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

Case Number: T 1473/23 - 3.2.01

Application Number: 14184236.9

Publication Number: 2850956

IPC: A24F47/00

Language of the proceedings: EN

Title of invention:

An electrically heated smoking system with improved heater

Patent Proprietor:

Philip Morris Products S.A.

Opponents:

Imperial Tobacco Limited
Weickmann & Weickmann PartmbB
KELTIE LLP

Headword:

Relevant legal provisions:

EPC Art. 76(1), 107, 123(2)
EPC R. 116(1)
RPBA 2020 Art. 11, 12, 13(2), 15(1)

Keyword:

Auxiliary request - admittance (yes)

Amendments - allowable (yes)

Remittal - special reasons (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 1473/23 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 18 November 2025

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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
5 June 2023 concerning maintenance of the
European Patent No. 2850956 in amended form.

Composition of the Board:

Chairman	G. Pricolo
Members:	B. Spitzer
	A. Jimenez

Summary of Facts and Submissions

- I. Opponents 1 and 3 and the patent proprietor filed an appeal against the interlocutory decision of the opposition division finding that the European patent No. 2 850 956 (the patent) as amended according to auxiliary request 1 meets the requirements of the EPC.
- II. On 4 July 2025, the Board issued its preliminary opinion in a communication under Article 15(1) RPBA.
- III. With letter dated 16 July 2025, opponent 3 withdrew its appeal.
- IV. Oral proceedings took place via videoconference before the Board on 18 November 2025.
- V. During the oral proceedings before the Board, the patent proprietor withdrew its main request and auxiliary requests 1 to 22 and 7A, and therefore, consequently withdrew its appeal.
- VI. The patent proprietor (respondent) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the auxiliary request 22A as filed with letter dated 13 October 2025, or on the basis of any of auxiliary requests 23-25 as filed with the reply to the appeal on 25 March 2024.

Opponent 1 (appellant) and opponents 2 and 3, which are parties to the appeal proceedings as of right under Article 107 second sentence EPC, request that the decision under appeal be set aside and that the European patent be revoked.

VII. Independent claim 1 of auxiliary request 22A has the following wording (Amendments compared to claim 1 of the main request are marked by the Board.):

"1. **[1]** An electrically heated smoking system comprising:
[2] a housing designed to be grasped by a user;
[3] an plug of aerosol-forming substrate (407) received in the housing,
[4] at least one heater for heating the substrate to form the aerosol, the at least one heater comprising **[4a]** ~~one or more~~ electrically conductive tracks (103, 203, 303, 403, 503) **[4b]** on an electrically insulating substrate (101, 201, 301, 401, 501);
[5] a power supply for supplying power to the at least one heater; and
[6] a thermally insulating material (507) for insulating the at least one heater, **[7]** wherein the electrically insulating substrate is flat and rigid and **[8]** is inserted directly into the plug of the aerosol-forming substrate (407).

Reasons for the Decision

1. Admittance of auxiliary request 22A

Auxiliary request 22A was filed on 13 October 2025 and as such after the Board's communication under Article 15(1) RPBA. It is based on auxiliary request 22 that was withdrawn at the oral proceedings before the Board. The admissibility of auxiliary request 22 was contested, and after discussing this issue at the oral proceedings the Board admitted it into the appeal proceedings.

1.1 Auxiliary request 22 was filed with the patent proprietor's reply, and corresponds to auxiliary request C filed in opposition proceedings on 20 September 2022, i.e. one day prior to the oral proceedings before the opposition division and, thus, after the date set in accordance with Rule 116(1) EPC. In the Board's view, this request was admissibly raised and maintained in opposition proceedings (Article 12(4), first sentence). It is accordingly part of the patent proprietor's case in appeal.

Opponent 1 essentially argued that the patent proprietor filed auxiliary request C in response to the filing of document D24 by opponent 1, with letter of dated 21 July 2022, i.e. two months earlier. The opposition division did not decide on the admittance of this request and, in opponent 1's view, would not have admitted it. Moreover, if the request was intended to address novelty objections based on document D1, it should not be admitted either, because document D1 and the corresponding objections had been on file from the outset.

However, the Board judges that the filing of document D24 in opposition proceedings represented a new situation justifying the filing of an additional request. Moreover the amendments made to claim 1, in particular the introduction of the feature that the aerosol-forming substrate is provided in the form of a plug, clearly addressed the objections of opponent 1 based on D24. Accordingly, the auxiliary request C was admissibly raised in opposition proceedings. Under these circumstances, it is irrelevant whether the patent proprietor in appeal proceedings turned to auxiliary request C, i.e. auxiliary request 22, when seeking to distance themselves from D1.

1.2 Auxiliary request 22A differs from auxiliary request 22 mainly in that dependent claims 5 ("*the thermally insulating material comprises a plurality of air cavities*") and 6 ("*the air cavities are arranged in a regular pattern*") have been combined and dependent claims 8 and 9 have been deleted. The other claims remain unchanged.

1.3 Contrary to the patent proprietor's view, the Board considers that these amendments, including the deletion of dependent claims, constitutes an amendment of their appeal case, the admittance of which is subject to the provisions of Article 13(2) RPBA.

1.4 However, in the Board's view, there are exceptional circumstances for admitting auxiliary request 22A.

First, the amendments in auxiliary request 22A are straightforward and overcome the objection of an allegedly unallowable intermediate generalisation raised by the opponents against claims 5, 8 and 9 of auxiliary request 22.

Second, these amendments do not change the framework of discussion as regards the remaining claims.

1.5 Therefore, in exercising its discretion under Article 13(2) RPBA, the Board decided to admit auxiliary request 22A into the appeal proceedings.

2. Auxiliary request 22A - amendments (Articles 123(2) EPC and 76(1) EPC)

2.1 The Board notes that the original descriptions and Figures of both the divisional application as filed and its parent application as filed are identical. The

original claims of the divisional application and those of the parent applications differ. Accordingly, in the following, references to the description and the Figures are made in relation to the application as filed, in general.

- 2.2 The opposition division found that the requirements of Articles 76(1) and 123(2) EPC were met for claim 1 of the main request (see decision under appeal, Reasons, point 2.3.1.3).
- 2.3 In appeal, the opponents contested the opposition division's conclusion in respect to features 3 and 8 of claim 1 of the main request, which remain present in claim 1 of auxiliary request 22A, albeit with feature 8 being amended. No further added-matter objections were raised against auxiliary request 22A.
- 2.4 The Board arrives at the conclusion that claim 1 of auxiliary request 22A fulfils the requirements of Article 76(1) EPC and 123(2) EPC.
- 2.5 Feature 3 of claim 1 of auxiliary request 22A: *"a plug of aerosol-forming substrate received in the housing"*
- 2.5.1 Feature 3 of claim 1 of auxiliary request 22A is based on feature 3 of claim 1 of the main request with the amendment that "a plug of" aerosol-forming substrate is received in the housing.
- 2.5.2 As argued by the patent proprietor, basis for feature 3 of the main request *"an aerosol-forming substrate (407) received in the housing"* can be found in claim 5 of the parent application as filed, disclosing an *"electrically heated smoking system for receiving an aerosol-forming substrate"* and on page 9, lines 10 to

11 of the application as filed, specifying that "*the electrically heated smoking system comprises a housing for receiving the aerosol-forming substrate and designed to be grasped by a user*". The fact that the system is not only suitable for receiving an aerosol-forming substrate but indeed does receive it, is confirmed by the passage bridging pages 8 and 9 of the application as filed, reading "*during operation, aerosol-forming substrate may be completely/partially contained within the electrically heated smoking system*". Since the housing defines the outer boundaries of the system (see application as filed, page 9, lines 12 to 14), the aerosol-forming substrate must therefore be received within the housing.

The same applies *mutatis mutandis* to a plug of an aerosol-forming substrate according to feature 3 of claim 1 of auxiliary request 22A being disclosed in in the context of the first embodiment shown in Figure 4 and on page 13, lines 21 to 30 of the application as filed as referred to by the patent proprietor.

- 2.5.3 The Board shares the patent proprietor's view. Accordingly, the Board finds the opponents' argument, that the passage bridging pages 8 and 9 of the application as filed was entirely unspecific as to the location of the aerosol-forming substrate within the system, unconvincing.
- 2.5.4 The opponents further argued that the passage bridging pages 8 and 9 of the application as filed described two specific embodiments; one in which the aerosol-forming substrate was "*completely contained within the electrically heated smoking system*", for which the user puffed "*on a mouthpiece*", and another in which the aerosol-forming substrate was "*partially contained*

within the electrically heated smoking system", for which the aerosol-forming substrate was a "separate article and the user may puff directly on the separate article". They contended that the omission of the features "mouthpiece"/"separate article" resulted in an unallowable intermediate generalisation. However, the Board concurs with the patent proprietor that these further features "mouthpiece"/"separate article" are optional features and do not alter the fact that in both embodiments the aerosol-forming substrate may be completely/partially contained within the electrically heated smoking system.

- 2.6 Feature 8 of claim 1 of auxiliary request 22A *"the electrically insulating substrate is inserted into the aerosol-forming substrate"*
- 2.6.1 Feature 8 of claim 1 of auxiliary request 22A is based on feature 8 of claim 1 of the main request with the amendment that the electrically insulating substrate is inserted *"directly into the plug of"* the aerosol-forming substrate is received in the housing.
- 2.6.2 The Board agrees with the opposition division, as well as with the patent proprietor, that feature 8 of claim 1 of the main request is directly and unambiguously disclosed in the application as filed and does not constitute an unallowable intermediate generalisation. The amendments to feature 8 in auxiliary request 22A do not change this conclusion.
- 2.6.3 Feature 8 of claim 1 of the main request defines that the rigid substrate *"is inserted into the aerosol-forming substrate"*. The Board concurs with the opponents' observation that *"is arranged to be inserted"* does not directly and unambiguously disclose

that the electrically insulating substrate *"is inserted"*.

2.6.4 As confirmed by the patent proprietor, the actual insertion is disclosed in the last full paragraph at page 4 of the application as filed, reading: *"In a first embodiment of either aspect of the invention, the electrically insulating substrate is rigid and is arranged to be inserted into the aerosol-forming substrate. If the electrically insulating substrate is appropriately sized and is rigid, it may be inserted directly into the aerosol-forming substrate."*

2.6.5 In the Board's view, this disclosure, made in the context of the first embodiment, is a direct and unambiguous disclosure for the rigid electrically insulating substrate being directly inserted into the aerosol-forming substrate. The Board concurs with the opposition division's reasoning according to which the size being appropriate does not add any technical information and thus can be omitted (see decision under appeal, Reasons, point 2.3.1.3).

2.7 Combination of features 3 and 8

Opponent 3 especially referred to features 3 and 8 being interlinked such that *"complementary mechanisms are required for producing the combination of an aerosol-forming substrate that is received in the smoking system and an electrically insulating substrate that is inserted into that aerosol forming substrate."* (see opponent 3's statement of grounds of appeal, point 4.1). Opponent 3 argued that the receiving (feature 3) and the insertion (feature 8) required, for instance, either (i) a rigidity of the electrically insulating substrate being greater than

that of the aerosol forming substrate or (ii) the electrically insulating substrate and the aerosol forming substrate being shaped in a complementary manner. The Board observes that the application as filed does not disclose that the electrically insulating substrate and the aerosol forming substrate are shaped in a complementary manner. Furthermore, the Board refers to point 2.6.5 above.

3. Remittal (Article 11 RPBA)

3.1 The Board considers that special reasons present themselves for remitting the case to the opposition division for further prosecution.

3.2 Claim 1 of the request allowed by the opposition division included the feature that "the thermally insulating material is positioned around the aerosol forming substrate" which was in the opposition division's view particularly relevant for concluding on the presence of an inventive activity (see point 3.6.1.6 of the impugned decision). This feature is no longer present in claim 1 of auxiliary request 22A, which now features a plug of aerosol-forming substrate into which the flat, rigid, electrically insulating substrate is directly inserted. Accordingly, claim 1 of auxiliary request 22A creates a situation substantially different than that underlying the case leading to the attacked decision.

3.3 Since the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020) and under the circumstances addressed above, the Board finds that there are special reasons justifying the remittal of the case to the opposition division for further

prosecution on the basis of this request.

- 3.4 Both parties agreed to the remittal of the case to the opposition division.

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:



D. Grundner

G. Pricolo

Decision electronically authenticated