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**Datasheet for the decision  
of 23 January 2025**

**Case Number:** T 0274/23 - 3.2.07

**Application Number:** 16725911.8

**Publication Number:** 3283397

**IPC:** B65D75/58, B65D85/10

**Language of the proceedings:** EN

**Title of invention:**  
PACKET OF SMOKE ARTICLES

**Patent Proprietor:**  
G.D S.p.A.

**Opponents:**  
Focke & Co. (GmbH & Co. KG)  
Philip Morris Products S.A.

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56, 83, 123(3)  
EPC R. 80  
RPBA 2020 Art. 11, 12(6)

**Keyword:**

Inventive step - (no)

Sufficiency of disclosure - (yes)

Amendment occasioned by ground for opposition - amendments allowable (yes)

Amendments - extension of the protection conferred (no)

Late-filed objection - should have been submitted in first-instance proceedings (yes) - circumstances of appeal case justify admittance (no)

**Decisions cited:**

**Catchword:**



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

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Case Number: T 0274/23 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 23 January 2025**

**Appellant:** Focke & Co. (GmbH & Co. KG)  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
30 November 2022 concerning maintenance of the  
European Patent No. 3283397 in amended form.**

**Composition of the Board:**

**Chairman**            G. Patton  
**Members:**            S. Watson  
                             S. Fernández de Córdoba

## **Summary of Facts and Submissions**

- I. An appeal was filed by opponent 1 against the decision of the opposition division to maintain European patent 3 283 397 in amended form according to the then second auxiliary request.
- II. In preparation for oral proceedings, the board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA, dated 20 August 2024, according to which the appeal was likely to be dismissed. This communication was based on the appellant's statement of grounds of appeal and its submissions of 6 December 2023 as well as the patent proprietor's reply to the appeal.
- III. The patent proprietor responded to this communication by filing arguments and new claims requests in its submissions of 19 December 2024.
- IV. Oral proceedings before the board took place on 23 January 2025. Opponent 2 did not attend the oral proceedings.

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

- V. The final requests of the parties are as follows.

Opponent 1 ("appellant") requested

- that the decision under appeal be set aside and
- that the patent be revoked or alternatively that the case be remitted to the opposition division for

further prosecution on the basis of the auxiliary requests.

The patent proprietor ("respondent") requested

- that the appeal be dismissed,

or if the decision under appeal is set aside,

- that the case be remitted to the opposition division or alternatively that the patent be maintained in amended form on the basis of one of the sets of claims of the third to thirty-ninth auxiliary requests.

Opponent 2, party as of right (Article 107 EPC), made no requests or submissions in the appeal proceedings.

VI. The following documents are referred to in this decision:

D1: WO 2015/011621 A1  
D4: WO 02/30790 A2  
D7: WO 2014/097064 A1.

VII. Independent claim 1 of the main request (auxiliary request 2 of the decision under appeal) reads as follows (feature labelling as used by the appellant in its statement of grounds of appeal):

M1.1 "A packet (1) of smoke articles comprising:  
M1.2 an outer container (2), which has an open top end (9); a lid (3), which is hinged to the outer container (2) to rotate, with respect to the outer container (2), between an open position and a closed position of the open top end (9);  
M1.3 a first soft inner package (5), which is housed inside the outer container (2), encloses a

- first group (6) of smoke articles, and has a first smoke articles extraction opening (28) closed by a first sealing flap (30); and
- M1.4 a second soft inner package (7), which is housed inside the outer container (2) alongside the first inner package (5), encloses a second group (8) of smoke articles, and has a second smoke articles extraction opening (41) closed by a second sealing flap (43);
- M1.5 the packet (1) is characterised in that at least one portion (31) of the first sealing flap (30) is connected permanently and non-detachably to the lid (3) so that opening and closing the lid (3) also simultaneously opens and closes the first sealing flap (30), and in that the
- M1.6 packet (1) comprises a layer of adhesive material arranged between the second sealing flap (43) and the lid (3), and a removable tab (44) arranged at least partially above the layer of adhesive material, the lid (3) being connectable to the second sealing flap (43) by means of the layer of adhesive material once the removable tab (44) has been removed from the layer of adhesive material, wherein
- M1.7 the first sealing flap (30) is provided with a first connecting tab (31), which is devoid of repositionable adhesive, wherein the first connecting tab (31), is glued permanently and non-detachably to an inner surface of the lid (3)."

VIII. In view of the decision taken, it is not necessary to reproduce the wording of the auxiliary requests here.

- IX. 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 - Rule 80 EPC*

1.1 The opposition division found that the corrections made to the dependency of claims 8 to 10 of the then auxiliary request 1 were allowable under Rule 139 EPC (see decision under appeal, point II.17.3). The same corrections are found in dependent claims 7 to 9 of the current main request.

1.2 The appellant argued that the corrections were not allowable as, even if it could be seen that there was an error in the claims, it was not immediately obvious that nothing else was intended than what was offered as the correction.

According to the appellant claim 9 could have been made dependent on claim 8 alone, not on claims 6 to 8 as in the main request.

As the corrections were not allowable under Rule 139 EPC, the appellant argues that the amended claims do not fulfil the requirements of Rule 80 EPC as the changes to the dependencies were not occasioned by a ground for opposition.

1.3 The board however agrees with the opposition division that as claim 10 as granted was dependent on claims 1 to 9, and as the feature of the second connecting tab was first mentioned in claim 7, it was evident to the

skilled person that claim 10 as granted could only be dependent on claims 7, 8 and 9, but not on claims 1 to 6.

The board also notes that in claim 1 of the present main request the features of claim 2 as granted were added and claim 2 as granted was consequently deleted. This deletion led to a necessary amendment of claim dependencies of claims 2 to 9 of the present main request. The introduction of the feature of claim 2 as granted in claim 1 was made in order to overcome an objection under Article 100(a) EPC with Article 54 EPC, so that the amended request is occasioned by a ground for opposition and Rule 80 EPC is not contravened.

2. *Main request - Articles 84 and 123(2) EPC - admittance*

2.1 In its submissions of 6 December 2023, the appellant raised objections under Article 84 EPC to claims 1 and 9 and under Article 123(2) EPC to claim 1, for the first time in the appeal proceedings.

2.1.1 The appellant contended that the meaning of the terms "repositionable adhesive" in claim 1 and "re-stick glue" in claim 9 was unclear (Article 84 EPC).

2.1.2 In addition, the omission from claim 1 of features found on page 7, lines 3 to 5 and page 8, lines 3 to 5, of the application documents of the contested patent, led to added subject-matter (Article 123(2) EPC).

2.2 The respondent requested that these objections not be considered in the appeal proceedings as they were not raised in opposition proceedings and did not form part of the decision under appeal.

- 2.3 Under Article 12(6), second sentence, RPBA, a board should not admit any objections which should have been submitted, or which were no longer maintained, in the proceedings leading to the decision under appeal, unless the circumstances of the case justify their admittance.
- 2.3.1 The appellant argued at the oral proceedings before the board that objections under Articles 84 and 123(2) EPC had been raised during opposition proceedings in its submissions of 18 November 2021, albeit in relation to the then auxiliary request 1.
- 2.3.2 The board is of the view that the objections raised in that submission were not raised against the then second auxiliary request, i.e. current main request. The minutes make no mention of the discussion of such objections and clearly state that apart from objections under Articles 83 and 56 EPC, no objections were raised (see minutes of the oral proceedings before the opposition division, point 6.5) and the opposition division explicitly stated in point II.22 of the decision under appeal that the opponents had no objections regarding Articles 54, 84 and 123 EPC to the then second auxiliary request.
- 2.3.3 Further, the then auxiliary request 1 was found not to be allowable by the opposition division as it did not fulfil the requirements of Article 123(2) EPC (decision under appeal, point II.18.3).

As no further objections regarding Articles 84 or 123(2) EPC were raised against auxiliary request 2, the opposition division and both opponents must have been satisfied that auxiliary request 2 overcame the Article

123(2) EPC objection and that the Article 84 EPC objection was no longer maintained.

2.3.4 The appellant's argument at the oral proceedings before the board that the objections had been overlooked is unconvincing as the then auxiliary request 2 was filed with the respondent's reply to the notices of opposition, i.e. at the earliest possible stage of the opposition proceedings. The opponents had had ample time to prepare and clearly present all objections they wished to raise in writing, and at the latest at the oral proceedings before the opposition division.

2.4 The board therefore cannot see that the circumstances of the present case are such as to justify the admittance of these objections for the first time in appeal proceedings (Article 12(6) RPBA).

3. *Main request - claim 1 - Article 123(3) EPC*

3.1 The appellant raised a further new objection in its submissions of 6 December 2023, that the deletion of the word "first" prior to "opening and closing the lid" in feature M1.5, extended the protection conferred (Article 123(3) EPC).

3.2 The board was of the preliminary view that the objection under Article 123(3) EPC could be admitted into the appeal proceedings under Article 12(6) RPBA due to the circumstances of the case as set out below.

3.2.1 When filing the then auxiliary request 2, the respondent did not indicate that any amendment to the claim had been made apart from the addition of the feature that *"the first sealing flap (30) is provided with a first connecting tab (31), which is devoid of*

*repositionable adhesive*", together with the feature of claim 2 as originally filed.

- 3.2.2 It is clear from the decision under appeal that the opposition division were not aware of the amendment in feature M1.5 of claim 1, see decision under appeal, page 12, where the opposition division recite feature e) as including the term "so that first opening and closing the lid...", although in the then second auxiliary request this reads "so that opening and closing the lid...".
- 3.2.3 Therefore, even if the objection should have been raised during the opposition proceedings, the board was of the preliminary view that as none of the parties or the opposition division appeared to be aware of the difference in wording, that the objection could be admitted.

It was however unnecessary to decide on the admittance of the objection as the board decided that the deletion did not extend the scope of protection for the following reasons.

- 3.3 The appellant had argued that the deletion of the term "first" broadened the scope of protection as it was no longer necessary that the very first opening and closing of the lid, after manufacture of the packet caused the simultaneous opening and closing of the first sealing flap. Without the term "first", a packet which at any time caused the sealing flap to open and close on opening and closing the lid, would fall within the scope of the claim. This could occur after a period of use.

3.4 In the board's view, the deletion of the term "first" does not extend the protection conferred as the feature now requires that not only the first opening and closing of the lid simultaneously opens and closes the first sealing flap, but also that every time the lid is opened and closed the first sealing flap is simultaneously opened and closed. The protection is therefore narrower than that granted such that the requirements of Article 123(3) EPC are fulfilled.

4. *Main request - claim 1 - Article 83 EPC*

4.1 The opposition division found that the claimed invention was sufficiently disclosed, in particular in relation to the feature that the removable tab 44 was "arranged at least partially above the layer of adhesive material".

4.2 The appellant argued that the opposition division was incorrect in its finding that in the present case any hypothetical embodiments where the removable tab did not prevent the adhesive material sticking to the lid would be discarded by the skilled person as the lid, according to further features of the claim, was connectable to the second sealing flap by the adhesive material "once the removable tab (44) has been removed from the layer of adhesive material".

4.3 The appellant argued that the term "partially" meant that some of the adhesive material was not covered by the removal tab and the lid could therefore open the inner package before the tab has been removed. The contested patent did not show how to prevent the connection of the lid with the sealing flap when the removable tab was only partially covering the adhesive material.

The appellant also argued that the term "above" must mean that only part of the adhesive material is covered by the removable tab.

4.4 The respondent argued that the term "arranged at least partially" applied to the removable tab, not to the adhesive material. In other words, the removable tab might be larger than the adhesive material so that the tab covered the adhesive material fully, but was itself only partially above the adhesive material.

4.5 In the board's view, even if the term "at least partially" is understood to mean that the adhesive material is not fully covered by the removable tab, the board agrees with the opposition division that in view of the further feature that the lid is connectable once the removable tab has been removed (feature M1.6), the claimed invention does not include embodiments where the lid and adhesive material connect before removal of the tab.

The appellant argued that it was not permissible to interpret the claim only in such a way that it fulfils the requirements of Article 83 EPC. However, as the appellant itself argued, a technical effect has been claimed, so that packets which do not demonstrate this effect, cannot fall within the scope of the claim.

4.6 The appellant argued further that if the adhesive material is not completely covered by the tab then the lid will connect with the sealing flap through the adhesive material and that from the contested patent itself and their common general knowledge, the skilled person was unable to carry out the invention as there was no indication how to prevent the lid connecting to

the sealing flap through the uncovered adhesive material.

The board does not agree. The claim features are not exhaustive and the skilled person is aware of how to manufacture a packet with the removable tab covering only part of the adhesive layer but without the lid connecting to the sealing flap (see decision under appeal, page 6, first paragraph).

As a result, the requirements of Article 83 EPC are fulfilled.

5. *Main request - claim 1 - inventive step (Article 56 EPC) - D1 with D7*

5.1 In section II.23.1.2 of the decision under appeal the opposition division found that the subject-matter of claim 1 differed from the disclosure of document D1 through the following features (referred to as feature M1.6 (part) in the statement of grounds of appeal):

- g) a removable tab (44) arranged at least partially above the layer of adhesive material,
- h) the lid (3) being connectable to the second sealing flap (43) by means of the layer of adhesive material once the removable tab (44) has been removed from the layer of adhesive material.

5.1.1 The respondent argued that, contrary to the findings of the opposition division, document D1 also did not show feature M1.4 (feature d) in the decision under appeal), as there was no disclosure of a second packet "alongside" a first packet in document D1. Document D4, which was referred to in document D1 (see page 3, line 26) showed inner wrappers arranged concentrically rather than alongside one another. According to the

respondent this lack of disclosure of feature M1.4 also led to a lack of disclosure of features M1.6 and M1.7.

5.1.2 The board follows the reasoning of the opposition division and the appellant's arguments made at the oral proceedings before the board, that the disclosure of document D4 is disclosed in D1 only as an example. Document D1 itself discloses two inner wrappers (D1, page 3, lines 23 to 25) and these must be "alongside" one another as there is no other way of arranging them within the outer container.

5.1.3 The board therefore agrees with the distinguishing features as set out in the decision under appeal.

5.2 The opposition division found that the problem to be solved was to improve the ease of use of the container such that it is more closely customised in view of the specific needs of the consumer (see decision under appeal, page 13, third complete paragraph).

Although document D7 disclosed a "bond on demand", the opposition division reasoned that the skilled person would apply the teaching of D7 to both sealing flaps, not only to one, so that feature M1.5 would no longer be present in the packet of smoke articles (see decision under appeal, II.23.1.2 and II.23.1.3, page 12, last line to page 14, second paragraph).

5.2.1 The appellant contested the findings of the opposition division and argued that the skilled person would not apply the teaching of document D7 to both sealing flaps. In the packet of D1 the skilled person would want to keep the automatic opening of one inner package in D1 for ease of use, but if two inner packages are present, an automatic opening of both would not make

sense as then the advantages of having two inner packages in terms of product freshness would be lost.

Therefore, according to the appellant, the only logical combination would be to have one inner package open immediately on opening the lid and the other inner package open on demand by the user as in document D7.

- 5.2.2 The board however agrees with the reasoning of the opposition division that without the benefit of knowledge of the claimed invention, the skilled person has no motivation to provide two different types of sealing flaps in two inner packages. If the skilled person were to modify the packet of document D1 using the teaching of D7, they would provide both inner packages with the opening and closing system of D7.

Neither document D1 nor document D7 suggest that two inner packages opened in two different ways should be present. The appellant argued that document D7 should be seen as a reservoir of ideas, but there is no disclosure in document D7 of how the teaching of D7 should be applied when more than one inner package is present so that if the skilled person were to change the manner of opening of the inner packages of D1, they would modify both packages according to the teaching of D7.

- 5.3 In a second line of argument, introduced with its submissions of 6 December 2023 and developed during oral proceedings before the board, the appellant argued that even if both inner packages in document D1 were adapted identically, according to the teaching of document D7, the resulting packet would still fall within the scope of the claims.

- 5.3.1 The appellant argued that the second and third embodiments disclosed in document D7 showed the removable tab outside of the lid, such that the user would remove it before opening the lid (D7, page 6, lines 13 to 15). In fact, the removable tab was to be removed together with the outer wrapper of the outer container via an opening tongue 29 (D7, figures 10 and 11 and page 8, lines 16 to 22). The combination of this teaching with the packet of document D1 would inevitably result in two opening tongues, one for each inner package. When the user first removed one opening tongue 29, and consequently the removable tab (tongue 18) on that side of the packet, the packet would then show all features of claim 1 of the main request as one sealing flap would be connected permanently and non-detachably to the lid as required by feature M1.5, whereas the other sealing flap would still have a removable tab as required by feature M1.6.
- 5.3.2 The respondent argued that the packet according to the subject-matter of claim 1 of the main request must be understood such that, immediately after manufacturing, one of the sealing flaps must be in a state of permanent and non-detachable connection, without any intervention by a user.
- 5.3.3 The board however finds the arguments of the appellant convincing as claim 1 does not specify that the packet is in a state immediately after manufacturing and before any user intervention. For the board, as the teaching of document D7 is that the tab is removed with the outer wrapper, the first sealing flap is connected permanently and non-detachably before the first opening of the lid of the outer container and therefore fulfils the requirements of feature M1.5.

5.4 The subject-matter of claim 1 of the main request is therefore not inventive in view of the combination of the teaching of documents D1 and D7.

6. *Remittal*

6.1 Both the appellant and the respondent requested remittal of the case to the opposition division.

6.2 Article 11 RPBA sets out that a board shall remit a case only where special reasons present themselves for doing so.

In the present case, the board views the development of the argument on inventive step during oral proceedings, which led to a change of opinion of the board on this point, as a special reason for remitting the case.

## 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 for further prosecution.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated