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**Datasheet for the decision
of 4 February 2025**

Case Number: T 1514 / 22 - 3.2.04

Application Number: 17174102.8

Publication Number: 3248483

IPC: A24F40/46

Language of the proceedings: EN

Title of invention:

AN ELECTRICALLY HEATED SMOKING SYSTEM WITH IMPROVED HEATER

Patent Proprietor:

Philip Morris Products S.A.

Opponents:

Nicoventures Trading Limited
JT International S.A.

Headword:

Relevant legal provisions:

EPC 1973 Art. 56, 76(1)

RPBA 2020 Art. 13(2)

Keyword:

Amendment after summons - Exceptional circumstances (yes)
Inventive step - Main request (yes) - Auxiliary requests (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1514/22 - 3.2.04

D E C I S I O N of Technical Board of Appeal 3.2.04 of 4 February 2025

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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
24 May 2022 concerning maintenance of the
European Patent No. 3248483 in amended form.

Composition of the Board:

Chairman A. Pieracci

Members: S. Oechsner de Coninck
K. Kerber-Zubrzycka

Summary of Facts and Submissions

- I. The opponent 2 and the proprietor both appeal against the decision of the Opposition Division of the European Patent Office to maintain the European Patent No. 3248483 in amended form.
- II. The Opposition Division held that the patent and the invention to which it related according to auxiliary request 1 met the requirements of the EPC, having regard in particular to the following documents:

D1: WO 95/27412 A -
D2: US 5 322 075
D3: WO98/23171 A
D14: "A Summary of Findings and Recommendations for the Flexible Heater", posted 5 June 1998
- III. In a communication in preparation for oral proceedings the Board gave a provisional opinion on the relevant issues.
- IV. By letter of 13 November 2024, the opponent 1 party as of right withdrew its appeal and declared its intention not to attend the oral proceedings.
- V. Oral proceedings were held on 4 February 2025 per videoconference.
- VI. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained on the basis of a main request or alternatively on the basis of the auxiliary request 1a submitted in oral proceedings on 4 February 2025 before the Board of appeal.

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

VII. The independent claim 1 according to the relevant requests read as follows (features numbering and amendments added by the Board) :

Main Request (with feature numbering added by the Board) :

- 1a) "An electrically heated smoking system for receiving an aerosol-forming substrate (407), the system comprising:
- 1b) at least one heater for heating the aerosol-forming substrate to form an aerosol, and
- 1c) a power supply for supplying power to the at least one heater,
- 1d) wherein the at least one heater comprises one or more electrically conductive tracks (203) on an electrically insulating substrate (201),
- 1e) wherein the electrically insulating substrate (201) is formed from polyimide 1f) and is tubular,
- 1g) and further comprising a thermally insulating material (507) for insulating the at least one heater,
- 1h) wherein the thermally insulating material comprises a metal.

Auxiliary request 1a

Claim 1 adds to granted claim 1 according to the main request the following features:

1a') *"a housing for receiving the aerosol forming substrate;"*
1i) *"and wherein the housing is designed to be grasped by a user and houses the at least one heater, the thermally insulating material, and the power supply"*, feature 1g is furthermore amended to specify that the thermally insulating material is provided as *"a separate element."*

VIII. The appellant-opponent 2 argues as follows:

- The subject-matter of claim 1 of the main request lacks an inventive step starting from D1 with the teaching of either D2 or D14.
- The subject-matter of claim 1 of the auxiliary request 1a lacks an inventive step starting from either D1 or D3.
- Auxiliary request 1a should not be admitted and contains added subject-matter.

IX. The appellant-proprietor argues as follows:

- The subject-matter of claim 1 of the main request involves an inventive step starting from D1 with the teaching of either D2 or D14.
- The subject-matter of claim 1 of the auxiliary request 1a involves an inventive step starting from either D1 or D3.
- Auxiliary request 1a should be admitted and does not contain added subject-matter.

Reasons for the Decision

1. Main request - inventive step
- 1.1 The opposition division decided that the subject-matter of claim 1 of the main request lacks an inventive step in view of D1 with the teaching of either D2 or D14. This negative conclusion is confirmed by the Board.
- 1.2 D1 discloses an electrically heated smoking system for receiving an aerosol forming substrate (feature 1a) with at least one heater in form of heating elements in the front housing portion 33, page 11, paragraph 2 (feature 1b) receiving power from a power supply 37, page 11, last paragraph (feature 1c).
- 1.3 The appellant proprietor disputes the opposition division's findings that D1 discloses conductive tracks 122 on a substrate 310 in the sense of feature 1d. In particular it is submitted that 1d should be understood as a plurality of conductive path like patterns on a common supporting sheet structure.
- 1.4 The Board disagrees with this narrow interpretation of the electric conductive tracks on an electrically insulating substrate. As consistently applied by the Boards, terms used in patent documents should be given their normal meaning in the relevant art, unless the description gives them a special meaning see Case Law of the Boards of Appeal (CLBA), 10th edition, 2022 II.A.6.3.3.
- 1.4.1 Contrary to the appellant-proprietor's opinion, both the terms "track" and "substrate" have a clear understandable meaning, and thus do not need to take

the description into account for interpreting them. This is especially so, as the description of the patent does not confer or suggest any other different meaning of these terms, as correctly observed by the appellant-opponent 2.

1.4.2 Using such normal meaning of the terms tracks and substrate in the electrical field, page 44, paragraph 2 of D1 clearly discloses at least one electrically conductive track on a substrate according to feature 1d. Indeed this passage discloses the fabrication technique for the arrangement of heaters shown in figure 11 before it is rolled, and thus becomes tubular according to feature 1f. This fabrication includes forming blades 120 from a metal sheet 300 by application of a first ceramic layer 310 and then to apply resistive heat elements 122 for example by screen printing. Thus at least one of these heat elements is conductive and in form of an elongated path, corresponding to the normal understanding of the term track. Furthermore, they are also laid on an underlying "thing which underlies or forms the basis of" (e.g. OED Oxford English Dictionary Online, definition 1). This fabrication technique for the arrangement of heaters corresponds to the step of depositing ceramic layer and heaters layers (2) or (3) explained on page 27 and common to both embodiments. The appellant proprietor in particular relies on the laser cutting (2) of the second embodiment on the same page to submit that the heating elements need to be individually formed, contrary to the patent, however the claim is not limited by the tracks being formed together.

1.4.3 Thus the Board concludes that D1 also discloses feature 1d, contrary to the appellant-proprietor's opinion.

1.5 It is otherwise not disputed that D1 fails to disclose that the substrate is made of polyimide according to feature 1e. Since however this is the sole distinguishing feature, the proprietor's argument that the technical problem need to be derived from the technical effects provided by both features 1d and 1e and their synergy cannot be followed either.

1.6 Rather for polyimide as an insulating material, the patent does not offer any particular advantage. Indeed paragraph 031 of the patent merely quotes numerous materials for the electrically insulating substrate, amongst them polyimide is not associated with particular advantage. Only in the second embodiment disclosed in paragraphs 035 and 058 is polyimide referred to as a preferred material, however without mention of any further advantage.

1.7 Therefore the Board agrees with the formulation of the objective technical problem identified in item 31 of the decision to provide an alternative material for the electrically insulating substrate.

1.8 In solving this problem, the skilled person will already consider other insulating materials in particular considering the teaching given in its starting document D1 that explains in the last paragraph on page 25 that "any appropriate electrical insulator can be employed such as...." In this context "appropriate" is a clear pointer for the skilled person to seek other suitable materials.

1.8.1 Selecting another material may possibly require to adapt boundaries of the operating conditions, such as temperature or electrical current boundaries of a

heating device. This however does not involve changing the nature or fundamental operation of the device disclosed in D1 used as starting point, and thus would not deter the skilled person from considering other possible electrically insulating material. For this reason, the argument of the appellant-proprietor relying on the consequence of choosing a certain starting point by reference to case law, CLBA I.D.3.6 fails to convince the Board.

- 1.8.2 Selecting material properties such as temperature resistance, coefficient of expansion and dielectric constant suitable for use in certain operating conditions and making compromise and trade off to best match a particular application is exactly what a skilled person is expected to do in its daily workshop practise, if necessary using trial and error practise.
- 1.8.3 The appellant-proprietor emphasizes in particular, that the operating temperatures mentioned in D1 would render the use of polyimide unsuitable as a substrate. The Board however agrees with the appellant-opponent 2 that the ability of the heater to convey a certain range of temperature between 200°C and 900°C explained in the last paragraph of page 47, does not require operation in the highest part of the range, especially, as the disclosed range starts at 200°C, and the mid-range thus lies in conventional temperatures that polyimide may support. As explained above, adjusting if need be the operating condition of the heater to the kind of electrical conductor and substrate is workshop practise as it merely implies adjusting the electrical current fed to the resistive track.

1.8.4 The further reference to high dielectric constant of the material used in D1 on which the appellant proprietor relies, does not appear to limit the ceramic used, especially because this ceramic is just mentioned as "preferably" having a high dielectric constant. Thus no teaching away can be recognised in that context.

1.9 In seeking a suitable alternative electrically insulating material as substrate the skilled person would turn to either D2 or D14, both hinting at the use of polyimide.

1.9.1 D2 discloses a heater for an electric flavor generating article. Several non-conductive heat resistant materials including polyamide polymers, especially Upilex and Kapton are contemplated that may be used with high temperatures above 500°C, column 4, lines 21-35.

1.9.2 D14 also explicitly teaches Kapton to be used as flexible insulating substrate for flexible heater amongst the thermoplastic polymers usable in high temperature environment, even up to 900°C, page 4, paragraph 4.

1.9.3 Thus the Board considers, as the opposition division did, that the skilled person would seriously consider polyimide as -further- alternative to the list of insulating material applicable to the heater of D1. Hence the Board confirms the conclusion of lack of an inventive step starting from D1 explained in the impugned decision.

2. Auxiliary request 1a

Auxiliary request 1a corresponds to auxiliary request 1 in opposition proceedings which has been found by the opposition division to meet the requirements of the EPC and it differs from the latter only in that the dependency of claim 6 has been amended.

3. Auxiliary request 1a - admission

3.1 During oral proceedings the appellant-proprietor filed new auxiliary request 1a to overcome the sole outstanding issue of added subject-matter for auxiliary request 1. This request only amends the dependency of claim 6.

3.2 According to Art 13(2) RPBA any amendment to a party's appeal 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.

3.3 The appellant-proprietor justifies the filing of this new request by the fact that it solves all issues raised against auxiliary request 1, and is thus not detrimental to procedural economy.

3.4 The Board considers that it is indeed faced with an exceptional circumstance from the fact that the amendment concerns a simple correction of the dependency of a claim. This, as can be seen from the following paragraphs, solves all outstanding issues, and does not raise new issues to be considered at this very advanced stage reached in the proceedings. This straightforward amendment of dependency simplifies the proceedings and amounts to exceptional circumstances

within the meaning of Art. 13(2) RPBA 2020 (see also CLBA, 10th edition 2020, V.A.4.5.5.g) and j). These circumstances are decisive for the Board's exercise of its discretion.

3.5 In view of the exceptional circumstances of this case as outlined above, in the sense of Art 13(2) RPBA, the Board decided to admit auxiliary request 1a into the proceedings.

4. Auxiliary request 1a - inventive step

4.1 Claim 1 of this request is as upheld and adds to claim 1 according to the main request feature 1a': "a housing for receiving the aerosol forming substrate;" and 1i: "and wherein the housing is designed to be grasped by a user and houses the at least one heater, the thermally insulating material, and the power supply." Feature 1g is furthermore amended to specify that the thermally insulating material is provided as a separate element.

4.2 The subject-matter of claim 1 of auxiliary request 1a in addition to the substrate being made of polyimide, feature 1e, at least further differs from D1 in that the housing defined in feature 1a' houses the thermally insulating material as a separate element as further defined in features 1g and 1i. The opponent argues that the technical effect provided by the added feature is not linked to that provided by the substrate being made of polyimide and thus has to be considered separately for the issue of inventive step.

4.2.1 As explained in paragraph 016 of the patent, the thermally insulating material reduces heat loss from the heater and protects the user that grasps the housing. According to the opposition division, as

indicated in item 49 of the impugned decision, and also submitted by the appellant proprietor in point 89 of their reply dated 16 February 2023, the objective technical problem can be formulated as to improve heating efficiency.

This is contested by the opponent arguing that the technical effect provided by the thermally insulating material being provided as a separate element is only to provide the thermally insulating function in an alternative way.

4.2.2 The appellant-opponent 2 in particular contests that this technical effect can be derived from the patent, that does not disclose any associated effect by providing a separate heat insulation in paragraph 017 of the patent. In addition a particular location for the separate heater is not defined in claim 1, thus lacking any influence on the location of heat.

4.2.3 Independently of the correctness of the objective technical problem formulated by the opposition division and assuming that the formulation provided by the opponent is correct, the first question is whether the skilled person when looking for an alternative way for providing the insulating function would have been incited to deviate from the configuration disclosed in D1 with barrier blades 220 interposed between heater blades 120 that act as heat sink during operation of the heater, and confine the heat close to the heater blades 120, page 37, paragraph 2. In the Board's view the skilled person would fail to find any real incentive to modify such a configuration that provides suitable heat protection using different means.

4.3 The appellant-opponent 2 in particular relies on the teaching of D3 to suggest the use of a separate metallic thermal insulation of the heating arrangement disclosed in D1. However independently from the issue of whether the opposition division correctly formulated the objective technical problem, the Board remains unconvinced by the argument of the opponent.

4.3.1 D3 in the embodiment of Figure 9A discloses an intermediate tube 215A between inner and outer sleeves 84 of the lighter housing on page 28, first paragraph made of reflective metallic coating. However this tube is located on the lighter housing and used for cleaning cycle purposes, sentence bridging pages 27 to 28. It remains unclear how and why this teaching would lead the skilled person to modify the arrangement of D1 when looking for an alternative way for providing the insulating function, since this is not addressed in D3. .

4.3.2 The appellant-opponent 2 further argues that the space shown in figure 1 of D1 would be suitable to adapt the tube 215A of D3, either to replace the outer sleeve 39 or to adapt in the housing as further optional cleaner. This would be especially considered because claim 1 is neither limited to a particular type of heating and thus includes flash heating disclosed in D1, nor does it exclude the provision of an additional cleaning component.

4.3.3 The Board is however not convinced by such further argument. As correctly identified by the appellant-proprietor in particular in relation to paragraphs 1 on page 37, the heater of D1 operates by pulsing a heater blade. Such an operation involves very short periods of times with relatively lower heat emission away from the

substrate area, therefore rendering any additional reflection of heat of little relevance to further concentrate heat on the substrate or to avoid heating the housing with heat originating from different spread heating sources.

Even if the space provided in D1 allows the provision of an additional cleaning device as disclosed in D3, the Board also fails to recognise any particular reason for considering such an additional function or device because it remains irrelevant for the skilled person also when looking for an alternative way for providing the insulating function. Considering such a modification rather appears artificial, therefore based on hindsight as submitted by the appellant-proprietor.

4.4 The further reasoning suggested by the appellant-opponent 2 using D3 as an alternative starting point also fails to convince the Board.

4.4.1 D3 does not disclose any detailed structure for the heater blades 120, especially no tracks on a substrate according to feature 1d. Although in the last paragraph of page 19, D3 may indeed refer to D5 or D6 as disclosing possible heater structures, these are merely cited amongst other possibilities. Whether mentioned as incorporated by reference or not, a first modification step would require the skilled person to choose and select D5 or D6 amongst the at least three different documents cited in chapter G of D3. Even seeking alternative heaters as suggested by the appellant-opponent 2, such selection would not be related to any particular advantage, thus rendering such selection arbitrary.

4.4.2 The further step required to arrive at a substrate made of polyimide appears as a further arbitrary modification step. It is indeed unclear why the skilled person once having selected the heater structure of D5 and D6 with a certain insulating material, would in addition actively seek an alternative thereby also contemplating to replacing the material for electrical insulation. Thus the two modification steps of the metallic heater blades disclosed in D3 would not be seen straightforward and fails to convince the Board.

4.5 It follows from the above that the opposition division did not err in finding the subject-matter of claim 1 according to auxiliary request 1a to involve an inventive step.

5. Auxiliary request 1a - added subject-matter

5.1 The question of added subject-matter concerns the following amendments:

The addition that the electrically insulating substrate is tubular (in feature 1f), the unallowable selection of only some items in isolation to be located within the housing (in feature 1i), that the thermally insulating element is provided as a separate element (in feature 1g), and that the thermally insulating material comprises metal (feature 1h).

5.1.1 The specification that the electrically insulating material is tubular without mention that the electrically conductive tracks are either inside or outside the tube cannot be seen as an unallowable extension as these correspond to the sole possible alternative location of the electric tracks inside or outside when provided on a substrate that is made

tubular, this common geometry being equally applicable to either aspect of the parent application and already defined in claims 5 and 6 of the published parent application EP2850956A1, on which the parties rely, and identical for all relevant passages as WO2011050964, grand parent application.

The appellant-opponent 2 considers that the tubular nature of the heater was not disclosed in isolation in any of the paragraphs, 024, 025 or 061 of the parent application as filed, but instead closely related to the provision of the tracks on one side and in direct contact with the aerosol forming substrate.

The Board however disagrees. In paragraph 061 of the parent application both alternatives only depend from the way the insulating substrate is rolled with sole consequence that the conductive tracks are either outside or inside the tubular form obtained.

The possible optional use as external or internal heater expressed by the expression "may function" in lines 9 and 14 of paragraph 061 merely appears as a possible consequence of rolling the substrate in one way or the other, without intrinsically requiring the direct contact with the aerosol forming substrate on which the appellant-opponent relies. This is especially so as any such direct contact with the heater occurs when it is combined with the aerosol forming substrate, which however does not form part of the heated system defined in claim 1. Therefore the Board finds that the skilled person would not consider the tubular character intrinsically related to the location of the tracks thereon.

5.1.2 The next question is whether the thermally insulating material provided as a separate element was intrinsically related to other features that have been omitted. A relevant passage in the parent application can be found in paragraph 015. The last sentence considers an alternative provision of thermally insulating material as a separate element without any mention of additional intrinsically related features. This last statement is thus presented as stand alone simple alternative with respect to the "non-separate" alternative described in more details in paragraph 015. The fact that the introduction of paragraph 015 refers to cavities does not introduce such an inextricable link because the cavities are mentioned as purely optional "preferably". The appellant-opponent 2 also considers that the disclosure of the housing in paragraph 048 fails to identify the thermally insulating material amongst the component that it may optionally house. However, the requirement in feature 1g that the thermally insulating material has the purpose to insulate the heater, wherever the heater is located in the housing, so that the thermally insulating material is directly and unambiguously enclosed within the housing as a consequence.

5.1.3 The Board is not convinced by the arguments of the appellant-opponent 2 that claim 1 contains added subject-matter in view of a multiple selections amongst several possibilities, in particular leading to the selection of the second of the first and second aspects a combination of the features "polyimide", "tubular" and any "metal" in general. Pursuing a first choice between the two aspects disclosed in the application does not imply a selection causing *per se* subject-matter to be added, the additional choice of further options for the three main components already defined

in claim 1 of the application as filed does not represent multiple selections amongst two lists -or more- in the sense of the case law, see CLBA, II.E. 1.6.2, on which the appellant-opponent 2 relies.

Instead the Board considers that no new combination arises from choosing metal as generic type of thermally insulating material explained to be particularly advantageous in the last sentence of paragraph 014, further providing it as a separate element amongst a simple alternative "separate" or "non-separate" disclosed in paragraph 015, both independent and equally applicable options to both aspects of the original disclosure. Finally providing the tubular configuration, appears as the main configuration for the substrate considered in the parent application for both aspects of the invention in paragraphs 024 and 025.

Rather than operating multiple selections amongst several lists, the Board considers that the skilled person is presented with a device comprising the same core elements, the conductive tracks on a substrate and a thermally insulating material, for which a realisation implying further specification of one amongst two disclosed equivalent alternatives has been provided. No new subject-matter or combination of features arises from such concretisation of several simple disclosed options.

5.1.4 As concerns the further objections of added subject-matter submitted in writing, in its communication in preparation to the oral proceedings, the Board expressed its provisional opinion for auxiliary request 1 as follows (see points 5.2.1, 5.2.4 and 5.2.6):

"5.2.1 As concerns the provision of other components within the housing that are not defined in the added feature 1i of claim 1, the Board observes that paragraph 048 of the parent application as filed is unspecific as concerns the further components "required for the system" and merely quotes the electronic circuitry as an example of these further components. Thus no inextricable relationship can be recognised from this mention of an unspecific "electronic circuitry" that has been omitted from the context of paragraph 048."

"5.2.4 The further definition in feature 1h that the thermally insulating material comprises metal also appears to lack any inextricable relationship with the heat reflection. Paragraph 014 of the parent application explicitly considers the preferred use of a metal for the thermally insulating material without any further component or feature, therefore as a stand alone optional material for the insulating material. In particular the further explanation in the last sentence of paragraph 014 that the metal may reflect heat is understood as a further advantage with respect to the other non-combustible material mentioned as further materials."

"5.2.6 The other objections in relation to the dependent claims appear as repetition from the opposition procedure rather than explanation why the opposition division erred in their conclusion that they do not add subject-matter."

The appellant opponent 2 at the oral proceedings expressly referred to their written submissions. Absent any further comment, the Board, after having reconsidered all the relevant legal and factual aspects of the case, sees no reason to change its provisional view that these additional amendments do not add subject-matter.

5.1.5 It follows from the above that the Board confirms the positive findings on added subject-matter made in the impugned decision.

6. Auxiliary request 1a - Clarity - Sufficiency

6.1 In relation to these questions the Board has expressed its preliminary opinion under point 5.1 of its communication pursuant to article 15(1) RPBA for auxiliary request 1 as follows:

"The provision of the thermally insulating material as a separate element in feature 1g corresponds to the same limitation expressed in granted claim 14 and is thus not open to review under G3/14.

The feature that the housing may be grasped by a user is broad but can be easily put into practice within the context of a hand held device such as an E-cigarette.

The sufficiency objections concern the disclosure on how the electric tracks could be provided on the substrate. There the Board agrees with item 42 of the decision stating that the patent discloses several examples of arrangements of the electrically conductive tracks on the electrically insulating substrate in Figures 1d(i)-(iii), 2(i)-(iii), 3f, 4 and 5a. With regard to some embodiments falling within the scope of claim 1 but not explicitly disclosed such as tracks on

the outside for use as internal heater, the Board notes that the skilled person would automatically exclude such embodiments where the aerosol cannot be heated properly as technically not realistic and these would thus not prevent the skilled person from putting into practice the claimed invention."

- 6.2 The appellant-opponent 2 at the oral proceedings relied on their written submissions. Absent any further comment, the Board, after having reconsidered all the relevant factual and legal issues of the case, sees no reason to change its provisional view that the decision's findings on clarity and sufficiency is correct.
7. No other objections have been raised against the auxiliary request 1a. Thus the patent as amended according to the claims of the auxiliary request 1a and the invention to which it relates, meet the requirements of the EPC, and the patent can be maintained in this amended form, Art 101(3) (a) 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 as amended in the following version:**

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Description:

Paragraphs 1-16, 18-48, 50-82 of the patent specification

Paragraphs 17, 49 filed during oral proceedings before the opposition division on 15 February 2022

Claims:

No. 1 to 13 according to auxiliary request 1a filed during oral proceedings before the Board of appeal on 4 February 2025

Drawings:

Sheets 1/4 to 4/4 of the patent specification

The Registrar:

G. Magouliotis

The Chairman:

A. Pieracci



Decision electronically authenticated