

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 10 February 2021**

Case Number: T 2225/17 - 3.2.01

Application Number: 11715872.5

Publication Number: 2552260

IPC: A24D3/04

Language of the proceedings: EN

Title of invention:

FILTER CIGARETTE WITH VARIABLE VENTILATION

Patent Proprietor:

Philip Morris Products S.A.

Opponent:

British-American Tobacco (Investments) Limited

Headword:

Relevant legal provisions:

EPC Art. 83, 52(1), 54, 56

RPBA 2020 Art. 12(3)

RPBA Art. 12(4)

Keyword:

Sufficiency of disclosure - (yes)

Novelty - (yes)

Inventive step - (yes)

Statement of grounds of appeal - arguments only by reference
to the notice of opposition disregarded

Late-filed evidence - admitted (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 2225/17 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 10 February 2021

Appellant: British-American Tobacco (Investments) Limited
(Opponent) Globe House,
1 Water Street
London WC2R 3LA (GB)

Representative: Harrison, Philip Mark
Venner Shipley LLP
200 Aldersgate
London EC1A 4HD (GB)

Respondent: Philip Morris Products S.A.
(Patent Proprietor) Quai Jeanrenaud 3
2000 Neuchâtel (CH)

Representative: Millburn, Julie Elizabeth
Reddie & Grose LLP
The White Chapel Building
10 Whitechapel High Street
London E1 8QS (GB)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 14 July 2017 rejecting the opposition filed against European patent No. 2552260 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: V. Vinci
A. Jimenez

Summary of Facts and Submissions

I. The appeal filed by the opponent is directed against the interlocutory decision of the opposition division to reject the opposition and to maintain the European patent No. 2 552 260 as granted.

II. In its decision the opposition division held that none of the grounds of opposition raised by the opponent under Article 100(a) in combination with Articles 54 and 56 EPC and Article 100(b) in combination with Article 83 EPC was prejudicial to the maintenance of the patent as granted. In particular, the opposition division found that the subject-matter of claim 1 as granted was novel in the meaning of Article 54 EPC and involved an inventive step in the meaning of Article 56 EPC in view of the following state of the art:

D1: EP 2 033 531 A

D2: US 3 519 000 A

D3: FR 2 273 443 A

D7: <http://web.archive.org/web/20100130144248/haat://graphicriver.det/item/vectorvolume-balance-knobs/83785>

III. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

The respondent (patent proprietor) requested that the appeal be dismissed.

IV. Summons to oral proceedings were issued on 06 March 2020.

With a communication under Article 15(1) RPBA dated 24

April 2020, the Board informed the parties of its preliminary, non binding assessment of the appeal.

With letter dated 02 February 2021, the appellant withdrew its request for oral proceedings.

With a further communication dated 08 February 2021, the Board informed the parties that the oral proceedings scheduled on 23 February 2021 were cancelled and that the decision would be issued in writing.

V. Claim 1 of the patent as granted reads as follows:

"A filter cigarette (10, 20, 30) with variable ventilation comprising:

a rod (1) of smokable material;

a mouthpiece (3) attached to the rod of smokable material, the mouthpiece comprising an element (34) rotatable relative to the rest of filter cigarette about the longitudinal axis thereof to vary the ventilation of the filter cigarette; and

a ventilation indicator (5) comprising a scale (9) extending circumferentially about the periphery of the filter cigarette and a cursor (7), wherein

the scale is symmetric about the longitudinal axis of the filter cigarette and the cursor and the scale are rotatable relative to one another about the longitudinal axis of the filter cigarette, one of the cursor and the scale rotating with the rotatable element, the level of ventilation being indicated by the longitudinal distance between the cursor and a

longitudinally aligned point on the scale."

Reasons for the Decision

Article 83 EPC

1. The appellant referred to the expression in claim 1 that *"the scale is symmetric about the longitudinal axis of the filter cigarette"* and argued that the patent does not identify anywhere which specific form of symmetry is meant by this wording. Furthermore, it was pointed out that there is an inherent conflict between the scope of the invention as defined by the claims and that of the examples given in the description of the opposed patent because claim 1 would cover embodiments not described in the patent specification that the person skilled in the art would not thus be able to carry out without undue burden. Therefore, the appellant concluded that the person skilled in the art reading the patent specification was not provided with sufficient information in order to carry out the invention as required by Article 83 EPC and, in particular, not across the whole range of possibilities covered by the claims as instead required by established Case Law of the Boards of Appeal.

These arguments are not convincing for the following reasons:

- 1.1 The Board concurs with the view of the opposition division that a person skilled in the art, confronted with the teaching of claim 1 that the scale *"is symmetric about the longitudinal axis of the filter cigarette"* and in view of the further statements

describing how the cursor and the scale can be rotated relative to each other in order to set and show the required level of ventilation, would directly and unambiguously realize that what is actually meant is a "*mirror symmetry*". In fact, only this interpretation makes sense in the technical context in which claim 1 is read by a person skilled in the art. Furthermore, the patent specification provides the person skilled in the art with all the information required in order to carry out two possible embodiments of a scale which is symmetric about the longitudinal axis of the filter cigarette, namely the embodiments described in paragraphs [0040] to [0048] in combination with figures 1 and 2. Moreover, the Board concurs with the opposition division and with the respondent that the person skilled in the art, unlike in the appellant's view, would rule out other kind of more complex symmetries which might theoretically fall within the scope of claim 1, but which are illogical in view of its technical context and not supported at all by the patent disclosure.

- 1.2 In view of the above, the Board does not see any reason for deviating from the conclusion of the opposition division that the invention to which the contested patent relates is sufficiently disclosed in the meaning of Article 83 EPC.

Novelty: Articles 52(1) and 54 EPC

2. Regarding the alleged lack of novelty in view of D1, which is the only novelty attack mentioned in the statement of the grounds of appeal, the appellant only referred to the arguments submitted on February 2016 with the notice of opposition. The Board sees no reasons for deviating from the conclusion of the

opposition division in this respect and judges that the subject-matter of claim 1 is novel for the same reasons given in the decision under appeal (page 5 of the contested decision), which are reiterated under points 3.1 and 3.2 herein below.

Inventive Step: Articles 52(1) and 56 EPC

D1 in combination with D2, D3 or D7

3. The appellant essentially argued that the subject-matter of claim 1 as granted does not involve an inventive step in view of D1, allegedly disclosing a *"scale symmetric about the longitudinal axis of the filter cigarette"*, in combination with the teaching of documents D2, or in alternative in combination with D3 or D7. However, the arguments and the conclusions of the appellant are not convincing for the following reasons:

3.1 The Board shares the view of the opposition division that the person skilled in the art can directly and unambiguously derive from D1 only the idea of providing 2 positions, corresponding to the maximum and minimum ventilation level respectively, which are attained by rotating the sleeve in 2 opposite directions in order to switch from one position to the other. It is true, as asserted by the appellant, that according to the embodiment in figures 6 and 7 of D1 (see paragraphs [0043] to [0047]), 2 positions of high ventilation level and 2 position of low ventilation level are attained for a 360° rotation of the sleeve (24) about the filter (4). However, unlike the appellant's view, no *"scale symmetric about the longitudinal axis of the filter cigarette"* is directly and unambiguously disclosed. The attempt of the Appellant to infer this

teaching by artificially interpreting the wording of paragraph [0010] is not convincing because this passage does not mention or imply at all such a symmetric scale, but rather the provision of a maximum and a minimum ventilation level position, without disclosing the possibility of further turning the sleeve after reaching one of the limits in the same direction, thereby still varying the ventilation level according to a scale arranged symmetrically about the longitudinal axis of the filter cigarette.

- 3.2 In conclusion the Boards shares the view of the opposition division that the subject-matter of claim 1 differs from D1 in the following features characterizing the scale, namely in that the scale

"is symmetric about the longitudinal axis of the filter cigarette",

and in that the scale and cursor are such that:

"the level of ventilation is indicated by the longitudinal distance between the cursor and a longitudinally aligned point on the scale".

- 3.3 In view of these distinguishing features, the Board concurs with the assessment of the technical problem proposed by the respondent, namely to improve the operation of the ventilation indicator of D1 in order to permit an easier and more reliable selection and reproducibility of a given ventilation level.

- 3.4 The Board shares the view of the appellant and of the opposition division that the indication of the selected level of a certain magnitude (in this case of the ventilation level of a filter cigarette) by viewing the

distance between a cursor and a longitudinal aligned point on a scale may belong to the common general knowledge, as it is demonstrated by D2, D3 and D7. However, contrary to the appellant's assumption, the use of a cursor cooperating with a symmetrical scale for indicating the ventilation level set on a filter cigarette is not suggested in any one of the cited documents. D2 shows the combination of a cursor (26) with a non symmetric scale (28) applied to a cigarette holder. D3 and D7, which have not been discussed in detail by the appellant, do not disclose the use of such a symmetric scale in a ventilation indicator either.

4. In conclusion, starting from D1 and in order to solve the technical problem at stake, the person skilled in the art would not find any obvious hint in the available prior art which would encourage him/her to replace the ventilation indicator of D1 by a cursor cooperating with a symmetric scale according to claim 1. Furthermore, the assertion of the appellant that the use of a symmetric scale would be an obvious choice for a person skilled in the art aiming to improve operation of the ventilation indicator of D1 is not substantiated by any evidence and is thus not convincing.

Admissibility of document D8 and D9

5. Documents D8 and D9 have been filed for the first time with the statement of the grounds of appeal. In support of their admissibility the appellant argued that both D8 and D9 disclose a "*symmetrical scale*" in the meaning of claim 1 and therefore that they are relevant in combination with D2 for assessing inventive step. Their admittance in the appeal procedure was contested by the respondent with the arguments that these documents are

both late filed and not relevant for the decision to be taken.

- 5.1 According to the provisions of Article 12(4) RPBA in the version 2007 which in view of the provision of Article 25(2) RPBA 2020 is applicable to the present appeal, the admittance of any evidence which could have been submitted in the first instance proceedings is at discretion of the Board.
- 5.2 The Board observes that the opposition division, in the preliminary opinion issued in preparation of the oral proceedings, had already informed the parties that in its view, none of the documents cited during the opposition proceedings was found to disclose a ventilation indicator provided with a symmetrical scale according to claim 1. The final conclusion in the decision under appeal simply confirmed this preliminary view and cannot thus be considered surprising or unexpected for the appellant. It follows that the appellant, in view of the preliminary opinion and in an attempt to convince the opposition division that the use of a symmetric scale in a ventilator indicator is a known measure in the relevant technical field of the production of filter cigarettes, could and should have filed documents D8 and D9 already at the oral proceedings at the latest in order to improve the appellant's position at the oral proceedings.
- 5.3 The Board thus concludes that the submission of documents D8 and D9 for the first time in the appeal proceedings is not justified by the circumstances which led to the decision under appeal and therefore, in exercise of the discretion conferred by Article 12(4) RPBA 2007, decides not to admit documents D8 and D9 in the appeal procedure because they could and should have

been submitted in front of the first instance.

5.4 Only for completeness and irrespective of the decision on the admissibility of D8 and D9 taken above, the Board is of the opinion that these documents, even in the combination with D2 proposed by the appellant, cannot question the positive assessment of the inventiveness of the subject-matter of claim 1 of the opposition division because, as in the case of D1, they do not disclose a symmetrical scale in the meaning of claim 1 as granted. In this respect the attention is drawn to the arguments provided by the Board in the communication according to Article 15(1) RPBA 2020 to which no reaction from the appellant has been received.

5.5 The Board thus concurs with the assessment of the opposition division that the subject-matter of claim 1 of the patent as granted also meets the requirements of Article 52(1) and 56 EPC.

6. In view of the above, the Board does not thus see any reason for deviating from the conclusion of the opposition division that the patent as granted meets all the requirements of the EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Magliano

G. Pricolo

Decision electronically authenticated