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Datasheet for the decision of 27 August 2024

Case Number: T 1930/22 - 3.2.07

Application Number: 16787758.8

Publication Number: 3368429

IPC: B65D5/50, B65D85/10, B65D5/355

Language of the proceedings: EN

Title of invention:
PACKET FOR SMOKING ARTICLES

Patent Proprietor:
I.M.A. Industria Macchine Automatiche S.p.A.

Opponent:
Focke & Co. (GmbH & Co. KG)

Headword:

Relevant legal provisions:
EPC Art. 100(a), 54

Keyword:
Novelty - (no)

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Decisions cited:

Catchword:

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Case Number: T 1930/22 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 27 August 2024

Appellant: (Patent Proprietor)	I.M.A. Industria Macchine Automatiche S.p.A. Via Emilia 428-442 40064 Ozzano Dell Emilia (Bologna) (IT)
Representative:	Paglia, Pietro Intellectual Property Department I.M.A. Industria Macchine Automatiche S.p.A. Via Emilia 428-442 40064 Ozzano dell'Emilia (BO) (IT)
Respondent: (Opponent)	Focke & Co. (GmbH & Co. KG) Siemensstrasse 10 27283 Verden (DE)
Representative:	Ellberg, Nils Meissner Bolte Patentanwälte Rechtsanwälte Partnerschaft mbB Hollerallee 73 28209 Bremen (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 10 June 2022 concerning maintenance of the European Patent No. 3368429 in amended form.**

Composition of the Board:

Chairman	G. Patton
Members:	S. Watson
	S. Ruhwinkel

Summary of Facts and Submissions

I. An appeal was filed by the patent proprietor against the decision of the opposition division maintaining European patent No. 3 368 429 in amended form on the basis of the third auxiliary request.

The opposition division had found that the subject-matter of claim 1 of the main request as well as the first and second auxiliary requests was not novel (Articles 54 and 100(a) EPC) with respect to the disclosure of document **EP 2 977 334 A1 (E1)** which formed part of the state of the art according to Article 54(3) EPC.

II. In preparation for oral proceedings, the board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA, dated 18 April 2024. Neither party responded substantively to the communication.

III. Oral proceedings before the board took place on 27 August 2024.

At the conclusion of the proceedings the decision was announced. Further details of the oral proceedings can be found in the minutes.

IV. The final requests of the parties are as follows.

The patent proprietor ("appellant") requests that
- the decision under appeal be set aside, and
- the opposition be rejected, i.e. the patent be maintained as granted (main request); or
- the patent be maintained in amended form based on one of the sets of claims according to the first or

second auxiliary request filed with the reply to the notice of opposition and re-filed with the statement of grounds of appeal.

The opponent ("respondent") requests that
- the appeal be dismissed.

V. Claim 1 of the main request reads as follows (labelling of the features as used by the parties in their submissions in appeal):

a) "Packet (1) for smoking articles, comprising
- a parallelepiped-shaped container (2) with a front wall (21), a rear wall (22), a bottom wall (24) and two lateral walls (23);

b) - a single parallelepiped-shaped wrapper (3) enclosing a charge of smoking articles inside the container (2), this wrapper (3) having a width less than the width of the container (2) measured as the distance between the two lateral walls (23) of the container (2), this wrapper (3) being placed substantially centrally to the container (2);

c) - a lid (5) hinged to the container (2) in order to be able to close an open upper end (20) of the container (2); and

d) - a collar (6) arranged inside the container (2), projecting outside of the container (2) through said open upper end (20);

e) this collar having a front wall (61) and two lateral walls (63) respectively arranged in contact with the front wall (21) and lateral walls (23) of the container (2);

f) this collar (6) including two partition walls (64) that divide the internal volume of the container (2) into a central chamber (68)

occupied by the wrapper (3) and two empty side chambers (69) at the lateral sides of the wrapper (3), characterised by the fact that

g) each partition wall (64) is formed by two flat partition panels (64a, 64b) folded and joined,

h) each flat partition panel (64a, 64b) of each partition wall (64) extending from the front wall (21) of the container (2) to the rear wall (22) of the container (2),

i) the flat partition panels (64a, 64b) of each partition wall (64) being joined to the front wall (61) of the collar (6) by parallel folding lines (61a',61b')

j) and by the fact that the collar (6) comprises a respective folded tab (7) placed inside each of the two empty chambers (69) in order to immobilize said wrapper (3) in the container (2)."

VI. Claim 1 of auxiliary request 1 reads as follows (amendments shown with respect to claim 1 as granted):

"Packet (1) for smoking articles, comprising
- a parallelepiped-shaped container (2) with a front wall (21), a rear wall (22), a bottom wall (24) and two lateral walls (23);
- a single parallelepiped-shaped wrapper (3) enclosing a charge of smoking articles inside the container (2), this wrapper (3) having a width less than the width of the container (2) measured as the distance between the two lateral walls (23) of the container (2), this wrapper (3) being placed substantially centrally to the container (2);
- a lid (5) hinged to the container (2) in order to be able to close an open upper end (20) of the container (2); and

- a collar (6) arranged inside the container (2), projecting outside of the container (2) through said open upper end (20);
this collar having a front wall (61) and two lateral walls (63) respectively arranged in contact with the front wall (21) and lateral walls (23) of the container (2);
this collar (6) including two partition walls (64) that divide the internal volume of the container (2) into a central chamber (68) occupied by the wrapper (3) and two empty side chambers (69) at the lateral sides of the wrapper (3),
wherein ~~characterised by the fact that~~ each partition wall (64) is formed by two flat partition panels (64a, 64b) folded and joined, each flat partition panel (64a, 64b) of each partition wall (64) extending from the front wall (21) of the container (2) to the rear wall (22) of the container (2), the flat partition panels (64a, 64b) of each partition wall (64) being joined to the front wall (61) of the collar (6) by parallel folding lines (61a',61b') and wherein ~~by the fact that~~ the collar (6) comprises a respective folded tab (7) placed inside each of the two empty chambers (69) in order to immobilize said wrapper (3) in the container (2), characterised by the fact that each folded tab (7) of the collar (6) is in contact with the lateral wall (63) of the collar (6) and with the partition wall (64) of the collar (6)."

VII. Claim 1 of the second auxiliary request corresponds to claim 1 of the first auxiliary request with the following characterising portion (amendments shown with respect to claim 1 of the first auxiliary request):

"...characterised by the fact that each folded tab (7) of the collar (6) is placed transversely with respect to the lateral walls (23) of the container (2) and at a certain distance from an upper side (32) of the wrapper (3), and that each folded tab (7) of the collar (6) is in contact with the lateral wall (63) of the collar (6) and with the partition wall (64) of the collar (6)."

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

Reasons for the Decision

1. *Main request - claim 1 - novelty (Articles 100(a) and 54 EPC)*

1.1 The opposition division found that document E1 disclosed all the features of claim 1 as granted (see decision under appeal, point II.10.2).

1.2 The appellant argued that feature j) is not disclosed in E1 as the rear walls 41 cannot be interpreted as tabs which immobilize the wrapper in the container. In E1 the components 42 and 51 are clearly labelled as tabs and refer to a portion of a wall. The wall 41 forms part of the empty chamber defined in feature f) and therefore cannot be within the empty chamber as required by feature j).

1.3 It is established case law that a mere difference in wording is not sufficient to establish novelty (see Case Law of the Boards of Appeal, 10th edition 2022,

I.C.5.2.1, first paragraph). Although document E1 describes the panel 41 as a rear wall, this alone cannot confer novelty.

1.3.1 The appellant has not given any reasons why a skilled person would not consider wall 41 as a tab, i.e. which specific physical features of wall 41 would lead the skilled person to understand that it cannot be considered to be a tab as described in feature j) of claim 1 of the main request.

1.3.2 As the respondent argues, the tabs 7 in the contested patent extend over the whole width and depth of the side chambers (see figures 1 and 5). There is however no limitation in the claim that the tabs have a specific relative size. Therefore, the fact that the rear wall 41 extends over the whole width and height does not lead the skilled person to consider that it cannot be a tab.

1.4 The appellant argued further that in E1 it is the tabs 42 and embossed parts 43, not the rear wall 41, which immobilize the wrapper as required by feature j).

1.4.1 The board however agrees with the opposition division and the respondent that the purpose of the rear walls 41 is to immobilize the wrapper. Without the rear walls 41 the wrapper would move within the container as the side chambers ("Füllkörper") 37 and 38 formed by the collar would not be stable without rear wall 41 (see E1, paragraph [0033]).

Claim 1 does not require that the tab alone immobilizes the wrapper, so that it is not relevant whether the tabs 42 and embossed portions 43 of the partition walls work together with the rear walls 41 or not.

1.5 The appellant also questioned how the rear wall 41 in E1 could be defined as a tab placed inside an empty side chamber, when the wall 41 itself forms part of that chamber. According to the appellant, the empty chamber is formed by four walls 41, 30, 40 and 39/35 as described in E1, paragraph [0032].

1.5.1 However, the board agrees with the respondent that the empty chamber in E1 is not formed by the walls 41, 30, 40 and 39/35 as suggested by the appellant.

Feature f) of claim 1 does not require that the empty side chambers are formed on all four sides by the collar.

The feature only requires that the two partition walls divide the internal volume of the container into a central chamber and two empty side chambers, at the lateral sides of the central chamber.

Indeed, in the contested patent, the collar only forms three walls of the side chambers, the rear wall being the container wall (see figures 1 and 2A).

Therefore, the empty chambers in E1 (figures 1 and 5) can be understood to be formed by the rear wall 13 of the container, the side walls 30/31 of the collar, the two double-panelled partition walls 39 (with 36/35) and the front walls 40 of the collar.

The rear walls 41 thus do not form part of the chambers defined in feature f) and can be considered folded tabs placed inside each empty chamber as required by feature j).

The appellant's argument that the rear walls 41 close the chamber rather than being inside them cannot be followed as there is no restriction in claim 1 regarding the manner in which the tab is placed inside the chamber, or the amount of the chamber which it might fill. In figure 5 of E1, it can clearly be seen that the wall 41 is inside the space formed by the walls 13, 39, 40 and 30 or 31. As argued by the respondent, the rear walls 41 also are inside the space formed by the U-shaped form of the collar alone, if the container wall 13 were to be viewed as not forming part of the empty chamber.

1.6 The board, therefore, agrees with the opposition division that document E1 discloses feature j).

1.7 The appellant did not dispute the disclosure of any other features, therefore the subject-matter of claim 1 as granted is not novel with respect to the disclosure of document E1.

1.8 The appellant has therefore not convincingly demonstrated that the opposition division was incorrect in its findings with respect to the main request.

2. *First auxiliary request - claim 1 - novelty (Article 54 EPC)*

2.1 The opposition division found that the rear wall 41 contacted the lateral wall at the fold line 44 (see figure 2) and the partition wall 39, at least at the embossed portion 43 (see decision under appeal, II. 12.1).

2.2 The appellant argues that the rear wall 41 is not in contact with the partition wall 39 because the rear

wall only touches the embossed part and not the flat wall itself.

2.3 The board agrees with the opposition division and the respondent, that even if the rear wall were considered to only touch the embossed part, this part still forms part of the partition wall (see E1, figure 5 and paragraph [0033]).

The appellant argued that only the flat parts of the wall 39 would be understood by the skilled person as forming part of the partition wall.

The board however agrees with the arguments of the respondent that the claim does not limit the partition wall to only being formed by flat portions.

2.4 Therefore the subject-matter of claim 1 of the first auxiliary request is considered not to be novel with respect to E1.

3. *Second auxiliary request - claim 1 - novelty (Article 54 EPC)*

3.1 The opposition division reasoned that the term "at a certain distance" was not restricted to being at a certain *vertical* distance. In E1 the rear wall 41 is separated from the upper side of the wrapper at least by the partition wall (E1, figures 1 and 5), therefore the rear wall is placed at a certain distance from an upper side of the wrapper (decision under appeal, point II.13.2).

3.2 The appellant argued that the opposition division did not sufficiently support and reason its findings as it

was not clear where the opposition division considered the distance to be formed.

3.3 The board is of the view that it is clear from the decision under appeal how the opposition division interpreted the disputed feature, as put forward under point 3.1 above.

3.4 At the oral proceedings before the board, the appellant argued that the skilled person, having a mind willing to understand, would consider that a distance from an upper side was equivalent to a distance from a plane, which would be understood to be measured in a direction perpendicular to the plane.

According to the appellant, "an upper side of the wrapper" clearly referred to the top surface of the parallelepiped-shaped wrapper and was therefore to be considered as a horizontal plane. The skilled person would consider a certain distance to be a certain distance above or below such a plane.

3.5 The board however follows the arguments of the respondent, that the skilled person would not necessarily understand "an upper side of the wrapper" as referring to the horizontal top surface. It could also refer to the top portion of the wrapper side walls, from which the skilled person would also consider non-vertical distances.

Even if "an upper side" was regarded as referring to the horizontal, top surface of the wrapper this would not lead the skilled person to understand it as a plane. The top surface is clearly limited by its edges and does not extend indefinitely. The skilled person therefore would have no reason to consider that "a

certain distance" must relate only to a certain *vertical* distance.

3.6 The appellant also argued at the oral proceedings before the board that paragraph [0044] of the description of the contested patent supported the interpretation of distance as being in a vertical direction.

Paragraph [0044] reads as follows:

> "*The folded tabs 7 can be arranged parallel to the bottom wall 24 of the container 2 and at a distance so as to remain below the upper edge 20 of the container 2*."

The board notes that although paragraph [0044] refers to the folded tabs, it includes a feature which is not in claim 1 of the second auxiliary request, namely that the tabs are parallel to the bottom wall. In addition the distance referred to is from the upper edge of the container, not an upper side of the wrapper and it is clearly indicated that the tab is below the upper edge.

There is therefore no indication in this paragraph that the term distance is generally, or in the case of an upper side of the wrapper, to be understood as referring to vertical distance only.

3.7 There is therefore no explicit or implicit limitation in claim 1 of auxiliary request 2 to a vertical distance, even in the hypothetical case that the description would be considered for limiting the claims. The rear wall 41 in E1 is at a certain distance from an upper side of the wrapper (see point 3.1 above) so that E1 also discloses the feature introduced into claim 1 of the second auxiliary request.

3.8 Therefore, the appellant has not shown that the opposition division was incorrect on this point and the subject-matter of claim 1 of the second auxiliary request is not new over the disclosure of E1.

4. *Conclusion*

As the appellant has not convincingly demonstrated that the opposition division was incorrect in finding that the subject-matter of claim 1 of the main request and first and second auxiliary requests lacks novelty, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Nachtigall G. Patton

Decision electronically authenticated