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**Datasheet for the decision
of 7 October 2025**

Case Number: T 1128/23 - 3.2.01

Application Number: 18157257.9

Publication Number: 3354144

IPC: A24F47/00

Language of the proceedings: EN

Title of invention:
HEATING SMOKABLE MATERIAL

Patent Proprietor:
Nicoventures Trading Limited

Opponent:
Philip Morris Products S.A.

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 76(1), 83, 123(2), 123(3)
EPC R. 80
RPBA 2020 Art. 12

Keyword:

Main request - novelty (no)

Auxiliary request - clarity (yes), sufficiency of disclosure (yes), added subject-matter (no), extension of scope of protection (no), novelty (yes), inventive step (yes)

New objections - admittance (no)

Decisions cited:

G 0002/10, G 0001/05

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1128/23 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 7 October 2025

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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
20 April 2023 concerning maintenance of the
European Patent No. 3354144 in amended form.

Composition of the Board:

Chairman G. Pricolo
Members: B. Spitzer
O. Loizou

Summary of Facts and Submissions

- I. Both the opponent and the patent proprietor filed an appeal against the interlocutory decision of the Opposition Division finding that the European patent No. 3 354 144 (the patent) as amended according to the first auxiliary request meets the requirements of the EPC.
- II. The opposition had been filed against the patent as a whole on the basis of the grounds for opposition under Article 100(a) EPC together with Article 54 EPC (lack of novelty) and Article 56 EPC (lack of inventive step), under Article 100(b) EPC and Article 100(c) EPC.
- III. The documents cited in this decision include the following:
- D2: WO 95/27 411 A1
D3: EP 2 327 318 A1
parent application: WO 2013/034460 A1
- IV. With a communication pursuant to Article 15(1) RPBA dated 7 April 2025, the Board informed the parties of its preliminary assessment of the case.
- V. Oral proceedings pursuant to Article 116 EPC took place before the Board on 7 October 2025 by videoconference.
- VI. The patent proprietor (appellant I) requested that the decision under appeal be set aside and the patent be maintained according to the main request filed with their reply or, in the alternative, that the appeal of the opponent be dismissed (first auxiliary request as

maintained by the Opposition Division) or that the patent be maintained in amended form on the basis of the claims of one of the auxiliary requests 2 to 35 filed with their reply.

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

VII. Independent claims 1, 9 and 12 of the main request have the following wording (the feature references used by the Opposition Division are included in square brackets):

"**[1.1]** An apparatus (1) comprising:
an elongate heater (3) configured to heat smokeable material (5) to volatilize at least one component of the smokeable material, **[1.2]** the heater comprising a first heating cylinder **[1.2.1]** configured to heat a first region of smokeable material **[1.2.2]** located within the first heating cylinder and **[1.3]** a second heating cylinder **[1.3.1]** configured to heat a second region of smokeable material **[1.3.2]** located within the second heating cylinder, **[1.4]** the first heating cylinder and the second heating cylinder being axially aligned; and
[1.5] a smokeable material heating chamber (4), **[1.5.1]** defined by the first heating cylinder and the second heating cylinder, **[1.5.2]** configured to receive a cartridge of smokeable material, **[1.6]** wherein the first heating cylinder and the second heating cylinder are configured to be activated sequentially to independently heat the first region of the smokeable material and the second region of smokeable material."

"**[9.1]** A method of heating smokeable material using the

apparatus of any preceding claim, comprising:

[9.2] activating the first heating cylinder; and

[9.3] activating the second heating cylinder [9.3.1]

following a predetermined period of time after the activation of the first heating cylinder."

"12. A system comprising:

apparatus (1) according to any of claims 1 to 8; and smokeable material (5) for use with the apparatus."

VIII. Independent claims of the first auxiliary request underlying the decision under appeal (amendments compared to the independent claim 1 of the main request are marked) read as follows.

"[1.1] An apparatus (1) comprising:

~~An elongate~~ heater (3) configured to heat smokeable material (5) to volatilize at least one component of the smokeable material, [1.2] the heater comprising a plurality of heating regions (10) in an elongate arrangement, each heating region (10) comprising a heating cylinder configured to heat a respective region of smokeable material located within the heating cylinder, the heater thus including a first heating cylinder [1.2.1] configured to heat a first region of smokeable material [1.2.2] located within the first heating cylinder and [1.3] a second heating cylinder [1.3.1] configured to heat a second region of smokeable material [1.3.2] located within the second heating cylinder, [1.4] the first heating cylinder and the second heating cylinders of the heater (3) being axially aligned; and

[1.5] a smokeable material heating chamber (4), [1.5.1] defined by the first heating cylinders of the heater (3) and the second heating cylinder, [1.5.2] configured to receive a cartridge of smokeable material; and

[1.6] a controller (12) configured to control operation of the apparatus (1), wherein the controller (12) is configured to control activation of the heater (3) to heat smokable material (5), wherein, in response to an initial activation stimulus, the heating cylinders including the first heating cylinder and the second heating cylinder are configured to be activated sequentially over a predetermined period of use to independently heat the regions of the smokeable material located within the respective heating cylinders."

Independent method claim 9 and system claim 12 of the first auxiliary request correspond to those of the main request.

Reasons for the Decision

Main request

1. Main request - lack of novelty of the subject-matter of claim 1 of the main request over document D3 (Article 54 EPC)
- 1.1 The Opposition Division came to the conclusion that the subject-matter of claim 1 of the main request was not new over document D3 (see decision under appeal, Reasons, point 17). The Board agrees.
- 1.2 The patent proprietor argued that document D3 failed to disclose either an elongate heater (feature 1.1) or a heater in which first and second heating cylinders together defined a (single) heating chamber that is configured to receive a cartridge of smoking article (feature 1.5.1). In the example given in

paragraph [0032] of document D3, the heating cylinders each had a length of 3 mm, with a separation of 0.5 mm (paragraph [0029] of document D3). According to paragraph [0017] of document D3, the external diameter of the smoking article might be 7.2 mm. The width of the heating cylinders was therefore greater than the length of the heater, as was also shown in Figure 2 of document D3.

Figure 2

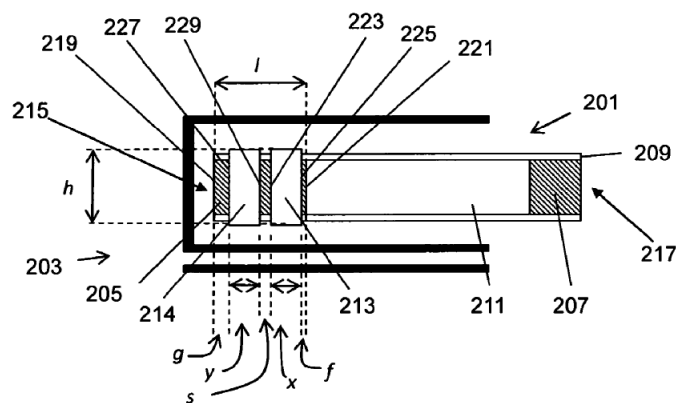


Figure 2 of document D3

1.3 The patent proprietor's arguments are unconvincing in view of the disclosure in paragraphs [0028] and [0033] of document D3, as cited by the opponent. The heater may comprise three, four, five, six or more heating elements. For at least a higher number of heating elements, the length of the heating elements including the gaps will be larger than the external diameter of 7.2 mm.

Moreover, the gaps in document D3 do not render the subject-matter of claim 1 of the main request new, as the patent also discloses a gap between the first and second heating cylinders, which together define a

heating chamber, as pointed out by the opponent.

- 1.4 Therefore, contrary to the patent proprietor's allegations, the Board considers this a direct and unambiguous disclosure of both an elongate heater according to feature 1.1 and a heater in which first and second heating cylinders together defined a heating chamber that is configured to receive a cartridge of smoking article according to feature 1.5.1.

2. Conclusion for the main request

Since the subject-matter of claim 1 of the main request is not new, the main request is not allowable.

First auxiliary request underlying the decision under appeal

3. First auxiliary request - admissibility of amendments (Rule 80 EPC)

- 3.1 According to the opponent, the first auxiliary request was not admissible under Rule 80 EPC because the amendments in feature 1.1 from "a" to "A", in feature 1.5.2 from "material," to "material;" and in feature 1.6 "*cylinders of the heater (3) (...) located within the respective heating cylinders*" were not based on a response to the grounds of opposition under Article 100(a), (b), (c) EPC. These objections were raised for the first time with its statement of grounds of appeal and its reply to the patent proprietor's statement of grounds of appeal, respectively.

- 3.2 In the Board's view, the amendments made in the first auxiliary request as a whole (see point VIII. above) are occasioned by a ground for opposition (Rule 80 EPC). Moreover, this request underlies the

decision under appeal. It is not to be regarded as an amendment (see Articles 12(2) and (4) RPBA).

4. First auxiliary request - clarity (Article 84 EPC)
 - 4.1 The Opposition Division concluded that the claims of the first auxiliary request were clear (see decision under appeal, Reasons, point 19).
 - 4.2 The Board agrees with the Opposition Division that the sole feature objected to by the opponent in the opposition proceedings - "*configured to heat a respective region of smokeable material*" in feature 1.2 - is clear, as the skilled person interpreting claim 1 in a technically meaningful way would readily recognise that reference is to a single smokeable material throughout claim 1.
 - 4.3 With its statement of grounds of appeal and its reply to the patent proprietor's statement of grounds of appeal, the opponent raised further new clarity objections concerning feature 1.6 "*to independently heat the regions of the smokeable material*", the different predetermined periods in feature 1.6 of claim 1 and feature 9.3.1 of claim 9, and concerning the term "predetermined period of use" in feature 1.6 of claim 1.
 - 4.4 The Board notes that these objections have been filed for the first time in appeal and their admittance into the appeal proceedings is, thus, subject to the discretion of the Board pursuant to Article 12 RPBA. The first auxiliary request had been filed with the patent proprietor's reply to the notice of opposition. So these objections could and should have been submitted in the opposition proceedings. Neither has

the opponent alleged any circumstances in the appeal proceedings that would justify their admittance, nor does the Board see any. Therefore, the Board did not admit these objections in accordance with Article 12(6), second sentence, RPBA.

- 5. First auxiliary request - sufficiency of disclosure (Article 83 EPC)
- 5.1 The Opposition Division considered the invention as per the main request sufficiently disclosed (see decision under appeal, Reasons, point 11).
- 5.2 The Board comes to the same conclusion.
- 5.3 The opponent argued that it was not apparent from claim 1 of the main request how an independent heating of a single portion of smokable material in the cartridge should work (features 1.5.2 and 1.6 of claim 1 of the main request).

The opponent stated that this also held true for the first auxiliary request.

The embodiment of Figure 2 of the patent clearly showed adjacent heating cylinders separated by only a small gap. As heat would naturally radiate laterally, one of two adjacent heating cylinders could not independently heat only the smokable material portion located within that cylinder. Moreover, the patent contained no teaching as to how separate regions of the smokable material were defined, nor how these alleged separate regions could be heated independently.

- 5.4 The opponent's arguments are not persuasive. As submitted by the patent proprietor, the meaning of

"independent heating" is explained in the patent, for example in paragraph [0028], which states that the heating regions shown in the figures are arranged to predominately and independently heat different regions of the smokeable material. Paragraph [0028] further clarifies that the heating regions are also operable independently. As described in paragraphs [0030] and [0032] of the patent, activation of a particular heating region causes that heating region to supply thermal energy to the smokeable material located within it, without substantially heating the remainder of the smokeable material. This defines what is meant by "independent heating" and results from the axial arrangement of the heating regions. Accordingly, in light of the patent's teaching, there is no lack of sufficiency of disclosure.

- 5.5 The opponent raised a further objection of insufficiency of disclosure for claim 1 of the main request which concerned the cartridge of smokable material. The Board notes that the cartridge is not part of claim 1 of the first auxiliary request and, thus, this objection of insufficiency of disclosure does not apply for the first auxiliary request.
- 6. First auxiliary request - extension of the protection conferred (Article 123(3) EPC)
 - 6.1 The Opposition Division came to the conclusion that the claims of the first auxiliary request did not extend the scope of protection beyond that conferred by the opposed patent (see decision under appeal, Reasons, point 20). The Board confirms this conclusion.
 - 6.2 The opponent argued that claim 1 of the first auxiliary request had been broadened, since features 1.2, 1.5 and

1.5.1 define a heating chamber by reference to a "plurality of heating cylinders". In particular, in claim 1 of the first auxiliary request, the heater comprised a plurality of heating regions, each comprising a heating cylinder, instead of a first and a second heating cylinder. Furthermore, the smokeable material heating chamber was now defined by the heating cylinders of the heater, rather than by the first and second heating cylinders alone. While the terms "comprising" and "consisting" had well-established meanings in patent law, this was not the case for the term "defined by". In the opponent's view, the wording "defined by" related to an exclusive interpretation. Reference was made to the Merriam-Webster Dictionary, according to which "define" meant "*to determine or identify the essential qualities*". The opponent further referred to claim 3 of the main request (remark: corresponds to claim 5 as granted), which did not specify that the heating chamber was defined by the third heating cylinder. Accordingly, claim 1 of the first auxiliary request now defined the heating chamber by the heating cylinders of the heater, and not only by the first and second cylinders as in claim 1 as granted, thereby extending the protection conferred. The opponent also referred to page 8, lines 10 to 11 of the parent application (remark: [0029] in the patent), which contained the only sentence mentioning the term "defined", stating that the heating regions define the exterior of the heating chamber. Finally, the opponent supported its argument by way of a comparative example of a six-sided die, which was (exclusively) defined by six sides and therefore could not be defined by ten sides.

- 6.3 The Board notes that in accordance with Article 123(3) EPC, the European patent may not be amended in such a

way as to extend the protection it confers.

- 6.4 In claim 1 as granted, the heater comprises a first and second heating cylinders, respectively heating regions, and a smokeable material heating chamber was defined by the first heating cylinder and the second heating cylinder.

In claim 1 of the first auxiliary request, the heater comprises a plurality of heating regions, each heating region comprising a heating cylinder, the heater thus including a first heating cylinder and a second heating cylinder. A smokeable material heating chamber is defined by the heating cylinders of the heater.

- 6.5 The opponent's arguments are not convincing. It is undisputed that the term "comprising" has an inclusive meaning. Accordingly, as stated by the patent proprietor, the heater in claim 1 as granted can comprise further heating cylinders as, for instance, also claimed in dependent claim 5 as granted or in claim 3 of the first auxiliary request. The Board concurs with the patent proprietor that, in claim 1 as granted, the heating chamber is defined by (at least) the first and second heating cylinders, and in claim 1 of the first auxiliary request, the heating chamber is defined by (all of) the heating cylinders, including the first and second heating cylinders. In the context of the patent as a whole - see , in particular paragraph [0029], the embodiments and the figures - it is clear that the term "define" is not used in an exclusive sense, but rather as interpreted by the patent proprietor.

- 6.6 Consequently, the amendments to claim 1 of the first auxiliary request do not extend the protection

conferred.

7. First auxiliary request - Added subject-matter (Article 76(1) EPC)
- 7.1 The Opposition Division came to the conclusion that the subject-matter of claim 1 of the main request and the first auxiliary request did not extend beyond the content of the earlier (parent) application (see decision under appeal, Reasons, points 12 and 21).
- 7.2 The Board reaches the same conclusion with respect to the first auxiliary request.
- 7.3 When determining what extends beyond the content of the earlier application, exactly the same principles are to be applied for assessing compliance with Article 123(2) EPC and Article 76(1) EPC (see G 1/05). According to the "gold standard" (see G 2/10), any amendment to the parts of a European patent application or of a European patent relating to the disclosure (the description, claims and drawings) can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed (see Case Law of the Boards of Appeal of the European Patent Office, 11th edition, July 2025, "Case Law", II.F.2.1. and II.E.1.1.). Concerning the three-point essentiality test applied by the opponent, the Board refers to established case law according to which this test is no longer considered appropriate (see Case Law, II.E.1.4.4c)).

- 7.4 The opponent's objections under Article 76(1) EPC are addressed below (see points 7.5 to 7.10).
- 7.5 Omission of "concurrent heating" (see opponent's statement of grounds of appeal, point 3.4.1 and decision under appeal, Reasons, point 12.2.1)
- 7.5.1 According to the opponent, the gist of the whole parent application was to prevent condensation. This was achieved by "*concurrently heating a second region of smokable material to a temperature lower than said volatilizing temperature*" (see parent application, page 1, summary; page 2, lines 24 to 25; page 3, first paragraph). Furthermore, this feature was included in all independent claims of the parent application. Thus, concurrent heating was an essential feature, and its omission was deemed to contravene Article 76(1) EPC.

All passages cited by the Opposition Division in point 12.2.1 of the Reasons of the decision under appeal disclosed sequential heating (see parent application, page 9, lines 23 to 24; page 16, lines 3 to 5; page 17, lines 5 to 8). However, this did not exclude concurrent heating. Although, for instance, in the first operational mode a newly activated heating region deactivated the previous one, there was nevertheless concurrent heating, as the deactivated heater remained hot and continued to heat the smokeable material (see parent application, page 18, line 33 to page 19, line 8).

- 7.5.2 The Board is not convinced by the opponent's arguments.
- 7.5.3 The decisive point is not whether a feature is essential, but rather whether there is a direct and unambiguous disclosure for its omission (see

point 7.3). While the summary of the invention (see parent application, page 1, line 12 to page 3, line 8) and the claims of the parent application were based on concurrent heating, the claims of the present main request address a different technical problem and claim sequential heating as disclosed, for instance, in at least the first mode of operation (see parent application, page 18, line 31 to page 19, line 9). In the first operational mode, the previous heater is deactivated when a new heater is activated. There is no concurrent heating.

Contrary to the opponent's argument, remaining heat of the deactivated heater still heating the smokable material is not considered as concurrent heating. The Board concurs with the patent proprietor that such a heat transfer also occurred in the apparatus according to claim 1 of the first auxiliary request and that in the parent application concurrent heating was addressed as, for instance, in the second and third operational mode, where the previous heater is not deactivated but remains fully or partially activated. Accordingly, the second and third operational mode disclose (active) concurrent heating while in the first operational mode no (active) concurrent heating occurs.

7.5.4 Thus, the Board agrees with the patent proprietor and the Opposition Division that the passages cited by them disclose a sequential activation of the heaters are a direct and unambiguous disclosure that concurrent heating is an optional feature, and its omission does not lead to an unallowable amendment.

7.6 Omission of the heater being "cylindrical" (see opponent's statement of grounds of appeal, point 3.4.4

and decision under appeal, Reasons, point 12.2.4)

- 7.6.1 The opponent referred to page 5, lines 14 to 16 of the parent application according to which "[t]he heater 3 may comprise a substantially cylindrical, elongate heater 3" and argued that the feature "elongate heater" was inextricably linked to the feature "substantially cylindrical". Thus, the omission of "cylindrical" resulted in an unallowable intermediate generalisation.
- 7.6.2 According to features 1.2 and 1.3 of claim 1 of the main request, the heater comprises a first and second heating cylinder. Therefore, the opponent's objection that the feature "cylindrical" was omitted is unconvincing to the Board.
- 7.7 Omission of nicotine (see opponent's statement of grounds of appeal, point 3.4.10 and decision under appeal, Reasons, point 12.2.10)
 - 7.7.1 The opponent argued that feature 1.1 "to volatilize at least one component of the smokable material" of claim 1 was broader than the disclosure in the parent application. The disclosure on page 5 of the parent application held that "the heater 3 heats the smokable material 5 therein to volatilize aromatic compounds and nicotine in the smokable material 5, without burning the smokable material 5".
 - 7.7.2 The Board concurs with the Opposition Division's reasoning that the person skilled in the art would derive directly and unambiguously, using common general knowledge, that at least one component of the smokable material is volatilized (see decision under appeal, Reasons, point 12.2.10). Furthermore, the parent application discloses that nicotine and/or aromatic

compounds were volatilized and nicotine is not an absolutely necessary component (see parent application, page 3, line 14 to 15; page 16, line 33; page 17, line 13; page 18, lines 18 to 19).

7.8 Feature 1.6 (see opponent's statement of grounds of appeal, points 4.6.1 and 4.6.2; its reply to the patent proprietor's statement of grounds of appeal, point 3.21; opponent's letter dated 15 July 2024, point 3.1.5)

7.8.1 The opponent raised several objections under Article 76(1) EPC in relation to feature 1.6 of claim 1 of the first auxiliary request.

(a) The controller in feature 1.6 was based on an intermediate generalization.

The added feature "over a predetermined period of use" was inextricably linked to the feature "one after the other" and the added feature "in response to an initial activation stimulus" was inextricably linked to the feature "single, initial puff at the mouthpiece".

By omitting the features that the controller activated the heating regions and that the sequential activation over a predetermined period of use was one after the other in response to a single, initial puff at the mouthpiece, claim 1 of the first auxiliary request related to an embodiment wherein the heating regions could be activated puff-by-puff and sequentially which was not disclosed in the parent application and thus violated Article 76 EPC.

(b) Furthermore, the feature "over a predetermined period of use" was selected instead of "activating

each heating region 10 in response to an individual puff", thereby constituting a further selection.

The opponent referred to page 15, lines 20 to 23; page 16, lines 2 to 9; and page 17 lines 5 to 9 of the parent application. In view of these passages, it argued that the parent application disclosed two alternatives, namely that activation might occur either in response to the detection of a puff by puff sensor or to an elapse of a predetermined period of time. The addition of the feature "over a predetermined period of use" therefore constituted a further selection that was not directly and unambiguously derivable from the parent application.

(c) Finally, the feature "*wherein the controller is configured to control activation of the heater to heat smokable material*" in feature 1.6 of claim 1 of the first auxiliary request could not be found in the parent application.

7.8.2 The Board is not convinced as elaborated below:

(a) No unallowable intermediate generalisation

The feature that the controller activates the heating cylinders is not omitted, but is recited in feature 1.6 of in claim 1 of the first auxiliary request 1.

Basis for the "predetermined period of use" is the disclosure on page 17, lines 7 to 8 of the parent application, which reads "*activated sequentially, for example over a predetermined period of use, one after the other*". The Board concurs with the patent proprietor's view that the expression "one after the other" means "sequentially" and is therefore redundant

in the present context.

The Board notes that it is optional for the initial activation stimulus to be a single, initial puff at the mouthpiece. This is directly and unambiguously disclosed on page 17, lines 5 to 9 of the parent application.

In the Board's view, feature 1.6 of claim 1 of the first auxiliary request is not an unallowable intermediate generalisation.

(b) No selection

It is undisputed and indeed obvious that the parent application discloses two alternative modes of activating the heater: one being puff-by-puff activation, and the other activation in a predetermined manner.

The Board does not see any multiple selection, since the claim combines preferred features from the same embodiment, which does not correspond to a selection from multiple lists.

(c) Basis for the controller

The Board concurs with the patent proprietor that the parent application discloses on page 15, lines 19 to 20 that the controller, in general, is configured to control activation of the heater, for instance, the heating cylinders. The activation performed according to a predetermined heating profile is described on page 16, lines 2 to 9 and, as well, on page 17, lines 5 to 9 of the parent application.

- 7.9 Claim 9 (see opponent's statement of grounds of appeal, point 4.6.3)
 - 7.9.1 In the opponent's view, the term "predetermined period of time" in claim 9 resulted in an embodiment not originally disclosed in the parent application.
 - 7.9.2 The Board notes that the feature "predetermined period of time" used in claim 9 of the first auxiliary request is directly and unambiguously disclosed, e.g. on page 16, lines 6 to 7 of the parent application.
- 7.10 Dependent claims 4, 5, 7, 8, 10 and 11 (see opponent's statement of grounds of appeal, points 3.4.12 and 4.6.3; see decision under appeal, Reasons, point 21.1.2 to 21.2.4))
 - 7.10.1 The opponent argued that the parent application did not disclose that the smokable material was heated without combusting the smokable material, whereby claim 7 contravened the requirements of Article 76(1) EPC.
 - 7.10.2 The Board is not convinced as the parent application directly and unambiguously disclosed that smokeable material was volatilized without burning (see parent application, page 5, lines 7 to 10).
 - 7.10.3 Furthermore, the opponent argued that the teaching of claim 8 concerning thermal insulation located coaxially around the heating chamber lacked basis in the parent application. Page 14, lines 1 to 3 of the parent application described further inextricably linked features of the thermal insulation such as the heater being integrated with the thermal insulation in the relevant embodiment of Figure 2 and the thermal insulation comprising a substantially elongate hollow

body with integrated heating regions.

- 7.10.4 The Board concurs with the patent proprietor that these features are optional features and that page 11, lines 35 to 36 of the parent application discloses a thermal insulation between the smokeable material and the housing in general terms.
- 7.10.5 According to the opponent, claims 4, 5 10 and 11 were based on page 23, lines 5 to 9 of the parent application. However, the feature that the heating temperature was user controllable was missing.
- 7.10.6 The Board concurs with the Opposition Division's view that user control is disclosed on page 23, lines 5 to 9 of the parent application as an optional feature. As stated by the patent proprietor, a basis for these claims can be found on page 18, lines 19 to 23 of the parent application.
- 8. First auxiliary request - novelty of the subject-matter of claim 1 (Article 54 EPC) over document D3
 - 8.1 The Opposition Division considered that document D3 did not disclose that the heating cylinders were sequentially activated over a predetermined period of time (see decision under appeal, Reasons, point 22). The Board notes that it should have read "over a predetermined period of use" as noted by the opponent.
 - 8.2 The Board shares the Opposition Division's conclusion.
 - 8.3 It is disputed between the parties whether document D3 discloses a sequential activation over a predetermined period of use. However, it is undisputed that document

D3 discloses a puff-by-puff activation.

- (a) The opponent argued that a "predetermined period of use" had to be interpreted broadly since there was no definition of a "period of use" in the claim. While claim 9 of the first auxiliary request referred to a predetermined period of time after the activation of the first heating cylinder, claim 1 merely referred to a sequential activation of the heaters over a "predetermined period of use". In the opponent's view, a puff-by-puff activation was not excluded by claim 1. Furthermore, the "period of use" could refer to any event.

According to paragraph [0090] of document D3, the user started the smoking, and the heating element was activated. The activation of the heater was terminated, by the puff count reaching a predetermined limit, by the user terminating the smoking experience, or by removing the smoking material. The second heating element was activated either by the user resuming smoking or by the puff count of the first heating element having reached a predetermined limit. Therefore, there was a predetermined period of use. It did not matter, whether there was a break between the puffs.

- 8.4 The Board notes that claim 1 of the first auxiliary request refers to a sequential activation over a predetermined period of use. As argued by the patent proprietor, the term "period" already in its usual reading implies a period of time and, clearly under the present circumstances, a period of use is related to time. This interpretation is consistent with the disclosure in paragraph [0055] of the patent, which describes that a sequential activation over a

predetermined period of use may, for example, involve an activation at regular, predetermined intervals over the expected inhalation period for a particular smoking material cartridge. In contrast thereto, document D3 does not disclose heating at predetermined time intervals, but rather defines a predetermined limit based on the puff counts. Since the number of puffs depends on the individual user's behaviour, it cannot be regarded as a predetermined parameter but rather as an indefinite one.

Thus, claim 1 of the first auxiliary request claims sequential activation over a predetermined period of use, thereby excluding the puff-by-puff operation disclosed in document D3 (see patent proprietor's reply to the opponent's statement of grounds of appeal, page 9).

8.5 In view of the foregoing, the subject-matter of claim 1 of the first auxiliary request is new over document D3.

9. First auxiliary request - Further novelty objections

9.1 In its statement of grounds of appeal, the opponent argued for the first time that the subject-matter of claim 1 of the first auxiliary request was not new over documents D1 and D2.

9.2 These novelty objections constitute an amendment to the appeal case and their admittance into the appeal proceedings is subject to Article 12 RPBA. The first auxiliary request had been filed with the patent proprietor's reply to the notice of opposition. So these objections could and should have been submitted in the opposition proceedings. The opponent did not invoke any circumstances of the appeal case which could

have justified its admittance, and the Board did not see any. In the absence of such circumstances, the Board did not admit these objections in accordance with Article 12(6), second sentence RPBA.

- 10. First auxiliary request - inventive step of the subject-matter of claim 1 over document D3 in combination with document D2 (Article 56 EPC)
- 10.1 The Opposition Division concluded that the subject-matter of claim 1 of the first auxiliary request involved an inventive step over document D3 in combination with document D2 because neither of said documents disclosed a sequential activation of the heaters over a predetermined period of time (see decision under appeal, Reasons, point 23). The Board notes that it should have read "over a predetermined period of use" as noted by the opponent.
- 10.2 The Board arrives at the same conclusion as the Opposition Division.
- 10.3 The opponent disagreed, in particular, because both documents D2 and D3 disclosed this feature. The opponent further argued on page 30, second paragraph of its statement of grounds of appeal:

"Further, we note that the alleged distinguishing feature is simple the controller applying a different heating program. It is common practise and does not involve an inventive skill to provide a controller with a different heating program, in particular as the allegedly inventive heating program does not solve a problem. Therefore, claim 1 of the 1st Auxiliary Request is not inventive over the cited prior art and thus does not comply

with Art. 56 EPC."

- 10.4 The subject-matter of claim 1 of the auxiliary request differs from document D3 in feature 1.6, in particular, that the first heating cylinder and the second heating cylinder are configured to be activated sequentially over a predetermined period of use to independently heat the regions of the smokeable material (see point 8. above).
- 10.5 The Board is not convinced by the opponent's argument that document D2 disclosed feature 1.6.

As the patent proprietor stated in the paragraph bridging pages 21 and 22 of its reply to the opponent's statement of grounds of appeal, document D2 does not disclose the sequential activation of a plurality of axially aligned heating cylinders over a predetermined period of use in response to an initial activation stimulus. Claim 21 of document D2, referenced by the opponent, merely discloses that the controller activates an induction source at a desired time and deactivates the induction source after a predetermined period. The Board also refers to the decision under appeal, Reasons, point 15, where the Opposition Division stated that document D2 did not disclose two heating cylinders.

In the Board's view, document D2 discloses an induction source that produces an alternating electromagnetic field, which induces a heat-generating eddy current in a susceptor (see document D2, page 5, lines 10 to 14). Although document D2 discloses a plurality of induction sources, the induction source itself cannot be regarded as a heater, but only together with the susceptor. However, document D2 does not disclose discrete

susceptors in the form of cylinders. Therefore, features 1.2 to 1.6 of claim 1 of the first request are, in the Board's view, not disclosed in document D2.

10.5.1 Since neither document D3 nor document D2 discloses feature 1.6, even a combination of these documents would not have led the person skilled in the art to the claimed subject-matter of claim 1 of the first auxiliary request.

11. First auxiliary request - inventive step of the subject-matter of claim 1 - further inventive step-objections

11.1 With its reply to the patent proprietor's statement of grounds of appeal, the opponent argued for the first time that the subject-matter of claim 1 of the first auxiliary request was also not inventive in the light of the teaching of documents D1 to D3 and D5.

11.2 The patent proprietor requested to not admit these objections.

11.3 With letter dated 15 July 2024, the opponent raised further inventive-step objections for the subject-matter of claim 1 of the first auxiliary request. It was not inventive

- over document D1 in combination with documents D2, D3 and/or D5,
- over document D2 alone, and
- over document D5 in combination with the common general knowledge or documents D1, D2 or D3.

11.4 The Board did not admit the inventive-step objections referred to in point 11.1 and 11.3 above in accordance with Article 12(6) RPBA for the same reasons as

elaborated above for the new novelty objections (see point 9.).

12. Conclusion for the first auxiliary request

Accordingly, the decision of the opposition division in respect of the first auxiliary request is to be confirmed.

Order

For these reasons it is decided that:

Both appeals are dismissed.

The Registrar:

The Chairman:



A. Wille

G. Pricolo

Decision electronically authenticated