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**Datasheet for the decision  
of 25 April 2024**

**Case Number:** T 0018/22 - 3.2.01

**Application Number:** 15151200.1

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A45D2/02, A45D2/10

**Language of the proceedings:** EN

**Title of invention:**  
Hair styling device

**Patent Proprietor:**  
TF3 Limited

**Opponents:**  
Philips International B.V.  
Ehlers, Jochen

**Headword:**

**Relevant legal provisions:**  
EPC Art. 54, 56, 123(2), 123(3)

**Keyword:**

Novelty - main request (no) - auxiliary request (yes)  
Inventive step - auxiliary request (yes) - non-obvious  
modification  
Amendments - extension beyond the content of the application  
as filed (no) - broadening of claim (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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

Case Number: T 0018/22 - 3.2.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.01**  
**of 25 April 2024**

**Appellant:** TF3 Limited  
(Patent Proprietor) Studio 11, Magreal Industrial Estate  
Freeth Street  
Birmingham B16 0QZ (GB)

**Representative:** Gee, Steven William  
Fairfield IP Limited  
1 South Lynn Gardens  
London Road  
Shipston on Stour, Warwickshire CV36 4ER (GB)

**Appellant:** Ehlers, Jochen  
(Opponent 2) Eisenführ Speiser  
Patentanwälte Rechtsanwälte PartGmbB  
Johannes-Brahms-Platz 1  
20355 Hamburg (DE)

**Party as of right:** Philips International B.V.  
(Opponent 1) High Tech Campus 5  
5656 AE Eindhoven (NL)

**Representative:** Philips Intellectual Property & Standards  
High Tech Campus 52  
5656 AG Eindhoven (NL)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
4 October 2021 concerning maintenance of the  
European Patent No. 2862476 in amended form.**

**Composition of the Board:**

**Chairman**            G. Pricolo  
**Members:**            A. Wagner  
                              S. Fernández de Córdoba

## **Summary of Facts and Submissions**

- I. The appeals by the patent proprietor and the opponent 2 are directed against the decision of the opposition division to maintain European patent No. 2 862 476 in amended form on the basis of auxiliary request 4 filed during the oral proceedings.
- II. The opposition division held, inter alia, that claim 1 as granted and claim 1 of auxiliary requests 1 and 2 contravened Article 100(c) EPC, respectively Articles 123(2) and 76(1) EPC. Auxiliary request 3 was not admitted into the proceedings. Auxiliary request 4 was objected, among others, under Articles 54 and 56 EPC.
- III. In order to come to these conclusions the opposition division considered the following documents:
- D1: US 4,148,330  
D2: JP 61-10102  
D2a: English Translation of D2  
D3: US 4,177,824  
D4: US 1,692,111  
D5: US 2,595,844  
D6: WO 2009/077747  
D7: WO 2012/080751 (parent application of the patent in suit)
- IV. Oral proceedings were held before the Board on 25 April 2024. As announced with letter dated 26 January 2024, the appellant (opponent 2) and, as announced with letter dated 26 January 2024, the party as of right (opponent 1) did not attend the oral proceedings.

V. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, as an auxiliary measure, that the patent be maintained on the basis of one of the auxiliary requests 5, 7 and 1, filed with the reply to the opponent 2's statement of grounds of appeal.

The appellant (opponent 2) requested in writing that the decision under appeal be set aside and that the patent be revoked.

The other party (opponent 1) did not submit in writing any observations.

VI. Claim 1 of the **main request** (patent as granted) reads as follows (feature numbering adopted from the opponent 2's reply to the patent proprietor's statement of grounds of appeal):

**a)** A hair styling device (10) having:

**b)** a body (12) defining a chamber (16) adapted to accommodate a length of hair (26), the chamber having a primary opening (24) through which the length of hair may pass into the chamber,

**c)** a rotatable element (34) in the chamber;

**d)** an elongate member (20) having an end spaced apart from the rotatable element,

**e)** the rotatable element (34) being adapted to engage the length of hair adjacent to the primary opening, to pull the length of hair through the primary opening and

into the chamber, and to wind the length of hair around the elongate member in use,

**f)** wherein the end of the elongate member is a free end,

**g)** wherein the chamber has an annular secondary opening (50) through which the length of hair may pass out of the chamber, the secondary opening being located adjacent to the free end, the secondary opening surrounding the free end of the elongate member (20); and

**h)** wherein the device has a movable abutment (52) which can engage the length of hair in use, the movable abutment having an open position in which the length of hair can pass through the secondary opening, and a closed position in which the length of hair is retained within the chamber, the movable abutment (52) being located in the primary opening, the secondary opening or between the primary and secondary openings.

**Auxiliary requests 5 and 7** were filed for the first time in first instance proceedings with letter dated 7 August 2020 as auxiliary requests 1 and 3 and renumbered during first instance oral proceedings.

In claim 1 of **auxiliary request 5**, features b, c and h are amended as follows:

**b')** a body (12) defining a chamber (16) adapted to accommodate a length of hair (26) with the length of hair not being clamped by any part of the device, the chamber having a primary opening (24) through which the length of hair may pass into the chamber,

**c')** a rotatable element (34) in the chamber and rotatable relative to the primary opening;

**h')** wherein the device has a movable abutment (52) which can engage the length of hair in use, the movable abutment having an open position in which the length of hair can be slid off the free end of the elongate member and pass through the secondary opening, and a closed position in which the length of hair is retained within the chamber, the movable abutment (52) being located in the primary opening, the secondary opening or between the primary and secondary openings.

**Auxiliary request 7** is based on auxiliary request 5 with features b' and h' further amended as follows:

**b'')** a body (12) defining a chamber (16) adapted to accommodate a length of hair (26) with the length of hair not being clamped by any part of the device, the chamber having a primary opening (24) through which the length of hair may pass into the chamber, the primary opening having a closed end (48);

**h'')** wherein the device has a movable abutment (52) which can engage the length of hair in use, the movable abutment being movable relative to the elongate member and having an open position in which the length of hair can be slid off the free end of the elongate member and pass through the secondary opening, and a closed position in which the length of hair is retained within the chamber, the movable abutment (52) being located in the primary opening, the secondary opening or between the primary and secondary openings.

**Auxiliary request 1** in appeal corresponds to auxiliary request 1 underlying the impugned decision. Claim 1 is

based on the main request with feature c amended as follows:

**c\***) a rotatable element (34) in the chamber and configured to project beyond the primary opening in use

VII. The appellant's (patent proprietor's) arguments relevant to the present decision may be summarized as follows:

*Main request, auxiliary requests 5 and 7 - Novelty over D3*

Claim 1 differed from the device of D3 in that the rotatable element pulled the length of hair through the primary opening and into the chamber (feature e). D3, column 1, lines 54, 55, instead, disclosed that the *"air together with a hair lock are sucked inwardly through the inlet"*. Thus, not the rotatable element but air pulled the length of hair into the chamber. D3 did not even provide an enabling disclosure such that the skilled person would not consider D3 at all. In order to create a suitable suction action, the driving rod G had to rotate very quickly, which would be far too dangerous for the user and his hair.

Furthermore the alleged movable abutment ("*appendix 15*") of D3 did not have a closed position in which it was able to retain the length of hair (feature h). Firstly, D3 provided contradictory disclosures with regard to the appendix 15. Column 3, line 2, disclosed that it *"assure regular retention"*. In contradiction thereto, column 3, lines 55 to 57, disclosed that the hair lock was completely free *"to come off in the axial direction, at any instant"*. Because of this contradiction - according to established case law - the

skilled person would completely ignore the teaching regarding the appendix 15.

Secondly, "retaining" in claim 1 was to be understood in the sense of "control". It meant that in the closed position, the movable member retained the length of hair until the end of the styling operation in a controlled manner. This was not the case for the device of D3, because the length of hair could slid off the elongate member at any time.

*Auxiliary request 1 - Admission*

The decision of the opposition division (point 27) to admit auxiliary request 1 - filed during oral proceedings - was to be confirmed. The opponent 2's argument that the feature of claim 1 as granted "*a rotatable element in the chamber*" encompassed embodiments not illustrated in the original application was raised for the first time during oral proceedings. Auxiliary request 1 was filed in direct reaction to the new argument at the earliest possible moment in time.

*Auxiliary request 1 - Added subject-matter*

The opposition division was correct in understanding the feature "chamber" as being the complete space inside the body 12 (impugned decision, point 25, fourth paragraph). However, the opposition division erred in concluding that the wording of feature c\* did not reflect the information provided in the original application (impugned decision, point 29).

The feature "*a rotatable element in the chamber and configured to project beyond the primary opening in use*" was directly and unambiguously derivable from the parent application, in particular from D7, page 8, lines 11 to 14, and figure 1. The shape of the

rotatable element as shown in figure 1 was not inextricably linked because any other form, e.g. a simple radial protrusion, may project beyond the primary opening and function as defined in feature e.

*Auxiliary request 1 - Article 123(3) EPC*

The amendment "*configured to project beyond the primary opening in use*" was a restriction to the wording as granted. "*A rotatable element in the chamber*" covered embodiments in which the rotatable element was either completely or partly in the chamber.

*Novelty over D1 to D4*

As held by the opposition division with regard to claim 1 as maintained (impugned decision, point 40), D1 to D4 did not disclose "*a rotatable element in the chamber and configured to project beyond the primary opening in use*" (feature c\*).

*Inventive step*

D6 as cited in the patent in suit was the closest prior art. Therein, the curled hair was forced to unwind to get out of the device. The problem to be solved was to improve the device of D6. The patent in suit solved the problem by features f to h, allowing the curled length of hair to slid off the free end of the elongated member through a second opening at the end of the styling operation without getting unwound. Starting from D6, features f to h were not obvious in combination with D3 as it required a different arrangement of the elongated member to provide the secondary opening.

D5 was not closest prior art and was not combinable with any of the documents D1 to D4.

VIII. The appellant's (opponent 2's) arguments relevant to the present decision may be summarised as follows:

*Main request, auxiliary requests 5 and 7 - Novelty over D3*

D3 disclosed a device according to claim 1. In D3, the driving rod G with the element M were the rotatable element according to feature e. The shoe-like appendix 15 constituted the movable member as described in D3, column 2, line 65 to column 3, line 5. Additionally, also D1, D2 and D4 took away the novelty of the subject-matter of claim 1 as granted.

*Auxiliary request 1 -Admission*

The opposition division was wrong in its discretionary decision to admit auxiliary request 1 filed during oral proceedings (impugned decision, point 27). The amendment addressed an objection raised with the notice of opposition and was prima facie not suitable to overcome the established objection.

*Auxiliary request 1 -Added subject-matter*

The opposition division was wrong in interpreting the feature "chamber" as being the complete space inside the body 12. In the patent in suit, the chamber 16 was limited by the additional cylindrical part in the body 12 as shown in figure 1. Accordingly, the rotatable element 34 was only shown as being adjacent the chamber 16 and not "*in the chamber*". Also the requirement of feature e, that the rotatable element engaged the

length of hair adjacent to the primary opening, was only possible with the rotatable element being adjacent the chamber.

Should the feature "chamber" be understood as being the complete space inside of the housing, then the opposition division was right in finding that the wording of feature c\* introduced an unallowable intermediate generalisation (impugned decision, point 29). In particular in figure 1 of the patent in suit, the rotatable element did not project as claimed. Furthermore, feature c\* was inextricably linked to the shape of the rotatable element having a leading end 28 and an arcuate leading edge 38 (D7, page 8, lines 23 to 28).

*Auxiliary request 1 - Article 123(3) EPC*

Granted claim 1 required a rotatable element completely in the chamber at any time. Amended claim 1 allowed the rotatable element to project outside of the chamber.

*Novelty over D1 to D4*

Like claim 1 as granted, claim 1 of auxiliary request 1 was not new over D1 to D4. The same arguments as for the main request applied. D1 (figures 1 to 3, 6) and D2 (figures 1 to 3) showed devices similar to that of D3, with a rotatable element in a chamber of a body, a primary opening at the side of the body and a secondary opening at the front end of the body. The devices of D1 and D2 also comprised a movable abutment (D1, rod 22; D2, hair guide arm 16) according to feature h. D4 (figures 2 and 11) disclosed a strip-like member 69 attached to the casings 14, 16 with a tongue 70 projecting beyond a slot 15 of the casings to engage

the hair adjacent thereto. The movable abutment was constituted by two plates 50 and 53 and a notch 49, shown in figure 4. All features of claim 1 were thus also known from D4.

*Inventive step*

Claim 1 lacked inventive step in view of document D5 taken alone or in combination with any of the prior art documents D1 to D4.

D5 did not disclose a rotatable element according to features c and e. Instead D5, figure 2, disclosed an axially slidable sleeve 20. To improve the usability of a hair curling device, it was obvious to the skilled person to rotate the sleeve instead of pulling it to engage the length of hair and to wind it on the elongate member.

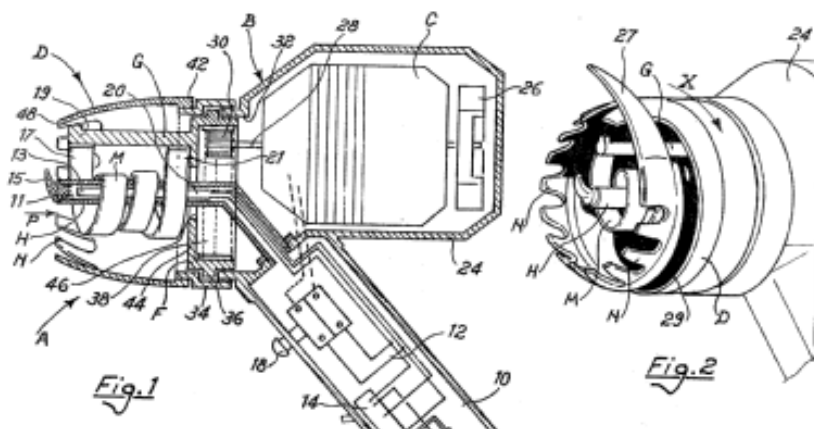
Furthermore the opposition division was wrong that the more limited subject-matter of claim 1 of auxiliary request 4 underlying the impugned decision involved an inventive step over D6 with D3. With features g and h as distinguishing features the problem to be solved was to *"modify the known device of D6 so that the length of hair can be removed without forcing the curl to unwind"*. However features g and h were known from D3. When applying the teaching of D3 to the device of D6, the skilled person arrived at the claimed subject-matter without an inventive step.

## Reasons for the Decision

### 1. Main request - Novelty over D3

1.1 The subject-matter of claim 1 as granted is not new over D3.

1.2 D3 (figures 1 and 2 (reproduced below) with column 3, lines 40 to 55) discloses a body ("housing D") defining chamber, a primary opening ("opening 29"), a rotatable element ("driving rod G" and "tape-like element M"), an elongate member ("hollow pin H") with a free end (at number 11 in figure 1) spaced apart from the rotatable element, a secondary opening ("opening P") at the front side of the body D and a movable member ("shoe-like appendix 15") located at the free end of the elongate member H in the secondary opening P.



1.3 The appellant (patent proprietor) disputed that, in the device of D3, the rotatable element G/M was adapted to engage the length of hair adjacent to the primary opening to pull the length of hair through the primary opening and into the chamber (feature e). In D3, the length of hair was sucked inwardly by air (column 1, lines 54, 55, and column 3, line 50) - however without any enabling disclosure how this was done.

1.3.1 The Board is not convinced. D3 discloses that a length of hair is inserted into the device through opening 29 (column 3, lines 37 to 39: "*a hair lock has to be introduced into the mouth-piece formed by the opening 29 [...]*"). An initial manual introduction of the length of hair into the chamber and into the reach of the rotatable element G/M is not excluded by the claim wording. The driving rod G and the tape-like member M - also disclosed as curling means (column 1, lines 48 to 50 - are described as producing "*by means of their structure and movement, an intake action which in turn causes advancement and winding of the hair lock around a stationary element*" (column 1, lines 35 to 38). Further on, D3 discloses that the tape-like element M (i.e. curling means) "*develops a soft mechanical action on the hair under treatment*" (column 3, lines 12, 13). Consequently, not the suction action alone, but also the structure of the curling means is adapted to pull the length of hair into the chamber. This understanding is further supported by claim 1 of D3, defining that "*the combined action of said rotating spiral-shaped member and said suction operates to wind a lock of hair, introduced into said housing through said inlet opening, around said fixed rod.*"

1.3.2 From the passages cited, the skilled person easily understands that the rotatable element G/M in D3 pulls the initially introduced length of hair from the hair root to the hair tip (column 3, lines 60, 61) through the opening 29 into the chamber by winding the length of hair around the elongate member in use. That D3 is a non-enabling disclosure is an unsubstantiated allegation of the appellant (patent proprietor). In fact, the passages of D3 cited above make plausible that the device of D3 functions as described. Whether in practice the functionality of the device might be

dangerous for the user and his hair, as alleged by the appellant, is irrelevant in this respect.

- 1.4 The appellant (patent proprietor) was further of the opinion that the shoe-like appendix 15 did not constitute a movable member according to feature h.
- 1.4.1 The Board does not agree. D3 discloses that the shoe-like appendix 15 is "*elastically oscillatable around the end portion of pin H, in order to assure regular retention of a hair lock under treatment on hollow pin H as well as easy stripping-off of the hair curl by elastically lowering the shoe-like appendix.*" (column 3, lines 1 to 5). Hence, the appendix is disclosed as engaging the length of hair, as having a closed position in which the length of hair is retained within the chamber, and as having an open position in which the length of hair can pass through the secondary opening P. Nothing else is required by feature h.
- 1.4.2 Contrary to the appellant's (patent proprietor's) opinion, the disclosure in column 3, lines 54, 55, that "*The hair lock is completely free to come off in the axial direction, at any instant, before, during and at the end of rotation of the motor.*" is not in contradiction to the function of assuring "*regular retention*". The skilled person understands from this passage that the appendix 15 can be lowered and brought into the open position by the user at any time, independent from the motor. The fact that the user can decide himself when he wants to move the appendix 15 from a closed to an open position is not excluded by the wording of the claim. Correspondingly, the patent proprietor's interpretation of the word "*retaining*" in the sense of "*controlled retaining until the end of the styling operation*" is too narrow in view of the wording

of feature h.

1.5 Hence, D3 discloses all features of claim 1 as granted in combination.

**2. Auxiliary requests 5 and 7 - Novelty over D3**

2.1 Auxiliary request 5 and 7 do not meet the requirements of Article 54 EPC for the same reasons as claim 1 of the main request.

2.2 The appellant (patent proprietor) has not put forward any additional arguments in respect of auxiliary requests 5 and 7 to those already submitted in respect of the main request. Actually, the appellant (patent proprietor) acknowledged during oral proceedings that the amendments made to claim 1 in both auxiliary requests are not suitable to overcome the novelty objection with regard to D3.

2.3 For completeness it is noted that the change in the order to consider auxiliary requests 5 and 7 before auxiliary request 1, was requested with letter dated 11 April 2024 after the summons to oral proceedings. As both auxiliary requests were not suitable to overcome the novelty objection over D3 raised with regard to the main request, the question of admittance of the change of order was of no further relevance.

**3. Auxiliary request 1**

3.1 Auxiliary request 1 corresponds to auxiliary request 1 underlying the impugned decision. The Board judges that auxiliary request 1 meets the requirements of the EPC.

3.2 Claim 1 of auxiliary request 1 specifies that the rotatable element is "*configured to project beyond the primary opening in use*".

**3.3 Admission - discretionary decision of the opposition division**

3.3.1 Auxiliary request 1 was filed for the first time during oral proceedings before the opposition division. The opposition division exercised its discretion and admitted auxiliary request 1 into the proceedings.

3.3.2 The appellant (opponent 2) requested to revisit the exercise of the discretion. The opposition division allegedly followed the wrong criteria. First, auxiliary request 1 was not a reaction to the opposition division's opinion expressed during oral proceedings but a reaction to the opponent 2's objection in the initial opposition brief. Second, the criteria that the amendment did prima facie address the issue, was not sufficient for exercising the discretion as the opposition division did.

A correct finding would have been to establish that the patent proprietor filed auxiliary request 1 at the latest possible moment and that it did not prima facie overcome the objection.

3.3.3 Actually, the appellant (opponent 2) argued with the same criteria as the opposition division (date of filing and prima facie relevance), thereby confirming that the right criteria were considered. Whether the outcome of applying the criteria is not in the sense of the opponent 2 does not mean that the opposition division applied the wrong criteria. As the latter obviously was not the case, the Board does not see any

reason to overturn the discretionary decision of the opposition division to admit auxiliary request 1 into the proceedings.

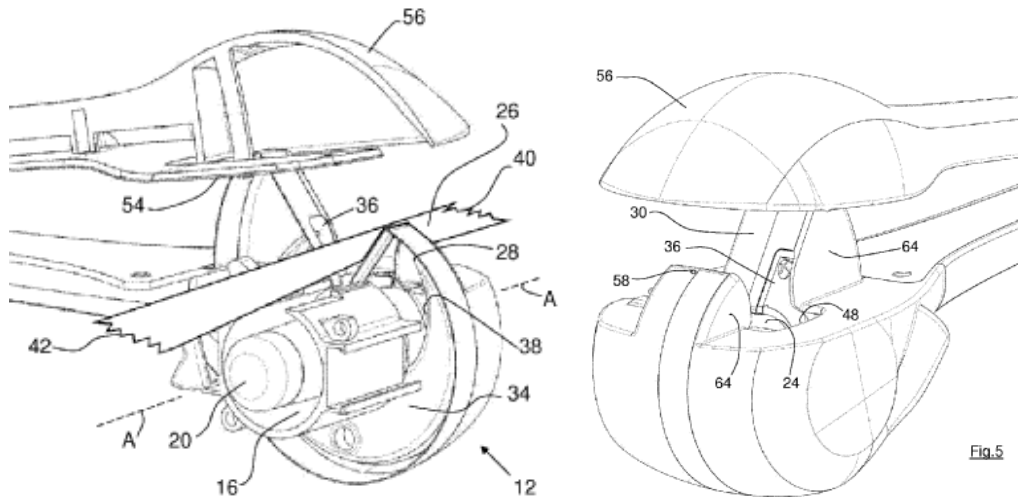
### **3.4 Added subject-matter**

- 3.4.1 Auxiliary request 1 meets the requirements of Articles 76(1) and 123(2) EPC.
- 3.4.2 The feature under discussion is feature c\*. Therein the wording "*in the chamber*" was added during examining proceedings and the wording "*configured to project beyond the primary opening in use*" was added to granted claim 1.
- 3.4.3 The amendments are taken from the description. The description of the parent application (D7) and that of the application as originally filed are identical. The following reasoning only refers to D7 (Article 76(1) EPC) but likewise applies to the application as originally filed (Article 123(2) EPC).

#### *Interpretation of "the chamber"*

- 3.4.4 The Board confirms the opposition division's interpretation of the feature "chamber" (impugned decision, point 25, fourth paragraph). Even if D7 is not very clear about the definition of the chamber, the description of D7 provides basis for the interpretation that "the chamber" is the complete space inside the body 12 of the device in which the rotatable element is located as shown in figure 1.
- 3.4.5 Contrary to the appellant's (opponent 2's) opinion, the feature "chamber 16" is not necessarily restricted to the inside of the cylindrical part surrounding the

elongate member 20 shown in figure 1 (a cut-out is reproduced below, left hand side), such that the rotatable element is placed adjacent to the chamber.



While in the general part of the description, the chamber 16 is required to have a primary opening 24 (page 2, lines 10, 11), D7 discloses on page 8, line 4, with regard to the specific embodiment, that it is the body 12 that has a primary opening 24 (see figure 5, a cut-out is reproduced above, right hand side). Therefrom, for the skilled person, with a mind willing to understand, it is clear that the chamber can be understood as being the complete space inside the body 12. Such a chamber can have a primary opening 24 that is at the same time a primary opening 24 of the body 12.

- 3.4.6 The Board further agrees with the appellant (patent proprietor) that the previously explained understanding of the chamber is not contradicting feature e. The meaning of "engage the length of hair adjacent to the primary opening" in feature e is to engage the length of hair "close to" the primary opening. A rotatable element in the chamber configured to project beyond the primary opening in use is perfectly suitable to engage

a length of hair adjacent to the primary opening be it at the inside or at the outside of the chamber.

"in the chamber and *configured to project beyond the primary opening in use*"

3.4.7 Taking into account the interpretation of the feature "chamber", feature c\* does not represent an unallowable intermediate generalisation. The amendment finds basis in the description of D7, page 8, lines 11 to 14 and figure 1.

3.4.8 The specific embodiment of figure 1 shows a rotatable element 34 mounted in the chamber. Page 8, lines 12, 13 literally discloses that "*the rotatable element 34 projects beyond the primary opening 24*" during its rotation.

3.4.9 The appellant (opponent 2) referred to the impugned decision, point 29, and argued that the amendment did not comply with the embodiment of figure 1 as therein the device was "used" but without the rotatable element projecting. Furthermore it required the specific shape of the rotatable element to achieve the effect as defined in feature e.

3.4.10 The Board is not convinced.  
The rotatable element has only to be configured to project at some point in use. "In use" means during the rotation of the rotatable element. Consequently, even if in figure 1 the rotatable element does not yet project, it is still configured to project when it starts rotating. Figure 1 therefore is in line with the wording of feature c\*.

Furthermore the shape of the rotatable element is not

inextricably linked to the ability of projecting beyond the primary opening or to the function as defined in feature e.

The function of engaging and winding the length of hair was already included in claim 1 of the parent application and of claim 1 as originally filed without defining any specific shape for the rotatable element. Furthermore, the original claim wording kept it open whether the engagement of the length of hair happens at the inside of the chamber and/or at the outside of the chamber. For the case with the length of hair at the outside, the rotatable element implicitly needs to be configured to project beyond the primary opening in use (i.e. during rotation). The amendment thus only clarifies the functioning of the device as originally disclosed without introducing an unallowable intermediate generalisation.

### **3.5 Article 123(3) EPC**

- 3.5.1 Feature c\* does not extend the scope of the claim as granted.
- 3.5.2 According to the appellant (opponent 2), claim 1 as granted claimed a rotatable element that was always and completely "*in the chamber*". In auxiliary request 1, the rotatable element was now additional "*configured to project out of the chamber*". This subject-matter broadened the scope of granted claim 1.
- 3.5.3 However, the Board agrees with the patent proprietor and the opposition division (decision, point 30) that the wording as granted was not limited to a rotatable element located always and completely inside the chamber. The feature "*in the chamber*" is also met by a rotatable element located at least partly in the

chamber during rotation. The requirements of Article 123(3) EPC are thus met.

#### **4. Novelty over D1 to D4**

4.1 The subject-matter of claim 1 of auxiliary request 1 is new over D1 to D4. None of the documents D1 to D4 discloses a rotatable element in the chamber that can project beyond the primary opening in use. D4 additionally does not disclose feature h.

4.2 The Board agrees with the opposition division's findings regarding D1 that the wording "*project beyond*" is to be understood in a manner that a part of the rotatable element has "*to go beyond the primary opening (54) and thus outside of the chamber*" (impugned decision, point 40.1, penultimate paragraph). The opposition division further concluded that in D1 to D3, the rotatable element is not configured to project to the outside of the chamber (impugned decision, points 40.2, 40.3 penultimate paragraph) and that in D4, the rotatable element 66 is always projecting beyond the slot 15 constituting a primary opening (impugned decision, point 40.4).

4.3 In their reply to the patent proprietor's statement of grounds of appeal, the appellant (opponent 2) objected to claim 1 as granted on the grounds of lack of novelty over D1 to D4. With regard to claim 1 of auxiliary request 1, it was stated that the novelty objections raised for the main request apply *mutatis mutandis* also for the subject-matter of auxiliary request 1 (page 31 of the opponent 2's reply).

4.3.1 However, no additional arguments with regard to feature c\* are submitted. In particular, the findings of the

opposition division with regard to D1 to D4 summarized in point 4.2 above are not addressed at all.

- 4.3.2 Furthermore, feature c\* is not apparent from the documents as the respective rotatable element of D1 to D3 is configured to be inside the chamber at all time, see D1, figures 6 and 7, D2, figure 1 and D3, figure 2.
- 4.3.3 In D4, the complete body ("*winder*"), comprising an inner casing 16 and an outer casing 14, rotates around the elongate member ("*rod 48*") (page 3, lines 43 to 45). Both casings have a slot (D4, page 1, lines 72 to 75). To the casings a tongue 70 is attached that reaches over the slot 15. The tongue rotates with the winder. According to the appellant (opponent 2), the rotatable casings with the tongue fulfilled the functionality of the rotatable element (reply to the patent proprietor's statement of grounds of appeal, page 21, item (v)). However, in this case, the rotatable element was not in the chamber where the length of hair is wound around rod 48.
- 4.4 In their statement of grounds of appeal, in view of D2, the appellant (opponent 2) merely alleged with regard to the subject-matter of claim 1 of the patent as maintained by the opposition division that in D2, the rotatable element ("*rotating pressing piece 8*") protruded beyond the primary opening ("*introduction groove 22*") without giving any evidence supporting this allegation (statement of grounds of appeal, page 33, last paragraph).
- 4.4.1 As already mentioned, feature c\* is not apparent from D2. In particular, D2a discloses on page 4, third paragraph, that the lock lever 25 "*is attached freely rotatable in the tangential direction of the protective*

*tube body 6 in a state in which the free end section covers the hair introduction groove 22". Thus, in use, the primary opening, constituted by the "introduction groove 22" is covered as shown in figure 1 and the rotatable element 8 can not be configured according to feature c\*.*

4.5 Regarding D4, it is further noted that the Board also does not see feature h disclosed. The movable abutment was seen in plates 50, 53 (see figure 2, 4). Feature h defines the movable abutment (50, 53) as being located in the primary opening (slot 15), the secondary opening (front opening) or between the primary and secondary openings.

In D4, however, the movable plates 50, 53 cover the secondary opening from the outside and are not located therein.

4.6 The requirements of Article 54 EPC are thus met.

## **5. Inventive step**

5.1 The subject-matter of claim 1 of auxiliary request 1 involves an inventive step over the cited prior art.

### **5.2 D5 as closest prior art**

5.2.1 The appellant (opponent 2) raised objections with regard to D5 alone or combined with any of the documents D1 to D4.

5.2.2 D5 relates to a hair shaping device adapted for curling the hair in pin curls (column 1, lines 1 to 3). Claim 1 undisputedly differs from the device known from D5 at least in a rotatable element according to features c\* and e. Instead of a rotatable element, D5,

figure 2, discloses an axially slidable sleeve 20.

- 5.2.3 According to the appellant (opponent 2), it would be obvious to the skilled person - to improve the usability of a hair curling device - to rotate the sleeve instead of pulling it to engage the length of hair and to wind it on the elongate member.
- 5.2.4 The Board is not convinced. The sleeve in D5 does not have the function of engaging the hair and winding the hair around the elongate member ("*spindle 18*"). The sleeve 20 is rather a part of the spindle 18 with the specific function of releasing the hair "*by pulling the sleeve 20 axially from the spindle 18, as illustrated in Figure 5. The action of the sleeve 20 is, as mentioned above, an important feature of this invention inasmuch as the releasing of the curls can be difficult to accomplish unless a special means is provided to pull the curl from the cup without damaging the hair, a function achieved perfectly by the sleeve 20.*" (column 3, line 36 to column 4, line 4).
- 5.2.5 Starting from D5, features c\* and e are not obvious as the skilled person would not modify the sleeve, which is specifically provided for releasing the hair, such as to wind the length of hair around the elongate member.  
Furthermore, nothing in D5 prompts the skilled person to a rotatable element configured to project beyond a primary opening. This also applies to the combination of D5 with any of the documents D1 to D4.
- 5.2.6 The claimed subject-matter is thus not rendered obvious when starting from D5.

### 5.3 D6 with D3

5.3.1 In their statement of grounds of appeal, the appellant (opponent 2) argued that the opposition division erred in concluding that the combination of D6 with D3 would not render obvious the subject-matter of claim 1 of the patent as maintained by the opposition division (point 41).

As claim 1 of auxiliary request 1 is broader than claim 1 as maintained by the opposition division and the features under discussion are the same in claim 1 of auxiliary request 1 as in claim 1 as maintained by the opposition division, the attack also applies to claim 1 of auxiliary request 1.

5.3.2 D6 has a similar design for pulling the length of hair into the chamber and for winding the length of hair around the elongate member 36 (figures 4, 5A to 5C). D6 is cited as closest prior art in the patent in suit and discloses undisputedly the features a to f. In D6, the curled hair is forced to unwind to get out of the device.

5.3.3 As found by the opposition division with regard to the patent as maintained, claim 1 differs from D6 in features g and h as granted, i.e. a secondary opening for releasing the length of hair and the movable member (see impugned decision, point 41.2).

5.3.4 The appellant (opponent 2) argued in the context of the patent as maintained (statement of grounds of appeal page 21f) that when trying to solve the problem of "*how to modify the known device of D6 so that the length of hair can be removed without forcing the curl to unwind*", it was obvious from D3 to provide a secondary opening adjacent to the free end of the elongate member

of D6. The skilled person would also incorporate appendix 15 known from D3 as movable member according to feature h.

5.3.5 However, the Board agrees with the opposition division's findings that the combination of D6 with D3 does not render features g and h obvious, in particular for the reasons given on page 28, fourth and fifth paragraph of the impugned decision (point 41.4).

5.3.6 Therein it was held that the construction of the styling device of D3 is of completely different nature than that of the device of D6. D3 shows e.g. a secondary opening at the front end of the device. The free end of the elongate member is directed to this end of the device so that the curl can easily come out through the secondary opening. In D6, however, the free end of the elongate member is directed to the opposite direction, away from the closed front end of the device (see figure 4). It is not obvious where a second opening according to feature g is to be arranged in the device of D6 to arrive at the claimed subject-matter. Further modifications would be necessary, in particular with regard to the arrangement of the elongate member.

5.3.7 The requirements of Article 56 EPC are thus met.

## **6. Description**

The amendments made to the description during the first instance proceedings are into conformity with the amendments made to the claims according to auxiliary request 1. The Board therefore agrees with the appellant (patent proprietor) that the patent can be maintained in amended form with the claims of auxiliary

request 1 and the description as amended before the opposition division.

## 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 in amended form with the following documents:
  - Claims 1 to 7 according to the auxiliary request 1 filed with the reply to the opponent 2's statement of grounds of appeal;
  - Description: Paragraphs 1-5, 7-41 of the patent specification; Paragraph 6 filed during oral proceedings before the opposition division;
  - Figures of the patent specification.

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated