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**Datasheet for the decision
of 18 February 2025**

Case Number: T 2023/22 - 3.2.04

Application Number: 15733487.1

Publication Number: 3160274

IPC: A24F47/00

Language of the proceedings: EN

Title of invention:
ELECTRONIC VAPOUR INHALERS

Patent Proprietor:
JT International SA

Opponents:
Nicoventures Trading Limited
Philip Morris Products S.A.

Headword:

Relevant legal provisions:
EPC Art. 100(a), 100(b), 100(c)
RPBA 2020 Art. 13(2)

Keyword:

Grounds for opposition - insufficiency of disclosure (no) -
added subject-matter (no) - lack of patentability (no)
Amendment after notification of Art. 15(1) RPBA communication
- exceptional circumstances (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2023/22 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 18 February 2025

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
28 June 2022 concerning maintenance of the
European Patent No. 3160274 in amended form.**

Composition of the Board:

Chairman	A. Pieracci
Members:	G. Martin Gonzalez
	M. Millet

Summary of Facts and Submissions

- I. The appeals were filed by the appellant proprietor) and appellant opponent 2 against the interlocutory decision of the opposition division to maintain the patent in amended form.

Opponent 1 withdrew their appeal with letter of 23 January 2025.

- II. The opposition division held inter-alia that claim 1 as granted and according to auxiliary request 1 was not novel over D12.

- III. In preparation for oral proceedings the board issued a communication setting out its provisional opinion on the relevant issues.

Oral proceedings before the Board were held by videoconference on 18 February 2025. As announced with their letter of 23 January 2025, respondent opponent 1 did not attend the oral proceedings.

- IV. The appellant proprietor requests that the decision under appeal be set aside and the patent be maintained as granted (main request), or according to auxiliary requests 1-9, 12, 16, 20, 21, 22, 2A or 16A.

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

V. Granted independent claim 1 reads as follows:

"A capsule (26) for an electronic vapour inhaler (10),
the capsule comprising:
a shell (28) for containing a flavour-release medium
(40),
at least part of the shell (28) comprising an air
permeable material;
an induction heatable element (42) disposed inside the
shell (28) and
arranged to heat the flavour-release medium (40),
characterized in that
the cross-section of the induction heatable element
(42) conforms generally to the cross-section of the
shell (28)."

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

(D1) WO 2014/048745 A1
(D7) US 2007/0102013 A1
(D12) WO 2014/023965 A1
(D14) US 5,613,505 A
(D15) US 5,388,594 A
(D16) WO 2015/177043 A1
(D17) US 2012/0247494 A1
(D21) WO 2009/079641 A2
(D24) WO 2015/176898 A1.

VII. The parties' arguments relevant to the decision are
discussed in detail in the Reasons for the Decision.

Reasons for the Decision

1. Background

The invention concerns a capsule for an electronic vapour inhaler, in particular for electronic cigarettes, e-cigarettes and personal vaporisers. The capsule includes a shell containing a flavour-release medium, with an air permeable section to allow airflow through the shell. An induction heatable element inside the shell has a cross-section conforming to the shell's cross-section. The induction heatable element enables rapid and efficient heating with low power, avoiding wear and maintaining performance. Airflow through the capsule maximizes flavour and aroma release, see patent specification description paras 0001, 0002 and 0007-0009.

2. Main request - Sufficiency

The opponents object that the feature requiring a cross-section of the heatable element generally conforming to a cross-section of the shell cannot be implemented by the skilled person. They primarily argue that the terms are broad or ambiguous, making it difficult for a skilled person to determine the necessary technical measures to carry out the contested feature. They also contend that the technical problem of uniform heating proposed by the opposition division is therefore not applicable. Moreover, as objected by the appellant opponent 2 during the oral proceedings, since it is unclear to what extent the heatable element's cross-section must conform to the shell's cross-section, the claimed invention cannot be carried out in its entire claimed range.

However, in the Board's opinion, as held by the opposition division in section 2.1 of the appealed decision, a skilled person would have no difficulty understanding these terms. The examples provided in Figures 2-4, further detailed in paragraph [0033] of the patent, demonstrate a working example of a circular heatable element (42) conforming to the cross-section of the shell (28), thereby enabling the skilled person to apply the claimed feature without undue burden also to other geometries.

The Board also considers it within the routine skills of a skilled person, experienced in designing and developing electronic vapour inhalers, to determine through routine trial and error the appropriate extent to which the heatable element should conform to various shell cross-sections to achieve uniform heating, thus enabling implementation of the invention across its "entire claimed range" without undue burden.

Furthermore, the Board notes that the effect of uniform heating, although discussed, is not a claimed feature. Therefore, there is no "claimed range" in this respect, which renders appellant opponent 2's argument concerning an "entire claimed range" moot. Otherwise, the opponents' arguments, including those related to whether the claimed features achieve a certain effect or not, are primarily related to issues of clarity or inventive step and have no bearing on the issue of sufficiency of disclosure.

3. Main request - Added subject-matter.

The opponents object to the original disclosure that the cross-section of the induction heatable element generally conforms to the cross-section of the shell.

They argue that this constitutes an unallowable intermediate generalisation by extracting this feature in isolation from the specific embodiment described on page 8, lines 6-9, which provides a literal basis for the added feature. However, this feature - albeit using the term "cross-sectional shape" - is also disclosed in a generalised manner on page 4, lines 19-20 of the original application. The terms "cross-sectional shape" (used on page 4) and "cross-section" (used in the granted claim and on original page 8) are treated as synonymous in the original disclosure. Indeed, page 8, lines 6-9 uses "cross-section" to describe the same feature for the specific embodiment shown in the figures. Additionally, the phrase "conforms generally to" implies that the cross-sections or cross-sectional shapes need to approximate each other in both size and shape.

Appellant opponent 2's argument, reiterated during the oral proceedings, stating that "cross-section" includes both shape and size while "cross-sectional shape" excludes size, is unconvincing. Although this might be the case in different contexts, it is clear to the skilled person in this instance that both terms, as used on pages 8 and 4 of the original disclosure, are meant to describe the same technical feature and must therefore have the same scope. It is, in this respect, unambiguously derivable for the skilled person from the description on original page 8, which discusses the effect of this feature in achieving uniform heating, that the term encompasses both shape and size of the cross-section. Therefore, the inclusion of this feature in a generalised manner - i.e. not being restricted to circular or disc shapes - and also using the term "cross-section" in granted claim 1 does not introduce

new technical information and thus does not constitute added subject-matter.

4. Main request - Novelty

4.1 The Board considers that the subject-matter of granted claim 1 is new over the cited prior art.

4.2 In the Board's opinion, the subject-matter of granted claim 1 is novel over **D12**, contrary to the conclusions of the opposition division in section 2.3.1 of the decision under appeal. Document D12 does not disclose a capsule for an electronic vapour inhaler, as required by granted claim 1.

D12 is directed at a diffuser or air refresher, which is a device for evaporating a volatile material, such as a fragrance, pesticide, or medicament (see D12, p. 1, ln. 3-4). The division held that since the air refresher produces a volatile material which is then inhaled by a person present in the room, particularly in the case of a medicament, the device can be considered an inhaler.

However, as argued by the appellant proprietor, the term inhaler, particularly for describing a device, has a more specific meaning for the skilled person in the field. It implies a device intended for personal use that directly administers substances into the respiratory system of an individual, delivering a controlled dosage over a relatively short period. In contrast, diffusers and air refreshers are designed to affect the environment over a prolonged period by dispersing volatile materials more gradually.

Consequently, the skilled person would not regard the device of D12 as an electronic vapour inhaler within the meaning of the contested claim.

- 4.3 The Board also remains unconvinced by the opponents' arguments that the capsule (refill 2) described in D12 anticipates the subject-matter of granted claim 1. Claim 1 is directed to a capsule per-se intended for use in an electronic vapour inhaler. The opponents argue that the known capsule of D12 is suitable for that use and deprives granted claim 1 of novelty.

However, as convincingly explained by the appellant proprietor during the oral proceedings, inhalers are designed for personal use to deliver a significant quantity of material in a limited period of time, thus necessitating a substantial vapour volume, or higher flow-rates, to satisfy the dosage requirements of the individual inhaling the volatilized substances. In contrast, air refreshers or diffusers typically release substances more slowly and continuously within a room. A novelty objection can only be based on unambiguous anticipation of the claimed features. In this instance, the Board is not convinced that it can be stated with absolute certainty that the refills described in D12 unequivocally meet the vaporisation flow-rate demands of inhalers.

During the oral proceedings, opponent 2 maintained that the suitability of the refills described in D12 for use in inhalers depends only on the specific type of inhaler, suggesting that they might be appropriate for certain models. The Board, however, does not concur with this view. Although some inhalers might operate with lower flow rates, there is always a minimum flow rate that must be met. The direct applicability of the

refills detailed in D12 to such a hypothetical inhaler, without necessitating modifications to be able to meet the required minimum, cannot be conclusively inferred from D12.

- 4.4 As for the other novelty objections against granted claim 1, discussed during these appeal proceedings, the Board remains unconvinced by the submissions of the opponents, as detailed below.
- 4.5 None of the embodiments of **D1** anticipates the subject-matter of claim 1.

In respect of the embodiment of Figs. 1-2, the opponents submit different arguments. They submit that the cylindrical housing 8, resembling a cigarette structure 1, and its internal components of the embodiment of Fig. 1 may be provided as a unitary disposable cartridge (p. 10, ln. 18-20), and may thus be considered as a capsule in the sense of the contested patent having all features of claim 1. However, D1 does not disclose that the shell or housing 8 comprises an air permeable material as required by granted claim 1. In this respect opponent 2, reiterates during oral proceedings, that the mouthpiece 4 may comprise a filter material and that it anticipates therefore the claimed air permeable material (see p. 4, ln. 14-18). However, the contested claim requires that the shell comprises an air permeable material. As described on p. 7, ln. 26-27, mouthpiece 4 is contained in housing 8 (housing 8 is the shell of the cartridge in the wording of the contested claim), it is not a part of the shell or housing 8 itself, which is otherwise not described to comprise an air permeable material. On an alternative argument, opponent 1 points in their written submissions to p. 10, ln. 15 to 16. In

this different variant of the embodiment of Figs. 1-2, the cartridge contains only the smokable material 2 and is separable from the rest of the components. While this configuration might imply the use of an air permeable material to transmit smoke into the separable mouthpiece, the cartridge - holding only the smokable material - does not include a heatable element, therefore not meeting the claimed combination of features.

As for the embodiment of Fig. 3, the spherical heating members 6, described on p. 7, ln. 14-16, interspersed within the smokable material 2. The size of these particles is very small and far apart from the size of the housing 14. It cannot be said that they conform substantially to the cross-section of housing or shell 14.

4.6 Granted claim 1 is also novel over **D14**, even when considering D15 (cited in D14). As argued by the appellant proprietor, D14 does not disclose that at least part of the shell comprises an air permeable material. D14 discloses a cylindrical cigarette structure, which includes an external paper overwrap 310 internally lined with susceptor 300 (see col. 9, ln. 19-32 and Fig. 8). The cigarette structure is considered a capsule by the opponents, and the paper overwrap 310 is regarded as the shell of the capsule.

4.7 D14, col. 10, ln. 6-12 states that "The paper overwrap 310 overlying susceptor 300 has a sufficient thickness and/or gaseous impermeability to retain the vast majority of the generated aerosols interior to the formed cylinder" (emphasis added). Thus this passage does not describe a fully impermeable overwrap. The

opponents argue that this passage implies that the paper overwrap possesses some degree of permeability.

This argument is not convincing. The skilled person, when reading a claim, will aim for an interpretation that is technically sensible. When interpreting the feature that the shell comprises an air permeable material, they would seek to make technical sense of it. Specifically, in the context of a capsule for a vapour inhaler or a cigarette, this means that there must be enough permeability to allow a flow of air that is noticeable, particularly for the user inhaling from the cigarette. This excludes from the scope of the feature the incidental permeability described in col. 10, ln. 6-12 of D14, which merely indicates that the material is not completely impermeable but is otherwise designed to be impermeable for the purposes intended by the cigarette described therein or for the effects pursued by the claimed capsule.

4.8 Otherwise, the references in D14 to the construction of the cigarette of D15 in col. 2, ln. 8-14, col. 2, ln. 40-43 or col. 8 or ln. 28-31 of D14 are too general to directly and unambiguously imply that precisely the air permeable filter or the air permeable features of the overwrap of D15 are the features to be incorporated in the cigarette of D14. While these passages describe some features of the cigarette from D15, they do not mention the air permeable filter or the air permeable features of the overwrap.

4.9 None of the cited embodiments of document **D16** discloses the features of granted claim 1 in combination.

The embodiment of Fig. 14 has a similar construction to that of Fig. 12 (see p. 13, ln. 8-9), implying that it

takes the form of a cartridge. In the embodiment of Fig. 14 the cartridge housing or shell includes an air permeable membrane 282, see p. 13, ln. 10-11. It is further disclosed at p. 13, ln. 9-10 that a susceptor element 280 fills the cartridge. The opponents suggest that this statement implies that the susceptor element's cross-section substantially conforms to the housing or shell cross-section as required by claim 1. However, as convincingly argued by the appellant proprietor during the oral proceedings, the cited passage in p. 13 does not provide information about the shape of the susceptor, while Fig. 14 is very schematic, making it impossible to unambiguously derived the claimed features from this information. Indeed, Fig. 14 shows a hatched area 280 representing the susceptor and an area 282 representing the vapour permeable membrane. However, it does not depict the cartridge shell or housing. It is thus not derivable from Fig. 14 whether the susceptor (hatched area 280) also extends partially outside the cartridge or not, while claim 1 requires that the susceptor or induction heatable material is inside the shell. Furthermore, as indicated by the appellant proprietor, D16 does not specify the type of susceptor used in the Fig. 14 embodiment. The susceptor element could be comprised of various configurations, such as a mesh, flat spiral coil, interior foil, fibers, fabric, or rod (see p. 5, ln. 28-29), thus having different shapes. Therefore, filling the cartridge with a susceptor does not necessarily imply that its cross-section conforms to the internal cross-section of the cartridge housing as required by granted claim 1. It depends on the physical form of the chosen susceptor, which is not specified for the embodiment of Fig. 14.

- 4.10 Regarding the other embodiments of D16, the Board indicated in its preliminary opinion (see page 7, point 7.6, second paragraph) that:

"The embodiments of Figs. 6 and 12 appear less relevant. The susceptor 210 of Fig. 6 does not appear to be inside the shell or housing. The housing wall or shell of the cartridge 260 of Fig. 12 has no air permeable material. The susceptor element 262 (described as air permeable in D16) is the induction heatable element in the language of the claim, it is thus not the part of the shell in the sense of the contested claim."

The opponents refrained from further comments, both in writing or orally. After reviewing its preliminary opinion, the Board found no reason to alter its position and therefore confirms that also the embodiments of Figs. 6 and 12 do not anticipate the claimed subject-matter.

- 4.11 The opponents also raised in their written submissions novelty objections based on documents **D7**, **D17**, **D21** and new document **D24**. In its written communication the Board gave its preliminary opinion as follows:

"4.1 The Board intends not to admit new evidence D24. D24 was filed by opponent 1 on 24 March 2023, without convincing justification in the sense of Art 12(6) RPBA 2nd. paragraph. As a document relevant for granted claim I (see section 9 of the opponent's letter of the same date) it should have been submitted during the opposition proceedings. That the opponent has recently become aware of it is not a circumstance of the proceedings. D24 also appears not prima facie highly relevant. D24, p. 10, In. 27-28 mentions an outer paper wrapper, not clearly disclosing whether it is air permeable, as

submitted by the patent proprietor (see section III of letter of 12 January 2024)."

"7.9 Document D7, Fig. 7 in combination with para 0047 including the option that the heating assembly and tobacco plug may be enclosed, for example in a cylindrical shell is also cited against novelty of claim 1, see opponent I's grounds, section 6.5. However, D7 does not disclose a shell comprising a permeable material, see proprietor's letter of 27 March 2023, section VI.4.6.

7.10 Documents D17 (Figs. 15, 16) and D21 do not appear to be relevant for novelty. Documents D17 and D21 do not disclose induction heating. It may be discussed whether the metal heating elements in D17 and D21 can be considered an induction heatable element in the sense of the claim, see sections VI.4.4 and VI.4.5 of the proprietor's reply dated 27 March 2023. The proprietor adds regarding D21 that the air permeable lid (with apertures) is disclosed in para 0080 for the embodiment of Fig. 12 and not for the embodiment of Fig. 9, which is the one discussed by the opponents for novelty. The embodiment of Fig. 9 is disclosed as an airtight cartridge in para 0076."

The opponents did not submit any comments to this preliminary opinion of the Board. After reviewing its preliminary opinion, the Board sees no reason to alter its view and sees no reason not to follow the proprietor's view. It therefore finds that documents D7, D17 and D21 are not prejudicial for the novelty of granted claim 1 and does not admit document D24 into the proceedings.

4.12 In view of the above, the Board concludes that, contrary to the conclusions of the opposition division, the opposition ground of novelty does not prejudice the maintenance of the patent as granted. The appealed decision must thus be set aside.

5. Main request - Inventive step, request for remittal and admissibility of appellant opponent 2's new objections.

5.1 In the light of the above result of novelty, appellant opponent 2 required during the oral proceedings before the Board that the case be remitted for consideration of inventive step of the main requests by the opposition division for the reason that this issue was not considered at first instance.

However, inventive step was duly discussed and decided for the upheld request, and the ground is thus within the framework of the appeal, Art 12(1) RPBA. All documents cited in appeal, apart from new document D24, were extensively discussed in opposition and again in the parties' submissions in the present appeal. The Board therefore sees no special reasons in the sense of Art 11 RPBA 2020 for remitting the case.

5.2 The opponent 1's inventive step objections on file, in section 1.ii of their letter of 24 March 2023, starting from D1 or D12 do not convince the Board.

5.3 It follows from the above novelty analysis that D12 does not disclose a capsule for an electronic vapour inhaler. The opponent 1's argument starting from D12 does not address this differentiating feature. It addresses the feature related to the cross-section of the induction heatable element.

- 5.4 D1 discloses two different variants of the structure shown in Figs. 1-2, see p. 10, ln. 4-20.

In the form of an integrated disposable capsule (second variant), it comprises all internal components shown in Fig. 1, but it does not include a shell with an air permeable material (see the novelty analysis above). This difference is not addressed in the opponent 1's inventive step argument.

In the first variant, the smokeable material 2 alone is in a disposable cartridge, a capsule in the sense of the contested claim, which however does not contain the required heatable element within it (see novelty analysis above). The cartridge shell in this variant may include a section made of permeable material (although this detail is not disclosed in D1, it may employ another mechanism) to facilitate passage of vaporised components towards the mouthpiece during use. Would the skilled person follow the suggestion in D1, as argued by opponent 1, to modify this variant by integrating all components into a single disposable cartridge (see D1, p. 10, ln. 18-20), they would inevitably arrive at the other variant analysed previously (second variant), which lacks a shell with an air permeable material.

- 5.5 In their written submissions against the main request, the appellant opponent 2 only indicates that "Should the Board of Appeal take the view that one or more features are not disclosed in the cited prior art then we may wish to raise inventive step objections against one or more of claims 1-15" (see reply dated 22 March 2023, section 3.21.1). They did not submit any

substantiated inventive step objection before the oral proceedings.

During the oral proceedings, they requested the admission into the proceedings of inventive step objections against claim 1 of the main request, starting from D1, D12 or D14. They argued that there were exceptional circumstances under Article 13(2) of the RPBA, justifying the late submission because these arguments had already been presented in relation to auxiliary request 5. They thus submitted that there was no disadvantage or surprise to any party. They also referenced case law, specifically section V.A.4.5.7.b) of the Case Law of the Boards of Appeal, 10th edition 2022 (CLB). Following the reasons in the cited case law, if it is immediately clear that the objections presented for auxiliary request 5 also apply to other request, the main request in the present case, such objections should be considered admissible.

- 5.6 However, the Board did not admit these new objections under Art 13(2) RPBA. According to Art 13(2) RPBA, amendments to the party's case made after the communication of the Board under Art 15, paragraph 1 (the written preliminary opinion of the Board in preparation for the oral proceedings in the present case) shall, in principle, not be taken into account unless there are exceptional circumstances that justify their late submission.

According to established case law, the "exceptional circumstances" required by Article 13(2) RPBA refer to new or unforeseen developments in the appeal proceedings itself, such as new objections raised by the Board or another party, see RPBA, 10th edition 2022, V.A.4.5.4.a). This is however not the case here,

where the Board has arrived at its conclusions based on arguments on file, submitted by the appellant proprietor. Nor can it be considered exceptional circumstances if the Board during the oral proceedings changes its preliminary opinion or reverses the conclusions of the opposition division without opening a new case. This possibility is a characteristic inherent of the oral proceedings which would otherwise be purposeless.

- 5.7 As regards the further argument of the appellant opponent 2, that the objections were presented for another request, in the cited case law (CLB, section V.A.4.5.7.b), exceptional circumstances were found to exist because "the arguments submitted by the opponent against claim 1 of auxiliary request 3 during the oral proceedings were entirely identical with the arguments submitted in the statement of grounds of appeal against claim 1 of auxiliary request 1" (emphasis added).

However, in the present case, auxiliary request 5 (the version upheld by the opposition division) includes an additional feature not found in granted claim 1, namely that the shell contains a flavour-release medium "wherein the flavour-release medium is tobacco or a tobacco material, the tobacco or tobacco material being impregnated with a vapour forming-medium". The inventive step objections in opponent 2's grounds (section 17) address this feature as one of the differentiating features, indicating that the arguments are not entirely identical and it is not immediately apparent that the arguments apply equally to the main request. Appellant opponent 2 submits that parts of the arguments are applicable, namely those referring to the features of the main request, which are easily identifiable. However, this requires an adaptation of

the existing arguments; it is not an immediate and direct application of them, nor is it the task of the Board or the other parties to the proceedings, especially in a case like the present one with 16 auxiliary requests, to anticipate which arguments submitted for one request may be adaptable for any of the others before the oral proceedings, to be prepared to deal with them, however easy such identification or adaptation might appear in retrospect for only one possible combination.

- 5.8 In summary, the submitted objections are either not admissible or do not convince the Board that the ground of inventive step prejudices that maintenance of the patent as granted.
6. The Board is thus unable to confirm the conclusion of the decision under appeal that at least one ground for opposition prejudices the maintenance of the patent. On the contrary, the Board concludes that none of the opposition grounds admissibly raised by the opponents against the granted claims prejudices the maintenance of the European patent. Therefore the decision must be set aside and the opposition rejected, Art 101(2) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



G. Magouliotis

A. Pieracci

Decision electronically authenticated