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

**Case Number:** T 1088/20 - 3.2.04

**Application Number:** 11791532.2

**Publication Number:** 2645912

**IPC:** A47J31/44

**Language of the proceedings:** EN

**Title of invention:**

SIMPLE USER-INTERFACE FOR A BEVERAGE MACHINE

**Patent Proprietor:**

Société des Produits Nestlé S.A.

**Opponents:**

BSH Hausgeräte GmbH  
Oslo Patentkontor AS

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2), 54, 56

**Keyword:**

Amendments - allowable (yes)

Novelty - main request (no) - auxiliary request (yes)

Inventive step - (yes)

Reimbursement of appeal fee - (no)

**Decisions cited:**

T 0079/96, T 0640/91

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 1088/20 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 6 December 2022**

**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  
28 February 2020 concerning maintenance of the  
European Patent No. 2645912 in amended form.

**Composition of the Board:**

**Chairman**           A. de Vries  
**Members:**         J. Wright  
                      T. Bokor

## **Summary of Facts and Submissions**

- I. The appeals were filed by the appellant (proprietor), appellant (opponent 1) and appellant (opponent 2) against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request II (auxiliary request 9 in appeal), the patent in suit met the requirements of the EPC. The opposition division decided that the subject-matter of the main request (patent as granted) and auxiliary request I (auxiliary request 8 in appeal) was not novel.
- II. In a communication in preparation for the oral proceedings, the Board made observations on the relevant issues. Oral proceedings before the Board were held on 6 December 2022 in the absence of the appellant-opponent 2 which had informed the Board in a letter dated 2 December 2022 that it would not attend the oral proceedings.
- III. The appellant-opponents 1 and 2 requested that the decision under appeal be set aside and that the patent be revoked.

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted, in the alternative that the patent be maintained in amended form according to one of auxiliary requests 8, 9, 9a, 9b, 9c, 10 to 26, where auxiliary requests 8 to 20 were filed with statement of grounds, and remaining auxiliary requests 9a, 9b, 9c, 21 to 26 with its letter of 4 December 2020.

IV. The sole independent claim 1 of the relevant requests reads as follows:

*Main request* (with feature references in square brackets added by the Board):

"[M1] A machine (1) for preparing a beverage comprising:

- [M1.1] an ingredient processing module (10) for processing at least one ingredient, in particular an ingredient supplied within a capsule (2) into the module;
- [M1.2] a sensing arrangement (70,70') for sensing a user-request by a user-actuation of the sensing arrangement; and
- [M1.3] a control unit (60) containing different control programs for controlling the ingredient processing module executable on corresponding user requests,

characterised in that

[M2.1] the sensing arrangement (70,70') has a single actuation state detection, i.e. actuation detected or not detected, and in that

[M2.2] the sensing arrangement (70,70') and the control unit (60) are so arranged that each of said different user requestable control programs is executed on a user-actuation of the sensing arrangement (70,70') only and

[M2.3] the identification of the relevant user-requestable control program linked to said user-actuation of the sensing arrangement (70,70') among said different user-requestable control programs is carried out based on a state of the machine at the time of said user-actuation of the sensing arrangement (70,70')".

Claim 1 of *auxiliary request 8* reads as for the main request except that the following wording is added to the end of the claim: "wherein the control unit (60) contains a user-requestable beverage preparation program, wherein the control unit (60) contains a first and a second user-requestable beverage preparation program, the first program being requestable by a single user-actuation of the sensing arrangement (70, 70'), the second user-requestable beverage preparation program being requestable by a repeated user-actuation of the sensing arrangement, such as a double user-actuation of the sensing arrangement."

V. In the present decision, reference is made to the following documents:

E2 : DE 20100700U  
E2a: US 2002/0096054A1 (family document of E2)  
E3 : EP 2196117A1  
E4 : EP 1833750B1  
E19: DE 102004046452A1

VI. The appellant-proprietor's arguments can be summarised as follows:

E2/E2a does not prejudice novelty of claim 1 of the main request. The subject-matter of claim 1 of the next highest ranking auxiliary request, auxiliary request 8 does not add subject-matter extending beyond the application as filed. Its subject-matter is new with respect to E2/E2a, E3 and involves an inventive step starting from E2/E2a with E4.

VII. The appellant-opponent 1's arguments can be summarised as follows: E2/E2a takes away novelty of claim 1 of the main request. Auxiliary request 8 contains added subject-matter. The subject-matter of claim 1 of auxiliary request 8 lacks novelty with respect to E2/E2a, and lacks an inventive step starting from E2/E2a with E4.

VIII. The appellant-opponent 2's arguments can be summarised as follows: E2/E2a takes away novelty of claim 1 of the main request. Claim 1 of auxiliary request 8 adds subject-matter extending beyond the application as filed for the same reasons as granted claim 1. E2, E3 and E19 take away novelty of claim 1 of auxiliary request 8 and its subject-matter lacks inventive step starting from E2 with E19.

### **Reasons for the Decision**

1. The appeals are admissible.
2. Interpretation of certain claim features
  - 2.1 Feature M2.2: *[...] each of said different user requestable control programs is executed on a user actuation of the sensing arrangement only.* The opposition division (see the impugned decision, point 2.4) considered that the qualifying word *only* lead to there being two technically sensible but contradicting interpretations of the feature, namely: (a) the triggering of the execution of the control programs is possible exclusively (only) by actuation by the user (i.e. user-actuation of the sensing arrangement is a necessary and sufficient condition to make the machine work); or (b) it suffices to activate only the sensing arrangement for triggering the execution of the control



programs (which does not exclude that the machine could be triggered otherwise).

In the Board's view, the skilled person, reading feature M2.2 with a mind willing to understand, would arrive at the interpretation b, but not a. In particular, from a semantic point of view, because the word *only* is positioned at the end of the feature, it qualifies the nature of the immediately preceding user actuation of the sensing arrangement. Put differently, the Board holds that the feature says that the user need only actuate the sensing arrangement and the machine will execute a programme, but gives no information as to whether or not the same program could sometimes be caused to execute in a different way. Had the author of the claim wanted to communicate the meaning a, then they would have put the word *only* immediately preceding the word executed. Should the skilled person have any doubt as to the meaning of this feature, interpretation b would be confirmed at numerous places in the description of the published patent specification: See for example paragraph [0014], first and last sentences and paragraphs [0017] to [0020] - various user requests are communicated to the machine via the same sensing arrangement by the same user actuation. This idea is also disclosed in paragraph [0068], where the user interface senses only one form of actuation for identifying a user request pertaining to any of the programs.

Moreover, in the Board's view, the skilled person would dismiss the idea that feature M2.2 might mean that programmes could only be initiated by operating the sensing arrangement since the patent explains that certain programs can be initiated in a different way (cf. published patent specification, paragraph [0022]).

With regard to this point, the appellant-opponent 1 has argued that both interpretations (a) and (b) are possible and interpretation (a) should not be excluded because it is a *technical sensible* interpretation of the claim. Leaving aside, for the sake of argument, that the Board considers interpretation (b) not (a) to be correct, according to the relevant established jurisprudence a claim should be given its *broadest* technically sensible meaning (see CLBA I.C.4.1 and for example T 0079/96, reasons 2.1.3). In the present case, rather than interpretation (a) as such contradicting interpretation (b), it is merely narrower than (b) since it adds the additional limitation that the user must *necessarily* actuate the sensing arrangement to start a program. Put differently, embodiments that could be seen as falling under the speculative interpretation (a) would in fact also be encompassed by the proper interpretation (b). Therefore, the broader interpretation (b) would be the relevant interpretation of the feature. The appellant-opponent 1's argument that the claim feature should be given both interpretation (a) and (b) is moot.

2.2 Interpretation of the feature "sensing arrangement", [M1.2] and [M2.1]

It is true that, read in isolation, the term *sensing arrangement* could include any arrangement of a sensor or sensors, including a set of switches. However, read in its claim context, the Board considers it to define a single binary arrangement. The claim introduces the sensing arrangement in feature M1.2 where it is said to be: for sensing a user-request by a user-actuation of the sensing arrangement. Here only a single request is mentioned and a single actuation of the [entire]

sensing arrangement. In the Board's view, the skilled person would understand from this that the whole sensing arrangement can be activated or not, rather than just a part of it. Feature M2.2 confirms this: the sensing arrangement has a single actuation state detection, i.e. the two states "actuation detected" or "actuation not detected". Thus, the claimed sensing arrangement is a single, binary (either activated or not activated) device, such as a switch. At the oral proceedings before the Board the appellant-proprietor no longer disputed this interpretation.

The Board agrees with the appellant-opponent 2 (see its letter of 2 December 2022, paragraph bridging pages 4 and 5, that such a sensing arrangement could be a rotary knob (cf. granted claim 2) insofar as a rotary knob can have a single activation state (on or off).

3. Main request, claim 1, novelty with respect to E2/E2a

The appellant-proprietor challenges the opposition division's finding (see impugned decision, section 4.2) that E2/E2a takes away novelty of claim 1.

In the following reference will be made to family document E2a which discloses the same information as E2. It is not disputed that E2a (see abstract) discloses a machine for preparing beverages, an ingredient processing module, a sensing arrangement for sensing a user request according to features M1, M1.1, M1.2 and that it implicitly discloses (cf. paragraph [0003]) a control unit for processing user requests, feature M1.3. Moreover, E2a (see abstract and paragraph [0008] with figure 1) discloses a push button 12 which can make contact with a starting contact by being pushed in, thus it has a single actuation state

detection (detected or not detected) corresponding to feature M2.1. In this regard, the Board is not convinced by the appellant-proprietor's speculative interpretation of E2/E2a (see letter of 7 July 2021, pages 3 and 4), according to which the turning knob introduces different impedances into a circuit so that the push switch does not have a single activation state. Rather, as explained in paragraph [0003], the rotary selector selects *switching contact groups* not impedances and the push button has only one contact - a starting contact. Therefore, novelty with respect to E2a hinges on its disclosing features M2.2 and M2.3.

- 3.1.1 As already explained, the Board interprets feature M2.2 to mean that the only action the user needs to take to cause the machine to execute a programme is to actuate the sensor arrangement (interpretation b). The appellant-proprietor has argued in written proceedings (appeal grounds, page 7) that E2/E2a does not disclose this because, to execute a program, it must first be selected by turning the rotary selector 4 (cf. E2a paragraph [0019], abstract and figure 1). In the Board's view, the selector merely sets up the machine in a particular way but does not cause any program to be executed [started]. This only happens when the user actuates the central button 12 as is explained in paragraph [0020]. Therefore, the argument is not convincing.

With regard to the last claim feature (M2.3), the Board agrees with the appellant-proprietor that the *state of the machine* means a mode or condition of being in its broadest sense. In E2a, the position of the rotary selection switch 4, exemplarily shown in figure 1 selecting symbol 10 under the arrow 11, determines a machine state. In the Board's view, actuating E2a's

central button 12 thus identifies that programme (with symbol 10) as the relevant one linked to the user actuation *at the time of user-actuation* as feature M2.3 requires. Thus E2a discloses all features of claim 1.

- 3.2 The appellant-proprietor has argued that the term *user request* (feature M1.2) implies that the user interacts with the sensing arrangement in such a way as to identify the requested program, for example by double pressing the sensing arrangement. For this to be implied it must be a necessary logical consequence of the remaining features of the claim. In the Board's view, this is not the case.

Feature M1.2 first mentions a *user request* in the singular without suggesting that there could be different ways of making such a request. Although the next feature (M1.3) defines that there are different control programs executable on *corresponding* user requests (plural) this does not imply that there is more than one way of making such a request because the feature leaves open how the machine makes such a correspondence. It could, for example, simply mean that requests made at different times call up different control programs. The last claim feature (M2.3) explains how a correspondence is made: It first introduces the idea of *identification of a relevant program*, which can but mean one that corresponds to a user's request. Indeed, the feature then spells this out by defining that it is *the one linked to the user-actuation of the sensing arrangement among other selectable control programs* but without suggesting that *the way* the user actuates the machine plays any role in making this link. The next and final part of feature M2.3 defines how the identification is made: it is based on a state of the machine at the time of

actuation of the sensing arrangement. Thus, contrary to how the appellant-proprietor has argued, the claim does not imply that *the way* the user actuates the sensing arrangement needs to play any role in identifying what program is to be executed. This is also explicitly supported by the general description of the invention in the published patent specification (see paragraph [0014]) which explains that: *In the most simple configuration, all user requests may be acquired by the control unit via the same user-actuation irrespectively of the length and repetition of actuation.*

Nor does the Board construe the claim more narrowly than its wording defines because there are embodiments where the machine does discriminate between different actuations, as disclosed in the published patent specification, for example paragraph [0077] with its *slightly more complex embodiment in which a single actuation is distinguished from a repeated user actuation in order to request different beverage preparation programs.* Rather, as has already been explained, a claim should be given its broadest possible technically sensible meaning. In the present case, this means that the program executed can be independent of *the way* the user actuates the sensing arrangement.

- 3.3 For all these reasons, the Board confirms the opposition's finding (see reasons point 4.3) that E2/E2a takes away novelty of claim 1. Therefore, the main request fails.

4. Admission of auxiliary request 8

4.1 The appellant-opponents' (see appellant-opponent 1's, letter of 25 November 2020, page 29 and appellant-opponent 2's letter of 9 July 2020, page 1) request that present auxiliary request 8 be retroactively not admitted into the opposition proceedings/this aspect of the impugned decision be reviewed by the Board, which in the Board's reading amounts to a request for auxiliary request 8 to be not admitted in the appeal proceedings. In its communication in preparation for the oral proceedings (see section 4, in particular 4.3), the Board commented on the status of auxiliary request 8 as follows:

*4. Admission of auxiliary requests 1 to 9*

[...]

*4.3 Auxiliary requests 8 and 9*

*4.3.1 The opponents have asked the Board to review the opposition division's decision to admit these auxiliary requests into the opposition proceedings.*

*4.3.2 According to settled jurisprudence of the Boards of appeal (see CLBA IV.C.4.5.2, and the cited decisions, for example T0640/91, headnote III and reasons, 6.3) a board of appeal should only overrule the way in which a department of first instance has exercised its discretion if it concludes that it has done so according to the wrong principles, or without taking into account the right principles, or in an unreasonable way.*

4.3.3 *The opposition division admitted the requests into the proceedings having assessed novelty of the main request differently with respect to its (positive) preliminary opinion. This is in line with the Guidelines for Examination, 2019, E-VI,2.2 and E-III, 8.6. The parties were furthermore heard on the issue of admittance. This aspect of the decision is also fully reasoned (see impugned decision, points 11.2 and 14). Therefore, the opposition division appears to have exercised its discretion according to the right principles and in a reasonable way.*

4.3.4 *That the requests were filed at the last minute at the oral proceedings before the opposition division alone is not a reason for not admitting requests in opposition, as is also evident from the cited Guidelines. As to the aspect raised by the opponents of their convergence with other auxiliary requests, whatever role convergence might normally play, since these requests were promoted above all other auxiliary requests then on file, any issue of convergence could only be with respect to the main request, to which these requests merely add features. Therefore the argument is moot.*

4.3.5 *In any case, since the impugned decision is based on these requests, it would seem not possible to now retroactively excise them from the opposition proceedings. Nor is the legal basis for un-admitting such requests apparent to the Board.*

4.2 Neither in written proceedings nor at the oral proceedings did the parties comment on this opinion with respect to auxiliary request 8. The Board confirms its provisional opinion that the opposition division's



decision to admit auxiliary request 8 (then auxiliary request I) into the opposition proceedings was procedurally correct, and rejects the request for the non-admission of this request.

5. Auxiliary request 8, claim 1, added subject-matter

5.1 The opposition division found that the subject-matter of the main request (as granted) did not extend beyond the application as filed. Auxiliary request 8 has all features of granted claim 1 and the appellant opponents have raised the same objections of added subject-matter against claim 1 of auxiliary request 8 as were raised for the main request. In particular, the objections raised were that there was no original basis for:

- i) Adding the word *only* to the end of feature M2.2
- ii) Defining the control unit without *user logic*
- iii) for omitting the wording *generally identical* from feature M2.2

5.1.1 With regards to point (i) - addition of *only* in M2.2

The feature M2.2 is largely based on the corresponding feature of original claim 1, adding the word *only* at the end of the feature. As explained above, the Board interprets the feature to solely define that it *suffices to activate only the sensing arrangement for initiating the execution of the control programs* (interpretation b). It is not disputed that there is an original basis for the feature thus interpreted see for example page 4, lines 15 to 24 where a user requests each requestable program using only one button or other simple interface device. The appellant-opponent 1 has only argued that there is no unambiguous original disclosure for the feature M2.2 when additionally

interpreted in a more specific way (cf. appeal grounds of appellant-opponent 1, page 11 - interpretation a). Since the Board does not do so, the argument is moot.

5.1.2 Regarding point (ii) - omission of *user logic*, the Board explained why it considered that the feature had a basis in the application as filed in its communication (see point 3.3.2). The Board wrote the following:

*"3.3.2 The opponents have argued that feature M2.2 ([...] each of said different user requestable control programs is executed on a user actuation of the sensing arrangement only) represents an inadmissible intermediate generalisation since it omits the features an appropriate user logic and generally identical user actuation and that there is no basis for adding the word only to the end of the feature.*

*In the first place, the feature is based on original claim 1, where user logic was not mentioned. Moreover, in the Board's view, the user logic mentioned on page 4 is simply the logic, in other words predetermined logical operations used by the machine to carry out the user's commands (cf. application as filed, page 4, lines 15 to 24). The Board agrees with the opposition division (see impugned decision, point 2.3.3) that such a logic is implicit in the explicit claim feature (M1.3) of a control unit with control programmes for executing programmes according to users' requests. Therefore, the Board sees no subject-matter to be added by not explicitly including user-logic in the claim".*

Neither appellant-opponent commented on this, either in written proceedings (cf. appellant-opponent 2's letter of 2 December 2022) or at the oral proceedings before

the Board, at which the appellant-opponent 1 merely referred to its written submissions. Therefore, the Board confirms its preliminary opinion in this respect (omitting *user logic* does not add subject-matter).

5.1.3 With regard to point iii) - omitting the wording *generally identical* from feature M2.2 - the Board commented as follows in its communication:

*"3.3.3 Regarding the feature that the sensing arrangement/ control unit are arranged so that each program is executed on a generally identical user-actuation of the sensing arrangement (omitted feature italicised by the Board), this feature was present in original claim 1 and is in particular stated in the description (see page 5, lines 10 to 15) in conjunction with the statement that the user's request is identified based on the state of the machine at the time of activation - a feature of the present claim.*

*Therefore, the question arises as to whether it is directly and unambiguously derivable from the application as filed that this feature can be left out of the claim. The opposition division (see impugned decision, point 2.7) answered this question with a yes, because the claim defines (see feature M2.1) that the sensing arrangement has a single actuation state i.e. [a binary] actuation detected or not, so an actuation is always exactly identical. The division's argument boils down to the omitted feature being implicit in the claim so need not be explicitly stated. The Board agrees with this assessment.*

*The application (see page 5, lines 16 to 19) gives a definition of the term: Two user-actuations of the sensing arrangement are considered to be "generally*

*identical" when the same information is derived by the control unit from the sensing arrangement. The Board agrees with the opposition division that, in the context of a sensing arrangement with a single actuation state (detected or not), then the information derived by the control unit from the sensing arrangement will be identical (detected yes or no), whether or not a sequence of actuations or indeed the duration of an actuation determines how the machine operates (cf. application as filed, page 4, line 33 to page 5, line 6 and claims 12 and 13). Therefore, the Board considers the feature [generally] identical to be implicit in granted claim 1."*

- 5.1.4 Neither in written proceedings nor at the oral proceedings before the Board did the appellant-opponents dispute the Board's provisional opinion that the feature *generally identical* [user actuation of the sensing arrangement] was implicit in the present claim.

In view of the above, the Board confirms its provisional opinion that the *generally identical* [user actuation of the sensing arrangement] feature is implicit in the present claim and therefore the omission of its explicit wording does not add subject-matter extending beyond the application as filed.

- 5.1.5 From the above, the Board confirms its provisional opinion (see communication, point 3.3.5) that claim 1 as granted and its corresponding features in present claim 1 do not add subject-matter extending beyond the application as filed. The only other amendments to present claim 1 are the literal additions of original claims 8 and 12. Therefore, claim 1 of auxiliary request 8 does not add subject-matter extending beyond the application as filed.

6. Auxiliary request 8, novelty with respect to E3

6.1 The appellant-opponent 2 raised a novelty objection against claim 1 based on E3. In its provisional opinion (see point 3.5), the Board explained, amongst other things, that it did not consider E3 to disclose a sensing arrangement having a *single actuation state detection* (feature M2.1). There the Board wrote the following: "*[E3's] sensing arrangement is a rotary knob which must be turned to different positions depending on which program is to be actuated (see again paragraph [0009] and all the drawings). It therefore has multiple actuation state detection.*"

In its letter of 2 December 2022, the appellant-opponent 2 argued that E3's rotary switch has multiple single actuation states according to its rotary position and thus anticipates feature M2.1. Bearing in mind how the Board interprets the claimed sensing arrangement (single, binary device), the Board is not convinced by the argument. The argument boils down to the idea that a switch defined as having a single (binary) actuation state is merely a generic expression of multiple actuation states. The Board does not see it this way. Rather it sees the two concepts (single and multiple) actuation state switches as being mutually exclusive and E3 discloses only the latter. Therefore, at least for this reason, E3 does not take away novelty of claim 1 of auxiliary request 8, whether or not it discloses *repeated* actuation to actuate a beverage preparation program.

Therefore, without prejudice to the question of admittance of E3 and the associated novelty objection, E3 does not take away novelty of claim 1.

7. Auxiliary request 8, claim 1, novelty with respect to E2/E2a
- 7.1 Interpretation of the feature *repeated user actuation*.
  - 7.1.1 The skilled person reads the claim with a mind willing to understand, giving terms their usual meaning. The usual meaning of *repeated* - in relation to the repetition of actions - is [t]o do, make, or perform again (see OED, meaning III.7a). Thus, as such, a repeated user actuation of the sensing arrangement means no more than that the user actuates it again. In its claim context, the skilled person first reads that a first beverage preparation program is requestable by a *single user-actuation*. The use of the word *single* emphasises that to request this first beverage program it is important to actuate just once. Thus, when the skilled person reads further into the claim that the second beverage preparation program is requestable by a *repeated user actuation* of the sensing arrangement, they will understand that to request this program the user must do something different, namely the actuation of the sensing arrangement must be repeated, with appropriate immediacy (cf. impugned decision, point 13.2), and not merely that they call up the second program in just the same way as for the first program (another single actuation) at some later time as the opposition division considered (cf. impugned decision, reasons, 13.1). This is all the more true since the claim also gives an example of what is meant by a repeated user actuation, namely a double user actuation. Therefore, from the claim alone, the Board holds that the skilled person will interpret the term *repeated user actuation* to define a particular way of actuating the sensing arrangement in order to call up

the second program, just as it defines a particular way (single actuation) of calling up the first programme.

- 7.1.2 This interpretation is further supported by the description (see the published patent specification, e.g. paragraph [0016]) where the control unit discriminates repeated actuations to identify particular user requests. Paragraph [0077] adds at the end of the double actuation example that this will typically be within a short time frame e.g. 1 to 2 seconds: this additional information eliminates any doubt that this particular repeating could be merely repeating an actuation that was made to initiate the preparation of a previous beverage.
- 7.1.3 Moreover, since the *repeated actuation* has the technical effect of calling up a different program from a single actuation, it is a technical feature, so it must be taken into account for assessing novelty and inventive step. This is so also in the understanding that the actuation that is repeated is implicitly *generally identical*.

In this regard, at the oral proceedings, the appellant-opponent 1 argued that the opposition division had found the original feature *generally identical* [user actuation of the sensing arrangement] could be omitted from the claim because it was non-technical (cf. appellant-opponent 1, appeal grounds page 12 and impugned decision, point 2.7) and considered the Board's position on this technicality issue to be decisive for inventive step since the feature was implicit in the present claim.

The opposition division considered the omitted feature (generally identical) to be superfluous because, in the present claim, user-actuation was not merely generally identical but exactly identical (decision reasons, section 2.7, last sentence). Read in this context, the Board understands the opposition division's comment that the omitted feature made *no technical contribution* merely as stating that including the deleted feature in the claim would not change its subject-matter, rather than stating that the feature was not technical (in the sense of lacking technical character) as the appellant-opponent 1 would have it. The appellant-opponent 1's argument is based on a flawed interpretation of the impugned decision and is thus moot.

7.2 In the light of the Board's interpretation of the claim's *repeated user actuation* feature, contrary to the opposition division's finding (see impugned decision, reasons, 13.1 to 13.3), the Board considers that E2a does not take away novelty of claim 1. In E2a, only one kind of actuation for requesting all beverage preparation programs is disclosed, namely a single push on the start button 12 (see paragraph [0020]), rather than single and *repeated user actuations* requesting different beverage preparation programs as claimed. Requesting a first beverage preparation program by actuating the sensing arrangement (activation element 12) to make a first drink, then adjusting the machine's settings, then pressing the element 12 again to make a second [different] drink is merely to initiate two different programs with two single actuations of the sensing means, rather than with respective single and repeated actuations as claimed.



7.2.1 The Board is also not convinced by the appellant-opponent 1's argument that E2/E2a discloses the claimed single and repeated actuations to request different beverage preparation programs because a user pressing element 12 once to request a first beverage preparation program could press element 12 again before the first program had finished. According to the appellant opponent 1, this would implicitly cause the machine to abort the first program and start a new program. This new program, if allowed to run to completion, would be longer and therefore a different program from the aborted program according to the appellant-opponent 1.

Firstly, the Board agrees with the appellant-proprietor that it is mere speculation that pressing E2a's button 12 whilst a beverage preparation program was running would interrupt it: Paragraph [0020] explains that pressing the start button 12 *initiates an operating cycle so that finally* the preparation flows from the beverage spouts 2 and 3, thus it describes a program initiation when no drink preparation is in progress. As to what happens if button 12 is pressed whilst preparing a drink, E2a is silent. It could be that the machine would simply ignore such a request.

Moreover, even if such a second press of button 12 during a first preparation cycle might abort it and start a new preparation cycle (which the Board holds not to be disclosed), this would not request a second user-requestable beverage preparation program as claimed. Rather it would merely request the *same* program as the previously aborted program as determined by the position of the rotary knob 4. This is different from what is claimed, where both the first and second beverage preparation programs are *contained in the*

*control unit* and thus must be discrete separately stored programs.

7.2.2 For all these reasons, the Board finds that E2a and by implication E2, do not disclose a *repeated user actuation to request a second beverage preparation program* and therefore E2/e2a does not take away novelty of claim 1.

8. Main request, claim 1, inventive step starting from E2/E2a with E4

Following the above discussion on novelty. E2/E2a does not disclose a *repeated user actuation to request a second beverage preparation program*. The appellant-opponent 1 has argued that E4 discloses this feature so the combination of E2/E2a with E4 would take away inventive step of claim 1.

In the Board's view E4 does not disclose the differing feature (*repeated user actuation*). Therefore, however obvious the combination of E2/E2a and E4 might be, it would not lead the skilled person to the subject-matter of claim 1, and would not take away inventive step.

8.1 It is not in dispute that E4 discloses a beverage preparation machine which can make a coffee beverage on activation of a single activation state switch by the user (see paragraph [0031], [0046] and [0049] with figures 1, 2 and 3, operating button 6/60). As explained in paragraphs [0018] to [0020] and [0039] to [0041] with figure 1, different fill levels in a cup can be achieved by visually marking a desired filling level on the cup with an optical pointing device 2 that focuses a light-spot 41 on the cup.

However, E4 (see paragraph [0046] and column 10, lines 53 to 55 with figure 2) discloses that always a [single] press on the operating button starts a new filling cycle, not a double press.

- 8.2 The Board is not convinced by the appellant-opponent 1's argument that E4 discloses that, to call up a program, the start button 6/60 is pressed twice - once to turn on a laser to select a desired fill level for the drink and once to start the filling process. In this regard the appellant-opponent 1 has pointed to column 10, first sentence, where it is disclosed that there is only a single operating button and to column 10, lines 42 to 53, which discloses what has to happen before the user presses the start button to start the filling process: The user first positions their cup on the support 13 under the spout 11. The next sentence states: *When the laser is turned on, the user can orient the laser ray in such a way as to mark the internal edge of the cup corresponding to the level of fill that he desires* (by turning the unit 20, 21 on its axis I that adjusts the position of the visible light spot 41).

According to the appellant-opponent 1, figure 2 discloses that the laser is first turned on by the user pressing the operating switch 6/60, and thus, so it argued, in some cases the user *repeat actuates* the operating switch 6/60 to start a beverage preparation program as claimed.

- 8.3 This argument could only hold if E4 directly and unambiguously disclosed that the laser is turned on by the user pressing the switch 6/60. In the Board's view this is not so. The only explicitly explained purpose of the switch 6/60 is to start a filling of the cup or

to stop an extraction (see for example paragraphs [0049], [0056], figure 5 and claim 16). Nothing suggests that it turns on the laser. Rather, as explained in paragraph [0056] with figure 5, the machine is in standby mode until, at step 120, the switch is activated and extraction of coffee starts.

As to what E4 says about turning on the laser, column 10, line 4, uses the passive voice to explain that the laser *is turned on* - leaving open by what or by whom. At most, figure 2 shows that it is controlled by the control unit 5 (cf. paragraph [0045]). However, whether the control unit turns on the laser when the user presses the button 60 or whether it happens due to some other event monitored by the control unit such as powering up the machine or the camera (which is also connected to the control unit 5 - paragraph [0047], first sentence) detecting some event, is left unsaid. Therefore, the combination of E2/E2a and E4 would not lead to the repeated actuation feature as claimed, so this objection fails.

9. Admissibility of E19 and the associated objections

In its communication the Board commented (see section 5.3) on the admittance of E19 for consideration of novelty as follows:

*"5.3 Admittance of document E19 and new lines of attack, Article 12(4) RPBA*

*5.3.1 E19 and new attacks based on other documents already on file were filed with the appellant-opponent 2's grounds of appeal, and thus represent amendments to its case in the sense of Articles 12(2) and 12(4) RPBA 2020. As already noted, present auxiliary requests 8*

and 9 (then 1 and 2) were correctly admitted in accordance with the relevant Guidelines; moreover, in that their claim 1 is a straightforward combination of granted claims 1, 8 and 12, against which both appellant opponents had already launched attacks based on documents on file, they were also foreseeable and discussable in that framework at the oral proceedings before the division. Appellant-opponent 2 chose not to attend those oral proceedings before the division and must bear the consequences of that choice; its chosen absence does not provide a justification for submitting further evidence and attacks against granted subject-matter in appeal for which it had already raised objections.

The appellant opponent 2 has further reasoned that E19 and these further attacks are prima facie relevant for assessing novelty and inventive step for auxiliary requests 8 and 9. Prima facie, E19 (see abstract, step d) discloses double actuation of a switch to make a particular brewing parameter selection on a coffee machine. However, E19 does not appear to disclose that the sensing arrangement has a single actuation state detection and that the sensing arrangement and the control unit are so arranged that each user-requestable control programs is executed on a user-actuation of the sensing arrangement only. E19's machine has at least two buttons 18a and 18b for selecting programs that control the ingredient processing module, so its sensing arrangement has more than a single actuation state detection. Thus it would appear to be of limited relevance. The Board is therefore inclined not to admit this late filed document, Article 12(4) RPBA 2020.  
[...]

*The Board is inclined not to admit these amendments to the appeal case of the appellant opponent 2, Article 12(4) RPBA."*

- 9.1 The appellant-opponent 2 did not explain in its letter of 2 December 2022 (pages 2 and 3) why this aspect of the Board's preliminary opinion might have been wrong. Instead, it substantiated an inventive step argument against auxiliary request 8 (and 9) for the first time (E2/E2a with E19). Therefore, the Board confirms its provisional opinion that the novelty objection based on E19 should not be admitted into the proceedings.
- 9.2 With regards to the inventive step objection (E2 combined with E19) filed just two working days prior to the oral proceedings, it represents a very late amendment to the appellant-opponent 2's case made after the summons to oral proceedings and its admittance is thus subject to the Board's stricter discretion under Article 13(2) RPBA 2020. According to that article, [any such amendment to a party's case] *shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.*

In the present case, the appellant-opponent 2 did not explain any reasons in its letter, cogent or otherwise, as to why there might be any such exceptional circumstances. Nor was the appellant-opponent 2 present at the oral proceedings to present such reasons regarding an issue it could have expected to be raised there if it had been present. Therefore, the Board considered that it should not take this late filed inventive step objection into account.

- 9.3 For all these reasons, the Board decided not to admit E19 and the associated objections into the proceedings, Articles 12(4), 12(6) and 13(2) RPBA 2020. Therefore, the appellant-opponent 2's request (appeal grounds page 1) for remittal to the opposition division for treating objections to auxiliary request 8 based on E19 is moot.
10. The Board concludes that the main request (patent as granted) fails for lack of novelty but that it is satisfied that the claims of the 8th auxiliary request (auxiliary request 8) meet the requirements of the EPC. Since this means that the opponent 1's appeal fails, a reimbursement of its appeal fee is not possible, Rule 103(1)(a) EPC. However, the description has yet to be adapted to this request, in particular in such a way that it supports the claims, Article 84 EPC.

## Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division with the order to maintain the patent with Claims 1-13 of the 8<sup>th</sup> auxiliary request filed with the grounds of appeal dated 26 June 2020, and a description to be adapted thereto.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated