as follows:

Admissibility of auxiliary request 0

Given that auxiliary request 0 has been filed less than one month before the date of oral proceedings, said request should not be admitted into the proceedings.

Auxiliary request 0 - Amendments

In WO a system A disclosing an exchangeable capsule and a system B disclosing an alternative capsule were disclosed. Disadvantages of system A were listed in

paragraph 3 of WO, which according to paragraph 7 were reduced by the system B according to the invention, whereby the object of the invention as defined in paragraph 5 was achieved. The teaching of WO was to replace the closed (exchangeable) capsule of the prior art system A with an open (alternative) capsule of system B while maintaining the machine of the system. This solved the task specified in paragraph 5 of WO. There was no hint in WO indicating that these two systems or the two capsules should be **used together** in the machine because that would be contrary to the teaching of WO. Therefore, the technical addition of two capsules being part of the same system could not be derived from WO. Hence, the alternative capsule could not be part of the proposed solution. This was true regardless of whether the alternative capsule alone or as part of the prior art system was claimed along with the machine.

Reasons for the Decision

1. Right to be heard

Although appellant 2 did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA cited in T 1704/06, not published in OJ EPO; Case Law of the Boards of Appeal, 8th edition 2016, sections III.B.2.7.3 and IV.E.4.2.6.d)).

2. *Admissibility of auxiliary request 0*

2.1 According to Article 13(1) RPBA it is in the Board's discretion to admit and consider any amendment to a party's case after it has filed its grounds of appeal or reply. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. Furthermore, according to Article 13(3) RPBA amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings.

2.2 The filing of auxiliary request 0 is considered a justified reaction of the appellant to the objection raised by the Board under number 3.3 of its communication dated 16 March 2018. The amendments made are easy to understand and do not raise issues which the Board or the other party could not reasonably be expected to deal with without adjournment of the oral proceedings. In fact, the respondent submitted arguments in respect of said request (see letter of 24 May 2018).

2.3 Hence, the Board exercises its discretion according to Articles 13(1) and (3) RPBA and admits auxiliary request 0 into the proceeding.

3. *Auxiliary request 0 - Claim 1 - Articles 123(2) and 76(1) EPC*

3.1 It is uncontested that WO discloses a "prior art system" depicted in figures 1a to 1c and consisting of the combination of the alternative capsule 102 and the

apparatus 104 comprising the receptacle 106 for holding said alternative capsule. It is further uncontested that WO discloses further a "system according to the invention" depicted in figure 2 and consisting of the combination of the exchangeable capsule 2 and the same apparatus 104 comprising the same receptacle 106 for holding said exchangeable capsule.

3.2 Accordingly, WO discloses the technical information that the apparatus 104 comprising the receptacle 106 is in position to work with both the exchangeable capsule 102 and the alternative capsule 2. The combination of the apparatus 104 (together with the receptacle 106), the alternative capsule 102 and the exchangeable capsule 2, each of said capsules interacting with the same apparatus and its receptacle, can therefore be considered as a system, said system being obviously disclosed in WO. The fact that this parts' combination was not labelled as a system in WO, unlike the other two disclosed systems, is irrelevant as the technical information that this collection of parts works in the combination of 104, 106, 102 and 104, 106, 2 is objectively disclosed therein. Furthermore, the Board follows the appellant's line of argument that the term "system" does not require all the parts of the system being in use at the same time.

3.3 Claim 1 of auxiliary request 0 recites now

- a) "an apparatus comprising a receptacle for holding either the exchangeable capsule" ... "when the receptacle holds the exchangeable capsule" and
- b) "an apparatus comprising a receptacle for holding ... the alternative capsule" ... "when the receptacle holds the alternative capsule".

The above-mentioned conditions in claim 1 clearly define that the alternative capsule 102 is an alternative to the exchangeable capsule 2 and that the use of said capsules is non-synchronous.

3.4 Thus, claim 1 of auxiliary request 0 meets the requirements of Articles 123(2) and 76(1) EPC.

4. *Auxiliary request 0 - Claims 20, 60, 61 - Amendments*

The aforementioned finding applies *mutatis mutandis* to claims 20, 60 and 61 of auxiliary request 0.

5. *Procedural matters*

Although other grounds for opposition were raised by the respondent in the opposition proceedings against the patent in suit (see point II above), the Board notes that only the ground for opposition according to Article 100(c) EPC for the main request and the requirements of Article 123(2) EPC for auxiliary requests have been addressed in the impugned decision. Hence, having also in view that further objections were raised by the respondent for the first time in the appeal proceedings, the Board exercises its discretion according to Article 111(1) EPC to remit the case to the opposition division for further prosecution, as also requested by both parties.

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.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated