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**Datasheet for the decision
of 11 December 2025**

Case Number: T 0439/22 - 3.2.01

Application Number: 14806330.8

Publication Number: 3076804

IPC: A24D1/00, A24F47/00

Language of the proceedings: EN

Title of invention:

HEATED AEROSOL GENERATING ARTICLE WITH THERMAL SPREADING WRAP

Patent Proprietor:

Philip Morris Products S.A.

Opponent:

Yunnan Tobacco International Co., Ltd.

Headword:

Relevant legal provisions:

EPC Art. 100(a), 52(1), 54, 123(3)
RPBA 2020 Art. 13(2)

Keyword:

Grounds for opposition - lack of patentability (yes)
Interpretation of the claims in light of the description (yes)
Novelty - main request (no)
Amendment after summons - exceptional circumstances (yes) -
cogent reasons (yes)
Amendments - patent amended in such a way as to extend the
protection it confers (yes)

Decisions cited:

G 0001/24, T 0400/94, T 0860/08, T 2284/09, T 1964/10,
T 2758/18, T 1473/19, T 1735/19, T 2405/19, T 0169/20

Catchword:

1. In interpreting the language used in a claim, "consulting", "referring to", "using" and "taking into account" the description and figures are synonyms for the act of deriving the necessary information from the patent as a whole to understand which meaning a person skilled in the art would attribute to the terms used in the claim.
(see Reasons 2.3)

2. Claim interpretation is the result of both reading the claims and consulting the description and drawings as a unitary process (holistic approach taken by the Enlarged Board of Appeal in decision G 1/24).
(see Reasons 2.4)

3. In line with this approach, a person skilled in the art reading the claim in the context of the description and figures will try to take a definition found in the description at face value. As long as the definition is technically reasonable and complies with the overall teaching of the claims, description and figures, the skilled person will read terms in the claim in the sense of the definition, taking into account both the broadening and limiting aspects.
(see Reasons 3.4 and 6)



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Case Number: T 0439/22 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 11 December 2025

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 23 December
2021 rejecting the opposition filed against
European patent No. 3076804 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: V. Vinci
P. Guntz

Summary of Facts and Submissions

I. The appeal filed by the appellant (opponent) lies against the decision of the Opposition Division rejecting the opposition filed against European patent No. 3 076 804.

In its decision, the Opposition Division found that the only ground for opposition raised by the opponent under Article 100(a) EPC in association with Articles 54 and 56 EPC was not prejudicial to the maintenance of the patent as granted and rejected the opposition.

Novelty and inventive step were positively assessed, *inter alia*, in view of the following prior-art document, which is relevant for the present decision:

D1: EP 2 368 449 A1

II. In a communication dated 5 December 2023, the Board expressed the view that the outcome of the case appeared to hinge on whether the description was to be taken into account when interpreting a claim containing an allegedly clear term, as argued by the appellant (opponent), or not, as stated by the Opposition Division in the contested decision. The Board further gave its preliminary opinion that there was a divergence in the case law of the Boards of Appeal concerning claim interpretation and indicated its intention to refer the matter to the Enlarged Board of Appeal.

Oral proceedings to discuss the necessity of a referral to the Enlarged Board of Appeal were held on 10 April

2024 before the Board by videoconference.

By its interlocutory decision dated 24 June 2024, the Board decided that the conditions for a referral were met and referred the following questions of law to the Enlarged Board of Appeal.

Question 1

Is Article 69(1), second sentence, EPC and Article 1 of the Protocol on the Interpretation of Article 69 EPC to be applied to the interpretation of patent claims when assessing the patentability of an invention under Articles 52 to 57 EPC?

Question 2

May the description and figures be consulted when interpreting the claims to assess patentability and, if so, may this be done generally or only if the person skilled in the art finds a claim to be unclear or ambiguous when read in isolation?

Question 3

May a definition or similar information on a term used in the claims which is explicitly given in the description be disregarded when interpreting the claims to assess patentability and, if so, under what conditions?

The appeal proceedings were thus stayed pending the decision of the Enlarged Board.

III. By its decision in case G 1/24 dated 18 June 2025, the Enlarged Board of Appeal answered the first two questions referred by the Board by ordering as follows:

"The claims are the starting point and the basis for assessing the patentability of an invention under Articles 52 to 57 EPC. The description and drawings shall always be consulted to interpret the claims when assessing the patentability of an invention under Articles 52 to 57 EPC, and not only if the person skilled in the art finds a claim to be unclear or ambiguous when read in isolation."

The third question referred by the Board was deemed inadmissible and thus not discussed.

With the summons dated 16 July 2024, the parties were summoned to oral proceedings pursuant to Article 116 EPC.

In a communication pursuant to Article 15(1) RPBA dated 30 July 2025, the Board set out the points to be discussed and decided upon at the oral proceedings in view of the conclusions of the Enlarged Board of Appeal in case G 1/24 concerning claim interpretation.

Oral proceedings took place before the Board on 11 December 2025 by videoconference.

IV. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent be revoked. It further requested apportionment of costs and that neither the auxiliary request, nor the new evidence (CH691156), nor the new line of argument contained in the respondent's submission dated 3 July 2025 be admitted into the proceedings.

The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained in amended form on the basis of the auxiliary request dated 3 July 2025 and received on 4 July 2025. The respondent's initial request for apportionment of costs was withdrawn.

V. Independent claim 1 as granted reads as follows (labelling of the features according to the appealed decision):

"(a) A heated aerosol-generating article for use with an electrically-operated aerosol-generating device comprising a heating element,

(b) the aerosol-generating article comprising an aerosol-forming substrate

(c) in which the aerosol-forming substrate comprises a gathered sheet of aerosol-forming material circumscribed by a wrapper

(d) radially encircled by a sheet of thermally-conductive material, the wrapper being the sheet of thermally-conductive material which acts as a thermally conducting flame barrier for spreading heat and mitigating against the risk of a user igniting the aerosol-forming substrate by applying a flame to the aerosol-generating article."

The auxiliary request submitted by the respondent differs from the main request in that paragraph [0035] of the description of the contested patent has been deleted.

Reasons for the Decision

MAIN REQUEST - PATENT AS GRANTED

Ground for opposition pursuant to Article 100(a) in conjunction with Article 54 EPC

1. Contrary to the findings of the Opposition Division, the ground for opposition pursuant to Article 100(a), in conjunction with Article 54 EPC, is prejudicial to the maintenance of the patent as granted.

Novelty over D1

- 1.1 With its statement of grounds of appeal, the appellant contested the Opposition Division's assessment that the subject-matter of claim 1 as granted was novel over document D1. It argued that the heated aerosol-generating article disclosed in this prior-art document - contrary to the findings of the department of first instance - also comprised "*a gathered sheet of aerosol-forming material*" as required by feature (c) of claim 1.
- 1.2 The Board notes that it is common ground that document D1 discloses a heated aerosol-generating article comprising features (a), (b) and (d) of claim 1 as granted, namely:

a heated aerosol-generating article (see paragraphs [0005] and [0014]) for use with an electrically operated aerosol-generating device comprising a heating element (see the "*heater*" mentioned in paragraphs [0006] and [0013]), the aerosol-generating article comprising an aerosol-forming substrate (see "*tobacco sheet 21*" mentioned in paragraph [0022]), in which the

aerosol-forming substrate comprises a sheet ("*tobacco sheet 21*") of aerosol-forming material (tobacco) circumscribed by a wrapper (wrapping material 22 described in paragraphs [0007] and [0014]), radially encircled by a sheet of thermally conductive material, the wrapper being the sheet of thermally conductive material which acts as a thermally conducting flame barrier for spreading heat and mitigating against the risk of a user igniting the aerosol-forming substrate by applying a flame to the aerosol-generating article (see paragraph [0015] of D1). D1 discloses in Figure 1 an aerosol-generating article in the form of a roll 20 intended to be uniformly heated by the inside surface of a heater 11 having the shape of a hollow cylinder (see paragraph [0020]). According to the teaching of D1, the roll 20 comprises a tobacco sheet 21 which "*may be wound as a single or multiple layers. In this case, only the tobacco sheet 21 may be spirally wound or a laminate of the tobacco sheet 21 and aluminum foil may be spirally wound*" (see paragraph [0018]).

1.3 Therefore, the issue under discussion is whether the spirally wound tobacco sheet (21) of the heated aerosol-generating article disclosed in D1 and shown in Figure 1 of this prior-art document takes away the novelty of a "*gathered sheet of aerosol-forming material*" within the meaning of feature (c) of claim 1.

1.4 In the decision under appeal, the Opposition Division answered this question in the negative. It found that the spirally wound tobacco sheet (21) of the heated aerosol-generating article disclosed in D1 did not equate to a "*gathered sheet*" as this term was commonly understood by a skilled reader to mean a sheet that is "*folded and convoluted to occupy a tridimensional*

space". In doing so, and in line with the respondent's submissions, the Opposition Division disregarded the broader definition of *"gathered sheet"* given in paragraph [0035] of the contested patent and thus construed claim 1 in accordance with the principle that recourse to the description for claim interpretation was only justified in exceptional circumstances, namely where the claimed subject-matter and/or its technical context required clarification (see, for example, T 169/20). Conversely and in accordance with the *"primacy of the claims"* approach, where the wording of a claim was clear to the skilled person, as was the case for the term *"gathered sheet"* of claim 1, reliance on the description was neither necessary nor allowed.

- 1.5 In its statement of grounds of appeal, the appellant criticised the novelty assessment of the Opposition Division and argued that the broader and specific definition of the term *"gathered sheet"* provided in paragraph [0035] of the patent, namely, a sheet of tobacco material that was *"convoluted, folded, or otherwise compressed or constricted substantially transversely to the cylindrical axis of the rod"* could not be disregarded when construing claim 1 for the purpose of assessing patentability. In its view, this definition belonging to the patent lexicon made technical sense, did not contradict any established meaning in the art and clearly encompassed any sheet that was deformed substantially perpendicularly to the axis normal to its surface and hence also the wound tobacco sheet of D1. Accordingly, the appellant concluded that feature (c) was also disclosed in D1 in combination with features (a), (b) and (d), with this prior-art document being prejudicial to novelty of claim 1 as granted.

1.6 The Board, in view of the conclusions of the Enlarged Board of Appeal in case G 1/24, does not agree with the solely claim-based interpretation of the term "*gathered sheet*" of the Opposition Division and hence with the findings that the subject-matter of claim 1 as granted is novel in view of D1.

2. Application of the conclusions of the Enlarged Board of Appeal in case G 1/24 to the interpretation of the term "*gathered sheet*" of claim 1

2.1 The comments submitted by the parties in response to the conclusions of decision G 1/24 can be summarised as follows:

2.1.1 In its letter of 3 July 2025, the respondent inferred from the conclusions of the Enlarged Board of Appeal in case G 1/24 that the extent to which the description and the drawings were to be taken into account when interpreting the claims for the purpose of assessing patentability appeared to be left to the discretion of the deciding body. It further expressed the view that the Enlarged Board substantially confirmed the principle of the "*primacy of the claims*" as the starting point for claim interpretation, thereby confirming that the wording of the claims was of greater importance than the other components of the disclosure. According to the respondent, the first and decisive step in the claim interpretation process thus remained the attempt to assess the meaning of the claim terms "*per se*", i.e. without relying on information which could have been presented in the description. It argued that in the case at hand, it was undisputed that the term "*gathered sheet*", when read in isolation in view of common understanding of a person skilled in the art, denoted a sheet gathered to form a three-

dimensional structure having a width smaller than that of the original sheet and comprising a plurality of folds. Such a sheet did not correspond to a spirally wound tobacco sheet as disclosed in document D1. The respondent acknowledged the Enlarged Board's conclusion that, for the purposes of claim interpretation and assessment of patentability, the description and drawings were always to be consulted. However, it argued that this consultation takes place only in a secondary step and that the requirement to "*consult*" the description and drawings meant merely that they had to be "*considered*". However, such a consideration had always to be undertaken through the eyes of the skilled person who had already read the claims and, in light of common general knowledge, had already formed an initial construction of the terms recited therein in the course of the above-mentioned first interpretation step. The respondent considered that the order of the Enlarged Board in case G 1/24 supported a significantly more subtle approach than simply looking at a single passage of the description. It submitted that, when read in its totality, the description of the contested patent confirmed the narrower meaning of the term "*gathered sheet*" as understood by a skilled person reading claim 1 in isolation in light of common general knowledge. The respondent referred to paragraphs [0003], [0057], [0060] and [0063] to [0066] and Figure 1 of D1, as well as to documents D3, D4 and CH-A-691 156 (cited in the contested patent), all of which allegedly supported the conventional understanding of the term "*gathered sheet*" adopted by the skilled person at the initial stage of claim interpretation. The respondent also argued that an aerosol-forming substrate manufactured as a cylindrically rolled sheet as suggested in D1 and allegedly encompassed by the definition of paragraph [0035] would not solve the technical problem addressed

by the contested patent and would also not make technical sense because it would not be promptly distinguishable, with the risk that the user could mistakenly ignite the aerosol-forming substrate. In its view, these considerations did not support interpreting the term "*gathered sheet*" based on paragraph [0035] to encompass a cylindrically rolled sheet according to D1. The respondent acknowledged that part of paragraph [0035] could lead to a broader interpretation of the term "*gathered sheet*" that deviated from its established meaning. However, it stressed that this passage was isolated from, and only partly inconsistent with, the remainder of the description. For this reason, it argued that the skilled person would realise that their initial understanding of the term "*gathered sheet*", based solely on the wording of the claims, was consistent with the overwhelming part of the description and thus correct, the sole partially contrary teaching being confined to part of paragraph [0035]. The respondent expressed the view that the skilled person, after having considered the description in its entirety as required by the approach set out in the order of the Enlarged Board in case G 1/24, would still rely on the meaning of the term "*gathered sheet*" initially derived from the reading of claim 1 and would therefore disregard - in accordance with the Opposition Division's approach - the isolated and partially contrary statement of paragraph [0035] of the contested patent. Consequently, it concluded that document D1 did not directly and unambiguously disclose a "*gathered sheet*" within the meaning of claim 1 of the patent as granted and therefore that its subject-matter was novel within the meaning of Articles 52(1) and 54 EPC as correctly found by the Opposition Division in the decision under appeal.

2.1.2 In its letter of 11 July 2025, the appellant conversely argued that the view of the respondent that the description and the drawings only needed to be "*considered*" and could thus be ignored in view of the language of the claim was a clear misinterpretation of the order of the Enlarged Board of Appeal in case G 1/24, which clearly indicated that the description and in particular paragraph [0035] could not be disregarded. This passage gave a precise definition of what had to be understood by "*gathered sheet*" in the contested patent. This definition - which following consultation of the description would be adopted by the person skilled in the art when construing claim 1 - made technical sense, did not contradict any established meaning in the art and encompassed the spirally wound tobacco sheet of D1. Therefore, this prior-art document - contrary to the findings of the Opposition Division - was prejudicial to the novelty of the subject-matter of claim 1 as granted.

2.2 The Board considers that to correctly apply the conclusions of the Enlarged Board in case G 1/24 to the current appeal, in particular to the issue of the disputed interpretation of the feature "*gathered sheet*" of claim 1 as granted, it is first necessary to determine what is meant by the expression "*to consult*" as used in the order of the Enlarged Board's decision and its implication on the required interpretation approach.

2.3 The Board sees no reason to assume that the expression "*to consult*" used in the order of the Enlarged Board should be given a meaning different from the expression "to use" found in Article 69 EPC. The term "*consulted*" is used by the referring Board itself in the second question referred to the Enlarged Board and

was also previously widely used in the relevant case law (see e.g. T 400/94, Reasons 3.3.2; T 860/08, Reasons 1.2; T 2284/09, Reasons 2.3; T 1964/10, Reasons 3.2; T 2758/18, Reasons 3.9; T 1735/19, Reasons 2.3; T 2405/19, Reasons 1.3.2). In the context of the referring decision, this term is clearly equivalent to "referred to" (or "taken into account") and is used in connection with the discussion on the application of the principles of Article 69 EPC for claim interpretation (see e.g. points 3.2 and 3.3). The Enlarged Board did not take a different approach, and confirmed in point 18 of G 1/24, according to which *"the description and any drawings are always **referred to** when interpreting the claims, and not just in the case of unclarity or ambiguity"*, that "consulted" in the order has the same meaning as "referred to". The Enlarged Board also stated under point 15 of the Reasons that *"the diverging case law under para 12, point 2) above, where the description is referred to only in cases of unclarity or ambiguity, is contrary to the wording, and hence the principles, of Article 69 EPC. It is also contrary to the practice of the national courts of the EPC states and to the practice of the UPC (see Reasons 4.3 and 4.4.4 of the Referring Decision for a discussion of this national and UPC case law)"*. Finally point 19 of G 1/24 states that *"the Enlarged Board notes that the current case law of the UPC, as exemplified in Headnote 2 of the order of the UPC Court of Appeal of 26 February 2024 in NanoString Technologies -v- 10x Genomics, (as rectified by the order of 11 March 2024), appears to be consistent with the above conclusions"* [the conclusions being those under point 18 mentioned above]. Headnote 2 of the order of the UPC Court of Appeal specifically states that *"the description and the drawings must always be **used** as explanatory aids for the interpretation of the*

patent claim and not only to resolve any ambiguities in the patent claim". Thus, in interpreting the language used in a claim, "consulting", "referring to", "using" and "taking into account" the description and figures are synonyms for the act of deriving the necessary information from the patent as a whole to understand what meaning a person skilled in the art would attribute to the terms used in the claim.

2.4 Furthermore, the Board does not agree with the respondent's assumption that the process of claim interpretation consists of two separate and temporally consecutive steps, namely first reading the claims in isolation and construing their terms in the light of common general knowledge, and then consulting the description and the drawings in order to assess whether this construction is correct or needs to be adapted. Rather, the Board takes the view that claim interpretation is the result of both reading the claims and consulting the description and drawings as a unitary process. This holistic approach follows from the order of the Enlarged Board, according to which if, on the one hand *"the claims are the starting point and the basis for assessing the patentability of an invention under Articles 52 to 57 EPC"*, the interpretation of the claims requires, on the other hand, that *"the description and drawings shall always be consulted when assessing the patentability of an invention under Articles 52 to 57 EPC"*, and is moreover confirmed in point 17 of G 1/24, according to which *"the finding that the language of a claim is clear and unambiguous is an act of interpretation, not a preliminary stage to such an interpretative act"*.

3. The Board therefore now turns to the decisive question of the interpretation of the term *"gathered sheet"* of

claim 1 as granted in light of the order of G 1/24.

- 3.1 The Board agrees with the Opposition Division that a skilled person in the relevant technical field of the tobacco manufacturing industry would understand the term "*gathered sheet*" of claim 1, when read in isolation, as defining a sheet convoluted and folded along lines to occupy a three-dimensional space. It is also common ground between the parties that if this term was read in isolation, claim 1 as granted would be novel over D1.
- 3.2 However, as follows from G 1/24 and explained above, the claim cannot be interpreted in isolation, as done by the Opposition Division, but the description and drawings must be consulted. Certainly, as pointed out in the above-mentioned Headnote 2 of the order of the UPC Court of Appeal of 26 February 2024 in NanoString Technologies -v- 10x Genomics, this does not mean that the patent claim merely serves as a guideline but that its subject-matter also extends to what, after examination of the description and drawings, appears to be the subject-matter for which the patent proprietor seeks protection.
- 3.3 When consulting the description, the skilled person is necessarily confronted with paragraphs [0030] and [0035], which contain definitions of the terms "*sheet*" and "*gathered*" as used in the contested patent: "*As used herein, the term 'sheet' denotes a laminar element having a width and length substantially greater than the thickness thereof*" and "*As used herein, the term 'gathered' denotes that the sheet of tobacco material is convoluted, folded, or otherwise compressed or constricted substantially transversely to the*

cylindrical axis of the rod", respectively.

3.4 The Board has no doubt that a skilled person aiming to correctly determine the subject-matter for which protection is sought and reading the patent specification with a mind willing to understand will attribute considerable weight to any definition of a term used in the claims. Having cross-checked that the claim in itself and in the context of the other claims makes technical sense and is in line with the information presented in other passages of the description, the person skilled in the art will have no reason to disregard such definitions and to give the defined terms a different meaning in the claim. This appears to be why the Enlarged Board saw the answer to question 3 (*"May a definition or similar information on a term used in the claims which is explicitly given in the description be disregarded when interpreting the claims to assess patentability and, if so, under what conditions?"*) to be encompassed by the answer given to question 2 which is in essence: *"The description and drawings shall always be consulted to interpret the claims when assessing the patentability of an invention under Articles 52 to 57 EPC"* (see the order of G 1/24 and Reasons 1 and 21).

3.5 The Board sees no reason why the skilled person would be prompted to disregard the definitions for the terms *"gathered"* and *"sheet"* in the case at hand. The fact that the interpretation of the term *"gathered sheet"* when read in isolation would lead to a different result compared to when read in the patent specification, especially regarding the definitions in paragraphs [0030] and [0035], is not sufficient to allow for this conclusion.

- 3.5.1 The fact that the patent defines this term in the description is a clear indication that, at least for the patent proprietor when drafting the application, "*gathered sheet*" did not have a meaning that is so commonly accepted and well established that each further explanation would be superfluous.
- 3.5.2 The definition of "*gathered*" given in paragraph [0035] does not contradict but rather encompasses the commonly accepted meaning of the term "*gathered sheet*", namely a sheet that is folded and convoluted to occupy a three-dimensional space. The definition is simply not restricted to folded sheets but includes other forms of transverse constrictions of the extension of a sheet.
- 3.5.3 Contrary to the allegation of the respondent, no inconsistencies arise between the definition of "*gathered*" of paragraph [0035] and other passages of the description or of the content of the prior-art documents cited by the respondent. The Board observes that the manufacturing method disclosed in paragraphs [0063] to [0065] in conjunction with Figure 1 of the contested patent only represents a possible way to obtain a gathered sheet. However, in view of its exemplary character, this embodiment does not rule out other possibilities and does not justify disregarding the broader definition of "*gathered sheet*" of paragraph [0035] of the contested patent.
- 3.5.4 Finally, the mere allegation of the respondent that an interpretation of the term "*gathered*" according to paragraph [0035] encompassing also a rolled tobacco sheet as disclosed in D1 should be ruled out for functional reasons is not convincing. In accordance with the reply of the appellant, the Board cannot see why the use of a rolled tobacco sheet according to D1

would prevent the manufacture of a heated aerosol-generating article that has a lowered propensity for flame ignition. Also, the risk mentioned by the respondent that the user may mistakenly ignite the aerosol-forming substrate is considered speculative.

- 3.6 When reading the definition of paragraph [0035], the person skilled in the art realises that the *"gathered sheet"* recited in feature (c) of claim 1 can also be embodied as a tobacco sheet *"which has been convoluted, folded or otherwise compressed or constricted substantially transversely to the cylindrical axis of the rod"*. As explained above, it is uncontested that D1 discloses in Figure 1 an aerosol-generating article in the form of a roll (20) which comprises a tobacco sheet (21) which *"may be wound as a single or multiple layers. In this case, only the tobacco sheet (21) may be spirally wound or a laminate of the tobacco sheet (21) and aluminum foil may be spirally wound"* (see paragraph [0018]). The Board concurs with the appellant that winding a sheet to form a cylinder presupposes a form of compression or constriction since the dimensions of the sheet are reduced in the compression direction. When the tobacco sheet (21) of D1 is spirally wound to form a cylinder, it is also compressed or constricted substantially transversely to the cylindrical axis of the obtained rod. The winding results in particular in folding of the sheet in a tangential direction relative to the (circular) cross-section of the aerosol-generating article and hence transversely to its cylindrical axis. Moreover, as demonstrated by the appellant (see extracts of Oxford Dictionary on pages 9 and 10 of the statement of grounds of appeal), one of the technical meanings of *"convoluted"* is coiled, i.e. spirally wound. The wound

tobacco sheet (21) of the aerosol generating article of D1 thus equates to the gathered sheet recited in feature (c) of claim 1 when this term is correctly interpreted according to paragraph [0035] of the description.

- 3.7 In conclusion and contrary to the findings of the Opposition Division in the decision under appeal, the subject-matter of claim 1 lacks novelty over the content of document D1.

Auxiliary Request

Admissibility of the auxiliary request

4. The sole auxiliary request on file was submitted by the respondent with the letter dated 3 July 2025 in response to the conclusions of the Enlarged Board of Appeal in case G 1/24. The sole amendment is the deletion of paragraph [0035] from the description. The claims remained unchanged. The appellant requested that this request not be admitted for being late filed.
- 4.1 The submissions of the parties regarding the question of the admittance of the auxiliary request into the appeal proceedings can be summarised as follows:
- 4.1.1 The appellant essentially argued that the submission of the auxiliary request resulted in an amendment to the respondent's appeal case at a very late stage of the appeal proceedings without any justifying circumstances. In the appellant's view, the request could and should have been filed during the opposition proceedings or, at the latest, in response to the appeal since the question of the claim interpretation in light of the description was already the central

issue under discussion. The respondent could and should have thus anticipated an adverse outcome in view of the diverging case law. The appellant put forward that the referral to the Enlarged Board of Appeal could not justify the failure to present a complete case at an earlier stage. Moreover, the appellant submitted that the requirements of Article 13(1) RPBA 2020 were not met because the auxiliary request did not *prima facie* overcome the objections raised and instead gave rise to new issues, thus being prejudicial to procedural economy.

- 4.1.2 The respondent conversely expressed the view that the submission of the auxiliary request in which the only amendment was the foreseeable deletion of a paragraph of the description did not represent an amendment to its appeal case. Accordingly, no discretion was required from the Board to admit this request into the appeal proceedings. In any event, it argued that the auxiliary request should be admitted under Article 13(2) RPBA 2020 because the referral to, and the subsequent conclusions of, the Enlarged Board of Appeal regarding claim interpretation constituted an exceptional procedural situation. Only after the Enlarged Board's order was known did it become apparent that an amendment to the description might be required. The respondent pointed out that the auxiliary request was filed at the earliest possible opportunity after publication of the Enlarged Board's decision and was therefore not detrimental to procedural efficiency. It put forward that it was not possible to file a meaningful auxiliary request before being aware of the the Enlarged Board of Appeal's conclusion. Finally, the respondent expressed the view that the auxiliary request did not cause any procedural disadvantage for the opponent as the amendment placed it in the same

position as it would have been had the Board followed the established approach adopted by the Opposition Division, i.e. decided to disregard an interpretation of the term "*gathered sheet*" based on paragraph [0035] of the contested patent.

- 4.2 The Board notes that the auxiliary request was filed by the respondent before notification of the Board's communication pursuant to Article 15(1) RPBA 2020 dated 30 July 2025 in preparation for the second oral proceedings, but after notification of the Board's communication dated 5 December 2023 in preparation for the first oral proceedings. It constitutes, irrespective of its substantive content, an amendment to the respondent's appeal case within the meaning of Article 13 RPBA 2020. Assuming that the strict requirements of Article 13(2) RPBA apply in the current case, the Board considers that the referral to, and the subsequent decision of, the Enlarged Board of Appeal in case G 1/24 constitute exceptional circumstances within the meaning of Article 13(2) RPBA 2020. The referral was necessitated by diverging case law on the interpretation of claims in light of the description, an issue which was central to the appeal and which the Board itself was unable to resolve without guidance from the Enlarged Board. In the Board's view, the respondent could not have reasonably been expected to file a meaningful auxiliary request prior to the Enlarged Board's decision, since the legal framework governing claim interpretation had not yet been clarified. The Board also notes that the auxiliary request was filed at the earliest possible opportunity, namely shortly after notification of the decision of the Enlarged Board of Appeal and appeared to be a simple, straightforward attempt to overcome the issues

at stake.

- 4.3 For these reasons, the Board, in the exercise of its discretion pursuant to Article 13 RPBA, decided to admit the auxiliary request into the appeal proceedings.

Article 123(3) EPC

5. At the oral proceedings the appellant raised, *inter alia*, an objection under Article 123(3) EPC against claim 1.

Admissibility of the objection under Article 123(3) EPC

- 5.1 The respondent requested that the late-filed objection not be admitted pursuant to Article 13(2) RPBA. It pointed out that the auxiliary request had been filed more than five months prior to the oral proceedings and that since the amendment consisted solely in the deletion of paragraph [0035] of the description of the contested patent, it was neither complex nor unexpected. Consequently, in the respondent's view, there was no justification for raising this objection for the first time at the very latest stage of the appeal proceedings.
- 5.2 The Board notes that the objection under Article 123(3) EPC was raised for the first time at the oral proceedings and hence after issue of the communication pursuant to Article 15(1) RPBA dated 30 July 2025. Therefore it constitutes an amendment to the appellant's case within the meaning of Article 13(2) RPBA. Its admittance into the appeal proceedings is thus subject to the discretion of the Board and to the existence of exceptional circumstances, which must be

justified with cogent reasons. In the case at hand, the Board considers that such exceptional circumstances are present. Although the auxiliary request was filed on 4 July 2025 soon after notification of the decision of the Enlarged Board of Appeal, its admission was discussed and decided upon only at the oral proceedings. The objection under Article 123(3) EPC arose directly from the amendment made by the auxiliary request, namely the deletion of paragraph [0035] of the description of the contested patent, which affected the interpretation of the term "*gathered sheet*" in claim 1. The Board further notes that, in the letter dated 11 July 2025 filed shortly after the submission of the auxiliary request, the appellant not only objected to a further oral proceedings taking place and to the admission of the auxiliary request under Article 13(1) RPBA, but also expressed its intention to raise objections, in particular of added subject-matter and requested the opportunity to substantiate them should the auxiliary request be admitted by the Board. Under these circumstances, the Board considered that raising and substantiating the objection under Article 123(3) EPC at the oral proceedings was justified.

- 5.3 For these reasons, the Board, in the exercise of its discretion pursuant to Article 13(2) RPBA, decided to admit the objection under Article 123(3) EPC into the appeal proceedings.

Assessment of the objection under Article 123(3) EPC

- 5.4 The auxiliary request does not comply with the requirements of Article 123(3) EPC.
- 5.5 The appellant submitted that the deletion of paragraph [0035] from the description of the contested patent

altered the interpretation of the term "*gathered sheet*" in claim 1 and, consequently, the scope of the protection conferred. It was argued that, in the absence of the broader definition provided in paragraph [0035], the term "*gathered sheet*" no longer encompassed a gathered tobacco sheet that is "*compressed or constricted substantially transversely to the cylindrical axis of the rod*" of the claimed aerosol-forming article. As a result, the scope of protection conferred by claim 1 was extended compared with that of claim 1 as granted, contrary to the requirements of Article 123(3) EPC.

- 5.6 The respondent replied that it was implicit from the wording of claim 1, when read by a person skilled in the art in the light of common general knowledge, that the claimed aerosol-forming article was rod-shaped, with it being implicit that the gathered sheet was compressed or constricted substantially transversely to the cylindrical axis of the rod. In the respondent's view, this geometry was inherent in the common understanding of the term "*aerosol-forming article*", even in the absence of paragraph [0035].
6. The Board is not persuaded by the respondent's arguments.

Claim 1 contains neither explicit nor implicit features that necessarily limited the claimed aerosol-forming article to a rod-shaped configuration or, as a consequence, required the tobacco sheet to be gathered by being compressed or constricted substantially transversely to the cylindrical axis of a rod. In the absence of the definition formerly provided in paragraph [0035], claim 1 also encompasses aerosol-forming articles that are not rod-shaped, i.e. not

substantially elongated in one direction and, if they are, sheets that are folded and gathered not substantially transversely to but along the cylindrical axis of the rod, like a bellows, thus extending the scope of protection compared with claim 1 of the main request.

In line with the Enlarged Board of Appeal's holistic approach to claim interpretation in decision G 1/24, Reasons 12 and 17 (see point 2.4 above), a person skilled in the art reading the claim in the context of the description and figures will try to take a definition found in the description at face value. As long as the definition is technically reasonable and complies with the overall teaching expressed in the claims, description and figures, the skilled person will read the terms in the claim in the sense of the definition, taking into account both the broadening and limiting aspects found in that definition. It is therefore not permissible to consider only the broadening aspects contained in a definition and disregard any limiting aspects. As set out by the Enlarged Board in G 1/24, Reasons 20, Article 84 EPC may require that limiting or broadening aspects are expressed in the claim to avoid any unclarity, but a granted claim has to be read in light of all aspects of a definition found in the description.

7. For the reasons above, the auxiliary request does not comply with the requirement of Article 123(3) EPC, and is therefore not allowable.

Request for apportionment of costs

8. The appellant requested an apportionment of costs pursuant to Article 104(1) EPC and Article 16 RPBA,

submitting that the second oral proceedings were unnecessary and had given rise to avoidable costs.

8.1 The Board does not agree.

The second oral proceedings were necessary in view of the referral to and the decision of the Enlarged Board of Appeal in case G 1/24, which clarified the legal and factual framework for interpreting the claims in light of the description. In the Board's view, both parties were entitled to orally defend for a second time their positions on the issues under discussion, namely, the patentability of the main request and the admissibility and allowability of the auxiliary request in light of the Enlarged Board's conclusions. Accordingly, the Board considers that holding the second oral proceedings was justified by the new procedural developments and required in order to ensure that the parties' right to be heard was duly respected.

8.2 For these reasons, there is no justification for an apportionment of costs, and the request of the appellant has to be rejected.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for apportionment of costs is rejected.

The Registrar:

The Chairman:



M. Schalow

G. Pricolo

Decision electronically authenticated