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**Datasheet for the decision
of 3 November 2025**

Case Number: T 0426/23 - 3.2.04

Application Number: 12163576.7

Publication Number: 2649888

IPC: A24B13/00, A24B15/30

Language of the proceedings: EN

Title of invention:

A smokeless tobacco composition comprising non-tobacco fibers and a method for its manufacture

Patent Proprietor:

Swedish Match North Europe AB

Opponent:

British-American Tobacco (Investments) Limited

Headword:

Relevant legal provisions:

EPC Art. 56, 84, 113(1)

Keyword:

Inventive step - (no)

Claims - clarity - auxiliary request (no)

Decisions cited:

Catchword:



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Case Number: T 0426/23 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 3 November 2025

Appellant: British-American Tobacco (Investments) Limited
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
20 December 2022 concerning maintenance of the
European Patent No. 2649888 in amended form.**

Composition of the Board:

Chairman A. Pieracci
Members: J. Wright
M. Millet

Summary of Facts and Submissions

- I. The appeal was filed by the opponent against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 1, the patent in suit met the requirements of the EPC.
- II. In particular, the opposition division decided that the subject-matter of this request involved an inventive step.
- III. The Board issued a communication, dated 7 February 2025, in preparation for oral proceedings. With a letter of 7 April 2025 the respondent-proprietor withdrew its request for oral proceedings and commented on the communication. The Board decided in written proceedings.
- IV. The appellant (opponent) requests that the decision under appeal be set aside and that the patent be revoked.
- V. The respondent (proprietor) requests that the appeal be dismissed, that is that the patent be maintained according to auxiliary request 1 which is the version found allowable by the opposition division, filed as auxiliary request 8 on 2 September 2022, in the alternative that the patent be maintained in amended form according to one of auxiliary requests 9 to 15 filed before the opposition division on 2 September 2022.
- VI. The independent claim 1 of the main request (as maintained, auxiliary request 1 in opposition proceedings) reads as follows:

"A smokeless tobacco composition for oral use comprising at least one type of non-tobacco fibers having an average length-to-width ratio of 3.5:1 to 15:1, wherein the content of the non-tobacco fibers in the composition is from 2 to 10 wt% based on the dry weight of the final composition, wherein the at least one type of non-tobacco fibers originates from bamboo".

Independent claim 11 of the main request (as maintained, auxiliary request 1 in opposition proceedings) reads as follows:

"A method for manufacturing of a smokeless tobacco composition according to claim 1, comprising:
a) providing a tobacco material;
b) processing the tobacco material provided in step a) and optionally other ingredients,
wherein non-tobacco fibers are added to the composition either prior to the processing, during the processing, or after the processing of the tobacco material, whereby the non-tobacco fibers are mixed into the tobacco composition to a homogeneous blend; and
c) optionally packing, either in pouches, or as is in cans, sachets or boxes".

Claim 1 of auxiliary request 9 reads as for auxiliary request 1 except that the following words are added to the end of the claim: "and wherein the average length-to-width ratio is measured as described herein."

Claim 1 of auxiliary request 10 reads as for auxiliary request 1 except that the following wording is added to the end of the claim: "and wherein the average length-to-width ratio denotes the ratio of the length-weighted average fiber length to the average fiber width."

Claim 1 of auxiliary request 11 reads as for auxiliary request 1 except that the following wording is added to the end of the claim:

"wherein the average length-to-width ratio denotes the ratio of the length-weighted average fiber length to the average fiber width, said length-weighted average fiber length being calculated with the following formula (1)

$$\bar{x}_l = \frac{\sum_i l_i x_i}{\sum_i l_i} \quad (1)$$

wherein \bar{x}_l represents length-weighted average length as defined in the STFI Fiber Master, STFI report TF 70, 1997, STFI, Stockholm, and where x_i is equal to l_i ".

Claim 1 of auxiliary request 12 reads as for auxiliary request 11 except that the following wording is added to the end of the claim: ", and wherein an instrument called the Fiber Tester from Lorentzen & Wettre is used for measurements on the fibers."

Claim 1 of auxiliary request 13 reads as for auxiliary request 12 except that the following wording is added to the end of the claim: "and with this instrument the area and perimeter of a fiber is measured from a digital image and the fiber length is calculated as perimeter/2 and the width as area/length".

Claim 1 of auxiliary request 14 reads as follows:

"A method for manufacturing of a smokeless tobacco composition for oral use comprising at least one type of non-tobacco fibers having an average length-to-width ratio of 3.5:1 to 15:1, wherein the content of the non-

tobacco fibers in the composition is from 2 to 10 wt% based on the dry weight of the final composition, wherein the at least one type of non-tobacco fibers originates from bamboo, the method comprising:

- a) providing a tobacco material;
- b) processing the tobacco material provided in step a) and optionally other ingredients, wherein the non-tobacco fibers are added to the composition either prior to the processing, during the processing, or after the processing of the tobacco material, whereby the non-tobacco fibers are mixed into the tobacco composition to a homogeneous blend; and
- c) optionally packing, either in pouches, or as is in cans, sachets or boxes.

Claim 1 of auxiliary request 15 reads as claim 1 of auxiliary request 14 except that, after the words : "wherein the at least one type of non-tobacco fibers originates from bamboo" the following wording is inserted:

"and wherein the average length-to width ratio is measured as described herein,".

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

D2: WO 2011/127182 A1

D3: Data Sheet for Just Fiber bamboo fiber,
International Fiber Corporation, New York

D4: Experimental data showing calculations of average
L/W ratios for Just Fiber bamboo fibers

D5: WO 2012/019025 A2

D6: US 2012/0031415 A1

VIII. The arguments of the parties relevant to the decision are set out in the reasons for the decision presented below.

Reasons for the Decision

1. The appeal is admissible.
2. By its communication, the Board made the parties aware of the central points underlying this decision. They therefore had sufficient opportunity to take a position thereon, indeed the respondent proprietor has done so. The Board is thus satisfied that the requirements of Article 113(1) EPC have been met and that the case can be decided in written proceedings.
3. Main request, claim 1, inventive step starting from D2

In sections 11 and 12 of its communication, the Board considered this matter. It wrote the following:

"11. Main request, claim 1, inventive step starting from D2

11.1 Differing features

D2 discloses a smokeless tobacco product for oral use comprising non-tobacco fibres (see impugned decision, section 9.3 and D2, page 3, lines 13 to 20). The decision referred in particular to examples 5 and 6 on page 22 with example 1 on page 18 to 20, to which example 5 refers. The opposition division considered that the subject matter of claim I differed from D2 by the features:

- At least one type of non-tobacco fibre having an average L/W ratio of 3.5:1 to 15:1
- The content of non-tobacco fibres is 2 to 10wt%
- The at least one non-tobacco fibre type is bamboo.

The Board agrees with this assessment. Moreover, the claimed average L/W ratio range is to be considered in assessing inventive step. In D2, examples 5 and 6 Fibrex 610-22 is used. Its average L/W ratio (see the patent specification, table 3, penultimate set of fibre compositions) is below that claimed (cf. opponent's appeal grounds, top of page 37).

According to the appellant-opponent (see its appeal grounds, page 36), if no water is added, the non-tobacco fibres should make up 23.9 Wt% of the examples 5 and 6 compositions. Since the claim relates to the dry weight of the final composition, this must be the relevant calculated value (rather than the one where water is added). Therefore, it is well above the upper limit claimed (2 to 10wt%).

The fibre in examples 5 and 6, by reference to example 1, is sugar beet not bamboo.

12. Technical effects of the differing features

12.1 The opposition division (see impugned decision, sections 9.3.4, 9.3.6 and 9.3. 10) saw no synergetic effects between the differing features nor any special technical effects associated with the features chosen. The respondent-proprietor (see its reply to the appeal, section 5, point 41) disputes only the technical effect of the claimed average L/W ratio range (3.5:1 to 15:1). It writes: "*Example 3 of the opposed patent supports that samples in the average L/W range of 3.5:1 to 15:1*

(applying the accuracy of the claim) show a clear trend of density decrease with increasing content, whereas samples outside this range show a more doubtful such trend or even a density increase. Accordingly, an appropriate objective problem technical problem in view of the average L/W ratio is related to the density of the oral composition".

12.2 According to the specification (paragraph [0032]), a reduced density is advantageous. Example 3 with table 3 studies fibres of different origin and different average L/W ratio by measuring density (see paragraph [0094]). Paragraph [0103] concludes that *the desired density change is achieved with average L/W equal or greater than 3.5:1*. It makes no mention of any upper limit for achieving the effect.

12.3 Contrary to how the respondent-proprietor has argued, the Board is unable to identify any particular advantageous trend in density associated with the average L/W range 3.5:1 to 15:1 that would not be present for example above that range, let alone a trend which the skilled person would be able to identify without knowledge of the discussion of whether the claimed range was associated with a particular technical effect. The Board rather agrees with the opposition division's assessment (see impugned decision, reasons 9.3.9- 9.3. 10) that, considering for example table 3's BAF 400, CTMP Fiber 550 and CTMP 350, at the same wt% (8) the first of these exceeding the claimed average L/W ratio and the latter two falling within the claimed range, all have the same density of 0.44Kg/dm³, so there would appear to be no noticeable advantageous effect that was exclusive to the claimed range.

12.4 Moreover, the first entry of table 3 discloses a value of average L/W ratio (15.3) lying above the claimed range (3.5:1 to 15:1). However, if anything, it appears better in terms of density than entries falling within the claimed range (cf. Bamboo Fiber BAF 200, with average L/W of 8.6). It follows from the above that the Board does not consider that the skilled person would recognise any particular advantageous effect in terms of density in the claimed average L/W range from example 3 with table 3.

12.5 Based on the opposition division's assessment that no special technical effects are associated with any of the differing features, which the Board considers to have been correct, the Board holds that for each of these, although they are to be evaluated separately, the problem is to modify D2's examples 5 and 6 compositions to provide an alternative smokeless tobacco composition (cf. impugned decision, reasons, points 9.3.4, 9.3.6 and 9.3. 10).

12.6 Differing feature: average L/W ratio 3.5:1 to 15:1

12.6.1 The appellant-opponent has argued based on D2, examples 5 and 6, which refer to the composition of example 1- sugar beet fibres Fibrex 610. According to the patent table 3, these fibres have an average L/W ratio of 3.3, and thus fall just outside the claimed range. Moreover, sugar beet is not bamboo.

12.6.2 The Board agrees with the opposition division (see decision grounds, point 9.3.8) that since D2 itself also proposes bamboo (see claim 9 and page 10), it would be obvious to use bamboo as a substitute to sugar beet in examples 5 and 6, as such. However, the bamboo substitute must also provide the claimed average

L/W ratio if it is to take away inventive step of claim 1. In this context, the appellant-opponent has referred to page 10 of D2 which discloses Just Fiber bamboo. The opposition division considered (see reasons, 9.3. 14) that D2 did not disclose which particular Just Fiber was referred to there, nor its average L/W ratio. The Board agrees with this assessment. Therefore, it is not convincing that the mere mention of Just Fiber bamboo in D2 leads to the conclusion that it would have an average L/W ratio as claimed.

12.6.3 In this regard, the appellant-opponent also mentions D3 and D4, (see its appeal grounds, page 38, item (i), and page 40) as proof of Just Fibre bamboo's implicit average L/W ratio or as common general knowledge of suitable fibres with average L/W ratio falling in the claimed range. This objection appears to be a new in appeal for auxiliary request 1 (see the undisputed minutes, points 17.3 to 17.9) where nothing more specific than common general knowledge, D18 and D19 is mentioned. Its admissibility may therefore need to be discussed. In accordance with Articles 12(4) and 12(6) RPBA, the Board is provisionally of the opinion that they should not be admitted into the proceedings

12.6.4 The appellant-opponent has also cited the patent table 3 (appeal grounds, page 40), in particular showing that commercially available bamboo was prior known, such as bamboo BAF 200 fibre in table 3 having an average L/W ratio of 8.6, thus within the claimed range, and argued that the skilled person would use this as a suitable alternative to D2's Fibrex 610 in examples 5 and 6. The opposition division (see decision, reasons 9.3. 12) considered that it would not be obvious to use one falling in the claimed range since others would not and it needed to be demonstrated

that the skilled person *would* rather than merely could use ones falling in the claimed range.

The Board disagrees with this aspect of the decision. Rather, since the problem is merely one of finding an alternative composition, the skilled person would consider any available composition. With this in mind it would appear just as obvious to use BAF 200 as any other mere alternative. Therefore, the Board sees no inventive step in this aspect of the claim.

12.6.5 Regarding the argument of combining D2 with D5 or D6, the opposition division (cf. impugned decision, point 9.3. 15) considered that D5 did not explicitly mentioned any average L/W ratio, let alone for bamboo fibres, so the combination of D2 with D5 or D6 would not lead to the disputed feature. At most, only in D6, example 1, is an oat fibre (Vitacel HF 401) mentioned which, in combination with table 2 of the opposed patent would implicitly fall within the claimed average L/W ratio range. Since this is not a bamboo fibre, the Board is not convinced that this would lead to the claimed average L/W ratio for bamboo.

12.7 Differing feature: 2 to 10wt% of non-tobacco fibres

12.7.1 D2 does not disclose %wt values of non-tobacco fibres falling in the claimed range. The opposition division noted that it disclosed at least 20%wt of non-tobacco fibre (cf. decision, point 9.3. 17 and D2, page 4 - "at least 20 weight percent"). Therefore, it seems to teach a higher wt% value for the non-tobacco fibres than the one claimed. Faced with the problem of finding an alternative composition, the the opposition division considered the combination of D2 with D5 and found that

it would not lead to the claimed feature as a matter of obviousness. It wrote the following (see impugned decision: [The opposition division] *considers that the skilled person would not readily consult D5 as D5 is directed at a different type of product and does not describe snus. Furthermore, D5 describes various types of structural fibers, also polymeric materials and therefore it would not be a straight-forward choice for the skilled person to arrive at bamboo fibers with the content range of 2-10 wt%.*

12.7.2 In the Board's view, the opposition division was not correct in saying that D5 does not disclose snus, so the idea that this would make it incompatible with D2 is moot: As the appellant-opponent has pointed out (see its appeal grounds, pages 42 and 43): D5 mentions snus in a general discussion of smokeless tobacco products (page 1 - background) and also on page 3, line 7 as part of an overview of certain embodiments. Therefore, the only reason the skilled person might not combine the teachings of D2 and D5 could be because they relate to *different types* of product. In this regard, the Board notes that, like D2, D5 discloses a tobacco composition for oral use (cf. D5, page 1 background). In its reply to the appeal, the respondent-proprietor argued (page 10, point 45) that D2 and D5 would be incompatible because D2 is a simple mixture [of fibres] whereas D5 discloses structural fibres in which tobacco is entangled. It may need to be discussed whether this would mean that the skilled person would reject the idea of looking to D5 for an alternative composition for the tobacco and non-tobacco fibres in D2.

12.7.3 If the skilled person were to do so, the Board considers that D5 does disclose wt% for the non-tobacco

fibres that fall within the claimed range and which would thus anticipate this feature. As the appellant-opponent has pointed out (see its appeal grounds, page 42 with D5, page 32, last line and page 35, first [sic] ten lines) D5 proposes various suitable structural fibres including bamboo and that these can make up between 0.5 and 10wt% for example between 1 to 7wt%.

12.7.4 In this regard, the opposition division's argument that it would not be obvious for the skilled person to arrive at between 2 and 10wt% of bamboo fibres, because D5 discloses other fibres including polymeric fibres is not convincing. It seems to imply that the claim would require all the non-tobacco fibres to originate from bamboo. As the appellant-opponent has pointed out (appeal grounds, page 43), this is not so. Unlike the average L/W range feature, the %wt range feature relates to all non-tobacco fibres in the composition and not just those originating from bamboo (cf. claim 6 of this request)".

3.1 In item 11.1 of its communication, the Board established 3 differing claim features starting from D2 (At least one type of non-tobacco fibre having an average L/W ratio of 3.5:1 to 15:1; the content of non-tobacco fibres being 2 to 10wt% and the at least one non-tobacco fibre type being bamboo). In item 12.5, the Board established that obviousness of these features was to be evaluated separately for assessing inventive step, the objective technical problem for all features being to provide an alternative smokeless tobacco composition. In its letter of 7 April 2025, the respondent-proprietor agreed with the differing features identified by the Board. It also did not dispute that the approach of assessing inventive step separately for the differing features nor the objective

technical problem proposed. Having reviewed the case, the Board confirms its preliminary opinion with regard to the differing features and its approach to inventive step.

However, in its letter of 7 April 2025 (see page 2), the respondent opined, in summary, that D2 already disclosed parameters for the differing features rather than merely having gaps in its disclosure. In its view, any modification of D2 would thus change intentionally chosen parameters which could only be done with hindsight so that for this reason auxiliary request 1 would involve an inventive step.

In its inventive step assessment, the Board started from D2 and used the problem and solution approach, which is well established. The Board is not aware of a different approach being used, according to which inventive step might be denied as being down to hindsight purely because a differing feature contrasted with a corresponding feature which could be considered to have been "chosen" in the closest prior art, rather than the closest prior art having no such corresponding feature - "a gap" in its disclosure to use the proprietor's words. Therefore, the argument of the respondent-proprietor is moot.

3.2 Turning now to the particular differing features, In item 12.6.4 of its communication, the Board established that, starting from D2, the claim feature of using at least one non-tobacco fibre did not contribute an inventive step and that the same was true for the claimed L/W ratio feature of claim 1. In item 12.7.3 of its communication, the Board explained that, *if* the skilled person were to combine the teachings of D2 and D5, they would arrive at a smokeless tobacco

composition for oral use comprising bamboo where the claimed wt% of non-tobacco fibres feature would be anticipated.

In this regard (see the Board's communication, item 12.7.4), the Board disagreed with the opposition division's conclusion of non-obviousness because the division had considered a feature that was not claimed (%wt of bamboo).

In its letter of 7 April 2025, the respondent-proprietor did not take issue with these matters. Having assessed them again, the Board concludes that its preliminary opinions on these matters were correct.

- 3.3 From the above, the denial of inventive step starting from D2 and considering D5 for the wt% of non-tobacco fibres feature, would hinge on answering the following question in the affirmative: Would the skilled person combine D2 and D5? This question was raised by the Board as a topic for discussion [at oral proceedings] in item 12.7.2 of its communication. The respondent-proprietor no longer requests oral proceedings. Having reviewed the case the Board considers that the question must be answered in the affirmative on the basis of the parties written submissions.
- 3.4 The appellant-opponent has argued (see its appeal grounds, page 42) that D2 and D5 are in the same technical field. The Board agrees with this assessment. Both disclose oral tobacco products, so they are the same type of product. Both also disclose products that are a mixture of tobacco and non-tobacco fibres, whether the latter are in a granular or structural form. In the Board's view, starting from D2's oral tobacco product and with their mind set on finding a

mere alternative composition in terms of a suitable wt% of non-tobacco fibres, the skilled person would not dismiss D5's teaching. Rather, they would consult it to find a wt% of non-tobacco fibres that would be suitable for an oral tobacco product. In other words, the skilled person would combine D2 with D5, as a matter of obviousness.

- 3.5 The respondent proprietor took a different view in its letter of 7 April 2025 (starting on page 2). Under the title "Item 12.7.2", it argued that [the teachings of] D2 and D5 would not be compatible for several reasons and so the skilled person would not look to D5 for an alternative composition to the tobacco and non-tobacco fibres that it referred to as the *fibre mixture*.

Without prejudice to their admittance, these arguments have not convinced the Board that the skilled person would not combine the teachings of D2 and D5 as a matter of obviousness.

- 3.5.1 A first argument made by the respondent reads as follows:

"D5 does, in the first place, not provide an appropriate alternative to the fibre mixture of D2. D2 relates to a pouched product, the particulate fibre mixture being portioned into a snus type of pouch (last line of Example 5, first line of Example 6). D5 relates, on the other hand, to a fabric having tobacco entangled with structural fibres, a piece of which is placed in a consumer's mouth (page 2, lines 9-12). In contrast to a particulate mixture, the fabric of D5 does not need, and is not intended for, inclusion in a pouch. In fact, the fabric of D5 provides a user experience that is not impeded by a pouch or pouch

materials (page 2, line 22). D5 thus teaches away from inclusion in a pouch. For this reason, a skilled person would not consider D5 to provide an alternative composition to the one of D2. Accordingly, the skilled person would not modify the fibre mixture of D2 based on the teachings of D5".

As the Board explained in its communication, like D2, D5 relates to a snus smokeless tobacco composition (see D5, page 3, line 7). Therefore, the difference between D2 and D5's mouth-placed snus product is the delivery format: D2 being a pouch of tobacco particles and non-tobacco fibre particles and D5 a fabric strip with tobacco fibres entangled in non-tobacco fibres. In this regard, it might well be that these provide different user experiences: The user experiences D2's tobacco product in the mouth through a pouch whereas that of D5, unimpeded by such a pouch (see D5, page 2, line 22). However, the respondent-proprietor has not explained why such experiential differences might lead the skilled person to reject D5 when seeking an alternative *composition* for the product itself in terms of its proportion of non-tobacco fibres. With the skilled person's eye focused on finding an alternative composition for the underlying product, they would not reject combining D2's teaching with that of D5 simply because their delivery formats provide different user experiences.

3.5.2 In a further comment, the proprietor wrote:

"Should the Board contemplate not only modifying the fibre mixture but entirely replacing the pouched product of D2 with the fabric of D5, it is respectfully recalled that the starting point of a pouched, particulate fibre mixture was deliberately chosen over

that of a fabric. The consequence of choosing a certain starting point is well established in case law (Case Law of the Boards of Appeal, 10th edition, I.D.3.6) and is that the starting point defines the framework for further development. A change from a pouched, particulate fibre mixture to a fabric can only be seen as the result of an ex-post-facto analysis. For this reason, a skilled person would not replace the pouched product of D2 with the fabric of D5".

In this regard, the Board notes that, in its communication (point 12.7.2) it raised the question as to whether the skilled person would reject the idea of looking to D5 for an alternative composition for the tobacco and non-tobacco fibres in D2. It did not pose the question as to whether it would be obvious to change D2's disclosed pouch delivery format, nor does the Board contemplate that idea in this decision. Therefore, the comment of the respondent-proprietor is moot.

3.5.3 A further argument made by the respondent-proprietor was:

"The approach of being bound to the chosen starting point applies also in respect of the weight percentage as such. The starting point of 23.9 wt% non-tobacco fibres (D2) was deliberately chosen over that of 1.0 to 7.0 wt% structural fibres (D5). In such context, a change from the chosen to the not chosen weight percentage results from an ex-post-facto analysis. For this reason, the skilled person would not modify the fibre mixture of D2 towards the weight percentage of D5".

As the Board has already explained, the fact that D2 discloses a certain wt% of non-tobacco fibres does not exclude it as a candidate for modification, as a matter of obviousness, within the framework of the problem solution approach. Moreover, the Board sees no disclosure in D2, page 22, examples 5 and 6 that 23.9 wt% non-tobacco fibres was *deliberately chosen over D5's 1.0-7.0 wt% non-tobacco fibres value*. Indeed, the Board is not aware that D2 refers anywhere to D5. It follows that the respondent's premise that this would be the context of D2's examples 5 and 6 is not convincing. Therefore, its associated conclusion that considering changing D2's wt% starting point [as part of the problem solution approach] would constitute *ex-post-facto* analysis is moot.

3.5.4 The respondent proprietor has also argued:

"Furthermore, D2 utilizes non-tobacco fibres to reduce tobacco content and (thus) cost (page 3, lines 18-20). A skilled person would not go against the aim of D2 by lowering the content of non-tobacco fibres to that disclosed in D5. Also for this reason, the skilled person would not modify the fibre mixture of D2 towards the weight percentage of D5".

The cited passage of D2 on page 3 is in the general part of the description. It reads: "As such, a smokeless tobacco product can exhibit highly desirable sensory attributes, while possessing a reduced overall tobacco content and potentially reduced cost (e.g., depending upon factors such as the non-tobacco plant material that is selected)". Thus it does not specifically relate to the examples 5 and 6 on page 22. Nor does it state that the aim of D2 is to reduce cost. Rather, at best it seems only to concretely teach that

a potential cost reduction can depend on which non-tobacco plant material is selected. Therefore, the Board is not convinced that this passage would stop the skilled person from modifying the fibre mixture of D2 [examples 5 and 6] towards the weight percentage of D5 in the hope of finding an alternative composition.

- 3.5.5 Finally, the respondent-proprietor has argued: "It is additionally noted that the structural fibres of D5 serve to maintain the cohesion of the tobacco-entangled fabric during packaging, transport, handling and consumer use (page 35, first ten lines). A skilled person would thus understand the weight percentage of D5 as being intimately associated with the cohesiveness of a product in the form of a self-contained, entangled fabric and not, without further consideration, be applicable to the pouched, particulate fibre mixture of D2. This is a further reason why a skilled person would not modify the fibre mixture of D2 towards the weight percentage of D5".

The Board does not find this argument convincing. The cited passage of D5 states that including "at least 0.5 weight percent structural fibers, [...] can increase the likelihood that the tobacco-entangled fabric 100 maintains its cohesion during packaging, transport, handling, and use." In the Board's view, the skilled person would not understand the statement that such an open ended range ($\geq 0.5\text{wt}\%$ structural fibres) holding out the mere possibility of likely maintenance of cohesion, to demonstrate that the weight percentage [of D5's non-tobacco fibres] is *intimately associated* with cohesiveness. Therefore, however important cohesiveness might be in D5's product compared to D2's product, the argument is moot.

3.6 For the above reasons, the Board is not convinced that the skilled person would not consult D5 to find an alternative for D2's wt% composition (of non-tobacco fibres). As explained in part 12.7.3 of its communication, to which the respondent-proprietor has not commented, the result of this combination is the anticipation of the claimed wt% of non-tobacco fibres feature. Having reviewed this aspect of the communication, the Board confirms that this is so. Therefore, the feature (wt% of non-tobacco fibres) does not contribute an inventive step.

3.7 Since the remaining features of claim 1 are also known or obvious when starting from D2, the subject matter of claim 1 lacks inventive step.

4. Main request (as maintained, auxiliary request 1 in opposition proceedings), independent claim 11

Claim 11 is a method for manufacturing of a smokeless tobacco composition according to claim 1. It also defines certain manufacturing steps. In particular, it adds that the non-tobacco fibres are mixed into the tobacco composition to a homogenous blend.

In its communication (point 16) the Board wrote the following with regard to claim 11 amongst others:

"16 Auxiliary request 1 [main request], independent claims 11, 20 and 21

The above considerations for claim 1 appear to equally apply to claims 11, 20 and 21 which all refer to claim 1. With regard to claim 11, the Board agrees with the appellant-opponent (see its appeal grounds, page 66 with D2, page 14, line 31 to page 15, line 1), that D2

discloses a uniform mixture and thus one that is homogeneous."

The respondent-proprietor has not commented on this aspect of the communication. In its letter of 7 April 2025, it only commented on claim 1 of the main request (as maintained, auxiliary request 1 in opposition proceedings). As has already been explained, the subject matter of claim 1 lacks inventive step starting from D2. As the Board pointed out in its communication, upon which the respondent-proprietor has not commented, D2 already discloses a homogenous mixture, which the skilled person would not change merely because a different fibre composition was being chosen. Therefore, starting from D2 in combination with D5 the skilled person would arrive at the subject matter of claim 11, including the step of mixing non-tobacco fibres into a tobacco composition to a homogeneous blend, as a matter of obviousness, for the reasons explained for claim 1. Therefore, the subject matter of claim 11 likewise lacks inventive step.

4.1 For all these reasons, the main request (as maintained, auxiliary request 1 in opposition proceedings) fails.

5. Auxiliary requests 9 to 13

5.1 The Board considered these requests in its communication. The relevant section of the communication (17) reads as follows:

"17. Auxiliary requests 9 to 13, admissibility and allowability

According to the respondent-patent proprietor (see its reply to the appeal, section 6, point 72 and 73),

auxiliary requests 9 to 13 provide increasingly detailed definitions of the average length-to-width ratio of claim 1 in order to remedy possible objections under Article 83 EPC. Moreover, it explains: *Should the Board accept any of the opponent's objections under Art. 54 or 56 EPC, in particular those based on that the average L/W ratio is so ill-defined that it should not be relied on when interpreting claim 1, introduction of the definitions of any of these requests will remedy said objections so that the average L/W ratio may be properly identified as feature distinguishing the subject-matter of claim 1 from the prior art.*

17.1 The Board notes that, in accordance with established jurisprudence (see CLBA, section II.C.3.1), sufficiency of disclosure within the meaning of Art. 83 EPC must be assessed on the basis of the application [patent in opposition proceedings, Article 100(b) EPC] as a whole - including the description and claims. Merely incorporating an additional feature into the claim with respect to the average L/W ratio that was already contained in the description might improve the clarity of the claimed feature but would not change the overall disclosure of the patent. Therefore, the amendments to these requests would appear not to be suited to rendering the invention sufficiently disclosed with regard to this feature.

17.2 Rather, the respondent-proprietor's statement that the amendments might overcome a problem with the average L/W ratio being ill-defined appears aimed at addressing possible clarity problems. Since this feature was in granted claim 1 and clarity is not an opposition ground, to the extent that the amendments are aimed at clarifying the claim, they would appear

not to be occasioned by an opposition ground and thus would not meet the requirements of Rule 80 EPC. Moreover, in the Board's view, some of the amendments may introduce issues of clarity. In particular, claim 1 of auxiliary request 9 adds to claim 1 of auxiliary request 1 (as maintained) the feature "*and wherein the average length-to-width ratio is measured as described herein*". This unspecific reference, seemingly to the whole patent specification renders the scope of the claim unclear, Article 84 EPC.

The respondent-proprietor has not otherwise substantiated how any of the amendments made in the various requests might overcome any objection of novelty and inventive step as part of its complete case, Article 12(3) RPBA.

17.3 From the above, the Board is of the provisional opinion that the auxiliary requests are either not allowable or not admissible under Article 12(5) RPBA".

5.2 The respondent-proprietor has not commented on this part of the Board's communication. In its letter of 7 April 2025, it dealt only with auxiliary request 1. Having reviewed it, without prejudice to the question of the admissibility of auxiliary requests 9 to 13, the Board confirms that these requests are not allowable.

5.2.1 As has been explained, claim 1 of auxiliary request 1 lacks inventive step starting from D2 with D5. Absent any arguments from the proprietor as to why auxiliary requests 9 to 13 might have succeeded in this respect in the event of auxiliary request 1 failing, the Board considers that its findings of lack of inventive step for auxiliary request 1 must also apply to auxiliary requests 9 to 13. Additionally, claim 1 of auxiliary

request 9 lacks clarity, Article 84 EPC. Therefore, the Board confirms its provisional opinion that auxiliary requests 9 to 13 are not allowable.

6. Auxiliary requests 14 and 15

6.1 In its reply to the opponent's appeal, the respondent-proprietor wrote the following with regard to novelty/inventive step of these requests (section 7, paragraph 88):

"7 Auxiliary requests 14 and 15

88 Auxiliary requests 14 and 15 involve only the method claim of Auxiliary request 1 (current main request) and Auxiliary request 9, respectively. The respective method claims recite that the none-tobacco fibres are mixed into the tobacco composition to form a homogeneous blend. These requests thus further distinguish the claimed subject-matter from D5, in which the structural fibres form a network in which the smokeless tobacco is entangled (abstract; throughout the specification, e.g., pages 7-32). Should the Board accept any of the opponent's objections under Art. 54 or 56 EPC, in particular those involving D5, the method claims of these requests will remedy said objections. Auxiliary request 15 furthermore remedies objections under Art. 54, 56 or 83 EPC as set out above for Auxiliary request 9."

6.2 In its communication (section 18), the Board also considered the matter. It wrote the following:

"18. Auxiliary requests 14 and 15

The only substantiation provided by the respondent-proprietor for auxiliary requests 14 and 15 (see its reply to the appeal, section 7, points 88 and 89) is that they are aimed at overcoming possible objections of novelty/inventive step involving D5. To the extent that these issues might prove to be decisive, they may need to be discussed in substance".

6.3 The respondent-proprietor has not commented on this part of the communication. Since the Board found the issue of inventive step starting from D2 with D5 for the auxiliary request 1 to be decisive, in the absence of further comment from the proprietor, it behoves the Board to consider these requests in more detail.

6.4 The subject matter of claim 1 of auxiliary request 14 is the same as that of claim 11 of auxiliary request 1, the difference in wording being due to the insertion of the actual wording of claim 1 of auxiliary request 1 (rather than a reference thereto) into claim 1 of auxiliary request 14.

For the reasons explained for claim 11 of auxiliary request 1, the subject matter of claim 1 of auxiliary request 14 lacks inventive step starting from D2 with D5. Therefore, the request fails.

6.5 Auxiliary request 15

6.5.1 Claim 1 of auxiliary request 15 incorporates the wording of claim 1 of auxiliary request 9, including its last line: *and wherein the average length-to-width ratio is measured as described herein*. It is otherwise the same as claim 1 of auxiliary request 14.

- 6.5.2 In the Board's view, as far as it can be understood, the feature added to this claim compared to claim 1 of auxiliary request 14 does not change its substance: Howsoever the skilled person might choose to measure the claimed length-to-width ratio, the ratio itself is rendered obvious for the reasons explained for auxiliary request 14 (with reference to the discussion of claim 11 of auxiliary request 1). Therefore, claim 1 of auxiliary request 15 is not allowable for the same reasons of lack of inventive step as apply to auxiliary request 14.
- 6.5.3 For completeness, the Board adds that claim 1 of auxiliary request 15 lacks clarity because it incorporates the wording of claim 1 of auxiliary request 9, which the Board finds to lack clarity, Article 84 EPC.
- 6.5.4 For all these reasons, auxiliary request 15 is not allowable.
7. Because the Board finds that the opposition division was wrong to find that the subject matter of claims 1 and 11 of auxiliary request 1 in opposition proceedings, main request in appeal, involved an inventive step, it must set aside the decision. Since none of the respondent-proprietor's lower ranked requests are allowable, the Board must revoke the patent.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Magouliotis

A. Pieracci

Decision electronically authenticated