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**Datasheet for the decision  
of 19 March 2021**

**Case Number:** T 1839/18 - 3.2.04

**Application Number:** 11702622.9

**Publication Number:** 2531085

**IPC:** A47J31/60, A47J31/44

**Language of the proceedings:** EN

**Title of invention:**

BEVERAGE DISPENSER WITH HYGIENIC CLEANING CYCLE

**Patent Proprietor:**

Société des Produits Nestlé S.A.

**Opponent:**

González Posada, Luis

**Headword:**

**Relevant legal provisions:**

EPC Art. 99(1), 100(a), 54(2), 123(2), 83, 56  
ECHR Art. 6.1

**Keyword:**

Admissibility of opposition - (yes)  
Novelty - (no)  
Amendments - intermediate generalisation  
Sufficiency of disclosure - (yes)  
Inventive step - auxiliary request (yes)

**Decisions cited:**

G 0001/06, G 0003/97, G 0004/97, G 0007/91, G 0008/91,  
G 0009/91, G 0010/91, T 0009/00, T 0598/98

**Catchword:**

Reasons 2: admissibility of straw man oppositions



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**Case Number: T 1839/18 - 3.2.04**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 19 March 2021**

**Appellant:** Société des Produits Nestlé S.A.  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
9 May 2018 concerning maintenance of the  
European Patent No. 2531085 in amended form.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** G. Martin Gonzalez  
C. Heath

## **Summary of Facts and Submissions**

I. The appellant-proprietor lodged an appeal, received on 17 July 2018, against the interlocutory decision of the Opposition Division posted on 9 May 2018 concerning maintenance of the European Patent No. 2531085 in amended form, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 19 September 2018.

The appellant-opponent also appealed the interlocutory decision by notice of appeal received on 18 July 2018 and paid the appeal fee on 19 July 2018. The statement setting out the grounds of appeal was received on 17 September 2018.

II. Opposition was filed by a natural person resident in Valladolid, Spain and based inter alia on Article 100(a) EPC, lack of novelty

The Opposition Division held that the opposition was admissible and that the patent as amended met the requirements of the EPC, having regard inter alia to the following evidence:

(D4') US 2006/0000363 A1  
(E4) EP 1 656 863 A1

III. The appellant-proprietor requests that the decision under appeal be set aside and that the patent be maintained as granted because the opposition should be considered inadmissible (Main Request) or else that a question on the admissibility of the opposition be referred to the Enlarged Board, or else that the patent be maintained as granted (Subsidiary Request 0), or in

amended form based on one of Subsidiary Requests 1 - 9 filed with letter dated 6 February 2019, whereby Subsidiary Request 1 corresponds to the version of the patent as maintained.

The appellant-opponent requests that the decision under appeal be set aside and that the patent be revoked.

- IV. In an annex to a summons to attend oral proceedings the Board made provisional observations on the relevant issues.

Oral proceedings by videoconference before the Board were duly held on 19 March 2021.

- V. The wording of claim 1 of the requests relevant to this decision is as follows:

(a) Subsidiary request 0 (as granted)

"A flavoured-beverage preparation machine (1), in particular a flavoured-beverage containing at least one of milk, coffee, tea, soup and chocolate, said machine comprising:

- a fluid circuit having a duct (10) that has an outlet (15) for dispensing a flavoured-beverage over a filling area (35) for user-receptacles (40); and
- a cleaning arrangement for removing remnant flavoured-beverage from the duct by passing a clearing fluid through the duct and out of the duct via the outlet,

the cleaning arrangement having:

- means (300,400,450) for providing a gas under pressure; and

- a configuration for passing said gas as said clearing fluid under pressure through and out of the duct for evacuating remnant flavoured-beverage from the duct,

characterised in that the cleaning arrangement (300,400,450) is configured to pass immediately after a flavoured-beverage dispensing cycle into a user-receptacle (40) or after a delay in the range of 0.05 to 3 sec after a flavoured-beverage dispensing cycle, the pressure gas through and out of the duct (10) at an end of a flavoured-beverage dispensing cycle into a user-receptacle (40) for evacuating remnant flavoured-beverage to said user-receptacle."

(b) Subsidiary request 1

Claim 1 as granted, amended to introduce the following features (emphasis added by the Board to indicate added features):

"A flavoured-beverage preparation machine (1), in particular a flavoured-beverage containing at least one of milk, coffee, tea, soup and chocolate, said machine comprising:

- a fluid circuit having a duct (10) that has an outlet (15) for dispensing a flavoured-beverage over a filling area (35) for user-receptacles (40), the duct (10) being pivotally assembled to a conduit (20) for moving the outlet (15) from an operative position to a cleaning position via an intermediate position; and..."

(c) Subsidiary request 2

Claim 1 as in subsidiary request 1, amended to introduce the following features (emphasis added by the Board to indicate added features):

"A flavoured-beverage preparation machine (1), in particular a flavoured-beverage containing at least one of milk, coffee, tea, soup and chocolate, said machine comprising:

- a fluid circuit having a duct (10) that has an outlet (15) for dispensing a flavoured-beverage over a filling area (35) for user-receptacles (40), the duct (10) being pivotally assembled to a conduit (20) for moving the outlet (15) from an operative position to a cleaning position via an intermediate position, the intermediate position being a standby position of the duct; and..."

(d) Subsidiary request 3

Claim 1 as granted, amended to introduce the following features (emphasis added by the Board to indicate added features):

"A flavoured-beverage preparation machine (1), in particular a flavoured-beverage containing at least one of milk, coffee, tea, soup and chocolate, said machine comprising:

- a fluid circuit having a duct (10) that has an outlet (15) the duct (10) being pivotally assembled to a conduit (20) for moving the outlet (15) from a dispensing position for dispensing a flavoured-beverage over a filling area (35) for user-receptacles (40), to a cleaning position via an intermediate position, the intermediate position being a standby position of the duct (10); and...

..for evacuating remnant flavoured-beverage to said user-receptacle while the outlet (15) is in the dispensing position."

(e) Subsidiary request 4

Claim 1 as in subsidiary request 3, amended to introduce the following features (emphasis added by the Board to indicate added features):

"A flavoured-beverage preparation machine (1), in particular a flavoured-beverage containing at least one of milk, coffee, tea, soup and chocolate, said machine comprising:

- a fluid circuit having a duct (10) that has an outlet (15) the duct (10) being pivotally assembled to a conduit (20) for moving the outlet (15) from a dispensing position for dispensing a flavoured-beverage over a filling area (35) for user-receptacles (40), to a cleaning position via an intermediate position, the intermediate position being a standby position of the duct (10), wherein in the cleaning position the duct (10) extends from outside into a housing (5) of the machine (1) for evacuating a cleaning liquid in a shielded, confined space separated from a user; and..."

VI. The appellant-opponent argued as follows:

The opposition should be held admissible. Granted claim 1 (subsidiary request 0) lacks novelty over D4' while claim 1 of subsidiary requests 1-3 contains added subject-matter in the form of an unallowable intermediate generalisation. Claims 4,5 of subsidiary request 4 are not supported by the description while claim 6 is not sufficiently disclosed. Moreover claim 1



of subsidiary request 4 does not involve an inventive step in the light of the teachings of D4' and E4.

VII. The appellant-proprietor argued as follows:

The opposition should not be held admissible. At no point had the opponent proven that he had a true interest in the opposition, which however was a condition for any procedural act under the EPC. This position was supported by decision **G 1/06** that thereby superseded earlier decisions to the contrary such as **G 3/97**. While it could even be argued that commercially operating "strawman" companies had a financial interest in raising an opposition, it was inconceivable that a garage owner in Valladolid had any legitimate interest whatsoever in the outcome of the case and thus in raising an opposition against the patent at issue. Already the amount of fees and legal costs involved clearly indicated that someone was "behind" such strawman opponent. Neither in writing, nor during the hearing before the Board had the opponent submitted evidence to demonstrate legitimate interest. Allowing an opposition under such circumstances also disproportionately disadvantaged the patentee to an extent that this amounted to a contravention of Art. 6 European Convention on Human Rights. This was so because the person truly interested in the outcome of the current dispute could hide behind the officially registered opponent and in a subsequent infringement suit was not bound by anything argued in the current proceedings, which amounted to a *venire contra factum proprium*, an estoppel well recognised by law in general and in the field of patent infringement, as was evidenced by the German Federal Supreme Court decision "Weichvorrichtung" of 20 April 1993, English version in 25 IIC 420 [1995]. Also US case law mandated the

opponent to identify all persons of real interest in the proceedings: US Board of Appeal case Ventex Co. Ltd. v. Columbia Sportswear North America, Inc., IPR2017-00651 (PTAB of 24 January 2019). All this cast sufficient doubt on the continued application of decisions **G 3/97** and **G 4/97** and should justify a referral of this case to the Enlarged Board. Therefore, the Main Request was well founded.

As to merit, granted claim 1 was new over all cited prior art. There was no unallowable intermediate generalisation in claim 1 of subsidiary requests 1-3. The claims of subsidiary request 4 were supported by the description and sufficiently disclosed. Its claim 1 was new and involved an inventive step over the teachings of the cited prior art.

### **Reasons for the Decision**

1. The appeals are admissible.
2. Admissibility of the opposition
  - 2.1 The patentee argued that the opposition was not validly filed because the opponent, whom the patentee referred to as a garage owner in Valladolid (Spain), had no interest whatsoever in doing so.
  - 2.2 Of the various arguments advanced by the patentee to question admissibility of the opposition is decision **G 1/06** (OJ 2008, 307), namely the following passage:

*"13.4 The Board accepts that the principle of prohibition of double patenting exists on the basis that an applicant has no legitimate interest in proceedings leading to the grant of a second patent for*

*the same subject-matter if he already possesses one granted patent therefor."*

The patentee construes this statement as a general acknowledgement that every act performed before the EPO requires a legitimate interest, thereby making previous case law of the Enlarged Board in regard of straw man oppositions obsolete.

- 2.3 The Board is unable to read this case in a broader context than that decided on (double patenting), and can see even less how this decision should have superseded case law that addresses the very specific issues of straw man oppositions, namely Enlarged Board of Appeal decisions **G 3/97** and **G 4/97** (published in OJ 1999, 245 and 270). The Enlarged Board in these decisions held as follows:

*"1. Both referrals essentially pose the question whether an opposition is inadmissible if the opponent is acting on behalf of another person, ie as a straw man... the respondents invoked the principle that a person acting on behalf of a third party was not the true opponent.*

*2. The Board is unable to accept this premise.*

*2.1. The status of opponent is a procedural status and the basis on which it is obtained is a matter of procedural law. The EPC addresses this in Article 99(1) in conjunction with Article 100, Rule 55 and 56(1) EPC. On this basis, the opponent is the person who fulfils the requirements of the EPC for filing an opposition; in particular, the person must be identifiable (see Rule 55(a) EPC). The EPC does not specify any further formal requirements to be met by the opponent. A person who fulfils the said requirements becomes a party to the opposition proceedings (Article 99(4) EPC). In*

*these proceedings, only his acts are relevant. A third party (the "principal") who has incited the opponent to file the opposition cannot perform any procedural acts. The question whether the opponent's acts accord with the intentions or instructions of the principal is relevant only to the internal relationship between the latter and the opponent, and has no bearing on the opposition proceedings.*

*By contrast, it has been argued that a person acting on behalf of a third party is not acting in his own name...However, such a view is expressly contradicted by the opponent's procedural statements. He has neither stated that he wishes to file an anonymous opposition, nor is this his intention; instead, he expressly wishes to file the opposition in his own name...he is exercising his own right as a member of the public to file an opposition."*

The Enlarged Board specifically addressed the question whether in addition to the requirements as stated in Art. 99 EPC any interest was required, and answered in the negative:

*"3.2.1 Some of the EPC contracting states require, as a precondition for instituting revocation proceedings, that the plaintiff must have an interest in the invalidation of the patent. Taking a different approach, the EPC legislator explicitly designed the opposition procedure as a legal remedy in the public interest which, according to Article 99(1) EPC, is open to "any person". It would be incompatible with this to require that the opponent show an interest, of whatever kind, in invalidating the patent...*

*"3.2.3. All this shows that the opponent's motives are of no consequence for the purposes of the opposition procedure.*

*This procedure is designed to give the public the opportunity to challenge the validity of the patent in question (G 9/93, supra, Reasons point 3). This takes account, inter alia, of the fact that a patent office cannot be aware of all the actual circumstances which argue against patentability. For the purpose of the opposition procedure - to prevent the maintenance of clearly invalid patents, by making it possible to institute proceedings before the EPO itself - it does not matter who provides the EPO with the relevant information (see also T 798/93, supra, Reasons point 4, final paragraph). Opposition should be a simple, speedily conducted procedure in which, on the one hand, relevant objections to patentability are given appropriate consideration, and on the other hand, a decision on the validity of the patent is reached as quickly as possible, in the interests of both parties."*

2.4 In other words, regardless of whether the Enlarged Board in the above passage of decision **G 1/06** wanted to stipulate a rule whereby in principle, all acts before the EPO require a specific interest, the Enlarged Board in decisions **G 3/97** and **G 4/97** regarded the fact that anyone could raise opposition procedures as a specific legislative choice in the public interest that left no room for interpretation as to whether a legitimate interest could be required.

2.5 This is corroborated by other decisions that have taken decisions **G 3/97** and **G 4/97** as a starting point and qualified the basic principle that anyone could raise or continue an opposition in certain respects: An opponent may only raise one opposition (decision **T 9/00**, OJ 2002, 275), or should declare that a continuation of proceedings after lapse of the patent

is still of interest (Rule 84 (1) EPC and decision **T 598/98** of 16 October 2001).

2.6 From a comparative perspective, there is ample evidence for the fact that opposition proceedings in a good many countries can, as a specific legislative choice, be raised by anyone without demonstrating a legal interest. A comparative overview of opposition proceedings on the website of the World Intellectual Property Organisation (WIPO) under

[https://www.wipo.int/scp/en/revocation\\_mechanisms/opposition/index.html](https://www.wipo.int/scp/en/revocation_mechanisms/opposition/index.html)

mentions the following:

*"The patent system intends to promote innovation, dissemination and transfer of technology by granting a limited exclusive right to prevent others from using a patented invention without the consent of the patent owner and, at the same time, requiring the patent owner to fully disclose the invention to the public. In order to meet this objective, the patent law lays down strict requirements, both procedural and substantive, to obtain patent protection. Those requirements are fundamental to a functioning patent system, as they were created in order to ensure that only those inventions that are "worth" protecting for the purposes of facilitating innovation and meeting the broad public interest would obtain patent protection.*

*However, in reality, it may nevertheless happen that an invention that does not fully meet the requirements under the applicable law obtains a patent. For example, since the patent examination process is conducted primarily ex parte, a substantive examiner may overlook a piece of prior art and inadvertently reach a positive*

*decision regarding the patentability of the claimed invention. Such a situation should not be necessarily considered as low quality examination in a given country, since the piece of prior art could be published in an exotic language or in an isolated publication. Further, in some countries, only formality examination is conducted. In order to rectify the grant of a deficient patent, in general, a patent revocation procedures are provided either before a competent court or before an administrative/quasi-judicial body the decision of which can be reviewed by a judicial body. The opposition system provides an additional administrative layer of review that prevents the grant of invalid patents through the participation of third parties to the review process. The idea is that the participation of third parties, who may be well informed about the technology concerned, would complement the resources available to the patent office, and would increase the credibility of granted patents. The third parties could be, inter alia, competitors of the applicant or patentee having a good knowledge of the technological area concerned and who have their business interest in eliminating deficient patents.*

*Since the opposition procedure is provided just before or after the grant of the patent, it allows an early rectification of invalid patents. The possibility to rectify invalid patents at an early stage is also beneficial for a patentee, since the patentee can have more trust in the validity of his patent. Thus, a patent granted on an invention that has gone through opposition proceedings would be considered as having a higher credibility in terms of its compliance with novelty, inventive step and other requirements of patent law.*

*Compared to the review process before a court, the opposition system and related administrative mechanisms have various **advantages**. They include:*

- the opposition procedure, which is an administrative process, is generally simpler, quicker and less expensive;*
- an opposition may be filed by any person (or any third party), while a patent revocation procedure in court may, in some countries, be initiated only by a party who fulfills certain conditions, for example, being an interested party or being adversely affected by the decision subject to the appeal. Therefore, the opposition system takes into account the wider knowledge of the general public; in addition, in some countries, the reviewing body may also consider the evidence not presented by the parties;"*

*.....*

*"Entitlement to file an opposition: in many national laws, any party, including the applicant or the patentee, may file an opposition. However, some laws provide that any third party (excluding the applicant or the patentee) may file an opposition;*

*the disclosure of the identity of the requester: in some countries, it is possible for the opponent, the true party in interest, not to disclose his identity, which may be in favor of continuing good business relationship between the opponent and the patent applicant or patentee;"*

- 2.7 Albeit in very general terms and without references to particular countries, the above WIPO publication highlights that it is common for opposition procedures to be initiated by any person, while nullity or revocation proceedings can only be initiated by an



*interested person*. In other words, this distinction is nothing specific to the European Patent System.

2.8 The patentee argues in this regard that appeal proceedings before the Boards of Appeal should be likened to nullity or revocation proceedings and points to decisions **G 7/91** and **G 8/91** that highlighted the adversarial - rather than administrative - character of appeal proceedings.

2.9 Decisions **G 7/91** and **G 8/91** of 5 November 1992 (OJ 1993, 346 and 356, respectively), just as decisions **G 9/91** and **G 10/91** of 31 March 1993 (OJ 1993, 408 and 420, respectively) clarify the legal character of opposition and appeal proceedings and the nature of examining/opposition divisions and the Boards of Appeal. The gist of these decisions is indeed the distinction between the judicial character of proceedings before the Boards of Appeal, and the administrative character of examining and opposition proceedings. As the current case concerns the question of whether an *opposition* (rather than an appeal) has been validly filed, it might be appropriate to stress that the Enlarged Board in decisions **G 9/91** and **G 10/91** highlighted the administrative nature of opposition proceedings by raising opposition grounds of its own motion:

*"16. Although the wording of Article 114 EPC is not formally covering the concept of grounds for opposition, there would seem to be support in the travaux préparatoires to the EPC for the opinion that the principle of examination by the EPO of its own motion as laid down in Article 114 EPC was intended to be applied even to that concept at least in proceedings before the Opposition Division (cf. BR/87/71, point 9).*

*This has also been accepted in the practice of the EPO (cf. Guidelines for substantive examination of opposition, Part D, Chapter V). The Enlarged Board does not consider that there is sufficient justification for changing this practice insofar as it concerns the proceedings before the Opposition Division. It is obviously aimed at avoiding the maintenance of European patents which are invalid. Thus, an Opposition Division may, in application of Article 114(1) EPC, of its own motion raise a ground for opposition not covered by the statement pursuant to Rule 55(c) EPC or consider such a ground raised by the opponent (or referred to by a third party under Article 115 EPC) after the expiry of the time limit laid down in Article 99(1) EPC."*

In the same vein, decisions **G 7/91** and **G 8/91** affirm the possibility of the opposition division of continuing the opposition proceedings in the public interest although the opposition has been withdrawn (Rule 60(2) EPC):

*"10.1 In the European patent system, the public interest is primarily safeguarded by the fact that within nine months from the publication of the mention of the grant of the European patent, any person may give notice of opposition to the patent. In principle, therefore, it must be assumed that the patent does not disturb those who have not filed opposition. It is therefore at variance with the thinking on which the European patent system is based to continue the appeal proceedings where the appeal of the sole opponent (or of the patent proprietor if the patent has been maintained in amended form) has been withdrawn merely in order to safeguard the interests of those who filed no opposition at all. Whatever the circumstances, the possibility - mentioned in this respect under point 7*

*above - of continuing the opposition proceedings by way of exception after the opposition has been withdrawn must be regarded as sufficient."*

All of the above makes clear that opposition proceedings are administrative proceedings in the first place where public interest considerations supersede the interests of the parties. That this may apply in different measure for proceedings before the Boards of Appeal is of no concern to the argument raised by the patentee, because the argument concerns the admissibility of the opposition, not the appeal.

- 2.10 The Board readily acknowledges that the legislative choice of allowing everyone to raise opposition proceedings has given rise to discussions about its scope and limits. Already *Josef Kohler* (*Handbuch des Deutschen Patentrechts*, 1900) dedicates a whole section of his book on this issue (p. 373 - 383). According to him, the justification of anyone raising an opposition lies in the fact that validity or invalidity of a patent did not concern a specific individual, but the public at large ("Die Gültigkeit und Nichtigkeit des Patents ist eine nicht nur den Einzelnen, sondern den ganzen Verkehr betreffende Frage; denn der ganze Verkehr ist dabei beteiligt, ob ein technischer Vorgang Allen freisteht, oder nicht" - p. 373). After some further discussion on the legal nature of such proceedings (opponent as a representative of the public at large, or representative in his or her own right, p. 375), Kohler argues the latter and concludes that "accordingly, legislation does not require proof of any interest" ("Dem entsprechend verlangt die Gesetzgebung gar keinen Nachweis des Interesses"), yet argues that there is an abuse "when the opponent demonstrably acts neither in his or her own reasonable interest, nor in

the interest of a third party directly concerning him or her" ("wenn der Handelnde erweislich weder in vernünftigen Eigentinteresse, noch in einem ihn unmittelbar berührenden vernünftigen Drittinteresse handelt"). In the following decades after 1900, the lack of any interest was not or no longer deemed an impediment to raising an opposition, though. According to *Hermann Jsay*, *Patentgesetz*, 6th. ed. 1932, 397, "the action is a popular action. No specific interest is necessary; it is thus insufficient for the patentee to argue that the petitioner in a nullity action has no interest in the revocation of the patent" ("die Klage ist eine Popularklage. Ein besonderes Interesse ist nicht nötig; es genügt daher nicht, wenn der Patentinhaber einwendet, der Nichtigkeitskläger habe kein Interesse an der Vernichtung"). For further arguments related to possible abuses, see below.

2.11 Summarising, the political rationale behind the remedy of opposition to be initiated by any person is the public interest. Already the English Statute of Monopolies 1623/24 has spelt out that patent monopolies are a burden to society. Their grant can only be justified by their technical contribution to society. Any person challenging a patent by way of opposition contributes to society by clearing the register from undeserved monopolies (where the patent is revoked), by reducing monopolies to the scope of their technical contribution (where the patent is limited in scope), or by adding legal certainty (where the patent is maintained unamended). Patents that are granted without meeting the requirements of patentability put in jeopardy the patent system's purpose of fostering industrial development in that competitors wishing to engage in research and development may divert such activities due to such wrongful titles. A further

reason is that by opposition proceedings, legal certainty is enhanced. This is of relevance since despite differences in national grant and enforcement practice, the general picture is that patents do not normally stand a better chance of being upheld in administrative or judicial proceedings.

The contribution to society by raising an opposition is thus threefold:

- (1) Undeserved monopolies may be revoked or limited to their due scope;
- (2) Industrial development is fostered in that the direction of innovation is not led astray by wrongfully granted monopolies;
- (3) Legal certainty is enhanced.

It is therefore in the public interest to provide a simple, cost-effective and timely remedy for reviewing the grant of a patent. Allowing any person without proof of any specific interest to file an opposition is thus a "procedural instrument in order to request an objective legal control" ("prozeßrechtliches Instrument zur Geltendmachung einer objektiven Rechtskontrolle": Axel Halfmeier, *Popularklagen im Privatrecht*, 2006, 275 and Benkard, *Patentgesetz*, 11th ed. 2015, § 59 note 21).

2.12 The Board thus finds that the current system of allowing any person to have a patent reviewed by way of opposition proceedings regardless of any specific interest is in line with the function of patents to make a technical contribution to society and the public interest in legal certainty and clearing the register from undeserved or undeservedly broad monopolies. Case law of the Enlarged Board of Appeal in this regard is consistent and without contradiction.

2.13 The patentee however argues that such system contravenes Art. 6.1 European Convention of Human Rights (ECHR) whereby "In the determination of his civil rights and obligations...everyone is entitled to a fair...hearing.". It should be noted in this regard that the patentee is not alleging any disadvantage or unfair treatment in these proceedings, or in the proceedings before the opposition division. Rather, the patentee alleges a potential disadvantage in other, possible subsequent proceedings. Such disadvantage was not - according to the patentee - the fact that the patent could be revoked or limited in scope, but that the patentee would be unable to rely on these proceedings in future infringement proceedings. The patentee thereby invites the Board to consider the hypothetical case that in opposition proceedings, the "strawman" opponent (who had no real interest in the matter) made some procedural remarks that could have a bearing on the interpretation of the patent. If these opposition proceedings were conducted by the party with a real interest and if this party subsequently was sued for infringement of the patent at issue, the patentee - so the argument goes - could then rely on what was said in the current proceedings by way of estoppel. In this regard, the patentee relies on the German Federal Supreme Court case "Weichvorrichtung" and on a case of the US Board of Appeal, both cited in the facts and submissions.

2.14 The headnote of the decision "Weichvorrichtung" reads as follows:

*"The declaration by an applicant that patent protection is not sought for a certain embodiment can be of importance for the interpretation of the scope of*

*protection under the aspect of a venire contra factum proprium in an infringement suit, if the applicants waiver formed the basis of the patent being granted and if the waiver was declared in proceedings involving the party against whom patent protection was later claimed in contradiction to the waiver."*

The above case relates to the well-reported Angora cat phenomenon whereby the patent is given a different interpretation in opposition and infringement proceedings. As Robin Jacob in UK Court of Appeal, decision of 19 August 2008, *European Central Bank v DSS* [\[2008\] EWCA Civ 192](#) has noted:

*"Professor Mario Franzosi likens a patentee to an Angora cat. When validity is challenged, the patentee says his patent is very small: the cat with its fur smoothed down, cuddly and sleepy. But when the patentee goes on the attack, the fur bristles, the cat is twice the size with teeth bared and eyes ablaze."*

2.15 First of all, the Board observes that both the German and the English decisions concern statements made by the patentee rather than the opponent. The patentee did not provide the Board with any evidence (case law or other) that also declarations by the opponent had ever played a role in the subsequent interpretation of a patent in infringement actions. The Board further observes that for the case at issue, it is not apparent what advantage a future defendant in an infringement proceedings might derive from not having been part of the opposition or appeal proceedings.

2.16 Still, the patentee heavily relied on the prohibition of *venire contra factum proprium* as applied in the above German decision. A *venire contra factum proprium*

refers to contradictory behaviour, in particular contradictory statements in regard of the same subject matter and is mentioned in the Unidroit Principles Article 1.8:

*"A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."*

In relation to patents, the above-mentioned decision "Weichvorrichtung" has put it this way:

*"[I]t may run counter to the principles of trust and good faith, especially in view of a venire contra factum proprium (contradictory behaviour), if the scope of patent protection now claimed has been the subject of a waiver; this may especially be the case if the waiver was essential for the patent being granted and was declared in proceedings involving the party who is no subject to an infringement suit."*

However, the patentee's arguments for an alleged contravention of Art. 6 ECHR due to a prohibition of *venire contra factum proprium* must fail for the simple fact that in the present case there is no contravention against one's own fact. The estoppel based thereupon could only be raised in subsequent proceedings to the extent that there are contradictory statements in relation to the former act. By the simple fact that a statement in possible subsequent proceedings has not yet been made and its content is therefore unknown it cannot contradict a former act or statement. The German Federal Supreme Court was faced with a case where a declaration made in examination was compared to a contradictory declaration made as a matter of fact in



subsequent proceedings. The patentee's case, if any, consequently might be argued in subsequent proceedings, but not in this one.

- 2.17 Other cases of possible abuse mentioned in academic writings (Somi Miscunescu, *Der "Strohmann" Einwand im Patentnichtigkeits- und Markenlöschungsverfahren*, GRUR Prax 2012, 429) concern the circumvention of contractual non-challenge clauses or *res iudicata* effect of inter partes nullity actions. None of this has been argued here.
- 2.18 The patentee also points to opposition proceedings under 35 USC § 112(a)(2) and the US Board of Appeal case *Ventex Co. Ltd. v. Columbia Sportswear North America, Inc.*, IPR2017-00651 (PTAB of 24 January 2019) according to which an opposition could be filed by anyone, yet an opponent needs to declare any "real party of interest". The above case does not concern the question whether the petitioner could raise an opposition for lack of interest, but whether such opposition was time barred in light of earlier infringement suits against "real parties of interest". The court specifically identified the defendant of a previous infringement suit as having a close connection to the petitioner in the case the board had to decide.
- 2.19 The Board finds it difficult to see what the patentee wishes to demonstrate by a reference to the above case. During the entire opposition and appeal proceedings, the patentee has referred to the phantom-like existence of an alleged "party of real interest" and invited the opposition division and the Board to draw conclusions therefrom. In creating all these hypotheses, the patentee has effectively invited the opposition division and now invites the Board to search in a dark

room for a black cat that may not even be there. Despite the fact that the patentee has invited the Board to draw consequences from the fact that a "party of real interest" was behind the current opponent, the patentee has never presented any evidence to back this up. As the lack of any such party can hardly be proven by the opponent (*negativa non sunt probanda*), it would have been incumbent on the patentee to instil doubts in this regard in order to pursue its case of alleged procedural unfairness.

- 2.20 Finally, the patentee points to the revised fee structure of the EPO based on the Administrative Council decision of 13 December 2017 (CA/D 17/7) which allows for a reduced appeal fee to be paid by individuals. This could be abused by companies when employing "straw men" to file their oppositions/appeals.

It might be helpful at this stage to point out that the Boards of Appeal are not the custodians of the EPO's finances and neither are they called upon to question the wisdom of decisions made by the Administrative Council in full knowledge and awareness of the established jurisprudence of the Enlarged Board of Appeal. Should the Administrative Council have wished to impose further conditions for taking advantage of paying a reduced fee and in order to avoid abuses, it would no doubt have done so. In the case of issue, the full appeal fee was paid and no abuse alleged. Though the Board appreciates the proprietor's concern for office finances, it is not apparent what advantage an opponent under an assumed guise might gain over the proprietor from a fee reduction. If under their true guise they had no right to the fee reduction they would run the risk - if found out - of their opposition being

deemed not filed for non payment of the appeal fee, Art 8, RFee with Art 99(1), last sentence, which would rather be to their detriment.

2.21 The Board therefore remains unconvinced that the Enlarged Board's case law on "straw man" oppositions is inconsistent with later decisions, has been superseded or is in contravention of Art. 6 ECHR. Nor is it able to see how such an opposition might put the proprietor at a procedural disadvantage. Finally, labelling an opponent as a "straw man" is misguided, as no interest in raising an opposition is necessary or needs to be proven, and consequently any argument based on an opponent's alleged lack of "real interest" must fail.

2.22 The request for a referral is thus refused and the opposition is admissible.

### 3. Background of the invention

The invention is concerned with a machine for dispensing a flavoured beverage to a user-receptacle, see patent specification paragraph [0001]. For removing remnant flavoured-beverage from the outlet or dispensing duct, the machine cleaning arrangement can perform light clearing or cleaning. This is realised by passing a clearing fluid (gas) under pressure through the dispensing duct and out of the duct via the outlet for dispensing the beverage into a user-receptacle immediately after or after a delay in the range of 0.05 to 3 sec after the flavoured-beverage dispensing cycle, see paragraphs [0012], [0017]-[0018] and granted claim 1. For a more thorough cleaning, which may be carried out at specific periods of time, the duct can be pivoted into a cleaning position. In the cleaning position the duct extends into a housing of the machine

for evacuating cleaning liquid in a shielded, confined space separated from the user. The user is so protected against projections of cleaning fluid, see paragraphs [0025],[0029] and [0053]-[0054].

- 4. Subsidiary request 0 (granted claims) - Novelty
- 4.1 Granted claim 1 is directed to the light clearing cycle of the outlet duct, immediately after or after a short delay after the dispensing cycle for removing remnant flavoured-beverage where a gas under pressure passes through the duct and out of the duct via the outlet for dispensing the beverage into a user-receptacle.

Document D4' anticipates the subject-matter of claim 1.

- 4.2 D4', concerning a beverage brewer and dispensing machine, describes in paragraphs [0027]-[0028] and claim 28 of D4' an air purge through the brew chamber immediately after the dispensing cycle: "air is escaping via line 14 through the brew chamber during a concluding purge". The term "purge" in its normal sense as used in this case means "to rid (a container, apparatus, etc.) of a gas or liquid, esp. by flushing of it with another" (OED). The skilled person would thus readily identify this process as a light clearing process for removing remnant beverage as in claim 1.
- 4.3 The appellant-proprietor contends that there is no disclosure of an air-tight brew chamber. The air may thus escape the brew chamber by leakage and not through the outlet duct 22, as is required by the contested claim 1. It is also not excluded in D4' that an alternative route other than the outlet probe 22 for air out of the brew chamber may exist. Figure 1 is only a schematic representation of the machine, where not

all the elements are necessarily depicted. It would follow that an air purge through the outlet conduit 22 is not unambiguously disclosed.

The Board is not convinced by these arguments. It is readily apparent for the skilled person knowing the liquid tightness features of the dispensing circuit from common general knowledge, that though some pressure may be lost in the brewing chamber due to possible air leakage, the pressurized air will mainly leave the brewing chamber through the dispensing or outlet probe 22 with pressure being thus able to remove remnants of beverage from the duct to the user-receptacle, as claimed. It is also immediately evident to the skilled person that figure 1 is schematic inasmuch as it represents only the hydraulic system of the machine, thus not depicting other structural elements, but otherwise representing any machine piping or valves. In this connection no other brewing chamber outlet than the dispensing probe 22 is disclosed by that figure and therefore by D4'. This is furthermore in accordance with the customary constructions of brewing chambers for the machines of the type of D4', known to the skilled person from common general knowledge. The Board is thus also convinced that the skilled person would read the schematic representation of figure 1 in D4' as excluding any other outlet than the dispensing probe 22.

Summing up, the fact that D4' does not expressly state that the brew chamber is air tight, does not of itself allow to conclude that therefore its teaching must cover also a non air tight brew chamber. Whether this is so or not depends entirely on how the skilled person in the field, using their common general knowledge, reasonably reads D4'. In this case the Board is of the

solid conviction that the skilled person in this field would not reasonably consider the brew chamber not to be air tight.

4.4 The Board therefore concludes that granted claim 1 lacks novelty over D4', Article 100(a) EPC and 54(2) EPC. The patent as granted should thus be revoked, Article 101(2) EPC.

5. Subsidiary requests 1-3 - Amendments.

5.1 Claim 1 of subsidiary request 1 is deficient under Article 123(2) EPC. The feature added to claim 1, namely of the duct being pivotally assembled to a conduit for moving the outlet from an operative position to a cleaning position via an intermediate position, represents an unallowable intermediate generalisation and so violates Article 123(2) EPC.

5.2 According to established case law, it is normally not allowable to base an amended claim on the extraction of isolated features from a set of features originally disclosed only in combination, e.g. a specific embodiment in the description. An intermediate generalisation is justified only in the absence of any clearly recognisable functional or structural relationship among the features of the specific combination or if the extracted feature is not inextricably linked with those features, see Case Law of the Boards of Appeal, 9th edition 2019 (CLBA) II.E. 1.9.

5.3 In the present case, the added features are taken from original page 5, lines 31-36, which unequivocally relate to the embodiment "[A]s illustrated in Figs 1 to 3". That embodiment is detailed in preceding and

following paragraphs of which the cited passage is an integral part. Read in this broader context it is clear that in the cleaning position, the duct extends *from outside into housing 5* for evacuating the cleaning liquid *in a shielded, confined space separated from the user* as described at page 5, lines 4-9, page 7, lines 18-21 and also depicted in the figures 1-3. These features are closely and inextricably linked by their function to protect the user from evacuated cleaning fluid during the (more thorough) clearing operation, as is also described on page 7. The other original passages cited by the appellant-proprietor, namely page 5, line 38 to page 6, line 2, page 11, lines 3-13 and page 9, lines 28-31 do not suggest that the shielded housing is optional. Thus the omission of the latter feature gives rise to an unallowable intermediate generalisation.

- 5.4 The appellant-opponent submits that the amendment passes the essentiality or three-point test for intermediate generalisations as set out in **T 331/87** and is therefore allowable, see CLBA II.E.1.4.4. However, this test is not an absolute standard, but can only be used as an aid in ascertaining what had been originally disclosed, see CLBA II.E.1.4.4.b). Having said that, the intermediate generalisation is not allowable even under the essentiality test. The omitted features that the duct in the cleaning position extends into the housing for evacuating the cleaning liquid in a shielded, confined space separated from the user are essential for the purpose of providing shielding from evacuated cleaning fluid projections in that position. These features are thus indispensable for the function of the invention defined by the added feature in the light of the technical problem it serves to solve, namely to provide a simplified construction for safely

protecting the user from evacuated cleaning fluid projections, see original description page 7, lines 18-21 for the embodiments of figures 1-3, or page 9, lines 24-31; page 11, lines 8-13. Their omission represents therefore an unallowable intermediate generalisation.

5.5 The Board thus holds that claim 1 of subsidiary request 1 contains subject-matter extending beyond the content of the application as filed.

5.6 The above conclusion also holds for subsidiary requests 2 and 3, since they include the same unallowable intermediate generalisation.

6. Subsidiary request 4 - Sufficiency of disclosure.

6.1 The appellant-opponent objects against the vice versa option in dependent claim 6 (a long water cleaning cycle followed by a short clearing gas purge) because it would be in contradiction with claim 1 which requires gas clearing *immediately* after dispensing. This contradiction would mean that claim 1 cannot be carried out across its full breadth.

6.2 The Board is unconvinced. It is undisputed that the patent specification contains sufficient detail for the skilled person to carry out the thorough cleaning operation per se. In particular, paragraphs [0076] and [0081] in combination with figures 8 and 9 to which these paragraphs refer contain sufficient information for the skilled person in respect of what components of the machine need be used and how they should be connected for supplying either claimed clearing fluid, a gas under pressure or water optionally with a detergent. This process, as depicted in figures 8 and 9



and explained in paragraph [0081] is carried out with the duct 10 in the cleaning position defined by claim 1. Paragraph [0076] also gives details of how to perform the two claimed variants of first passing the gas or first the clearing liquid. The skilled person finds in these parts of the description therefore enough information to carry out, the invention as claimed by claim 6 without undue burden.

6.3 Moreover, it is clear from paragraph [0081] that the subject-matter of claim 6 a concerns a more thorough cleaning processes that is complementary or additional to the light clearing process that is the subject of claim 1. This more thorough cleaning operation takes place after a longer non-dispensing period and is followed by a gas drying step. At the latest in view of paragraph [0081] it is clear to the skilled person, that where claim 6 refers to "said gas" it may be the same type of gaseous clearing fluid under pressure, but used here (in the vice versa option) for a different purpose of drying. Insofar as they might initially have seen some contradiction between claims 1 and 6 that is thus easily resolved in the light of paragraph [0081].

6.4 The Board also does not see any fatal flaw in the description's varying use of terminology for the fluids supplied to the dispensing duct 10 for either operation, with that used for light clearing referred to as "clearing fluid" or "clearing gas", and that use for more thorough cleaning referred to as "clearing fluid", "liquid clearing fluid" (paragraphs [0076] to [0081]) or "cleaning liquid" ( paragraphs [0025], [0027], [0030]). With their mind willing to understand and using normal reading skills the skilled person easily sees beyond such minor inconsistencies and understands that, broadly speaking, both light clearing

and thorough cleaning use respective fluids, preferably but not necessarily a gas for light cleaning or purging and a liquid for thorough cleaning.

6.5 The Board thus concludes that claim 6 is sufficiently disclosed, Article 83 EPC.

7. Subsidiary request 4 - Inventive step

7.1 The appellant-opponent contests inventive step of claim 1 starting from D4' in combination with E4, or vice versa.

7.2 Neither document D4' or E4 describe or suggest the new feature of a pivotally assembled outlet conduit with a cleaning position extending from the outside of the machine into a shielded confined space into a housing of the machine.

Indeed, D4' discloses the presence of an outlet probe 22 without further detail of whether it is pivotable or not, let alone of a cleaning position where the probe is pivoted into a shielded space into the housing of the machine.

The dispensing duct 5 of document E4 is not pivotally mounted. It rather appears to be fixedly mounted on the mixing head 2. Furthermore, the mixing head can be retracted into the housing in a movement effected by cams 36 and 37 within curved guides 14 and 14' that is essentially a translatory, parallel displacement, see paragraphs [0022]-[0025] and figures 7 to 8, showing the head in extended and retracted positions. Such a movement cannot reasonably be described as pivotal. Additionally, in the retracted position (figure 8), the dispensing duct does not extend from the outside of the

housing, as claimed, into the housing. It is completely inside the housing, see housing wall 17, mixing head 2 and dispensing duct 5 in figure 8 and corresponding description in paragraphs [0021]-[0025].

7.3 Thus, the claim's central feature of a pivotally assembled outlet conduit with a cleaning position extending from the outside of the machine into a shielded confined space into a housing of the machine, is not taught or suggested by either document D4' or E4. It follows immediately that any combination of these documents will not lead the skilled person to the subject-matter of claim 1 as a matter of obviousness. This structure, which is not trivial per se, provides a simplified construction for safely protecting the user from evacuated cleaning fluid, see specification paragraphs [0053], [0081].

7.4 The Board thus concludes that claim 1 of subsidiary request 4 involves an inventive step in the sense of Article 56 EPC.

8. For the above reasons the Board finds that the claims as amended according to subsidiary request 4 meet the requirements of the EPC. The Board thus concludes that a patent can be maintained on the basis of subsidiary request 4 pursuant to Article 101(3)(a) EPC once the description has been adapted to be in line with these claims.

## Order

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
  
2. The case is remitted to the department of first instance with the order to maintain the patent in the following version:  
  
- Claims 1 - 15 of Subsidiary Request 4 filed with letter dated 6 February 2019 and a description to be adapted thereto.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated