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**Datasheet for the decision  
of 6 October 2022**

**Case Number:** T 1312/19 - 3.2.07

**Application Number:** 15157259.1

**Publication Number:** 2910492

**IPC:** B65D85/10, B65D75/58, A24F15/12

**Language of the proceedings:** EN

**Title of invention:**

PACKAGE OF TOBACCO ARTICLES WITH AN INNER PACKAGE FITTED WITH  
A SEALING FLAP FIXED TO A HINGED LID

**Patent Proprietor:**

Philip Morris Products S.A.

**Opponents:**

- 1.Focke & Co. (GmbH & Co. KG)
- 2.British American Tobacco (Investments) Ltd

**Headword:**

**Relevant legal provisions:**

EPC Art. 14(2), 76(1), 123(2)  
EPC R. 36(2), 115(2)  
RPBA Art. 12(4)  
RPBA 2020 Art. 15(1), 15(3)

**Keyword:**

Divisional application - subject-matter extends beyond content of earlier application (yes)

Amendments - extension beyond the content of the application as filed (yes)

**Decisions cited:**

G 0003/89, G 0001/05

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1312/19 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 6 October 2022**

**Appellant:** Philip Morris Products S.A.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 21 February  
2019 revoking European patent No. 2910492  
pursuant to Article 101(3)(b) EPC.**

**Composition of the Board:**

<b>Chairman</b>	A. Pieracci
<b>Members:</b>	S. Watson
	O. Loizou

## **Summary of Facts and Submissions**

- I. An appeal was filed by the patent proprietor in the prescribed form and within the prescribed time limit against the decision of the opposition division revoking European patent No. 2 910 492.
- II. The opposition division found that the subject-matter of claim 1 of the main request as well as claim 1 of the first to eleventh auxiliary requests extended beyond the content of the earlier (parent) application, contrary to the requirements of Article 76(1) EPC. The patent proprietor's twelfth and thirteenth auxiliary requests were not admitted into the proceedings.
- III. In preparation for oral proceedings the Board communicated its preliminary assessment of the case in a communication pursuant to Article 15(1) RPBA 2020 to which the patent proprietor responded in substance.
- IV. Oral proceedings before the Board took place on 6 October 2022.  
On behalf of opponent 1 (party as of right) as announced with letter dated 6 September 2022 no one attended the oral proceedings. According to Rule 115(2) EPC and Article 15(3) RPBA 2020 the proceedings were continued in its absence.  
At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes.
- V. The final requests of the parties are as follows:  
for the patent proprietor (appellant):

that the decision be set aside, and that the case be remitted to the opposition division for further prosecution regarding the main request or the auxiliary requests 1 to 13;

for opponent 2 (respondent):

that the appeal be dismissed.

Opponent 1 made no requests or substantive submissions during the appeal proceedings.

VI. The arguments of the parties are dealt with in detail in the reasons for the decision.

VII. Claim 1 of the main request (patent as granted) reads as follows:

"A package of tobacco articles comprising:  
a group of tobacco articles;  
a cup-shaped outer container (2) having an open top end (6), and a cup-shaped lid (7) hinged to the outer container (2) along a hinge (8) to rotate, with respect to the outer container (2), between an open position and a closed position opening and closing the open top end (6) respectively;  
and  
an inner package (3), which is housed in the outer container (2), encloses the group of tobacco articles, and has a tobacco article extraction opening (4) closed by a sealing flap (5);  
wherein the sealing flap (5) comprises a connecting tab (16) glued permanently and non-removably to the lid (7) by permanent glue (17a), so that opening and closing the lid (7) also simultaneously opens and closes the sealing flap (5);

wherein the connecting tab (16) is separated from the rest of the sealing flap (5) by a fold line (19);

wherein the sealing flap (5) is fixed to the inner package (3) by non-dry, re-stick glue (17b) about the extraction opening (4), to allow the sealing flap (5) to be repeatedly detached partly from and re-fixed to the inner package (3); and

wherein the connecting tab (16) has permanent glue (17a) but no re-stick glue (17b);

the package (1) being characterized in that the fold line (19) is separated from the re-stick glue (17b) on the sealing flap (5) by a distance (D) of other than zero."

Claim 1 of the first auxiliary request contains the additional feature with respect to claim 1 of the main request that

"the fold line (19) is formed before gluing the connecting tab (16) to the lid (7)."

Claim 1 of the second auxiliary request contains the additional feature with respect to claim 1 of the main request that

"the fold line (19) is formed by cutting or removing material from the sealing flap (5) before gluing the connecting tab (16) to the lid (7)."

Claim 1 of the third auxiliary request contains the following additional features with respect to claim 1 of the main request:

"the fold line (19) is formed before gluing the connecting tab (16) to the lid (7), wherein the distance (D) between the fold line (19) and the re-stick glue (17b) on the sealing flap (5) is at least 1 mm."

Claim 1 of the fourth auxiliary request contains the following additional features with respect to claim 1 of the main request:

"the fold line (19) is formed by cutting or removing material from the sealing flap (5) before gluing the connecting tab (16) to the lid (7), wherein the distance (D) between the fold line (19) and the re-stick glue (17b) on the sealing flap (5) is at least 1 mm."

Claim 1 of the fifth auxiliary request contains the following additional features with respect to claim 1 of the main request:

"the fold line (19) is formed before gluing the connecting tab (16) to the lid (7), wherein the distance (D) between the fold line (19) and the re-stick glue (17b) on the sealing flap (5) is at least 1 mm and wherein the permanent glue (17a) on the connecting tab (16) touches the fold line (19), i.e. borders directly on the fold line (19) with no gap in between."

Claim 1 of the sixth auxiliary request contains the following additional features with respect to claim 1 of the main request:

"the fold line (19) is formed by cutting or removing material from the sealing flap (5) before gluing the connecting tab (16) to the lid (7), wherein the distance (D) between the fold line (19) and the re-stick glue (17b) on the sealing flap (5) is at least 1 mm and wherein the permanent glue (17a) on the connecting tab (16) touches the fold line (19), i.e. borders directly on the fold line (19) with no gap in between."



Claim 1 of the seventh auxiliary request reads as follows (additions with respect to claim 1 of the main request are shown underlined and deletions struck-through):

"A package of tobacco articles comprising:  
a group of tobacco articles;  
a cup-shaped outer container (2) having an open top end (6), and a cup-shaped lid (7) hinged to the outer container (2) along a hinge (8) to rotate, with respect to the outer container (2), between an open position and a closed position opening and closing the open top end (6) respectively;  
and  
an inner package (3) formed by folding a rectangular sheet (24) of packing material, which is housed in the outer container (2), encloses the group of tobacco articles, and has a tobacco article extraction opening (4) closed by a sealing flap (5);  
wherein the sealing flap (5) comprises a connecting tab (16) glued permanently and non-removably to the lid (7) by permanent glue (17a), so that opening and closing the lid (7) also simultaneously opens and closes the sealing flap (5);  
wherein the connecting tab (16) is separated from the rest of the sealing flap (5) by a ~~fold~~ line of weakness (19);  
wherein the sealing flap (5) is fixed to the inner package (3) by non-dry, re-stick glue (17b) about the extraction opening (4), to allow the sealing flap (5) to be repeatedly detached partly from and re-fixed to the inner package (3); and  
wherein the connecting tab (16) has permanent glue (17a) but no re-stick glue (17b);  
the package (1) being characterized in that the ~~fold~~ line of weakness (19) is separated from the

re-stick glue (17b) on the sealing flap (5) by a distance (D) of other than zero, wherein the line of weakness (19) is formed before applying the sealing flap (5) to the sheet (24) of packing material."

Claim 1 of the eighth auxiliary request contains the additional feature with respect to claim 1 of the seventh auxiliary request:

"wherein the distance (D) between the line of weakness (19) and the re-stick glue (17b) on the sealing flap (5) is at least 1 mm."

Claim 1 of the ninth auxiliary request reads as follows (additions with respect to claim 1 of the main request are shown underlined):

"A package of tobacco articles comprising:  
a group of tobacco articles;  
a cup-shaped outer container (2) having an open top end (6), and a cup-shaped lid (7) hinged to the outer container (2) along a hinge (8) to rotate, with respect to the outer container (2), between an open position and a closed position opening and closing the open top end (6) respectively;  
and  
an inner package (3) formed by folding a rectangular sheet (24) of packing material, which is housed in the outer container (2), encloses the group of tobacco articles, and has a tobacco article extraction opening (4) closed by a sealing flap (5);  
wherein the sealing flap (5) comprises a connecting tab (16) glued permanently and non-removably to the lid (7) by permanent glue (17a), so that opening and closing the lid (7) also simultaneously opens and closes the sealing flap (5);

wherein the connecting tab (16) is separated from the rest of the sealing flap (5) by a fold line (19);

wherein the sealing flap (5) is fixed to the inner package (3) by non-dry, re-stick glue (17b) about the extraction opening (4), to allow the sealing flap (5) to be repeatedly detached partly from and re-fixed to the inner package (3); and

wherein the connecting tab (16) has permanent glue (17a) but no re-stick glue (17b);

the package (1) being characterized in that the fold line (19) is separated from the re-stick glue (17b) on the sealing flap (5) by a distance (D) of other than zero, wherein the fold line (19) is formed by cutting or removing material from the sealing flap (5)."

Claim 1 of the tenth auxiliary request reads as follows (additions with respect to claim 1 of the main request are shown underlined):

"A package of tobacco articles comprising:

a group of tobacco articles;

a cup-shaped outer container (2) having an open top end (6), and a cup-shaped lid (7) hinged to the outer container (2) along a hinge (8) to rotate, with respect to the outer container (2), between an open position and a closed position opening and closing the open top end (6) respectively;

and

an inner package (3) formed by folding a rectangular sheet (24) of packing material, which is housed in the outer container (2), encloses the group of tobacco articles, and has a tobacco article extraction opening (4) closed by a sealing flap (5);

wherein the sealing flap (5) comprises a connecting tab (16) glued permanently and non-removably to the lid (7) by permanent glue (17a), so that opening and closing the lid (7) also simultaneously opens and closes the sealing flap (5);

wherein the connecting tab (16) is separated from the rest of the sealing flap (5) by a fold line (19);

wherein the sealing flap (5) is fixed to the inner package (3) by non-dry, re-stick glue (17b) about the extraction opening (4), to allow the sealing flap (5) to be repeatedly detached partly from and re-fixed to the inner package (3); and

wherein the connecting tab (16) has permanent glue (17a) but no re-stick glue (17b);

the package (1) being characterized in that the fold line (19) is separated from the re-stick glue (17b) on the sealing flap (5) by a distance (D) of other than zero, wherein the fold line (19) is formed by cutting or removing material from the sealing flap (5) before applying the sealing flap (5) to the sheet (24) of packing material, and wherein the distance (D) between the fold line (19) and the re-stick glue (17b) on the sealing flap (5) is at least 1 mm."

Claim 1 of the eleventh auxiliary request reads as follows (additions with respect to claim 1 of the main request are shown underlined and deletions struck-through):

"A package of tobacco articles comprising:  
a group of tobacco articles;  
a cup-shaped outer container (2) having an open top end (6), and a cup-shaped lid (7) hinged to the outer container (2) along a hinge (8) to rotate, with respect to the outer container (2), between an

open position and a closed position opening and closing the open top end (6) respectively;

and

an inner package (3) formed by folding a rectangular sheet (24) of packing material, which is housed in the outer container (2), encloses the group of tobacco articles, and has a tobacco article extraction opening (4) closed by a sealing flap (5);

wherein the sealing flap (5) comprises a connecting tab (16) glued permanently and non-removably to the lid (7) by permanent glue (17a), so that opening and closing the lid (7) also simultaneously opens and closes the sealing flap (5);

wherein the connecting tab (16) is separated from the rest of the sealing flap (5) by a ~~fold~~ line of weakness (19);

wherein the sealing flap (5) is fixed to the inner package (3) by non-dry, re-stick glue (17b) about the extraction opening (4), to allow the sealing flap (5) to be repeatedly detached partly from and re-fixed to the inner package (3); and

wherein the connecting tab (16) has permanent glue (17a) but no re-stick glue (17b);

the package (1) being characterized in that the ~~fold~~ line of weakness (19) is separated from the re-stick glue (17b) on the sealing flap (5) by a distance (D) of other than zero, wherein the line of weakness (19) is formed by cutting or removing material from the sealing flap (5) before applying the sealing flap (5) to the sheet (24) of packing material, and wherein the distance (D) between the line of weakness (19) and the re-stick glue (17b) on the sealing flap (5) is at least 1 mm."

Claim 1 of the twelfth auxiliary request reads as follows (additions with respect to claim 1 of the main request are shown underlined and deletions struck-through):

"A package of tobacco articles comprising:

a group of tobacco articles;

a cup-shaped outer container (2) having an open top end (6), and a cup-shaped lid (7) hinged to the outer container (2) along a hinge (8) to rotate, with respect to the outer container (2), between an open position and a closed position opening and closing the open top end (6) respectively;

and

an inner package (3) formed by folding a rectangular sheet (24) of packing material, which is housed in the outer container (2), encloses the group of tobacco articles, and has a tobacco article extraction opening (4) closed by a sealing flap (5);

wherein the sealing flap (5) comprises a connecting tab (16) wherein the connecting tab (16) is separated from the rest of the sealing flap (5) by a line of weakness (19) formed by cutting or removing material from the sealing flap (5) before applying the sealing flap to the sheet (24) of packing material, wherein the connecting tab (16) is glued permanently and non-removably to the lid (7) by permanent glue (17a), so that opening and closing the lid (7) also simultaneously opens and closes the sealing flap (5);

~~wherein the connecting tab (16) is separated from the rest of the sealing flap (5) by a fold line (19);~~

wherein the sealing flap (5) is fixed to the inner package (3) by non-dry, re-stick glue (17b) about the extraction opening (4), to allow the sealing

flap (5) to be repeatedly detached partly from and re-fixed to the inner package (3); and wherein the connecting tab (16) has permanent glue (17a) but no re-stick glue (17b); the package (1) being characterized in that the ~~fold~~ line of weakness (19) is separated from the re-stick glue (17b) on the sealing flap (5) by a distance (D) of other than zero."

Claim 1 of the thirteenth auxiliary request differs from claim 1 of the twelfth auxiliary request in that the line of weakness (19) is separated from the re-stick glue (17b) on the sealing flap (5) by a distance (D) of "at least 1 mm."

## **Reasons for the Decision**

1. The present proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Article 12(4) to (6) RPBA 2020, instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).
2. *Main request - claim 1 as granted - Article 100(c) EPC - Article 76(1) EPC*
- 2.1 The opposition division found that the subject-matter of claim 1 of the patent as granted extended beyond the content of the earlier (parent) application as the term "fold line" in claim 1 as granted was broader than the term "*linea di indebolimento*" (translated as "line of weakness" in the decision under appeal) used in the

earlier application as filed (see the decision under appeal, Reasons 3.1).

2.2 It is uncontested that it is the filing in the Italian language of the parent application that constitutes the earlier application as filed for the purposes of Article 76(1) EPC (see also Case Law of the Boards of Appeal (CLB), 10th edition 2022, II.F.2.1.3).

The appellant argued at the oral proceedings that the skilled person reading the earlier application as filed was able to directly and unambiguously derive a "fold line" since the terms "*linea di indebolimento*" and fold line were overlapping and the parent application disclosed that the function of the "*linea di indebolimento*" was to facilitate folding of the connecting tab. Therefore the skilled person would understand that the "*linea di indebolimento*" in the earlier application as filed was a fold line.

The Board is not convinced by these arguments. The skilled person, reading the earlier application as filed, does not find a basis for a fold line together with the other features of claim 1. The patent proprietor, when asked by the Board at the oral proceedings, could not indicate in the application as originally filed a specific basis for the feature of the fold line in combination with the other features of claim 1 as granted and the Board also does not see any.

In the earlier application as filed the term "*linea di indebolimento*" cannot be seen as synonymous with fold line. As the opposition division pointed out in the decision under appeal (reasons for the decision, 3.1), a fold line may merely be a printed line indicating where something should be folded, whereas in a '*linea*



*di indebolimento*' the material must be weaker along the line.

Therefore the term "fold line" is an extension of the subject-matter beyond the content of the earlier application as filed and the main request does not meet the requirements of Article 76(1) EPC.

The appellant has therefore not convincingly demonstrated that the appealed decision was wrong on this point.

3. *First to sixth auxiliary requests*

3.1 All the first to sixth auxiliary requests contain the term "fold line" in claim 1. The appellant put forward no further arguments in relation to these requests, therefore claim 1 of each of these requests also contravenes the requirements of Article 76(1) EPC, for the same reasons as given above.

4. *Seventh auxiliary request - claim 1 - Article 123(2) EPC*

4.1 In claim 1 of the seventh auxiliary request, the appellant replaced, *inter alia*, all instances of the term "fold line" with the term "line of weakness".

In its reply to the statement setting out the grounds of appeal, the respondent objected to this amendment and argued that it contravened the requirements of Article 123(2) EPC (see reply to the statement of grounds of appeal, page 5, final three paragraphs).

4.2 In point 4. of the decision under appeal, the opposition division had stated that "the term 'fold line' is corrected under Rule 14(2) EPC into the term

'line of weakness' in the seventh, eighth and eleventh auxiliary requests."

4.3 The Board understands this to mean that the opposition division regarded the replacement of the term "fold line" with "line of weakness" as having the effect of bringing a translation into conformity with an application as filed, as laid out in Article 14(2) EPC.

4.3.1 However, as set out by the Board in its communication pursuant to Article 15(1) RPBA 2020 (point 14.2), as the application of the patent in suit was filed directly in the English language, there is no application filed in "any other language" and no translation which could be brought into conformity with the application as filed. The provisions of Article 14(2), second sentence, EPC therefore do not apply.

4.3.2 The appellant argued in its submissions of 6 September 2022 (page 3, second to fourth paragraphs) and during the oral proceedings before the Board, that it was unfair to applicants with non-official languages that a divisional application could not be corrected in order to bring a translation into conformity with the originally filed parent application in a non-official language.

In its communication pursuant to Article 15(1) RPBA 2020, the Board had indicated that, according to the provisions of Rule 36(2), second sentence, EPC, the patent in suit could have been filed in the Italian language as long as a translation into the language of the proceedings of the parent (English) was filed within two months. If the divisional application had been filed in the Italian language with an English translation, this translation could have been brought

into conformity with the original filing of the divisional application in the Italian language.

The appellant did not contest this, but argued that native speakers of German, French or English could never "fall into the trap of choosing a non-official EPC language as the filing language and then file a divisional application directly in the language of the proceedings of the parent application" (see appellant's submissions of 6 September 2022, page 3, fourth paragraph) and therefore applicants with a non-official language were placed at a disadvantage.

The Board notes that the appellant had the choice to file the patent in suit in either the English or Italian language. The appellant was therefore not "penalised by this legal framework" as suggested by the appellant in its submissions of 6 September 2022, page 2, seventh paragraph) as it was the appellant's own action in choosing to file in the English language which caused the provisions of Article 14(2), second sentence, EPC to be unavailable.

- 4.3.3 Therefore the replacement of "fold line" with "line of weakness" cannot be regarded as bringing a translation into conformity with an application as filed, but must be assessed as an amendment. The opposition division therefore erred in this respect.
- 4.4 It is established case law that divisional applications are new applications which are separate and independent from earlier applications. Amendments to a divisional application are therefore allowed under Article 123(2) EPC to the same extent as amendments of any other non-divisional application. Any amendment must meet the requirements of both Articles 76(1) and 123(2) EPC, the

requirements of Article 76(1) EPC do not however have priority (see G 1/05, Reasons 9. and 11.2, second paragraph; CLB, *supra*, II.F.2.2.).

In other words, a divisional application cannot extend beyond the content of the earlier (parent) application as filed but nor can it be amended in such a way that it extends beyond the content of its own application documents as filed, even if such an amendment were necessary to overcome an objection under Article 76(1) EPC.

- 4.4.1 Therefore, the replacement of the term "fold line" with "line of weakness" must be assessed to determine if the amendment can be directly and unambiguously derived from the application documents as filed by the skilled person (G 3/89).
- 4.4.2 The respondent argued that as the terms "fold line" and "line of weakness" do not have the same meaning, the term "fold line" cannot provide the basis for the term "line of weakness".
- 4.4.3 The appellant did not contest that there was no literal basis for the term "line of weakness" in the application documents as filed.

During the oral proceedings before the Board the appellant argued that as the fold line in the application as filed could be formed by cutting or removing material from the sealing flap, this could be considered to be a line of weakness.

The Board does not find this argument convincing, as a fold line even if formed by cutting or removing material from the sealing flap cannot be considered as

synonymous with a line of weakness. A line of weakness has no inherent connection to folding. There is thus no direct and unambiguous disclosure in the (divisional) application as originally filed for the feature "line of weakness" together with the other features of claim 1 of the seventh auxiliary request and without the feature of a "fold line".

4.5 Therefore, the Board concludes that claim 1 of the seventh auxiliary request does not meet the requirements of Article 123(2) EPC.

5. *Eighth to thirteenth auxiliary requests*

The eighth and eleventh to thirteenth requests all contain the term "line of weakness" in claim 1. The appellant put forward no further arguments in relation to these requests. Therefore claim 1 of these requests also contravenes the requirements of Article 123(2) EPC, for the same reasons as given above in section 4.

It is therefore unnecessary to consider the further objections raised, or the issue of admittance into the appeal proceedings of the twelfth and thirteenth auxiliary requests (Article 12(4) RPBA 2007).

Further, as the ninth and tenth auxiliary requests both contain the term "fold line", and the appellant put forward no further arguments in relation to these requests, claim 1 of these requests contravenes the requirements of Article 76(1) EPC, for the same reasons as given above in section 3.

6. Therefore claim 1 of the main request, the first to sixth auxiliary requests and the ninth and tenth auxiliary request do not fulfil the requirements of Article 76(1) EPC and claim 1 of the seventh, eighth and eleventh to thirteenth auxiliary requests do not fulfil the requirements of Article 123(2) EPC.

In the absence of any set of claims which complies with the requirements of the EPC, the appeal cannot be allowed.

## Order

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

**The appeal is dismissed.**

The Registrar:

The Chairman:



G. Nachtigall

A. Pieracci

Decision electronically authenticated